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A Shift in the Windfall: An Analysis of Indiana's Punitive Damages Allocation Statute and the Recovery of Attorney's Fees Under the Particular Services Clause

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Notes

A SHIFT IN THE WINDFALL: AN ANALYSIS OF INDIANA'S PUNITIVE DAMAGES ALLOCATION STATUTE AND THE RECOVERY OF ATTORNEY'S FEES UNDER THE PARTICULAR SERVICES CLAUSE

I. INTRODUCTION

After being falsely accused of theft and detained for several hours at the local shopping mall in Smalltown, Indiana, Ms. Smith contacts an attorney, who must consider whether to take the case on a contingency basis.[1] Ms. Smith suffered no physical injuries, just a little embarrassment and humiliation. Her attorney has heard about others being held at this particular shopping mall and believes this case presents an opportunity to punish the mall and stop this type of thing from happening again. The attorney evaluates what might happen. She could bring a tort action seeking compensatory and punitive damages. If settlement conferences prove unsuccessful, a trial might result. After a three day trial, a jury could very well award Ms. Smith $1000 in compensatory damages for her mental anguish and $11,000 in punitive damages. The shopping mall would then pay $12,000 to the clerk of the court, who would allocate $8250 to the state of Indiana, and $3750 to Ms. Smith, who would then pay her attorney a third (or $1250). After some consideration of the idea, the attorney apologizes to Ms. Smith and declines the case.

A troublesome irony surrounds efforts to limit punitive damage awards. Punitive damages are quasi-criminal sanctions leveled in civil actions when a defendant's conduct is found especially reprehensible.[2] Punitive damages punish defendants and are designed to deter similar conduct in the future.[3] Unlike criminal penalties, punitive damages are not sought by state prosecutors.[4] In the appropriate situations, plaintiffs may seek such "penalties" and place themselves in the role of "private attorneys general."[5]

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1. This hypothetical situation, the name of the tort victim, and the town are fictitious and are used to illustrate the impact of Indiana's punitive damages allocation statute, IND. CODE ANN. § 34-51-3-1 to -6 (West Supp. 1998).

2. 1 DAN B. DOBBS, REMEDIES § 3.11(1) (2d ed. 1993); David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 365 (1994).

3. Owen, *supra* note 2, at 377-78. In Indiana, punitive damages are clearly understood as limited to punishment and deterrent functions. *See* Miller Brewing Co. v. Best Beers of Bloomington, Inc., 608 N.E.2d 975 (Ind. 1993) (noting that punitive damages in Indiana are designed to punish the wrongdoer and dissuade from similar conduct in the future).

4. *See* Angela P. Harris, *Rereading Punitive Damages: Beyond the Public/Private Distinction*, 40 ALA. L. REV. 1079 (1989). Professor Harris argues that the distinction between tort law as "private" enforcement and criminal law as "public" has traditionally broken down when applied to punitive damages. *Id.* at 1099. This conventional analysis of punitive damages resounds in *Orkin Exterminating Co. v. Traina*, 486 N.E.2d 1019 (Ind. 1986). "[T]he sole issues [concerning an award of punitive damages] are whether or not the Defendant's conduct was so obdurate that he should be punished for the benefit of the general public. Punitive damages may be likened to a fine imposed for breach of the criminal statutes." *Id.* at 1022.

5. Owen, *supra* note 2, at 381 (stating that "the prospect of punitive damages awards serve as a kind of bounty, inducing injured victims to serve as 'private attorneys general,' increasing the number of wrongdoers who are pursued, prosecuted and eventually brought to justice").

Concerns about the increasing size and frequency of punitive damage awards have resulted in serious reconsideration of the usefulness of punitive damage awards and the propriety of awarding punitive damages to plaintiffs.[6] Numerous commentators have suggested limiting punitive damage awards or awarding punitive damages to the state rather than to plaintiffs.[7] Critics of punitive damage awards point out that allowing plaintiffs to profit from punitive damage awards results in "windfalls"[8] to the plaintiffs and serves neither the punishment nor the deterrent functions of punitive damages.[9] As the number of proposals to reform punitive damage awards have increased, so have the number of ways to reward the plaintiff's attorney for arguing the case for

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6. For an excellent analysis of the various criticisms of punitive damages, see Owen, *supra* note 2, at 382-400. *See also* Michael L. Rustad, *Nationalizing Tort Law: The Republican Attack on Women, Blue Collar Workers and Consumers*, 48 RUTGERS L. REV. 673 (1996). Rustad argues that there never has been a tort "crisis" and presents findings from the nine empirical studies that have been conducted on punitive damage awards, concluding that "[t]he key finding of every empirical study of punitive damages is that the number and size of awards do not indicate a nationwide litigation crisis." *Id.* at 702.

