LDRC Libel Defense Resource Center

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SPECIAL NOTE TO OUR READERS: As this Bulletin was being prepared for press, the Supreme Court granted certiorari in Browning-Ferris Indust. v. Kelco Disposal, cert. granted, 57 U.S.L.W. 3394 (December 5, 1988), a non-libel case questioning the constitutionality of excessive punitive damage awards. The prospect that the Supreme Court will shortly be revisiting the issues left open just last Term in Bankers Life v. Crenshaw should make this Issue's Punitive Damages Roundtable that much more topical and pertinent.

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PUNITIVE DAMAGES IN LIBEL ACTIONS: AN LDRC STATUS REPORT AND ROUNDTABLE DISCUSSION

As the Supreme Court opens its 1988 Term, one issue of continuing great moment to libel defendants -- punitive damages -- is not currently on its docket for plenary consideration.[1] And, during its 1987 Term, the Court declined to decide the constitutionality of punitive damages, despite a number of significant challenges to such awards that came before it and despite some early indications that this issue would indeed finally be reached by the Court. From this, some knowledgeable observers drew the conclusion that a constitutional challenge to punitive damages may now be a dead letter, and suggested that the Court may not soon revisit this issue.

In order to examine the current status and future viability of a constitutional attack on punitive damages, with particular emphasis on a possible First Amendment challenge in the libel field, LDRC invited the preparation of two papers, by attorneys closely associated with last Term's punitive damages cases that present their views on these issues.

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1. A recent examination of petitions or appeals pending before the Supreme Court reveals no cases currently presenting a constitutional challenge to punitive damages in libel actions similar to that presented last Term in Brown & Williamson Tobacco Corp. v. CBS -- see DeVore/Nelson paper, infra. Interestingly, two media libel and privacy cases accepted for plenary review by the Court this Term -- Florida Star v. B.J.F., 499 So. 2d 883 (Fl. Ct. App.), petition for cert. filed, 57 U.S.L.W. 3015 (U.S. Sept. 26, 1987) (No. 87-329), and Harte-Hanks Communications, Inc. v. Connaughton, 842 F.2d 825 (6th Cir.), cert. granted, 57 U.S.L.W. 3280 (U.S. October 17, 1988) (No. 88-10) -- both involve judgments that include punitive damage awards -- in Florida Star, $25,000 in punitives out of a total award of $100,000; in Harte-Hanks, $195,000 in punitives out of a total award of $200,000. However, in neither of these cases is the punitive award separately challenged; as presented by the media defendants both cases focus only on liability issues.

(footnote continued on following page)

Bruce J. Ennis, now a partner in the Washington office of Jenner & Block, and former Legal Director of the American Civil Liberties Union, represented the plaintiff-respondent in Bankers Life and Casualty Co. v. Crenshaw, and the respondents in four other non-libel actions that came before the Supreme Court last Term, in all of which he successfully fended off challenges to punitive damage awards under the Excessive Fines Clause of the Eighth Amendment and under the Due Process and Contract Clauses. Despite his recent role in upholding non-libel punitive damage awards, Mr. Ennis argues below that a First Amendment attack on punitive damages in libel actions stands on a different footing from the cases he defended, and concludes that the Supreme Court may ultimately be prepared to hold that punitive damages in libel actions are unconstitutional.

P. Cameron DeVore and Marshall Nelson, partners in the Seattle office of Davis Wright & Jones, represented CBS in two separate challenges to punitive damages last Term. First, representing lead amicus curiae CBS supporting the defendant-appellant in Bankers Life and Casualty Co. v. Crenshaw, and second, as unsuccessful petitioner from the $3-plus million punitive (and presumed) libel damage award against CBS in Brown & Williamson Tobacco Corp. v. Jacobson. Despite the Court's failure to grant certiorari in Brown &

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On the other hand, several currently pending petitions in non-libel cases do directly present punitive damage challenges similar to those raised last Term by the Appellant in Bankers Life and Casualty Co. v. Crenshaw, 108 S. Ct. 1645 (1988). See, e.g., Nationwide Mutual Insurance Co. v. Clay, 525 So. 2d 1339 (Ala. 1987), petition for cert. filed, 57 U.S.L.W. 3123 (U.S. July 27, 1988) (No. 88-157); CNA Casualty Co. v. Rouhe, Unpublished opinion (Cal. Ct. App.), petition for cert. filed, 57 U.S.L.W. 3161 (U.S. Sept. 18, 1988) (No. 88-297); Metromedia Inc. v. April Enterprises Inc., 195 Cal. Rptr. 421, 147 Cal. App. 3d 805 (1983), petition for cert. filed, 57 U.S.L.W. 3296 (U.S. Oct. 14, 1988) (No. 88-625); Goodyear Tire & Rubber Co. v. Hodder, 426 N.W. 2d 826 (Minn.), petition for cert. filed, 57 U.S.L.W. 3296 (U.S. Oct. 14, 1988) (No. 88-626); Browning-Ferris Indust. v. Kelco Disposal, Inc., 845 F.2d 404 (2d Cir.), petition for cert. filed, 57 U.S.L.W. 3282 (U.S. Sept. 30, 1988) (No. 88-556).

Williamson, or to reach the constitutional issues in Crenshaw, Messrs. DeVore and Nelson also conclude that, whatever the reasons for the Court's inaction last Term, there remains a strong foundation for a constitutional challenge to punitive damages in libel cases. Indeed, according to DeVore and Nelson, there is every reason to believe that such a challenge will be successful if the proper case reaches the Court.

Before presenting the Ennis and DeVore/Nelson papers, it may be worthwhile briefly to trace some of the background of punitive damages in libel actions in order to set the stage for further discussion of the current constitutional challenges to punitive damages.

Background

Since New York Times Co. v. Sullivan, 376 U.S. 254 (1964), it is fair to say that the Supreme Court has acted ambivalently toward the issue of punitive damages in libel actions. On the one hand, as outlined below many of the Justices, in a variety of case settings and from a variety of points of view, have expressed concern over the potential chilling effect of "unrestrained" punitive awards in libel actions on the exercise of First Amendment rights. On the other hand, the Court has failed to take the ultimate step by ruling that punitive damages in libel actions are therefore unconstitutional -- and should thus be barred -- on First Amendment grounds.

(i) Concerns of the Justices

Beginning with Sullivan and in several cases over the ensuing years, numerous members of the Supreme Court have, in one form or another, expressed (or joined in the expression of) serious concerns regarding the imposition of punitive damages in libel actions. In Sullivan, Justice Brennan, reversing a $500,000 jury award apparently based to an undifferentiated extent upon both punitive and presumed damages, decried the grave "hazards to protected freedoms" that a succession of such awards would present.

In Linn v. Plant Guard Workers, 383 U.S. 53, 64-66 (1966), Justice Clark recognized "the propensity of juries to award excessive damages for defamation" and, at least for purposes of that labor-context/pre-emption case, held that punitive damages in such libel actions could be awarded only if compensable harm

were also proven. Justices Fortas, Douglas and Chief Justice Warren would have gone further in Linn, and would have entirely pre-empted libel suits in the labor context because of, inter alia, "the threat of punitive damages...jeopardiz[ing]... stability...in labor management relations." Id. at 69.

Even in Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), although upholding a punitive award, Justice Harlan was careful to note that punitive damages were traditionally limited under common law principles.[2] In any event, Justice Harlan thereafter expressly modified his views in Rosenbloom v. Metromedia Inc., 403 U.S. 29 (1971), and concluded that punitive damages would be unconstitutional, at least absent proof of actual malice and confinement of such damages to a "reasonable and purposeful relationship to the actual harm done." Justices Marshall and Stewart would have gone further, in Rosenbloom, to abolish outright punitive (and presumed) damages, at least in all libel actions involving matters of public concern, based on a recognition that "unlimited" punitive (and presumed) damages "compounds the problem of self-censorship" in libel actions.

Speaking for the majority in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), Justice Powell recognized that punitive damages allow juries "uncontrolled discretion...to punish expressions of unpopular views," and therefore held that a private-figure libel plaintiff may not recover punitive (or presumed) damages, "at least when liability is not based on [proof of actual malice]." Id. at 349, 350.

Even Justice Rehnquist, while he has not written separately to express these concerns in any libel action, did join in Justice Powell's majority opinion in Gertz. And thereafter, in

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2. Indeed, subsequently in Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974), in an opinion written by Justice Stewart (and joined in by all of the Justices except Justice Douglas), the Court recognized a clear distinction between the common law malice required to uphold an award of punitive damages and the concept of constitutional actual malice relevant to liability under New York Times Co. v. Sullivan. While the Cantrell Court reinstated a compensatory damage award, it left undisturbed the trial court's initial action striking plaintiff's demand for punitive damages.

his dissent in Smith v. Wade, 461 U.S. 30 (1983), a non-libel, civil rights action, Rehnquist reiterated with seeming approval all of the concerns adverted to in Gertz -- use of punitive damages "to punish unpopular defendants," "jur[y] assess[ment of] punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused" and the potential "chilling of desirable conduct." Id. at 59.

In his dissenting opinion in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985), Justice Brennan, joined by Justices Marshall, Blackmun and Stevens, reiterated the constitutional concerns of Rosenbloom and Gertz in objecting to an award of punitive damages noting, inter alia, that the arguable deterrent effect of such awards is outweighed by their costs, including their "chilling" effect on free expression. And also in Dun & Bradstreet, even Justice White, generally joined in this view by Chief Justice Burger -- neither Justice viewed as a proponent of broad constitutional protections in the libel field -- suggested in his concurring opinion that perhaps an outright prohibition on punitive damages (and a prohibition on or limitation of presumed damages) might represent a better approach than the Sullivan actual malice rule for achieveing the stated goal of Sullivan to protect the press's First Amendment rights.

Finally, in Bankers Life v. Crenshaw, 108 S. Ct. 1645 (1988), Justice O'Connor, joined in her concurrence by Justice Scalia, urged the Court, under the Due Process Clause, to "scrutinize carefully the procedures under which punitive damages are awarded in [all] civil lawsuits," and cited Gertz as an example of the Court's prior (and presumably legitimate) concerns over punitive awards. Indeed, Justice O'Connor possibly overstated the holding of Gertz by suggesting that Gertz entirely "for[bade] the award of punitive damages in defamation suits brought by private plaintiffs."

In sum, a head count of the Justices' positions in the foregoing cases documents a quite remarkable number of members of the Supreme Court since Sullivan, both "liberal" and "conservative," who have expressed (or joined in the expression of) substantial concerns regarding the imposition of punitive damages in libel actions. Thus, of the 19 Justices who have sat on the Court since Sullivan, this review indicates that fully 16 have either written opinions stating such concerns (9 Justices) and/or have joined in those opinions (7 Justices).

This includes 8 of the 9 Justices now sitting on the Court. During that entire period only Justices Black, Goldberg and Kennedy do not appear to have written or joined such statements of concern. Justices Black and Goldberg, of course, declined to do so because, as stated in their concurring opinions in Sullivan itself, they believed that libel actions -- at least those brought by public officials -- should be barred outright on First Amendment grounds. Justice Kennedy was not on the Court in time either to have joined or disassociated himself with any of these prior statements. Yet notably, even Justice Kennedy at the end of last Term and post-Bankers Life, joined Justice O'Connor in dissenting to the denial of certiorari in two non-libel actions that would have presented additional Due Process and Eighth Amendment challenges to punitive damage awards.[3]

(ii) Opportunities Declined

Despite these oft-stated concerns, over a period of twenty-four years, and by such a remarkable number of Justices, the Supreme Court has never taken the definitive final step toward ruling that punitive damages in libel actions are constitutionally prohibited. Indeed, during that period a number of libel cases coming before it have involved judgments that included punitive damages, yet the Court has ruled in a manner that left those awards standing. Thus, beginning with Sullivan, the Court, while concerned over the First Amendment implications of damage awards clearly disproportionate to the actual harm suffered, reversed the award in that case on the issue of liability, thereby failing to reach the question of damages. Indeed, in Sullivan the jury's $500,000 award was not identified in terms of compensatory or punitive damages, although the jury had been instructed on both issues and the award could well have been considered as a punitive -- and thus suspect -- award, had the Court been so inclined.

Similarly, in Rosenbloom v. Metromedia, Inc., supra, a sharply divided Court affirmed the reversal of a $275,000

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3. Atlantic Richfield Co. v. Nielsen, Unpublished opinion (Cal. Ct. App. 1987), cert. denied, 56 U.S.L.W. 3818 (U.S. May 31, 1988) (No. 87-1196); Ohio Casualty Insurance Co. v. Downey S&L Assn', 189 Cal.3d 1531, 234 Cal. Rptr. 835 (Cal. Ct. App. 1987), cert. denied, 56 U.S.L.W. 3818 (U.S. May 31, 1988) (No. 87-159).

damage award -- $250,000 of which was punitive (remitted by the trial court from the jury's initial punitive award of $725,000), but again only on the basis of liability and not, ultimately, on the constitutionality of the punitive award.

In 1967, in Curtis Publishing Co. v. Butts, supra, another sharply divided Court declined to rule that punitive damages were prohibited by the First Amendment, and in that case the Court's judgment had the effect of letting stand a punitive damage award of $400,000 (remitted by the trial court from $3 million).

In 1974, however, in Gertz v. Robert Welch, Inc., supra, it seemed that the Court did prohibit presumed and punitive damages, at least absent a showing of actual malice in all private figure libel cases, even though that Court did not hold that punitive damages would be unconstitutional in other circumstances.

