

The Burger Court Opinion Writing Database

Aetna Life Insurance Co. v. Lavoie

475 U.S. 813 (1986)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: JAN 29 1986

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1601

AETNA LIFE INSURANCE CO., APPELLANT *v.* MARGARET W. LAVOIE AND ROGER J. LAVOIE, SR.

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

[January —, 1986]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented is whether the Due Process Clause of the Fourteenth Amendment was violated when a justice of the Alabama Supreme Court declined to recuse himself from participation in that court's consideration of this case.¹

I

This appeal arises out of an insurance policy issued by appellant covering appellees Margaret and Roger Lavoie. In January, 1977, Mrs. Lavoie was examined by her physician, Dr. Douglas, because of various ailments. Shortly thereafter, on Dr. Douglas' recommendation, she was admitted to

¹Appellant also argues that the retrospective imposition of punitive damages under a "new" cause of action violates its rights under the Contracts Clause, U. S. Const., Art. I, § 10, cl. 1, that a \$3.5 million punitive damage award is impermissible under the Excessive Fines Clause, U. S. Const., Amdt. VIII, and that the standards governing punitive damage awards in Alabama are so vague as to constitute a violation of the Due Process Clause. In addition, appellant contends that Ala. Code § 12-22-72 (1975), under which any person who unsuccessfully appeals a money judgment is assessed a 10% penalty, is unconstitutional under the Equal Protection Clause. Appellees among other responses contend that we are without jurisdiction to consider all of these challenges since appellant raised them only in its rehearing petition before the Alabama Supreme Court.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

RE: 84-1601 - Aetna v. Lavoie

March 19, 1986

Personal

Dear Lewis:

On your "three options," (1) I could not join your concurrence, although I agree with the basic thrust; my reason is that the issue is not presented and such a highly important subject, for me, should not be expressed in dicta.

(2) The publication could be embarrassing to both you and Lewis, Jr., especially in light of your criticism of Justice Embry.

(3) Omitting the due process threatened would not help on (1) and (2).

I have a speech prepared for a future date--perhaps to ABA--on excessive verdicts, juror responsibility, punitive damages and lawyer greed.

I'm not sure when I'll give it or write it.

I'll be glad to discuss.

Regards,



Justice Lewis F. Powell, Jr.

Supreme Court of the United States
Washington, D. C. 20543

l

CHAMBERS OF
THE CHIEF JUSTICE

PERSONAL

April 1, 1986

RE: No. 84-1601 - Aetna v. LaVoie

Dear Lewis:

I put my hand to your suggestion, and here is the "fruit":

Appellant also argues that the retrospective imposition of punitive damages under a new cause of action violates its rights under the Contracts Clause, of Article I, Section 10, that a \$3.5 million punitive damage award is impermissible under the Excessive Fines Clause of the Eighth Amendment, and that the standards governing punitive damage awards in Alabama are so vague as to constitute a violation of the Due Process Clause of the Fourteenth Amendment. In addition, Appellant contends that Ala. Code § 12-22-72 (1975), under which any person who unsuccessfully appeals a money judgment is assessed a 10% penalty, is unconstitutional under the Equal Protection Clause of the the Fourteenth Amendment. These arguments raise important and substantial issues which, in an appropriate setting, must be resolved; however, our disposition of the recusal-for-bias issue makes it unnecessary to reach them.

My thought is to elevate this into the text at page 14 and omit my footnote 1 on page 1, giving more force to your point.

What do you think?

Regards,

CRB

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

STYLISTIC CHANGES THROUGHOUT

From: **The Chief Justice**

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1601

AETNA LIFE INSURANCE CO., APPELLANT *v.* MARGARET W. LAVOIE AND ROGER J. LAVOIE, SR.

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

[April —, 1986]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented is whether the Due Process Clause of the Fourteenth Amendment was violated when a justice of the Alabama Supreme Court declined to recuse himself from participation in that court's consideration of this case.

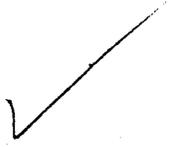
I

This appeal arises out of litigation concerning an insurance policy issued by appellant covering appellees Margaret and Roger Lavoie. In January 1977, Mrs. Lavoie was examined by her physician, Dr. Douglas, because of various ailments. Shortly thereafter, on Dr. Douglas' recommendation, she was admitted to the Mobile Infirmity Hospital, where she remained for 23 days for a battery of tests.