7. *See* ABA REPORT OF THE ACTION COMMISSION TO IMPROVE THE TORT LIABILITY SYSTEM 19 (1987). Many other proposals followed. *See, e.g.*, Janie L. Shores, *A Suggestion for Limited Tort Reform: Allocation of Punitive Damage Awards to Eliminate Windfalls*, 44 ALA. L. REV. 61 (1992). Justice Shores, a member of the Alabama Supreme Court, traces the history of punitive damages and addresses the myths and realities of the tort "crisis." *Id.* at 62-84. She then proposes that judges award punitive damages to the state to maintain the deterrent effect of punitive damages while avoiding the perceived plaintiff's windfall. *Id.* at 90-91. "By such a procedure, the dual purposes of punitive damages are served: punishment of the defendant and deterrence of that defendant and others who might act similarly." *Id.* at 91. *See also* E. Jeffrey Grube, Note, *Punitive Damages: A Misplaced Remedy*, 66 S. CAL. L. REV. 839, 851 (1993) ("[i]f some entity must be compensated for the malicious, aggravated, or outrageous conduct of the defendant, it should be society rather than the plaintiff"); Lynda A. Sloane, Note, *The Split Award Statute: A Move Toward Effectuating the True Purpose of Punitive Damages*, 28 VAL. U. L. REV. 473, 505 (1993) (finding "no justification for allowing only one member of society to collect monies that are awarded in the interest of society at large").

8. *See* Smith v. Wade, 461 U.S. 30 (1982) (Rehnquist, J., dissenting):

> Punitive damages are generally seen as a windfall to plaintiffs, who are entitled to receive full compensation for their injuries—but no more. Even assuming that a punitive "fine" should be imposed after a civil trial, the penalty should go to the State, not to the plaintiff—who by hypothesis is fully compensated.

Id. at 59. Others consider any amount over and above the plaintiff's actual damages plus costs and attorneys' fees to be a windfall. Note, *An Economic Analysis of the Plaintiff's Windfall from Punitive Damage Litigation*, 105 HARV. L. REV. 1900 (1992) (hereinafter *Economic Analysis)* (identifying a "windfall" as an award of punitive damages beyond the amount necessary to: (1) punish the defendant, (2) deter the defendant's similar conduct, and, as a secondary goal, (3) compensate the plaintiff for the litigation costs incurred). *But see* Owen, *supra* note 2, at 378-79 (discussing the functions of a punitive damages award as including a compensatory role). Professor Owen argues that the plaintiff's responsibility for the costs and the attorney's fees, often leaving the plaintiff worse off than before the injury, "provides a compelling argument for punitive damages in appropriate cases." *Id.* at 379.

9. Grube, *supra* note 7, at 850-52. Only a minority of states hold to the theory that punitive damages are meant to compensate the victim. *See infra* note 40.

punitive damages.[10] Thus, the inherent irony in placing limitations on punitive damages is this: if a plaintiff's attorney is not compensated in a manner which makes the time and effort of arguing for punitive damages worthwhile, reprehensible conduct goes unpunished.

In 1995, Indiana joined the list of states that have limited punitive damage awards when it enacted an "allocation"[11] statute in House Enrolled Act 1741.[12] The Act places a substantive cap on punitive damages at the greater of $50,000 or three times the compensatory damage award.[13] Seventy-five percent of the punitive damage award is allocated to the state for deposit in a compensation fund for victims of violent crime,[14] and the remaining twenty-five percent[15] is awarded to the plaintiff. The Act, however, fails to mention when or to what extent the state becomes involved in collecting a punitive damage award, neither does it mention compensating plaintiffs' attorneys for arguing the case for punitive damages. