THE LOEWEN GROUP V. UNITED STATES: Punitive Damage Awards as Expropriation Pursuant to the North American Free Trade Agreement

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> The *O'Keefe* verdict represents to me everything that is wrong with the court system and stands as a vivid example of the continuing need for tort reform . . . . It appears to represent a denial of justice that I can assure you is otherwise contrary to the public policies of the great state of Mississippi.[1]
>
> [The Defendants were] rich, dumb Canadian^] . . . who thought [they] could come down and pull the wool over the eyes of a good ole Mississippi boy. It didn't work.[2]

I. INTRODUCTION

On November 2, 1995, a civil jury constituted in the First Circuit Court of Hinds County, Mississippi returned an award of punitive damages in the amount of $400 million in favor of Jeremiah O'Keefe, Sr., his son and their related business entities (O'Keefe) and against The Loewen Group, Inc. and its related entities (Loewen) in the case of *O 'Keefe* v. *The Loewen Group, Inc. (O 'Keefe* Litigation).[3] This punitive damages award followed an award of $100 million in compensatory damages entered by the jury on November 1, 1995.[4] The compensatory damages award covered losses allegedly sustained by O'Keefe arising from breaches of three contracts entered in 1974, 1979 and 1987 between Gulf National Life Insurance Company, a Mississippi funeral insurance company owned by O'Keefe, and Wright & Ferguson Funeral Home, Inc., a funeral home owned by Loewen.[5] The compensatory award also covered losses allegedly sustained by O'Keefe arising

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[1] Letter from Kirk Fordice, Governor of Mississippi, to International Centre for Settlement of Investment Disputes 1-2 (Oct. 30,1998).

[2] Nina Bernstein, *Brash Funeral Chain Meets Its Match in the Old South,* N. Y. TIMES, Jan. 27, 1996, at 6 (quoting Glenn Millen, jury foreman, O'Keefe v. The Loewen Group, Inc., No. 91-67-423 (Cir. Ct., Hinds County, Miss. 1991)).

[3] *See* Letter from Glenn Millen, Jury Foreman, to James Graves, Judge, Circuit Court for the First Judicial District of Hinds County, Mississippi 1 (Nov. 2, 1995) (on file with the author).

[4] *See* Interrogatories to the Jury at 1-9, O'Keefe v. The Loewen Group, No. 91-67-423 (Cir. Ct., Hinds County, Miss. 1991) [hereinafter *Interrogatories to the Jury],*

[5] *See id.* at 1-5.

from the purported breach of a contract by Loewen in April 1992,[6] fraud and violations of Mississippi's antitrust laws.[7]

Confronted with this massive verdict, a state appellate bond requirement of 125% of the total judgment in order to obtain a stay of execution pending appeal[8] and the financial inability to satisfy either, Loewen filed motions for a new trial, remittitur, reduction of the punitive damages award and reduction of the appeal bond requirement to $125 million.[9] The trial court denied all relief requested by Loewen including its request for stay of enforcement of the judgment pending appeal.[10] This denial was affirmed by the Mississippi Supreme Court on January 24, 1996 [11] xhe Mississippi Supreme Court ordered Loewen to post the full $625 million bond within seven days in order to obtain a stay of execution pending an appeal.[12] Faced with imminent financial ruin, Loewen resolved the *O'Keefe* Litigation on January 29, 1996 through a structured settlement agreement valued at $175 million.[13] Despite the substantial discounting of the verdict in the settlement agreement, its amount was thirty to fifty times greater than the total value of the companies at issue in the underlying commercial disputes.[14]

In the era of the pre-global economy, the *O 'Keefe* Litigation would have ended with the execution of the settlement agreement and its subsequent performance. However, on October 30, 1998, Loewen initiated an arbitration proceeding against the United States through the filing of a claim with the International Centre for the Settlement of Investment Disputes (ICSID).[15] In their

[6] *See id.* at 5-7.

[7] *See id.* at 7-9.

[8] *See* Miss. R. App. P. 8(a).

[9] *See* Motion for Judgment Notwithstanding the Verdict and/or, in the Alternative, for a New Trial and/or, in the Alternative, for a Remittitur, O'Keefe v. The Loewen Group, Inc., No. 91-67-423 (Cir. Ct., Hinds County, Miss. 1991) [hereinafter *Motion for New Trial*]; *see also* Motion for Stay of Enforcement of Final Judgment Pending Appeal, O'Keefe v. The Loewen Group, Inc., No. 91-67-423 (Cir. Ct., Hinds County, Miss. 1991); Motion to Vacate Judgment and/or Reduce Award of Punitive Damages, O'Keefe v. The Loewen Group, Inc., No. 91-67-423 (Cir. Ct., Hinds County, Miss. 1991).

[10] *See* O'Keefe v. The Loewen Group, Inc., No. 91-67-423 (Cir. Ct., Hinds County, Miss., Nov. 29, 1995) (order denying motion for stay of enforcement of final judgment).

[11] *See* The Loewen Group, Inc. v. O'Keefe, No. 95-M-01216 (Miss. Jan. 24, 1996) (order denying motion for stay of execution of judgment pending appeal).

[12] *See id.* at 2.

[13] *See* Notice of Claim * 127, The Loewen Group, Inc. v. United States, International Centre for the Settlement of Investment Disputes, No. ARB(AF)/98/3 (1998) [hereinafter *Notice of Claim],*

[14] *See id.*

[15] *See id.* The claimants were identified as The Loewen Group, Inc. and Raymond L. Loewen. *See id.* 1H 15-16. The Loewen Group, Inc. was identified as a publicly traded corporation organized under the laws of British Columbia, Canada. *See id.* H 15. The principal operating subsidiary of The Loewen Group, Inc. in the United States is Loewen Group International, Inc., a corporation organized under the laws of the state of Delaware. *See id.* The Loewen Group, Inc. owns 85% of Loewen Group International, Inc. and directly controls its affairs. *See id.* In turn, Loewen Group International, Inc. owns and controls various lower- lier U.S. subsidiaries. *See id.* Raymond L. Loewen was identified in the Notice of Claim as a Canadian

claim, Loewen contended that the ultimate result in the *O'Keefe* Litigation constituted a violation by the United States of its obligations with respect to the protection of international investments pursuant to the North American Free Trade Agreement (NAFTA).[16]

The initiation of proceedings against the United States by Loewen provoked a firestorm of criticism. By raising the question of the extent to which domestic civil judicial proceedings are subject to re-examination by international bodies such as ICSID, Loewen's Notice of Claim provided fresh ammunition to critics of comprehensive international trade pacts, who have condemned NAFTA as "sacrificing local political control on the altar of unbridled capitalism."[17] Critics further charged that NAFTA's investment provisions invite abuse by defining the rights of foreign investors too broadly and providing multinational firms with a legal weapon traditionally reserved for governments.[18] Loewen's claims were further decried as providing foreign investors with an unfair advantage over domestic corporations, who lack standing to assert claims arising pursuant to NAFTA.[19] Furthermore, resort to international review of state jury verdicts provided foreign investors with a potent "back door" challenge to the American legal system, potentially resulting in immunity from liability in a wide variety of other types of civil cases.[20] Such a result was uniformly condemned as a subversion of the U.S.

national serving as co-Chairman of the Board of The Loewen Group, Inc. and as a Director of Loewen Group International, Inc. *See id.* H 16. Mr. Loewen served as the Chairman and Chief Executive Officer of both companies at the time the claims set forth in the *O 'Keefe* Litigation arose. *See id.* The claimants will be collectively identified as "Loewen" throughout this article unless otherwise noted.

[16] *See generally,* North American Free Trade Agreement, Dec. 8, 1993, 107 Stat. 2057, 32 I.L.M. 289, 1993 WL 574441 [hereinafter NAFTA],

[17] Evelyn Iritani, *Trade Pacts Accused of Subverting U.S. Policies,* L.A TIMES, Feb. 28, 1999, at Al. Heidi Heitkamp, the attorney general of North Dakota, characterized NAFTA and other comprehensive multilateral trade agreements as presenting "the greatest challenge to state sovereignty that [states' attorney generals] have." *Id.* at A32. Michael Allred, one of the plaintiffs' attorneys in the *O 'Keefe* Litigation, condemned the claims asserted by Loewen before ICSID as an attempt to "coerce the United States government [into] surrendering] its sovereignty over a matter of fraud and tort and predatory and illegal practices within its own boundaries." *Id.* at A33. Lori Wallach, the Director of Public Citizen's Global Trade Watch, noted that Loewen's claims "underscored the critics' insistence that NAFTA was not so much about trade as about creating powerful new rights for corporations and investors at the expense of the public interest and democratic governance." Jane Bussey, *NAFTA Suit Could Cost U.S. Taxpayers,* MIAMI HERALD, Nov. 25, 1998, at 1C.

[18] *See* Iritani, *supra* note 17, at Al.

[19] *See* NAFTA's Birthday Bombshell: Corporate Predator Found Liable for Malicious and Fraudulent Business Practices in Mississippi Uses NAFTA to Attack Legal System, PROGRESSIVE NEWSWIRE (Common Dreams, Washington, D C.), Nov. 24, 1998, at 2 [hereinafter *NAFTA's Birthday Bombshell].*

[20] See William Glaberson, *NAFTA Invoked to Challenge Court Award,* N.Y. TIMES, Jan. 28, 1999, at C6; *see also* Canadian Corporation Uses NAFTA to Challenge State Civil Verdict; Claims U.S. Legal System Violated Its Rights, CIVIL JUSTICE (Public Citizen, Washington, D.C.), 1999, at 1-2 [hereinafter *Canadian Corporation Uses NAFTA],*

civil jury system.[21] Loewen's attempt to expand NAFTA's investor-state arbitration provisions beyond instances where governments deprive foreign investors of assets by direct action without compensation to measures having the indirect effect of expropriating foreign-owned assets was also condemned.[22] Finally, critics claimed that, if successful, Loewen's claims "could set a precedent that would embolden any number of other North American corporations to use NAFTA to challenge laws, policies or jury verdicts they find objectionable."[23] Federal and state laws providing for the award of punitive damages and other civil penalties were deemed particularly vulnerable to attack pursuant to NAFTA.[2,1] These concerns were exacerbated by the absence of public notice[25] and state and private participation in the proceedings before ICSID,[26] the confidentiality of the proceedings[27] and the refusal by representatives of the U.S. Department of Justice and Office of the U.S. Trade Representative to address the issues raised by Loewen's claims on the record.[28]

This article examines the *O'Keefe* Litigation and resultant arbitration proceeding pending before ICSID. The article initially examines the factual background to the *O 'Keefe* Litigation and subsequent progress of the case through

[21] *See NAFTA's Birthday Bombshell, supra* note 19, at 1-2; *see also Canadian Corporation Uses NAFTA, supra* note 20, at 1-2. Public Citizen has condemned Loewen's use of NAFTA to attack the results of the *O 'Keefe* Litigation as a threat to "the very core of our nation's civil justice system." Canadian Corporation Found Liable in Mississippi Courts Uses NAFTA to Claim Legal System Violated Its Rights, GLOBAL TRADE WATCH (Public Citizen, Washington, D.C.), 1999, at 3 [hereinafter *Canadian Corporation Found Liable],* Joan Claybrook, the President of Public Citizen, characterized Loewen's challenge as demonstrative of "how global corporate predators, whether U.S., Canadian or Mexican, can use NAFTA as a giant loophole to evade the rule of law and our system of jurisprudence." *NAFTA's Birthday Bombshell, supra* note 19, at 1. Mark S. Mandell, the President of the Association of Trial Lawyers of America, criticized Loewen's claims as "wrong and harmful" on the basis that "it substitutes for our judicial system a confidential arbitration panel that's not open to public scrutiny." Glaberson, *supra* note 20, at C6.

[22] *See* Corporations Use Trade Pact to Sue Countries, ECONOMIC JUSTICE NOW (U.S. Network for Global Economic Justice, Washington, D.C.), Sept. 2, 1998, at 2.

[23] *NAFTA's Birthday Bombshell, supra* note 19, at 2. According to Public Citizen, federal and state laws and jury verdicts in such areas as products liability, employment discrimination and consumer fraud would be subject to challenge pursuant to NAFTA in the event that Loewen is successful in prosecuting its claims against the United States. *See Canadian Corporation Found Liable, supra* note 21, at 3-4; *see also Canadian Corporation Uses NAFTA, supra* note 20, at 2.

[24] *See Canadian Corporation Found Liable, supra* note 21, at 4. Global Trade Watch concluded that "[i]f Loewen is successful in attacking the punitive damages award as illegal under NAFTA, it could mean the end of punitive damages against corporations covered by the trade deal." *Id.*

[25] *See* The Importance and Implications of Loewen's NAFTA Suit, GLOBAL TRADE WATCH (Public Citizen, Washington, D.C.), 1999, at 2 [hereinafter *Importance and Implications]; see also NAFTA's Birthday Bombshell, supra* note 19, at 2.

[26] *See Canadian Corporation Uses NAFTA, supra* note 20, at 2.

[27] *See NAFTA's Birthday Bombshell, supra* note 19, at 2; *see also* Glaberson, *supra* note 20, at C6.

[28] *See* Bussey, *supra* note 17, at 1C; *see also* Glaberson, *supra* note 20, at C6; Iritani, *supra* note 17, at Al.

the Mississippi judicial system. Specific emphases are placed upon instances of discrimination and misconduct that allegedly tainted the trial, the denial of the ability of Loewen to avail itself of the right to meaningful appellate review of the *O 'Keefe* verdict and the resultant settlement agreement. Part II concludes with an examination of the factual and legal allegations underlying Loewen's Notice of Claim. Particular emphasis is placed upon the allegation that the *O 'Keefe* Litigation resulted in an expropriation of Loewen's U.S. investments in contravention of applicable provisions of NAFTA. Part III of the article applies American, Canadian and international standards with respect to recognition and enforcement of punitive damage awards to the verdict in the *O 'Keefe* Litigation. The article concludes that the *O'Keefe* verdict violates these standards as well as those set forth in NAFTA with respect to the protection of international investments.

IL The Historical Background To *THE LOEWEN GROUP V UNITED STATES*

A. *Introduction*

Although comprehensive histories of NAFTA and the *O'Keefe* Litigation are beyond the scope of this article, a review of the factual background underlying these topics is necessary in order to place the pending ICSID arbitration between Loewen and the United States in its proper context. The United States and Canada maintain the largest bilateral trading relationship in the world.[29] Free trade between the countries dates back to 1854 with the conclusion of the Elgin-Marcy Treaty, which provided for free trade covering agriculture, natural resources and other primary products between the United States and the Canadian provinces.[30] Seventy percent of trade between the two nations was already duty-free by the time of implementation of the Canada-United States Free Trade Area Agreement in 1989.[31] Subsequent to the implementation of NAFTA in 1994, bilateral trade between the two nations blossomed to over $300 billion annually, reaching $322 billion in 199 8 [32] This constituted a 125% growth in bilateral trade since 1993 and a 425%

[29] *See* RALPH H. FOLSOM ET AL., HANDBOOK OF NAFTA DISPUTE SETTLEMENT § B.l (1998); *see also* NAFTA COMMENTARY, CANADA: ECONOMIC AND TRADE PRACTICES 2 (James R. Holbein & Donald J. Musch eds., 1998).

[30] *See* FOLSOM, *supra* note 29, § B. 1. However, the history of free trade between the United States and Canada is riddled with prolonged gaps. *See id.* The Elgin-Marcy Treaty was terminated in 1866 and was followed by protectionist trade policies on both sides of the border until the late nineteenth century. *See id.* Subsequent Canadian attempts to negotiate bilateral trade agreements with the United States in 1891, 1896 and 1911 proved unsuccessful. *See id.* Only with the arrival of the General Agreement on Tariffs and Trade did bilateral trade between the two countries truly begin to flourish. *See id.*

31*See id.* § B.l.

[32] *See id.* § B.l; *see also* Holbein & Musch, *supra* note 29, at 2; Barry Brown, *U.S.-Canadian Trade Pact Delivering on Its Promise,* S.F. CHRON., Aug. 13, 1999, at A14. By comparison, the amount of

growth in such trade since 1980.[33] In excess of eighty percent of Canada's merchandise exports currently flow to the United States, and U.S. exports to Canada have increased by over thirty percent since NAFTA's implementation.[34] Leading trade sectors include automobiles, automotive parts, textiles and industrial equipment and machinery.[35]

Investment between the two nations also flourished during this period of time. Canada and the United States account for the largest two-way flow of foreign direct investment in the world.[36] Foreign direct investment in Canada has grown steadily since the liberalization of restrictions upon foreign investment in the Investment Canada Act adopted in 1985.[37] Foreign direct investment exceeds $125 billion, of which $84 billion is owned by U.S. business interests.[38] Approximately forty percent of the assets of Canadian manufacturing firms are foreign-owned with seventy-five percent of such assets belonging to U.S. business interests.[39] By contrast, foreign assets in the United States grew rapidly from $54.5 billion in 1979 to over $410 billion by the early 1990s.[40] Although Canadian investments in the United States remain far behind those of Great Britain and Japan,[41] such investments grew from $7.2 billion in 1979 to $30 billion by the early 1990s.[42] Sixty-six percent of Canadian investment in the United States is in manufacturing facilities and wholesale and retail trade, and one-quarter of such investment is in the finance and insurance industries.[43] Furthermore, several large Canadian companies, such as Seagram, Variety and Thompson, have moved their headquarters to the United States in recent years.[44]

bilateral trade between the United States and Canada is more than three times the amount of such trade between the United States and Japan. *See* FOLSOM, *supra* note 29, § B. 1.

[33] *See* Brown, *supra* note 32, at A14. Bilateral trade between the United States and Canada totaled $180 billion in 1993 and $61 billion in 1980. *See id.*

[34] *See* Holbein & Musch, *supra* note 29, at 2.

[35] *See id.; see also* FOLSOM, *supra* note 29, § B.l.

[36] *See* RALPH H. FOLSOM & W. DAVIS FOLSOM, UNDERSTANDING NAFTA AND ITS INTERNATIONAL BUSINESS IMPLICATIONS § 11.01 (1996).

[37] *See id.* § 11.03. For a complete discussion of the provisions and implications of the Investment Canada Act, *see* Timothy Kennish, *NAFTA and Investment - A Canadian Perspective*, *in* NAFTA AND INVESTMENT, § 2.2 (Seymour J. Rubin & Dean C. Alexander eds., 1995).

[38] *See* Holbein & Musch, *supra* note 29, at 2.

[39] *See id.*

[40] *See* FOLSOM & FOLSOM, *supra* note 36, § 1 l.03[C].

[41] *See id.* In the early 1990s, foreign direct investment by Great Britain in the United States exceeded $106 billion, which equaled 26% of all foreign direct investment in the United States. *See id.* Foreign direct investment in the United States by Japan totaled in excess of $86 billion, which equaled 21 % of all foreign direct investment in the United States. *See id.*

[42] *See id.*

[43] *See id.*

[44] *See id.; see also The Spreading Maple Leaf,* ECONOMIST, Jan. 15, 1994, at 68-9.

B. *The North American Free Trade Agreement*

Effective on January 1, 1994, the North American Free Trade Agreement serves several different purposes.[45] NAFTA's Preamble alone identifies fourteen separate purposes to be accomplished by the creation of a free trade area between the United States, Canada and Mexico.[46] These purposes are further elaborated in six objectives identified in Article 102. Article 102 specifically provides that the objectives of NAFTA are to (1) eliminate tariff and non-tariff barriers to trade; (2) promote fair competition; (3) increase investment opportunities; (4) provide protection for intellectual property rights; (5) create procedures for effective implementation and enforcement of the Agreement; and (6) establish a forum for further enhancement and expansion of the benefits provided by the Agreement.[47] Article 102(2) provides that the specific provisions of the Agreement are to be interpreted and applied "in light of these objectives" and "in accordance with applicable rules of international law."[48] These purposes and objectives and their implementation within the specific provisions of the Agreement are binding upon the federal governments of the respective parties as well as their subnational components.[49]

The rules governing the treatment and protection of foreign investments made by the parties or their nationals within each other's respective territories are set forth in Chapter Eleven of the Agreement. Chapter Eleven has three primary objectives. These objectives are: "(1) to establish a secure investment environment through the elaboration of clear rules of fair treatment of foreign investment and investors; (2) to remove barriers to investment by eliminating or liberalizing

[45] *See generally,* NAFTA, *supra* note 16.

[46] *See id.* pmbl. NAFTA's purposes as identified in the Preamble are to:

> Strengthen the special bonds of friendship and cooperation among [the] nations; contribute to the harmonious development and expansion of world trade and provide a catalyst to broader international cooperation; create an expanded and secure market for the goods and services produced in [the member states'] territories; reduce distortions to trade; establish clear and mutually advantageous rules governing [the member states'] trade; ensure a predictable commercial framework for business planning and investment; build on [the member states'] respective rights and obligations under the General Agreement on Tariffs and Trade and other multilateral and bilateral instruments of cooperation; enhance the competitiveness of [the member states'] firms in the global marketplace; foster creativity and innovation, and promote trade in goods and services that are the subject of intellectual property rights; create new employment opportunities and improve working conditions and living standards in [the member states'] respective territories; undertake each of the preceding in a manner consistent with environmental protection and conservation; preserve [the member states'] flexibility to safeguard the public welfare; promote sustainable development; strengthen the development and enforcement of environmental laws and regulations; and protect, enhance and enforce basic workers' rights.

Id. (capitalization omitted).

[47] *See id.* ch. 1, art. 102(lXa-f)

[48] *Id.* ch. 1, art. 102(2).

[49] *See id.* ch. 2, art. 201(2).

existing restrictions; and (3) to provide an effective means for the resolution of disputes between an investor and the host government."[50] These purposes are accomplished through the provision of five basic protections for NAFTA investors and their investments. These basic protections are: (1) nondiscriminatory treatment; (2) freedom from performance requirements; (3) the right to freely transfer funds related to an investment; (4) expropriation only in conformity with international law; and (5) to right to international arbitration to seek redress for purported violations of the Agreement's protections.[51] The protections provided to foreign investments by NAFTA are broader than any bilateral or multilateral instrument to which the United States is a party and establish a standard for future hemispheric and global investment treaties.[52]

Chapter Eleven applies to "measures adopted or maintained by a Party relating to: (a) investors of another Party; (b) investments of investors of another Party in the territory of the Party; and (c) with respect to Articles 1106 (performance requirements) and 1114 (environmental measures), all investments in the territory of the Party."[53] The term "investment" embraces virtually all forms of participation in a business enterprise including majority and minority ownership interests, income and profit-sharing agreements, tangible and intangible property (including goodwill and intellectual property rights) and real estate.[54] Government

[50] Daniel M. Price & P. Bryan Christy III, *An Overview of the NAFTA Investment Chapter, in* THE NORTH AMERICAN FREE TRADE AGREEMENT: A NEW FRONTIER IN INTERNATIONAL TRADE AND INVESTMENT IN THE AMERICAS 172 (Judith H. Bello et al. eds., 1994).

[51] *See* U.S. Gen. accounting Office, Rep. No. GAO/GGD-93-137B, North American Free Trade Agreement - Assessment of Major Issues, vol. 2, at 18 (1993) [hereinafter *GAO REPORT]*, From the standpoint of the United States, these five basic protections incorporate the protections granted to foreign investment by the Canada-United States Free Trade Agreement and the prototypical bilateral investment treaty utilized by the United States. *See id.* at 19. The bilateral investment treaty utilized by the United States provides for "(1) nondiscriminatory treatment; (2) elimination of performance requirements; (3) unrestricted 'transfers,' including capital and profit repatriation; (4) expropriation protection based on international legal standards, including compensation equivalent to the 'fair market value' of the investment; and (5) binding third-party arbitration to resolve disputes." *Id.* at 19 n. 11.

[52] *See* Price & Christy, *supra* note SO, at 182.

[53] NAFTA, *supra* note 16, ch. 11, art. 1101(1). An "investor of a Party" is defined as "a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment." *Id.* art. 1139. An "investment of an investor of a Party" is defined as "an investment owned or controlled directly or indirectly by an investor of such Party." *Id.*

[54] Article 1139 defines the term "investment" to mean:

> (a) an enterprise; (b) an equity security of an enterprise; (c) a debt security of an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a state enterprise; (d) a loan to an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a state enterprise; (e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise; (f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d); (g) real estate or other property, tangible or

procurement and financial services are excluded from NAFTA's investment provisions.[55] The investment provisions are also subject to general exceptions for national security, taxation, balance of payments and Canadian "cultural industries."[56]

Chapter Eleven is divided into two subchapters. Subchapter A of the Agreement, encompassing Articles 1101 through 1114, sets forth the substantive rights of investors and the duties of the parties with respect to investment. There are six basic protections afforded to investors and investments pursuant to Subchapter A. Article 1102 requires that each party accord to investors of another party and investments of investors of another party "treatment no less favorable than that it accords, in like circumstances, to its own investors [and investments of its own investors] with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."[57] This national treatment requirement extends to sub-national states and provinces of the parties.[58] Article 1103 requires that each party accord to investors of another party and investments of investors of another party "treatment no less favorable than it accords, in like circumstances, to investors [and investments of investors] of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."[59] Investors of another party and their investments are entitled to the most favorable of the treatments required by Articles 1102 and 1103.[60] In any event, Article 1105 requires that each party treat investments of investors of another party "in accordance with international law, including fair and equitable treatment and full protection and security."[61] Article 1106 eliminates performance requirements

> intangible, acquired in the expectation or used for the purposes of economic benefit or other business purposes; and (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor's property in the territory of a Party, including turnkey or construction contracts, or concessions, or (ii) contracts where renumeration depends substantially on the production, revenues or profits of an enterprise; but investment does not mean, (i) claims to money that arise solely from (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enteiprise in the territory of another Party, or (ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or (j) any other claims to money, that do not involve the kinds of interests set out in subparagraphs (a) through (h).

NAFTA, *supra* note 16, art. 1139.

[55] *See GAO REPORT*, *supra* note 51, at 20.

[56] *See id.* at 20-21. The cultural industries exception does not apply to obligations between the United States and Mexico. *See id.* at 21.

[57] *See* NAFTA *supra* note 16, arts. 1102 (l)-(2). Government subsidies payable exclusively to domestic enterprises are excluded from the national treatment provisions of Article 1102. *See GAO REPORT*, *supra* note 51, at 21.

[58] *See* NAFTA, *supra* note 16, art. 1102(3).

[59] *Id.* art. 1103 (1) & (2).

[60] *See id.* art. 1104.

[61] *Id.* art. 1105(1).

for foreign investors and their investments operating in the territory of a party,[62] and Article 1109 eliminates restrictions upon the transfer of investment-related funds into and out of a party.[63]

Most importantly for purposes of this article, Chapter Eleven also protects investors in the event of expropriation or nationalization of property. Article 1110(1) prohibits the parties from "directly or indirectly nationalizing] or expropriating] an investment of an investor of another Party in its territory or tak[ing] a measure tantamount to nationalization or expropriation of such an investment" unless the party is able to satisfy four separate criteria.[64] These criteria are that the taking must: (1) be for a public purpose; (2) occur on a non- discriminatory basis; (3) occur in accordance with due process of law and the requirements of Article 1105(1) of equity, fairness, full protection and security as provided by international law; and (4) occur only upon payment of compensation.[65]

[62] *Id.* art. 1106. Article 1106(1) lists seven performance requirements that may not be imposed with respect to the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a party or of a non-party in its territory. *See id.* art. 1106(1). The prohibited requirements include: (1) exportation of a given level or percentage of goods or services; (2) achievement of a specified level of domestic content; (3) purchase from or giving preference to a local supplier; (4) restrictions upon imports to a certain volume or value of exports or to an amount of foreign exchange inflows; (5) restrictions upon domestic sales to a certain volume or value of exports or to an amount of foreign exchange earnings; (6) transfers of technology, production processes or other proprietary knowledge to a domestic entity; and (7) acting as an exclusive supplier of the goods or services it produces to a specific region or world market. *See id.* Furthermore, parties may not utilize the first four listed performance measures as a condition to receive an advantage such as a tax concession or other investment incentive. *See id.* art. 1106(3). However, parties may condition receipt of such advantages on "compliance with a requirement to locate production, provide a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory." *Id.* art. 1106(4). Parties are also permitted to impose performance requirements other than those prohibited by Articles 1106(1) and (3). *See id.* art. 1106(5). Finally, provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, parties are free to adopt and maintain measures "necessary to secure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; . . . necessary to protect human, animal or plant life or health; ... or necessary for the conservation of living or non-living exhaustible natural resources." *Id.* art. 1106(6).

