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***Browning-Ferris Industries v. Kelco Disposal, Inc.:* The Excessive Fines Clause and Punitive Damages**

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*BROWNING-FERRIS INDUSTRIES V. KELCO DISPOSAL, INC.: THE
EXCESSIVE FINES CLAUSE AND PUNITIVE DAMAGES*

FOLLOWING A CRESCENDO of law review articles¹ that argued that the excessive fines clause of the eighth amendment² was applicable to punitive damages, the Supreme Court of the United States, in *Browning-Ferris Industries v. Kelco Disposal, Inc.*,³ held that the "Excessive Fines Clause does not apply to awards of punitive damages in cases between private parties."⁴ Although this decision foreclosed constraints on punitive damages by the excessive fines clause, the Court left the door open for a due process clause challenge to punitive damages.⁵

Prior to 1980, Browning-Ferris Industries (BFI) was the sole provider of roll-off waste collection services⁶ in the Burlington, Vermont area. In 1980, Joseph Kelly, a former BFI district manager, founded Kelco Disposal, Inc., in order to compete with BFI in the Burlington roll-off waste market. By 1982, Kelco had captured 43 percent of the Burlington market.⁷

In 1982, BFI reacted to Kelco's success by offering to buy Kelco and, after that failed, attempting to drive Kelco out of business by reducing its prices.⁸ During the first four months of BFI's lower rates, Kelco's revenues dropped 30 percent. In response, Kelco's attorney contacted BFI and threatened legal action to challenge BFI's pricing strategy. BFI did not react to the

1. E.g. Boston, *Punitive Damages and the Eighth Amendment: Application of the Excessive Fines Clause*, 5 COOLEY L. REV. 667 (1988); Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139 (1986); Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233 (1987); Note, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 85 MICH. L. REV. 1699 (1987).

2. The eighth amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

3. 109 S. Ct. 2909 (1989).

4. *Id.* at 2912.

5. *Id.* at 2921.

6. "Roll-off waste collection is usually performed at large industrial locations and construction sites with the use of a large truck, a compactor, and a container that is much larger than the typical 'dumpster.'" *Id.* at 2912 n.2 (quoting 845 F.2d 404, 406 (2d Cir. 1988)).

7. *Id.* at 2912.

8. *Id.*

threatened legal action and maintained its pricing strategy for several more months. By 1985, however, Kelco had captured 56 percent of the market in spite of BFI's actions. As a result, BFI sold out to a third party and left the Burlington area.⁹

In 1984, Kelco brought suit against BFI in the United States District Court in Vermont. Kelco alleged that BFI had attempted to monopolize the roll-off waste collection market in the Burlington area in violation of the Sherman Act.¹⁰ Kelco also claimed that BFI had interfered with its contractual relations in violation of Vermont tort law. The case proceeded to a jury trial where BFI was found liable on both the federal antitrust and the state tort claims.¹¹

At a subsequent trial to determine damages, Kelco argued for compensatory and punitive damages, appealing to the jury to "deliver a message" to BFI.¹² The jury returned a verdict of \$51,146 in compensatory damages and \$6 million in punitive damages. The district court then denied BFI's motions for judgment notwithstanding the verdict, a new trial, and remittitur. The court "awarded Kelco \$153,438 in treble damages and \$212,500 in attorney's fees and costs on the federal antitrust claim, or, in the alternative, \$6,066,082.74 in compensatory and punitive damages on the state-law claim."¹³

The Second Circuit Court of Appeals affirmed,¹⁴ and the Supreme Court of the United States granted *certiorari* on the punitive damages issue.¹⁵

I. HISTORY

The eighth amendment received little attention from the First Congress, and the excessive fines clause itself sparked little debate.¹⁶ In fact, "[a]lthough the prohibition of excessive fines was

9. *Id.* at 2913.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. 845 F.2d 404 (2d Cir. 1988). The court of appeals noted that *even if* the excessive fines clause applied to punitive damages in cases between private parties, the punitive damages awarded were not "so disproportionate as to be cruel, unusual, or constitutionally excessive." *Id.* at 410.

