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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner -v- CLEOPATRA HASLIP, ET AL.

CASE NO: 89-1279

PLACE: WASHINGTON, D.C.

DATE: October 3, 1990 ✓

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IN THE SUPREME COURT OF THE UNITED STATES

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PACIFIC MUTUAL LIFE INSURANCE :
COMPANY, :
Petitioner :
v. : No. 89-1279
CLEOPATRA HASLIP, ET AL. :

-----X
Washington, D.C.
Wednesday, October 3, 1990

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:02 a.m.

APPEARANCES:
BRUCE A. BECKMAN, ESQ., Los Angeles, California; on behalf
of the Petitioner.
BRUCE J. ENNIS, JR., ESQ., Washington, D.C.; on behalf of
the Respondents.

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1 PROCEEDINGS

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first in Number 89-1279, Pacific Mutual Life Insurance
5 Company v. Cleopatra Haslip.

6 Mr. Beckman.

7 ORAL ARGUMENT OF BRUCE A. BECKMAN

8 ON BEHALF OF THE PETITIONER

9 MR. BECKMAN: Mr. Chief Justice, and may it
10 please the Court:

11 This matter is here on writ of certiorari to
12 review a judgment of the Alabama Supreme Court. That
13 judgment affirmed and awarded punitive damages against the
14 Petitioner, Pacific Mutual Life Insurance Company, on a
15 respondeat superior basis for fraud committed by a sales
16 agent in collecting and pocketing premiums from a policy
17 of group health insurance issued by another carrier, Union
18 Fidelity Life Insurance Company, and also on individual
19 policies of life insurance issued by Pacific Mutual. The
20 insurance was issued to cover employees of the City of
21 Roosevelt, which is a small town in Alabama.

22 During the course of the trial, all counts
23 asserted by plaintiffs alleging any wrongdoing against
24 Pacific Mutual directly were dismissed and abandoned, so
25 that the sole basis of the award was respondeat superior,

1 or the fraud of the agent.

2 The major portion of the award went to
3 Mrs. Haslip because she incurred medical expenses during a
4 period which would have been covered by the Union Fidelity
5 policy had the agent not misappropriated the premiums.
6 She was apparently unable to pay the hospital expenses,
7 and a judgment was entered against her. And that appears
8 to explain the great disparity in the award that went to
9 her, and the relatively nominal awards that went to the
10 other plaintiffs.

11 QUESTION: Now, I suppose we do not know the
12 breakdown of compensatory and punitive damages here?

13 MR. BECKMAN: Justice O'Connor, under Alabama
14 law, the punitive damage award to Mrs. Haslip would have
15 been at least \$840,000, because the maximum -- she had a
16 prayer for \$3 million of punitive damages, and a prayer
17 for her actual damages, plus emotional distress damages of
18 \$200,000.

19 The award to her was \$1,040,000, so that if we
20 assumed that she got the full general, actual, economic
21 damages, and emotional distress damages, for which she
22 prayed, the punitive award still would have been at least
23 \$840,000, and that would have been the computation under
24 Alabama law.

25 The plaintiffs themselves submitted the case to

1 the Alabama Supreme Court --

2 QUESTION: Excuse me. Why do you say that would
3 be the computation under Alabama law? Is it impossible,
4 under law -- under Alabama law, to give a plaintiff more
5 than the plaintiff prays for?

6 MR. BECKMAN: Yes, and under the cases that were
7 cited, in fact by the Respondents here, that would be the
8 computation of the award. It would be at least \$840,000,
9 because the actual other damages would not exceed
10 \$200,000. And as I said, the plaintiffs here submitted --

11 QUESTION: Are there Alabama cases that set
12 aside judgments for more than what is prayed for?

13 MR. BECKMAN: It is my understanding that there
14 are, Justice Scalia. I cannot cite them to you at this
15 point.

16 The plaintiffs --

17 QUESTION: I think it makes sense to say she
18 asked for so much, and --

19 MR. BECKMAN: Yes.

20 QUESTION: -- and you subtract that from the
21 total. But the jury could have said in the jury room,
22 couldn't it, well, she asked for that much, but we really
23 think that her emotional distress was even more than that
24 and we'll give her even more?

25 MR. BECKMAN: That could happen, but they would

1 then have been limited to the prayer under Alabama law.
2 And again --

3 QUESTION: Are you going to supply the Court
4 with citations to establish that proposition?

5 MR. BECKMAN: I will do that, Justice O'Connor,
6 and I would cite the Court to the case cited by the
7 Respondents in the Respondents brief, which laid out their
8 position that the award would have been \$840,000 and not
9 more, because as I stated, the respondents -- the
10 plaintiffs presented this court case to the Alabama
11 Supreme Court as an award of \$1,040,000.

12 QUESTION: Does that mean that we should sort of
13 treat the case as though the actual damage -- I guess
14 there were some actual pecuniary damages, a few thousand
15 dollars, too, weren't there? Maybe there was about 210 of
16 actual damages, and 840 of the other, so it's 4 -- 4 to 1
17 ratio?

18 MR. BECKMAN: All of the -- all of the
19 plaintiffs in the case had a total of economic damages
20 something of about \$3,900, and the total award was
21 something in the area of \$1,077,000.

22 QUESTION: Right, but as to this particular
23 respondent, it's roughly -- we can treat the case as
24 though the punitive damage was roughly four times the
25 actual damage?

1 MR. BECKMAN: Yes, Justice Stevens.

2 Pacific Mutual has petitioned this Court to
3 vacate a judgment of the Alabama Court and the award of
4 punitive damages as violating the due process clause of
5 the Fourteenth Amendment. Of the issues that were briefed
6 and submitted here on behalf of the petitioner, I would
7 like to focus my argument on three central issues:

8 First, that the open-ended, standardless
9 discretion delegated by Alabama law to the jury here to
10 determine whether or not to punish Pacific Mutual for the
11 agent's fraud, and if so, how much, violated due process.

12 Second, that the system of judicial review in
13 place in Alabama did not cure those violations, and third,
14 that respondeat superior on the record in this case is not
15 a constitutionally permissible basis for imposing
16 punishment on Pacific Mutual.

17 QUESTION: You say, not a constitutional --
18 constitutionally permissible basis for imposing punishment
19 on Pacific Mutual. Are you saying it was not a
20 constitutionally permissible basis for imposing any sort
21 of liability, or just what you call punishment?

22 MR. BECKMAN: Just the punitive award.

23 QUESTION: You -- there's a different
24 constitutional standard for respondeat superior, in your
25 view, when you're talking about punitive damages?

1 MR. BECKMAN: Petitioner submits that that is
2 correct, Your Honor. The -- in -- for compensatory
3 damages under respondeat superior, the rationale of it is
4 that where one of two innocent people should suffer
5 because of acts of an agent, wrongful acts of an agent,
6 the principal who put the agent in a position to cause the
7 injury should bear the loss. Imposing punishment on a
8 principal who, as in this case, was in fact a victim of,
9 in effect, embezzlement -- is not a rational basis for
10 punishment.