The majority opinion in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., however, interpreted Gertz as applying only to those private figure libel cases that involved matters of "public concern." Writing for the majority, Justice Powell, also the author of the Gertz opinion, therefore held that punitive damages are not prohibited in private issue/private figure cases, and thus let stand a punitive award of $300,000.

In sum, as a result of this ambivalence, the question of the constitutionality of punitive awards in libel actions remains to this day -- at least by inaction -- an open one. Such contradictory inaction and uncertainty might be only a matter of academic concern were it not for the fact that the practical economic impact of punitive damages in libel actions has, if anything, far exceeded the stated concerns of the Justices in those many cases.

Thus, LDRC's systematic empirical studies of recent media libel litigation document that punitive damages have in recent years been awarded in an astoundingly high 60% of all cases tried that resulted in a judgment for the libel plaintiff. See, e.g., LDRC Litigation Study #9 Defamation Trials, Damage Awards and Appeals III: Two Year Update (1984-1986) (October 31, 1987). (This contrasts with average punitive award rates in other categories of civil actions ranging from none or a few percentage points to a maximum of 21.6% in the county with the highest rate of punitive damages reported in the most recent authoritative study -- see Daniels, Punitive Damages: The Real Story, 92 A.B.A. Journal 60 [1986]).

Moreover, during the period 1980 to 1986, the average of those many punitive awards initially entered in media libel cases was staggering -- slightly under $2 million ($1,898,417). (According to another LDRC study, this recent average for punitive awards is higher than the total for 37 of the 38 damage awards -- both compensatory and punitive -- entered in reported libel actions during the decade prior to Sullivan -- see "Historical Trends in Media Libel Damage Awards," LDRC Bulletin No. 17 [July 31, 1986] at 2.) In the aggregate, in the cases in which punitive damages were initially awarded during the 1980-1986 period, triers of fact (almost always juries) sought to assess an astounding total of $142,381,275 in such damages -- and this in only 75 cases.

Based on such troubling data, it is a bitter irony worthy of comment that, despite the aforementioned concerns of the Justices, and despite the partial limitations adopted in Gertz, punitive damages in libel actions today remain a far more serious problem than in most if not all other areas of civil litigation -- areas where First Amendment concerns are not presented.*

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* LDRC expresses its thanks to Alexandre de Gramont, second-year student at New York University School of Law, for his assistance in the preparation of this Report and Roundtable Discussion.

PUNITIVE DAMAGES AND THE SUPREME COURT

Bruce J. Ennis[1]

In recent years, many litigants have tried to persuade the Supreme Court that punitive damage awards violate various provisions of the U.S. Constitution. Although the Court has indicated that those challenges raise important questions[2], to date the Court has declined to resolve them.

Last term in Bankers Life and Casualty Co. v. Crenshaw, a case I argued and won, the Appellant challenged a punitive damage award on the basis of the Excessive Fines Clause of the Eighth Amendment, the Contract Clause, and the Due Process Clause. The Court declined to reach these claims because they had not been adequately raised and passed upon in state court. When the Court does reach these claims, it is my opinion that the Court will not issue any across-the-board ruling that punitive damages are unconstitutional on these grounds. Nor do I think it likely to issue any other rulings that would require great changes in punitive damage proceedings.

The only two arguments of any potential consequence that I believe could attract a majority on the Court are less dramatic than the frontal assaults mounted this past Term. The first is the procedural due process issue of the appropriate evidentiary

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1. Mr. Ennis is a partner in the Washington office of Jenner & Block. He specializes in constitutional and Supreme Court litigation. Last term, he was counsel or co-counsel in several Supreme Court cases involving punitive damage awards, including Bankers Life and Casualty Co. v. Crenshaw, 108 S. Ct. 1645 (1988), which he argued; Allstate Insurance Co. v. Hawkins, 152 Ariz. 490, 733 P.2d 1073, cert. denied, 56 U.S.L.W. 3248 (U.S. Oct. 5, 1987) (No. 87-40); Mutual Life Ins. Co. of New York v. Wesson, 517 So. 2d 521 (Miss. 1987), cert. denied, 56 U.S.L.W. 3831 (U.S. June 6, 1988) (No. 87-1684); Atlantic Richfield Co. v. Nielsen, Unpublished opinion (Cal. Ct. App. 1987), cert. denied, 56 U.S.L.W. 3818 (U.S. May 31, 1988) (No. 87-1196); and Playtex Holdings, Inc. v. O'Gilvie, 821 F.2d 1438 (10th Cir. 1987), cert. denied, 56 U.S.L.W. 3818 (U.S. May 31, 1988) (No. 87-1021). The views herein are his own.

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

standard for punitive damages -- and on this I believe it is possible that the Court may eventually adopt a "clear and convincing" evidence standard for the imposition of punitive damages. The second, and more substantive argument is that a jury's unlimited discretion in determining the size of punitive damage awards violates the Due Process Clause. That argument has attracted at least two Justices, O'Connor and Scalia, and may eventually command a majority of the Court.

The most significant exception to my view that last Term's actions by the Court signal a likely retreat from any major actions limiting punitive damages is libel cases, where the Court could -- and, I believe, should -- rule punitive damages unconstitutional on First Amendment grounds. Despite the Court's apparent reticence on punitive damages as a general matter, there are at least some indications that the Court considers the First Amendment issue very much an open issue.

I will first consider the challenges that have been made to punitive damages generally, discussing why they have not succeeded to date and why they are unlikely to succeed in the future. I will then consider the quite different challenge to punitive damages still available on First Amendment grounds, and why I believe such a challenge can and should succeed.

I. Traditional Challenges to Punitive Damages

A. The Excessive Fines Clause

Until now, the principal basis for challenging the constitutionality of punitive damage awards has been the Excessive Fines Clause of the Eighth Amendment. (In Crenshaw, for example, the Appellant devoted thirty pages of its brief to that argument, and a total of four pages to its Due Process and Contract Clause arguments.) The Excessive Fines Clause has been the flagship leading the opposition to punitive damage awards. In my opinion, that ship is dead in the water, and rightly so.

During oral argument in Crenshaw, no Justice showed real interest in the Appellant's Excessive Fines Clause argument, and Justices Rehnquist and Scalia actively expressed considerable skepticism. Applying the Excessive Fines Clause to civil punitive damage awards would be contrary to Supreme Court precedent and English history, and would embroil the Court, and all lower courts, in making case by case determinations of "excessiveness" the judiciary is not equipped or inclined to make.

(i) Precedent

In Ingraham v. Wright, 430 U.S. 651, 664 (1977), the Court squarely ruled that the Eighth Amendment does not apply to civil proceedings, and was only "designed to protect those convicted of crimes." In Crenshaw, the Appellant argued for a broader interpretation of the Eighth Amendment: whenever a civil monetary award serves the "criminal" functions of punishment and deterrence, it should be subject to the Eighth Amendment, and should be found excessive if it exceeds the criminal fine authorized for comparable criminal conduct. The problem with that argument is that punishment and deterrence are not the sole province of the criminal law. A great many civil proceedings are designed to punish and deter. Under the Appellant's proposed interpretation of the Eighth Amendment, treble damage awards for violation of state and federal antitrust laws, environmental protection laws, and a broad range of other civil laws, would violate the Eighth Amendment whenever the treble damage award exceeded the criminal fine for comparable criminal conduct. For example, civil RICO proceedings would violate the Eighth Amendment because the federal RICO statute authorizes treble damages, as punishment and deterrence, for conduct that is criminal in nature, and does not limit those damages to the amount of the criminal fine authorized for that conduct. See Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 481-83, 492-92 (1985).[3]

(ii) History

The centerpiece of the Appellant's historical argument was that the Excessive Fines Clause can be traced to the "amercements" clause of Magna Carta, which limited the size of

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3. Accepting the Crenshaw Appellant's interpretation of the Excessive Fines Clause would also have required the Court to overrule early cases holding that clause inapplicable in state court proceedings. Eilenbecker v. District Court, 134 U.S. 31 (1890); Pervear v. Massachusetts, 5 Wall 475 (U.S. 1867). And it would have required the Court to rule, for the first time, that the Excessive Fines Clause protects corporate entities. Cf. California Bankers Assoc v. Schultz, 416 U.S. 21 (1974); United States v. Morton Salt Co., 338 U.S. 632 (1950); and First National Bank of Boston v. Bellotti, 435 U.S. 765 (1977); all holding that some "personal" guarantees of the constitution do not protect corporations.

amercements in both criminal and civil proceedings. ("Amercements" were, in effect, court costs that were imposed on litigants who lost, or made errors in pleadings; they were paid to the King, who set their amount.) Given that history, argued Appellant, the Excessive Fines Clause should be interpreted to apply to both criminal and civil proceedings. The argument is interesting, but flawed.

At the time of Magna Carta, there was no rigid or even clear distinction between "criminal" proceedings and "civil" proceedings. That distinction emerged later. Almost every infringement of the rights of an individual was also regarded as a breach of the King's peace, and thus as an affront to society at large. Thus, although it is true that the amercements clause of Magna Carta applied to proceedings that we would today think of as "civil," that fact, in historical context, is largely irrelevant. The more important fact is that in every case, the amercement was paid not to a private party, but to the King. The amercements clause did not limit the size of monetary payments from one private litigant to another, and is thus historically irrelevant to civil damages, including punitive damages. Because amercements were paid only to the King, they are historically more closely analogous to criminal fines.

Given this history, it is not surprising that no English court has ever applied the amercements clause to limit the size of a (civil) punitive damage award. Furthermore, even if the amercements clause had been intended to limit the size of punitive damage awards, the discretion conferred on juries by that clause was so great that, as a practical matter, it would not require reversal of any of the punitive damage awards that have been before the Supreme Court. In Crenshaw, for example, the award, though large, was less that one percent of the defendant's net worth. Clearly, an award of that size could not be said to deprive that corporate defendant of "its means of livelihood," which was one of the principal limitations on the amount of amercements.

The Appellant in Crenshaw recognized that the "livelihood" restriction of the amercements clause would not require reversal of the award at issue in that case, even if the amercements clause did apply. Accordingly, the Appellant suggested an entirely new test, which also finds no support whatsoever in Magna Carta, or in English history. Appellant suggested that a punitive damage award should be found excessive, even if it did not deprive the offender of his means of livelihood, if the award was greater that the criminal fine authorized by the legislature for comparable criminal conduct. Application of

that test would require the Supreme Court, and the lower courts, to make innumerable policy judgments they are not equipped to make.

(iii) Determining "excessiveness" by reference to criminal fines

The test proposed by the Appellant in Crenshaw would be exceedingly difficult to apply. If punitive damages are to be limited to the maximum analogous criminal fine, how is a court to determine whether there are analogous crimes, and if there are several, which is the most analogous? Suppose a motorist kills three children while driving drunk, at high speed, across a school-yard, and a jury awards punitive damages. Is the appropriate analogy the maximum criminal fine for driving while intoxicated, or for manslaughter? If manslaughter, should the punitive damage award be limited to the maximum criminal fine for one count of manslaughter, or three? If the maximum criminal fine is obviously insufficient to serve as a meaningful deterrent, is the jury free to assess a larger sum, and if so, what test would be used to evaluate the reasonableness of that larger sum? These are not merely academic questions. In Brooks v. Wooton, 355 F.2d 177 (2d Cir. 1966), the court upheld a punitive damage award of $6,500 against a motorist who caused an accident while intoxicated. The maximum criminal fine for that conduct was $25. Under the test proposed by the Appellant in Crenshaw, a $26 punitive damage award would have violated the Excessive Fines Clause.

The "criminal fine" analogy breaks down in numerous other respects. For most crimes, a fine is only one component of the maximum criminal punishment, and usually the least significant. In assessing whether a punitive damage award is excessive, could the jury add to the amount of the criminal fine for comparable criminal conduct the monetary value of whatever imprisonment is authorized by the criminal statute? If so, what is the monetary value of one year, or ten years, in jail? Could the jury add to the amount of the criminal fine the monetary value of the stigma of criminal conviction, or the value of the loss of voting rights, the revocation of a business license, and other rights such conviction entails? [4]

4. It is difficult to see how this approach would function in personal injury cases, especially those involving injuries

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Would the criminal fine fix the maximum for punitive damage awards if the state had expressly rejected caps on punitive damage awards, or had otherwise made it clear that it did not want to limit the discretion of juries to impose higher punitive damage awards for comparable conduct?

At bottom, the criminal fines analogy assumes that in setting criminal fines at a certain level state governments meant to express a view as to the appropriate maximum level of monetary damages that should be imposed upon a party found to have committed intentional or reckless harmful conduct. This assumption is untenable. When state governments set criminal fines, they do so with full knowledge that they are acting within the context of a complex tapestry of common law, statutory, and regulatory norms that govern human behavior, of which the criminal sanction is only a part. The civil justice system and the criminal justice system are designed to complement each other, not to copy each other. Both systems play important, but different, roles in regulating undesirable social behavior. Fine-tuning the complex inter-relationships between these two systems is quintessentially a matter for legislative judgment, not for courts. For these reasons, I think it is extremely unlikely that the Supreme Court will apply the Excessive Fines Clause to punitive damage awards.