15. *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S. Ct. 527 (1988).

16. *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2914 (1989); see *Weems v. United States*, 217 U.S. 349, 368-69 (1910) (interpreting the cruel and unusual punishment clause of the eighth amendment).

mentioned as part of a complaint that the amendment was unnecessary and imprecise . . . Congress did not discuss what was meant by the term "fines," or whether the prohibition had any application in the civil context."¹⁷

The Supreme Court had recognized, in such cases as *Aetna Life Insurance Co. v. Lavoie*¹⁸ and *Bankers Life & Casualty Co. v. Crenshaw*,¹⁹ that the application of the excessive fines clause to punitive damages was "a question of some moment and difficulty."²⁰ It was not until *Browning-Ferris Industries v. Kelco Disposal, Inc.*, that the Court squarely addressed the issue and finally provided an answer.

II. *Browning-Ferris Industries v. Kelco Disposal Inc.*

A. The Majority Opinion

Justice Blackmun authored the four-part majority opinion for the Court. He wrote for a unanimous Court in parts one, three, and four of the opinion.²¹ The first part outlined the history of the case.²² The second part, from which Justices O'Connor and Stevens dissented,²³ detailed the Court's reasoning in holding that the excessive fines clause does not apply to punitive damages in cases between private parties.²⁴ The next part explained why the Court did not address the due process challenge to punitive damages.²⁵ The fourth part responded to BFI's arguments that federal common law served to restrict the punitive damages awarded.²⁶

17. *Browning-Ferris Industries*, 109 S. Ct. at 2914; see also *Weems*, 217 U.S. at 369 (discussing the lack of statutory definition for the terms "excessive bail" or excessive fines").

18. 475 U.S. 813 (1986). This is the first case in which the Supreme Court raised the issue of whether the excessive fines clause limited punitive damages. The Court did not decide the issue as the case was decided on other grounds.

19. 486 U.S. 71 (1988). In this case, the Supreme Court once again raised the issue of whether the excessive fines clause limited punitive damages but again decided the case on other grounds.

20. *Id.* at 79.

21. *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2912 (1989). Justice Brennan also filed a concurring opinion in which Justice Marshall joined. *Id.* at 2923-24 (Brennan, J., concurring).

22. *Id.* at 2912-13.

23. *Id.* at 2924-34 (O'Connor, J., dissenting).

24. *Id.* at 2913-21.

25. *Id.* at 2921.

26. *Id.* at 2921-23.

1. The Excessive Fines Clause Does Not Limit Punitive Damages in Cases Between Private Parties

Justice Blackmun began the opinion by noting that even though prior cases had suggested that the eighth amendment was addressed to courts exercising criminal jurisdiction only, the Court did not need to limit the eighth amendment's application to criminal cases to decide the instant case. Rather, the Court needed only to decide whether the excessive fines clause was applicable to cases between private parties.²⁷ To decide this, the Court felt it needed only to examine the "purposes and concerns of the [Eighth] Amendment, as illuminated by its history."²⁸

Blackmun noted that the history of the eighth amendment yielded no direct evidence of the First Congress' intended meaning for the excessive fines clause.²⁹ Lacking direct evidence of its meaning, the Court focused on the meaning of the word "fine" at the time the amendment was adopted. According to the Court, the meaning of the word "fine" at that time was "a payment to a sovereign as punishment for some offense."³⁰ The Court concluded from this that fines were assessed in criminal, not civil actions.³¹

The Court was not content to rely on this inferential evidence to limit the excessive fines clause's application to criminal actions but deigned to examine the purpose and history of the Clause. According to Blackmun, the "undisputed purpose" of the eighth amendment's adoption was the "particular intent of placing limits on the powers of the new government" by providing "protection for persons convicted of crimes."³² Thus, the Court stated that the "primary focus of the Eighth Amendment was the potential for governmental abuse of its 'prosecutorial' power, not concern with the extent or purposes of civil damages."³³

To support its reading of the purpose of the eighth amendment, the Court recounted the amendment's historical pedigree. Because the eighth amendment was based directly on the Virginia Declaration of Rights which, in turn, was "adopted verbatim" from the English Bill of Rights (1689), the Court examined the

27. *Id.* at 2914.