[63] *See id.* art. 1109. The prohibition upon transfer restrictions contained within Article 1109 applies to profits, dividends, interest, capital gains, royalties, management fees, returns in kind and other amounts derived from investments. *See id.* art. 1109(1). Proceeds obtained from the sale or liquidation of all or any part of an investment, payments under a contract entered into by an investor or investment and payments arising out of an investment dispute are also subject to the prohibition upon transfer restrictions. *See id.* Furthermore, the parties must permit such transfers to be made in freely convertible foreign currency at the market rate of exchange prevailing on the date of the transfer. *See id.* art. 1109(2). However, these prohibitions are subject to NAFTA's balance of payment exception as well as restrictions applied in an equitable, non-discriminatory and good faith manner with respect to bankruptcy, insolvency and other proceedings for the protection of creditors, securities laws, criminal or penal offenses, reports of transfers of currency and other monetary instruments or measures designed to ensure satisfaction of judgments. *See id.* art. 1109(4).

[64] Id. art. 1110(1).

[65] *See id.* art. 1110(1).

Adequate compensation is defined in Article 1110(2) as the equivalent of "fair market value of the expropriated investment immediately before the expropriation took place . . . and shall not reflect any change in value occurring because the intended expropriation had become known earlier."[66] Criteria that may be utilized to calculate fair market value include going concern value, asset value (including the declared tax value of tangible property) and other appropriate measures of value.[67] Compensation reflecting the fair market value of the expropriated investment must be paid without delay upon calculation and must be fully transferable and realizable.[68] If fair market value is to be paid in a G7 currency, such compensation must also include interest at a "commercially reasonable rate" from the date of expropriation to the date of actual payment.[69]

Article 1110 does not define what constitutes "a measure tantamount to nationalization or expropriation."[70] Article 1110(8) does provide that a non- discriminatory measure of general application "shall not be considered a measure tantamount to an expropriation of a debt security or loan . . . solely on the ground that the measure imposes costs on the debtor that cause it to default on the debt."[71] Article 1110(7) exempts the creation, licensing, limitation and revocation of intellectual property rights from the operation of Article 1110(1) in the event that such actions occur in a manner consist with Chapter Seventeen of the Agreement relating to intellectual property.[72] What is clear is that Article 1110's expropriation and compensation provisions enjoyed full support among representatives of the

[66] *Id.* art. 1110(2).

[67] *See id.*

[68] *See id.* arts. 1110(3) & (6). "Fully realizable and transferable compensation" prohibits a party from compensating an injured investor in local currency and then preventing that investor from converting the local currency into the currency of another country before removing it from the territory of the expropriating party. *See GAOREPORT*, *supra* note 51, at 23 al5.

[69] *See* NAFTA, *supra* note 16, art. 1110(4). By contrast, if a party elects to pay compensation in a currency other than that of a G7 country, the amount payable to the injured investor, if converted into a G7 currency at the market rate of exchange prevailing on the date of payment, shall be no less than:

> if the amount of compensation owed on the date of expropriation had been converted into that G7 currency at the market rate of exchange prevailing on that date, and interest had accrued at a commercially reasonable rate for that G7 currency from the date of expropriation until the date of payment.

Id. art. 1110(5). Article 1139 defines "G7 Currency" as "the currency of Canada, France, Germany, Italy, Japan, the United Kingdom of Great Britain and Northern Ireland or the United States." *Id.* art. 1139.

[70] *Id.* art. 1110(1); *see also* Price & Christy, *supra* note 50, at 175. One prescient commentator noted at the time of the implementation of NAFTA that "[t]his is an area which is certain to receive attention from future NAFTA dispute settlement panels as acts which are not considered to constitute expropriation by the host state, but which impair the benefits of NAFTA investors, may be subject to this NAFTA obligation." BARRY APPLETON, A CONCISE USER'S GUIDE TO THE NORTH AMERICAN FREE TRADE AGREEMENT 86 (1994).

[71] NAFTA, *supra* note 16, art. 1110(8).

[72] *See id.* art. 1110(7).

United States, Canada and Mexico during NAFTA negotiations.[73] Furthermore, there is no exception to Article 1110 granted to national, state, provincial or local governments, and all levels of government are bound by Article 1110's commitment.

Subchapter B establishes procedures applicable to the settlement of investor disputes. The purpose of Subchapter B is to establish "a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal."[74] The investor dispute resolution procedures established by Subchapter B differ from other dispute resolution provisions contained within NAFTA by creating a process that may "be initiated by the investor, without the cooperation or any involvement of its own government, using existing legal procedures for the resolution of international commercial disputes."[75] Pursuant to Articles 1116 and 1117, an investor of a party, on its own behalf,[76] or on behalf of an enterprise that the investor owns or controls,[77] may initiate a claim alleging that the investor or the enterprise has suffered injury as a result of a breach by the host state of a provision of NAFTA.[78] Private parties are not required to exhaust remedies available to them pursuant to the laws of the host state prior to initiating a claim pursuant to Chapter Eleven's investor dispute resolution mechanism.[79]

[73] *See* LESLIE A. GLICK, UNDERSTANDING THE NORTH AMERICAN FREE TRADE AGREEMENT 25 (2d ed. 1994).

[74] NAFTA, *supra* note 16, art. 1115.

[75] Kennish, *supra* note 37, § 4.2.

[76] *See* NAFTA, *supra* note 16, art. 1116(1). Article 1116(1) provides, in part, that "[a]n investor of a Party may submit to arbitration under this section a claim that another Party has breached an obligation under . .. Section A .. . and that the investor has incurred loss or damage by reason of, or arising out of, that breach." *Id.*

[77] *See id.* art. 1117(1). Article 1117(1) provides, in part, that:

> [a]n investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under . . . Section A . . . and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

Id. Commentators have noted the importance of this provision in permitting investors to maintain actions against host states where the alleged injury is indirect. *See* Kennish, *supra* note 37, § 4.3 (noting that "the importance of this provision is that it permits an investor to assert a claim [on behalf of an entity] . . . where the only injury has been sustained by the entity and the investor has himself not been independently or directly injured.") *See also* Price & Christy, *supra* note 50, at 177 (noting that Article 1117 "is intended to . . . [permit] the investor to assert a claim for injury to its investment even where the investor itself does not suffer loss or damage independent from that of the injury to its investment.")

[78] An investor making a claim pursuant to Subchapter B of NAFTA is referred to as a "disputing investor." NAFTA, *supra* note 16, art. 1139. The state against which a claim has been made is referred to as a "disputing Party." *Id.*

[79] *See* Kennish, *supra* note 37, §§ 4.2, 4.3.

Actions of national, state, provincial and local governments in contravention of Chapter Eleven may form the basis of a valid claim asserted by an injured investor pursuant to NAFTA's investor dispute resolution procedures.[80] The national governments of the parties are charged with responsibility for assuring implementation of NAFTA's provisions and are accountable in the event that they are unable to secure state or provincial compliance with such provisions. Article 105 provides that "[t]he Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance . . . by state and provincial governments."[81] Article 105 codifies an established principle of international law that holds national governments responsible for acts of their component states, even where existing law does not provide them with the means of compelling such states to fulfill existing international obligations.[82] Article 105 also codifies the long-standing recognition by the United States that it is responsible for the misconduct of its states[83] as well as its understanding with respect to the liability of national governments for violations of NAFTA by their component states and provinces.[84] Article 1105(1) also requires that the parties provide "full protection and security" to investments of investors of other parties.[85] This provision codifies another established principle of international law holding states responsible for their failure to exercise due care to prevent harm to aliens caused by third parties within their jurisdiction.[86]

Arbitration is the mode of dispute resolution selected by NAFTA with respect to claims between injured investors and national governments of the parties. Article 1122 provides that each party consents to the submission of claims to arbitration in accordance with Subchapter B.[87] Investors may submit their arbitration claims under the Convention on the Settlement of Investment Disputes

[80] *See* Price & Christy, *supra* note 50, at 178.

[81] NAFTA, *supra* note 16, art. 105.

[82] *See* IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY 141 (1983) (noting that "[i]t is well settled that a state cannot plead the principles of municipal law, including its constitution, in answer to an international claim.")

[83] The U.S. State Department has acknowledged that, in its relations with other states maintaining federal forms of government, "[the United States has] invariably insisted on the liability of the Federal Government although the failure . . . was chargeable to the officials of one of the constituent states or provinces." 5 GREEN HAYWOOD HACKWORTH, DIGEST § 527 (1943).

[84] The U.S. Trade Representative has noted that "Article 105 . . . mean[s] that the federal government will be held accountable if it cannot secure state or provincial compliance with NAFTA obligations." Letter from Michael Kantor, U.S. Trade Representative, to Henry A Waxman, Chairman, Subcommittee on Health and the Environment 4 (Sept. 7, 1993), *reprinted in* 1993 U.S.C.C.AN. 2858, 2862.

[85] NAFTA, *supra* note 16, art. 1105(1).

[86] *See* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 183(bXii) (1995); *see also* BROWNLIE, *supra* note 82, at 161; LOUIS HENKIN, INTERNATIONAL LAW: CASES AND MATERIALS 717 (3d ed. 1993).

[87] *See* NAFTA, *supra* note 16, art. 1122(1).

between States and Nationals of Other States,[88] the Additional Facility Rules of the ICSID Convention[89] or the Arbitration Rules of the United Nations Committee on International Trade Law.[90] Despite these options, as the United States is the only NAFTA member currently a signatory to the ICSID Convention, arbitration claims against it can only proceed pursuant to the Additional Facility Rules or the UNCITRAL Arbitration Rules.[91]

There are several limitations placed upon claims asserted by investors against the national governments of the parties. Claims must be submitted within three years "from the date on which the investor first acquired, or should have acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage."[92] However, claims cannot be filed within six months of the occurrence of the events giving rise to the claims.[93] Article 1121(1) requires the disputing investor to waive the right to initiate or continue litigation of the dispute before another administrative tribunal, court or other dispute settlement body as a condition precedent to submission of a claim for arbitration pursuant to Article 1116.[94] Article 1121(2) establishes the same condition precedent for claims initiated

[88] *See id.* art. 1120(lXa). *See generally* Convention on the Settlement of Investment Disputes, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter *ICSID Convention],* A claim for arbitration can only be brought pursuant to the ICSID Convention if "both the disputing Party and the Party of the investor are parties to the Convention." NAFTA, *supra* note 16, art. 1120(lXa).

[89] *See* NAFTA *supra* note 16, art. 1120(lXb). *See generally* Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes, ICSID Doc. 11 (June 1979) [hereinafter *Additional Facility Rules],* A claim for arbitration pursuant to the Additional Facility Rules may be brought if "either the disputing Party or the Party of the investor, but not both, is a party to the ICSID Convention." NAFTA, *supra* note 16, art. 1120(l)(b).

[90] *See* NAFTA, *supra* note 16, art. 1120(lXc). *See generally* Arbitration Rules of the United Nations Commission on International Trade Law, Report of the United Nations Commission on International Trade Law, Official Records of the United Nations General Assembly, 31* Sess., Supp. No. 17 (A/31/17), chap. V § C (1976) [hereinafter *UNCITRAL Arbitration Rules],*

[91] The ICSID Convention had been signed by 146 states and ratified by 131 states as of October 1998. *See List of Contracting States and Other Signatories of the Convention,* Int'l Centre for Settlement of Investment Disputes, at 1-5 (Oct. 1998). The United States signed the ICSID Convention on August 27, 1965 and deposited its ratification on June 10, 1966. *See id.* at 5. The ICSID Convention entered into force with respect to the United States on October 14, 1966. *See id.; see also* Price & Christy, *supra* note 50, at 178.

[92] NAFTA, *supra* note 16, arts. 1116(2) & 1117(2). A claim is deemed submitted when:

> (a) the request for arbitration under paragraph (1) of Article 36 of the ICSID Convention has been received by the Secretary-General; (b) the notice of arbitration under Article 2 of Schedule C of the ICSID Additional Facility Rules has been received by the Secretary-General; or (c) the notice of arbitration given under the UNCITRAL Arbitration Rules is received by the disputing Party.

Id. art. 1137(1).

[93] *See id.* art. 1120(1).

[94] *See id.* art. 1121 (1 Xa)-(b). As arbitration panels convened pursuant to Subchapter B are only permitted to award monetary damages and interest, Article 1121 exempts "proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court" from the waiver requirement. *Id.* art. 1121(1 Xb); *see also* art. 1135(1).

pursuant to Article 1117.[95] Disputes arising from the financial service industry[96] or from an action of a party involving national security interests[97] are outside of the scope of Subchapter B. Subchapter B also is not applicable to certain decisions by Canadian and Mexican investment authorities[98] as well as disputes that an investor may have with private parties in the state in which it invests.[99]

NAFTA's procedures with respect to investment disputes initially require the parties to attempt to settle claims through consultation or negotiation.[100] Failing settlement of the claim, a disputing investor is required to serve upon the disputing party written notice of its intention to submit a claim to arbitration at least ninety days before the actual submission.[101] The tribunal responsible for conducting the arbitration consists of three arbitrators with one arbitrator appointed by each of the disputing parties and the third, who is designated as the presiding arbitrator, appointed by agreement of the disputing parties.[102] Regardless of its composition, the tribunal must decide the issues in dispute in accordance with NAFTA and applicable rules of international law.[103]

The tribunal is authorized to order interim measures to preserve the rights of the parties or ensure the full effectiveness of the tribunal's jurisdiction.[104] If a tribunal makes a final award in favor of a disputing investor, it may only award, separately or in combination, monetary damages, interest, restitution of property

[95] *See id.* arts. U21(2Xa)-(b).

[96] Procedures and protections for the financial service industry are set forth in Chapter 14 of NAFTA. *See* NAFTA, *supra* note 16, ch. 14, arts. 1401-16; *see also* Kennish, *supra* note 37, § 4.3.

[97] *See* NAFTA, *supra* note 16, art. 1138(1) (providing, in part, that "a decision by a Party to prohibit or restrict the acquisition of an investment in its territory by an investor of another Party, or its investment, pursuant to [Article 2102 (National Security)] shall not be subject to [Subchapter B*]." Id.*

[98] *See id.* annex 1138.2. With respect to Canada, Annex 1138.2 provides, in part, that "[a] decision .. . following a review under the Investment Canada Act, with respect to whether or not to permit an acquisition that is subject to review, shall not be subject to the dispute settlement provisions of Section B." *Id.* The same exemption is granted to decisions of Mexico's National Commission on Foreign Investment. *See id.*

[99] *See* Kennish, *supra* note 37, § 4.3.

[100] *See* NAFTA, *supra* note 16, art. 1118.

[101] *See id.* art. 1119. The notice of intent to submit a claim to arbitration must disclose: (1) the name and address of the disputing investor; (2) the name and address of the enterprise (if the claim is to be brought pursuant to Article 1117); (3) the provisions of NAFTA alleged to have been violated by the disputing party; (4) the issues raised by the claim; (5) the factual basis for the claim; and (6) the relief sought and amount of damages claimed. *See id.*

[102] *See id.* art. 1123. If a tribunal is not constituted within ninety days from the date of submission of the claim, the secretary-general of ICSID may appoint the arbitrator or arbitrators not yet appointed upon the request of either party. *See id.* art. 1124(2). If the disputing parties are unable to agree upon a presiding arbitrator, the secretary-general of ICSID, on the request of either party, may appoint such arbitrator from a roster of forty-five designated arbitrators appointed by consensus by the parties. *See id.* art. 1124(3) & (4). The presiding arbitrator so appointed cannot be a national of the disputing investor or party. *See id.* art. 1124(3). If no such person is available to serve as a presiding arbitrator, the secretary-general of ICSID must make his appointment from the ICSID Panel of Arbitrators. *See id.* In any event, the arbitrator selected from the ICSID Panel of Arbitrators may not be a national of any of the parties. *See id.*

[103] *See id.* art. 1131(1).

[104] *See id.* art. 1134.

and costs in accordance with applicable arbitration rules.[105] Tribunals are expressly prohibited from ordering a party to pay punitive damages.[106]

Although lacking the force of precedent,[107] final awards are binding upon the disputing parties[108] and must be fully enforced in the territory of all parties.[109] In the event that a disputing party fails to abide by a tribunal's final award, NAFTA's Free Trade Commission, upon request by a party whose investor was a party to the arbitration, shall establish a panel pursuant to Article 2008. This panel must determine whether the disputing party's failure to comply with the tribunal's final award is inconsistent with its obligations pursuant to NAFTA and may recommend that the party comply with the final award.[110] An investor may seek enforcement of an arbitration award against a disputing party pursuant to the ICSID Convention, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the Inter-American Convention on International Commercial Arbitration regardless of the pendency of enforcement proceedings pursuant to Article 1136(5).'[111]

NAFTA was implemented by the United States through the adoption of the NAFTA Implementation Act of 1993.[112] There are several provisions of the Implementation Act relevant to the investor protection measures set forth in

[105] *See id.* art. 1135(1). In the event the tribunal awards a disputing investor restitution of property, such award must provide that the disputing party may pay monetary damages and applicable interest in lieu of restitution. *See id.*

106 *See id.* art. 1135(3).

[107] *See id.* art. 1136(1). Article 1136(1) specifically provides that "[a]n award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case." *Id.*

[108] *See id.* art. 1136(2). Article 1136(2) specifically provides that "a disputing party shall abide by and comply with an award without delay." *Id.* However, a disputing party may not seek enforcement of a final award rendered pursuant to the ICSID Convention until 120 days have elapsed from the date of the award without a request for revision or annulment of the award or until revision or annulment proceedings have been completed. *See id.* art. 1136(3XaXi-ii). Final awards entered pursuant to the Additional Facility Rules or UNCITRAL Arbitration Rules may not be enforced until three months have elapsed from the date of the award without a request for revision, setting aside or annulment or a court has dismissed or allowed such an application and there is no further appeal. *See id.* art. 1136(3XbX'***)-

[109] *See id.* art. 1136(4).

[110] *See id.* art. 1136(5). Established pursuant to Article 2001(1), NAFTA's Free Trade Commission consists of cabinet-level representatives of the parties and is empowered to "(a) supervise the implementation of [the] Agreement; (b) oversee its further elaboration; (c) resolve disputes that may arise regarding its interpretation or application; (d) supervise the work of all committees and working groups established under this Agreement; . . . and (e) consider any other matter that may affect the operation of this Agreement." *Id.* arts. 2001(1) & (2).

[111] *See id.* art. 1136(6); *see also supra* note 88 and accompanying text; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38; Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, O.AS.T.S. No. 42 *reprinted in* 1 ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, INTER-AMERICAN ARBITRATION, annex 1 (1984).

[112] 19 U.S.C. §§ 3301-3473 (1994). The U.S. Congress specifically approved the entry into force of NAFTA and the accompanying statement of administrative action implementing the Agreement. *See id.* § 3311(aXl)&(2).

Chapter Eleven. Initially, the Implementation Act provides that no provision of NAFTA that is inconsistent with any law of the United States shall have effect.[113] This section also provides that no provision of the Implementation Act shall be construed to amend or modify any existing law of the United States[114] or limit any authority conferred under any U.S. law.[115] With respect to the relationship between NAFTA and state law, the Implementation Act requires the President to "consult with the States for the purpose of achieving conformity of State laws and practices with the Agreement." [116] Furthermore, the U.S. Trade Representative is required to establish a consultative process with the states to identify and address actual and potential conflicts between state law and NAFTA.[117] This consultative process also serves to inform the states on a continuous basis of matters arising pursuant to NAFTA that may have a direct impact upon the conduct of their affairs and provide them with an opportunity to submit information and advice to the U.S. Trade Representative with respect to such matters.[118] The U.S. Trade Representative is required to take this information and advice into account in formulating U.S. positions with respect to NAFTA.[119] In fact, the states are to be involved "to the greatest extent practicable" in the formulation of U.S. positions with respect to NAFTA through committees, subcommittees or working groups or through the dispute resolution processes established by the Agreement.[120] Actions seeking to declare state laws invalid pursuant to NAFTA may only be initiated by the United States.[121] In this same vein, no person other than the United States may allege a cause of action or assert a defense based upon NAFTA or the Implementation Act.[122]

C. *The Factual Background to the O 'Keefe Litigation*

Organized pursuant to the laws of British Columbia, Canada, The Loewen Group, Inc. is one of the world's largest funeral home and cemetery operators.[123] Operating through over 1000 subsidiaries, The Loewen Group owned or operated

[113] *See id.* §3312(aXl).

[114] *See id.* § 3312((aX2XA).

[115] *See id.* § 3312(aX2XB).

[116] *Id.* § 3312(bXlXA). "State law" includes not only the law of any state but also any law of a political subdivision of a state. *See id.* § 3312(bX3XA).

[117] *See id.* § 3312(bXlXB).

118 See id. §§ 3312(bXlXBX>> & '•')•

[119] *See id.* § 3312(bXl)(BXiv).

[120] *See id.* § 3312(bXl)(BXv).

[121] *See id.* §3312(bX2).

[122] See id. §3312(cXlXA).

[123] *See Investor Information* (The Loewen Group, Inc., Burnaby, B.C.), Aug. 1999, at 1 [hereinafter *Investor Information*]. The Loewen Group is the second largest funeral services company in North America behind Houston-based Service Corporation International. *See* Tamsin Carlisle, *Loewen Outlook Downgraded by S&P, Which Cites Damages Award Against It,* WALL ST. J., Nov. 6, 1995,atC19.

more than 1100 funeral homes and 400 cemeteries in the United States, Canada and the United Kingdom as of June 1999.[124] The Loewen Group employs more than 13,000 people and performs approximately 180,000 funerals on an annual basis.[125] The Loewen Group reported gross revenues of $311 million for the first quarter of 1999 with gross revenues for its funeral home, cemetery and insurance operations totaling $175.4 million, $111.6 million and $23.7 million respectively.[126] Despite its international presence, more than ninety percent of The Loewen Group's revenue is derived from its operations in the United States.[127]

The principal operating subsidiary of The Loewen Group is Loewen Group International, Inc., a corporation organized pursuant to the laws of the state of Delaware.[128] The Loewen Group owns more than eighty-five percent of the outstanding shares of Loewen Group International and exercises direct control over its operations.[129] Loewen Group International in turn owns and controls over 800 U.S. subsidiaries.[130] At the time of the events resulting in the *O'Keefe* Litigation, Raymond L. Loewen, a Canadian national, was a substantial shareholder of the publicly traded shares of The Loewen Group and was the chairman and chief executive officer of The Loewen Group and Loewen Group International.[131]

In 1990, The Loewen Group entered the Mississippi funeral home, cemetery and insurance industries.[132] This entry was in the form of a purchase by Loewen Group International of Riemann Holdings, Inc., a Mississippi funeral

[124] *See Investor Information, supra* note 123, at 1; *see also* THE Loewen Group, Inc., First QUARTER report 3 (1999) [hereinafter *FIRST QUARTER REPORT]; The Loewen Group Files for Chapter II in U.S. andCCAA in Canada to Facilitate Restructuring* (The Loewen Group, Inc., Burnaby, B.C.), June 1, 1999, at 2 [hereinafter *The Loewen Group Files for Chapter II],*

[125] *See FIRST QUARTER REPORT, supra* note 124, at 1; *see also The Loewen Group Files for Chapter 11, supra* note 124, at 2.

126 *See* The Loewen Group, First Quarter Report, Consolidated Statements of Operations and Retained Earnings (Deficit) 1 (1999) [hereinafter *CONSOLIDATED STATEMENTS].* Costs and expenses associated with these operations totaled $202.3 million with $101.7 million attributable to funeral home operations, $81.3 million attributable to cemetery operations and $19.1 million attributable to the operation of insurance companies. *See id.* These revenue, cost and expense calculations resulted in reported net revenue of $108.4 million for the first quarter ending March 31, 1999. *See id.* However, after deductions for general and administrative expenses, interest, dividends, taxes, losses associated with other operations and the retained deficit from the beginning of the period, The Loewen Group reported a retained earnings deficit of $534.9 million. *See id.* at 1-2.

[127] *See FIRST QUARTER REPORT, supra* note 124, at 3; *see also Investor Information, supra* note 123, at 1; *The Loewen Group Files for Chapter II, supra* note 124, at 2. The Loewen Group's Canadian operations accounted for nine percent of its revenues with less than one percent of the Company's revenues deriving from its operations in the United Kingdom. *See The Loewen Group Files for Chapter II, supra* note 124, at 1.

[128] *See Notice of Claim, supra* note 13, 1 15.

[129] *See id.*

[130] *See id.; see also The Loewen Group Files for Chapter II, supra* note 124, at 2.

[131] *See Notice of Claim, supra* note 13,1 16.

[132] *See id.* H 23.

services and insurance provider.[133] Subsequent to this acquisition, Riemann Holdings acquired Wright & Ferguson Funeral Homes, a long-time provider of funeral services in Mississippi.[134] Wright & Ferguson maintained a long-standing contractual relationship with Gulf National Life Insurance Company, a Mississippi insurance provider owned and operated by the O'Keefe family.[135] Gulf National had entered into joint operating agreements with Wright & Ferguson in 1974, 1979 and 1987.[136] Wright & Ferguson continued to do business with Gulf National and other competing insurance companies after its acquisition by Riemann Holdings.[137]

In their Notice of Claim, Loewen alleged that, faced with direct competition from a much larger and financially sounder firm, O'Keefe initiated a "bigoted advertising campaign" designed to emphasize the foreign-ownership of Riemann Holdings and Wright & Ferguson.[138] This advertising campaign consisted of three direct-mail advertisements distributed in January, July and December 1990.[139] The January 1990 advertisement emphasized the Canadian nationality of members of the new board of directors of Riemann Holdings.[140] The July 1990 advertisement focused upon the increasing amount of foreign investment in the United States and the O'Keefe family's 125-year history in the Mississippi fhneral industry.[141] Finally, the December 1990 advertisement "analogiz[ed] Loewen's competition against [O'Keefe] to the Japanese 'sneak attack' on Pearl Harbor" and alleged that Riemann Holding's operations in the state were financed by Asian

[133] *See id.* H 23. Loewen Group International purchased 90% of the stock of Riemann Holdings. *See id.*

134 *See id.* 1 23.

135 See id. 22. The O'Keefe family has owned and operated funeral homes and insurance companies in Mississippi since the latter half of the nineteenth century. *See id.*

136 See id.

*137 See id. 1*23.

[138] *See id.* U 24.

[139] *See id.*

[140] *See id.* The January 1990 advertisement stated, in part, that "[b]y now, you probably received a letter from David Riemann outlining their sale to a foreign company.... Loewen Group has not come in as a partner . . . . The majority of the board of directors are Canadian . . . . Obviously, prices are raised and profits go out of the U.S.A." *Id.*

[141] *See id.* The July 1990 advertisement stated, in part, that:

> Sometimes it seems America is being sold off piece by piece. The Rockefeller Plaza, Columbia Pictures, now, Riemann Funeral Home . . . . Recently, Riemann Funeral Homes sold out controlling interest to a chain in Canada. Furthermore, the acquiring company is largely funded from sources outside the United States. This has led some people to wonder who is still locally- owned and operated, thereby supporting the local community . . . . This year we're coming to celebrate our 125^ anniversary. What does this mean to you? It means a commitment from us to remain as one of [the] Coast's locally owned and operated funeral homes, a commitment to the local constituents . . . . We keep our money in south Mississippi . . . . Let me assure you that after one hundred twenty-five years of service, we're here to stay. Since [my great] grandfather founded Bradford-O'Keefe in 1865, we've done everything we can to meet the needs of south Mississippi, both personally and professionally.