That belief is strengthened by the fact that shortly after the Supreme Court decided not to resolve the Excessive Fines Clause issue in Crenshaw, ostensibly on the ground that that

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resulting from violations of statutory or regulatory safety standards. In this class of cases -- which constitutes a significant percentage of cases in which punitive damages are awarded -- no closely analogous criminal fines are readily apparent. And reliance on civil fines for violations of statutory or regulatory standards of care is clearly inappropriate. These fines are generally imposed for mere violation of safety standards, irrespective of whether the violation was intentional or reckless and irrespective of whether the violation resulted in severe harm to an individual. Such fines thus serve a more limited function than punitive damages. Although civil fines are intended to deter future violations, they do not impose punishment for the actual harms occasioned by violation of civil statutory or regulatory safety standards. The analogy to civil fines is thus clearly inappropriate.

issue had not been squarely raised and decided in the state courts, the Court denied review in Ohio Casualty Insurance Co. v. Downey Savings & Loan Assoc, 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835 (1987), cert. denied, 56 U.S.L.W. 3818 (U.S. May 31, 1988) (No. 87-159), in which the same Excessive Fines Clause issue had been squarely raised, and arguably decided, in the state courts. This fact suggests that after the benefit of full briefing and argument of the Excessive Fines Clause issue in Crenshaw, the Court is today less sympathetic to that claim than its brief discussion of it in Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986) (describing the claim as an "important issue" that, in an appropriate case, "must be resolved"), had suggested.

B. The Contract Clause

In Crenshaw, as in several of the recent cases, the Appellant argued, though briefly, that the Contract Clause of the U.S. Constitution, Art. I, sec. 10, cl. 1, prohibits state courts from expanding or otherwise changing the circumstances under which punitive damage awards can be granted. That argument can be dismissed as briefly as it has been made.

First, "[i]t has been settled by a long line of decisions" that the Contract Clause "is directed only against impairment by legislation, and not by judgments of courts. The language -- 'No state shall . . . pass any . . . law impairing the obligation of contracts'-- plainly requires such a conclusion." Tidal Oil Co. v. Flanagan, 263 U.S. 444, 451 (1923) (footnote omitted; emphasis in original).

Second, even legislative changes in the law governing punitive damage awards would not violate the Contract Clause because such changes would only affect tort law obligations, not contract obligations. Even when punitive damages are awarded for bad faith failure to honor a contractual obligation -- such as an obligation to pay insurance for specified losses -- the basis for the award is not the breach of contract, but the tortious, bad faith refusal to honor the contract. The distinction is somewhat metaphysical, but it is a distinction the Supreme Court has long accorded significance.

C. The Due Process Clause

Due Process is a broad and elastic concept. Opponents of punitive damage awards have raised several very different due process challenges to such awards. Until oral argument in Crenshaw, the principal due process challenge was the assertion

that due process requires all of the procedural protections that are available as of right in criminal proceedings. These would include, for example, proof beyond a reasonable doubt, application of the privilege against self-incrimination, rights concerning the size of the jury and the need for a unanimous verdict, the right to a speedy trial, the right to the effective assistance of counsel, the right of confrontation, and many others.

The lower courts have uniformly rejected such blunderbuss claims, and with good reason. The Supreme Court has often cautioned that "[e]ach constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved." Johnson v. New Jersey, 384 U.S. 719, 728 (1966). Wholesale incorporation of the panoply of criminal procedural protections into punitive damage proceedings would be inconsistent with the basic rule that the necessity for according particular protections should be evaluated in the context of the particular setting in which those protections are claimed. In Allstate Insurance Co. v. Hawkins, 733 P.2d 1073 (Ariz.), cert. denied, 108 S.Ct. 212 (1987), the Court denied review in a case raising similarly broad claims. That denial may have been based on the petitioner's failure to raise that claim until very late in the state court proceedings, but it is unlikely that the Court will think it appropriate to decide, in a single case, whether all of the procedural protections available in criminal trials should also be accorded in punitive damage proceedings.

Furthermore, although there is not space here to address each of those procedural protections individually, there are very strong arguments against applying any of them to punitive damage proceedings. For example, most of the major punitive damage awards recently challenged have been against corporate entities, and the Supreme Court has already ruled, even in the context of criminal proceedings, that corporate entities cannot claim the privilege against self-incrimination. California Bankers Assoc v. Shultz, 416 U.S. 21 (1974).

Moreover, because plaintiffs can ordinarily seek punitive damages only in civil cases in which compensatory or other damages are available, and because criminal safeguards are not even arguably required before those strictly civil damages can be awarded, application of any of the criminal procedural protections to the punitive damage component of such cases would require radical changes in the conduct of civil cases where

punitive damages are sought. For example, in a case alleging bad faith refusal to pay an insurance claim, the court would have to apply civil rules when determining whether the insurance contract was breached, and criminal rules when determining whether the breach was motivated by bad faith. Requiring a unanimous verdict on the bad faith issue, but not on the breach issue; requiring proof beyond a reasonable doubt on the bad faith issue, but not on the breach issue; etc., would result in an extremely cumbersome proceeding. And if the privilege against self-incrimination did apply to the bad faith issue, how could that right be respected during discovery on the breach issue without impairing the plaintiff's right to obtain information necessary to establish the breach?

D. Due process limitations the Supreme Court could generally impose on punitive damages

For these and other reasons not discussed here, I do not think the Supreme Court will require any of the traditional criminal procedural protections in punitive damage proceedings. I do think, however, that because of the Court's apparent antipathy, or at least ambivalence, towards punitive damage awards, and because of the Court's sympathy for an intermediate standard of "clear and convincing" proof in other "quasi-criminal" contexts, it is quite possible that the Court will require that intermediate standard in punitive damage proceedings. Application of that standard, however, would probably not result in substantial change in the frequency or amount of punitive damage awards.[5] Before awarding punitive damages, the jury must be persuaded that the defendant's conduct was particularly reprehensible, and was either intentional or grossly negligent. If the plaintiff has introduced sufficient proof to satisfy that substantive standard, it is likely the jury will find that proof "clear and convincing."

There is, in addition, a due process argument that is apparently attractive to at least two Justices of the Supreme

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5. Several states now require that entitlement to a punitive damage award be established by clear and convincing proof, apparently without substantial impact on the frequency or amount of punitive damage awards. And, of course, clear and convincing evidence is already constitutionally required under the First Amendment in at least those libel actions involving issues of public concern -- see Section II, infra.

Court, and perhaps a majority, and that argument, if adopted, could result in substantial changes in both state and federal punitive damage proceedings. In her opinion concurring in the judgment in Crenshaw, Justice O'Connor expressed serious concern that the amount of punitive damage awards is almost entirely within the discretion of the jury, with "no objective standard that limits their amount." In her view, "because of the punitive character of such awards, there is reason to think that this may violate the Due Process Clause . . . This grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process." Justice O'Connor agreed with the majority, however, that this particular due process argument had not been squarely raised by the Appellant in Crenshaw, and should not be resolved in the context of that case. This "standardless discretion" argument echoes a concern expressed repeatedly by Justice Scalia during oral argument in Crenshaw. After a series of probing questions, Justice Scalia indicated that he "would personally have some doubts about the constitutionality" of a criminal statute that left the amount of the criminal fine within the largely unfettered discretion of the jury, and remarked that he did not "see very much difference if you call it civil or criminal."[6] Not surprisingly, he joined in Justice O'Connor's opinion.

This is a powerful argument, and it could eventually command a majority of the Court. That result is not inevitable, or even likely, however, because wholesale adoption of that argument would require major doctrinal changes not only in punitive damages law, but also in criminal law. Even in the criminal law context, due process challenges to standardless jury sentencing have been universally rejected. See Garcia v. United States, 769 F.2d 697, 699 & n.1 (11th Cir. 1985); R.G. Britton v. Rogers, 631 F.2d 572, 578-581 (8th Cir. 1980), cert. denied, 451 U.S. 939 (1981); Vines v. Muncy, 553 F.2d 342, 347-348 (4th Cir.), cert. denied, 434 U.S. 851 (1977). Cf. Stevens v. Armontrout, 787 F.2d 1282, 1284 (8th Cir. 1986) (upholding against due process challenge a 200 year bench sentence under a

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6. During oral argument, I stated that I, too, would "personally" have substantial doubts about the constitutionality of standardless sentencing in the strictly criminal context, but I also stated that I thought there were very substantial differences between criminal proceedings and punitive damage proceedings, and those differences justified a different result.

statute that permitted sentences between ten years and "any number of years").

Indeed, in McGautha v. California, 402 U.S. 183, 185, 190 (1971), the Court ruled that a capital sentencing scheme which gave juries "absolute discretion," and provided "no standard for the guidance of the jury," did not violate the Due Process Clause. Of course, the Court subsequently ruled that the Eighth Amendment requires standards to guide the jury's discretion in the context of capital sentencing, but the Court has explicitly declined to extend that Eighth Amendment requirement for capital sentencing to other types of criminal sentencing, see Lockett v. Ohio, 438 U.S. 586, 603 (1978), or to base that requirement in the Due Process Clause.

Although superficially appealing, the claim that due process requires standards for jury decisions about the amount of punitive damages has other serious problems, in my view. In general, due process is thought to require clear and definite standards for government regulation of conduct. Such standards are thought necessary to provide citizens notice of what steps must be taken to conform their conduct to law. But requiring standards for the amount of punitive damages that may be awarded if individuals engage in the proscribed conduct does not serve this goal. Rather, such standards would serve merely to give notice to those who intentionally or recklessly inflict harm as to what the maximum adverse consequences of their harmful conduct will be. The primary function of clear notice of the maximum punitive damage award, therefore, would be to permit intentional and reckless wrongdoers to make nice calculations as to whether the profits from the harm they are inflicting are worth the risk.

If the Court eventually rules that the Due Process Clause requires reasonably objective or predictable standards for setting the amount of punitive damage awards, that ruling could have a substantial impact on the size of such awards, or a relatively inconsequential impact, depending on what standard those jurisdictions then adopt. States, and the federal government, presumably would still have very broad discretion concerning the particular standards they might choose to apply, and it is unlikely that the Supreme Court would strike down any reasonably objective standard on substantive due process grounds, even if that standard would permit a very large award. For example, given the deterrent purposes of punitive damage awards, some jurisdictions might choose to fix or limit such awards by reference to a specified percentage of the defendant's net worth. Such a standard would make the size of the award

reasonably predictable, but when applied to wealthy corporate entities, even a small percentage of net worth could result in a very large award.[7]

On the other hand, some jurisdictions might choose to fix or limit such awards by using a specified multiple of the compensatory damages awarded the plaintiff. That standard would usually result in much smaller punitive damage awards than are currently common.[8]

There are many other standards that legislative bodies could choose to apply. I will not attempt to describe them here, or to evaluate their various strengths and weaknesses. The point is obvious: the actual impact of a ruling by the Supreme Court that due process requires reasonably objective standards for assessing punitive damages could itself vary greatly from jurisdiction to jurisdiction, depending on the particular standards each jurisdiction chooses to apply.

II. Challenging Punitive Damages Through the First Amendment

A central purpose of the First Amendment (but not of the Eighth Amendment or the Due Process Clause) is to prohibit governmental action that unduly chills protected speech by causing speakers to self-censor their remarks whenever they are uncertain whether their remarks will be found protected or unprotected, for fear of sanction if they guess wrong. The evil of this "chilling effect" is that it results in the self-suppression of much speech that actually would be protected, even though the government has not directly attempted to sanction that particular speech and therefore there has been no formal occasion for testing the constitutionality of such governmental action.

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7. For example, the $1.6 million punitive damage award upheld in Crenshaw was less than one percent of the defendant's net worth. The $3.5 million punitive damage award the Supreme Court let stand in Allstate Insurance Co. v. Hawkins was only 1/25th of 1% of the defendant's reported assets.

8. For example, in Crenshaw, a multiple of three times the compensatory award would have resulted in a punitive damage award of $60,000, instead of $1.6 million. The same standard in Allstate Insurance Co. v. Hawkins would have resulted in a punitive damage award of about $600, instead of $3.5 million.

One of the purposes of punitive damage awards is to deter similar conduct in the future. When the "conduct" at issue is speech, the purpose of the punitive damage award is to deter similar speech in the future. Speakers will often be uncertain whether similar but not identical speech would be found libelous and unprotected. Accordingly, rather than risk the sanction of a punitive damage award if their similar speech is found libelous, they will self-censor the remarks they otherwise would have made. If those remarks actually would have been protected, the threat of a punitive damages sanction would have resulted in the suppression of protected speech.

Thus, in the libel context, where the purpose of punitive damage awards is to deter speakers from engaging in speech they would otherwise have uttered, such awards are fundamentally inconsistent with the First Amendment.

This inconsistency arises only in the context of speech offenses, where the First Amendment applies. A punitive damage award in the context of a bad faith refusal to pay an insurance claim may also result in suppression of behavior that would actually be found lawful, but that result would not implicate the First Amendment. And unlike the First Amendment, the Eighth Amendment and the Due Process Clause are not designed to prevent self-suppression of behavior for fear of governmental sanction. If one insurance company is hit with a substantial punitive damage award for bad faith refusal to pay an insurance claim, other insurance companies may pay some debatable claims they otherwise would not have paid, even though refusal to pay those claims actually would have been found lawful. But that "unnecessary payment" is not inconsistent with the Eighth Amendment or the Due Process Clause.

Furthermore, as noted, one of the major problems with the Eighth Amendment Excessive Fines Clause argument is that it would force courts to engage in case-by-case determinations of excessiveness, with no clear test to guide them. The Excessive Fines Clause, if it applied at all to punitive damage awards, would not prohibit all such awards, only "excessive" awards. On the other hand, in cases where the First Amendment applies, it probably would bar all punitive damage awards, of whatever amount. If so, courts would not have to engage in case-by-case determinations of how large a punitive damage award could be before it would be inconsistent with the First Amendment.