11 QUESTION: I guess that argument -- well,
12 supposing you have a corporation, and the president of the
13 corporation does a lot of things secretly. The directors
14 don't know, the stockholders don't know, and you impose a
15 criminal fine for violating the Sherman Act or something.
16 Is that unconstitutional?

17 MR. BECKMAN: There's -- there is -- that is a
18 different situation than we have here. Under the Sherman
19 Act, for example, or a regulatory program, the company is
20 under a direct obligation to comply with the law. And if
21 in fact fines or triple damages under the Sherman Act are
22 sought to be imposed upon it because of the violation by
23 the company, and the company comes in and tries to defend
24 saying well, high-level management or the responsible
25 people didn't authorize those acts or know that they were

1 going on. And the courts have held that if that action is
2 taken in the course of the company's business, and to
3 further its profits, the company management can't come in
4 and say well, we didn't know what was going on, and avoid
5 liability.

6 But the situation is different, I submit, where
7 the agent, even a high-level officer, is affirmatively
8 acting against the company's interest, and is in fact, as
9 here, embezzling, or stealing the money --

10 QUESTION: Maybe they -- maybe they fixed prices
11 at a level that caused them to lose money. That wouldn't
12 be a defense, would it?

13 MR. BECKMAN: But they were still acting to
14 benefit the corporation and seeking to increase its
15 profits by violating the law. I mean, here, there was no
16 possible way that Pacific Mutual could have benefited from
17 the agent's thefts of the premiums, and those thefts that
18 were actually premiums of a -- due to another company, but
19 both of those companies had liability imposed on them,
20 under Alabama law, for their policies.

21 QUESTION: But wouldn't that also -- that
22 argument also justify saying you can't recover civil --
23 even actual damages?

24 MR. BECKMAN: But there you have, again, an
25 innocent third party and the innocent company, and the

1 company put the agent in a position to cause the harm. So
2 for compensatory damages, vicarious liability has some
3 purpose. But to impose punishment on a company that has
4 had a theft or an embezzlement from it doesn't forward any
5 rational goal of retribution or deterrence.

6 QUESTION: Mr. Beckman, do you have any case
7 authority from this Court to support this rather curious
8 position?

9 MR. BECKMAN: Only the -- the authority that we
10 have cited in the briefing that has been submitted.

11 QUESTION: Mr. Beckman, if I understand the
12 position you're taking on this point, if -- if an officer
13 of a corporation is secretly -- secretly favors polluting
14 the environment, and at great expense to the company --
15 not in its interests, but at some expense to the
16 company -- pollutes -- intentionally causes the company to
17 pollute the environment, a penalty could not be imposed
18 upon the company because the officer was not acting in the
19 company's interest? That's -- that's your position?

20 Even though the company put this officer in a
21 position where he could do this, you know, put him in
22 charge of all its chemicals, so that he was in a position
23 to dirty the earth, which is what he wanted to do, you
24 couldn't punish the company for that?

25 MR. BECKMAN: That is a somewhat different case

1 than those that we have been relying on, such as the
2 Standard Oil of Texas v. The United States case, where you
3 had the three employees stealing oil from Standard and
4 then selling it back.

5 QUESTION: It's different from those cases, but
6 it's --

7 MR. BECKMAN: Yes.

8 QUESTION: But it tests what I understood to be
9 your response to Justice Stevens. As I understood your
10 response to Justice Stevens, you think the crucial factor
11 is whether -- whether you can impose punishment upon the
12 principal depends upon whether the agent was acting in the
13 principal's interest. Isn't -- wasn't that your -- your
14 line?

15 MR. BECKMAN: Yes, and -- and if you're --

16 QUESTION: All right.

17 MR. BECKMAN: If you are suggesting that --

18 QUESTION: So then your answer to my
19 hypothetical has to be that you cannot punish the
20 corporation.

21 MR. BECKMAN: I would suggest that's correct,
22 Justice Scalia, and that would be because if you had, in
23 effect, a disloyal employee trying to sabotage the company
24 by putting in procedures which would in fact be causing
25 emissions beyond EPA standards, for example, it would

1 really not forward the goals of retribution and deterrence
2 to punish the company because it had that employee doing
3 that.

4 QUESTION: It would deter the company from
5 putting such a nut in such a position, wouldn't it?

6 MR. BECKMAN: That would be direct liability,
7 not respondeat superior liability, if you're suggesting
8 that the basis of the punishment then would be that the
9 company had not controlled or was -- this agent, or had
10 not properly monitored them.

11 QUESTION: Mr. Beckman, we've been questioning
12 you about what you say was your third point. Perhaps
13 you'd like to get to your first and second point.

14 MR. BECKMAN: I would indeed, Your Honor --
15 Justice -- Mr. Chief Justice.

16 And with respect to Pacific Mutual's basic due
17 process point presented here, Alabama law delegated
18 complete discretion to the jury to determine whether or
19 not to punish Pacific Mutual for the agent's fraud, and if
20 so, how much.

21 The Alabama legislature had never established
22 any limits on permissible punishment for conduct, or for
23 punitive damages generally, and the decisions of the
24 Alabama Supreme Court recognized that in Alabama there was
25 no legal measure which limited these awards.

1 QUESTION: Assume that we're just talking about
2 punishing the agent himself. Forget the respondeat
3 superior problem. Are there any standards that you could
4 cite to the Court that would suffice for giving punitive
5 damages against the agent himself here?

6 MR. BECKMAN: Yes. One -- well, two come to
7 mind, and one that would not work. If you're talking
8 about overall standards for limiting punitive damages
9 awards, which I understand to be your question, it
10 would -- it -- I'm sure there is a continuum of solutions
11 which would be acceptable and meet due process
12 requirements. But one which certainly would be for the
13 legislature to take various categories of conduct which
14 are subject to this umbrella penalty, which is a whole
15 spectrum of torts and tortious breach of contract in
16 Alabama, and define the categories of conduct and specify
17 the penalties for those -- those specified items of
18 conduct, much as in a penal code.

19 The other could be, and still meet, I think, the
20 concerns which have been expressed by some members of this
21 Court and -- with respect to punitive damages, and have --
22 try to have an umbrella remedy, a situation where you had
23 either a fraction or a multiple of actual economic harm
24 caused, which would cause the award to have some
25 reasonable relationship to -- or a necessary relationship

1 to actual harm, plus attorney's fees, to take care of
2 small cases which might not otherwise be brought. And I
3 would suggest also a cap, and then the -- even the amount
4 of a multiple of actual damages, to take care of the cases
5 such as cited in the amicus brief of the national
6 accounting firms, where there would be a large corporation
7 where a lot of money was involved but a very small degree
8 of fault.