Id.

sources.[142] The advertising campaigns also utilized billboards containing messages critical of foreign competition in the Mississippi funeral home, cemetery and insurance industries.[143] Loewen alleged that the advertising campaigns generated widespread anti-Canadian sentiment in Mississippi, including negative coverage by the local media and a letter from the Mississippi Attorney-General's Consumer Protection Office criticizing Loewen for its failure to adequately publicize the Canadian nationality of the board of directors of Riemann Holdings.[144] However, despite these advertising campaigns, Loewen alleged that O'Keefe offered to sell his funeral homes and insurance companies to Loewen.[145] Negotiations between the parties ultimately failed allegedly due to Loewen's interest in exclusively purchasing funeral homes and O'Keefe's interest in including his insurance companies as part of the transaction.[146]

On April 24, 1991, O'Keefe initiated litigation in the Circuit Court of the First Judicial District of Hinds County, Mississippi against The Loewen Group, Inc. and Wright & Ferguson.[147] The focus of the litigation was O'Keefe's allegations that The Loewen Group had induced Wright & Ferguson to breach its 1974, 1979 and 1987 contracts with Gulf National, thereby resulting in damage to Gulf

[142] *See id.* The December 1990 advertisement stated, in part, that:

> The Japanese killed 3,451 Americans in that sneak attack on Pearl Harbor . . . . Millions of young Americans responded to the country's need, and Jerry O'Keefe was among those [who] distinguished himself in the U.S. Marines and was awarded the Navy Cross . . . . To remain free and at liberty were among the strongest goals of the people. Freedom allowed Riemann to sell their funeral homes to a foreign firm. Riemann is now owned by a Canadian firm, financed over $25 million from a Hong Kong bank. Freedom to sell to anyone is a right in this country, but freedom also carries with it responsibility of [sic] the truth . . . . Riemann borrowed some money from the Shanghai Bank.

Id. There were no Asian investors associated with Loewen's investments in Mississippi, and Riemann Holdings had not obtained financing from a bank located in Shanghai. *See id.*

[143] *See id.* 1 25. An example of such advertising noted by Loewen in their Notice of Claim displayed the flags of the United States, Mississippi, Canada and Japan in conjunction with the question "Does the Business You Patronize Keep Your Money in the Local Economy?" *Id.* Under the U.S. and Mississippi flags was the word "Yes" followed by the names of the O'Bryant-O'Keefe and Bradford-O'Keefe Funeral Homes. *See id.* Under the Canadian and Japanese flags was the word "No" followed by a list containing the names of the "Lowen [sic] Company" and "Riemann Holding Company." *Id.*

144 See id. 1)26.

[145] *See id.* 1 27.

146 See id.

[147] *See id.* H 28. The plaintiffs identified in O'Keefe's Complaint included Jeremiah J. O'Keefe, Sr., his son Jeffrey H. O'Keefe, Bradford-O'Keefe Funeral Homes, Inc., Gulf Holdings, Inc., The Gulf Group, Inc., Gulf National Investment Company, Gulf National Life Insurance Company, Gulf National Insurance Company, Selected Funeral Insurance Company and James F. Webb Funeral Homes, Inc. *See* Answer and Defenses to Amended and Supplemental Complaint at 1, O'Keefe v. The Loewen Group, Inc., No. 91-67-423 (Cir. Ct., Hinds County, Miss. 1991). The Loewen Group International, Riemann Holdings and Family Guaranty Life Insurance Company were added as defendants to the litigation by an Amended Complaint filed with the court on April 17, 1992. *See* Docket Information Sheet at 1, O'Keefe v. The Loewen Group, Inc., No. 91-67-423 (Cir. Ct., Hinds County, Miss. 1991) [hereinafter *Docket Sheet],*

National's related business holdings and O'Keefe personally.[148] This litigation was resolved through the execution of a settlement agreement between O'Keefe and The Loewen Group on August 19, 1991.[149]

The settlement agreement between O'Keefe and Loewen consisted of five principal provisions. Initially, O'Keefe agreed to dismiss the pending litigation against Loewen and Wright & Ferguson.[150] Second, O'Keefe agreed to sell two Mississippi funeral homes to Loewen at a price between $2 million and $2.5 million to be determined through subsequent negotiations between the parties.[151] Third, Loewen agreed to sell O'Keefe an insurance company and a trust fund worth between $3.3 million and $4 million.[152] Fourth, O'Keefe agreed to assign to Riemann Holdings an option to purchase a Jackson, Mississippi cemetery tract.[153] Finally, O'Keefe was to become the exclusive provider of certain insurance policies sold through funeral homes owned and operated by Loewen.[154]

The settlement agreement left numerous issues open for subsequent negotiation between the parties. For example, the agreement required the parties to establish a specific price for the two funeral homes to be transferred by O'Keefe to Loewen and the insurance company to be sold by Loewen to O'Keefe.[155] Other details left to future negotiation between the parties included the terms of the exclusive insurance provider relationship and how insurance trust funds subject to the agreement were to be valued and held.[156] The uncertainty of these critical provisions subsequently led the parties to dispute whether the settlement agreement was, in fact, a binding and enforceable contract at all.[157] A further issue arose with respect to the necessity of prior approval of the agreement by the Mississippi Insurance Commissioner.[158]

The settlement agreement required that all transactions close within 120 days of execution "provided all documentation has been provided, all valuations determined, and all requirements met."[159] However, the parties never reached an agreement upon the valuations of the funeral homes and insurance company.[160] Furthermore, concerns arose with respect to the financial stability of O'Keefe's

[148] *See Notice of Claim, supra* note 13, 28.

[149] *See id.* 129.

[150] *See id.*

[151] *See id.*

[152] *See id.*

[153] *See id.* The option was valued at $19,500. *See id.*

[154] *See id.*

[155] *See id.* 130.

[156] *See id.*

[157] *See id.*

[158] *See id.*

[159] W.H 31.

[160] *See id.* O'Keefe valued the funeral homes at $2.5 million, but Loewen offered to pay no more than $2 million for them. *See id.* Loewen valued the insurance company at $4 million, but O'Keefe offered $3.3 million for its purchase. *See id.*

operations after the seizure of records pertaining to the operation of O'Keefe's insurance companies by the Federal Bureau of Investigation from the office of the Mississippi Insurance Commissioner in February 1992.[161]

The failure of the parties to reach an agreement upon the open terms of the settlement agreement caused O'Keefe to file an amended complaint in his pending litigation against The Loewen Group on April 17, 1992.[162] The amended complaint added numerous parties[163] and claims to the litigation.[164] In addition to the previously-identified breaches of the 1974, 1979 and 1987 contracts between Gulf National and Wright & Ferguson, O'Keefe alleged that Loewen had breached the 1991 settlement agreement.[165] O'Keefe's amended complaint also alleged that Loewen's conduct constituted fraud[166] and bad faith[16] and violated Mississippi's antitrust laws.[168] The amended complaint sought actual damages totaling $5 million.[169] O'Keefe subsequently amended his complaint on July 18, 1994 to include claims for damages arising from Loewen's conduct that purportedly caused the Mississippi Insurance Commissioner to place Gulf National under administrative supervision.[170]

D. *The Procedural History of the O 'Keefe Litigation*

The *O 'Keefe* Litigation proceeded to a trial by jury in September 1995 before Judge James Graves of the Circuit Court for the First Judicial District of Hinds County, Mississippi. Loewen subsequently characterized this trial as infected

[161] *See id.* H 32. According to Loewen, O'Keefe subsequently represented that the target of the investigation was, in fact, the Mississippi Insurance Commissioner and that its insurance companies were financially secure. *See id.*

[162] *See id.* 1 33.

[163] *See supra* note 147 and accompanying text.

[144] *See Notice of Claim, supra* note 13,133.

[165] *See* Amended and Supplemental Complaint HI 1, 4-12, 19-48 & 72-82, O'Keefe v. The Loewen Group, Inc., No. 91-67-423 (Cir. Ct. Hinds County, Miss. 1991) [hereinafter *Amended and Supplemental Complaint],*

[166] *See id.* HI 1-2, 18,49, 63,66-71 & 135-77.

[167] *See id.* fH 3, 13-17, 19-48, 83-88 & 134-77.

[168] *See id.* 51-62 & 89-99. Loewen was specifically accused of engaging in price fixing of funeral services and insurance premiums, concealing its interest in Riemann Holdings, restraining trade through acquisition of local businesses, misrepresenting its services as those of another and false advertising. *See id.*

[169] The amount of damages was subsequently amended to $26.1 million consisting of $ 1.2 million for pecuniary and non-pecuniary losses allegedly suffered by Jeremiah and Jeffrey O'Keefe, $11.4 million in pecuniary loss to O'Keefe's funeral home interests and $13.5 million in pecuniary loss to O'Keefe's insurance company interests. *See Amended and Supplemental Complaint, supra* note 165, [f] 83. The amount of damages sought by O'Keefe increased to over $100 million by the time of trial. *See Notice of Claim, supra* note 13,133.

[170] *See Amended and Supplemental Complaint, supra* note 165, Iffl 100-33.

with appeals to regional bias and tainted by invidious discrimination against Loewen based upon its Canadian nationality from its very commencement. For example, Loewen noted the repeated references to its foreign ownership[171] as well as the foreign ownership of Wright & Ferguson by O'Keefe's counsel during jury selection.[172] Loewen also noted counsel's repeated allegation during jury selection that Loewen "[came] down from Canada to deceive Mississippi families," "took advantage of families here in Mississippi" and "was guilty of a crime."[173] Remarks by O'Keefe's counsel to prospective jurors that "foreigners from Canada" should be required to "play by the same rules" as state residents when they "[came] down to Mississippi to do business in Mississippi"[174] and other appeals to local biases[175] were also cited by Loewen as evidence of discrimination.

Loewen contended that this improper focus upon its nationality, as well as race and economic status, continued during opening statements.[176] O'Keefe's counsel made repeated reference to trips made by their clients to Vancouver, and Loewen "coming down to" or "descending on" Mississippi to drive the O'Keefe family operations out of business.[177] By contrast, counsel emphasized O'Keefe's long-standing Mississippi pedigree and status as a veteran of the U.S. military.[178] O'Keefe's decision to initiate litigation was characterized as "the American way of resolving disputes."[179] Furthermore, counsel noted that Loewen's operations in Mississippi catered primarily to the white community.[180] O'Keefe's counsel closed their opening statements with blatant appeals to regional bias and nationalism.[181]

Forty witnesses testified during the course of the seven-week trial.[182] Loewen alleged that O'Keefe's counsel continued their improper focus upon

[171] *See Notice of Claim, supra* note 13,11 41-51.

[172] *See id* 1 48.

[173] /¿1146-47.

174 Id. 43.

[175] *See id.* 11 42 & 49. Loewen specifically cited questions posed by O'Keefe's counsel to prospective jurors with respect to their patriotism, willingness to take up arms for the United States and belief in the American jury trial system. *See id.* ^ 42.

[176] *See id.* H 52-60.

[177] Trial Transcript, at 20, 22, 24-25, 30, 54, 58 & 61, O'Keefe v. The Loewen Group, Inc., No. 91-67-423 (Cir. Ct., Hinds County, Miss. 1991) [hereinafter *Transcript],*

[178] *See id.* at 49-50, 54.

[179] *Id.* at 63, 65.

[180] *See id.* at 16. Loewen contended that racial appeals were crucial to the outcome of the litigation as the presiding judge, O'Keefe's lead trial counsel and eight of the twelve jurors were African- Americans. *See Notice of Claim, supra* note 13, 1 35. Loewen further noted that O'Keefe's cause had widespread support in the local African-American community. *See id.*

[181] *See Transcript, supra* note 177, at 42, 78. O'Keefe's counsel Michael Allred closed his opening statement by "encouraging the jury to exercise the power of the people of Mississippi ... to say no to people like Loewen who would build rich fortunes upon the misery and poverty of burying loved ones of the people of the poorest state in our nation." *Id.* at 42. O'Keefe's lead trial counsel, Willie Gary, concluded his opening statement by urging the jury to "say with your verdict to Ray Loewen, no more, not in the state of Mississippi and hopefully nowhere else, but no more." *Id.* at 78.

[182] *See Notice of Claim, supra* note 13,161.

nationality, race and economic status throughout their examination of the witnesses.[183] Witnesses were asked repeated questions about the location of meetings between the parties,[184] O'Keefe's long-standing presence in the community versus Loewen's recent arrival,[185] local versus foreign ownership in the funeral home industry[186] and O'Keefe's willingness to serve white and black members of the community.[187] O'Keefe was portrayed as a patriotic "son of Mississippi," a World War II veteran with long-standing ties to the community and status as the "[protector of] the interests of black as well as white Mississippians."[188] Emphasis also was placed upon O'Keefe's modest local operations in contrast to the multinational nature of Loewen's operations[189] and Raymond L. Loewen's allegedly extravagant lifestyle.[190]

The nationality theme continued through closing arguments. Emphasis was once again placed upon Loewen's nationality[191] and the foreign location of many of the meetings that formed the subject matter of O'Keefe's Complaint.[192] O'Keefe's counsel reminded the jury that many of his witnesses were Mississippians while Loewen was characterized as "a foreign invader who 'came to town like gang busters.'"[193] Irrelevant reference was made to the allegedly unfair trade practices of Canadian wheat farmers with the conclusion drawn from this reference that "[l]ike the Canadian wheat farmers . . . Loewen '[came] in' . . . purchase[d] a funeral home . . . [and] jacked up the prices down here in Mississippi."[194] Perhaps most outrageously of all, Loewen's entry into the Mississippi marketplace and subsequent conduct therein were analogized to the Japanese bombing of Pearl Harbor in December 1941.[195] In conclusion, O'Keefe's counsel requested an award of compensatory damages in excess of $105 million.[196]

[183] *See id.* HI 61-95.

[184] *See Transcript, supra* note 177, at 212-14 (testimony of John Turner); 2047-50 (testimony of Jeremiah O'Keefe); 1996-97, 2831-33, 2838, 2894-96 (testimony of David Riemann); 5117-19, 5133, 5147, 5181 (testimony of Raymond L. Loewen).

[185] *See id.* at 1996-97, 2000, 2004-06, 2010-11,2022, 2025-26 (testimony of Jeremiah O'Keefe).

[186] *See id.* at 1107 (testimony of Michael Espy), 5171, 5174-75 (testimony of Raymond L. Loewen).

187 See *id.* at 1096 (testimony of Michael Espy), 1118-19 (testimony of Earl Banks).

[188] *Id.* at 1996-98, 2000, 2007,2022,2025-26, 2111 (testimony of Jeremiah O'Keefe).

[189] *See id.* at 5185 (testimony of Raymond L. Loewen).

[190] *See id.* at 2047-48 (testimony of Jeremiah O'Keefe), 5106-08 (testimony of Raymond L. Loewen).

[191] *See id.* at 5546-47, 5549, 5570, 5588.

[192] *See id.*

[193] *Id.* at 5548.

[194] *Id.* at 5588.

[195] *See id.* at 5593-94. In his closing argument, O'Keefe's counsel Willie Gary stated that: [S]omething inside [O'Keefe] said. .. fight on. [Loewen] lied to him, and a voice said fight on . .. . [WJhen [Loewen] cheated him, a little voice said fight on ... . He's a fighter, and he's fought them . . . . [T]hat little voice .. . [is] called faith . . . . It's called pride, in America . . . . It's called

On November 1, 1995, the jury returned a verdict for O'Keefe in the amount of $260 million.[197] The jury awarded $78 million for Loewen's breach of the contracts between O'Keefe and Wright & Ferguson.[198] An additional $145.6 million in damages was awarded for Locwcn's breach of the 1991 settlement agreement.[199] Finally, the jury assessed $18.2 million each for violations of Mississippi's antitrust laws and common law fraud.[200] After the announcement of the verdict, the jury's foreman notified Judge Graves that the verdict reflected $100 million in compensatory damages and $160 million in punitive damages.[201] Having failed to advise the jury of the bifurcated procedure utilized to assess compensatory and punitive damages in Mississippi, the court unilaterally reformed the verdict to reflect $100 million in compensatory damages and immediately commenced the punitive damages phase of the proceedings.[202]

> love, love for your country . . . . [TJhat little voice didn't just start speaking in 1991 when we started this lawsuit. That voice started back in 1941 on December 7th when our boys were bombed in the morning while they were sleeping . . . . [Ojn December the 8th, early in the morning, Jefly O'Keefe got out of his bed and found his way down to the recruiter's office. He was just a young lad then, just nineteen years of age, but he wanted to fight for his country, and he fought, and he fought.

Id.

[196] *See id.* at 5713. Loewen alleged that $74 million of the requested award represented damages for emotional distress accruing at the rate of $50,000 per day from the date of the alleged breach of the 1991 settlement agreement. *See Motion for New Trial*, *supra* note 9, ^ 121; *see also Notice of Claim*, *supra* note 13, U 102.

[197] *See Interrogatories to the Jury*, *supra* note 4, at 1-9.

[198] *See id.* at 2-5. The jury awarded $31.2 million for breach of contract, $7.8 million for tortious interference with contractual relations, $23.4 million for tortious breach of contract and $15.6 million for breach of the implied covenant of good faith with respect to such contracts. *See id.*

[199] *See id.* at 6-7. The jury awarded $54.6 million for willful or malicious breach of the agreement, $54.6 million for tortious breach of the agreement and $36.4 million for breach of the implied covenant of good faith with respect to the agreement. *See id.*

[200] *See id.* at 8.

[201] *See* Letter from Glenn Millen, Jury Foreman, to James Graves, Judge, Circuit Court for the First Judicial District of Hinds County, Mississippi 1 (Nov. 1, 1995) (on file with the author) [hereinafter *Millen Letter].*

[202] *See Transcript*, *supra* note 177, at 5752-54. In all cases where punitive damages are sought, Mississippi law requires a bifurcated trial procedure. Liability and compensatory damages are determined during the first phase. *See* MISS. CODE ANN. § 11-1-65($1X^{C}$) (1993). The issues of appropriateness of punitive damages and the amount of such award, if any, are considered during the second phase of the trial. *See id.* In order to receive an award of punitive damages, the claimant must first receive an award of compensatory damages. *See id.; see also* Guar. Serv. Corp. v. Am. Employers' Ins. Co., 893 F.2d 725, 731 (5th Cir. 1990); Herrington v. Spell, 692 So.2d 93, 104 (Miss. 1997); Hopewell Enters., Inc. v. Trustmark Nat'l Bank, 680 So.2d 812, 820 (Miss. 1996). Punitive damages are not ordinarily recoverable in actions for breach of contract in Mississippi. *See* S. Cent. Bell v. Epps, 509 So.2d 886, 892 (Miss. 1987). However, punitive damages are recoverable where the breach results from an intentional wrong, insult, or abuse, as well as from such gross negligence as constitutes an intentional tort. *See* Hurst v. Southwest Miss. Legal Servs. Corp., 708 So.2d 1347, 1350 (Miss. 1998); *see also* Funeral Assurance Co. v. Hubbs, 700 So.2d 283, 286 (Miss. 1997); Gulf Guar. Life Ins. Co. v. Duett, 671 So.2d 1305, 1309 (Miss. 1996); Peoples Bank and Trust Co. v. Cermack, 658 So.2d 1352, 1361 (Miss. 1995); Sessoms v. Allstate Ins. Co., 634 So.2d 516, 519 (Miss. 1993); Dynasteel Corp. v. Aztec Indus., Inc., 611 So.2d 977, 985 (Miss. 1992); Eselin-Bullock &

The entire punitive damages phase of the litigation occurred on November 2, 1995. Loewen alleged that the anti-Canadian bias that served as the centerpiece of O'Keefe's trial strategy was evident in the punitive damages phase of the case.[203] O'Keefe's opening statement appealed to the jury to award substantial punitive damages in order to "make sure that this doesn't happen to the citizens of Mississippi or the citizens of this nation again."[204] O'Keefe's counsel emphasized Loewen's supposed arrogance in doing business with O'Keefe and Mississippi consumers from the distant and safe haven of Canada.[205] O'Keefe counsel also

Assoc. Ins. Agency, Inc. v. Nat'l Gen. Ins. Co., 604 So.2d 236, 241 (Miss. 1992); Blue Cross & Blue Shield of Miss. v. Maas, 516 So.2d 495, 496-97 (Miss. 1987). Assuming the court determines that the case is appropriate for the consideration of an award of punitive damages, a party seeking such an award must prove by "clear and convincing evidence that the defendant against whom [such an award is] sought acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud." MISS. ANN. CODE § 11-1-65 (a). In determining the appropriate amount of punitive damages to be awarded, the trier of fact must consider:

> the defendant's financial condition and net worth; the nature and reprehensibility of the defendant's wrongdoing, for example, the impact of the defendant's conduct on the plaintiff. . . ; the defendant's awareness of the amount of harm being caused and the defendant's motivation in causing such harm; the duration of the defendant's misconduct and whether the defendant attempted to conceal such misconduct; and any other circumstances shown by the evidence that bear on determining a proper amount of punitive damages . . . . [bearing in mind] that the primary purpose of punitive damages is to punish the wrongdoer and deter similar misconduct in the future by the defendant.

Id. § 1 l-l-65(lXe). For further discussion of the purpose of punitive damages awards in Mississippi, *see* Allen v. R&H Oil & Gas Co., 63 F.3d 1326, 1333 (5th Cir. 1995); Wesson v. United States, 48 F.3d 894, 899-900 (5th Cir. 1995); Lawrence v. Va. Ins. Reciprocal, 979 F.2d 1053, 1057 (5th Cir. 1992); James W. Sessums Timber Co. v. McDaniel, 635 So.2d 875, 879-80 (Miss. 1994); Kaplan v. Harco Nat. Ins. Co., 716 So.2d 673, 679 (Miss. Ct. App. 1998). For further discussion of the factors to be considered in awarding punitive damages in Mississippi, *see* Ross-King-Walker, Inc. v. Henson, 672 So.2d 1188, 1193 (Miss. 1996); Valley Forge Ins. Co. v. Strickland, 620 So.2d 535, 540-41 (Miss. 1993); Harvey-Latham Real Estate v. Underwriters at Lloyd's, London, 574 So.2d 13, 17 (Miss. 1990); Mut. Life Ins. Co. of N.Y. v. Estate of Wesson, 517 So.2d 521, 532 (Miss. 1987). Before entering judgment upon the determination of the trier of facts, the trial court is charged with ascertaining the reasonableness of the amount of the award and its rational relationship to the purposes of the punitive damages statute. *See* MISS. CODE ANN. § 1 l-l-65(1 X0(*)- 1" determining whether an award of punitive damages is excessive, the court is directed to consider:

> Whether there is a reasonable relationship between the punitive damage award and the harm likely to result from the defendant's conduct as well as the harm that actually occurred; [t]he degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; [t]he financial condition and net worth of the defendant; and [i]n mitigation, the imposition of criminal sanctions on the defendant for its conduct and the existence of other civil awards against the defendant for the same conduct.

Id. § 11-1-65(1X0(*')- A trial court may overturn an award of punitive damages "where the verdict is so excessive that it evinces passion, bias and prejudice on the part of the jury so as to shock the judicial conscience." Life Ins. Co. of Miss. v. Allen, 518 So.2d 1189, 1194 (Miss. 1987).

[203] *See Notice of Claim, supra* note 13, HI 110, 113-14,116.

[204] *Transcript, supra* note 177, at 5755.

[205] *See id.* at 5794-95. O'Keefe's counsel specifically noted that:

alleged that Loewen officials were "smiling when they charge grieving families in Corinth, Mississippi."[206] In response to this perceived indifference, O'Keefe's counsel urged the jury to send a message from the people of the state of Mississippi to Loewen that such behavior would not be tolerated in the state through a large award of punitive damages.[207] O'Keefe's counsel requested an award of punitive damages in the amount of $1 billion dollars in order to "help the people of Mississippi [as well as]. . . families everywhere."[208]

O'Keefe presented testimony from two witnesses with respect to the net worth of Loewen during the punitive damages phase of the case. O'Keefe's chief punitive damages witness testified that Loewen's net worth was $3.2 billion.[209] However, this witness acknowledged that the total market capitalization of Loewen, based on the then-current value of its shares, was less than $1.8 billion.[210] Loewen presented testimony that its net worth, as reflected in its filing with the U.S. Securities and Exchange Commission, was between $600 and $700 million.[211] Loewen's witness further testified that the market value of the company was approximately $1.7 billion.[212]

On November 2, 1995, the jury returned an award of punitive damages in favor of O'Keefe in the amount of $400 million.[213] This punitive damages award was fifty times the size of the largest punitive damages award ever reviewed by the Mississippi Supreme Court and more than 200 times the size of the largest such award ever upheld by the court.[214] The total verdict of $500 million was the largest verdict in Mississippi state history and the largest civil verdict in the United States in 1995.[215] The award was 78% of Loewen's entire net worth at the time of the verdict and 290 times its net worth at the time of the conduct at issue in the *O 'Keefe*

> Ray Loewen is not here today. He's not here, and I think that's the ultimate arrogance, ultimate arrogance. He didn't even show up today. That's the ultimate arrogance for him to think that he can do what he's doing to people like Jerry O'Keefe . . . and to the consumers of this state, and he can deal with it in this fashion.

Id.

[206] *Id.* at 5796.

[207] *See id.* at 5797.

[208] *Id.* at 5809.

[209] *See id.* at 5762-63.

[210] *See id.* at 5762-64. The witness alleged that the "future value" of Loewen's contract for burial services with the National Baptist Convention served to make up the difference between his estimate of the net worth of the company and its current market capitalization. *See id.* at 5763.

[211] *See id.* at 5771-72.

[212] *See id.* at 5777.

[213] *See id.* at 5810; *see also* Letter from Glenn Millen, Jury Foreman, to James Graves, Judge, Circuit Court for the First Judicial District of Hinds County, Mississippi, *supra* note 3, at 1.

[214] *See* Miss. ECON. COUNCIL, POPULIST JURISPRUDENCE 7,26-27 (1996).

[215] *See id.*

Litigation.[216] The entire award also was 35% of the value of all of Loewen's assets at the time of the verdict and 100 times the value of the companies that were the principal subject matter of the parties' contractual disputes.[217] Despite its clearly excessive nature and significant constitutional and other legal defects inherent in the award, the trial court denied Loewen's motions to set aside or reduce the jury's verdict.[218] The court entered judgment upon the jury's verdict on November 6, 1995.[219]

Mississippi law provides that a party seeking to appeal a money judgment is entitled to a stay of execution pending appeal if said party provides "a supersedeas bond, payable to the opposite party, with two or more sufficient resident sureties, or one or more guaranty or surety companies authorized to do business in this state, in a penalty of 125% of the amount of the judgment [from which appeal is made]."[220] Initial application for a stay of execution pending appeal and other applications with respect to the required bond must ordinarily be addressed to the trial court.[221] The trial court may set the bond in an amount less than 125% of the outstanding judgment for "good cause shown."[222] Trial court rulings with respect to applications for stays of execution and reduction of the amount of the required bond are subject to review by the Mississippi Supreme Court or Court of Appeals.[223]

The bond required of Loewen pursuant to Rule 8(a)~$625 million- constituted virtually all of its net worth.[224] Loewen alleged that was unable to obtain financing to cover the cost of this bond through new credit due to its already

[216] *See Motion for New Trial, supra* note 9 , 1 3 2 - 3 3 . These calculations were based upon the June 30, 1995 and December 31, 1991 financial statements determining the net worth of Loewen as $631 million and $172 million respectively. *See id.*

[217] *See id.* U 134. This calculation was based upon the stated value of Loewen's assets as $1.4 billion in its June 30, 1995 financial statement. *See id.* O'Keefe objected to the verdict as inadequate and sought additur to $1 billion. *See* Motion for Additur, O'Keefe v. The Loewen Group, Inc., No. 91-67-423 (Cir. Ct., Hinds County, Miss. 1991).

[218] *See Notice of Claim, supra* note 13,1119.

[219] *See* Final Judgment, O'Keefe v. The Loewen Group, Inc., No. 91-67-423 (Cir. Ct., Hinds County, Miss. Nov. 6, 1995).

[220] MISS. R. APP. P. 8(a).

[221] MISS. R. APP. P. 8(b).