Finally, one of the principal concerns with punitive damage awards is the possibility that they might be used by juries to punish unpopular defendants, or unpopular opinions. In

Crenshaw, for example, Justice Blackmun made the following comment during my oral argument defending a punitive award: "Of course, this case is a very convenient one for a Mississippi jury. Here is a Chicago insurance company that really is the originator of the MacArthur Foundation, and with lots of money. It is a great place for a Mississippi jury to run wild, isn't it, and still meet your criteria?" That concern, of course, applies with particular force in the libel context, where juries "remain free to use their discretion selectively to punish expressions of unpopular views." Gertz, 418 U.S. at 350.

For these reasons, the Court could, and in my opinion should, prohibit punitive damage awards in cases where the First Amendment applies. Whether it will do so depends, of course, on the attitudes of the individual Justices. It is always difficult to predict how individual Justices will vote on a particular issue, and predicting votes on this issue is perhaps even more difficult than on most, because this issue cuts across traditional ideological lines. However, both "conservative" and "liberal" Justices have expressed concerns about the constitutionality of punitive damages -- particularly in libel cases -- often enough that a successful challenge to punitive damages based on the First Amendment is a real possibility.

For example, as noted above, Crenshaw has revealed that Justices Scalia and O'Connor, regarded as among the conservative members of the Court, apparently believe that, in all contexts, standardless jury discretion to fix the amount of punitive damage awards violates the Due Process Clause. Perhaps more significantly, regarding a possible First Amendment challenge to punitive damages, in her concurring opinion in Crenshaw, joined by Justice Scalia, Justice O'Connor wrote that "the Court has forbidden the award of punitive damages in defamation suits brought by private plaintiffs," citing Gertz v. Robert Welch, 418 U.S. 333, 349-50 (1974). That statement about Gertz, while it does support her position that the Court has been, and presumably should continue to be, responsive to concerns about the serious impact of punitive damages, is as interesting as it is puzzling. Gertz did not categorically prohibit punitive damages in defamation suits brought by private plaintiffs. It simply required such plaintiffs to meet the New York Times "actual malice" standard before they would be entitled to recover punitive (or presumed) damages. "It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury." Gertz, 418 U.S. at 349 (emphasis added). Gertz made it more difficult for private defamation plaintiffs to recover punitive damages, but by no means impossible. And

nothing in Gertz limits the size of the punitive damage award a private defamation plaintiff can recover if the plaintiff proves knowledge of falsity or reckless disregard for the truth. Indeed, to date, the Court has not categorically prohibited punitive damage awards in any type of defamation suit, although it has had numerous opportunities to do so,[9] and has not in any way limited the size of such awards in cases where the plaintiff meets the New York Times standard. Nevertheless, Justice O'Connor's intriguing description of the Court's holding in Gertz, joined by Justice Scalia, may be a precursor of things to come.

As for the liberal side of the Court, in his dissenting opinion in Rosenbloom v. Metromedia, 403 U.S. 29, 84 (1971), Justice Marshall indicated that in libel cases he would limit the "threats to society's interest in freedom of the press that are involved in punitive and presumed damages" by "restricting the award of damages to proved, actual injuries." His view seems clear.

Justice Brennan is obviously concerned with the threat libel actions pose to First Amendment interests; he authored the opinion for the Court in New York Times Co. v. Sullivan, 376 U.S. 254 (1964). In recent years, however, perhaps because he is concerned that fresh examination of First Amendment issues by the current Court might result in reversal or modification of prior First Amendment precedent, he has sometimes seemed more concerned with preserving the First Amendment rights established by earlier opinions than with seeking to expand First Amendment rights. For example, he concurred in the opinion for the Court in McDonald v. Smith, 472 U.S. 479 (1985), a case I argued and lost. In McDonald, the Court refused to grant increased protection, under the petition clause of the First Amendment,

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9. Indeed, shortly before the Court declined to resolve the Eighth Amendment, Due Process and Contract Clause claims raised in Crenshaw, it declined to review a First Amendment challenge to a $2 million punitive damage award in Brown & Williamson Tobacco Corp. v. CBS Inc., 827 F.2d 1119 (7th Cir. 1987), cert. denied, 56 U.S.L.W. 3683 (U.S. April 4, 1988) (No. 87-1354). That case involved the largest media libel award ever upheld on appeal ($2 million in punitive damages and $1 million in presumed damages against CBS and $50,000 against a reporter), and would have been a good vehicle for the Court to focus on in this First Amendment issue. See DeVore/Nelson paper, infra.

for libel defendants who privately petition the President for redress of grievances. Justice Brennan concurred in order to emphasize that the protections afforded by the New York Times standard, under the speech clause, were intended to cover every form of speech, including private petitions to government, and that speech protected by the petition clause would not be entitled to any different or greater protection than speech protected by the speech clause.

On the other hand, in his dissenting opinion in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985), which was joined by Justices Marshall, Blackmun and Stevens, Justice Brennan indicated that he would have extended Gertz so that presumed and punitive damages would not be available without a showing of actual malice in libel cases between private plaintiffs and publishers even if the false and defamatory statements did not involve matters of public concern. Of course, even that dissenting opinion would appear to have allowed punitive damages if the private plaintiff could prove "actual malice."

The views of Justice Kennedy may be determinative, but there is little in his previous opinions to indicate how he is likely to view this issue, and he did not participate in the decision in Crenshaw. However, it may be significant that Kennedy joined in dissenting from the denial of certiorari last term in Atlantic Richfield Co. v. Nielson, supra, and Ohio Casualty Insurance Co. v. Downey Savings & Loan Association, supra, both of which raised Excessive Fines Clause and Due Process Clause questions.

Perhaps a clue as to how the Court will decide this punitive damages issue will be found in the Court's decision in Ft. Wayne Books, Inc. v. Indiana, 504 N.E.2d 559 (Ind. 1987) cert. granted 56 U.S.L.W. 3608 (U.S. March 8, 1988) (No. 87-470), which was argued on October 3, 1988. Ft. Wayne raises very different issues, but they are similar in important respects. One of the issues in Ft. Wayne is the constitutionality under the First Amendment of RICO forfeitures when the predicate offenses triggering the forfeiture are speech offenses, and when the materials to be forfeited are presumptively protected speech materials.[10] Like the threat of punitive damages, the threat

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10. I have written an article on that subject with Don Verrilli that will be published in the December 1988 issue of Criminal Justice, a publication of the American Bar Association.

of forfeiture of the entire inventory of a bookstore or video store causes speakers who are in doubt concerning the protected or unprotected nature of their speech to self-censor their remarks. Like punitive damage awards, the amount of the forfeiture need bear no relation to the underlying injury that is the basis for the forfeiture.[11] As applied to speech enterprises, the threat of RICO forfeiture, like the threat of a punitive damage award if speech is found libelous, is specifically intended to deter speech that otherwise would have occurred. Accordingly, how the individual Justices approach the forfeiture issue in Ft. Wayne may shed some light on how they are likely in the future to approach the issue of punitive damage awards in libel cases.

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11. In one recent case, a federal judge upheld forfeiture of the entire and presumptively lawful inventory of a video store because that store had engaged in sales or rentals, with a total value of less than $200, of a few obscene videotapes. That case is pending on appeal.

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PUNITIVE DAMAGES IN LIBEL CASES

P. Cameron DeVore and Marshall J. Nelson[1]

When the Supreme Court denied certiorari earlier this year in Brown & Williamson Tobacco Corp. v. Jacobson, 827 F.2d 1119 (7th Cir. 1987), cert. denied, 108 S. Ct. 1302 (1988), there was cause for concern beyond the disturbing fact that it let stand a $3,050,000 libel judgment -- an award that included a record $2 million in punitive damages. Less than two months later, the Court also refused to decide a different kind of constitutional challenge to punitive damages in a non-libel action -- at least without a more complete record from the lower courts -- in Bankers Life & Casualty Co. v. Crenshaw, 108 S. Ct. 1645 (1988). But in Bankers Life there were strong signals from at least two of the Justices that the argument might receive a sympathetic hearing on due process grounds.[2]

In contrast to Bankers Life, the Brown & Williamson case not only presented a more complete record on the issue; in our view it presented the issue of punitive damages in libel cases in exceptionally sharp focus. The judgment upheld by the Seventh Circuit consisted entirely of presumed and punitive damages[3]

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1. Messrs. DeVore and Nelson are partners in the Seattle office of Davis Wright & Jones. They represented CBS Inc. and Walter Jacobson on appeal in Brown & Williamson Tobacco Corp. v. Jacobson, 827 F.2d 1119 (7th Cir. 1987) and the petition for certiorari of that case sub. nom. CBS Inc. v. Brown & Williamson Tobacco Corp., cert. denied, 56 U.S.L.W. 3683 (U.S. April 4, 1988) (No. 87-1354). They also filed a brief amici curiae on behalf of major media organizations in Bankers Life & Casualty Co. v. Crenshaw, 108 S. Ct. 1645 (1988).

2. Justice O'Connor, joined by Justice Scalia, concurred in the judgment because of the abbreviated record and argument on this issue, but stated clearly her belief that "the Court should scrutinize carefully the procedures under which punitive damages are awarded in civil lawsuits," and even suggested, "there is reason to think that [they] may violate the Due Process Clause." 108 S. Ct. at 1655 (O'Connor, J., concurring in part).

3. The Seventh Circuit had affirmed a jury award of punitive damages in the amount of $2,000,000 against CBS and $50,000

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and was awarded to a public figure corporation in a case involving commentary on a matter of the highest public concern -- the appeal of cigarette advertising to children.

The Court thus had an opportunity to complete the constitutional analysis of punitive damages which it began in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (prohibiting presumed and punitive damages in public issue/private figure cases)[4] and continued in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (permitting such damages in private issue/private figure cases).

The Supreme Court's refusal to consider the issue in this context was even more troublesome because even the proponents of punitive damages in the Bankers Life case acknowledged that such awards in libel cases present special constitutional problems.[5] Indeed, some of the Court's most searching criticism of punitive damages has occurred in its libel opinions. These prior libel decisions remain as a strong

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against Jacobson, and essentially on its own initiative, fixed $1,000,000 as presumed damages. (The jury had previously awarded $3,000,000 compensatory damages, which the district court reduced to nominal damages of $1 because of the plaintiff's failure to prove any actual damage.) 827 F.2d at 1121-22.

4. This prohibition was qualified by the words "at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." Gertz, 418 U.S. at 349 (emphasis added). The implications of this clause are discussed in the text accompanying note 9, infra.

5. See, e.g., Brief of Amicus Curiae Assoc. of Trial Lawyers of America, Bankers Life & Casualty Co. v. Crenshaw, supra, p. 10, n.5. Mr. Ennis, who represented the appellee in Bankers Life and otherwise supports the doctrine of punitive damages, concludes in his excellent companion piece that punitive damage awards in libel cases "are fundamentally inconsistent with the First Amendment."

foundation for a constitutional challenge to punitive damages[6] in libel cases, despite the Court's inaction in Brown & Williamson and there is every reason to believe that such a challenge will be successful if the proper case reaches the Court.

I. Punitive Damages in Prior Supreme Court Libel Decisions

The problem of unrestrained damage awards in libel cases has been a constant theme for over 20 years in the Supreme Court's effort to reconcile the common law of libel with constitutional limitations. From the very beginning of this analysis in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the Court recognized that the threat of unrestrained punitive damages raises severe constitutional problems as "a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law." Id. at 278 (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 [1963]). The Court noted the disparity between the $500,000 civil judgment against The New York Times and the $500 criminal fine that would have applied to the same conduct and questioned the lack of procedural safeguards that would have applied in a criminal case. 376 U.S. at 277.[7] The Court's answer in the

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6. Although the primary focus of this discussion is on punitive damages, it is impossible to ignore the equally arbitrary and unrestrained amounts that are awarded in libel cases under the label of "presumed damages" -- including the $1 million award of such damages in Brown & Williamson. As the Court recognized in Gertz, most of the constitutional objections to punitive damages apply with equal force to presumed damages, and much of the Court's criticism is leveled at "presumed and punitive damages" together. See, e.g., Gertz, 418 U.S. at 349-50. A brief discussion of separate issues involving presumed damages appears in the text at note 12, infra.

7. The Court's discussion on these points was prophetic of the recent Eighth and Fourteenth Amendment arguments raised against punitive damages in cases such as Bankers Life:

> Presumably a person charged with violation of this [criminal libel] statute involves ordinary criminal-law safeguards such as the requirements of an

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Sullivan case, however, was to address the issue of liability itself, leaving the matter of damages to another day.[8]

In Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), the Court initially rejected the argument that unlimited punitive damages were barred by the First Amendment. Justice Harlan, announcing the judgment of the Court in an opinion joined by only three Justices, concluded, inter alia, that the finding of "ill will" required for an award of punitive damages under general libel law, coupled with the heightened standard of liability announced by the Court, was sufficient protection for publishers. This rationale was short-lived, however. First, the standard of liability contemplated by Justice Harlan was not the actual malice rule of New York Times v. Sullivan, but a standard of "highly unreasonable conduct" which was rejected by a majority of the Court. See 388 U.S. at 155. The "malice" requirement on which Justice Harlan relied was therefore inconsistent with the actual malice rule ultimately adopted by the Court.

More importantly, in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), Justice Harlan himself expressly retreated from his earlier position in Butts:

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> indictment and of proof beyond a reasonable doubt. These safeguards are not available to the defendant in a civil action. The judgment awarded in this case -- without the need for any proof of actual pecuniary loss -- was 1,000 times greater than the maximum fine provided by the Alabama criminal statute and 100 times greater than that provided by the Sedition Act. And since there is no double-jeopardy limitation applicable to civil lawsuits, this is not the only judgment that may be awarded against petitioners for the same publication.