9 QUESTION: Mr. Beckman, the Alabama court has
10 handed down in the Green oil case a list of factors to be
11 used on appellate review of punitive damages cases. Is
12 that correct?

13 MR. BECKMAN: That is correct, Justice.

14 QUESTION: Now, in your view, if the Green Oil
15 factors were spelled out to the trial jury that fixed the
16 punitive damages, would that adequately serve to guide the
17 jury's discretion?

18 MR. BECKMAN: No, Justice O'Connor, it would
19 not. Those factors are highly judgmental, subjective, and
20 would not remove from the jury the personal discretion to
21 impose punishment on a -- virtually a limitless amount.

22 The Hammond and Green Oil factors would not cure
23 the lack of an upper limit limiting the amount of the
24 award. It would not --

25 QUESTION: Well, do you take the position here

1 today that the only possible way to meet the due process
2 concerns that you express is to set a dollar limit?

3 MR. BECKMAN: Not necessarily a dollar limit, if
4 a multiple plus a cap approach were taken, as I suggested
5 in answer to Justice Kennedy's question. But -- but --

6 QUESTION: That's a form of a dollar limitation.

7 MR. BECKMAN: Yes, Justice O'Connor -- Justice
8 O'Connor.

9 QUESTION: That's all you're saying would
10 suffice.

11 MR. BECKMAN: Yes. The -- yes, the Hammond
12 factors, there's really only three of them that are at all
13 substantive. The first is that the award should bear some
14 reasonable relationship to actual damages. But in
15 practice, that has proven to be a meaningless test,
16 because any -- any relationship can be and has been held
17 to be reasonable. And further, in Alabama, at least,
18 about the same time the Hammond case was decided, the
19 Alabama Supreme Court overruled an earlier decision which
20 had required a -- a -- required relationship between
21 actuals and punitives and adopted a rule that there was no
22 necessary relationship between actuals and punitives.

23 And the second Hammond factor is to consider the
24 reprehensibility of the conduct. That is really only
25 putting the -- in different words what the jury here was

1 instructed to consider, which was character and degree of
2 the wrong, and it is just as vague. And in fact this
3 Court noted that reprehensibility was not a suitable, or a
4 sufficiently precise basis for imposing punishment in the
5 *Giaccio v. Pennsylvania* case.

6 The third, relatively substantive, Hammond
7 factor was the wealth of the defendant. The wealth of the
8 defendant factor, when you take that into account, really
9 only ensures that a large corporation, with a jury
10 argument that the award has to be enough to hurt and
11 sting, is going to ensure that there is in effect a
12 multimillion dollar award, even if there is a very small
13 degree of fault, and -- I submit on behalf of the
14 petitioner that those factors just would not adequately
15 control the jury's discretion.

16 QUESTION: Mr. Beckman, suppose I had a criminal
17 statute that said for this offense the court may impose a
18 fine up to full confiscation of all property of the
19 defendant. You know that the penalty is everything you
20 own if you get convicted. Would that -- would that
21 comport with due process, and then it's --

22 MR. BECKMAN: I think I --

23 QUESTION: It's up to the judge to decide, you
24 know --

25 MR. BECKMAN: Yes, I think I understand your

1 question, and that is that you have a penal code section
2 which specifies in advance, and says that the maximum
3 penalty for that specified offense is up to -- in a sense,
4 a -- action. We will take -- confiscate the charter of
5 the corporation and all of its assets.

6 QUESTION: Um-hum.

7 MR. BECKMAN: Yes, I would suggest that that
8 would meet due process, but that is different than
9 punitive damages situation, because there the legislature
10 has acted to tailor a remedy to a defined offense.

11 But with punitive damages, you have this whole
12 spectrum of torts and tortious breach of contract, and
13 with an umbrella that -- that fits it all.

14 QUESTION: But the legislature has, in effect,
15 said for each of those offenses, for any -- for any civil
16 offense, you are on notice that what you can be penalized
17 is all of your assets.

18 MR. BECKMAN: I'd suggest that that --

19 QUESTION: Why isn't that -- you know. It's an
20 upper limit. Now, you may not like how high an upper
21 limit it is, but it is certainly there. You know, when
22 you commit any tort, that -- that that's the penalty that
23 -- that may exist.

24 MR. BECKMAN: That would be as if -- and the
25 situation really is as if, for example, the Alabama Penal

1 Code, which would cover everything from minor traffic
2 offenses to first degree murder, had a single penalty
3 section which said, for any violation of this code the
4 maximum penalty is capital punishment. And I suggest that
5 that would not be a rational and meaningful limit --

6 QUESTION: Well, let's take that out of it.

7 MR. BECKMAN: Or even notice --

8 QUESTION: We've place some limitations on
9 capital punishment. I mean, it can only be imposed for
10 murder.

11 But let's say -- let's say for all criminal
12 offenses it'll be up to -- up to the judge.

13 MR. BECKMAN: Up to life imprisonment --

14 QUESTION: Um-hum.

15 MR. BECKMAN: And I would suggest that that
16 would not be a meaningful or realistic penalty for
17 99.9 percent of the offenses in the code; similarly, that
18 confiscation of all the assets would not be a meaningful
19 or really reasonable penalty for 99.9 percent of the
20 offenses in punitive damages.

21 QUESTION: Because -- because it -- because
22 what? Because of a lack of procedural due process?

23 MR. BECKMAN: Because it is so high that it
24 wouldn't be fair notice of what the actual penalties would
25 be. I mean, it's like having life imprisonment for a

1 traffic offense. It wouldn't take the discretion away
2 from the sentencing authority to give virtually any
3 sentence for a minor offense, and there would be no real
4 notice to anyone of what the penalty might be, and it
5 would certainly not cure the open-ended discretion of the
6 sentencer in that situation.

7 QUESTION: Mr. Beckman, can I ask kind of a
8 long-run, long-range question? Are you claiming in this
9 case that the Alabama procedure is kind of invalid on its
10 face, and therefore, regardless of the facts of this
11 particular case, every punitive damage award in Alabama
12 should be set aside, or do you depend on the facts of your
13 case?

14 MR. BECKMAN: I suggest that in any case in
15 which the jury was instructed as it was in this case --

16 QUESTION: Right.

17 MR. BECKMAN: -- that due process requirements
18 would not be met, and to that extent, the answer to your
19 question would be yes.

20 QUESTION: Then the other thing that's running
21 through my mind, to the extent that you've suggested that
22 maybe we could craft rules like a ceiling and special
23 procedures and all, are you suggesting that those
24 procedures -- that we would write a rule for the future
25 that would not be retroactive to past awards, or -- you

1 don't have a retroactivity problem?