[222] *See id.*

[223] *See id.* A motion for relief from a trial court order with respect to an application for a stay of execution or amount of the required bond may be made to the Supreme Court or to the Court of Appeals if the case is so assigned by the Supreme Court. *See* Miss. R. APP. P. 8(c). Such motion is required to demonstrate that "the application to the trial court for relief sought is not practicable, or that the trial court has denied an application or has failed to afford the relief which the applicant has requested, with the reasons given by the trial court for its action." *Id.* The motion is required to demonstrate the reasons for the relief requested, the facts relied upon by the applicant and, if such facts are in dispute, affidavits or other sworn statements. *See id.* All such motions are considered by a panel of the Supreme Court or the Court of Appeals except in emergency cases where such motions may be considered by a single justice or judge of the appropriate appellate court. *See id.*

[224] *See Notice of Claim, supra* note 13,1121.

outstanding debt load of $736 million.[225] The rapid sale of equity at "fire-sale" prices also did not present a feasible alternative to raising the funds necessary for the appellate bond.[226] Loewen estimated the cost of pursuing an appeal, including the cost of the bond, the cost of selling equity at distress prices to finance the bond and the cost of continuing to finance corporate operations, at more than $200 million for the first two years.[227] Loewen also noted that virtually none of these costs were recoverable even in the event that it was ultimately successful in prosecuting its appeal.[228]

On November 28, 1995, Loewen filed its motion to reduce the bond with the trial court pursuant to Mississippi Rule of Appellate Procedure 8(b).[229] Loewen specifically sought to reduce the required bond to $125 million, which amount constituted 125% of the compensatory damages awarded by the jury.[230] Furthermore, Loewen offered "to notify the court and O'Keefe before conveying or encumbering any significant assets, notify the court and O'Keefe before making any increased dividend payments and provide O'Keefe with monthly financial reports" throughout the pendency of the appeal.[231]

On November 29, 1995, the trial court concluded that there was not good cause shown to grant any reduction in the amount of the bond required by Mississippi Rule of Appellate Procedure 8(a).[232] As a result, Loewen sought immediate relief from the Mississippi Supreme Court pursuant to Mississippi Rule of Appellate Procedure 8(c).[233] Although it granted interim relief to Loewen on November 30, 1995 and December 19, 1995, the Mississippi Supreme Court ultimately concluded that there was no good cause for reduction of the appeal bond.[234] On January 24, 1996, over the dissent of two justices, the court ordered Loewen to post the full $625 million bond within seven days in order to obtain a stay of execution pending appeal .[235]

[225] *See id.* Loewen specifically alleged that the change in its debt-equity ratio that would have resulted from undertaking an additional $625 million in debt would have violated covenants with its existing creditors, thereby causing its existing debt to become immediately due and payable. *See id.* Loewen cited the opinions of industry analysts that "obligations related to the bond could trigger defaults on Loewen's senior debt and bank credit lines." Bernard Simon, *Damages Award Puts Loewen in Jeopardy,* FIN. TIMES, Jan. 26, 1996, at 22. Loewen further alleged that all of its existing creditors refused to waive these covenants. *See Notice of Claim, supra* note 13,1 122.

226 *See Notice of Claim, supra* note 13,1123.

227 See id.

227 *See id.*

229 See id. 1124.

[230] *See id.*

[231] *See id.*

[232] *See* O'Keefe v. The Loewen Group, Inc., No. 91-67-423 (Cir. Ct., Hinds County, Miss., Nov, 29,1995) (order denying motion for stay of enforcement of final judgment pending appeal).

[233] *See Notice of Claim, supra* note 13,1126.

[234] *See* The Loewen Group, Inc. v. O'Keefe, No. 95-M-01216 (Miss. Jan. 24, 1996) (order denying motion for stay of execution of judgment pending appeal).

[235] *See id.*

According to Loewen, the ultimate result of the decision of the Mississippi Supreme Court was to effectively foreclose its right to appeal.[236] Unable to raise the necessary capital to fund the bond nor afford the cost had it even been able to raise such funds, Loewen settled the *O 'Keefe* Litigation on January 29, 1996 under what it deemed "extreme duress" for $175 million.[237] Pursuant to the terms of the settlement, O'Keefe received $50 million in cash on January 31, 1996, 1.5 million shares of Loewen on February 15, 1996 and annual payments of $4 million over a twenty-year period.[238] Despite the substantial reduction in the amount of damages awarded at trial, the settlement still exceeded the total value of the principal companies at issue in the underlying dispute by a factor of thirty to fifty times.[239] Ultimately, settlement of the *O'Keefe* Litigation was not enough to save Loewen from bankruptcy filings in the United States and Canada on June 1, 1999.[240]

E. *The Loewen Group and the International Centre for Settlement of Investment Disputes*

Loewen initiated an arbitration proceeding with respect to the results of the *O'Keefe* Litigation with ICSID on October 30, 1998.[241] The claimants were identified as The Loewen Group, Loewen Group International, Inc. and Raymond L. Loewen.[242] The United States was identified as the sole respondent.[243] Loewen

[236] *See Notice of Claim, supra* note 13, t 127. In his commentary on punitive damages, Richard L. Blatt noted that:

> [A]s a practical matter, the interaction between appellate bonding requirements and excessive punitive damage awards effectively may deny the right to appeal to a defendant faced with an excessive punitive damage judgment entered by a trial court. This scenario empowers a jury and a judge, no more than thirteen people, to destroy a defendant that effectively is unable to appeal from the arbitrary and capricious actions of thirteen people.

RICHARD L. BLATT ET AL., PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE § 1.4 (1991).

[237] *See Notice of Claim, supra* note 13," 127.

[238] *See id.* 1 127; *see also* Walter Olson, *A Small Canadian Firm Meets the American Tort Monster,* WALL ST. J., Feb. 14, 1996, at A15.

[239] *See Notice of Claim, supra* note 13, f 127.

[240] *See The Loewen Group Files for Chapter II, supra* note 124, at 1. Loewen's press release announcing the initiation of bankruptcy proceedings did not reference the *O 'Keefe* Litigation as the root cause of the filings. Rather, the Company's "burdensome debt load," "intensive working capital needs," and focus on cemetery sales rather than the Company's core business of funeral home operations were cited as the primary reasons necessitating bankruptcy protection. *Id.*

[241] *See Notice of Claim, supra* note 13, at 70. Loewen had previously provided the United States with notice of its intent to initiate arbitration before ICSID pursuant to Article 1119 of NAFTA on July 31, 1998 and invited the United States to engage in consultation pursuant to Article 1118 of NAFTA on September 25, 1998. *See id.* at iii.

[242] *See id.* 1 1. Loewen alleged that it possessed standing to initiate arbitration proceedings pursuant to Article 1116 of NAFTA on the basis of its status as a Canadian corporation maintaining investments in the United States and suffering injury as a result of breaches of NAFTA by the United States and Mississippi. *See id.* 1 177. The claimants also asserted that The Loewen Group and Loewen Group

also attached the opinions of numerous experts, scholars and politicians with respect to the consistency of the outcome of the *O 'Keefe* Litigation with established principles of U.S. and international law.[244]

Established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States that came into force and effect on October 14, 1966,[245] ICSID is one of the five international organizations that comprise the World Bank Group.[246] Prior to ICSID's creation, the World Bank as an institution and the President of the Bank in his personal capacity assisted in the mediation of investment disputes between governments and private foreign investors.[247] ICSID's creation was intended to relieve the Bank and the President of this burden as well as "promote an atmosphere of mutual confidence between States and foreign investors conducive to increasing the flow of private international investment."[248] Despite its close association with the Bank, ICSID is an autonomous

International, Inc. possessed standing to initiate the arbitration pursuant to Article 1117 of NAFTA on the basis of their status as Canadian and U.S. corporations who had suffered injury as a result of breaches of NAFTA by the United States and Mississippi. *See id.* H 180. Raymond L. Loewen claimed to possess individual standing pursuant to Article 1116 of NAFTA on the basis of his status as a Canadian citizen maintaining investments in the United States that were harmed by the acts and omissions of the United States and Mississippi. *See id.* 1 178. Raymond L. Loewen also claimed to possess individual standing pursuant to Article 1117 of NAFTA on the basis of his status as a Canadian investor maintaining indirect ownership and control of Loewen Group International, Inc. *See id.* 1 181. All three claimants consented to the submission of their claims to arbitration and waived their right to initiate or continue legal proceedings before other forums as required by Article 1121 of NAFTA *See id.* 1182.

[243] *See id.* H 168-74. Loewen alleged that the United States was liable for injuries arising from the *O'Keefe* Litigation for two reasons. Initially, Loewen alleged that the United States is strictly liable for any breaches of NAFTA by its component states pursuant to Article 105. *See id.* 1fl| 169-71. Second, Loewen alleged that the United States failed to adequately protect their investments in violation of Article 1105 of NAFTA *See id.* 172-74.

[244] *See id.* Exs. A-E. Exhibit A consisted of a statement by Sir Robert Jennings, Q.C., the former President of the International Court of Justice, wherein he opined that the conduct and result of the *O 'Keefe* Litigation constituted a violation of international law and NAFTA *See id.* 1 8. Exhibit B consisted of the affidavit of the Honorable Richard Neely, the former Chief Justice of the West Virginia Supreme Court of Appeals, in which he concluded that the result of the *O'Keefe* Litigation was tainted by "invidious discrimination" on the basis of race, wealth and nationality. *Id.* ' 9. Exhibit C consisted of the statement of then-current Mississippi Governor Kirk Fordice characterizing the conduct of the *O'Keefe* Litigation as resulting in the denial of Loewen's due process rights. *See id.* K 10. Exhibit D consisted of the curriculum vitae and opinion of Professor Andreas Lowenfeld of the New York University School of Law in which he concluded that "the *O Keefe* verdict and the failure to waive the appeal bond requirements were a violation of NAFTA and international law because they were discriminatory, unfair and inequitable, a denial of both substantive and procedural justice, and tantamount to expropriation." *Id.*^ 11.

[245] *See supra* note 88 and accompanying text. The ICSID Convention was drafted by the Executive Directors of the World Bank and submitted to the member states of the Bank for review and ratification on March 18, 1965. *See* THE WORLD BANK GROUP, ICSID CASES 2 (1999) [hereinafter *ICSID CASES],*

[246] *See* Antonio R. Parra, *The Role of ICSID in the Settlement of Investment Disputes,* 16 ICSID News 5 (1999).

[247] *See* The World Bank Group, About ICSID 1 (1999) [hereinafter *ABOUT ICSID],*

[248] *ICSID CASES, supra* note 245, at 1; *see also ABOUT ICSID, supra* note 247, at 1.

international organization.[249] Membership in ICSID is open to all members of the World Bank that ratify the ICSID Convention.[250] As of February 1999, 146 states had signed or ratified the Convention, including the United States for whom the Convention came into force and effect on October 14, 1966.[251]

ICSID performs numerous functions with respect to international investments and disputes arising therefrom. In addition to providing facilities for the conciliation and arbitration of disputes, ICSID conducts advisory and research activities relevant to its objectives, produces numerous publications and, in conjunction with the American Arbitration Association and the International Chamber of Commerce, co-sponsors colloquia on topics of current interest in the area of international arbitration.[252] Until the mid-1980s, jurisdiction in cases brought before ICSID was based primarily upon consents recorded in an investment contract or similar instrument.[253] ICSID jurisdiction may also be based upon mutual consents contained within bilateral investment treaties between states.[254] Finally, ICSID established procedures in 1978 authorizing the Secretariat to administer proceedings between states and nationals of other states that are outside of the scope of the ICSID Convention.[255] These so-called Additional Facility Rules authorize the Secretariat to conduct conciliation and arbitration proceedings "where either the State party or the home State of the foreign national is not a member of ICSID."[256]

[249] *See ABOUT ICSID, supra* note 247, at 1. ICSID is governed by an Administrative Council and Secretariat. The Administrative Council is headed by the President of the World Bank and consists of one representative of each state that has ratified the Convention. *See id.* Unless otherwise designated, these representatives are the governors of the World Bank for the countries concerned. *See* Parra, *supra* note 246, at 5. The Administrative Council's responsibilities include approval of ICSID's annual report and its administrative budget. *See id.* The Administrative Council also selects a secretary-general to head the Secretariat every six years. *See id.* Under the Secretary-General's direction, the Secretariat carries out the daily work of ICSID. *See id.* The Secretariat's expenses are financed out of the World Bank's budget. *See ABOUT ICSID, supra* note 247, at 1. However, the costs of individual proceedings are borne by the parties involved. *See id.*

[250] *See ABOUT ICSID, supra* note 247, at 1.

[251] *See* Parra, *supra* note 246, at 1; *see also* THE WORLD BANK GROUP, LIST OF CONTRACTING STATES AND OTHER SIGNATORIES OF THE CONVENTION 5 (1998). Neither Canada or Mexico had signed the Convention as of the time of preparation of this article. *See id.*

[252] *See ABOUT ICSID, supra* note 247, at 1& 3.

[253] *See ICSID CASES, supra* note 245, at 2.

[254] *See* Parra, *supra* note 246, at 3-4.

[255] *See id.* at 2.

[256] *ABOUT ICSID, supra* note 247, at 2; *see also ICSID CASES, supra* note 245, at 2. The Additional Facility Rules also authorize the Secretariat to conduct:

> conciliation and arbitration proceedings for the settlement of disputes that do not arise out of an investment, provided that the underlying transaction is not an "ordinary commercial" one and at least one of the parties is a Contracting State or a national of a Contracting State . . . . [and] [f]act- finding proceedings . . . whenever any State and foreign national wish to institute an inquiry to examine and report on facts.

Parta, *supra* note 246, at 7.

All signatory states are required by the Convention to recognize and enforce ICSID awards whether or not they are parties to the underlying dispute.[257]

Despite its ambitious goals, submission of cases to ICSID was infrequent, and it remained "the least conspicuous entity within the World Bank Group."[258] The complexity of the arbitration procedures and length of time necessary to implement such procedures resulted in the consideration of only twenty-three cases by ICSID in its first fifteen years of existence.[259] However, ICSID's caseload grew exponentially with the increase in acceptance of bilateral investment treaties in the late 1980s, most of which designated ICSID as the preferred forum for the settlement of investment disputes.[260] There are currently more than 1,100 bilateral investment treaties in force and effect between 155 states, more than 800 of which have been concluded since 1987.[261] ICSID was also designated as one of the preferred forums for the settlement of investment disputes in the proposed Multilateral Agreement on Investment.[262] As a result, by late 1999, the number of pending ICSID cases had reached twenty-five, more than at any time in the Centre's history.[263]

Loewen's case before ICSID consists of three separate claims. Initially, Loewen claims that the introduction of testimony and comments relating to nationality, race and wealth during the course of the *O 'Keefe* Litigation violated Articles 1102 and 1105 of NAFTA.[264] Loewen alleged that the introduction of such testimony and comments at trial caused it to be treated less favorably than similarly situated U.S. investors and their investments in direct violation of the express language of Article 1102(3).[265] With respect to Article 1105, Loewen contended that the introduction of anti-Canadian evidence and comments at trial was inconsistent with the treatment to which it was entitled pursuant to international law.[266] Loewen specifically alleged that "[u]nder international law, an alien is

[257] *See ABOUT ICSID, supra* note 247, at 1.

[258] Thomas L. Brewer, *International Investment Dispute Settlement Mechanisms: Agreements, Institutions and Issues, in* ORG. FOR ECON. COOPERATION AND DEV., TOWARDS MULTILATERAL INVESTMENT RULES § 5.1 (1996).

[259] *See id.*

[260] *See id.; see also* THE WORLD BANK GROUP, LIST OF PARTIES TO BILATERAL INVESTMENT TREATIES 1 (1999) (hereinafter *ICSID BIT List].*

[261] *See ICSID BIT LIST, supra* note 260, at 1. Two hundred fifty bilateral investment treaties were concluded between 1996 and 1999. *See* Parra, *supra* note 246, at 8. Approximately 950 bilateral investment treaties currently in force and effect designate ICSID as the forum for the arbitration of investment disputes between states and private investors. *See id.* at 6. Among the NAFTA member states, the United States is a party to thirty-seven bilateral investment treaties, and Canada is a party to seventeen such treaties. *See ICSID BIT LIST, supra* note 260. Mexico is a party to two bilateral investment treaties. *See id.*

[262] *See* Parra, *supra* note 246, at 8. Negotiations on the Multilateral Agreement on Investment were discontinued in late 1998 and had not resumed at the time of preparation of this article. *See id.*

[263] *See Disputes Pending Before the Centre,* 16 ICSID NEWS 2-3 (1999).

[264] *See Notice of Claim, supra* note 13,[rr] 139-43.

[265] *See id.* H 140; *see also* note 58 and accompanying text.

[266] *See Notice of Claim, supra* note 13,1141; *see also* note 61 and accompanying text.

entitled to an impartial trial untainted by invidious discrimination."[267] Loewen cited numerous instances of anti-Canadian remarks and testimony spanning the entire length of the trial that served to infect it with a fatal strain of xenophobia in violation of NAFTA.[268]

Apart from its claim of anti-Canadian bias, Loewen alleged that the proceedings surrounding the *O'Keefe* Litigation violated Article 1105's mandate of fair and equitable treatment of foreign investors in accordance with international law. Loewen asserted three separate bases for this claim. Initially, Loewen claimed that the "egregiously wrong judicial judgment" in Mississippi constituted a substantive denial of justice.[269] In this regard, Loewen particularly noted the view of the United States that "manifestly unjust judicial decisions violate international law."[270] Furthermore, Loewen contended that the punishment imposed as a result of the *O'Keefe* Litigation was unreasonably harsh and so grossly disproportionate to the purported offenses as to constitute a denial of justice.[271] The excessive punitive damages award[272] and the $75 million damage award for emotional distress[273] were specifically cited as examples of the grossly disproportionate nature of the court's judgment. The unforeseeable size of the damages award was a further denial of substantive justice.[274] The "bizarre," "outrageous" and "astonishing" nature of the outcome in this case led Loewen to conclude that "[i]f the judgment against [it] in the *O 'Keefe* litigation was not a denial of justice, then no civil judgment is or could be."[275]

The second asserted basis for the violation of Article 1105 was a purported denial of procedural justice.[276] Loewen specifically alleged that a denial of procedural justice may arise "when [a state] permits an 'improper administration of civil and criminal justice as regards an alien, including denial of access to courts, [and] inadequate procedures.'"[277] Denials of procedural justice may also occur when

267 *Notice of Claim, supra* note 13,1) 141.

268 *See id.* H 143.

269 Id. 1|145.

[270] *Id.* H 146.

[271] *See id.* DU 148-53.

[272] *See id.* 1 150. Loewen particularly noted that most countries do not recognize punitive damages at all and disdain the frequency and size of such awards in the United States. *See id.* Loewen contended that such rejection was sufficiently universal to constitute customary international law with respect to punitive damages (citing United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820) and Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980)).

[273] *See Notice of Claim, supra* note 13, HI 152-53. Loewen noted that "almost all other countries require tort damages to be proportionate to physical or economic harm." *Id.* 1152.

[274] *See id.* 1154 (citing Hadley v. Baxendale, 9 Ex. 341,156 Eng. Rep. 145 (1854)).

275 *Notice of Claim, supra* note 13, K 155.

276 See id. 1iH 156-58.

[277] *Id.* 1 156 (citing A.O. Adede, *A Fresh Look at the Meaning of the Doctrine of Denial of Justice Under International Law,* 14 CAN. Y.B. Int'l L. 73,91 (1976)).

a state "imposes unwarranted delay or obstruction of access to courts, [is] gross[ly] deficiencft] in the administration of judicial or remedial process, [or] fail[s] to provide those guaranties which are generally considered indispensable to the proper administration of justice."[278] In the *O 'Keefe* Litigation, Loewen alleged that the trial court's repeated allowance of irrelevant and prejudicial testimony and comments with respect to nationality, race and wealth constituted denials of procedural justice.[279] Furthermore, the trial court and Mississippi Supreme Court's refusal to grant Loewen's request for a reduction in the amount of the bond effectively foreclosed its access to the courts and resulted in a coerced and excessive settlement in violation of NAFTA's guarantee of procedural justice.[280]

The final purported basis for the contention that the *O'Keefe* Litigation violated Article 1105 was that the same behavior that constituted substantive and procedural denials of justice also constituted a denial of fair and equitable treatment.[281] Loewen noted that this requirement was drawn from several U.S. bilateral investment treaties, including the model bilateral investment treaty upon which all U.S. treaties are based.[282] Citing numerous sources, Loewen contended that Article 1105's requirement of fair and equitable treatment went '"far beyond' the minimum protections afforded to foreign investors under international law.'"[283] Loewen concluded that, "even if the *O Keefe* litigation did not rise to the level of a 'denial of justice' under international law, it would nonetheless violate the 'much wider' protection afforded under the 'fair and equitable treatment' standard."[284]

Finally, Loewen alleged that the excessive verdict, the denial of its appeal rights and the coerced settlement were tantamount to an uncompensated expropriation in violation of Article 1110 of NAFTA.[285] Loewen noted the longstanding recognition by the United States that expropriation covers "'a multitude of activities having the effect of infringing property rights.'"[286] These activities may include government action that interferes with an alien's use or enjoyment of

[278] *Notice of Claim, supra* note 13,1156.

[279] *See id.* 1157.

[280] *See id.*

281 See id. HI 159-61.

[282] *See id.* 1 160.

[283] *Id.* (citing KENNETH J. VANDEVELDE, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE 2 (1992); K. Scott Gudgeon, *United Slates Bilateral Investment Treaties: Comments on Their Origin, Purposes and General Treatment Standards,* 4 INT'L TAX & Bus. Law. 105, 125 (1986); F.A. Mann, *British Treaties for the Promotion and Protection of Investments,* 52 BRIT. Y.B. INT'L L. 241-44 (1981)).

[284] *Notice of Claim, supra* note 13, *[161.

[285] *See id.* 1162-67; *see also supra* notes 64-73 and accompanying text.

[286] *Notice of Claim, supra* note 13, 1 166 (citing President's Statement on U.S. Government Policy on International Investment, 19 WEEKLY COMP. PRES. Doc. 1214, 1217 (Sept. 12, 1983); Com Prods. Ref. Co. Claim, 1955 INT'L L. Rep. 333, 334; 8 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1007 (1967)).

property[287] or redistributes wealth amongst private parties.[288] Loewen specifically contended that there were five separate actions constituting expropriation in the *O 'Keefe* Litigation. Initially, Loewen contended that the conduct and result of the *O'Keefe* Litigation "had the effect of severely infringing and interfering with Loewen's property rights."[289] Second, Loewen alleged that there was no legitimate public purpose underlying the verdict.[290] Third, as noted in the previous claims, the verdict and coerced settlement were the product of anti-Canadian discrimination imposed in violation of Article 1110(l)(b).[291] The fourth basis for contending that the trial and verdict constituted expropriation were their failure to conform to the due process requirements of Articles 1105(1) and 1110(l)(c).[292] Finally, Loewen alleged that it had not been compensated "either for the coerced settlement or for the further harms it [had] suffered as a result of the *O 'Keefe* litigation."[293]

Loewen sought monetary relief in an amount that, as far as possible, would wipe out all consequences of the actions of the United States and Mississippi and reestablish the situation which would have existed if the *O 'Keefe* Litigation had not occurred.[294] Loewen specifically sought recovery of the $175 million settlement as well as damages for reduced prospects for corporate investment and growth, harm to its business reputation, reduced credit ratings, increased financing costs, interest and costs.[295] Raymond L. Loewen sought damages to compensate for the reduction in value of his shares in The Loewen Group attributable to the *O 'Keefe* Litigation and harm to his individual reputation.[296] Although the Notice of Claim did not specify the amount of damages sought for each of these injuries, it has been estimated that Loewen is seeking an award in excess of $725 million.[297]

[287] *See Notice of Claim, supra* note 13, H 164 (citing Tippetts, Abbett, McCarthy, Stratton v. Iran, 6 Iran-U.S. Cl. Trib. Rep. 219, 225 (1984); Starrett Hous. Corp. v. Iran, 4 Iran-U.S. Cl. Trib. Rep. 122, 154, 172 (1983); Louis B. Sohn & R.R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens,* 55 AM. J. INT'L L. 545, 553 (1961)).

[288] *See Notice of Claim, supra* note 13, H 165 (citing Tippetts, *supra* note 287, at 225; GEOROE H. ALDRICH, THE JURISPRUDENCE OF THE IRAN-UNITED STATES CLAIM TRIBUNAL 188 (1996); ALLAHYAR MOURI, THE INTERNATIONAL LAW OF EXPROPRIATION AS REFLECTED IN THE WORK OF THE IRAN-U.S. CLAIMS TRIBUNAL 66 (1994)).

[289] *Notice of Claim, supra* note 13, 1 167.

290 See id.

291 See id.

[292] *See id. ; see also supra* notes 61,65 and accompanying text.

[293] *Notice of Claim, supra* note 13, H 167.

[294] *See id.* 184-85 (citing Amoco Int'l Fia v. Iran, 15 Iran-U.S. Cl. Trib. Rep. 189, 270 (1987); ALDRICH, *supra* note 288, at 247-70; MARJORIE M. WHITEMAN, DAMAGES IN INTERNATIONAL LAW 1767 (1943)).

[295] *See Notice of Claim, supra* note 13, 186(a-e).

[296] *See id.* 187(a) & (b). The Loewen Group's stock price fell from 40 3/64 per share reflecting a market capitalization of $1.92 billion on October 31, 1995 to 31 7/8 per share reflecting a market capitalization of $1.53 billion on November 3, 1995. *See Motion for New Trial, supra* note 91130.

[297] *See* Glaberson, *supra* note 20, at C6.

At the time of preparation of this article, Loewen's claims remain pending before ICSID. The Notice of Claim was registered with ICSID on November 19, 1998, and a tribunal was constituted on March 17, 1999.[298] The tribunal is composed of Sir Anthony Mason of Australia, who is serving as the tribunal's president, L. Yves Fortier of Canada and Judge Abner J. Mikva of the United States.[299] The tribunal held its first session in Washington, D C. on May 18, 1999 3°° or ij er information with respect to the status of the proceedings remains confidential.

IIL PUNITIVE DAMAGE AWARDS IN THE UNITED STATES: DESERVED PUNISHMENT FOR WRONGDOERS OR UNCOMPENSATED EXPROPRIATION?

A. *The NAFTA Definition of Expropriation*

Article 1110 of NAFTA prohibits member states from nationalizing or expropriating investments of investors of other member states or taking measures tantamount to nationalization or expropriation except "(a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law . . . and (d) on payment of compensation" in an amount equal to fair market value payable without delay.[301] Article 1110 does not attempt to articulate the line between legitimate regulatory measures and compensable takings nor defines those circumstances that constitute "acts tantamount to expropriation."

Despite this lack of guidance, NAFTA's definition of expropriation mirrors traditional U.S. and Canadian definitions of expropriation. The modern U.S. definition of expropriation had its origin in the bilateral investment treaty program of the early 1980s.[302] Originally devised for the protection of investments of U.S. nationals in developing countries, the definition of expropriation in U.S. bilateral investment treaties has "become [a] standard component of United States' investment policy with both developing and industrialized countries."[303] The primary purpose of the U.S. bilateral investment treaty program has been to

[298] *See Disputes Pending Before the Centre*, *supra* note 263, at 2-3; *see also* THE WORLD BANK Group, list of pending Cases Before ICSID 9 (1999) [hereinafter *ICSID LIST OF CASES*],

[299] *See Disputes Pending Before the Centre*, *supra* note 263, at 2-3; *see also ICSID LIST OF CASES*, *supra* note 298, at 9.

[300] *See Disputes Pending Before the Centre*, *supra* note 263, at 2-3; *see also ICSID LIST OF CASES*, *supra* note 298, at 9.

[301] NAFTA, *supra* note 16, arts. 1110(1) & 1110(2); *see also GAO REPORT*, *supra* note 51, at 23; FOLSOM, *supra* note 29, § C.3; GLICK, *supra* note 73, at 25; Kennish, *supra* note 37, at § 3.12.

[302] *See* Mark S. McConnell, *Limitations Imposed by the Constitution and Treaties of the United States on the Regulation of Foreign Investment*, *in* MANUAL OF FOREIGN INVESTMENT IN THE UNITED STATES § 1.30 (John Byam et al. eds., 1993). For a discussion of the historical development of the definition of expropriation prior to the initiation of the bilateral investment treaty program, *see* VANDEVELDE, *supra* note 283 § 7.01.