After her discharge, the hospital forwarded the appropriate forms and medical records along with a bill for \$3,028.25 to appellant's local office in Mobile, Alabama. The local office refused to pay the entire amount, tendering payment for only \$1,650.22. The local office also sent a letter to the national office, concluding that the 23-day hospitalization was unnecessary and that "[h]ospital records do not indicate anything to the contrary," even though all the hospital records had not yet been received. At one point, the national office told the local office to continue denying the request for full

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Supreme Court of the United States
Washington, D. C. 20543



CHAMBERS OF
THE CHIEF JUSTICE

April 8, 1986

Re: No. 84-1601, Aetna Life Insurance Co. v. Lavoie

Personal

Dear Lewis:

With regard to Bill's memo of April 7, I think I should drop "substantial" and leave it with "important." If you agree, I'll proceed.

Regards,

Justice Powell

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

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13-4
3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1601

AETNA LIFE INSURANCE CO., APPELLANT v. MARGARET W. LAVOIE AND ROGER J. LAVOIE, SR.

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

[April —, 1986]

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 30, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases Held for Aetna v. Lavoie, No. 84-1601

DVR Nationwide Mutual Ins. Co. v. Clay, No. 84-1942

Resp obtained a judgment against petr for bad faith failure to pay an insurance claim. The jury awarded \$46,165 in compensatory damages and \$1.2 million in punitive damages. The Alabama Supreme Court affirmed the jury's verdict on February 8, 1985. On February 14, 1985, petr discovered that Justice Embry, who joined the majority opinion, had filed two civil actions seeking punitive damages against insurance companies for bad faith in paying first-party insurance claims. On February 22, 1985, petr filed a motion suggesting that the court withdraw its opinion and that the entire court disqualify itself from further consideration of the case because of Justice Embry's interest in its outcome. At the same time, petr for the first time raised several federal constitutional objections to the imposition of the punitive damages award. On April 5, 1985, the court denied petr's motion on authority of its ruling on similar disqualification arguments in the Aetna case, decided one month earlier. Justice Powell, acting as Circuit Justice, granted a stay on May 31, 1985, pending disposition of the petition for certiorari.

In this Court, petr challenges Justice Embry's participation in the decision affirming the punitive damages verdict against it. The nature of Justice Embry's participation in this case is virtually identical to the participation that was condemned in Aetna. Petr's appeal to Alabama's highest court raised unsettled issues involving the tort of bad faith refusal to pay a claim that were sure to arise in Justice Embry's then-pending tort suit. However, in contrast to Aetna, Justice Embry's vote here was not the deciding one. The Court's opinion in Aetna left open the question of whether this factor precludes relief on a disqualification claim, see op. at 13, n.4, while the two concurring opinions expressed their view that it would not. In either case, it appears best to allow the Alabama court wrestle with such issues in the first instance. As in Aetna, petr raised the disqualification issue in the Alabama Supreme Court as promptly as could reasonably be expected.

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1601

AETNA LIFE INSURANCE CO., APPELLANT *v.* MARGARET W. LAVOIE AND ROGER J. LAVOIE, SR.

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

[February —, 1986]

JUSTICE BRENNAN, concurring in the judgment.

I agree with the Court that, given Justice Embry's interest in the outcome of this case, his participation in its disposition violated due process. As the Court notes, resolution of the issues raised in the appeal below enhanced the viability and settlement value of Justice Embry's own lawsuit. Such an interest clearly required recusal under our decisions in *Tumey v. Ohio*, 273 U. S. 510 (1927); *In re Murchison*, 349 U. S. 133 (1955); *Ward v. Village of Monroeville*, 409 U. S. 57 (1972); and *Gibson v. Berryhill*, 411 U. S. 564 (1973). As Justice Black explained in *In re Murchison*, *supra*:

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." 349 U. S., at 136.

I concur only in the judgment because this reason for reversal makes it unnecessary to discuss the circumstances under which the Due Process Clause requires recusal on the basis of bias or prejudice deriving from sources other than an actual stake in the outcome of the case. Although the Court apparently agrees, *ante*, at 7, it nevertheless addresses that question, and I cannot join in this unnecessary exercise.