372 U.S. at 277-78.

8. Recently, Justice White questioned the wisdom of this approach, suggesting instead that punitive and presumed damages might have been prohibited as an alternative means of First Amendment protection. See Dun & Bradstreet, 472 U.S. at 765-774 (White, J., concurring) and discussion in text following n.9, infra.

> Reflection has convinced me that my earlier opinion (in Butts) painted with somewhat too broad a brush and that a more precise balancing of the conflicting interests involved is called for in this delicate area.

403 U.S. at 62 n.3. After lengthy analysis, he concluded:

> I would hold unconstitutional, in a private libel case, jury authority to award punitive damages which is unconfined by the requirement that these awards bear a reasonable and purposeful relationship to the actual harm done.

Id. at 77 (Harlan, J. dissenting).

In the same case, Justices Marshall and Stewart concluded that punitive damages should be prohibited altogether in libel cases involving matters of public interest. They recognized that punitive damages:

> [S]erve the same function as criminal penalties and are in effect private fines. Unlike criminal penalties, punitive damages are not awarded within discernible limits but can be awarded in almost any amount. Since there is not even an attempt to offset any palpable loss and since these damages are the direct product of the ancient theory of unlimited jury discretion, the only limit placed on the jury in awarding punitive damages is that the damages not be "excessive," and in some jurisdictions that they bear some relationship to the amount of compensatory damages awarded. [Citation omitted.] The manner in which unlimited discretion may be exercised is plainly unpredictable.

Id. at 82-83 (Marshall, J., dissenting).

These dissenting opinions became the touchstone of the majority opinion in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), where the Court concluded:

> [P]unitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. Instead, they are private fines levied by civil juries . . .Id. at 350. The Court therefore held:

> [T]hat the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.

Id. at 349 (emphasis added).

It is important to stress at this point that the Court in Gertz did not hold that such damages would automatically flow whenever actual malice could be shown; the question simply was not discussed. In context, it is clear that the Court used this language to confine its analysis and holding in Gertz to cases involving "the private defamation plaintiff who establishes liability under a less demanding standard than that stated by New York Times." Id. at 350.[9]

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9. It is also possible that Justice Powell, whose opinion for the Court drew heavily from Justice Harlan's analysis in Rosenbloom, was simply paraphrasing the following observation by Justice Harlan:

> At a minimum, even in the purely private libel area, I think the First Amendment should be construed to limit the imposition of punitive damages to those situations where actual malice is proved.

Rosenbloom v. Metromedia, 403 U.S. at 73 (Harlan, J., dissenting) (emphasis added).

If so, it is even clearer that the rule in Gertz was intended as the least -- i.e., the minimum -- protection permissible under the First Amendment, and that further restrictions on libel damages might be required in other cases. It must also be noted that Justice Harlan, even in Rosenbloom, persisted in his earlier view that "actual malice" incorporated traditional concepts of malicious conduct:

> This [actual malice] is the typical standard employed in assessing anyone's liability for punitive damages where the underlying aim of the law is to compensate for harm actually caused, [citations omitted], and no conceivable state interest could justify imposing a harsher standard on the exercise of those freedoms

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Most recently, in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., supra, Mr. Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, reasserted the constitutional objections to punitive awards discussed in Rosenbloom and Gertz, stressing the "largely uncontrolled discretion" of juries to assess damages "in wholly unpredictable amounts bearing no necessary relation to the actual harm caused" as a substantial reason for the limitations imposed in Gertz. Id. at 778 (quoting Gertz, 418 U.S. at 350). Justice Brennan noted in his opinion that these objections to punitive damages are not confined solely to First Amendment cases. Citing Chief Justice Rehnquist's dissenting opinion in Smith v. Wade, 461 U.S. 30, 59 (1983), he said:

> These cases, like Gertz, recognize that "the alleged deterrence achieved by the punitive damage awards is likely outweighed by the costs -- such as the encouragement of unnecessary litigation and the chilling of desirable conduct -- flowing from the rule, at least when the standards on which the awards are based are ill defined."

472 U.S. at 780 n.4 (Brennan, J., dissenting).

The importance of the dissenting opinions in Dun & Bradstreet should not be overlooked. The case involved, according to the plurality opinion, a purely private libel of a private individual, thus demanding far less constitutional protection than publications involving matters of public interest. Yet even in this purely private context, four members of the Court objected to the award of punitive damages, and a fifth, Justice White, joined in part by Chief Justice Burger suggested that First Amendment interests might be served by

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(footnote continued from previous page)

> that are given explicit protection by the First Amendment. Id.

The narrower definition espoused by Justice Powell and the majority of the Court, without the elements of "ill will" and intent to harm, would not fit with Justice Harlan's logic. It would, in fact, impose a harsher standard of liability on the exercise of First Amendment freedoms than that imposed on other non-protected conduct.

limiting or entirely prohibiting presumed and punitive damages, as an alternative to the New York Times rule. 472 U.S. at 771 (White, J., concurring in the judgment).[10] Considering these signals, there was some justifiable optimism that the Court would grant certiorari in Brown & Williamson and, as the final step of its Gertz/Dun & Bradstreet analysis, would impose further restrictions on libel damages in public figure/public interest cases. Although the Court ultimately declined the invitation in Brown & Williamson, the constitutional foundation set in its other libel opinions remains firm and fully supports continued attempts to bring the issue before the Court.

II. The Specific Argument Against Punitive Damages in Libel Cases

The constitutional objections to punitive damages are a common and consistent thread running through all the Supreme Court's libel decisions since New York Times Co. v. Sullivan. The specific argument, however, must begin with Gertz v. Robert Welch, Inc. in 1974. In that case, the Court characterized its prior libel decisions as "a struggl[e] . . . to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." 418 U.S. at 325. It then defined the task as a balancing of First Amendment interests against "the legitimate state interest underlying the law of libel . . . the compensation of individuals for harm inflicted on them by defamatory falsehood." Id. at 341. That interest, the Court stressed, "extends no further than compensation for actual injury." Id. at 348-49. The Court even suggested that in the absence of such a state interest, "this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation." Id. at 341.

Applying the balance, the Gertz Court held that the reputation of a private individual involved in a matter of public interest was entitled to greater protection than that afforded by the New York Times actual malice rule and left the states free to fashion their own rules within a constitutional prohibition against liability without fault. Addressing the question of damages, however, the Court declared:

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10. See n. 8, supra.

> [T]he doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injuries sustained by the publication of a false fact. More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.

Id. at 349 (emphasis added). And on the specific subject of punitive damages, the Court said:

> Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, but, unlike the former rule, punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injury.

Id. at 350 (emphasis added).

When the issue of libel damages arose again, in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., the Court expressly adopted the approach articulated in Gertz to "balance the State's interest in compensating private individuals for injury to their reputation against the First Amendment interest in protecting this type of expression [statements involving no issue of public concern]." 427 U.S. at 757. At the same time, the Court reaffirmed the lack of a substantial state interest in awarding presumed and punitive damages where issues of public concern are involved "in view of their effect on speech at the core of First Amendment concerns." Id. at 760. Where no issue of public concern is involved, however, Justice Powell, writing for a mere plurality of the Court, found that the state interest in awarding presumed and punitive damages is substantial, "relative to the incidental effect these remedies may have on speech of significantly less constitutional interest." As previously noted, four members of the Court took strong exception to the award of such damages under this reasoning. Id. at 774-94. (Brennan, J., dissenting). The two remaining Justices, Chief Justice Burger and Justice White, created a majority by concurring in the judgment, but called for reexamination of both Gertz and New York Times, with Justice White suggesting that presumed and punitive damages might be prohibited altogether as an alternative means of constitutional protection in lieu of the New York Times rule.

Despite the doubts expressed by Justices White and Burger, the Court in both Gertz and Dun & Bradstreet strongly reaffirmed constitutional protection for speech on matters of public concern and speech involving public officials and public figures.[11] Under the balancing approach espoused by both cases, the stage is thus set for the Court to further restrict or even prohibit the award of punitive damages in the context of a public official/figure libel suit involving issues of public concern. In such a case, the First Amendment interest in encouraging "'uninhibited, robust, and wide-open' debate on public issues" (Gertz, 418 U.S. at 340, quoting New York Times Co. v. Sullivan, 376 U.S. at 270) is at its strongest, and the state interest in providing any recovery beyond compensation for actual provable injury is at its weakest.[12]

If the balance applied is consistent with Gertz and Dun & Bradstreet, there should be even greater protection for these cases "at the heart of the First Amendment," (see Dun & Bradstreet, 472 U.S. at 758-59), and that protection should take the form of further restrictions on punitive damages. It should, that is, unless all analysis is blindly preempted by the finding of "actual malice" necessary to even reach damage issues in such a case. Before proceeding to a discussion of that troubled rule, however, some observations on presumed damages are worth noting.

III. The Case Against Presumed Damages

It can be argued convincingly that the doctrine of presumed damages, which allows recovery without evidence of actual injury, was effectively laid to rest in Gertz. The States have

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11. See Gertz, 418 U.S. at 339-41; Dun & Bradstreet, 472 U.S. at 758-59.

12. It may be argued that the state interest in providing any compensation at all to the plaintiff in a public figure libel case is diminished by the fact that public figures usually have greater access to the media to counter false publicity. 418 U.S. at 344; see also Curtis Publishing Co. v. Butts, 388 U.S. at 155. There is no question that the lack of such access by private figures and the perceived need to provide another remedy was a major rationale for the Court's retreat to a lesser standard than the New York Times rule in Gertz. Even there, however, recovery was limited to compensation for actual injury.

no substantial interest in awarding damages in excess of actual injury, 418 U.S. at 349; therefore, "all awards must be supported by competent evidence concerning the injury." Id. at 350. These conclusions do not magically dissolve where the applicable standard of liability is actual malice. Actual injury to the plaintiff (or lack of it) does not change; the plaintiff's opportunity to demonstrate elements of injury catalogued in Gertz is not diminished; nor is the ability of trial courts to frame instructions appropriate to the alleged injury. Id. at 350.

Presumed damages in libel cases are nothing more than a vestigial aspect of strict liability, clearly prohibited by the court in Gertz. Strict liability under the common law of libel resulted from a finding that speech in question was "libelous per se," from which the jury was allowed to presume falsity, malice, and damages. See Gertz, 418 U.S. at 371-75 (White, J., dissenting); see generally R. Sack, Libel, Slander and Related Problems, 39-43 (1980). Ironically, it was solely on the basis of this now-discredited logic that the Court of Appeals in Brown & Williamson awarded presumed damages of $1,000,000:

> Brown & Williamson is entitled in this case to recover under the doctrine of presumed damages because Jacobson's Perspective was libelous per se. 827 F.2d at 1139 (emphasis added).

Although the Court set out the common law rationale for presumed damages in Dun & Bradstreet, 472 U.S. at 760, the authorities cited all predate Gertz and in some cases, even New York Times v. Sullivan. They amount to a simple restatement of the libel per se rule. It is also important to remember that Dun & Bradstreet was an exceptional case, involving a private plaintiff, limited distribution to "commercial" clients, and issues that the prevailing plurality held to be not of public concern. In other words, it was a case in which the Court was ultimately unwilling to apply any of the First Amendment limitations applicable to other libel actions. In contrast, in any case that does involve a matter of public interest, brought by either a private or public plaintiff, the Dun & Bradstreet rationale regarding presumed damages should not pass muster under Gertz.

IV. The "Actual Malice" Problem

The Gertz Court's condemnation of presumed and punitive damages would be enough, standing alone, to declare

unconstitutional any award of such damages in a libel case involving matters of public interest, were it not for the qualifying language, "at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." Gertz, 418 U.S. at 349 (emphasis added). This language was interpreted by the Seventh Circuit in Brown & Williamson as a ruling by the Supreme Court that presumed and punitive damages flow automatically where New York Times actual malice can be shown. See Brown & Williamson Tobacco Corp. v. Jacobson, 713 F.2d 262, 273 (7th Cir. 1983). Other circuit courts have been less hasty to assume this conclusion, but have continued to uphold punitive awards, in some cases because of their uncertainty. For example, in Maheu v. Hughes Tool Co., 569 F.2d 459, 478 (9th Cir. 1977) the Ninth Circuit recognized that the Supreme Court "has left open the question of whether [punitive damages] can be awarded in situations in which the high and protective standard of actual malice has been met." The Second Circuit, in Buckley v. Littell, 539 F.2d 882, 897 (2d Cir. 1976), cert. denied, 429 U.S. 1062 (1977), also recognized that:

> [i]t may be that Gertz v. Robert Welch, Inc., [supra], and its underlying concern . . . will ultimately lead the Supreme Court to hold that punitive damages cannot constitutionally be awarded to a public figure . . .

Id.,[13] but felt compelled by its own prior decisions to permit punitive damages "absent clear word from the Court to the contrary."

A closer reading of Gertz confirms the Ninth Circuit's conclusion that the question is very much open. There is no discussion of the relationship between a finding of actual malice and the award of either presumed or punitive damages, nor is there any suggestion that such an award would be proper. There is only the Court's careful language confining its holding to cases involving "the private defamation plaintiff who

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13. See also Davis v. Schuchat, 510 F.2d 731, 737 (D.C. Cir. 1975); Carson v. Allied News Co., 529 F.2d 206, 214 (7th Cir. 1976). And, very recently, see Mahoney v. Adirondack Publishing Co., 71 N.Y.2d 31, 41, 523 N.Y.S.2d 480, 484 (1987): "[W]e have no occasion to consider whether punitive damages are ever recoverable in libel actions involving matters of public concern... [citing Gertz and Dun & Bradstreet]."

establishes liability under a less demanding standard than that stated by New York Times." 418 U.S. at 350.[14] The issue thus remains to be addressed.