[303] McConnell, *supra* note 302, § 1.30.

construct "a network of treaty practice consistent with the United States' view of the customary international legal principles governing expropriation."[304]

U.S. bilateral investment treaties do not expressly define the terms "expropriation" or "nationalization." However, it is clear that the U.S. definition encompasses individual acts of expropriation as well as broader takings designed to restructure a distinct industry or entire economy.[305] Also included within the definition of expropriation are indirect takings accomplished through such means as oppressive taxation and restrictions upon management.[306] Creeping expropriation accomplished through a series of individually innocuous regulatory measures is also encompassed within the U.S. definition.[307]

As codified in its bilateral investment treaties, the U.S. view is that expropriation is lawful only if it is for a public purpose, nondiscriminatory, in accordance with due process of law and consistent with any agreement between the investor and the host state.[308] The public purpose requirement is not defined in U.S. bilateral investment treaties but has been broadly construed to prohibit expropriations that "merely transfer property from one private party to another or which are carried out as a political reprisal."[309] The requirement of nondiscrimination prohibits the targeting of investments for expropriation on the basis of the nationality of the owner.[310] The due process of law element requires that the expropriation be consistent with the law of the expropriating state as well as international standards of due process. Generally speaking, international standards of due process prohibit arbitrary or capricious actions by the expropriating state and require available and meaningful judicial review.[311]

U.S. bilateral investment treaties also require the payment of prompt, adequate and effective compensation upon the occurrence of an expropriation, nationalization or taking in order for such action to be deemed lawful.[312] Prompt payment means payment to the injured investor within a reasonable time and without delay.[313] Adequate compensation requires the payment of fair market value for the property as of the date of expropriation.[314] Finally, effective compensation

[304] VANDEVELDE, *supra* note 283, § 7.02. Vandevelde concludes that this purpose is so important that "[f]rom the United States' perspective, it [is] far better to conclude no BIT at all than to conclude one which reflect[s] a compromise on the treatment of expropriated investment." *Id.*

[305] *See id.*

[306] *See id.*

[307] *See id.*

[308] *See id.*

309Id.

310 See id.

311See id.

312See id.

313See id.

314See id.

means that the compensation paid to the injured investor is in a freely convertible currency at the prevailing rate of exchange on the date of the expropriation.[315]

The Canadian definition of expropriation is very similar to that of the United States. Utilizing standards established by the Export Development Corporation,[316] expropriation occurs when "any act or omission taken, authorized, ratified or condoned by the host government . . . prevents [an] investor from exercising its fundamental rights under the terms of the investment or . . . results in loss of effective control over the host enterprise."[317] This definition includes instances of creeping expropriation where the host government renders the investment uneconomic through discriminatory measures affecting taxes, licensing and other matters essential to the efficient operation of the particular investment.[318] Such actions are considered unlawful if a host government acts in an arbitrary or discriminatory fashion.[319] Such occurrences require the payment of compensation to the injured investor in order to be rendered lawful.

Despite significant differences between members of the developed and developing world, there are numerous common threads between the U.S., Canadian and international definitions of expropriation.[320] For example, there is general

[315] *See id.*

[316] The Export Development Corporation issues insurance for non-commercial risks affecting Canadian investments in developing countries. The Export Development Corporation also provides insurance to exporters for commercial and political risks affecting their sale of goods, services and technology. These policies may cover global export sales of a particular insured, selected destinations or specific transactions. For a complete discussion of the operations of the Export Development Corporation, *see* ROBERT K. Paterson, Canadian Regulation of International Trade and Investment 351 (1986); *see also* Robert K. Paterson & Martine M.N. Bond, International Trade and Investment Law in Canada § 12.3 (1994).

[317] Paterson & Bond, *supra* note 316, § 12.3.

[318] *See id.; see also* PATERSON, *supra* note 316, at 362.

[319] *See* PATERSON, *supra* note 316, at 361.

[320] Many commentaries in this area have started with the basic assumption that there is no consensus on the rules of customary international law relating to the taking of foreign-owned property. *See* Karl M. Meessen, *Domestic Law Concepts in International Expropriation Law, in* THE VALUATION OF Nationalized Property in International Law 157 (Richard B. Lillich ed., 1987). Undoubtedly, this is an area of international law that abounds with controversy. *See* M. SORNARAJAH, THE INTERNATIONAL Law ON Foreign INVESTMENTS 277 (1994). Industrialized states have generally taken the position that expropriation is subject to the requirements of international law, including the payment of prompt, adequate and effective compensation. *See* IBRAHIM F.I. SHIHATA, LEGAL TREATMENT OF FOREIGN INVESTMENT: THE WORLD Bank GUIDELINES 86 (1994). By contrast, some lesser developed states have argued against the subordination of domestic expropriation practices to the constraints of international law and rejected the standard of compensation favored by developed states. *See id.* at 87. Broad definitions of expropriation with ensuing wide-ranging rights to compensation are rejected by such states as unduly interfering in matters of sovereignty associated with such activities as taxation and the regulation of property through the exercise of the police powers. *See* SORNARAJAH, *supra,* at 283. Uncertainty in this field has been exacerbated by the lack of an exhaustive survey with respect to state practices in this area over the course of the previous fifteen years. *See* A A Fatouros, *Toward an International Agreement on Foreign Direct Investment, in* ORG. FOR ECON. COOPERATION AND DEV., TOWARDS MULTILATERAL INVESTMENT RULES § 4.3 (1996). Nevertheless, for the reasons noted in the text, this author ascribes to the conclusion reached by the World Bank that there is an emerging consensus with respect to fundamental principles in the area of expropriation.

international consensus on the requirement that, in order to constitute a taking, the conduct at issue must be directly or indirectly attributable to a state.[321] Although states have a right to nationalize or expropriate foreign investments within their territory, such action must be motivated by a good faith public purpose.[322] Furthermore, there is general consensus on the requirements that such takings be conducted in conformance with national law[323] and be non-discriminatory in nature.[324] There is also some degree of international recognition of the concept of expropriation as encompassing state action "that is confiscatory or that prevents, unreasonably interferes with, or unduly delays effective enjoyment of an alien's property or its removal from the state's territory."[325] There is even emerging consensus on the payment of compensation by the host state to the foreign investor in the event of a nationalization or expropriation,[326] although there remains considerable dispute with regard to the appropriate measurement of such
[327]
compensation.

Nevertheless, the issue remains whether punitive damages awards of U.S. state courts, and specifically, the award in the ***O 'Keefe*** Litigation, meet any of the criteria for expropriation. In order to resolve this issue, an examination of the consistency of the punitive damages award in the ***O'Keefe*** Litigation with applicable U.S., Canadian and international standards is necessary. Applying these

321 *See* SORNARAJAH, *supra* note 320, at 284.

322 See SHIHATA, *supra* note 320, at 85, 88; *see also* Brewer, *supra* note 258, § 2.4; SORNARAJAH, *supra* note 320, at 315-18. The requirement of a good faith public purpose was also contained within the World Bank's guidelines with respect to expropriation as well as the proposed Multilateral Agreement on Investments. *See* ORO. FOR ECON. COOPERATION AND DEV., OPEN MARKETS MATTER: THE BENEFITS OF TRADE AND INVESTMENT LIBERALIZATION 82-83 (1998). However, it must be noted that the concept of public purpose is quite broad and is generally not subject to re-examination by other states, courts or arbitration panels. *See* SHIHATA, *supra* note 320, at 317-18.

[323] *See* SHIHATA, *supra* note 320, at 52-3, 88.

[324] *See id.* at 88; *see also* Brewer, *supra* note 258, § 2.4; SORNARAJAH, *supra* note 320, at 315.

[325] SORNARAJAH, *supra* note 320, at 284; *see also* SHIHATA, *supra* note 320, at 52-3, 88. However, it has been appropriately noted that such indirect methods of taking "have not been identified with any certainty either in arbitral decisions or in the literature." SORNARAJAH, *supra* note 320, at 321. In fact, takings occurring through the operation of antitrust, consumer and environmental protection, land use planning, securities and taxation laws may be essential to the efficient functioning of the state and, thus, may be non-compensable. *See* SORNARAJAH, *supra* note 320, at 283.

[326] Most bilateral and multilateral investment treaties allow expropriation upon the payment of appropriate compensation. *See* SHIHATA, *supra* note 320, at 52-3. The World Bank's guidelines also require the payment of "appropriate compensation" upon the occurrence of an act of expropriation. *See id.* at 89-90. The requirement of compensation also has received considerable support in scholarly writings on the topic. *See id.* at 85-86 n. 49; *see also* Brewer, *supra* note 258, § 2.4; Meessen, *supra* note 320, at 158.

[327] *See* SHIHATA, *supra* note 320, at 85-6 n.49. Industrialized states have generally favored the requirement of prompt, adequate and effective compensation based upon fair market or going concern value with interest while lesser developed states have denied the existence of any internationally-recognized standard or supported vaguer standards such as "appropriate" compensation. *See id.* at 52-55 & 86-90. *See also* Brewer, *supra* note 258, § 2.4; Meessen, *supra* note 320, at 158.

standards to the punitive damages award in the ***O'Keefe*** Litigation leads to the conclusion that such award was lacking in a public purpose, discriminatory and was obtained in violation of due process of law. As such, this award was a clear violation of Article 1110's prohibition upon uncompensated expropriation of foreign investments by NAFTA member states.

B. *U.S. Standards for Punitive Damages Awards*

The concept of punitive damages in American law had its historic origin in the system of monetary penalties, so-called amercements, exacted against civil wrongdoers in thirteenth century England.[328] The first reported cases validating the award of punitive damages in American jurisprudence date from the late eighteenth century.[329] The U.S. Supreme Court recognized the concept of punitive damages as early as 1818 and on repeated occasions throughout the nineteenth century.[330] Punitive damages in one form or another and for various reasons are presently recoverable in forty-six of the fifty states.[331] Among the states that permit the recovery of punitive damages, Mississippi is among those having "the least stringent requirements"[332] including recovery of such damages in breach of contract actions.[333] In any event, punitive damages awards remained relatively modest until the 1960s.[334]

[328] *See* BLATT, *supra* note 236, § 1.2; *see also* John C. Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139 (1986); Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons From History*, 40 VAND. L. REV. 1234 (1984).

[329] *See* Coryell v. Colbaugh, 1 N.J.L. 77 (1791); *see also* Genay v. Norris, 1 S.C.L. (1 Bay) 6 (1784). *But see* Fay v. Parker, 53 N.H. 342, 382 (N.H. 1872) (condemning punitive damages as "a monstrous heresy ... an unsightly and an unhealthy excrescence, deforming the symmetry of the body of the law."). For a comprehensive discussion of punitive damages awards in early American jurisprudence, *see* David G. Owen, *Punitive Damages in Product Liability Litigation*, 74 MICH. L. Rev. 1257, 1262-64 (1976).

[330] *See* The Amiable Nancy, 16 U.S. (1 Wheat.) 546 (1818); *see also* Minneapolis & St. Louis R.R. CO. v. Beckwith, 129 U.S. 26, 36 (1889); Barry v. Edmunds, 116 U.S. 550, 565 (1886); Miss. Pac. R.R. CO. v. Humes, 115 U.S. 512, 521 (1885); Day v. Woodworth, 13 U.S. (1 How.) 363 (1852).

[331] *See* BLATT, *supra* note 236, § 3.2. Only Michigan, Nebraska, New Hampshire and Washington do not permit the recovery of punitive damages. *See id.*

[332] *Id.* § 8.34.

[333] *See* Prudential Prop. & Cas. Ins. Co. v. Mohrman, 828 F. Supp. 432, 441 (S.D. Miss. 1993); *see also* Guy v. Commonwealth Life Ins. Co., 698 F. Supp. 1305, 1315-16 (N.D. Miss. 1987); Cabell Elec. Co. v. Pac. Ins. Co., 655 F. Supp. 625, 627 (S.D. Miss. 1987); Hurst v. Southwest Miss. Legal Servs. Corp., 708 So.2d 1347, 1350 (Miss. 1998); Am. Funeral Assurance Co. v. Hubbs, 700 So.2d 283, 286 (Miss. 1997); Gulf Guar. Life Ins. Co. v. Duett, 671 So.2d 1305, 1309 (Miss. 1996); Peoples Bank & Trust Co. v. Cermack, 658 So.2d 1352, 1361 (Miss. 1995); Sessoms v. Allstate Ins. Co., 634 So.2d 516, 519 (1993); Dynasteel Corp. v. Aztec Indus., Inc., 611 So.2d 977, 985 (Miss. 1992); Eselin-Bullock & Assoc. Ins. Agency, Inc. v. Nat'l Gen. Ins. Co., 604 So.2d 236, 241 (Miss. 1992); Blue Cross & Blue Shield of Miss., Inc. v. Maas, 516 So.2d 495,496-97 (Miss. 1987).

[334] *See* Brief for Amici Curiae American Institute of Architects, American Tort Reform Association, Council of Community Blood Centers, General Electric Company, Minnesota Civil Justice Coalition, National School Boards Association and Texas Civil Justice League at 14, Pac. Mut. Life Ins. Co.

The long-standing acceptance of punitive damage awards in American jurisprudence does not exempt their imposition from constitutional scrutiny.[335] Rather, punitive damages "pose an acute danger of arbitrary deprivation of property."[336] State interests associated with such awards and flexibility in their imposition must yield to constitutional provisions concerning due process, property rights and interstate commerce.[337] However, the test for determining the consistency of punitive damage awards with constitutional mandates cannot be drawn with "a mathematical bright line."[338] Rather, such awards must be reasonable in both amount and the procedure by which they were determined in order to pass constitutional muster.[339]

The punitive damages award assessed against Loewen in the ***O'Keefe*** Litigation fails the procedural and substantive tests for the reasonableness of punitive damages as established by the U.S. Supreme Court. Initially, as punitive damages awards must be based upon reason, an award that is the product of bias or passion cannot withstand constitutional scrutiny.[340] Such influences are antithetical to the rule of law,[341] and awards reached through consideration of such factors violate due process.[342] Punitive damage awards that reflect "bias, passion, or prejudice . . . rather than a rational concern for deterrence and retribution [violate the Constitution] no matter what the absolute or relative size of the award."[343]

The ***O'Keefe*** Litigation was infected with such unconstitutional bias, passion and prejudice at the expense of rationality from its very commencement. Repeated references were made to the foreign ownership of Loewen throughout jury

v. Haslip, 499 U.S. 1 (1991) (No. 89-1279) (noting that the largest punitive damages award in the United States in the nineteenth century was $4,500). The amici further noted that awards in excess of $12,000 were deemed excessive as late as the 1930s and, as of 1955, $75,000 was the largest punitive damage award in California history and one of the two largest awards in the United States. *See id.* at 16. *See also* BLATT, *supra* note 236, § 1.2.

335 *See Pac. Mut. Life Ins. Co.*. 499 U.S. at 18.

[336] Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994); *see also* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443,467 (1993) (Kennedy, J., concurring) (noting that punitive damage awards may be, under certain circumstances, "arbitrary or irrational deprivations of property" in violation of the U.S. Constitution).

[337] See BMW ofN. Am., Inc. v. Gore, 517 U.S. 559, 585 (1996) (holding that "[w]hile each State has ample power to protect its own consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation."); *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323,
349 (1974) (holding that "the States have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of actual injury.")

[338] *Pac. Mut. Life Ins. Co.*. 499 U.S. at 18.

[339] *See id.* at 18-20; *see also TXO Prod. Corp.*, 509 U.S. at 457. Mississippi's punitive damages statute recognizes this requirement by providing that awards must be "reasonable in [their] amount." MISS. CODE ANN. § 11-1-65(1X0(0(1993).

[340] *See Pac. Mut. Life Ins. Co.*, 499 U.S. at 9.

[341] *See TXO Prod. Corp.*. 509 U.S. at 475 (O'Connor, J., dissenting).

[342] *See Pac. Mut. Life Ins. Co.*, 499 U.S. at 41 (Kennedy, J., concurring).

[343] *TXO Prod. Corp.*, 509 U.S. at 467 (Kennedy, J., concurring).

selection,[344] opening statements,[345] the presentation of evidence[346] and closing arguments.[347] These references were not benign remarks made in passing but, rather, were ferocious in their characterization of Loewen as a "foreign invader" who descended upon the state like "gang busters" and the Japanese upon Pearl Harbor with the intent to drive O'Keefe from the funeral home industry, raise prices, take advantage of the citizens of Mississippi and build a fortune upon their misery, poverty and suffering.[348] Improper trial emphases also included race[349] and Loewen's economic status.[350] Such references were inflammatory in their characterization of O'Keefe as a modest patriot and protector of the interests of black as well as white Mississippians in contrast to Loewen's alleged insensitivity to the needs of the poorest citizens of the poorest state in the nation.[3S1] Any attempt to separate the conduct of the compensatory and punitive damages phases of the case is rendered unconvincing by the continued appeals to nationalism that characterized the punitive damages phase of the trial.[352] Loewen was portrayed as an arrogant foreigner that derived pleasure from overcharging Mississippians for its services from the distant and safe haven of Canada.[353]

The resultant punitive award of $400 million, astronomical in its size in comparison to similar cases, state judicial history and Loewen's net worth, belies any conclusion that it was the product of rational debate and concern for deterrence and retribution.[354] The very fact that the entire punitive damages phase of the trial, including opening statements, presentation of evidence, closing arguments, jury deliberation and award of damages, was completed in a single day is testament to the operation of influences upon the jury other than the force of reason.[355] Indeed, the compensatory award, seven weeks in the making, was quintupled overnight.[356] Although O'Keefe was undoubtedly entitled to and certainly expected aggressive representation of his interests, there must be a line, perhaps faint and fact specific, beyond which zealous advocacy becomes an unreasonable appeal to bias, passion, prejudice and nationalism without the pale of the Constitution. In pursuing their trial strategy in the fashion they thought most advantageous for their client, O'Keefe's counsel may have crossed such a line.

[344] *See supra* notes 171-74 and accompanying text.
[345] *See supra* notes 176-81 and accompanying text.
[346] *See supra* notes 182-90 and accompanying text.
[347] *See supra* notes 191-96 and accompanying text.
[348] *See supra* notes 173, 177, 181, 193-95, and 206 and accompanying text.
[349] *See supra* notes 180, 187-88 and accompanying text.
[350] *See supra* notes 181, 188 and 190 and accompanying text.
[351] *See supra* notes 180-81 and 187-89 and accompanying text.
[352] *See supra* notes 203-08 and accompanying text.
[353] *See supra* notes 205-06 and accompanying text.
[354] *See supra* notes 203-19 and accompanying text.
[355] *See id.*
[356] *See supra* note 182 and accompanying text.

The size of the punitive damages award in the ***O 'Keefe*** Litigation may, in and of itself, evidence unconstitutional bias without the presence of further aggravating circumstances. The Due Process Clause prohibits states from imposing "grossly excessive" punishment upon tortfeasors and places a substantive limit upon on the size of punitive damage awards.[357] Punitive damage awards must bear a reasonable relation to the actual harm caused.[358] Although, as previously noted, there is no "mathematical bright line" for determining the constitutionality of such awards, the U.S. Supreme Court has indicated that an award more than four times the amount of compensatory damages is "close to the [constitutional] line."[359] Beyond such a point, states have no legitimate interest in imposing punishment upon tortfeasors.[360] Indeed, this limitation is reflected in applicable Mississippi law, which provides that punitive damage awards must be "reasonable" in amount and "rationally related" to the purposes of punishment and deterrence.[361]

Unfortunately, this limitation upon state interests with respect to the imposition of punitive damages was ignored in the ***O 'Keefe*** Litigation. The punitive portion of the award toes, if not crosses, the line of four times the compensatory portion of the award declared constitutionally suspect by Justice Blackmun in ***Pacific Mutual Life Insurance Company*** v. ***Haslip.*** [362] In fact, if one accepts Loewen's contention that $75 million of the compensatory damages award was attributable to O'Keefe's purported emotional distress, the punitive portion of the award is sixteen times the actual economic loss allegedly suffered as a result of Loewen's actions.[363] This ratio balloons to eighty times the amount of actual economic loss if comparison is had between the approximate value of the transactions at issue in the ***O 'Keefe*** Litigation and the ultimate amount of punitive damages awarded by the jury.[364]

Heeding Justice Blackmun's warning, the comparison of the compensatory and punitive elements of the verdict in a light most favorable to O'Keefe barely sustains its constitutionality. However, the more reasonable comparison is between the amount of actual economic loss and the punitive damages award. This comparison is more accurate given the uncertainty associated with non-pecuniary losses as well as the often-haphazard methods by which such losses are proven and assessed. Utilizing quantifiable pecuniary loss provides a more accurate measure of

[357] *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 562 (1996); *see also* Honda Motor Co. v. Oberg, 512 U.S. 415, 420, 435 (1994); Pac. Mut. Life Ins. Co. v. Haslip. 499 U.S. 1, 10 (1991).

[358] *See BMW ofN. Am.,* 517 U.S. at 580; *see also* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 478 (1993); *Pac. Mut. Life Ins. Co.,* 499 U.S. at 12.

[359] *Pac. Mut. Life Ins. Co.,* 499 U.S. at 23.

[360] *See supra* note 337 and accompanying text.

[361] *See* MISS. ANN. CODE § 11-1-65(1X0(0 (1993).

[362] 499 U.S. 1,23(1991).

[363] *See Notice of Claim, supra* note 13, "ill 152-53.

[364] *See id* H 33.

the plaintiff's injury upon which to base a constitutionally sustainable award of punitive damages. Such a standard also introduces some degree of certainty into the otherwise murky process of assessing damages by providing notice to defendants of the potential scope of their liability for punitive damages. Additionally, this standard wisely limits the ability of juries to award punitive damages based upon haphazard "guesstimates." In any event, applying this standard of comparison, whether based upon Loewen's estimate of $25 million in actual economic loss or the $5 million value of the transactions at issue, it is clear that the punitive damages awarded by the jury in the ***O 'Keefe*** Litigation are unconstitutionally excessive.

This lack of rationality is further underscored by the procedural confusion surrounding the compensatory and punitive elements of the jury's verdict. The initial verdict reached by the jury on November 1, 1995 totaling $260 million represented $100 million in compensatory and consequential damages and $160 million in punitive damages.[365] The trial judge responded to this verdict by unilaterally reforming the verdict to reflect $100 million in compensatory damages and initiating the punitive damages phase of the trial.[366] It can be logically implied from these actions that the trial court found the jury's award of punitive damages inadequate. In any event, one day later, after hearing testimony from three witnesses on the sole issue of Loewen's financial worth, the jury increased the punitive damages award by two and one-half times to $400 million.[367] What motivated the jury to increase its award in such a significant fashion in so short of a period of time is known only to the panel members themselves. However, it can be convincingly contended that the ultimate result of the punitive damages phase of the trial was not an independent exercise in rationality but, rather, was the product of judicial pressure, continued invectives directed at Loewen by O'Keefe's counsel and, perhaps, lingering jury confusion. This result and the procedural morass from which it emerged are not reasonable, do not serve any legitimate state interest and, hence, cannot withstand constitutional scrutiny.

Additionally relevant in this regard is the size of the award in relation to previous punitive damages awards in the state.[368] Although state interests associated with punitive damages awards resist absolute quantification, previous jury awards within the state nonetheless do provide some guidance in ascertaining the boundaries of legitimacy for such awards.[369] When applied to the punitive damages

[365] *See supra* note 201 and accompanying text.

[366] *See supra* note 202 and accompanying text.

[367] *See supra* note 213 and accompanying text.

[368] *See* BMW ofN. Am., Inc., 517 U.S. 559, 594 (1996) (Breyer, J., concurring) (contending that a punitive damages award of $2 million for an intentional misrepresentation causing $56,000 of harm is "extraordinary by historical standards."); *see also* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 482 (O'Connor, J., dissenting) (contending that a punitive damages award entered by a West Virginia trial court in excess of twenty times the highest such award ever upheld in state history for any misconduct was unconstitutionally excessive).

[369] *See TXO Prod. Corp.*, 509 U.S. at 483 (O'Connor, J., dissenting).

award in the ***O 'Keefe*** Litigation, this comparison leads to the irresistible conclusion that the award was well beyond the legitimate bounds of Mississippi's interest in punishing tortfeasors and deterring similar conduct in the future. The $400 million punitive damages award was fifty times greater than the largest such award ever reviewed by the Mississippi Supreme Court.[370] Furthermore, the award was more than 200 times the size of the largest punitive damages award ever sustained by the Court.[371] The combined compensatory and punitive awards constituted the largest civil verdict in a business case in the United States in 1995 as well as the largest civil verdict in Mississippi history.[372] The absence of "bright mathematical lines" aside, it nonetheless can be safely concluded that the punitive damages award in the ***O 'Keefe*** Litigation was an unprecedented exercise in retribution and deterrence that was inconsistent with more than 150 years of Mississippi judicial history. Although perhaps not rendered illegitimate by its size alone, when combined with the other factors that contaminated the proceedings, the award clearly breaks free of the bonds of constitutionality restraining states from imposing excessive punishment upon those causing injury within their boundaries.

Undue emphasis upon the economic status of the tortfeasor from whom a punitive damages award is sought may also be indicative of unconstitutional bias. Although undoubtedly bearing some relevance to the punitive damage equation,[373] undue emphasis upon the wealth of the purported wrongdoer "increase[s] the risk that the award may [be] . . . influenced by prejudice against large corporations."[374] This risk is particularly acute when the wrongdoer is a nonresident.[375] As noted by Justice O'Connor in her dissenting opinion in ***TXO Production Corporation*** v. ***Alliance Resources Corporation,*** as "mere abstractions" often representing " a large accumulation of productive resources," corporations "are unlikely to be viewed with much sympathy."[376] As a result, Justice O'Connor concluded that "jurors naturally

[370] *See* Miss. ECON. COUNCIL, *supra* note 214, at 7, 26-7.

371 See id.

[372] *See id.*

[373] Mississippi law permits the finder of fact to consider a defendant's financial condition and net worth in determining the amount of punitive damages. *See* MISS. CODE ANN. § 1 l-l-65(lX°) (1993). These factors are also relevant to the trial court's subsequent determinations with respect to the reasonableness of the award and its rational relationship to legitimate state interests. *See id.* § 11-1-65(1X00)* Consideration of the pecuniary ability of a wrongdoer to pay punitive damages and its net worth as provided in Mississippi law were deemed consistent with the U.S. Supreme Court's opinion in *Pacific Mutual Life Insurance Company* v. *Haslip* by the U.S. Court of Appeals for the Fifth Circuit in the *Eichenseer* case. *See* Eichenseer v. Reserve Life Ins. Co., 934 F.2d 1377, 1385 (5th Cir. 1991); *see also* Ross-King-Walker, Inc. v. Henson, 672 So.2d 1188, 1193 (Miss. 1996); James W. Sessums Timber Co. v. McDaniel, 635 So.2d 875, 882-83 (Miss. 1994); Valley Forge Ins. Co. v. Strickland, 620 So.2d 535, 540-41 (Miss. 1993); Harvey-Latham Real Estate v. Underwriters at Lloyd's, London, 574 So.2d 13, 17 (Miss. 1990).

[374] *TXO Prod. Corp.*, 509 U.S. at 464.

375 See id.

376 *TXO Prod. Corp.*, 509 U.S. at 491 (O'Connor, J., dissenting).

think little of taking an otherwise large sum of money out of what appears to be an enormously larger pool of wealth . . . (and] may feel privileged to correct perceived social ills stemming from unequal wealth distribution by transferring money from 'wealthy' corporations to comparatively needier plaintiffs."[377] Once again, there is no "bright line" test for determining under what circumstances consideration of a wrongdoer's financial condition becomes undue or oppressive. What is certain is that the interest of states in punishing and deterring wrongdoers through the assessment of punitive damages does not extend to redistributing wealth to state residents at the expense of nonresidents.

The verdict in the ***O 'Keefe*** Litigation represents just such a redistribution of wealth condemned by Justice O'Connor. O'Keefe repeatedly emphasized the financial condition of The Loewen Group and Raymond L. Loewen throughout the course of the trial.[378] Loewen's wealth was repeatedly contrasted to O'Keefe's more modest financial means.[379] Moreover, the only witnesses called by O'Keefe during the punitive damages phase of the trial testified solely as to the net worth of Loewen.[380] No other evidence to support the jury's ultimate verdict was presented during this phase of the trial.[381] Furthermore, throughout closing arguments in both phases of the trial, the jury was urged to send a message on behalf of Mississippians to "gang busting foreign invaders" such as Loewen.[382] O'Keefe urged the jury to quantify this message at $105 million during the compensatory phase of the trial[383] and $1 billion during the punitive phase of the trial.[384] When combined with the emphasis upon Loewen's foreign nationality, it is not difficult to conclude that the verdict was nothing short of an unconstitutional redistribution of wealth from a relatively successful, and alien, corporation to a more modest local resident. The vital difference in this case is that the result readied by the jury ran afoul of not only the Constitution, but also U.S. treaty obligations as established by Chapter Eleven of NAFTA.

This conclusion is reinforced by the sheer size of the verdict. In addition to the previously noted concerns with respect to the size of the award in comparison to the compensatory award and state judicial history, the award also bears no reasonable relationship to Loewen's financial condition. The combined

[377] Id.