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

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pp 1,3

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1601

AETNA LIFE INSURANCE CO., APPELLANT v. MARGARET W. LAVOIE AND ROGER J. LAVOIE, SR.

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

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I write separately to set forth my understanding of certain statements in the Court's opinion. *First*, the Court stresses that Justice Embry's interest was "direct, personal, substantial, [and] pecuniary." *Ante*, at 10 (quoting *Ward, supra*, at 60); see also, *ante*, at 12. I do not understand that by this language the Court states that only an interest that satisfies this test will taint the judge's participation as a due

W

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 31, 1986

84-1601 -

Aetna Life Insurance Co. v. Lavoie

Dear Chief,

Please join me.

Sincerely yours,



The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 12, 1986

Re: No. 84-1601-Aetna Life Insurance v. Lavoie

Dear Harry:

Please join me in your opinion concurring in
the judgment.

Sincerely,

T.M.
T.M.

Justice Blackmun

cc: The Conference

FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Blackmun**

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1601

AETNA LIFE INSURANCE CO., APPELLANT v. MARGARET W. LAVOIE AND ROGER J. LAVOIE, SR.

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

[March —, 1986]

JUSTICE BLACKMUN, concurring.

I join the Court's judgment that Justice Embry's participation in this case denied appellant the impartial decisionmaker required by the Due Process Clause. I write separately, however, to stress that the constitutional violation in this case should not depend on the Court's apparent belief that Justice Embry cast the deciding vote—a factual assumption that may be incorrect and, to my mind, should be irrelevant to the Court's analysis. For me, Justice Embry's mere participation in the shared enterprise of appellate decisionmaking—whether or not he ultimately wrote, or even joined, the Alabama Supreme Court's opinion—posed an unacceptable danger of subtly distorting the decisionmaking process.

The Court states that a decision cannot be permitted to stand "when a disqualified judge casts the deciding vote. Here, Justice Embry's vote was decisive in the five-to-four decision and he was the author of the court's opinion." *Ante*, at 13-14. In a footnote, the Court elaborates on the decisiveness of Justice Embry's vote: had he disqualified himself, the decision of the trial court would not have been affirmed by an equally divided court because, under Alabama law, a special justice would have been appointed to break the tie. *Ante*, at 14, n. 6.

The record, however, casts doubt upon the Court's suggestion that Justice Embry provided the most crucial vote. Justice Embry's deposition testimony in the Blue Cross suit

My judgment

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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Blackmun**

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1601

AETNA LIFE INSURANCE CO., APPELLANT v. MARGARET W. LAVOIE AND ROGER J. LAVOIE, SR.

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 13, 1985

84-1601 Aetna Life v. Lavoie

Dear Chief:

In thinking further about this case, I am inclined to think we can and should reach the punitive damages issue.

I think we have jurisdiction even though the punitive damages issue was not raised until Aetna's petition for a rehearing. At Friday's Conference the Court voted to reverse on the due process issue of Judge Embrey's bias, and remand the case to the Alabama Supreme Court. A majority thought it best not to reach either the "10% add on" or the damages issues, leaving those to the Alabama Supreme Court on remand. I would assume, unless our opinion required otherwise, that the Alabama court would simply reaffirm its prior decisions on those two issues.

Reversing on the bias issue will leave our decision as a fact specific one on an issue that rarely arises in either federal or state courts. It will be a decision of slight or no precedential value given the highly unusual circumstances that generated appellant's bias claim. Moreover, as several Justices noted, a federal court should exercise special restraint in reviewing the failure of a state court judge to recuse himself or herself. Of course, this was an egregious example and I agree it was a denial of due process. But, Judge Embrey has now retired, and the suit against Blue Cross, Blue Shield has been settled. It seems needlessly intrusive to address the bias issue when the facts giving rise to that issue have disappeared.

In these circumstances, I would decide here both the "add on" and the punitive damages issues. If we should reverse both of these issues, the bias claim would be irrelevant, and we could save that issue for a case that is not so fact specific.

In sum, this is the way I now view this case.

Sincerely,



The Chief Justice

lfp/ss

cc: The Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 29, 1986

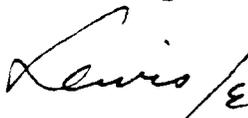
84-1601 Aetna Life Ins. Co. v. Lavoie

Dear Chief:

As you may recall, I believe the most important issue in this case is the validity of punitive damages in a civil suit where compensatory damages are available.