2 MR. BECKMAN: I would suggest there would be no
3 retroactivity problem and even that this Court would not
4 have to craft rules. I mean, State legislatures can --
5 are certainly free to experiment with any number of
6 possible solutions to --

7 QUESTION: But until they meet the minimum that
8 you think are required, all these awards would be invalid?

9 MR. BECKMAN: Yes, Justice Stevens, but that is
10 our position.

11 QUESTION: I take it you have no problem with
12 the theory of punitive damages, then. It's just the
13 standard. Suppose you had a manufacturer of children's
14 play equipment. Manufacturer A uses a rope because he
15 thinks its safe. Manufacturer B uses the same rope
16 because it's much cheaper, and he knows it's very unsafe.
17 Two children are injured. The injuries are exactly the
18 same. Should the recovery be the same in each case?

19 MR. BECKMAN: I would suggest not, Justice
20 Kennedy, if in fact guilt is personal and -- and if
21 penalties are to be imposed because of guilt, as they in
22 fact generally are not in punitive damages cases.

23 QUESTION: So you have -- you have no trouble
24 with the proposition that, in the second case, where there
25 was an intentionally substitution of an inferior fabric,

1 or piece of equipment, you have no trouble at all with
2 that child recovering substantially more, even though his
3 injuries were the same?

4 MR. BECKMAN: No, Justice Kennedy, and that is
5 because punitive damages are not a matter of compensation,
6 and -- and I suggest that it is not the perspective to
7 look at them from any entitlement of someone injured to
8 recover them. I mean, supposedly they are imposed to
9 punish and deter because of wrongful conduct. The
10 plaintiff gets them is a mere windfall.

11 QUESTION: And you have no quarrel with that
12 element in the law?

13 MR. BECKMAN: Well, I have a quarrel with it,
14 but to -- to seriously quarrel with it would require a
15 position that there could be no civil penalties in any
16 case, and that is not in the history of the decisions of
17 this Court.

18 Back to the basic due process point that I was
19 discussing, the -- it's the legislature in -- neither the
20 courts nor the legislature in Alabama had set any limits
21 to punishment. The jury here was told that it had
22 complete discretion to either punish or not punish, as it
23 chose, and with respect to fixing the amount of the award,
24 it was told only to --

25 QUESTION: Excuse me. That's been going on

1 since 1791, as I understand it. Do -- do -- do you have
2 any -- do you have any cases that -- that have imagined in
3 the past that this violates the due process clause, and
4 how -- you know, who -- who whispers in my ear that it --
5 it is in violation of due process when it's been going on
6 since 1791 and nobody has thought so?

7 MR. BECKMAN: I suggest, Justice Scalia that the
8 situation here is -- is essentially the same as it was in
9 Williams v. Illinois, when you have the practice which had
10 extended from medieval England down through the United
11 States from the time of the Revolution and the adoption of
12 the Constitution to the time of that decision, of -- of
13 increasing penalties of prisoners beyond the maximum
14 allowed by statute when they were unable to pay fines or
15 court costs, and there, as here, if that had been analyzed
16 and looked at, the Court would probably have found that it
17 violated due process, just as I submit that punitive
18 damages -- the procedures --

19 QUESTION: What was the basis of that decision?

20 MR. BECKMAN: That -- the basis of the decision
21 was that it was a violation of due process to sentence --
22 to allow a prisoner to be required to serve time beyond
23 the maximum allowed by the statute because he was unable
24 to pay a fine or court costs, and the court recognized
25 that even though that had been the practice from medieval

1 England through all the history of the United States, it
2 still violated due process, and recognized that it had
3 only come to the attention of the Court because that
4 practice's impact on society had changed radically. And I
5 submit that that --

6 QUESTION: But this one has come to the
7 attention of this Court before, and this Court has -- has
8 opinions that -- that have approved it before, doesn't it?

9 MR. BECKMAN: The -- the due process validity of
10 punitive damages has not been decided by the Court and
11 been directly before it. The Court has, in some prior
12 opinions, recognized the doctrine and assumed or accepted
13 it. But the issues have not been placed before it for --
14 for an actual determination.

15 I see that I am about out of time, and with the
16 Court's permission, if there are no further questions, I'd
17 reserve the balance of my time for rebuttal.

18 QUESTION: Very well, Mr. Beckman.

19 Mr. Ennis, we'll hear now from you.

20 ORAL ARGUMENT OF BRUCE J. ENNIS, JR.

21 ON BEHALF OF THE RESPONDENT

22 MR. ENNIS: Mr. Chief Justice, and may it please
23 the Court:

24 Alabama provides two levels of protection for
25 defendants facing the possibility of punitive damages.

1 First, the jury sets the award pursuant to the traditional
2 common law standards, then, trial and appellate courts
3 independently reassess the award pursuant to even more
4 protective standards.

5 Let me talk first about the jury instructions.
6 The jury was instructed, with respect to the State's
7 purpose in punitive damage awards, that they are to punish
8 and deter, that they are not to compensate the plaintiff,
9 or not to be a windfall to the plaintiff, and the jury was
10 instructed that the amount of the award must be tailored
11 to the character and the degree of the wrong as shown by
12 the evidence in that particular case.

13 Pacific Mutual did not object to those common
14 law instructions at the trial, and did not request any
15 more specific instructions at trial.

16 Those common law standards, by themselves,
17 certainly satisfy traditional notions of fair play and
18 substantial justice. They have been used and approved by
19 courts throughout the land for 200 years, and no court has
20 ever found them violative of due process. Despite
21 enormous pressure on State legislatures and Congress in
22 the past 15 years, those are still the standards that are
23 used in nearly every State today.

24 These standards, as the Court recognized in Day
25 v. Woodworth, were well established before the due process

1 clause was adopted. In fact, in another Alabama case,
2 Louis Pizitz, decided by this Court in 1927, this Court
3 upheld those very common law standards and unanimously
4 rejected precisely the same due process challenge Pacific
5 Mutual is raising again -- that these common law standards
6 gave the jury "unbridled discretion" to fix the punitive
7 amount "without any method of ascertainment and without
8 any limit to the amount it may impose." That argument was
9 rejected unanimously in Pizitz.

10 Earlier, in Standard Oil v. Missouri, this Court
11 also upheld against due process attack a punitive fine
12 where there were no standards for determining the amount
13 and no maximum. That was a State antitrust fine, but the
14 Court relied for its decision expressly on the analogy to
15 punitive damage proceedings.

16 I think that there is simply no anchor in the
17 text of the due process clause, and there is certainly no
18 established societal norm from which the Court could
19 define or develop new standards. In this circumstance,
20 where these standards have been used and thought to be
21 fair for over 200 years, and where, even today, Pacific
22 Mutual does not suggest specific standards for determining
23 what is the right amount, merely a cap on whatever amount
24 is awarded --

25 MR. DAY: Well, let's say a jury is instructed

1 by the trial court to -- that it may find punitive damages
2 and it's within their discretion to make that
3 determination.

4 MR. ENNIS: Purely -- wholly within their
5 discretion?

6 QUESTION: Yes, sir.

7 MR. ENNIS: Well, that -- that would be more --

8 QUESTION: Do you think that would raise any due
9 process concern about standardless discretion?

10 MR. ENNIS: I think, Justice O'Connor, that even
11 such minimal instructions as that would satisfy the due
12 process clause as that clause is constructed.

13 QUESTION: Well, that is a very strange notion
14 of what due process means, then, isn't it?

15 MR. ENNIS: I think not.

16 QUESTION: Doesn't the clause suggest to us that
17 wholly standardless discretion in these matters is
18 unauthorized?

19 MR. ENNIS: Well, Justice O'Connor, I think not,
20 for two reasons. First, this Court's due process
21 decisions in the past have always applied with respect to
22 clarity in the conduct that can trigger a punishment of
23 any type. There must be clear notice of the conduct.
24 That was certainly true in this case. Pacific Mutual was
25 punished for intentional fraud. There is no claim that

1 the conduct at issue in this case was vague.

2 Second, even in the case of capital punishment,
3 in the McGautha decision, this Court ruled that the due
4 process clause does not require more specific standards
5 for determining the sentence of death. In that case, the
6 jury was instructed that it had "absolute discretion to
7 decide whether to sentence to death or not," and there was
8 absolutely no legislative or judicial guidance as to
9 whether to impose that penalty.

10 The Court decided that, as a matter of due
11 process, that did not violate the Constitution. The next
12 year, in Furman, the Court, of course, did decide under
13 the higher, more rigorous standards of the Eighth
14 Amendment, that capital cases do require guided
15 discretion, but the due process clause does not, as this
16 Court ruled in Pizitz, and ruled in Standard Oil v.
17 Missouri.

18 Let me turn to the second level of protection
19 that Alabama gives defendants in punitive damages cases.

20 QUESTION: Excuse me. Before you get off the
21 first, I don't -- I don't quibble with your assertion that
22 that has been accepted for many years, but I do -- do you
23 really think it's fair to call it a standard? I mean, you
24 say that the standard is telling the jury, essentially, be
25 sure that the punishment fits the crime.

1 That -- that is what you describe as a standard.

2 MR. ENNIS: Yes. That is actually --

3 QUESTION: It's just like telling them, don't
4 punish too much, and don't punish too little. Punish just
5 enough.

6 MR. ENNIS: What is actually -- the hypothetical
7 that Justice O'Connor posed is actually less protective of
8 defendants than the traditional common law standards. The
9 traditional common law standards do more than that. They
10 say, here's the purpose of punitive damage awards, to
11 punish and deter, and they say that you must base your
12 amount on the character and the degree of wrongdoing as
13 shown by the evidence in this case.

14 QUESTION: Well, of course. I mean, in other
15 words, don't punish too much for -- for, you know, how bad
16 the wrong was.

17 MR. ENNIS: Yes. I think that that standard,
18 which was the standard before the Court in Pizitz and all
19 the other cases cited in our brief, and all the cases that
20 have been upheld over the 200-year history in which that
21 standard has been used, do find that that's --

22 QUESTION: I would rely more on the 200 years
23 than I would upon the standard.

24 (Laughter.)

25 MR. ENNIS: Justice Scalia, let me turn to the

1 next level of protection.

2 QUESTION: Counsel, before you get there,
3 suppose the rule in the State were that one out of every
4 four defendants is subject to a punitive damage award, and
5 it just rotates based on the docket number?

6 MR. ENNIS: No. I think that would certainly
7 not satisfy due process, because that would go to the
8 conduct issue that punitive damages --

9 QUESTION: Suppose -- suppose it were shown
10 that, in effect, that's what's happening in our legal
11 system?

12 MR. ENNIS: Well, I don't think there has
13 been --

14 QUESTION: But suppose it were?

15 MR. ENNIS: Well, if it were, then that would be
16 a different question entirely, about an arbitrary and
17 unequal application of a supposedly neutral principle of
18 law.

19 QUESTION: So if -- if -- if -- it could be
20 established that, in a particular State, and there was
21 simply no rhyme or reason at all to the award of punitive
22 damages, you would then think it would be a due process
23 problem?

24 MR. ENNIS: I think it would be a different
25 issue from the issue posed by the facts of this case.

1 QUESTION: Would there be a due process problem?

2 MR. ENNIS: I think, Your Honor, that if it
3 could be shown through empirical evidence that there
4 wasn't just an occasional aberrational decision, but that,
5 in a substantial number of cases it was entirely arbitrary
6 and fortuitous whether a particular defendant got hit with
7 a punitive damage award or not, that would raise a due
8 process question with respect to conduct that can subject
9 one to a punitive damage award.

10 But that is not this case at all.

11 QUESTION: Wouldn't it raise due process
12 standards because we've lost confidence in the operation
13 of the system to operate with predictability, with
14 fairness

15 MR. ENNIS: Justice Kennedy, let me say that
16 there is no basis in the record of this case or this Court
17 to have lost confidence in the punitive damage --

18 QUESTION: No, but I'm talking about what the
19 standards of due process are, and you seem to indicate
20 that predictability, evenness, fairness,
21 proportionality --

22 MR. ENNIS: In Alabama today --

23 QUESTION: -- are all some indices of due
24 process, and you indicate at the outset you don't think
25 there's any due process standard, I had thought, with

1 reference to the jury. Now, I know you're going to rush
2 to the second point, but let's just talk about the jury
3 instruction. Isn't there -- isn't there some due process
4 component that requires predictability?

5 MR. ENNIS: I think there is a due process
6 component that requires predictability with respect to the
7 nature of conduct that can trigger a punitive award.
8 Pacific Mutual has not cited any cases which take the very
9 big next step, and ruled that there must also be
10 predictability with respect to the precise punishment that
11 a defendant can incur when they violate a clear conduct
12 norm. And there is no case in the history of this Court's
13 jurisprudence, that I am aware of, that takes that step.

14 QUESTION: What about ex post facto cases?

15 MR. ENNIS: Well, Your Honor, I am talking right
16 now with respect to civil cases. This is not, obviously,
17 a criminal case where the ex post facto case -- ex post
18 factor clause would apply. The ex post facto clause also,
19 I think, is different because it requires -- it applies to
20 conduct that was not criminal at the time of the crime.

21 QUESTION: Mr. Ennis, would you apply your
22 principle that unpredictability produces a violation of
23 the due process clause to substantive liability as well,
24 so that if one can show that, gee, lawyers really never
25 know what's going to happen when you send a case to the

1 jury, except to the extent that it hinges upon factors
2 that really should have no bearing -- like whether the
3 defendant has deep pocket or not. If -- if you could show
4 that, then the whole system would be infected? Or does
5 this just apply to the amount of the liability, not to the
6 liability itself, which would seem very peculiar? You'd
7 extend that to the whole system, I assume.