There is an apparent, but deceptive, connection between the rationale for punitive damages and a finding of "actual malice." After all, what could be more "malicious" than the intentional publication of calculated falsehoods? But the connection is flawed in at least two respects. First, because of confused application of the rule in the lower courts, the actual malice rule is often treated as nothing more than a semantic hurdle easily overcome by well-meaning juries and judges who feel compelled to compensate the victim of what they view as unfair or irresponsible news coverage.[15] All too often, the result is a mechanistic finding of "knowing falsehood" based on an interpretive comparison of the defendant's words with all supposedly "known" facts, or a finding of "reckless disregard of the truth" from circumstances that show mere negligence, at most. See, e.g., Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984); Time, Inc. v. Pape, 401 U.S. 279 (1971); Greenbelt Cooperative Publishing Assoc v. Bresler, 398 U.S. 6 (1970). When such a finding is also allowed to determine the availability of punitive damages, without any evidence of malice in the traditional sense, the end result is punishment of speech on a lesser standard than is applied to the award of punitive damages in other cases. See Smith v. Wade, 461 U.S. 30 (1983). Justice Harlan found such a result unjustifiable under "[any] conceivable state interest." See Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 73 (1971) (Harlan, J., dissenting).

Even when the actual malice rule is properly applied, it does not necessarily reach the issue of whether the defendant's conduct is truly "outrageous" and prompted by the "evil motives"

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14. See n.9, supra.

15. As Justice Douglas suggested in his dissent in Gertz, 418 U.S. at 359, the influence of emotion and prejudice is not confined to the jury. See also Van Alstyne, First Amendment Limitations on Recovery from the Press, 25 Wm. & Mary L. Rev. 793, 801, 808 (1984); Report, Committee on Communications Law, Punitive Damages in Libel Actions, 42 Record of Assoc. of Bar of City of New York, 20, 32-36 (Jan./Feb. 1987).

normally required to be shown before punitive damages may be awarded. See Restatement (Second) of Torts §908(2) (1977). As several commentators have noted[16] the requirement of actual malice in public figure libel cases is a tool for defining the standard of liability, not the level of damages. It focuses only on the defendant's attitude toward the facts, and not on the defendant's attitude toward the plaintiff or any intent to do harm. It is therefore possible to have a technical finding of "actual malice" as defined by New York Times where there is absolutely no evidence of "malicious" conduct in the traditional sense of the word. The jury is then erroneously invited to award punitive damages without any further restrictions. This fact points to the second flaw in application of actual malice as the test for determining both liability and availability of punitive damages.

Some states quite properly recognize that punitive damages are an extreme remedy and must be supported by evidence of malicious conduct beyond that required to establish liability[17] or, in libel cases, by evidence of express malice, in addition to New York Times "actual malice."[18] If actual malice alone is allowed to determine the availability of punitive damages, the end result is a rule that permits recovery of presumed and punitive damages, regardless of malicious conduct, in all successful public official/public figure libel

16. See, e.g., Note, Punitive Damages and Libel Law, 98 Harv. L. Rev. 847, 854-55 (1985); Report, Committee on Communications Law, supra n. 15, at 32-36.

17. See, e.g., Parsons v. Winter, 142 Ill. App. 3d 354, 491 N.E.2d 1236, 1241 (1986).

18. See, Appleyard v. Transamerican Press, Inc., 539 F.2d 1026, 1030 & n.4 (4th Cir. 1976), cert. denied, 429 U.S. 1041 (1977); Buckley v. Littell, 394 F. Supp. 918, 945 (S.D.N.Y. 1975) modified, 539 F.2d 882 (2d Cir. 1976), cert. denied, 429 U.S. 1062 (1977); Selby v. Savard, 134 Ariz. 222, 655 P.2d 342, 348 (1982); Venturi v. Savitt, Inc., 191 Conn. 588, 468 A.2d 933, 935 (1983); Matthews v. Deland State Bank, 334 So. 2d 164, 166 (Fla. App. 1976); Wood v. Lee, 41 A.D.2d 730, 731, 341 N.Y.S.2d 738, 739 (1973).

cases, where First Amendment protection is supposed to be at its highest.[19]

There is no easy resolution to the confusion, semantic and otherwise, that has developed in application of the actual malice rule. Some commentators argue for a high standard of proof of truly intentional and malicious conduct ("express malice") as a prerequisite to punitive damages after liability has been established with actual malice.[20] It can also be argued that the New York Times rule in its original form was always intended to reach only truly malicious conduct, even in its application to determine liability.[21] But perhaps the best answer is found in the decisions of the Supreme Court, itself, summarized by Justice Brennan in Dun & Bradstreet -- that the award of punitive damages in libel actions "is too

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19. That punitive damage awards have become well nigh "automatic," once liability has been established under New York Times, is strongly suggested by the LDRC finding, cited in the Introduction, supra, at page 7, that some three out of every five damage awards in these cases over a period of several years, have included a punitive award -- and on average, a very substantial award at that.

20. See Note, Punitive Damages and Libel Law, supra n.16, at 860.

21. In the earlier cases, the Supreme Court characterized actual malice in terms of "deliberate lies" and "calculated falsehoods" uttered with a "high degree of awareness of probable falsity." See, e.g., Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964). Under these cases, it was the "intent to inflict harm through falsehood" that demonstrated actual malice. Id. at 73. In the Court's struggle to educate the lower courts that evidence of ill will, enmity, and intent to inflict harm were not sufficient to establish actual malice, perception of the rule began to shift away from any consideration of motive and intent. See Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 82 (1967); Henry v. Collins, 380 U.S. 356 (1965). A close reading of the earlier cases, however, leaves a strong impression that the Court did, indeed, assume the existence of truly malicious intent as almost inherent in its definition of actual malice; and that it most certainly did not intend to foreclose consideration of the traditional common law elements of "malice" with regard to the issue of punitive damages.

blunt a regulatory instrument" to satisfy First Amendment principles under any test. 472 U.S. at 778 (Brennan, J., dissenting).

V. Eighth and Fourteenth Amendment Objections to Punitive Damages

The constitutional objections to punitive damages in libel cases can be asserted with equal conviction under the Due Process clause of the Fourteenth Amendment and the Excessive Fines clause of the Eighth Amendment. In this sense, the only difference between a libel case and any other is the fact that the conduct being punished and deterred by punitive damages is speech. The difference, of course, is a highly significant one.

The Supreme Court has long recognized that the Constitution demands careful examination of any form of state regulation that restricts free speech.[22] As the Court stated in Speiser v. Randall, 357 U.S. 513, 520 (1957):

> When we deal with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied. (Emphasis added.)

The allowance of punitive damages in libel cases is an exercise of state regulatory power that is subject to this constitutional limitation. See New York Times Co. v. Sullivan, 376 U.S. at 269; see also, Dun & Bradstreet, 472 U.S. at 759 (Brennan, J., dissenting). As such, the operation and effect of the method by which such penalties are assessed must also be closely scrutinized to insure that the remedy is in fact necessary to protect a substantial state interest and to insure that it does not encroach upon protected conduct. Gertz, 418 U.S. at 349. These are essentially due process considerations, but they are magnified and ultimately subsumed in the First

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22. See Young v. American Mini Theatres, 427 U.S. 50, 76 (1976) (Powell, J., concurring); New York Times Co. v. United States, 403 U.S. 713 (1971); United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938); Lovell v. Griffin, 303 U.S. 444 (1938).

Amendment analysis. Even when the Supreme Court has framed its analysis of speech restrictions in due process terms, its conclusion has turned on First Amendment concerns. See, e.g., Police Dep't v. Mosley, 408 U.S. 92 (1972); Freedman v. Maryland, 380 U.S. 51 (1965); Speiser v. Randall, supra at 520.

It is also possible to argue -- indeed, the language of the Supreme Court has almost invited the argument[23] -- that punitive damages in libel cases are nothing more than "private fines" levied against unpopular views and speakers in excessive and totally uncontrolled amounts, i.e., that they are excessive fines barred by the Eighth Amendment. Proponents of punitive damages argue strenuously that the Eighth Amendment was never intended to reach civil penalties; that the prohibition is addressed to fines levied by the government. The argument, whatever merit it might have as a matter of history, is undermined by the reasoning of the Supreme Court's libel decisions, at least in the First Amendment context.

The first two decisions of the Court to articulate First Amendment limitations on libel law recognized virtually no difference between criminal punishment and assessment of civil damages in libel cases. New York Times Co. v. Sullivan, 376 U.S. at 177, held in the civil context, "what a state may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel." Garrison v. Louisiana, 379 U.S. at 67 n.3, held in the criminal context, "whether the libel law be civil or criminal, it must satisfy relevant constitutional standards." These observations alone suggest that punitive damages are at least directly analogous to "fines" within the purview of the Eighth Amendment and should be subject to the same protection. See also Smith v. Wade, 461 U.S. at 59 (Rehnquist, J., dissenting) (punitive damages are "fines" and are "quasi-criminal").[24]

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23. See discussion in text after n.6, supra.

24. It is difficult -- and in the libel context, probably unnecessary -- to argue with Bruce Ennis' scholarly treatment of the Eighth Amendment issue -- see pages 10-15, supra. In many ways, the strongest arguments in favor of Eighth Amendment limitations on punitive damages are found in the Supreme Court's libel cases, which ultimately turn on First Amendment considerations. It is also tempting to follow the lead of Justices O'Connor and Scalia in finding that the problem is essentially one of due process.

In First Amendment cases, however, it is not necessary to rely on either the due process or excessive fines arguments, by themselves. The overriding constitutional consideration is not merely that punitive damages are excessive private fines that violate due process rights of the speaker, although that may be demonstrably true. The constitutional evil is that punitive damage awards deter speech and lead to self-censorship by those who would otherwise engage in "uninhibited, robust, and wide-open" debate on public issues. In short, although the awards themselves may well violate the Fourteenth Amendment and at least the spirit of the Eighth Amendment, it is the broader First Amendment interest of society as a whole that is most threatened by such unrestrained imposition of liability.

Conclusion

The discussion of damages in the Supreme Court's libel decisions leaves little doubt that there are severe problems -- long recognized by the Court -- with both punitive and presumed damage awards under any constitutional analysis, whether it begins with the Eighth, the Fourteenth, or the First Amendment. But it is equally clear that the First Amendment argument against these unrestrained damage awards stands on its own, regardless of how the issues are resolved in non-libel cases. This conclusion should not discourage the media from joining the fight in these other arenas, however. Well-placed efforts as amici curiae can frame the issues in a broader context and will remind the Court of its own dissatisfaction with punitive awards in libel cases. If, as Justice Brennan suggested in Dun & Bradstreet, these objections are not confined solely to First Amendment cases, the end result may be a general limitation or even prohibition of such damages in all cases. On the other hand, if punitive damages are ultimately upheld in some cases, participation of the media in the process will be even more important to ensure that the special First Amendment issues presented by punitive damages in libel cases are preserved.

Eventually -- hopefully sooner rather than later -- another libel case will reach the Supreme Court in a posture that makes the punitive and the presumed damage issues unavoidable. However, what the Court made clear last Term in Bankers Life and Casualty Co. v. Crenshaw, is that this will only happen if the issue is well developed in the record from the lower courts. Accordingly, as long as the invitation remains open, every answer, affirmative defense, motion for dismissal, and jury instruction in a libel case should raise and challenge the constitutionality of punitive and presumed damages under all viable theories, and most importantly, under the First Amendment.

LDRC 50-STATE SURVEY 1988 -- KEY FINDINGS

The fully updated LDRC 50-State Survey 1988 (generally covering developments through December 31, 1987) was recently published. (If you have not yet ordered your copy of the 1988 Survey, complete the attached order form at the end of this Bulletin). As in the past, this year's 50-State Survey highlights trends in the law of libel, privacy and related claims. It is thus appropriate this year, as in years past, to summarize briefly the key findings of the 1988 Survey for our Bulletin readers.

However, as is noted in the 50-State Survey itself, it is important to recognize that, just as each of the state survey reports provide no more than an overview or outline of the law, the "key findings" that follow provide no more than a shorthand description of general patterns in the law. In particular, the numbers and statistics (provided below) are no more than approximations and general descriptions of basic trends. While we believe they provide generally reliable quantifications of our findings, they should not be considered or cited as precise measures of the exact state of the law in any or every jurisdiction.

Similarly, neither this summary of key findings nor the status summaries in the 1988 Survey volume should be used as a substitute for consulting the individual state reports in the Survey and, beyond them, the actual cases or statutes to which they refer.

APPELLATE STANDARD OF REVIEW

In 1984, the Supreme Court in Bose v. Consumers Union, 466 U.S. 485 (1984), reaffirmed "independent appellate review" as the appropriate standard for appellate courts reviewing cases

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tried under an actual malice standard. While presumably all jurisdictions must ultimately consider themselves bound to apply Bose in some fashion, there have been no significant shifts in this direction in the last year, according to this year's Survey. At least 23 jurisdictions still expressly apply the independent review standard, with another 8 applying the arguably more expansive "de novo" review standard.

Although according to this year's Survey ten jurisdictions continue to apply the same standard of review in defamation actions as would usually be applied in any other civil case, this is apparently because an appropriate occasion to consider the Bose issue has not arisen. Two jurisdictions (Florida & Nebraska) also indicate that special standards for appellate review in libel actions will be applied, but the state reports do not define what those special standards would be. In those states specifically reported as undecided, at least two (Delaware and Tennessee) appear to apply the same standard of review as would be applied in any civil case.