I believe it is appropriate to reach this issue, and accordingly I will write a concurring opinion on that basis. As I have not had an opportunity to read your opinion before leaving for a week (Devitt Award Committee, etc.), I will advise you later whether I can join your opinion as well as the judgment.

Sincerely,



The Chief Justice

cc - The Conference

LFP/vde

03/06

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: MAR 6 1986

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1601

AETNA LIFE INSURANCE CO., APPELLANT v. MARGARET W. LAVOIE AND ROGER J. LAVOIE, SR.

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

[March —, 1986]

JUSTICE POWELL, concurring.

I agree that Justice Embry's participation in this case rendered the Alabama Supreme Court an unconstitutionally biased tribunal, and therefore join the Court's opinion. I write separately because this case presents another issue of far greater importance. I would hold that the Due Process Clause is violated when a civil jury, exercising unguided discretion, imposes punitive damages that are the functional equivalent of a criminal fine. Alternatively, I would find that the award of punitive damages in this case constitutes an "excessive fine" barred by the Eighth and Fourteenth Amendments.

I

After a 23-day stay in the hospital, Margaret Lavoie made a claim for \$3,229.96 on her insurance policy. Aetna paid \$1,579.74 of this claim, but refused to pay the remaining \$1,650.22, on the ground that those expenses were incurred unnecessarily. Mr. and Mrs. Lavoie made repeated attempts to convince Aetna that all of Mrs. Lavoie's expenses had been properly incurred. When Aetna remained unmoved, Mr. and Mrs. Lavoie brought suit in Alabama court for breach of contract and bad faith failure to pay an insurance claim. They sought both compensatory and punitive damages. The evidence at trial supported a finding that Aetna had made its determination on Mrs. Lavoie's claim

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March 17, 1986

PERSONAL

84-1601 Aetna v. Lavoie

Dear Chief:

When I was in Richmond last week, Jo and I had dinner with Lewis III and his wife Mims. I knew that Lewis had been working on a case that involves suits against a company (the name of which I do not recognize or remember) that manufactured a chemical called dioxin. Apparently these suits, like other product liability cases, claim that this product is toxic and has caused serious illnesses. I do not know whether there have been deaths. I believe that dioxin was disposed of in dumps as waste, but am not sure.

Although I had known for some time that Lewis was on a team of perhaps four or five lawyers representing the defendant in suits involving this chemical, I had not focused - until our discussion last week - on the possibility that punitive damages would be an issue in this litigation. Perhaps I should have assumed this, but in any event Lewis - responding to my question - advised me that the plaintiffs in these cases are claiming punitive as well as compensatory damages.

The question I would like to discuss with you is whether, in the circumstances, I should publish my view in the Aetna case that granting punitive damages violates the Due Process Clause.

The arguments that can be made against the announcement of my due process views include the following: Lewis bears my name. Since no one has joined my concurring opinion, it can be argued - I suppose - that I wrote it to assist my former law firm and particularly our son. Of course, this is untrue but the truth rarely catches up with a libel.

The answers of record include the following: My view with respect to punitive damages appears in my dissenting opinion in Silkwood v. Kerr McGee Corp., decided Jan. 11, 1984, an opinion in which you and Harry joined. In Silkwood, I did not explicitly argue that punitive damages

violated the Due Process Clause, as the issue was whether the NRC had exclusive jurisdiction over nuclear safety regulation. I did state, in text and footnotes, that authorizing juries "to impose damages to punish and deter" was unfair, and that "in view of the purpose and effect of punitive damages, the question is whether such damages may be imposed not to compensate . . . but solely to punish and deter."

In addition, you will recall that last Term, I circulated an opinion in Dun & Bradstreet in which I explicitly would have held - had there been a Court for the view - that punitive damages violate the Due Process Clause. In the end, I withdrew that opinion in order to obtain a Court for a more restricted holding.

I have not asked Lewis III whether the dioxin suit was pending as early as when I dissented in Silkwood (January 1984), or, if it was pending, whether Lewis - not a partner at Hunton & Williams - was then working on the case. I can say that if the suit was pending, I had no knowledge of the issues. Nor did I know about the claim in the dioxin suit for punitive damages when I wrote in Dun & Bradstreet, though if I had thought about it, this would have been obvious.