28. *Id.*

29. *Id.* at 2914-15.

30. *Id.* at 2915.

31. *Id.*

32. *Id.*

33. *Id.*

purpose of the English Bill of Rights.³⁴ The Court concluded that the English Bill of Rights was drawn up by men who had been subjected to heavy fines by the King's Bench and who wished to limit the sovereign's ability to collect fines. Seeing as the English definition of fines was identical to the American definition of fines suggested by the Court earlier, the Court found "clear support for reading our Excessive Fines Clause as limiting the ability of the sovereign to use its prosecutorial power, including the power to collect fines."³⁵ Thus, the Court believed that the history of the excessive fines clause limited its application only to those fines "directly imposed by, and payable to, the government."³⁶

The Court's inquiry did not end there. Justice Blackmun noted that eighth amendment jurisprudence had not been "inflexible" and that when time brings into existence new conditions and purposes the amendment "must be capable of wider application than the mischief which gave it birth."³⁷ Justice Blackmun concluded that as punitive damages were around when the eighth amendment was adopted but not specifically included within the scope of the amendment, to widen the application of the amendment to include punitive damages would be inappropriate.³⁸ To include punitive damages within the scope of the amendment would be to stray "too far afield from the concerns that animate the Eighth Amendment."³⁹

2. A Due Process Challenge to Punitive Damages Was Not Properly Before the Court

BFI also argued that the due process clause would limit a jury's discretion to award punitive damages in the absence of any statutory limitation. Blackmun admitted that some authority existed to support that proposition but that the Court would not consider the argument in the instant case as it was not raised before the district court or the court of appeals and BFI made no specific mention of the due process argument in its petition for *certiorari*.⁴⁰

34. *Id.* at 2916.

35. *Id.*

36. *Id.* at 2916.

37. *Id.* at 2919.

38. *Id.* at 2919-20.

39. *Id.* at 2920.

40. *Id.* at 2921.

3. Federal Common Law Does Not Compel the Determination that Punitive Damages Are Excessive

BFI argued that the punitive damages awarded to Kelco were "excessive as a matter of federal common law."⁴¹ Justice Blackmun responded that BFI failed to direct the Court to a body of developed federal law which would support its position.⁴² He also noted that nothing BFI had presented to the Court had convinced it to disturb the deference that appellate courts traditionally accord district courts in deciding whether to order a new trial or exercise its power of remittitur.⁴³

B. The Concurrence

Justice Brennan, joined by Justice Marshall, wrote a separate concurrence addressing the issue of whether the due process clause limited punitive damages. The concurring Justices joined the majority opinion only on the understanding that that the opinion "leaves the door open for a holding that the due process clause constrains the imposition of punitive damages in civil cases brought by private parties."⁴⁴ The concurrence agreed that the due process clause issue was not properly before the Court in the instant case but stated that because "[t]he touchstone of due process is protection of the individual against arbitrary action of government," and juries are "left largely to themselves in making this important, and potentially devastating" award of punitive damages, due process may very well constrain such awards.⁴⁵

C. The Dissent

The dissent, written by Justice O'Connor and joined by Justice Stevens, agreed with the majority that no due process argument was properly presented by BFI, and that the punitive damages award could "not be overturned as a matter of federal common law."⁴⁶ The dissent disagreed, however, with the majority's conclusion that the excessive fines clause did not constrain

41. *Id.*

42. *Id.*

43. *Id.* at 2922-23.

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

45. *Id.* (Brennan, J., concurring).