[378] *See supra* notes 189-90 and accompanying text.

[379] *See supra* note 189 and accompanying text.

[380] *See supra* notes 209-10 and accompanying text.

[381] The presentation of evidence devoted exclusively to Loewen's financial condition is important as it tends to show undue emphasis upon economic status resulting in unconstitutional bias. *See TXO Prod. Corp.*, 509 U.S. at 488 (O'Connor. J., dissenting) (contending that plaintiff's exclusive reliance upon defendant's wealth in measuring punitive damages resulted in an unconstitutionally biased award 526 times in excess of actual damages and over twenty times greater than any punitive award in West Virginia history).

[382] *See Notice of Claim, supra* note 13,[rl] 96-103, V 113-16.

[383] *See id.* 1102.

[384] *See id.* H 115.

compensatory and punitive awards were seventy-eight percent of Loewen's net worth at the time of the verdict and 290 times its net worth at the time of the conduct at issue in the ***O'Keefe*** Litigation.[385] The punitive portion of the award exceeded sixty-two percent of Loewen's net worth at the time of the verdict.[386] Ultimately, the verdict forced a settlement upon the parties that exceeded the total value of the principal companies at issue in the underlying litigation by a factor of thirty to fifty times[387] and undoubtedly contributed to Loewen's subsequent decision to seek protection pursuant to U.S. and Canadian bankruptcy laws.[388] Given these circumstances, the verdict may be characterized as an attempt to restructure the Mississippi funeral industry in a fashion more amenable to in-state interests by elimination of a foreign competitor. Such a restructuring and accompanying redistribution of wealth was beyond the competence of the trial court and the jury.

The size of the verdict is also inconsistent with the nature of the injuries suffered by O'Keefe. The degree of reprehensibility of the defendant's conduct and resultant injury to the plaintiff is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award."[389] The U.S. Supreme Court has placed "special emphasis" in its opinions upon the principle that punitive damages may not be "grossly out of proportion to the severity of the offense."[390] The importance of this factor in determining the reasonableness of punitive damages awards is enshrined in Mississippi law, which requires the trier of fact and the trial court to shape any such award upon the reprehensibility of the defendant's conduct and the impact of such wrongdoing upon the plaintiff.[391]

Large punitive damage awards in cases involving purely economic loss are more inherently suspect than those in cases involving grave physical injury or indifference to or reckless disregard for the health and safety of others.[392] The ***O'Keefe*** Litigation did not involve "grave physical injury (or the risk thereof]

[385] *See supra* note 216 and accompanying text.

[386] *See* Notice of Claim, *supra* note 13, H 117.

[387] *See supra* note 239 and accompanying text.

388 *See supra* note 240 and accompanying text.

389 BMW of N. Am. v. Gore, 517 U.S. 559, 575 (1996); *see also* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 482 (O'Connor, dissenting) (1993); David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform,* 39 ViLL. L.REV. 363, 387 (1994).

390 BMW of N. Am., 517 U.S. at 576; *see also TXO Prod. Corp.*, 509 U.S. at 453; Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 22 (1991).

391 *See* Miss. ANN. CODE §§ 1 l-l-65(lXe), (lXfX**) (1993); *see also* Guar. Serv. Corp. v. Am. Employers' Ins. Co., 898 F.2d 453, 454-55 (5th Cir. 1990); Buseen v. S. Cent. Bell Tel. Co., 682 F. Supp. 319, 325 (S.D. Miss. 1987); Harvey-Latham Real Estate v. Underwriters at Lloyd's, London, 574 So.2d 13, 17 (Miss. 1990); Defenbaugh & Co. v. Rogers, 543 So.2d 1164, 1167 (Miss. 1989); Whittington v. Whittington, 535 So.2d 573, 583 (Miss. 1988); Mut. Life Ins. Co. v. Estate of Wesson, 517 So.2d 521, 531- 32 (Miss. 1987).

[392] *See BMW of N. Am.,* 517 U.S. at 576.

imposed upon a helpless citizen by a callous malefactor."[393] Rather, the ***O 'Keefe*** Litigation was, at its heart, a business dispute between two sophisticated parties. The harm suffered by O'Keefe was purely economic in nature despite the juiy's attempt to characterize it otherwise through a ludicrously large award for emotional distress. This is not to denigrate economic injury or excuse behavior causing such injury, especially when intentionally inflicted through affirmative acts of misconduct or directed at a financially vulnerable target.[394] Such actions should warrant the imposition of substantial penalties.[395] However, as noted by the U.S. Supreme Court, this observation "does not convert all acts that cause economic harm into torts that are sufficiently reprehensible to justify a significant sanction in addition to compensatory damages."[396] To equate purely economic loss (or emotional distress suffered as a result of such loss) with losses arising from grave physical injury as the jury and trial court did in the ***O 'Keefe*** Litigation is to "make 'reprehensibility' a concept without constraining force."[397] Raising all injuries, regardless of their nature, to the same level with respect to punitive damages awards obviates what little guidance exists for juries to relate culpability to the size of an award and serves to encourage future arbitrary and outlandish awards for all types of loss.[398] The rational relationship between compensatory and punitive awards is thus threatened, if not outright jettisoned, in favor of a constitutionally questionable "one size fits all" standard.

The amount of the verdict also is suspect due to the evidentiary failure to link Loewen's conduct in Mississippi to similar conduct in other jurisdictions. Undoubtedly, punitive damages awards may take into account the harm likely to result from the defendant's conduct as well as the harm that has actually occurred.[399] This consideration is entirely proper if punitive damages awards are to adequately serve their deterrent purpose. Recognition of this factor in calculating punitive damages is provided for in Mississippi law which instructs trial courts to base their review of such awards, in part, upon "the existence and frequency of similar past conduct."[400]

Throughout the course of the trial, O'Keefe urged the jury to award punitive damages to deter Loewen from engaging in similar behavior throughout the United States. During opening statements, counsel for O'Keefe urged the jury to "say with your verdict ... no more, not in the State of Mississippi and hopefully

393 TXOProd. Corp., 509 U.S. at 482 (O'Connor, J., dissenting).

[394] *See BMW of N. Am.*, 517 U.S. at 576.

[395] *See id.*

396 Id.

[397] *Id.* at 590 (Breyer, J., concurring).

[398] *See id.*

[399] *See BMW of N. Am.*, 517 U.S. at 581; *see also* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 456, 460 (1993).

[400] MISS. ANN. CODE § 1 l-l-65(lXfX'i) (1993).

nowhere else."[401] This same argument was utilized during the punitive damages phase of the trial. In his opening statement, O'Keefe's counsel advised the jury that the purpose of punitive damages was to "make sure that this doesn't happen to the citizens of Mississippi or the citizens of this nation again."[402] Emphasis upon deterring similar behavior throughout the United States was reiterated during closing arguments when, in requesting punitive damages in the amount of $1 billion, O'Keefe's counsel advised the jury that its verdict was "not just helping the people of Mississippi" but was "helping . . . families everywhere."[403]

O'Keefe's plea to the jury to utilize its verdict to deter similar behavior by Loewen in other jurisdictions may have been proper had necessary evidentiary requirements been met. However, O'Keefe made no attempt whatsoever to establish a factual background that would have supported any portion of the jury's verdict based upon harm occurring in other jurisdictions. No similar behavior by Loewen in any other jurisdiction, let alone any injury resulting from such behavior, was presented to the jury at trial.[404] No expert or lay witness testified to the jury about any such behavior or resultant loss. In any event, no evidence was adduced that O'Keefe, rather than some nameless person or entity, had suffered any injury as a result of Loewen's behavior outside of Mississippi. Furthermore, no one advised the jury on how to calculate a punitive damages award sufficient in scope to punish Loewen for such behavior. Rather, the jury was simply instructed by O'Keefe's counsel to send a strong message to Loewen on behalf of all families in the United States without the slightest bit of guidance or clarification from the trial court. The jury's confused verdict may or may not have taken O'Keefe's instruction to heart, raising further issues about its constitutionality.[405] The jury was urged to reach, and may have assessed, a multimillion-dollar penalty against Loewen for damages that may have arisen if its purported misdeeds were repeated throughout the United States against other victims.

[401] *Transcript*, *supra* note 177, at 78.

[402] *Id.* at 5755.

[403] *Id.* at 5809.

[404] This contention assumes that the consideration of a defendant's behavior and resultant injury occurring in another jurisdiction is consistent with substantive and procedural standards of due process, an issue upon which the U.S. Supreme Court has remained silent.

[405] The author is referring to the lack of a disclosed and rational basis upon which the jury may have based its punitive damages award. Granting that juries have considerable discretion in calculating and awarding punitive damages and that awards failing to conform to mathematical exactness are not inherently unconstitutional, it remains that such awards must be both reasonable in amount and the procedure by which they were arrived at in order to pass constitutional muster. *See* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 457 (1993); *see also* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18-20 (1991). The failure of the O'Keefe award to signify what, if any, portion was attributable to deterring future conduct in other jurisdictions may violate these requirements. Furthermore, the absence of notice to Loewen as to scope of the conduct at issue and the portion of the award attributable to its out-of-state activities may also violate due process requirements.

Such a result is constitutionally impermissible. As the U.S. Supreme Court has noted, "(virtually any tort. . . can cause millions of dollars of harm if imposed against a sufficient number of victims."[406] From a constitutional perspective, a punitive damages award based upon competent evidence and purporting to deter future misconduct within and without the jurisdiction should be treated with extreme caution. By contrast, an award based upon conjecture and granted in the complete absence of an evidentiary foundation should fail constitutional scrutiny. Such awards are not reasonable in amount nor bear a rational relationship to compensatory damage awards resting upon solid evidentiary bases.

Adequate guidance from the trial court to the jury may have prevented or, at least, mitigated, the excessive verdict and harmful consequences flowing therefrom. Such guidance clearly enters into the "constitutional calculus" with respect to analysis of punitive damages awards.[407] Unfortunately, such guidance was absent in this case. Initially, the court failed to advise the jury of the bifurcation of the compensatory and punitive phases of the trial.[408] This omission resulted in the entry of a punitive damages award of $160 million at the end of the liability and compensatory phase of the trial.[409] Jurors may have concluded by implication that the court's rejection of this portion of its verdict meant that it was inadequate.

At the conclusion of the presentation of evidence in the punitive damages phase of the trial, the court presented the jury with over 100 instructions with respect to the issue of punitive damages. More importantly, however, the court attempted to orally summarize these instructions to the jury. This summary consisted of little more than a recitation of the Mississippi punitive damages statute lasting but a few minutes and encompassing a mere two and one-half pages of the trial transcript.[410] Notably absent from this summary was any mention that the punitive damages ultimately awarded by the jury, if any, should be reasonable in amount, should bear a rational relationship to the compensatory damage award and Loewen's financial resources and should not be grossly excessive. No attempt was made to dispel any notion that the court's refusal to accept the previous punitive damages award was based upon its inadequacy. Furthermore, the jury was not cautioned to avoid an award based upon bias, passion or prejudice. Such a warning would have been particularly appropriate in this case given the ferocity of O'Keefe's attack upon Loewen's nationality and economic status as well as the injection of race as an issue at trial. Nor did the court's oral instructions attempt to define reprehensibility and differentiate between economic and personal injuries. The jury also was not orally instructed to disregard, or at least exercise caution with respect

406 TXO Prod. *Corp.*, 509 U.S. at 485 (O'Connor, J., dissenting).

407 *Pac. Mut. Life Ins. Co.*, 499 U.S. at 18.

408 *See Transcript, supra* note 177, at 5752-54.

409 *See Millen Letter, supra* note 201, at 1.

410 *See Transcript, supra* note 177, at 5791.

to, O'Keefe's plea to utilize its verdict to deter Loewen from engaging in similar behavior in the future.

The resultant verdict is a product of this lack of guidance - a multimillion- dollar award - the largest in state history and the largest in the entire country in 1995 - reached in a matter of a few short hours in a single day. Such a verdict can hardly be deemed the result of careful, rational and impartial inquiry and assessment. Rather, such a verdict appears more likely an irrational product of a biased, perhaps bullied, jury adrift in a sea of paper and legalisms, operating under time pressures unilaterally imposed by the court and overeager to wash their hands of the case. Additional judicial guidance may not have prevented this result. However, such uncertainty does not excuse the trial court from exercising the leadership delegated to it by applicable state judicial processes.

The result of the trial court's lack of guidance to the jury resisted after the fact remediation. A jury award of punitive damages in Mississippi is entitled to a presumption of correctness and may be overturned or subject to remittitur only when it is so excessive as to evince passion, bias or prejudice on the part of the jury or is contrary to the overwhelming weight of credible evidence.[411] However, the constitutionality of this presumption has been questioned by at least one Justice of the U.S. Supreme Court. In ***Pacific Mutual Life Insurance Company*** v. ***Haslip,*** Justice O'Connor condemned the Alabama Supreme Court's insistence that a jury's award of punitive damages carried a "presumption of correctness" that a defendant must overcome before remittitur is appropriate.[412] According to Justice O'Connor, such a standard unconstitutionally restricted judicial review of punitive damages awards, thereby requiring courts to uphold even the most "unbridled, unchanneled, standardless" exercises of jury discretion.[413] In any event, the ***O'Keefe*** court summarily refused to overturn or reduce the jury's punitive damages award.[414] Thus, effective review of the award was left to the appellate courts.

The U.S. Supreme Court has recognized the importance of appellate review with respect to awards of punitive damages. According to the Court, appellate review "makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition."[415] In ***Honda Motor Co.*** v. ***Oberg,*** the Court struck down an

[411] *See* Miss. Ann. Code § 11-1-55 (1972); *see also* Life Ins. Co. of Miss. v. Allen, 518 So.2d 1189, 1194 (Miss. 1987).

[412] 499 U.S. 1, 56 (1991) (O'Connor, J., dissenting).

[413] *Id.*

[414] *See Notice of Claim, supra* note 13,1 107, H 119.

[415] *Pac. Mut. Life Ins. Co.,* 499 U.S. at 21; *see also* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 587 (1996) (Breyer, J., concurring); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 478 (1993) (O'Connor, J., dissenting). The Court noted that more than half of all cases in which punitive damages are awarded are appealed, and more than half of those appeals resulted in reductions or reversals of the punitive damages awards. *See* Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort*

interpretation of an article within the Oregon Constitution that was utilized to deny the right of appellate review of the amount of punitive damages.[416] The Court held that such an interpretation abrogated "a well-established common-law protection against arbitrary deprivations of property" and "raise|d] a presumption [that the plaintiff was ultimately unable to rebut] that [such] procedures violate the Due Process Clause."[417]

However, in order to be constitutional, this review must be more than "cavalier," "cursory" or "summary."[418] Rather, such review must be "meaningful" or "searching" in its scope.[419] As a constitutional minimum, one member of the Court has suggested that appellate review must "impose a 'meaningful constraint' on factfinder discretion" and must be sufficient to "ensurfe] that punitive damages awards are not grossly out of proportion to the severity of the offense [but rather] have some understandable relationship to some measure of harm."[420] In any event, regardless of the applicable level of scrutiny, it is clear that appellate review serves a vital constitutional purpose in ensuring the reasonableness and proportionality of punitive damages awards.[421]

In the ***O 'Keefe*** Litigation, applicable Mississippi appellate procedure and court orders prevented the occurrence of such a meaningful or searching review of the jury's punitive damages award. This occurred as a direct result of both the trial court and Mississippi Supreme Court's refusal to grant Loewen relief from the oppressive bond requirements established by the Mississippi Rules of Appellate Procedure. As previously noted, Mississippi law provides that a party appealing a

Anecdotes with Empirical Data, 78 IOWA L.REV. 1, 57 (1992) *cited in* Honda Motor Co. v. Oberg, 512 U.S. 415, 433 n. 11 (1994). Appellate courts reduced awards in ten percent of the cases appealed on the express basis of excessiveness. *See id.* These statistics actually understate the importance of appellate review because they do not take into account the effect of such review in encouraging settlements for less than the amount awarded in order to avoid appellate reduction of damages. *See id.*

[416] 512 U.S. 415, 430 (1994). Added to the Oregon Constitution by amendment in 1910, the provision at issue stated that:

> [i]n actions at law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this State, unless the court can affirmatively say there is no evidence to support the verdict.

Or. CONST, art. Vll § 3. With respect to punitive damages awards, this provision had been interpreted by the Oregon Supreme Court to permit trial and appellate courts to grant a motion for new trial if the jury was not properly instructed, if error occurred during the trial, or if there was no evidence to support any such award. *See* Van Lom v. Schneiderman, 210 P.2d 461, 462 (Or. 1949). The Court further interpreted the article to provide that Oregon courts had no jurisdiction to hold such awards excessive or otherwise reduce or set them aside. *See id.* at 462.

[417] *Honda Motor Co.*, 512 U.S. at 430.

[418] *TXOProd. Co.*, 509 U.S. at 496-97 (O'Connor, J., dissenting).

[419] *Id.* at 481 & 497.

[420] *Id.* at 497-98.

[421] *See Honda Motor Co.*, 512 U.S. at 436 (Scalia, J., concurring) (wherein Justice Scalia noted that "[tjhe deprivation of property without observing (or providing a reasonable substitute for) an important traditional procedure for enforcing state-prescribed limits upon such deprivation violates the Due Process Clause.")

money judgment is entitled to a stay of execution if said party provides "a supersedeas bond, payable to the opposite party, with two or more sufficient resident sureties, or one or more guaranty or surety companies authorized to do business in this state, in a penalty of 125% of the amount of the judgment [from which appeal is made]."[122] The amount of such bond may be set at less than 125% of the outstanding judgment for "good cause shown."[423]

On November 29, 1995, the trial court concluded that there was not good cause shown to grant any reduction in the amount of the bond.[4"4] The trial court's refusal to lower the bond requirement was affirmed by the Mississippi Supreme Court on January 24, 1996.[425] Rather, the Supreme Court ordered Loewen to post the full bond - $625 million - within seven days or otherwise pursue its appeal while simultaneously defending its assets against O'Keefe's efforts at collection.[426] In its Notice of Claim, Loewen alleged that the refusal to modify the bond requirement effectively foreclosed its right to appeal and precipitated the ultimate settlement between the parties, a settlement that Loewen claimed was a product of "extreme duress."[427]

The refusal to reduce the amount of the supersedeas bond pending appeal was erroneous on numerous grounds and further supports the conclusion that the punitive damages award did not conform to constitutional standards established by the U.S. Supreme Court. Initially, there is authority holding that the amount of any bond in support of a stay of execution should bear a reasonable relationship to the value of the property at issue.[428] The ***Essa*** case concerned litigation between a vendor and vendee concerning title to a disputed piece of real property. The trial court subsequently issued an order granting specific performance to the vendee.[429] The vendor perfected an appeal of this order, but a dispute subsequently arose over the nature and amount of the bond that the vendor should be required to post in order to stay the trial court's specific performance order pending appeal.[430] In resolving this issue, the New York Supreme Court held that the amount of the bond necessary to stay the trial court's order should bear a reasonable relation to the value of the property at issue.[431] The Court concluded that, given the agreed-upon value of the disputed real property, as expressed in the parties' contract of sale, and the probable length of time before an appellate decision would be rendered upon the

422 Miss. R. APP. P. 8(a).

423 Id.

[424] *See supra* note 232 and accompanying text.

[425] *See supra* note 234 and accompanying text.

[426] *See supra* note 235 and accompanying text.

[427] *See Notice of Claim, supra* note 13, 1 127.

[428] *See* Essa v. Weiner, 678 N.Y.S.2d 481, 482 (N.Y. App. Div.

[429] *See id.* at 481.

[430] *See id.* at 482.

[431] *See id.*

principal matter at issue in the case, an undertaking of $100,000 was reasonable and adequate to protect the vendee in the event that the specific performance order was affirmed on appeal.[432]

Applying this rule to the ***O'Keefe*** Litigation would have resulted in a considerably different outcome. Loewen valued the insurance company and funeral homes that were the principal subjects of the underlying contractual dispute at $5 million.[433] Although the parties failed to reach agreement upon the value of the transactions contemplated by the August 1991 settlement agreement, it is important to note that the agreement established the combined value of O'Keefe's two funeral homes and Loewen's insurance company and trust fund at between $5.3 million and $6.5 million.[434] It also bears to note that O'Keefe's amended complaint filed in April 1992 sought actual damages totaling $5 million.[435] Another alternative in this regard would have been to base the amount of the bond upon the actual economic loss suffered by O'Keefe as determined by the jury. Eliminating the $75 million alleged by Loewen to be attributable to emotional distress, this approach would have resulted in a bond based upon a compensatory award of $25 million.[436] In any event, the amount of the bond required by the trial court and the Mississippi Supreme Court was based upon a punitive damages award that was constitutionally excessive. As such, to the extent that the punitive damages award is unconstitutional, any bond, the value of which is dependent upon such award, must also fail constitutional scrutiny.

Even if the amount of the bond resulting from the application of the rule from the ***Essa*** case or a variation thereof would have been insufficient to protect O'Keefe's interests pending appeal, Mississippi law specifically provides trial courts and the Supreme Court with discretion to reduce the amount of the bond for "good cause shown."[437] Utilizing this standard, there were numerous grounds upon which

[432] *See id.* The amount of the bond set by the court was 40% of the $250,000 value of the property as established by the sales contract. *See id.*

[433] *See supra* note 160 and accompanying text.

[434] *See id.*

[435] *See supra* note 169 and accompanying text.

[436] *See Notice of Claim*, *supra* note 13, H 153.

[437] *See* MISS. R. APP. P. 8(b); *see also* Henry v. First Nat'l Bank of Clarksdale, 424 F. Supp. 633, 638-39 (N.D. Miss. 1976). Similar results permitting flexibility by courts in setting the underlying terms of a bond for stay of execution pending appeal have been reached in other jurisdictions. *See* Townsend v. Holman Consulting Corp., 881 F.2d 788, 796-97 (9th Cir. 1989) (holding that federal district courts have broad discretion to waive or otherwise modify the requirement that a supersedeas bond be posted in order to obtain a stay of execution pending appeal pursuant to Federal Rule of Civil Procedure 62(d)); Hamlin v. Charter Transp. of Flint, 181 F.RD. 348, 353 (E.D. Mich. 1998) (holding that, although courts generally require the posting of a supersedeas bond in the full amount of the judgment in order to obtain a stay of execution pending appeal, a court may, in its discretion, modify or waive the full bond requirement pursuant to Federal Rule of Civil Procedure 62(d)); Bruce Church, Inc. v. Superior Court, 774 P.2d 818, 821 (Ariz. Ct. App. 1989) (holding that trial courts have discretion to determine the nature and extent of the security required in order to stay execution of a money judgment pending appeal in the event of extraordinary facts and circumstances); O'Donnell v. McGann, 529 A2d 372, 373-74 (Md. 1987) (holding that trial and appellate

either the trial court or the Supreme Court should have modified the amount of the bond in this case. Initially, there undoubtedly existed good cause for reducing the amount of the bond given the serious constitutional issues raised by the punitive damages award.[438] This award, more than any other punitive damages award in Mississippi judicial history, begged for thorough appellate review, if for no other reason than its unprecedented size.[439] The very size of the award rendered the circumstances surrounding the case extraordinary and thus well within the parameters of the "good cause shown" standard.[440]

Furthermore, Mississippi courts as well as numerous courts in other jurisdictions, have granted relief from the requirements associated with supersedeas bonds in the event that strict adherence would cause irreparable harm.[441] In the ***O'Keefe*** Litigation, the courts' refusal to grant relief on this issue caused irreparable injury to Loewen. If Loewen had proceeded with its appeal, it would have been required to execute a bond in an amount constituting virtually its entire net worth in order to obtain a stay.[442] Unable to obtain additional credit for this amount, Loewen would have been required to liquidate existing equity at distress prices to finance the bond.[443] The cost of pursuing this course of action was

courts possess the inherent power and discretion to modify the terms of supersedeas bonds required for stay of execution of money judgments).

[438] *See supra* notes 340-42 land accompanying text.

[439] *See supra* notes 214-16 and accompanying text.

[440] *See id.* Courts in other jurisdictions have departed from the requirements associated with supersedeas bonds for stays of execution on appeal, including increasing or decreasing the face amount of said bonds, in cases involving extraordinary facts or circumstances. *See Bruce Church, Inc.* 774 P.2d at 821; *O'Donnell*, 529 A.2d at 373-74. Although the issue has not been considered by Mississippi courts, the author would note that the "good cause shown" standard appears on its face to be a considerably lesser standard than that requiring the existence of "extraordinary facts or circumstances." Given that the verdict in the *O'Keefe* Litigation can only be characterized as "extraordinary" in U.S. and Mississippi judicial history, the circumstances of the case clearly meet the more stringent "extraordinary" standard. Thus, to conclude as the trial court and Mississippi Supreme Court that there was no good cause for granting Loewen relief upon the amount of the supersedeas bond constitutes error.

[441] *See Henry*, 424 F. Supp. at 638-39 (holding that Mississippi statutes that required civil rights organizations to post bonds in support of their application for stay of execution in amounts that would have curtailed their activities in the state were inconsistent with due process). *See also* Miami Int'l Realty Co. v. Paynter, 807 F.2d 871, 873 (10th Cir. 1986) (holding that federal district courts have broad discretion to waive or otherwise modify the requirement that a supersedeas bond be posted in order to obtain a stay of execution pending appeal in the event strict adherence to the bond requirement would result in irreparable injury to the appellant); Matthews v. CTI Container Transp. Int'l, Inc., 689 F. Supp. 348, 350 (S.D.N.Y. 1988) (holding that appellants failed to demonstrate irreparable harm as would support variance from the requirements for supersedeas bonds supporting a stay of execution as required by Federal Rule of Civil Procedure 62(d)); Isem v. Ninth Court of Appeals, 925 S.W.2d 604, 606 (Tex. 1996) (permitting trial courts to reduce the amount of the required security to obtain a stay of execution pending appeal if failure to so order would cause irreparable harm to the judgment debtor).

[442] *See Notice of Claim, supra* note 13, ^1 121.

[443] *See id.*

estimated at $200 million for the first two years of the appeal.[444] Virtually none of these costs were recoverable, even in the event that Loewen was ultimately successful in prosecuting its appeal.[445] To proceed with the appeal without a stay of execution would have been equally foolhardy given the presence of numerous valuable assets subject to ready execution within the state. Ultimate success upon an appeal under such circumstances would have left Loewen with no recourse other than to pursue a subsequent claim against O'Keefe for unwarranted seizure and sale of its property.[446]

As a result, Loewen's right to appeal was effectively and improperly foreclosed.[447] The only remaining option available was settlement of the litigation. Loewen negotiated this settlement from a weakened position and under duress, thereby resulting in a resolution exceeding the value of the transactions and contributing to its ultimate financial collapse.[448] Considering these circumstances, it is clear that Loewen would have suffered irreparable harm as a result of the courts' orders regardless of the course of action it pursued in the litigation.

Financial difficulty resulting from judicial refusal to modify bond requirements also may constitute extraordinary circumstances. There is ample authority for the proposition that courts may modify or waive bond requirements in the event that adherence to such requirements would place the defendant's other creditors in undue jeopardy or an insecure position.[449] Such was undoubtedly the case in the ***O'Keefe*** Litigation. Obtaining financing for the $625 million bond required by the courts' orders, when added to Loewen's $736 million in existing debt, would have negatively impacted the company's already tenuous debt-equity ratio.[450] Further deterioration of this ratio would have in turn violated covenants with Loewen's existing creditors, thereby triggering acceleration of repayment obligations of the outstanding debt.[451] Indeed, industry analysts speculated that "obligations related to the bond could trigger defaults on Loewen's senior debt and

[444] *See id.* 1123.

[445] *See id.*

[446] *See Henry*, 424 F. Supp. at 638. The district court in *Henry* granted relief from state bond requirements for a stay of execution, in part, on the basis that the appellants would suffer irreparable harm if their sole recourse upon prevailing in their appeal was initiation of a new claim against the judgment creditors for unwarranted seizure and sale of their property. *See id.*

[447] *See* Trans World Airlines, Inc. v. Hughes, 314 F. Supp. 94, 96 (S.D.N.Y. 1970) (holding that federal courts are permitted to waive or otherwise modify appeal bonds in support of applications for stay "so that, in effect, the defendant's right of appeal would not be destroyed.")

[448] *See supra* notes 236-40 and accompanying text.