It would never occur to me normally to disqualify simply because my former law firm was engaged in unresolved litigation in which issues were similar to those pending in some case here. I rarely know about Hunton & Williams cases unless one is filed here. And, I assume I have no duty to ask Lewis about pending cases at Hunton & Williams.

Many things can happen in this case. It has not been tried; it could be settled; the plaintiffs may not win; even if they do recover compensatory damages, punitive damages may not be allowed. Of course, we do not know how the case will come out in the trial court, whether it will be appealed (this is in a state, not a federal court), and if appealed to the State Supreme Court, whether the case will present a federal question and ever reach this Court.

I should add one possibly negative fact as to my knowledge. Lewis is the Chairman Elect of the Young Lawyers Division of the Virginia State Bar. He told me - perhaps a month or more ago - that he was planning to have a seminar on punitive damages when he is state Chairman in June 1987, and that he had asked Professor Jeffries of the U.Va. Law School to chair the program. When Lewis' plans as to his program were mentioned, I did not relate them to this Missouri suit.

I suppose I have three options: (i) let my opinion come down (hoping still that you or some other Justice will join me); (ii) withdraw the entire opinion; or (iii) I suppose I could omit the due process argument and rely solely on my second basis, namely, that the \$3,500,000 punitive damages award in this case is so disproportionate as to violate the Eighth Amendment. See Solem v. Helm. I would prefer, of course, to publish my views on the due process issue, but I certainly want to avoid the appearance of impropriety - despite the hard facts to the contrary.

Forgive this long letter. I do need your advice, and I would like the opportunity to discuss this with you at your convenience.

Sincerely,

The Chief Justice

lfp/ss

March 25, 1986

PERSONAL

84-1601 Aetna v. Lavoie

Dear Chief:

Thank you for your response to my letter of March 17, as to whether I should express my views about punitive damages.

In light of your thinking, I have revised my concurring opinion to eliminate the portion of it in which I would hold that the Due Process Clause prohibits the imposition of punitive damages in any amount where compensatory damages may be proved. I enclose a copy of my revised concurring opinion.

As you will see, it is confined strictly to my view that in this particular case the award is so "disproportionate" as to constitute a violation of the Eighth Amendment. The disproportionality is evident when one compares the compensatory damages of only \$1,650.22 with the \$3-1/2 million awarded by the jury and approved by the Alabama Supreme Court. Our cases make clear that punitive damages are "fines" intended to penalize the defendant. The reasoning of my opinion in Solem v. Helm precisely fits this case.

As I cannot foresee the possibility that such a claim may arise in the litigation I mentioned, I am inclined to think that it is entirely appropriate for me to express my Eighth Amendment views.

Incidentally, in your note to me you indicated that we did not have jurisdiction over the amount of the damages. I believe if you take a look at the authorities cited on page 2, it is perfectly clear that we do have jurisdiction and that the issue is properly before us. It also has been fully briefed and orally argued.

As a separate matter, I would appreciate your adding a note to your opinion to the effect that as the Court is reversing the decision below, there is no occasion to reach or consider the punitive damages issue or whether the damages awarded are disproportionate.

Sincerely,

The Chief Justice

lfp/ss

March 31, 1986

84-1601 Aetna v. Lavoie

MEMORANDUM TO THE CONFERENCE:

With considerable reluctance, I have decided to withdraw my separate opinion with respect to the punitive damages award in this case.

My reason for making this decision is that my former law firm is engaged as defense counsel in a products liability case pending in a state court, and Lewis III is one of several lawyers taking part in discovery depositions and other preliminary matters. The case has not gone to trial. In a recent chance conversation with Lewis III on this subject, I was told that, of course, punitive damages are claimed. Normally, I know nothing about cases that my former firm is involved in unless the firm is counsel in a case that comes to this Court.

My interest in the punitive damages issue substantially antedates the above situation. My dissent in Silkwood v. Kerr-McGee addressed the unfairness of civil juries being permitted, without standards or statutory limits, to impose punitive damages. Similarly, last Term in Dun & Bradstreet, I developed the due process argument rather fully, but withdrew that opinion to facilitate getting a plurality opinion.

As this is the second time I have burdened you with reading an opinion not to be published, I thought I owed you this explanation.