46. *Id.* at 2924 (O'Connor, J., concurring in part and dissenting in part).

awards of punitive damages in civil cases.⁴⁷

1. The Reach of the Excessive Fines Clause

The dissent began by addressing two preliminary issues: "First, does the Excessive Fines Clause apply to the States through the Due Process Clause of the Fourteenth Amendment?" and "Second, is a corporation such as BFI protected by the Excessive Fines Clause?"⁴⁸

In answering the first question the dissent reasoned that since the eighth amendment's cruel and unusual punishment clause extended to the states as did the amendment's excessive bail clause, there was no reason to distinguish one clause from another, and, therefore, the excessive fines clause also applied to the states.⁴⁹

In addressing the second question, the dissent concluded that the excessive fines clause applied to corporations. It reasoned that as a corporation is protected by the due process clause it should also be protected by the excessive fines clause.⁵⁰

Having disposed of the two preliminary issues the dissent turned to the excessive fines clause itself. The dissent asserted that the eighth amendment was not limited to criminal cases only. It pointed out that prior suggestions by the Court that the eighth amendment was addressed to courts exercising criminal jurisdiction were dictum and that such dictum was inconsistent with, for instance, the Court's decision that the excessive bail clause of the eighth amendment applied to civil proceedings.⁵¹ Thus, the Court's precedents did not foreclose application of the excessive fines clause to civil cases.

The dissent then proceeded to examine the history and purpose of the eighth amendment's excessive fines clause. It began by noting that recent scholarship on the issue had been voluminous and unanimous in concluding that the excessive fines clause was applicable to punitive damages in civil suits.⁵² In short, this and other scholarship demonstrated that there was evidence to support the statement that "around the time of the framing and enact-

47. *Id.* (O'Connor, J., concurring in part and dissenting in part).

48. *Id.* (O'Connor, J., concurring in part and dissenting in part).

49. *Id.* at 2925 (O'Connor, J., concurring in part and dissenting in part).

50. *Id.* at 2926 (O'Connor, J., concurring in part and dissenting in part).

51. *Id.* at 2926 (O'Connor, J., concurring in part and dissenting in part).

52. *Id.* (O'Connor, J., concurring in part and dissenting in part)(citing the works listed in note 1, *supra*).

ment of the Eighth Amendment some courts and commentators believed that the word 'fine' encompassed civil penalties" as well as criminal penalties.⁵³

Justice O'Connor also noted that the framers of the eighth amendment failed to explicitly confine the eighth amendment to criminal proceedings "[a]fter deciding to confine the benefits of the Self-Incrimination Clause of the Fifth Amendment to criminal proceedings."⁵⁴ Coupling the evidence regarding the contemporary meaning of the word "fine" with the framers' failure to explicitly confine the eighth amendment to criminal cases, she concluded that the excessive fines clause was applicable to both civil and criminal cases.⁵⁵

The dissent also stated that "[h]istory aside, this Court's cases leave no doubt that punitive damages serve the same purposes — punishment and deterrence — as the criminal law, and that excessive punitive damages present precisely the same evil of exorbitant monetary penalties that the Clause was designed to prevent."⁵⁶

The fact that the degree of punitive damages awarded over the years had markedly changed disturbed the dissenters. They stated that as recently as a decade ago the largest award of punitive damages affirmed by an appellate court in a product liabilities case was \$250,000.⁵⁷ By 1986, awards in excess of \$10 million had been recorded.⁵⁸ They further observed that in the instant case, the award of punitive damages was "117 times the actual damages suffered by Kelco and far exceeds the highest reported award of punitive damages affirmed by a Vermont Court."⁵⁹

In view of all the foregoing, Justice O'Connor held that the excessive fines clause placed constraints on the award of punitive damages even in cases between private parties. Having made such a determination, Justice O'Connor then turned to the issue of whether the \$6 million awarded to Kelco was excessive within the meaning of the eighth amendment.⁶⁰

53. *Id.* at 2931 (O'Connor, J., concurring in part and dissenting in part).

54. *Id.* at 2930 (O'Connor, J., concurring in part and dissenting in part).