[449] *See* Dillon v. City of Chicago, 866 F.2d 902, 905 (7th Cir. 1988); *see also* Olympia Equip. Leasing Co. v. W. Union Tel. Co., 786 F.2d 794, 796 (7th Cir. 1986); Hamlin v. Charter Transp. of Flint, 181 F.R.D. 348, 353 (E.D. Mich. 1998); Dutton v. Johnson County Bd. of County Commissioners, 884 F. Supp. 431, 435 (D. Kan. 1995); Avirgan v. Hall, 125 F.R.D. 185, 186 (S.D. Fla. 1989).

[450] *See supra* note 225 and accompanying text.

[451] *See id.*

bank credit lines."[452] The only other method to finance the required bond, the liquidation of company equity, often at distress prices, was equally unattractive to Loewen's creditors for obvious reasons.[453] In the alternative, proceeding with the appeal without the benefit of a stay order would have hampered Loewen's ability to conduct normal business operations and service its existing debt. Nor did the resultant settlement benefit Loewen's creditors given its excessive nature. The courts' refusal to modify the bond requirement served the interests of only one party, O'Keefe, by placing him in a preferred position to the detriment of senior, and perhaps more deserving, creditors.

Courts may also modify or waive bond requirements in the event that adherence to such requirements would cause the defendant to become insolvent, file bankruptcy or terminate its operations during the pendency of the appeal.[454] Instructive in this regard is the U.S. District Court's opinion in ***Henry*** v. ***First National Bank of Clarksdale.*** [455] While concluding that the National Association for the Advancement of Colored People (NAACP) could obtain the funds necessary to post a bond in the amount of $1.56 million to stay execution of an antitrust judgment obtained against it by merchants subject to a boycott, the Court noted that such financing would have depleted funds necessary for the Association to conduct normal operations in the state.[456] Furthermore, in order to repay this financing, the NAACP would have been required to curtail "practically all of its usual functions" during the two to three year pendency of its appeal.[457] The court deemed this result unacceptable and thus issued an injunction prohibiting enforcement of the judgment during the pendency of the appeal without resort to the filing of a bond as required by Mississippi law.[458]

The plight of Loewen is similar to that of the NAACP in ***Henry.*** Compliance with the courts' orders with respect to the amount of the bond would have virtually bankrupted the company by confiscating practically its entire net worth.[459] Financing the bond would have equally devastated the company by requiring the breach of covenants with its existing creditors or the liquidation of

[452] Simon, *supra* note 225, at 22.

[453] *See supra* notes 226-28 and accompanying text

[454] *See* Miami Int'l Realty Co. v. Paynter, 807 F.2d 871, 874 (10th Cir. 1986); *see also* Henry v. First Nat'l Bank of Clarksdale, 595 F.2d 291, 305 (5th Cir. 1979); Henry v. First Nat'l Bank of Clarksdale, 424 F. Supp. 633, 638 (N.D. Miss. 1976); Isem v. Ninth Court of Appeals, 925 S.W.2d 604, 606 (Tex. 1996).

[455] 424 F. Supp. 639 (N.D. Miss. 1976).

[456] *See id.* at 639. The principal amount of the judgment obtained by the merchants was $1.25 million. *See Henry,* 595 F.2d at 305.

[457] *Henry,* 424 F. Supp. at 639.

[458] *See id.*

[459] *See Notice of Claim, supra* note 13, 1 121.

existing equity at "fire sale" prices.[460] Either option may have fatally impacted the company's reputation, creditworthiness and attractiveness to investors. If implemented, either option also may have shaken the confidence of vital market makers in the company's profitability and long term survivability. The $200 million cost associated with financing the bond would undoubtedly have impacted Loewen's operations, not only in Mississippi, but throughout the United States, Canada and the United Kingdom.[461] Compliance would have meant virtual extinction of the company in its present form. The resultant settlement, though not the product of the freest of wills, at least placed Loewen on the financially endangered list with a chance to return to past profitability at an unforeseen date in the future. In any event, this option would not have been forced upon Loewen had the trial court or Mississippi Supreme Court acted in a reasonable manner. Instead, Loewen was made to suffer as an unfortunate example of judicial inflexibility.

Implicit in this discussion is provision by the judgment debtor of a reasonable plan to preserve the status quo pending appeal.[462] A bond in the full amount of the judgment may be dispensed with only when the judgment creditor is afforded definite and certain recourse to some other means of enforcement.[463] This flexibility in accepting adequate alternatives to traditional supersedeas bonds has long-standing judicial recognition in Mississippi.[464] In this regard, the Mississippi Supreme Court has noted that compliance with the "just principle" that a successful litigant "be saved harmless from loss, and secured in the fruits of his victory ... is all that should be required of the losing litigant who desires that his case be reviewed on appeal, and that the status quo be maintained until a final decision is rendered in the cause."[465]

Loewen attempted to provide such reasonable assurances to O'Keefe in lieu of posting a bond for the entire amount of the judgment. Loewen requested that the bond be reduced to $125 million, which constituted 125% of the compensatory damages award.[466] In order to protect O'Keefe's interest as a judgment creditor, Loewen offered to notify O'Keefe and the court before encumbering or conveying any significant assets or making any increased dividend payments and provide O'Keefe with monthly financial reports.[467] This offer was rejected with little or no comment by either the trial court or the Supreme Court. Perhaps both courts deemed

[460] *See supra* notes 225-26 and accompanying text.

[461] *See Notice of Claim, supra* note 13, H 123.

[462] *See* O'Donnell v. McGann, 529 A.2d 372, 377 (Md. 1987) (holding that the judgment debtor bears the burden of objectively demonstrating the reasons for departure from the general requirement of a supersedeas bond in the full amount of the outstanding judgment, as well as the burden of presenting a plan reasonably calculated to preserve the status quo during the pendency of the appeal).

[463] *See* Matthews v. CTI Container Transp. Int'l, Inc. 689 F. Supp. 348, 350 (S.D.N.Y. 1988).

[464] *See In re* Estate ofTaylor, 539 So.2d 1029,1031 (Miss. 1989).

[465] W. at 1034.

[466] *See Notice of Claim, supra* note 13, f 124.

[467] *See id.*

the offer insufficient to meet Loewen's burden to demonstrate adequate protection of O'Keefe's interest as a judgment creditor. Nevertheless, some commentary from the courts would have been beneficial and may have caused Loewen to offer additional measures to safeguard O'Keefe's interests. This was the very least either court owed to a judgment debtor confronted with a verdict totaling 78% of its net worth, 80% of which consisted of a constitutionally suspect award of punitive damages.

C. *Canadian Standards for Punitive Damages Awards*

The concept of punitive damages in Canada also originated in the English legal system.[468] As in the United States, the concept of punitive damages has become a topic of considerable controversy.[469] A substantial portion of this controversy has been devoted to the theoretical underpinnings for such awards, the conduct that should be subject to such awards and applicable procedural considerations.[470] Canadian scholars and courts have long debated the anomaly of "a civil court. . . imposing] what is in effect a fine for conduct it finds to be worthy of punishment, and then remitting] the fine, not to the State Treasury, but to an individual plaintiff who will, by definition, be over-compensated."[471] Further controversy has ensued regarding the relative vagueness of the type of conduct that should be subject to such awards.[4 : Equally subject to criticism for vagueness is the absence of specified limits upon such awards other than the vagaries of reason.[473] Critics of such awards in the Canadian legal system further note that the bounds of reason may be exceeded by inexperienced juries swayed by passion and bias.[474] From a procedural standpoint, critics have pointed to the absence of adequate and effective processes to challenge such awards on appeal.[475] Furthermore, although closely resembling criminal punishment in nature, civil defendants confronted with the potential for such awards are not afforded any of the protections associated with

[468] *See* S.M. WADDAMS, THE Law of DAMAGES **HI** 11.20-11.180 (1997). This statement is applicable to all of the provinces except for the civil law province of Quebec where punitive damages were not awarded in private actions. *See* Patennaude v. Roy [1970] 123 D.L.R.4th 78. However, Quebec revised its civil code in 1991 to permit punitive damages awards. *See* Civil Code, R.S.Q., ch. 64, art. 1621 (1991) (Que.); *see also* Samuelli v. Jouhannett [1994] R.J.Q. 152 (S.C.). For further discussion of the development of the law of punitive damages in Canada, *see* Bruce Feldthusen, *Punitive Damages in Canada: Can the Coffee Ever Be Too Hot?*, 17 LOY. L.A. INT'L & COMP. L.J. 793 (1995). *See also* Lewis Klar, *Punitive Damages in Canada: Smith v. Mega Foods*, 17 LOY. L.A. INT'L & COMP. L.J. 809 (1995).

[469] *See* WADDAMS, *supra* note 468, DU 11.20-11.100.

470See id.

[471] *Id.* 1111.20; *see also* Vorvis v. Ins. Corp. of B.C. [1989] 1 S.C.R. 1085, 1104.

[472] *See* WADDAMS, *supra* note 468, H 11.60.

[473] *See id.*

[474] *See id.*

[475] *See id.*

criminal procedure.[476] The critics also have noted that such awards serve no purpose other than to create uncertainty, thereby increasing the time and cost of conducting litigation.[477]

Despite these criticisms, punitive damages have an undeniable place in Canadian jurisprudence. The survival of the doctrine may be attributable to its historic entrenchment in the Canadian legal tradition or, perhaps, the growing influence of its litigious neighbor to the south.[478] However, despite its acceptance, the law of punitive damages in Canada is less developed and far more conservative in its holdings than in the United States.[479] As the Supreme Court of Canada noted in its landmark opinion in ***Vorvis*** v. ***Insurance Corp. of British Columbia,*** [480]although the authority to award punitive damages lies within the discretion of Canadian trial courts, this discretion should be "most cautiously exercised."[481] As a result, punitive damages awards remain rare in all types of Canadian cases.[482]

Given the relative conservatism of Canadian jurisprudence with respect to punitive damages, one may be tempted to summarily conclude that, as the award in the ***O'Keefe*** Litigation failed scrutiny utilizing more liberal American standards, the award also must fail applying more stringent Canadian standards. Although this conclusion is entirely correct, it is not one that may be reached in a cavalier fashion. For example, the conduct of Loewen that was the subject matter of the ***O 'Keefe*** Litigation falls within the behaviors recognized by Canadian courts as subject to punishment through the assessment of punitive damages. Punitive damages have been awarded in Canada for most non-contractual wrongs including assault, battery, false imprisonment, trespass, conversion, nuisance, interference with contract and

[476] *See id.* 111.50.

[477] *See id.* f 11.80. *see also* Dorsey D. Ellis, *Fairness and Efficiency in the Law of Punitive Damages,* 56 S. CAL. L. REV. 1 (1982).

[478] *See* WADDAMS, *supra* note 468,111.90; *see also* Feldthusen, *supra* note 468, at 807.

[479] However, it must be noted that Canadian punitive damages law is more liberal than its English ancestor. In *Rookes* v. *Barnard,* Lord Devlin restricted the recovery of punitive damages to those authorized by statute, in cases involving abuse of power by the government or torts committed with the intention to make a profit. Rookes v. Barnard, App. Cas. 1129, 1226-27 (H.L. 1964). In Commonwealth jurisdictions such as Canada, where decisions of the House of Lords are not binding, the restrictive view of punitive damages espoused in *Rookes* has received little support. Many lower Canadian courts have rejected the scope of Lord Devlin's restrictions on punitive damages. *See* Turnbull v. Calgary Power Ltd. [1974] 51 D.L.R.3d 562 (Alta. S.C.); *see also* Paragon Props. Ltd. v. Magna Invs. Ltd. [1972] 24 D.L.R.3d 156 (Alta. S.C.); Holowaty v. Ford Motor Credit Co. [1974] 1 W.W.R. 225 (Alta. Dist Ct.); Eagle Motors (1958) Ltd. v. Makaoff [1970] 17 D.L.R.3d 222 (B.C.C.A); Fraser v. Wilson [1969] 6 D.L.R.3d 531 (Man. Q.B.); Walker v. CFTO Ltd. [1987] 37 D.L.R.4th 224, 59 O.R.2d 104 (C.A); Gouzenko v. Lefolii [1967] 63 D.L.R.2d 217, 2 O.R. 262 (C.A). However, it was not until 1989 that the Canadian Supreme Court expressly refused to restrict punitive damages awards to the categories set forth in *Rookes. See* Vorvis v. Ins. Corp. of B.C. [1989] 1 S.C.R. 1085, 1105. In addition to the *Rookes* categories, the Court stated that "exceptionally objectionable conduct" could also warrant an award of punitive damages due to its "harsh, vindictive, reprehensible and malicious nature." *Id.* at 1107-08.

[480] [1989] 1 S.C.R 1085, 1104.

[481] *Id.; see also* Warrington v. Great-West Life Assurance Co. [1996] 139 D.L.R.4th 18.

[482] *See* Feldthusen, *supra* note 468, at 793.

other economic interests, fraud and, in certain cases, negligence.[483] Conduct subject to punitive damages awards in Canada has been colorfully described as "malicious, high-handed, arbitrary, oppressive, deliberate, vicious, brutal, grossly fraudulent, evil, outrageous, callous, disgraceful, willful, wanton, in contumelious disregard of the plaintiff's rights, or in disregard of ordinary standards of morality or decent conduct."[484] The jury in the ***O 'Keefe*** Litigation concluded that Loewen's behavior was willful, intentional, attended by insult, abuse and malice, fraudulent, wrongful and in bad faith.[485] Most certainly, Loewen's conduct meets at least one of the standards justifying an award of punitive damages in Canada.

Where Canadian and American punitive damages law part company is with respect to the amount of awards. The Supreme Court of Canada has clearly held that awards of punitive damages must serve a rational purpose.[486] Although this standard seems similar to corresponding U.S. standards, they are quite different in application. Unlike awards of compensatory damages in the United States, Canadian awards of such damages may serve a retributive purpose, thereby obviating the need for punitive damages. Thus, in assessing the appropriate sum to award as punitive damages, the combined total of compensatory and requested punitive damages must be considered.[487] An independent award of punitive damages will not be granted if the compensatory award is large and considered to be adequate punishment for the defendant's misdeeds.[488]

It is thus most likely that a Canadian court considering the facts at issue in the ***O'Keefe*** Litigation would have reached a substantially different result with respect to punitive damages. It would difficult to imagine under what circumstances a Canadian court would find a rational purpose for such an astronomical award. Most certainly, as the award fails the test of reason devised by the U.S. Supreme Court, it would undoubtedly fail the far more conservative Canadian approach to calculation of such damages.[489] In fact, it is almost beyond doubt that any Canadian court confronted with the facts of the ***O 'Keefe*** Litigation would not have awarded a sum anywhere near the $400 million awarded by the jury in Mississippi. The $100

[483] *See id.* at 800-01; *see also* WADDAMS, *supra* note 468, [f] 11.210, 1] 11.230. However, it should be noted that refusal to award punitive damages in most commercial cases in Canada is deemed proper, including those involving breach of contract. *See id.* [r] 11.250. According to Waddams, the basis for this refusal is that breaches of contract lack the moral bankruptcy associated with the commission of a tort. *See id.* 1 11-250. Based upon this reasoning, punitive damages are available in Canada only when the breach of contract is accompanied by an independent tort. *See id.* 1 11-260.

[484] WADDAMS, *supra* note 468, H 11.210; *see also* Feldthusen, *supra* note 468, at 795; Klar, *supra* note 468, at 812-13.

[485] *See Interrogatories to the Jury*, *supra* note 4, at 3-8.

[486] See Hill V. Church of Scientology [1995] 2 S.C.R. 1130, 1210-11.

[487] *See* WADDAMS, *supra* note 468,[r] 11.280.

[488] *See* ONTARIO LAW REFORM COMMISSION, REPORT ON EXEMPLARY DAMAGES 13 (1991).

[489] *See supra* notes 340-72 and accompanying text.

million compensatory damages award, assuming such an amount in fact would ever be awarded by a Canadian court, would most likely be deemed more than sufficient to punish Loewen for its actions. This result would occur even taking into consideration the profits wrongfully earned by Loewen from its actions[490] and its financial means.[491] Regardless of the relevancy of such factors, punitive damages in Canada, as in the United States, may not serve as instruments for the arbitrary redistribution of wealth.

A comparison of the punitive damages award in the ***O 'Keefe*** Litigation with large punitive damages awards in Canada demonstrates this point. The case of ***Claiborne Industries*** v. ***National Bank of Canada*** represents the only punitive damages award in excess of $1 million in Canadian judicial history.[492] There are only three other reported cases where the punitive damages award exceeded $100,000. The second highest punitive damages award was $800,000 in ***Hill v. Church of Scientology,***[493]a defamation case.[494] An award of $500,000 in punitive damages was entered by the trial judge in ***MacDonald Estate*** v. ***Martin,***[495] a case involving a business dispute. Characterizing this award as the highest award of its kind in Canadian judicial history, the Manitoba Court of Appeals reduced the award to $250,000.[496] The third case, ***Mustaji*** v. 7//'/j,[497]involved a breach of contract and fiduciary duty resulting in a punitive damages award of $175,000.[198]

Aside from these cases, typical punitive damages awards in Canada range from $5000 to $50,000 in most cases.[499] A 1990 study of reported decisions in Ontario, Canada's most populous province, concluded that, other than the anomalous result in ***Claiborne Industries,*** the highest punitive damages award in the province was $50,000.[500] The vast majority of the awards surveyed were less than $25,000.[501] The study concluded that the median punitive damages award was twenty percent of the accompanying compensator)' damages award.[502] The results of this study led one commentator to note that "the chances of a Canadian judge or jury awarding punitive damages in the million-dollar range on anything but a

[490] *See* Claiborne Indus, v. Nat'l Bank of Can. [1989] 59 D.L.R.4th 533, 564-67 (Ont. C.A.); *see also* Klar, *supra* note 468, at 817.

491 *See* ONTARIO LAW REFORM COMMISSION, *supra* note 488, at 50.

[492] [1989] 59 D.L.R.4th 533. The punitive damages awarded in *Claiborne Industries* totaled $4.8 million. *See id.* at 542.

[493] [1995] 2 S.C.R. 1130.

[494] *See id.*

[495] [1994] 114 D.L.R.4th 67 (Man. C.A.).

[496] *See id.*

[497] [1996] 25 B.C.L.R.3d 220, 30 C.C.L.T.2d 53 (C.A.).

[498] *See id.*

[499] *See* Klar, *supra* note 468, at 824.

[500] *See* Neil Vidmar & Bruce Feldthusen, *Exemplary Damage Claims in Ontario: An Empirical Profile.* 16 CAN. BUS. L.J. 262, 264 (1990).

[501] *See id.*

[502] See id. at 265

theory of restitution are virtually nonexistent.... [and] [i]n the unlikely event that such an award materialized at trial, it would probably not survive an appeal."[503] Although the pull of the American legal system is strong and constitutes a growing influence in Canadian jurisprudence, Canada is "not yet ready to delegate to judges, much less to juries, the task of regulating and punishing industry with million dollar punitive damages awards."[504] Given these circumstances, the punitive damages award in the ***O'Keefe*** Litigation would not pass scrutiny utilizing applicable principles of Canadian law.

Canadian law also provides for maintenance of the status quo during meaningful judicial review of all damages awards through stay of execution procedures far more liberal than those in existence in Mississippi. Rule 27 of the Supreme Court Act grants the Supreme Court of Canada jurisdiction to stay execution or grant other relief in respect of an order or judgment of the Court or any other court.[505] By contrast, Section 65 of the Supreme Court Act provides for an automatic stay of execution upon filing and serving of a notice of appeal with the Supreme Court except with respect to awards of money damages.[506] In such cases, the execution of the judgment shall not be stayed until the appellant has given security "to the satisfaction of the court appealed from, or a judge thereof," that the appellant will pay any portion of said judgment affirmed upon appeal.[507] Finally, Section 65.1(1) of the Supreme Court Act provides that the Supreme Court, the court appealed from or a judge of either court may order that proceedings be stayed at the request of a party who has filed a notice for leave to appeal on "appropriate" terms.[508]

There are three primary principles upon which Canadian courts are to consider applications for stays of execution.[509] Initially, the court reviewing an application for stay of execution must conduct a preliminary assessment of the merits of the case. The case must present serious issues for resolution in order for

[503] Feldthusen, *supra* note 468, at 803.

[504] *Id.* at 807.

[505] *See* BRIAN a. CRANE & HENRY **S.** BROWN, SUPREME COURT OF CANADA PRACTICE 111 (1996). Rule 27 of the Supreme Court Act specifically provides that:

> [a]ny party against who judgment has been given, or an order made, by the Court or any other Court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

Id. at 110.

[506] *See id.* at 108.

[507] *Id.* at 109.

[508] *Id.* at 110. The authors have noted that Rule 27 and Sections 65 and 65.1 "were drafted at different times and are not entirely harmonious." *Id.* at 111. Clarification of the meaning of these sections awaits further action by the legislative and judicial branches.

[509] These criteria were developed and have been applied in numerous Canadian court opinions. *See* AG. (Man.) v. Metro. Stores (MTS) Ltd. [1987] 1 S.C.R. 110; *see also* Labatt Breweries of Can. Ltd. v. A.G. (Can.) [1980] 1 S.C.R. 594.

execution to be stayed.[510] Second, the court must consider the question of irreparable harm. Irreparable harm must result from denial of the stay application.[511] Finally, the balance of conveniences associated with granting the stay must favor the applicant.[512]

Applying these factors to the application filed by Loewen in the ***O'Keefe*** Litigation would have resulted in a favorable determination with respect to stay of execution. As set forth above, the punitive damages award raised serious issues with respect to U.S. as well as Canadian law.[513] The issues presented in Loewen's appeal were issues that most likely would have been resolved in its favor either through rejection of the punitive damages award in its entirety or a proportionate reduction thereof. Additionally, as discussed in detail with respect to U.S. law, Loewen suffered serious and irreparable harm as a result of the denial of its stay application by the trial court and Mississippi Supreme Court.[514] Finally, also for the reasons stated above with respect to U.S. and Canadian law, the balance of conveniences favored the granting of Loewen's stay application.[515]

Loewen also would have been able to meet any of the standards established by Rule 27 and Sections 65 and 65.1. Rule 27 provides for the granting of stay relief upon such grounds as the court deems just.[516] Certainly, for the reason previously stated, the granting of stay relief in the ***O Keefe*** Litigation was just.[517] Furthermore, even assuming the initial terms for the stay offered by Loewen were less than adequate, additional guidance from the court, rather than summary denial, would have resulted in a reasonable and suitable alternative.[518] This discussion also is relevant to Section 65 which provides for the granting of stay relief with respect to money judgments upon security "to the satisfaction of the court" and Section 65.1 which provides for stay relief pending an application for leave to appeal upon terms deemed "appropriate" by the court.[519]

[510] *See* RJR-MacDonald, Inc. v. AG. (Can.) [1994] 1 S.C.R. 311; *see also Metro. Stores*, 1 S.C.R. at 127-28.

[511] *See RJR-MacDonald*, 1 S.C.R. at 340-41; *see also Metro. Stores*, 1 S.C.R. at 128.

[512] *See RJR-McDonald*, 1 S.C.R. at 342-47; *see also Metro. Stores*, 1 S.C.R. at 129-30.

[513] *See supra* notes 336-414, 486-503 and accompanying text.

[514] *See supra* notes 428-61 and accompanying text.

[515] *See supra* notes 428-61,486-503 and accompanying text.

[516] *See* CRANE & BROWN, *supra* note 505, at 110-11.

[517] *See supra* notes 415-65, 486-503 and accompanying text.

[518] *See supra* notes 466-67 and accompanying text.

[519] *See* CRANE & BROWN, *supra* note 505, at 108-10. The author assumes that stay relief deemed just pursuant to Rule 27 would also meet with the satisfaction of the court and would be deemed appropriate by it pursuant to Sections 65 and 65.1(1).

D. ***International Standards for Punitive Damages Awards***

The concept of punitive damages outside of the United States and Canada dates as far back as the Code of Hammurabi and the Bible.[520] Despite this lengthy history, there is no universal consensus on the award of punitive damages in private international law. Common law countries, such as the United States and Canada, generally permit the award of punitive damages in private civil actions. By contrast, civil law countries generally view punitive damages as penal sanctions that only may be imposed in criminal proceedings. The following section of this article will briefly examine the status of punitive damages on a continent-by-continent basis and draw conclusions regarding the award in the ***O 'Keefe*** Litigation applying the standards of those countries that permit such awards.

European practice with respect to punitive damages is dependent on whether the country has a common law or civil law heritage.[521] The recovery of punitive damages in the United Kingdom has been substantially restricted by the House of Lords' opinions in ***Rookes*** v. ***Barnard*** [5‘"] and ***Cassell & Co. Ltd.*** v. ***Broome***.[523] Speaking for the House of Lords in ***Rookes,*** Lord Devlin deemed punitive damages appropriate only in cases involving: (1) oppressive, arbitrary or unconstitutional action by government servants; (2) conduct calculated by the defendant to make a profit for himself; and (3) conduct for which exemplary damages are expressly authorized by statute.[524] Eight years later in ***Cassell,*** the House of Lords elaborated on the type of behavior necessary to satisfy each of Lord Devlin's three categories. Of particular relevance is the second category providing for punitive damages when the defendant has knowledge that the proposed action is illegal or acts in reckless disregard of its legality for the purpose of gaining material advantage.[525] Private wrongs within the scope of such behavior include malicious prosecution, false imprisonment, assault, battery, defamation, trespass, private

[520] *See* CODE OF HAMMURABI § 8, *reprinted in* ALBERT KOCOUREK & JOHN WIOMORE, SOURCES OF ANCIENT AND PRIMITIVE LAW 391 (1915). For example, the Code provided that if a person stole an animal from the temple, that person would have to repay the temple thirtyfold. *See id.; see also The Bible, Exodus* 22:1, 22:4 & 22:9 (King James).

[521] Civil law countries generally limit recovery of damages in private actions to an amount that restores the party to its pre-injury condition. *See* Finland Damages Act of 1974, *summarized in* THE FINNISH LEGAL System 134 (Jaakko Uotila ed., 2d. 1985); Code civil [C. Civ.] art. 1382 (Fr.); Bürgerliches Gesetzbuch [BGB] art. 249 (Ger.); Codice civile [C.C.] art. 1223 (Italy); Burgerlijk Wetboek [BW] § 162 (Neth); Codigo Civil [C.C.] arts. 1106, 1902 (Spain); Schweizerisches Obligationenrecht [OR, Co, Co] art. 48 (Switz.).

[522] App.Cas. 1129 (H.L. 1964).

[523] App. Cas. 1027 (H.L. 1972).

[524] *See Rookes,* App. Cas. at 1226-27.

[525] *See Cassell,* App. Cas. at 1130.

nuisance and tortious interference with business.[526] Breach of contract cases are clearly outside of the scope of conduct subject to punitive damages awards in the United Kingdom.[527]

Assuming the existence of qualifying behavior, punitive damages are only available if the compensatory damages sought are insufficient to adequately punish the defendant's conduct and deter its repetition.[528] In any event, such awards must be moderate and made with restraint.[529] Such awards may not attempt to redistribute wealth or otherwise constitute a windfall for the plaintiff.[530] The size of the award is further limited in cases involving joint tortfeasors to a sum necessary to punish the defendant who had the least responsibility for the tort.[531] Appellate courts retain considerable authority to conform awards to these principles on appeal.[532]

Northern Ireland has followed the restrictions placed upon punitive damages by the ***Rookes*** and ***Cassell*** precedents.[533] Conduct subject to sanction by punitive damages in the Republic of Ireland includes oppressive conduct by private individuals as well as government servants. Such oppressive conduct has been interpreted to include actions seeking recovery for assault, battery and trespass.[534] However, such awards must be in reasonable proportion to the circumstances of the case, and appellate courts retain considerable authority to overturn awards deemed "scandalous," "outrageous," "grossly extravagant" or otherwise "so disproportionate to the circumstances of the case as to admit of no other view than that the damages are excessive."[535] By contrast, Scotland restricts recovery to actual loss and does not recognize the concept of punitive damages.[536]

Punitive damages are equally the exception rather than the rule in Asia. Recognition of punitive damages is limited to the former British colonies of Singapore,[537] Malaysia[538] and India[539] and the former American colony of the

526 See THE LAW COMMISSION OF THE UNITED KINGDOM, AGGRAVATED, EXEMPLARY AND Restttutionary Damages 61 (1997) [hereinafter *LAW COMMISSION REPORT].*

[327] *See* Addis v. Gramophone Co., App. Cas. 488 (H.L. 1909); *see also Law COMMISSION REPORT, supra* note 526, at 61.