8 MR. ENNIS: Well, Justice Scalia, I'm not
9 entirely sure I understand your question, but --

10 QUESTION: What I'm asking is, if it is true
11 that the amount of damages must be predictable in order
12 for due process to be -- roughly predictable --

13 MR. ENNIS: I don't think that's true.

14 QUESTION: I thought that was your answer to
15 Justice Kennedy, that if the system were entirely
16 unpredictable --

17 MR. ENNIS: Whether a defendant would be
18 subjected to any punitive damage award at all, if it was
19 just fortuitous --

20 QUESTION: Right.

21 MR. ENNIS: -- whether every fourth defendant
22 gets punitive awards against them --

23 QUESTION: Right.

24 MR. ENNIS: -- that would go to the conduct that
25 would trigger a punitive award, and I think that would

1 implicate a due process concern.

2 QUESTION: And the same would be true about
3 whether the jury finds liability at all?

4 MR. ENNIS: I think the same would not be --

5 QUESTION: I mean, did you think jury verdicts
6 are predictable in that sense? Do you -- has that ever
7 been a requirement?

8 MR. ENNIS: I think that it's not a requirement
9 that jury verdicts be predictable. That's the point I was
10 trying to make. This Court's decisions have never
11 required that due process requires predictability of the
12 amount of a particular punishment.

13 QUESTION: But they have to be just
14 nonarbitrary?

15 MR. ENNIS: They just have to have some rational
16 basis, and not be arbitrary, that's correct. And Alabama
17 today ensures that it is not an arbitrary process. The
18 Hammond Hornsby Standard of Review which the Alabama
19 Supreme Court has been adopting since 1986, expressly
20 provides that jury verdicts will be independently
21 reassessed by trial and appellate courts in order to
22 determine whether the amount set by the jury is more than
23 would be necessary to accomplish society's goals of
24 punishment and deterrence.

25 . That test has actually been advocated by the

1 insurance industry amicus brief supporting Pacific Mutual
2 as a workable and appropriate test that will protect
3 against arbitrary and irrational punitive awards. That's
4 the test that Alabama applies today.

5 QUESTION: Was that test applied in this case?

6 MR. ENNIS: Yes, it was, Your Honor.

7 QUESTION: Do you think the trial judge's
8 memorandum really reflected what the test is supposed to
9 reflect?

10 MR. ENNIS: Well, the trial judge's memorandum
11 does refer to the Hammond opinion and does state that the
12 award was reviewed by the trial court under Hammond. The
13 important thing to understand that it is not just the
14 trial court but the Alabama Supreme Court itself that
15 independently applies these factors. The Alabama Supreme
16 Court has itself reduced or set aside many punitive damage
17 awards, even when the trial court thought they were
18 appropriate.

19 For example, one of the Hammond-type reviews
20 requires a comparability review to ensure fairness of
21 punitive amounts across a range of similar cases. Using
22 that comparability review, which is not equally available
23 to the trial courts because they are not as aware as the
24 Alabama Supreme Court of the range of cases, the Alabama
25 Supreme Court has regularly reduced punitive damage awards

1 when it finds that the amount is outside that reasonable
2 range.

3 Just within the past 10 days, the Alabama
4 Supreme Court has done that twice.

5 QUESTION: The argument is that punitive damages
6 don't need all these protections, these specific factors
7 that Alabama Supreme Court has imposed, and that there
8 doesn't need to be appellate review.

9 MR. ENNIS: Justice White --

10 QUESTION: There's just no due process problem
11 at all.

12 MR. ENNIS: Justice White, I think there is no
13 due process problem at all simply with the common law
14 standards and standards for review, but in this case --

15 QUESTION: Well, what is -- is there -- is there
16 some due process requirement that the punitive damages not
17 be excessive?

18 MR. ENNIS: Yes, Your Honor, I think that there
19 are decisions of this Court that do impose an outer limit,
20 regardless of the fairness of the standard of procedure.

21 QUESTION: What, there's not a limit like,
22 excessive?

23 MR. ENNIS: The outer limit would be, under the
24 substantive component of the due process clause --

25 QUESTION: Yes?

1 MR. ENNIS: -- that the punitive award not
2 exceed an amount that would rationally further the State's
3 legitimate objectives.

4 Now, in this case, I think that there can be no
5 serious argument that this award violates that standard,
6 for the simple reason --

7 QUESTION: And you say this excessiveness comes
8 out of the due process clause, this -- you say? How does
9 it do that? You say that -- I thought you started out
10 saying the due process clause just doesn't read on
11 punitive damages?

12 MR. ENNIS: I think that the due process clause
13 does not apply to whether -- to predictability of the
14 amount of the punitive damage award. I think that's
15 right.

16 QUESTION: But it does apply, you say -- it can
17 be too great?

18 MR. ENNIS: There is, perhaps, a substantive
19 component of the due process clause.

20 QUESTION: Well, you said there was awhile ago.

21 MR. ENNIS: Well, Your Honor, I think that the
22 cases that established such a substantive limit on what is
23 State economic regulation are very old cases and may not
24 be good law today, but for purposes of this case. I'm not
25 challenging those old cases in which the Court did say

1 that a civil fine or civil penalty which is wholly
2 arbitrary and irrational may violate the substantive
3 component of the due process clause.

4 QUESTION: Do you know of any States around that
5 not only agree with that notion but have set down some
6 more specific standards than just excessiveness or
7 irrationality?

8 MR. ENNIS: Well, I --

9 QUESTION: Have they put down some overall
10 limits, or some proportionality rules?

11 MR. ENNIS: Your Honor, in the past -- since
12 1986, a majority of the States have actually legislatively
13 revisited their punitive damages systems, but only nine
14 States today impose caps on the upper limit of punitive
15 awards.

16 QUESTION: Well, what about -- nine States put
17 caps on, but how about others that have set some
18 standards, other than just these vague -- rather vague
19 standards?

20 MR. ENNIS: We have cited in our -- actually in
21 our opposition to certiorari -- the four States that have
22 legislatively established some standards. Those standards
23 are remarkably identical to the standards that Alabama
24 applies as a matter of common law. They are remarkably
25 similar to the Hammond Hornsby Standards of Review. So

1 far as I'm aware --

2 QUESTION: You don't think -- I gather you don't
3 think the due process clause need go any farther than just
4 to say to a jury or to an appellate court, the award
5 should not be excessive? Do you think that requires any
6 more specific guide -- guidelines than that?

7 MR. ENNIS: No, Your Honor, I don't think it
8 does.

9 In this case, let me make very clear that the
10 standard of review that was used by the Alabama Supreme
11 Court is much more protective than the traditional, common
12 law standard of review that was at issue in Browning-
13 Ferris and Bankers Life.

14 There, the courts applied the traditional
15 standard of whether the verdict was the result of bias,
16 passion, prejudice, or corruption.