L.F.P., Jr.

March 31, 1986

PERSONAL

84-1601 Aetna v. Lavoie

Dear Chief:

It will be helpful, especially for the future, if you would clarify footnote 1 in your Aetna opinion along the lines I suggest below. Presently footnote 1 carries no suggestion that the punitive damages issues in this case are at all serious. Some different phrasing may send a stronger message to litigants, without in any way appearing to pre-judge any claims. My suggested substitution is this:

"In addition to its bias claim, appellant challenges two other aspects of the Alabama Supreme Court's decision. First, appellant contends that the \$3.5 million punitive damages award violates due process, because Alabama law provides no standards or limits to the jury's discretion both in deciding whether to impose such damages, and in fixing the amount. Appellant further argues that the amount of the punitive damages imposed here is so disproportionate to appellees' injury as to constitute an 'excessive fine' barred by the Eighth Amendment. Finally, appellant contends that the retrospective imposition of punitive damages under a 'new' cause of action violates its rights under the Contracts Clause.

Second, appellant argues that Ala. Code §12-22-72 (1975), under which any person who unsuccessfully appeals a money judgment is assessed a 10% penalty, is unconstitutional under the Equal Protection Clause. Appellees contend that we are without jurisdiction to consider any of these arguments because appellant raised them only in its rehearing petition before the Alabama Supreme Court.

Although the questions raised are substantial, we do not reach appellant's constitutional challenges to the punitive damages award in this case or to the 10% penalty imposed when it lost on appeal. Our disposition of the bias issue is sufficient to resolve the case, and we accordingly do not go beyond that disposition."

* * *

Such a note, recognizing that the due process issue is a substantial one, will help to accomplish the objective you and I share of alerting courts and counsel that the punitive damages issue is important, and one the Court may address in a proper case. On the purely personal level, my disappointment in giving up my opinion will be ameliorated to some extent if your footnote is framed along the above lines. I do not see how other Justices could object.

Sincerely,

The Chief Justice

lfp/ss

April 2, 1986

84-1601 Aetna v. Lavoie

Dear Chief:

Your proposed addition to the text of this opinion is excellent, subject to one suggested change.

The language that troubles me is the statement "that the standards governing punitive damage awards in Alabama are so vague as to constitute a violation of the Due Process Clause." This can be read as suggesting that Aetna has raised only an ordinary vagueness challenge to Alabama's definition of "malice" and "bad faith".

I suggest the following as a substitute:

"that the lack of sufficient standards governing punitive damage awards in Alabama violated the Due Process Clause."

The foregoing language is important because it expresses the full scope of the due process argument made in appellant's brief and Erwin Griswold's brief, and that you and I will make when a proper case is here.

Sincerely,

The Chief Justice

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 9, 1986

84-1601 Aetna v. Lavoie

MEMORANDUM TO THE CONFERENCE:

With considerable reluctance, I have decided to withdraw my separate opinion with respect to the punitive damages award in this case.

Although my views as to the invalidity of punitive damages have not changed, in light of the posture of this case - and other reasons - I will await another opportunity to express them. The addition to the text of the Chief's opinion, circulated April 4, is helpful. I would have no objection to omitting the word "substantial", although I think all of us would agree that the issue is "important".

L.F.P.

L.F.P., Jr.

SS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 10, 1986

84-1601 Aetna v. Lavoie

Dear Chief:

Please join me.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 10, 1986

Re: 84-1601 - Aetna Life Insurance Co. v. Lavoie

Dear Chief:

I think I was the sole dissenter in this case at conference, because I was very concerned about what any opinion reversing on the issue of constitutional bias might open up. But I think you have written a very careful and narrow opinion; I agree far more with what you have said than with what Bill Brennan suggests in his separate opinion. Therefore, please join me in the present draft of your opinion.

Sincerely,



The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 29, 1986

Re: 84-1601 - Aetna Life Insurance Co. v.
Lavoie, et al.

Dear Chief:

At the conclusion of your next draft opinion for the Court, please indicate that I took no part in the consideration or decision of this case.

Respectfully,



The Chief Justice

Copies to the Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 29, 1986

No. 84-1601 Aetna Life Insurance Co. v.
Lavoie

Dear Chief,

Please join me.

Sincerely,

The Chief Justice

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