55. *Id.* at 2931 (O'Connor, J., concurring in part and dissenting in part).

56. *Id.* (O'Connor, J., concurring in part and dissenting in part).

57. *Id.* at 2924 (O'Connor, J., concurring in part and dissenting in part).

58. *Id.* (O'Connor, J., concurring in part and dissenting in part).

59. *Id.* (O'Connor, J., concurring in part and dissenting in part).

60. *See id.* at 2931-33 (O'Connor, J., concurring in part and dissenting in part).

2. Was the Amount Awarded Excessive?

The dissent recognized that the determination as to whether a particular award of punitive damages was excessive or not under the eighth amendment was not an easy task. But, it offered some broad guidelines:

First, the reviewing court must accord "substantial deference" to legislative judgments concerning appropriate sanctions for the conduct at issue. Second, the court should examine the gravity of the defendant's conduct and the harshness of the award of punitive damages. Third, because punitive damages are penal in nature, the court should compare the civil *and* criminal penalties imposed in the same jurisdiction for different types of conduct, and the civil *and* criminal penalties imposed by different jurisdictions for the same or similar conduct. In identifying the relevant civil penalties, the court should consider not only the amount of the awards of punitive damages but also statutory civil sanctions. In identifying the relevant criminal penalties, the court should consider not only the possible monetary sanctions, but also any possible prison term.⁶¹

Thus, the dissent would have remanded the case to the Second Circuit Court of Appeals so that it could apply the guidelines outlined above to determine whether the \$6 million punitive damages award was excessive or not under the excessive fines clause of the eighth amendment.⁶²

III. ANALYSIS

The majority opinion's refusal to simply rule that the eighth amendment does not apply exclusively to criminal cases weakened its argument considerably. Claiming that the eighth amendment applies only to criminal cases would have been the most compelling argument the majority could have made and the easiest to defend given the Court's earlier treatment of the eighth amendment.⁶³ The majority probably failed to embrace this approach for two reasons. First, it is generally thought best to make constitutional decisions on as narrow a basis as possible in order to avoid unintended results. Second, such a holding would have been inconsistent with at least one earlier case which had extended eighth

61. *Id.* at 2934 (O'Connor, J., concurring in part and dissenting in part).

62. *Id.* (O'Connor, J., concurring in part and dissenting in part).

63. *See generally Id.* at 2913-14 (discussing the Court's decisions that limit the eighth amendment to a criminal context).

amendment protection to a non-criminal situation⁶⁴ (a fact pointed out not by the majority but by the dissent). Whatever the majority's reasoning, its task was made much more difficult once a more limited holding was chosen.

Crucial to the soundness of the majority's result was its conclusion that the word "fine" did not encompass punitive damages at the time the eighth amendment was adopted. The majority maintained that the word "fine" was defined as a payment to the sovereign for some offense. Unfortunately, in arriving at this definition, the majority relied on too few sources and did not adequately respond to the scholarship and historical evidence put forward by the dissent which contradicted the narrowness of the majority's definition.

For example, the majority did not adequately respond to the dissent's citation of a number of 18th and 19th century dictionaries which did not define "fine" in the majority's narrow terms. The dictionaries which the dissent pointed to did not mention to whom the fine was to be paid.⁶⁵ In the very least, this demonstrates that the definition of the word "fine" was not nearly as settled as the majority would have one believe.

In the same vein, the majority did not respond sufficiently to the evidence which demonstrated that there was some 17th century law which provided for the imposition of a "fine" on a civil plaintiff, and that the fine was not for the use of the sovereign but for the civil defendant.⁶⁶ The majority stated that the purpose of the excessive fines clause was to place limits on the powers of the new government by providing protections for persons convicted of crimes. Further, the primary focus of the clause, according to the majority, was to limit "the potential for governmental abuse of its 'prosecutorial' power."⁶⁷ This is, however, an artificially narrow statement of the purpose. The same evidence which supports this statement of purpose can support the dissent's broader statement of purpose. The dissent stated that the excessive fines clause "derives from limitations in English law on monetary penalties exacted in civil *and* criminal cases to punish and deter miscon-

64. *Carlson v. Landon*, 342 U.S. 524 (1952) (Excessive Bail Clause applicable to immigration and deportation); *see United States v. Salerno*, 481 U.S. 739, 748 (1987) (recognizing that *Carlson* was a civil case).