17 Here, the Alabama Supreme Court applies a much
18 more protective standard, and it will explicitly reduce or
19 set aside a punitive award even if that award was not the
20 result of bias, passion, or prejudice, if the award is
21 greater than is reasonably necessary to accomplish
22 society's objectives of punishment and deterrence, and it
23 measures whether the award exceeds that test by an
24 application of the seven standards in the Hammond Hornsby
25 Standard of Review.

1 In 15 cases since 1986, the Alabama Supreme
2 Court has reduced or set aside jury awards under that
3 standard. This is a standard with teeth. It is a
4 meaningful, meaningful constraint on --

5 QUESTION: Let's just --

6 QUESTION: 15 out of how many? Of -- if -- in
7 15 -- it has set them aside out of how many punitive
8 damages cases that it's heard?

9 MR. ENNIS: I'm not sure of the exact total,
10 Your Honor, but I think it is at least 15, and I would be
11 happy in a post-trial submission to try to get that
12 information to the Court.

13 QUESTION: Thank you.

14 QUESTION: How -- how much of a penalty -- let's
15 assume you have a defendant with a net worth of \$1
16 billion. How much is necessary to deter that -- that
17 defendant?

18 The standard you recite sounds very nice. Does
19 it -- does it mean anything? How do I go about deciding,
20 as a judge of the Alabama Supreme Court, or any other
21 court --

22 MR. ENNIS: Well, Your Honor --

23 QUESTION: That it is no more than is necessary
24 to deter --

25 MR. ENNIS: Your Honor, there are at least two

1 parts of an answer to that question.

2 The first is, you can't determine how much is
3 appropriate to deter based simply on knowledge of the
4 wealth of a defendant. The jury is instructed they must
5 look at character and the degree of the wrongdoing. Under
6 the Hammond standards, the reviewing courts are instructed
7 to look at how much knowledge the defendant had.

8 QUESTION: Oh, so it -- so it isn't just -- just
9 what's necessary to deter, but also how bad is the thing
10 that you want to deter?

11 MR. ENNIS: That's right. The character and the
12 degree of the wrongdoing. That's right.

13 QUESTION: So it -- so it's not just how much is
14 necessary to deter, but also how much do you hate what was
15 done?

16 MR. ENNIS: That's right.

17 QUESTION: Okay. Yes.

18 MR. ENNIS: It's a societal judgment. That's
19 correct.

20 QUESTION: Right. Now, how do you decide how
21 much you hate what was done?

22 MR. ENNIS: Well --

23 QUESTION: As a judge, in order to apply this
24 standard?

25 MR. ENNIS: Your Honor, it's -- it's very much

1 the process that judges go through ^{and} a juries go through
2 every day in deciding difficult questions that are --

3 QUESTION: Juries I would agree, but -- but is
4 this really a legal -- you know, legally determinable
5 issue, how much we hate this particular act?

6 MR. ENNIS: Your Honor, the Alabama Supreme
7 Court looks at those factors. For example, whether the
8 defendant had continuing notice of the particular
9 wrongdoing at issue, whether it took corrective steps or
10 not. There very specific standards, cited at page 32, 33
11 of our brief, which the courts use to reach that decision.

12 In a recent case, for example, the Alabama
13 Supreme Court noted that the degree of the wrongdoing was
14 sufficient to merit a punitive award by itself, but noted,
15 as the jury does not know, that that same defendant had
16 been hit with a punitive award in another case, and
17 therefore decided that it was not necessary to have a
18 second punitive award against the defendant for the same
19 conduct. That would not rationally further the State's
20 objectives, and so it set aside the punitive award
21 entirely, based upon that factor.

22 The Alabama Supreme Court does the same thing
23 with respect to comparability reviews. It says to itself,
24 all right, here's another insurance bad faith case and a
25 punitive award was set at this amount; we have had seven

1 of these insurance bad faith cases in the past 3 years,
2 and here is what seems to be a reasonable range of
3 punishment in these cases; we think this one exceeds that
4 reasonable range, and reduces it accordingly.

5 It is not a standard of review that simply
6 rubber-stamps the jury. Far from it. In Alabama, I
7 think, unlike any other State of which I'm aware, there is
8 a right for a post-verdict evidentiary hearing at which
9 the defendant can present new evidence that was never
10 presented to the jury in -- in support of reducing the
11 punitive award.

12 The defendant can come in and say, the award
13 should be reduced because I am quite poor, and this would
14 absolutely bankrupt me and cripple me. The defendant can
15 come in and say, the award should be reduced because I
16 have already been subjected to a criminal fine for similar
17 conduct. That kind of information would be extremely
18 prejudicial to a jury -- for a jury to hear at the
19 liability phase.

20 But Alabama courts give the defendant an
21 evidentiary opportunity to present all relevant evidence,
22 and then, based on that evidence, the courts independently
23 reassess. They are not simply rubber-stamping jury
24 verdicts.

25 QUESTION: Is it -- is it anticipated that

1 juries given this kind of an instruction will often refuse
2 to give any punitive damages?

3 MR. ENNIS: Yes, Your Honor, I think that
4 that -- whether to award punitive damages is discretionary
5 with the jury, because it is supposed to reflect a
6 societal judgment about whether this conduct is deserving
7 of punishment.

8 QUESTION: Some -- deserving of imposing
9 something on the defendant other than compensatory --

10 MR. ENNIS: That's correct.

11 QUESTION: -- damages?

12 MR. ENNIS: That's correct. Let me just say --

13 QUESTION: Is that -- that's just the standard
14 the jury has? If you think this fellow really deserves
15 it, give it -- let him have it, eh?

16 MR. ENNIS: No, that's not quite as simple as
17 that, Justice White.

18 QUESTION: Well, the degree of the crime? How
19 much you hate it?

20 MR. ENNIS: The standard is that before a jury
21 can even consider whether it wants to impose a punitive
22 amount, it must find that the conduct violates the conduct
23 standard requisite for a punitive award. In this case,
24 the conduct standard was intentional fraud.

25 You can't simply --

1 QUESTION: No.

2 MR. ENNIS: -- impose punitive damages because
3 you think somebody was a little negligent, or a little
4 sloppy, in Alabama. There must be some element of
5 intentional wrongdoing. Once that threshold has been
6 crossed, however, it is discretionary.

7 QUESTION: You don't think -- you don't -- you
8 don't think you can be just so negligent that punitive
9 damages are authorized in Alabama?

10 MR. ENNIS: Not in Alabama, Your Honor. Some
11 States do authorize punitive damages for reckless conduct,
12 for gross recklessness. This Court in Smith v. Wade
13 adopted that as the appropriate standard for actions under
14 1983, without requiring --

15 QUESTION: Product liability cases?

16 MR. ENNIS: Private liability cases, Your Honor.
17 But in Alabama --

18 QUESTION: Product. Product. Product
19 liability.

20 MR. ENNIS: Product liability cases? In
21 Alabama, there has to be an intentional wrongdoing
22 element. I'm sure some other States have somewhat lesser
23 degrees of a mental wrongdoing component, but almost
24 everybody --

25 QUESTION: Well, everybody intends to put out

1 the product. Is that just enough?