In the only state court development last year, the Ohio Supreme Court declined to apply the Bose independent review doctrine to private figure cases in which actual malice need not be proven. Independent review is applied in Ohio in public figure cases, however.

BURDEN OF PROOF

In the second year since the Supreme Court decided Philadelphia Newspapers v. Hepps, state courts have steadily been moving in the direction of imposing the burden of proof of falsity on the plaintiff in constitutional libel actions. According to the 1988 Survey, at least 37 jurisdictions imposed the burden of proof of falsity upon the plaintiff in a libel action, up 2 from last year. Nearly all of these relied upon their interpretations of federal constitutional requirements.

There were, however, 11 jurisdictions that continued to impose at least the initial burden of proof of truth upon the defendant; 10 by judicial decision, 1 by constitutional provision. (While this is one more jurisdiction than had been reported last year, it reflects not a change in the law, but rather, a correction of LDRC's coding of the burden of proof issue.) However, none of these jurisdictions appears to have had an opportunity to consider the effect of Hepps on this issue, and several state reports have expressed uncertainty as

to the validity of their local rules post-Hepps. In the remaining jurisdictions it is undecided or unclear which party bears the burden of proof.

At least 13 jurisdictions were reported in the latest survey as somehow distinguishing between private and public plaintiffs with respect to the truth/falsity burden. The majority of these have placed the burden of proving truth on the defendant only when the case involves a private plaintiff and a matter not of public concern; three other jurisdictions relieve the private plaintiff of the burden of proving falsity when the case involves a non-media defendant. Finally, three jurisdictions make a distinction solely on the basis of the character of the plaintiff, requiring public figures or officials to prove falsity while still requiring defendants in a private plaintiff case to prove truth, again, presumably, because they have not had occasion to consider the effect of Hepps.

With regard to the burden of proof as to the requisite degree of fault in constitutional libel actions, at least 50 jurisdictions imposed the burden of proof of fault upon the public figure plaintiff, up 5 from last year. Nearly all of these relied upon their interpretation of constitutional requirements. However, one jurisdiction put the initial burden on defendants and then allowed it to shift to plaintiff, and in three jurisdictions (Alaska, Montana, and North Dakota) there have been no cases addressing the issue of burden of proving fault.

Finally, twenty-eight jurisdictions drew a distinction between "public" and "private" plaintiffs with regard to the burden of proving fault, holding that private as opposed to public plaintiffs do not have the burden of proving fault; with 3 of these reporting states also recognizing a distinction between issues of public, as opposed to private, concern regarding "private" plaintiffs. The remaining jurisdictions reported no such distinction.

COMMON LAW PRIVILEGES

Fair report, fair comment and other common law privileges have proven to be of continuing utility to the media in its coverage of events of significant public concern, both in states where post-Sullivan constitutional principles have not been fully developed and even in those that have also broadly recognized constitutional principles.

According to the 1988 Survey, at least 46 jurisdictions recognize some form of fair report privilege, the same number as last year, 16 by statute, 26 by common law, and 4 by both statute and common law. At least 25 jurisdictions, also the same as last year, recognize a qualified privilege for fair comment, although only 2 do so by statute. The number of jurisdictions recognizing a qualified privilege under common law to report on matters of public interest or concern has also remained stable, with at least 14 recognizing such a privilege.

Although there has been no change in the number of jurisdictions recognizing the common law privileges, there has been no dearth of case law on the subject, with most of the new cases reinforcing or extending, rather than limiting, the privileges. Cases in Colorado, Louisiana, New Jersey, New Mexico, and Rhode Island, for example, have utilized these privileges in the non-media context. Connecticut has reported 3 new cases on the "public interest" privilege, as well as a non-media case setting down the elements essential to establish a qualified privilege.

CONSTITUTIONAL OPINION PRIVILEGE UNDER GERTZ

Despite the questions raised in 1982 by Justices White and Rehnquist in a dissent from denial of certiorari, and reiterated in his dissent to the denial of certiorari in Ollman v. Evans during the 1985 Term by Justice Rehnquist (see LDRC Bulletin No. 17 at 38), the constitutional opinion privilege has continued to gain substantial momentum and may well be the most active single issue in the libel field today. As many as 39 jurisdictions, up 2 from last year's figures, have now recognized special constitutional protection for opinion in reliance upon Gertz. According to the section on Common Law Privileges, at least 25 jurisdictions, including some in which Gertz is followed, also recognize common law privileges for opinion (i.e. fair comment). Only 12 jurisdictions have not yet addressed the impact of Gertz on statements of opinion.

In the 1988 Survey, new cases considering the constitutional opinion privilege were reported in 19 jurisdictions. Although jurisdictions differ on what constitutes opinion under Gertz, a move to develop some sort of test has been clearly discernible. Connecticut, Delaware, and New York have adopted the four-pronged Ollman test for distinguishing fact from opinion. Virginia, although not explicitly adopting the Ollman test, has cited that case with approval, and Minnesota has adopted the

similar test employed by the 8th Circuit in Janklow v. Newsweek. Three jurisdictions (Nebraska, Pennsylvania, and Maryland) have adopted the somewhat less expansive Restatement test.

DAMAGES

The 1988 Survey reflects that, except for the Virgin Islands which has not addressed the issue, there are no longer any jurisdictions allowing punitive damages in libel actions without some sort of limitation or restriction. Seven jurisdictions still bar punitive damage awards entirely, whether generally in all civil actions or specifically in libel actions. Thirty-six jurisdictions, up four from last year, recognize constitutional limitations on the availability of punitive damages. Of those jurisdictions not recognizing a constitutional limitation, six jurisdictions place some sort of common law restriction on punitive damages, one limits them through a retraction statute, and three employ both common law limitations and a retraction statute.

The addition this year of a new section on "presumed damages" in the 1988 Survey has elicited more information than in past years in the areas of actual and presumed damages. With regard to actual damages, as many as 33 jurisdictions have recognized Gertz limitations on recoverable actual damages, although 3 of those restrict such Gertz benefits to public figure or media actions. Ten jurisdictions still appear to presume damages. Although only 3 jurisdictions were reported as presuming damages last year, this does not signal an increase in those jurisdictions presuming damages, but is, rather, the result of more complete information obtained because of the additional "presumed damages" section.

A new Connecticut case seems to hold that where statements are not libelous per se, the plaintiff may recover general damages "only upon proof of special damages for actual pecuniary loss suffered." A new Indiana case held that, in matters of public concern, a private figure plaintiff suing a media defendant must prove "malice" in order to sustain presumed damages; a new Minnesota case holds that actual malice must be proven to recover presumed damages against a media defendant. In Tennessee, a new case declared that the doctrine of presumed damages is no longer the law in that state.

DEFENDANTS' REMEDIES

As the cost of defending even frivolous claims is ever increasing, more and more media libel defendants have given serious consideration to pursuing their own counterclaims against libel plaintiffs for malicious prosecution, abuse of process or similar violations, or at the least have sought to secure costs and attorneys' fees against unsuccessful libel plaintiffs.

The 1988 Survey indicates that 41 jurisdictions, up 5 from last year, may provide potentially meaningful remedies against such meritless claims. (This increase would appear to be largely the result of legislation enacted under the rubric of general tort reform -- see also LDRC Bulletin No. 20 at 18, 22-23.) As many as 12 jurisdictions have already specifically recognized such remedies in the libel context. Survey reports indicate that 7 additional jurisdictions provide for remedies under state law, but those reports to some extent question their usefulness or meaningful availability. Only 1 jurisdiction is reported to provide no remedies to the libel defendant.

The 1988 Survey reports that the Alabama legislature recently passed a "Litigation Accountability Act," which provides for attorney's fees if the action is found to be frivolous. The Hawaii legislature also enacted a tort reform statute, but exempts many defamation actions. The Oregon legislature enacted a rule that the plaintiff in a separate subsequent suit for "wrongful use of a civil proceeding" need not have suffered special injury beyond the expense and trouble normally associated with defending against an unfounded claim. In a new Pennsylvania case, the court denied defendant's motion for summary judgment in an action for wrongful use of civil proceedings, holding that whether the plaintiff in the original suit had reasonable cause to believe his libel claim was valid presented a jury issue.

DISCOVERY OF EDITORIAL MATTER AND THE EDITORIAL PROCESS

Potentially intrusive discovery into the journalistic editorial process has become a controversial issue in libel litigation, with a number of decisions ordering discovery of editorial matter which the media defendant had vigorously sought to protect. Of the 11 jurisdictions reported to have considered this discovery issue, only 3 had denied discovery (Massachusetts, Louisiana and New Jersey), with 3 permitting such discovery and 5 permitting discovery but with certain limitations.

The Colorado, New Hampshire, and Wyoming reports all predict that their states would likely follow the Herbert v. Lando holding, which found no First Amendment restrictions on discovery of editorial process. A new Texas case reported in this year's Survey recognized a qualified privilege for investigative materials and notes under both federal and state constitutions.

INVASION OF PRIVACY

For several years now, the Survey has included detailed information covering the four traditional branches of the tort of invasion of privacy: false light; intimate facts; intrusion and misappropriation/right of publicity; and the extent to which these four torts have been recognized under common law, and by statutory and constitutional provisions in the jurisdictions surveyed. The Survey's focus is on the use of the privacy action in actions against the media based upon editorial content.

According to the 1988 Survey, at least 47 jurisdictions now recognize one or more of the four common law torts, up 2 from last year, with 22 of these recognizing all four branches. In at least 26 jurisdictions, up 2 from last year, some form of privacy right is provided for by statute or constitutional provision or both; explicit constitutional protection exists in 9 of these jurisdictions, up 1 from last year. Only one state (Minnesota) appears to have expressly declined to recognize the privacy tort in any form, while three others (New York, Virginia, Oklahoma) have narrowly confined recognition to a statutory cause of action for misappropriation.

According to this year's Survey, the false light tort has been explicitly recognized in at least 27 jurisdictions, up one from last year. However, six jurisdictions have expressly declined to adopt false light; in 21 others the issue is unsettled, or else undeveloped in the media context. A new Arizona case reported this year requires "outrageous conduct" to support a false light privacy claim. A new California case holds false light to be superfluous when libel is also alleged and reiterates the newsworthiness standard. A new Illinois case cited in this year's report recognizes for the first time a cause of action for false light. A new Kentucky case refused to extend false light privacy to a corporate plaintiff. Additional case law developments on false light were also reported in Mississippi, Oklahoma, Pennsylvania, Texas, and the District of Columbia.

At least 33 jurisdictions are reported to provide some right of action for the unauthorized publication of private facts, up 6 from last year, with only 4 jurisdictions clearly declining to do so. With regard to both false light and intimate facts, the plaintiff's right to recover is limited in a few jurisdictions (14 and 11 respectively) by a requirement that actual malice be proven or that the invasion be shown to be "highly offensive." In addition, a "newsworthiness" defense is recognized in at least 13 jurisdictions, up 4 from last year. A new North Carolina case cited this year held that a cause of action exists for publication of embarrassing facts, with newsworthiness a jury question. A further appeal is pending in that case, however. A new Tennessee case found no public disclosure of private facts when only a few employees inadvertently overheard a recorded private conversation of the plaintiff on a company telephone. New case law developments on "intimate facts" were also reported in Florida, Louisiana, and Wisconsin.

The 1988 Survey reports that the tort of intrusion has been recognized in at least 32 jurisdictions, the same as last year; this branch of the privacy tort has not been recognized in 1 state (Virginia) and remains unsettled in 21 jurisdictions. In four of the states that recognize the tort of intrusion as a cause of action, the invasion must be highly offensive.

A new California case holds that the statute of limitations on a cause of action for eavesdropping begins to run, not from the offense, but only when the plaintiff discovered or should have discovered the eavesdropping. The 1988 Colorado report suggests that although intrusion is recognized, there are First Amendment limits to such a claim.

The 1988 Survey indicates that 35 jurisdictions, up 2 from last year, recognize the tort of misappropriation/right of publicity in some form, although recognition is limited in 11 jurisdictions to common law or statutory misappropriation. New cases regarding this tort were reported in New York, Virginia, and Tennessee. A new Texas statute and a new Tennessee case declare the right of publicity in those jurisdictions to be descendable. New and recent Virginia cases reaffirm that Virginia recognizes no cause of action for privacy other than that created by its appropriation statute.

NEUTRAL REPORTAGE

A constitutionally-based privilege for neutral reportage has been seen by some observers as at least a partial

additional solution to the chilling effect of libel actions on the media (LDRC Bulletin No. 5 at 12-13). According to the 1988 Survey, in 12 jurisdictions at least one court has specifically recognized a first amendment privilege for neutral reportage (the same as last year); and another 13 jurisdictions have recognized related principles that might lead to adoption of neutral reportage or yield similar protection under the common law. Only 4 jurisdictions have definitely rejected the neutral reportage privilege. In New York there is divided authority: the State Court of Appeals appears to have rejected the neutral reportage privilege, but the Second Circuit has adopted it with certain limitations. The 1988 Survey reports that the Washington Supreme Court, in a new case, noted the privilege previously recognized by the Superior Court, but reserved judgment on it. New developments were also reported in Florida and Texas.

NON-MEDIA DEFENDANTS UNDER GERTZ

The question of the availability of constitutional privileges, particularly in actions brought by private-figure plaintiffs against non-media defendants, is an issue left open by Gertz.