65. *Id.* at 2931 (O'Connor, J., concurring in part and dissenting in part).

66. *Id.* (O'Connor, J., concurring in part and dissenting in part).

67. *Id.* at 2915.

duct.”⁶⁸ According to the dissent, the purpose of the clause is to limit the government’s ability to exact monetary penalties from individuals, whether those penalties are paid to the government or another party.⁶⁹ This statement of purpose is buttressed by the fact that civil penalties are “not awarded to compensate for injury, but rather to further the aims of the criminal law.”⁷⁰

The majority also failed to respond to the dissent’s astute observation that a “governmental entity can abuse its power” in civil cases just as much as in criminal cases “by allowing civil juries to impose ruinous punitive damages as a way of furthering the purposes of the criminal law.”⁷¹

Finally, the majority gave only cursory examination to the changed circumstances which may have justified the extension of the excessive fines clause to punitive damages. The majority glibly noted that as punitive damages were known at the time of the eighth amendment’s adoption, it would be erroneous to suggest their existence today would be a changed condition justifying a broadening of the scope of the excessive fines clause.⁷² Such a response by the majority ignores the developments in punitive damages which the dissent stressed at the beginning of its opinion. The dissent described the “skyrocketing” trend of punitive damages awards and its deleterious consequence of inhibiting product development in such industries as pharmaceuticals, automotives, and aerodynamics.⁷³ It is quite extraordinary that the majority did not recognize the explosion of punitive damage awards with its unfortunate consequences as constituting changed circumstances. At the very least, rather than ignoring this evidence, the majority should have attempted to minimize it.

The dissent’s opinion can be criticized not for its conclusion that the excessive fines clause applies to punitive damages, but for the consequential result of that conclusion. The dissent’s proposed guidelines for examining whether an award of punitive damages is excessive leave a very unpleasant taste in one’s mouth. The guidelines seem merely to remove the “arbitrariness” of punitive damage awards from the realm of the jury to the realm of the judge.

68. *Id.* at 2926 (O’Connor, J., concurring in part and dissenting in part).

69. *Id.* (O’Connor, J., concurring in part and dissenting in part).

70. *Id.* at 2932 (O’Connor, J., concurring in part and dissenting in part).

71. *Id.* (O’Connor, J., concurring in part and dissenting in part).

72. *See id.* at 2919-20.

73. *Id.* at 2924 (O’Connor, J., concurring in part and dissenting in part).

How this will realistically affect "excessive" awards is unclear. The dissent appears to believe that the gut instincts of the judge will better avoid excessive awards than the gut instincts of the jury. Given the guidelines which the dissent draws upon, it would have been a more convincing opinion if the dissent had concluded that in the absence of explicit legislative guidance (i.e., punitive damage caps adopted by the states), punitive damages would be inherently excessive and, by implication, unlawful. After all, legislative enactments would reflect a societal consensus on the appropriateness of a punitive damages award — a consensus which cannot be obtained when juries or judges make the decision.

CONCLUSION

As demonstrated in the analysis, the majority opinion by Justice Blackmun is flawed in a number of respects which suggests that the dissent should have prevailed on the merits of the arguments marshaled. Furthermore, the majority opinion is result-oriented whereas the dissent seems to engage in a much more thorough and honest reasoning process.

Finally, it must be noted that it is apparent throughout the majority, concurrence, and dissent that a due process challenge to punitive damages would be entertained by the Court. The concurrence is even kind enough to outline the argument for those who would pursue such a course. It is but a matter of time before the Court deals with this aspect of the constitutionality of punitive damages.

DONALD S. YARAB