[528] *See Law COMMISSION REPORT, supra* note 526, at 64.

[529] *See Rookes,* App. Cas. at 1227-28.

[530] *See Law COMMISSION REPORT, supra* note 526, at 79.

[331] *See* Cassell & Co. v. Broome, App. Cas. 1027, 1063-64 (H.L. 1972).

[532] *See Law COMMISSION REPORT, supra* note 526, at 83-88.

[333] *See* Pettigrew v. N. Ir. Royal Ulster Constabulary, 3 N. Ir. 86 (Q.B. 1988).

[334] *See* Conway v. Irish Nat'l Teachers Org. [1991] I.L.R.M. 497 (Ir. S.C.); *see also* Whelan v. Madigan [1978] I.R.L.M. 136 (Ir. H.Ct.). For a comprehensive discussion of the law of punitive damages in Ireland, *see* BRYAN M.E. MCMAHON & WILLIAM BINCHY, IRISH LAW OF TORTS 771-83 (1990).

[335] Foley v. Thermocement Products Ltd. [1954] 90 I.L.T.R. 92 (Ir. S.C.); *see also* McGrath v. Bourne, 10 Ir.R.-C.L. 160 (Exch. 1876); MCMAHON & BINCHY, *supra* note 534, at 779-82.

[536] *See* Shell U.K. Exploration and Prod. Ltd. v. Innes, [1995] S.L.T. 807 (Sess. Cas.).

[537] *See* M.F. RUTTER, HANDBOOK ON DAMAGES FOR PERSONAL INJURIES AND DEATH IN SINGAPORE AND MALAYSIA 40 (1988).

[538] *See id.*

Philippines.[540] In India, punitive damages are available when the conduct of the defendant is "high-handed, insolvent, vindictive, or malicious, showing a contempt for the plaintiffs right, or disregarding every principle which actuates the conduct of gentlemen."[541] This standard has been interpreted to include several intentional torts such as assault, false imprisonment, trespass, libel, slander, conversion and, in certain instances, negligence.[542] However, punitive damages are not recoverable for breach of contract.[543] Any such award must be made with restraint and reasonably related to the amount of the actual loss.[544] By comparison, the recovery of punitive damages in the Philippines much more closely resembles that in the United States. Several articles of the Civil Code authorize awards of punitive damages.[545] Such damages are available when their imposition would be in the "public good" including instances of gross negligence.[546] In contrast to India, punitive damages are available in breach of contract cases if the defendant acted in a wanton, fraudulent, reckless, oppressive, or malevolent manner.[547]

Punitive damages are also recognized in Australia[548] and New Zealand.[549] Despite their availability, punitive damages are rarely awarded in Australia.[550] Such damages are available only in a limited number of tort actions usually involving defamation, trespass, deceit or intentional torts affecting one's business interests where the defendant has "acted deliberately and outrageously in defiance of the rights of the plaintiff."[551] Punitive damages are never available in breach of contract

[539] *See* B.M. GANDHI, LAW OF TORT 311 (1987); *see also* JANKI PRASAD SINOHAL, LAW OF DAMAGES AND COMPENSATION 16 (1970).

[540] *See* MELQUIADES J. GAMBOA, AN INTRODUCTION TO PHILIPPINE LAW 406 (6th ed. 1955); *see also* ALICIA B. GONZALEZ-DECANO, TORTS AND DAMAGES 212(1996).

[541] SINGHAL, *supra* note 539, at 16.

[542] *See id.* at 18.

[543] *See* Contract Act § 73 (1872), *reprinted in* V.R. MANOHAR & W.W. CHITALEY, 11 THE A.I.R. MANUAL 76 (4th ed. 1979); *see also* SINGHAL, *supra* note 539, at 16.

[544] *See* SINGHAL, *supra* note 539, at 18, 236.

[545] *See* Civil Code arts. 2197, 2216, 2229-35 (Phil.) [PHIL. Civ. C.], *reprinted in* 5 CIVIL CODE OF THE PHILIPPINES ANNOTATED 869 (Edgardo L. Paras ed., 12th ed. 1990).

[546] *Id.* arts. 2229, 2231.

[547] *See id.* art. 2232.

[548] *See* ROSALIE P. BALKIN & J.L.R. DAVIS, LAW OF TORTS 832-34 (1991); *see also* FRANCIS TRINDADE & PETER CANE, THE LAW OF TORTS IN AUSTRALIA 496 (1993); Michael Noone, *Damages, in* THE LAWS OF AUSTRALIA, TORTS § 33.10 (Geoff Masel ed., 1998).

[549] *See* Norton v. Stringer [1909] 29 N.Z.L.R. 249, 256; *see also* The Law OF Torts IN NEW ZEALAND 1229-35 (Stephen Todd ed,, 2d ed. 1997).

[550] *See* TRINDADE & CANE, *supra* note 548, at 496.

[551] *Id.* at 6; *see also* BALKIN & DAVIS, *supra* note 548, at 833 (characterizing the standard of behavior necessary to receive an award of punitive damages as "contumelious disregard of another's rights," "flagrant violations of the plaintiff's rights" and "cruel and reckless disregard of the plaintiff, thereby demonstrating the defendant's callousness and indifference towards the plaintiff in committing the wrong.")

actions.[552] Furthermore, all such awards must be moderate and reasonable in their amount.[553] Awards of punitive damages are also rare in New Zealand.[554] Punitive damages are reserved for compelling cases evidencing high-handed disregard of the plaintiffs rights or similar outrageous conduct.[555] Included in such conduct are claims for assault, battery, trespass, false imprisonment and inducing breach of contract.[556] However, punitive damages are not available in breach of contract actions.[557] As in Australia, the amount of such awards must be moderate and rational.[558]

Punitive damages have not gained widespread acceptance in other parts of the world. The mixture of civil law, common law and religious principles common to countries in the Middle East typically limit recovery to compensatory damages in private actions and reserve punitive damages for criminal actions.[559] Israel, perhaps in deference to its British colonial past, permits punitive damages awards under extremely limited circumstances.[560] In Africa, punitive damages are recognized in the former British colony of South Africa, and so-called "moral damages" may serve a punitive purpose in Senegal.[561] Punitive damages have also been rejected throughout Latin America[562] with the exception of Brazil.[563]

[552] *See* Baltic Shipping Co. v. Dillon (1993) 176 C.L.R. 344; *see also* Whitfeld v. De Lauret & Co. Ltd. (1920) 29 C.L.R. 71. However, punitive damages may be available for inducing one to breach his contract. *See id.*

553 *See* XL Petroleum Ltd. v. Caltex Oil Ltd. (1985) 155 C.L.R. 448; *see also* Pollack v. Volpato (1973) 1 N.S.W.R. 653; Noone, *supra* note 548, § 33.10.

[554] *See* McLaren Transp. Ltd v. Somerville [1996] 3 N.Z.L.R. 424.

[555] *See* Willis v. A-G [1989] 3 N.Z.L.R. 574; *see also* Green v. Matheson [1989] 3 N.Z.L.R. 564; Auckland CCI v. Blundell [1986] 1 N.Z.L.R. 732; Taylor v. Beere [1982] 1 N.Z.L.R 81.

[556] *See* Hayward v. O'Keefe [1993] 1 N.Z.L.R. 181; *see also* A v. M [1991] 3 N.Z.L.R. 228; Shattock v. Devlin [1990] 2 N.Z.L.R. 88; Metro Mech. Ltd. v. Neil Day Motors Ltd. [1995] D.C.R. 232.

[357] *See* A v. B [1972] 1 N.Z.L.R. 673.

[558] *See* Todd, *supra* note 549, at 1232.

[559] *See* Civil Code art. 221 (Egypt) [EGYPT CIVIL C.], *reprinted in* MICHAEL H. DAVIES, Business Law in Egypt 199 (1984); Civil Code art. 328 (Iran) [IRAN CIVIL C.] (M AR. Taleghany trans., 1995); Civil Code arts. 169, 204 (Iraq) [IRAQ CIVIL C.], *translated in* 3 BUSINESS Laws of Iraq 65 (Nicola H. Karam trans., 1990); Civil Code art. 224 (Libya) [LIBYA CIVIL C.], *in* 18 Y.B. COM. ARB. 34,40 (1993). *See also* SAYED HASSAN AMIN, MIDDLE EAST LEGAL SYSTEMS 366 (1985).

[560] *See* THE Law OF ISRAEL: General Surveys 472-75 (Itzhak Zamir & Sylviane Colombo eds., 1995). Punitive damages are available in private civil actions in Israel where there is evidence of malice, violence and humiliation. *See id.* at 474. Punitive damages are not available in cases involving negligence, even if the defendant has been grossly negligent. *See id.* Despite their acceptance, awards of punitive damages remain a rarity in Israel and most commonly occur in defamation cases. *See id.* at 475.

[561] *See* Nina H.B. Jorgensen, *A Reappraisal of Punitive Damages in International Law.* 68 BRIT. Y.B. INT'LL. 247, 258 (1997).

[562] *See* Codigo Civil [COD. ClV.] arts. 554, 1143 (Arg.) (Frank L. Joaninr trans., 1917); Cm Code of the Republic of Costa Rica arts. 704, 1045 (United Fruit Co. trans., 1907); Codigo Civil para el Distrito Federal [C.C.D.F.] arts. 1910, 2110 (Mex.) (Michael W. Gordon trans., 1980); Civil Code art. 1616 (Pan.) (Frank L. Joanini trans., 1905); *see also* PEDRO SILVEIRA BARRIOS, A STATEMENT OF THE LAWS OF VENEZUELA IN MATTERS AFFECTING BUSINESS 85-86 (4th ed. 1977); JULIO GOMEZ PADILLA, A STATEMENT OF THE LAWS OF GUATEMALA IN MATTERS AFFECTING BUSINESS 75 (3d ed. 1975), DANTE GABRIEL RAMIREZ & ROBERTO RAMIREZ, A STATEMENT OF THE LAWS OF HONDURAS IN MATTERS

It thus may be concluded that current international practice does not grant wide recognition to the concept of punitive damages. Furthermore, it does not appear that the concept has gained acceptance as a general principle governing the relations between states. Indeed, many states have concluded, as one commentator has noted that "United States cases should not be given too much weight [in international practice] owing to the general prevalence [of punitive damages awards] ... on a scale unknown elsewhere."[564]

The question thus remains how the verdict in the ***O 'Keefe*** Litigation would fare utilizing standards in those states that recognize punitive damages. The answer to this question is quite poorly. Although the behavior of Loewen may have met the level of abomination necessary to merit condemnation through an award of punitive damages,[565] it must be remembered that such awards are quite rare in jurisdictions outside of the United States.[566] As such awards are not available in all tort cases in these jurisdictions, it remains an open question whether the torts alleged by O'Keefe would have been sufficient to support the imposition of an award utilizing international standards.[567] The weight of international authority appears to grant such awards in instances where the plaintiff has suffered physical, rather than merely commercial, injury as occurred in the ***O 'Keefe*** Litigation. Furthermore, if the claims asserted in the ***O'Keefe*** Litigation are determined to be contractual, rather than tortious, in nature, then recovery may be denied utilizing the well- recognized principle rendering punitive damages unobtainable in breach of contract actions.[56]*

Even assuming that international jurisdictions recognizing punitive damages would have granted an award if confronted with the facts at issue in the ***O 'Keefe*** Litigation, the amount awarded utilizing such standards would not have approached the amount awarded by the Mississippi court. The $400 million punitive damages award emerging from the ***O 'Keefe*** Litigation is most certainly not a model of restraint as required by the laws of these foreign jurisdictions.[569] Nor is the award moderate, reasonable and rational in its amount or its relation to the

AFFECTING BUSINESS 52 (4th ed. 1981); CARLOS WALTER URQUIDI, A STATEMENT OF THE LAWS OF BOLIVIA IN MATTERS AFFECTING BUSINESS 109 (4th ed. 1974); JORGE O. VELA & JUAN LARREA HOLGUIN, A STATEMENT OF THE LAWS OF ECUADOR IN MATTERS AFFECTING BUSINESS 42 (3d ed. 1975); HARRY A ZURCHER ET AL., A STATEMENT OF THE LAWS OF COSTA RICA IN MATTERS AFFECTINO BUSINESS 88 (5th ed. 1988);

[563] *See* Codigo Civil [C.C.] art. 1547 (Braz.). Punitive damages are strictly limited to cases of false imprisonment and defamation and are limited to twice the maximum amount of the applicable penal fine. *See id.* Punitive damages are not permitted in breach of contract cases. *See id.* arts. 1059, 1060.

564 Jorgensen, *supra* note 561, at 266.

565 See supra notes 541, 551 and 555 and accompanying text.

[566] *See supra* notes 522-23, 550, 554, 560 and accompanying text.

[567] *See supra* notes 526, 534, 542, 551, 556 and 560 and accompanying text.

[568] *See supra* notes 527 and 552 and accompanying text.

[569] *See supra* notes 529 and 544 and accompanying text.

compensatory damages award.[570] In fact, the compensatory award of $100 million would most likely be deemed as more than adequate in any foreign jurisdiction, thereby obviating the necessity of a further punitive damages award.[571] Mississippi's award constitutes a blatant redistribution of wealth that would not tolerate even the most lax scrutiny in these foreign jurisdiction.[572] As the award clearly violates the most liberal interpretation of punitive damages existing in the world in the United States, it thus must violate the far more conservative standards existing in other jurisdictions.

It is also most likely that the determination of Loewen's motion for relief from the bond requirements would have been different if standards from those countries recognizing punitive damages awards had been applicable. Although several of these jurisdictions recognize that the mere filing of an appeal does not automatically stay execution of the underlying judgment,[573] these jurisdictions grant their courts considerable discretion to recognize grounds for stay relief that may have been applicable in the ***O'Keefe*** Litigation.[574] Several jurisdictions, including the United Kingdom and New Zealand, grant discretion to their courts to order stay relief in the event that refusal to grant such relief would have the effect of terminating the action.[575] Other jurisdictions, such as India, may have granted Loewen's motion for stay of execution based upon the substantial losses that it would have suffered in the event that collection efforts were allowed to continue during the pendency of the appeal.[576] Another ground for granting stay relief based upon the laws of those jurisdictions that recognize punitive damages awards is that no court order could have returned Loewen unharmed to its former position if it had prevailed upon its appeal.[577] Like the United States and Canada, most of these jurisdictions require that appellants seeking stay relief post a bond securing

[570] *See supra* notes 535 and 553 and accompanying text.

[571] *See supra* note 528 and accompanying text.

[572] *See supra* note 530 and accompanying text.

[573] *See* B.N. Banerjee, Law of Civil Appeals and Revisions 773 (1994) (India); Bernard C. Cairns, Australian Civil Procedure 674-75 (1996) (Austl.); M.R. Mallick, Ganguly's Civil Court Practice and procedure 562 (1989) (India); Robert J. Martineau, Appellate Justice in England and the United States: A Comparative Analysis 180 (1990) (Eng.); David O'Brien, Special Leave to Appeal: The Law and Practice of Applications for Special Leave to Appeal to the High Court of Australia (1996) (Austl.); AN. Saha, The Code of Civil Procedure 823 (1978) (India); *see also* Hardie Boys, *Contract to Creditors· Remedies, in* THE LAWS OF NEW ZEALAND 90, 188 (Robin Cooke, ed., 1998) (N.Z.).

[574] *See* BANERJEE, *supra* note 573, at 776 (India); CAIRNS, *supra* note 573, at 676 (Austl.); Martineau, *supra* note 573, at 181 (Eng.); O'BRIEN, *supra* note 573, at 146 (Austl.); *see also* Boys, *supra* note 573, at 188 (N.Z.).

575 *See* Michael Supperstone & James Goudie, Judicial Review § 18.10 (1997) (Eng.); *see also* Boys, *supra* note 573, at 91, 189 (N.Z.).

576 *See* Banerjee, *supra* note 573, at 775-80 (India); *see also* SAHA, *supra* note 573, at 824 (India).

[377] *See* CAIRNS, *supra* note 573, at 675-76 (Austl); *see also* MARTINEAU, *supra* note 573, at 181; O'Brien, *supra* note 573, at 148 (Austl.).

payment of the underlying judgment in the event of failure of their appeal.[578] However, it is likely that this bond would have been in an amount much less than that required in the ***O 'Keefe*** Litigation given the decreased size of the verdict that would have entered had the case utilized international standards for the determination of punitive damages awards. It is also possible that these jurisdictions would have based the amount of the required bond solely upon the compensatory award.

IV. CONCLUSION

Although Loewen's claims remained pending before ICSID at the time of preparation of this article, numerous conclusions can be reached regarding the likely outcome of the proceedings. Initially, it can be concluded that the punitive damages award in the ***O 'Keefe*** Litigation violated due process standards established by recent U.S. Supreme Court cases. The award was clearly the product of bias, passion and prejudice against a financially successful foreign enterprise at the expense of reason. This bias and lack of reason are evident from the repeated, and often vicious, references to Loewen's nationality, alleged reluctance to serve all Mississippians in an equal fashion and purported eagerness to take advantage of the poorest citizens in the poorest state in the country. The scant evidence presented during the punitive damages phase of the trial is further demonstrative of the lack of a rational basis for the jury's award. The enormous size of the award in relation to O'Keefe's actual injuries and economic loss, previous awards in the state and the financial condition of Loewen lead to the conclusion that it was an unconstitutional, albeit perhaps unintentional, attempt to redistribute wealth amongst the parties. Any attempt to link the verdict to other instances of alleged misconduct by Loewen in other jurisdictions was completely lacking in evidentiary support.

The result of the ***O 'Keefe*** Litigation was also tainted from a procedural due process standpoint. The trial court's failure to ensure fairness by preventing repeated, malignant and often gratuitous remarks regarding issues of nationality, patriotism, race and economic status undoubtedly contaminated the proceedings and had a substantial effect upon their outcome. Procedural due process also suffered as a result of the confusion surrounding the jury's initial award and subsequent failure

[578] *See* BANERJEE, *supra* note 573, at 777 (India) ("[n]o order for stay of execution shall be made even if there is sufficient cause for doing so, unless security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him."); *see also* O'BRIEN, *supra* note

573, at 149 (Austl.) (requiring the applicant to "pay the respondent such damages or loss whether legally claimable or not as this court or a justice thereof may think just and fair as compensation to the respondent for any disadvantage it may sustain by reason of [the stay] order."); SUPPERSTONE & GOUDIE, *supra* note 575, § 18.10 (Eng.) ("when ... a stay of execution is sought, it is probable that it will only be granted subject to the party seeking it providing an undertaking in damages should the appeal ultimately be unsuccessful.")

of the trial court to adequately guide the jury in its deliberations. The trial court's refusal to correct the jury's grossly excessive verdict also casts doubt upon the constitutional pedigree of the proceedings.

The trial court's numerous failures were not subject to meaningful judicial review upon appeal as a result of the inflexible application of the rules governing bonds and stays of execution in Mississippi. The required bond bore no reasonable relationship to the actual value of the property at issue in the litigation. Strict adherence to Mississippi's bond requirements ignored the existence of good cause justifying departure from such requirements and caused Loewen irreparable harm through financial devastation and denial of meaningful review of the constitutionality of the punitive damages award. As a result, Loewen was left with no alternative other than to settle the litigation for a grossly inflated amount that ultimately contributed to its financial ruin. Given these numerous substantive and procedural deficiencies, it is safe to conclude that the award would not have survived scrutiny by the U.S. Supreme Court.

The punitive damages award in the ***O'Keefe*** Litigation also violated substantive and procedural standards governing such awards in Canada. The sufficiency of the $100 million compensatory damages award would have obviated the need for a separate punitive damages award. An additional $400 million award would hardly serve the rational purposes required of punitive damages awards by Canadian law. This point is demonstrated by the existence of only one Canadian appellate case upholding a punitive damages award in excess of $1 million and only three cases upholding awards in excess of $100,000. Subjecting the award in the ***O'Keefe*** Litigation to review utilizing these standards leads to the unmistakable conclusion that it is not an example of the most cautious exercise of discretion required of Canadian courts in awarding such damages. It is an award that would not be granted by a Canadian trial court or jury nor one that would survive appeal.

The result of the ***O Keefe*** Litigation is also inconsistent with Canadian standards with respect to stays of execution upon appeal. A Canadian court reviewing Loewen's application for stay relief would have been required to conduct a preliminary assessment of the merits of the appeal. Such an assessment would have supported a liberal grant of stay relief given the serious issues presented by the appeal and the meritorious arguments that could be advanced by Loewen with respect to each of these issues. In addition, a Canadian court could easily conclude that Loewen would suffer serious and irreparable harm as a result of denial of its stay application. Based upon the verdict's probable violation of substantive principles of Canadian law, the balance of conveniences would weigh in favor of maintenance of the status quo until such time as the award could be reviewed on appeal. Assuming the provision of reasonable security, it is fair to conclude that a Canadian appellate court would have deemed Loewen's application for stay relief just and appropriate.

The punitive damages award also is inconsistent with applicable international standards. These standards are particularly relevant given NAFTA's provisions that it is to be interpreted in accordance with applicable principles of international law.[579] Applying these principles, it may be concluded that the overwhelming weight of international authority reserves punitive damages awards for public penal actions and denies their availability in private civil actions. The few states that permit punitive damages awards in private civil actions have adopted strict limitations upon their recovery and measurement. The issue of whether the behavior at issue in the ***O 'Keefe*** Litigation was sufficient to support the imposition of punitive damages utilizing standards established in these jurisdictions remains an open question. Equally undetermined is whether such jurisdictions would grant punitive relief for solely commercial losses in the absence of catastrophic physical injury. In any event, the amount of the award in the ***O 'Keefe*** Litigation is neither modest or reasonable as required by these jurisdictions. The compensatory award, excessive though it was, would clearly serve the state's interest in restitution as well as punishment. Even assuming such an award emerged from the trial court of any of these states, it would be subject to strict appellate scrutiny and subsequent reversal. Stay relief, liberally granted during the course of this review, would have ensured the preservation of the status quo throughout the pendency of the appellate process without prejudicing the rights of either the appellant or the appellee or compelling a forced settlement occurring under circumstances of extreme economic duress.

Given the inconsistency of the punitive damages award in the ***O'Keefe*** Litigation with applicable American, Canadian and international standards, it may be concluded that it constituted an uncompensated expropriation pursuant to Article 1110 of NAFTA. Although not a direct taking, the Mississippi judiciary's acquiescence in a biased process that resulted in an excessive verdict, denied Loewen meaningful substantive review of such verdict and ultimately compelled a financially devastating settlement is without doubt an indirect measure tantamount to expropriation.[580] The biased nature of the proceedings as evidenced by the repeated emphases upon nationality, race and wealth do not support the existence of a legitimate public purpose underlying this expropriation.[581] The absence of a legitimate public purpose is further evidenced by the excessive nature of the award and its lack of evidentiary support and a rational relationship to actual economic loss. These factors are also evidence of the discriminatory nature of the expropriation and its failure to conform to the mandates of substantive due process.[582] The trial court's procedural confusion and arbitrary refusal to grant stay relief pending appeal further solidify the conclusion that the expropriation was inconsistent with due process of law.[583] Finally, Loewen has received no compensation, let alone prompt, adequate and effective compensation, for the losses suffered as a result of the confiscatory measures imposed upon it by the state of Mississippi.[584] This compensation, to which it is clearly entitled by the express terms of NAFTA, should be awarded by the ICSID tribunal currently considering Loewen's claims.

This conclusion, if reached by the ICSID tribunal, will undoubtedly be fraught with controversy. By effectively overturning the result of a domestic civil judicial proceeding, such a decision would undoubtedly result in renewed criticism of comprehensive international trade agreements as benefiting multinational corporations at the expense of local political control and interests.[585] The investor protection provisions of Chapter Eleven would be subject to condemnation as overbroad and an improper delegation of government authority to private foreign investors.[586] Such delegation also may be attacked as unfairly granting authority to foreign investors to challenge domestic laws and judicial decisions which authority is not possessed by domestic investors.[587] The decision advocated in this article would be susceptible to the charge that the investor protection provisions subvert the American judicial process[588] and may lead to widespread challenges to federal, state and local laws and court decisions deemed offensive to Canadian and Mexican investors.[589] These concerns would be exacerbated by the lack of transparency and state and local participation in the ICSID decision-making process.[590]

These concerns notwithstanding, a decision reaching the conclusion that the punitive damages award in the ***O 'Keefe*** Litigation constituted an uncompensated expropriation in violation of NAFTA would be the proper and correct resolution of the dispute. The language of Article 1110(1) of NAFTA clearly prohibits the United States, Canada and Mexico from adopting any measure tantamount to the taking of an investment of a private person of another party located within its territory unless the host state is able to meet four specific requirements.[591] For the reasons set forth above, the outrageous punitive damages

[579] *See* NAFTA, *supra* note 16, ch. 1, art. 102(2), ch. 11, art. 1131(1).
[580] *See id.* ch. 11, art. 1110(1).
[581] *See id.*
[582] *See id.*
[583] *See id.*
[584] *See id.* arts. 1110(1), (2).
[585] *See* Iritani, *supra* note 17, at Al; *see also* Bussey, *supra* note 17, at 1C.
[586] *See* Iritani, *supra* note 17, at Al.
[587] *See NAFTA's Birthday Bombshell*, *supra* note 19, at 2.
[588] *See id.* at 1-2; *see also Canadian Corporation Found Liable*, *supra* note 21, at 3; *Canadian Corporation Uses NAFTA*, *supra* note 20, at 1-2; Glaberson, *supra* note 20, at C6.
[589] *See Canadian Corporation Found Liable*, *supra* note 21, at 3-4; *see also Canadian Corporation Uses NAFTA*, *supra* note 20, at 2; *NAFTA's Birthday Bombshell*, *supra* note 19, at 2.
[590] *See Canadian Corporation Uses NAFTA*, *supra* note 20, at 2; *see also* Glaberson, *supra* note 2<Ut C6; *Importance and Implications*, *supra* note 25, at 2; *NAFTA's Birthday Bombshell*, *supra* note 19,
[591] *See* NAFTA *supra* note 16, ch. 11, art. 1110(1).

award in the ***O 'Keefe*** Litigation did not meet any of these criteria, regardless of the source of the applicable legal standards. The award clearly fails to meet the most liberal punitive damages standards in the world, those of the United States, and thus also fails the far more conservative standards governing such awards in Canada and the rest of the world. As the party responsible for conforming the behavior of its component states with NAFTA's requirements, the United States is thus liable for the payment of compensation in an amount equivalent to the fair market value of Loewen's expropriated investment immediately before the entry of the punitive damages award in Mississippi.[592] Whether claims such as those asserted by Loewen were intended by U.S. negotiators, representatives of the Bush and Clinton administrations or members of the U.S. Congress who voted in favor of U.S. participation in NAFTA or are an unanticipated and malevolent side effect of the pact, the language of Article 1110 is unambiguous in its prohibitions, clear in the remedies available to those injured as a result of its violation and equally applicable to all parties.

There is much that the federal government could do to address the concerns raised by critics of NAFTA's Chapter Eleven. If Loewen's ICSID proceeding was truly unanticipated or unintended, the United States should enter into immediate consultations with its NAFTA partners to clarify or otherwise restrict the meaning of Article 1110. Instances of indirect or creeping expropriation could be removed from the dispute resolution process. On a narrower basis, restrictions upon standing or the types of cases subject to Article 1110's prohibitions could be negotiated between the parties. For example, damages awards in certain types of cases such as products liability, consumer fraud and employment discrimination could be removed from challenge pursuant to Chapter Eleven. Such concerns may also be addressed by promoting greater transparency within the dispute resolution process such as public notice of the initiation of proceedings and granting affected state and local governments the right to participate in the dispute resolution process. In any event, the federal government owes an obligation to state and local governments and, ultimately, their constituencies, to clarify its position with respect to NAFTA's expropriation provisions if this result is not the interpretation it intended upon U.S. entry into the free trade agreement seven years ago. Nevertheless, until such time as reform or amendment occurs, whether unknown, overlooked or unanticipated, NAFTA is part of the American legal system, and Loewen's right to bring, and ultimately prevail upon, its expropriation claim before the ICSID tribunal is clearly found within its provisions.

[592] *See id.* ch. 11, art. 1110(2).