The 1988 Survey reveals that some 25 jurisdictions applied (expressly or implicitly) Gertz rules to non-media defendants. Five jurisdictions expressly refused to apply Gertz in the non-media context. In 14 jurisdictions the issue did not appear to have yet been considered. And in 5 jurisdictions there is divided authority on the matter. New developments in the area were reported in California, Hawaii, Massachusetts, Wyoming, and the District of Columbia.

The question of the effect, if any, of the "issue of public concern" concept (Dun & Bradstreet v. Greenmoss; Philadelphia Newspapers v. Hepps) on the availability of constitutional privileges for non-media defendants is also an open issue. The Supreme Court's plurality opinion in Dun & Bradstreet holding that, at least in certain limited circumstances, speech that does not involve matters "of public concern" will not be covered by the constitutional protections of Gertz, at least as to punitive and presumed damages, does not necessarily require a media/non-media distinction. At least according to Justice Brennan, a majority of the current justices of the Court appear to hold to the view that a distinction between media and non-media defendants should not be recognized. However, Justice O'Connor's footnote 4 in Hepps suggests that the

non-media issue remains open. Justice O'Connor's reservation was, however, expressly controverted in the concurring opinion of Justice Brennan. (See also Smolla, Foreword to LDRC 50-State Survey 1988 at xxii).

In 1988, a new District of Columbia case held that a private figure must prove at least negligence against a non-media defendant when the case involves an issue of public concern under Dun & Bradstreet. A new Wyoming case appears to apply an actual malice standard in suits by public figures against non-media defendants. A new California case applied Gertz to non-media defendants.

OTHER TORTS

In addition to defamation and invasion of privacy, each year the 50-State Survey covers eight related torts which have been, or might be, asserted against the media in actions based on editorial content. These are: intentional infliction of emotional distress, trade libel (or product disparagement), negligent infliction of emotional distress, simple negligence, prima facie tort, conspiracy, interference with contract, and product (or strict) liability.

Generally, the 1988 Survey reconfirms past years' findings that these alternative causes of action have not been asserted with great success against media defendants. Only a few jurisdictions have had occasion to consider one or more of these torts in the media context. In many of these cases, the claims have been dismissed or otherwise rejected on the theory that a plaintiff should not be allowed to recover on a cause of action that is, in essence, for defamation, but where one or more elements of a successful defamation claim are lacking. On the other hand, even where courts have allowed an independent claim for one or another of these torts, the claims have generally been held to be subject to the same privileges and defenses that are available in an action for defamation.

Perhaps foreshadowing the Supreme Court's refusal in Falwell v. Hustler to recognize intentional infliction of emotional distress when the elements of libel are lacking, the 1988 report reflects 5 jurisdictions that -- pre-Falwell -- either barred or limited such a claim. A new Michigan case held that the tort cannot properly be based on publication. Virginia and the Virgin Islands followed the dissenting opinion of the 4th Circuit on denial of rehearing en banc in Falwell, holding that a public official cannot bring a "reckless

infliction of emotional distress" claim as a separate cause of action on the basis of an allegedly defamatory publication. A new case in Alaska granted defendant's motion for summary judgment on an intentional infliction of emotional distress claim. A new nonmedia Pennsylvania case cited in the 1988 report held that the plaintiff must also prove the existence of emotional distress by competent medical evidence.

According to this year's Survey, unsuccessful claims against the media for trade libel were brought in Massachusetts and Michigan. A new Virgin Islands case recognized the tort for the first time in a media case. A new Texas case for the first time recognized the tort of "business disparagement," holding that plaintiff must prove publication of disparaging words, falsity, malice, lack of privilege, and special damages.

Fourteen jurisdictions, up 3 from last year, have considered the tort of intentional infliction of emotional distress/outrage in the media context. Twelve jurisdictions, up 2 from last year, have considered the tort of trade libel in the media context. Seven jurisdictions, up 5 from last year, have considered prima facie tort, negligent infliction of emotional distress, simple negligence and product liability in the media context.

Twelve jurisdictions have considered the torts of conspiracy and interference with contract in the media context, up 3 from last year.

PRIVATE FIGURE UNDER GERTZ

Since 1974, numerous lower state and federal courts have implemented the Gertz mandate to define state defamation law "fault" standards applicable to private-figure plaintiffs. According to the 1988 Survey, 36 jurisdictions (up 2 from last year) have now adopted a standard of mere negligence. Only 2 jurisdictions have adopted a standard more demanding than simple negligence but less than actual malice. Three jurisdictions have adopted actual malice standards. The standard is unsettled or unclear in 6 jurisdictions, with no reported cases in the remaining 7 jurisdictions.

RECOGNITION OF SHIELD PRIVILEGE IN THE LIBEL CONTEXT

According to the 1988 Survey, 43 jurisdictions recognize some form of shield privilege, up 3 from last year. However, only 16 of those jurisdictions have yet specifically recognized

a claim for protection of confidential sources or information in the context of a libel or privacy action against a media defendant asserting the privilege in that context. Two jurisdictions specifically reject the shield privilege in case law, and 5 jurisdictions have statutes still in force denying shield protection in the libel context.

According to this year's Survey, positive developments in the shield privilege area include new cases in Georgia, Illinois, Mississippi, and Oregon. The new cases in Georgia, Illinois, and Oregon, however, all concerned discovery of defendants in criminal cases. Recent Mississippi cases cited for the first time in this year's Survey involve a qualified shield privilege in "third party" contexts in non-libel civil actions. The only new case dealing with the privilege in a libel context was a Pennsylvania case which held that published documentary information gathered by a television station is discoverable by a plaintiff in a libel action to the extent that the documentary information does not reveal the identity of a personal source of information or may be redacted to eliminate the revelation of a personal source of information.

RETRACTION

According to the 1988 Survey, retraction laws have remained in effect in most jurisdictions. Some 31 jurisdictions still provide for retraction by statute, while another 11 jurisdictions recognize the effects of retraction under common law. There were no new developments reported in this area in 1988, either in case law or statutory provision.

STATUTES OF LIMITATIONS

According to the 1988 Survey, 28 jurisdictions provide one-year statutes of limitations for libel, 20 provide two-year statutes, and 6 three-year statutes. In 3 jurisdictions the statute for slander is shorter than for libel. In 27 jurisdictions, up 1 from last year, the single publication rule had been expressly recognized, 19 of them under common law and 8 by statute (generally the Uniform Single Publication Act). Two jurisdictions (Hawaii and Montana) expressly adhere to a multiple publication rule.

A new Washington case cited in the 1988 report now adopts the single publication rule, but held that a second broadcast using a new script and broadcaster was a separate publication.

A new Texas case applied a two-year statute of limitations to a false light claim, but limited any claims for injury to reputation to a one-year statute of limitations. New cases in Pennsylvania, Oregon, Indiana and Illinois addressed when the statute of limitations begins to run. A new Florida case cited in this year's Survey reversed Florida's prior choice of law rule and held that the statute of limitations of the state that has the most significant relationship to the alleged libel or slander will apply.

SUMMARY JUDGMENT

The LDRC 50-State Survey 1988 confirms a continuation of the favorable trends regarding summary judgment previously identified. (See LDRC Study: Summary Judgment Motions Made in Libel Actions: Two-Year Update [1984-86] Bulletin No. 19, Spring 1987.) Twenty-three jurisdictions are reported in the Survey as "favoring" summary judgment motions. Only 6 states appear to explicitly disfavor summary judgment in the libel context. Eighteen jurisdictions have continued to apply a neutral standard. The status of the summary judgment remedy remains unclear in at least 7 jurisdictions. In Florida, there is a sizable body of authority on both sides of the favoring disfavoring issue. A new Michigan case held, inter alia, that the mere allegation of actual malice, without more, is insufficient to raise an issue of material fact, and adopted the rule of Anderson v. Liberty Lobby. New cases in the Virgin Islands, Pennsylvania, Kansas, Kentucky and Iowa have also adopted the Liberty Lobby rule. A new Minnesota case affirmed that summary judgment may be properly decided on federal constitutional grounds, and a new case in Arizona reaffirmed the principle that, because of constitutional considerations, summary judgment is the rule rather than the exception in defamation cases.

SURVIVABILITY AND DESCENDABILITY OF LIBEL AND PRIVACY CLAIMS

It has generally been understood to be a universal "given" that the dead do not have a cause of action for libel. Correlatively, it may have been too casually assumed that such a cause of action previously asserted also dies with the person allegedly defamed. However, according to the 1988 Survey a minority of jurisdictions appears to hold that at least a previously-asserted claim will survive the death of the libel plaintiff. Also, the issue of survivability and descendability of privacy claims -- particularly right of publicity claims -- is the subject of a growing body of case law.

The LDRC 50-State Survey 1988 generally confirms the given wisdom regarding lack of survivability and descendability, but cannot be fully definitive because the issues are open and undecided in a number of jurisdictions. Thus, regarding libel claims, at least 25 jurisdictions do not allow for survival or descent, while 6 (Michigan, New Jersey, Pennsylvania, Rhode Island, South Dakota, and Washington) do appear to recognize survival or descent to some extent. In another 23 jurisdictions the matter is unclear or there is no law on point, according to this year's Survey.

A new Virginia case reported in the 1988 Survey held that neither the estate nor the relatives of a deceased person can maintain a defamation action based upon statements concerning the decedent made after his death.

The situation regarding survival of privacy claims is even less definitive. In a majority of jurisdictions (40) the 1988 Survey reports no law on point, or the Survey reports do not address the issue. Arizona, Ohio and Massachusetts are the only jurisdictions indicated as expressly not recognizing survival or descent of privacy claims. Only 10 jurisdictions (California, Georgia, Kentucky, Michigan, New Jersey, New Mexico, Oklahoma, Pennsylvania, Washington, Wisconsin), are reported as recognizing survival or descent (not necessarily as to all branches of the privacy tort), with one other jurisdiction, Texas, divided on the issue. No further new developments in this area were reported this year.

LDRC 50-STATE SURVEY 1988

The completely revised, updated and expanded 1988 edition of the **LDRC 50-State Survey: Current Developments in Media Libel & Invasion of Privacy Law**, is currently available for purchase. (Publication date: September, 1988)

The 1988 50-State Survey, over 1000 pages in length, is an exhaustive survey of media libel and privacy law in all 50 states, the District of Columbia and the U.S. possessions, current through December 31, 1987. The LDRC Survey is prepared by practicing attorneys in each state who are experts on their particular state's laws in the media libel field. Specific details of the law in each state are presented in brief but authoritative summaries.

This year's edition of the 50-State Survey also includes a Foreword on "Libel and the Renhnquist Court," written by Rodney A. Smolla, James Gould Cutler Professor of Constitutional Law; Director, Institute of Bill of Rights Law, William & Mary School of Law. The 25-plus page report provides an up-to-date assessment of the Rehnquist Court's current views, and likely future direction, on libel, privacy and related issues. In both narrative and tabular form, Professor Smolla surveys recent decisional trends on the Court in this area, analyzing both the substantive rulings, and the voting patterns, on such pivotal matters as public/private figure status; truth/falsity burdens; constitutional fault standards; and media/nonmedia distinctions. The Foreword attempts in tabular form to isolate the "track records" of the individual Justices -- including the newest members of the Court, Scalia and Kennedy -- on these issues and to project the Justice's "future inclinations" regarding press interests in the libel field. In two final sections of the Foreword Professor Smolla analyzes in depth, first, the Court's landmark decision in Hustler v. Falwell, as the most recent possible indicator of the Court's current views on first amendment issues affecting the press; and then, a series of lower court issues "vying for consideration" by the Court. These include: presumed and punitive damages; the scope of the Bose "independent review" doctrine; the fact/opinion distinction; and other "end-run" torts. We believe this new Foreword on the Rehnquist Court will be of interest and value to the media law practitioner as well as to all persons interested in libel law developments and the Supreme Court.

Illustrated with dozens of pages of fully updated charts and notes, the new 50-State Survey volume makes it easy to

track the status of key legal issues for ready state-by-state comparison. In the 1988 edition, as in prior editions, new information is highlighted in the text and charts, tables and index for easy identification of new developments. We believe this easy-to-use reference volume, updating LDRC's previous Surveys, will be an invaluable addition to your media law library. New topics covered in the 1988 Survey, including the extent to which each jurisdiction has adopted "declaratory judgment" or "restoration of reputation" statutes; more extensive clarification of the constitutionally- based opinion/fact distinction; and a new section on presumed damages, also enhance its value and pertinence to those needing the most up-to-date information in this field.

LDRC's annual Survey has become a widely recognized resource in this increasingly important field and is now a fixture on the desks and in the libraries of media defense lawyers, media organizations, law schools and courts across the nation. Previous editions of the LDRC Survey have been lauded by practitioners, scholars and journalists alike:

- "A reference of first resort . . . a key part of any library that purports to cover the law of defamation, a necessary tool for anyone who practices in this area of law."
  -- Robert D. Sack

- "A remarkable resource for lawyer and scholar alike . . . the starting point for all research on media libel law."
  -- Professor Marc A. Franklin

- "A beautifully organized goldmine of information . . . an indispensible resource for . . . problems of law affecting press and broadcasting." -- Benno C. Schmidt

- "A welcome reference tool . . . great value as a 'first-look' reference." -- Katharine P. Darrow

ORDERING INFORMATION

We have attached an order form for your convenience. Please note, if you have not already done so, that should you wish to enter a standing order for future editions of the 50-State Survey, you will be entitled to a 10% discount off the regular price of the 1988 volume as well as subsequent editions. Orders for multiple copies also qualify for special discounts. Whether or not you wish to enter a standing order, you should complete the order form and return it promptly with your check made payable to the Libel Defense Resource Center.