

by Robert E. Kohn

Due Process of Law in Private Civil Litigation: Is There Anything New to Say About It? (Yes, There Is.)

The notion of due process is old, and it started out vaguely. When it first appeared in the Magna Carta of England, legal due process represented just one piece of a complicated solution to the political problems of the day, involving military spending, government borrowing and taxation. The propertied barons of England won (among other things) that “No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We [i.e., the King] not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the land.”¹

Like many political ideas, the notion of due process was vague. For instance, when could property be taken—even without a lawful judgment—on the basis of a law? Would just any law be considered a “Law of the land?” Six centuries after King John of England had secured the (temporary) fealty of his barons by affixing his seal to that charter at the meadow of Runnymede, our Supreme Court observed in 1856 that, “The words, ‘due process of law,’” as used in the Fifth Amendment of 1791, “were undoubtedly intended to convey the same meaning as the words, ‘by the law of the land,’ in *Magna Charta*.”² Still, however, “The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process.”³

Old-time Due Process

In the 20th Century—the old days, if you will—we received the due process doctrine of *Mathews v. Eldridge*, a social security benefits case.⁴ *Mathews* teaches (among other things) that the procedural aspect of “due process” has the same meaning in the Fifth Amendment and in the Fourteenth Amendment of 1868.⁵ Then the *Connecticut v. Doehr* case explained how that doctrine applies to prejudgment distraints of property in private civil litigation:

For this type of case, therefore, the relevant inquiry requires, as in *Mathews*, first, consideration of the private interest that will be affected by the prejudgment measure; second, an examina-

tion of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and third, in contrast to *Mathews*, principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections.⁶

Applying that framework to prejudgment attachments, liens, and similar encumbrances of private property, “the Connecticut provision before us, by failing to provide a preattachment hearing without at least requiring a showing of some exigent circumstance, clearly falls short of the demands of due process.”⁷ The Connecticut statute did not require submitting evidence of exigent circumstances, sufficient to persuade a judge that the plaintiff had made “a clear showing of entitlement” to deprive the defendant of property prior to judgment.⁸ For that reason, *Doehr* held, “[t]he potential for unwarranted attachment in these situations is self-evident and too great to satisfy the requirements of due process absent any countervailing consideration.”⁹

21st Century Cases

Is there anything new here in the 21st Century? Yes, there is. A district court in 2012 applied *Doehr* to invalidate a Mississippi statute (dating back to 1880) that allowed construction subcontractors to impound money owed to their prime contractor merely by serving notices asserting that the subcontractors had not been paid.¹⁰ “The bottom line is that no matter what you call it, [Miss. Code] § 85-7-181 has the exact same effect as an attachment—immobilizing the contractor’s property for an indeterminate period of time to secure payment to a subcontractor.”¹¹ The State of Mississippi’s appeal of that decision is pending.

Due process also requires that only neutral judges (and judges who *seem* to be neutral) may participate in deciding an action. The 2009 decision of the Supreme Court in *Caperton v. A.T. Massey Coal Co.* holds that an appellate judge should have recused himself from hearing a case where the president of one of the parties had

Robert E. Kohn is a litigator of civil cases at trial and on appeal. He belongs to the Los Angeles Chapter of the FBA and serves as Vice-Chair of the Federal Litigation Section. Kohn is also a member of the Civil Rights Law Section of the FBA. He can be reached at rkohn@kohnlawgroup.com.



given him “campaign contributions in extraordinary amounts.”¹² On the other hand, “[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge’s recusal.”¹³ According to the Third Circuit in a 2013 decision, a relatively small contribution amounting to “far less than 1%” of the judge’s campaign funding does not offend due process.¹⁴

What about punitive damages in private civil litigation? Due process precludes awarding “grossly excessive or arbitrary” amounts for punitive purposes, the Supreme Court held in the 2003 case of *State Farm Mutual Automobile Insurance Co. v. Campbell*.¹⁵ Without specifying an entirely inflexible formula for testing the size of a punitive award, the Court has said, “few awards exceeding a single-digit ratio between

Supreme Court identified in 2008 in the *Taylor v. Sturgell* decision.²⁰

[W]e have confirmed that, “in certain limited circumstances,” a nonparty may be bound by a judgment because she was “adequately represented by someone with the same interests who [wa]s a party” to the suit. ... Representative suits with preclusive effect on nonparties include properly conducted class actions, ... and suits brought by trustees, guardians, and other fiduciaries. ...²¹

Recently, the Sixth Circuit held that the judgment in a labor union’s action could not bind future union members in a subse-



punitive and compensatory damages, to a significant degree, will satisfy due process.”¹⁶ And “[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.”¹⁷