2 MR. ENNIS: No, that's not enough. It's not
3 just putting the product into commerce that's enough.
4 There has to be an element of wrongdoing, a mental element
5 of intent to commit wrong.

6 QUESTION: And are juries told that?

7 MR. ENNIS: Yes, Your Honor.

8 QUESTION: It doesn't have to be an element of
9 wrongdoing by the defendant personally, though. It can be
10 by one of his agents, right?

11 MR. ENNIS: That's correct, Your Honor.

12 QUESTION: That's a strange use of
13 "intentionally," then. I mean, I'm perfectly innocent. I
14 haven't committed any fraud, and I've been negligent
15 enough to hire somebody who commits a fraud. That's
16 intentional wrongdoing on my part.

17 MR. ENNIS: Well, let me -- let me turn to that,
18 Your Honor. First, Pacific Mutual's argument on vicarious
19 liability is that there must -- constitutionally, there
20 must be some element of benefit to the principal.

21 First, that issue is not before the Court,
22 because at the trial level and in the Alabama Supreme
23 Court level, Pacific Mutual never argued that benefit is a
24 constitutional requirement for vicarious liability. It's
25 argument was on quite different grounds.

1 Furthermore, this would be a very inappropriate
2 case to consider that, because indisputably in this case,
3 there was economic benefit to Pacific Mutual. There were
4 at least 3 months of premiums on life insurance policies
5 that Pacific Mutual received and never refunded as a
6 result of these frauds.

7 But turning to the merits of that vicarious
8 liability argument, in both punitive damages cases and
9 antitrust cases and even in criminal cases, this Court has
10 expressly approved vicarious liability without either
11 fault by the principal or benefit to the principal.

12 Again, in the Pizitz case, decided unanimously
13 in 1927, the Court squarely ruled that Alabama, the same
14 system we're talking about here, could impose vicarious
15 liability for punitive damages without fault by the
16 principal. That was a unanimous ruling of this Court.

17 In the Hydro-level case, this Court even went so
18 far as to adopt as rational and wise social policy a rule
19 of vicarious liability for Federal antitrust cases that is
20 indistinguishable from the Alabama rule at issue here.

21 In Hydro-level, this Court ruled that, under the
22 antitrust laws, a principal can be held vicariously liable
23 for antitrust violations by an agent even if the principal
24 was not at all at fault, and even if the principal did not
25 benefit.

1 Now, I know that some justices of this Court
2 dissented from Hydro-level and did not think that was the
3 wisest or most rational -- the best policy choice, but the
4 fact that the Court as a Court reached that conclusion
5 shows that that decision is at least a rational judgment.
6 Alabama has made that rational judgment, and it should be
7 upheld.

8 Finally, even in criminal cases --

9 QUESTION: Do I have to do it as a policy
10 choice, Mr. Ennis?

11 MR. ENNIS: No, you don't, Your Honor.

12 QUESTION: Or because I think it's the law?

13 MR. ENNIS: No, you don't, Your Honor, not at
14 all. This is not a policy case. This is a constitutional
15 case before the Court, and you certainly don't have to as
16 a policy matter.

17 Even in criminal cases, this Court has upheld
18 vicarious criminal liability without fault or benefit. In
19 the Park and Daughterwite cases, the Court even went so
20 far as to rule that an individual officer of a company can
21 be held criminally liable on vicarious liability
22 principles for the wrongdoing of an agent of which the
23 principal was not aware, and from which the principal did
24 not benefit.

25 It seems to me to follow a fortiori that if

1 vicarious liability is appropriate even in that criminal
2 context, it is appropriate here.

3 Let me simply conclude, since my time is almost
4 to expire, by saying that the principal issue here I think
5 is the standards issue. I think that Alabama has
6 developed a rational system for achieving legitimate and
7 very important State objectives. Alabama provides
8 substantially more protection than the common law
9 standards that were well established when the due process
10 clause was adopted and that are still the prevailing
11 standards today.

12 This Court should not expand upon that
13 traditional understanding of due process and throw settled
14 State tort law into complete disarray without compelling
15 evidence that the punitive damage awards are fundamentally
16 unfair in the majority of cases, and without compelling
17 reason to believe that the legislative process is closed
18 or is incapable of addressing that problem.

19 There does not have to be a constitutional
20 remedy for every social problem. In this case, I think
21 this is a paradigmatic case for judicial restraint, not
22 judicial activism.

23 Thank you very much.

24 MR. ENNIS: Thank you, Mr. Ennis.

25 Mr. Beckman, you have 2 minutes remaining.

1 REBUTTAL ARGUMENT OF BRUCE A. BECKMAN

2 ON BEHALF OF THE PETITIONER

3 MR. BECKMAN: The jury instruction in this case,
4 and the common law jury instruction in Alabama really left
5 the jury entirely to its own internal resources in
6 deciding whether or not to punish and, if so, how much.

7 It was recognized rather forthrightly by Justice
8 Houston of the Alabama Supreme Court in a subsequent
9 decision to ours that that instruction was
10 incomprehensibly vague and incomprehensible as a gauge for
11 the jury to use in measuring the amount of a punitive
12 award. And he noted the consequences of that vagueness in
13 two recent cases that had come before the Alabama Supreme
14 Court, where he found the facts to be identical and the
15 jury instructions to be identical, and in fact identical
16 to the instruction here, and in one the jury came in with
17 an award of \$2,500,000, and in the other, \$21,000.

18 In the jury room when the question came up,
19 shall we punish Pacific Mutual for the agent's fraud, all
20 it had to go on was its own notions of right and wrong or
21 whether or no. All it was told by Alabama law was that
22 you have discretion. You can if you want.

23 Similarly, when it had decided to make the award
24 and say, we're going to punish Pacific Mutual for the
25 agent's fraud, how much should we award, all the

1 instructions told them was, you've got discretion. It's
2 any amount you want.

3 I suggest that that is exactly the arbitrary and
4 discriminatory enforcement that due process condemns, and
5 would respond -- in response to Respondent's contention
6 that due process requires no notice of penalty, I'd
7 suggest that that's a rather crabbed and narrow view of
8 due process, and prior decisions of this Court have held
9 that the fair notice portions -- concerns of the ex post
10 facto clauses are included within the concept of
11 fundamental fairness included in the due process clauses
12 of both the Fifth and Fourteenth Amendments.

13 If you could imagine a statute --
14 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
15 Beckman.

16 The case is submitted.

17 (Whereupon, at 11:02 a.m., the case in the
18 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of

The United States in the Matter of: 89-1279

Pacific Mutual Life Insurance Company, Petitioner -v-

Cleopatra Haslip, Et Al.,

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY *Joyceanne Haslip*
(REPORTER)

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