In 2007, the Supreme Court established in *Philip Morris USA v. Williams* that due process also forbids a state to use a punitive award to punish the defendant for injury that the defendant may have inflicted upon nonparties “who are, essentially, strangers to the litigation.”¹⁸ Explained the Court, “a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing, for example in a case such as this, that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant’s statements to the contrary.”¹⁹

For similar reasons, due process also precludes binding a nonparty to the results of litigation, except in narrow circumstances. Judgments in class actions and other “representative” proceedings cannot bind absentees except in narrow circumstances that the

quent action because the union did not “adequately” represent their interests, under *Taylor*.²² Representation of a nonparty’s interests is only “adequate” if the court employs “special procedures to protect the nonparties’ interests or [there is] an understanding by the concerned parties that the first suit was brought in a representative capacity.”²³ In the recent Sixth Circuit case, “The district court in the Pennsylvania action neither certified a class (nobody asked it to) nor employed any other ‘special procedures’ to protect the retirees’ interests in that action. So the plaintiffs here are not bound to the Pennsylvania decision by reason of any special procedures there.”²⁴

Now we also know that an action is not a “properly conducted class action[],” entitled to preclusive effect under *Taylor*, if the putative class was not actually certified. In 2011, the Supreme Court explained in *Smith v. Bayer Corp.* that “wishing” to serve as a representative in litigation “does not make it so.”²⁵ Thus, “[n]either a proposed, nor a rejected, class action may bind nonparties.”²⁶ A

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district court in California then applied the *Smith* rationale in refusing to bind nonparties to the results of a representative action under the Fair Labor Standards Act, after that action had been decertified.²⁷

What's Next?

The recent need for Supreme Court resolution of those 21st Century questions shows that the meaning of procedural due process in private civil litigation continues to be made clear. A few issues seem likely to need more clarifying:

- Rule 23.1 of the Federal Rules of Civil Procedure authorizes shareholder derivative actions. Is a corporation bound by rulings in such an action, if the court denied representative status to the shareholder?
- *State Farm* says that due process imposes no strict formulas for calculating the maximum amount of punitive damages. Under what circumstances may punitive damages be awarded for more than 9 times the compensatory damages suffered by the plaintiffs in the action?
- Does due process require elected judges to disclose their campaign contributors to litigants in cases where a contributor, or its affiliates (such as officers), are parties or counsel?
- Federal judges are appointed, not elected. May a magistrate judge participate in an action involving a politically influential party or counsel, if the magistrate aspires to an Article III appointment?

Stay tuned. ☺

Endnotes

¹⁹ Hen. III, ch. 29 (1225) (quoted in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 28 (1991) (Scalia, J., concurring)).

²⁰ *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856).

²¹ *Murray's Lessee*, 59 U.S. at 276.

²² *Mathews v. Eldridge*, 424 U.S. 319 (1976).

²³ *Mathews*, 424 U.S. at 332 (“Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment”).

²⁴ *Connecticut v. Doebr*, 501 U.S. 1, 11 (1991).

²⁵ *Doebr*, 501 U.S. at 18.

²⁶ *Doebr*, 501 U.S. at 10.

²⁷ *Doebr*, 501 U.S. at 14.

²⁸ *Noatex Corp. v. King Constr., LLC*, 864 F. Supp. 2d 478, 488-91 (N.D. Miss. 2012), remanded on other grounds, 2012 WL 3854437 (5th Cir. Aug 23, 2012).

²⁹ 864 F. Supp. 2d at 486.

³⁰ *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009).

³¹ *Caperton*, 556 U.S. at 884.

³² *Freeman v. Pittsburgh Glass Works, LLC*, --- F.3d ---- (3d Cir. 2013) (2013 WL 811884).

³³ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003).

³⁴ *State Farm*, 538 U.S. at 425.

³⁵ *Ibid.*

³⁶ *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007).

³⁷ *Philip Morris*, 549 U.S. at 353-54.

³⁸ *Taylor v. Sturgell*, 553 U.S. 880 (2008):

³⁹ *Taylor*, 553 U.S. at 894 (citations omitted).

⁴⁰ See *Amos v. PPG Indus.*, 699 F.3d 448 (6th Cir. 2012).

⁴¹ *Taylor*, 553 U.S. at 897, 898.

⁴² *Amos*, 699 F.3d at 452-53.

⁴³ *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2380 (2011).

⁴⁴ *Smith*, 131 S. Ct. at 2380.

⁴⁵ See *Mitchell v. Acosta Sales, LLC*, 841 F. Supp. 2d 1105, 1116-17 (C.D. Cal. 2011).



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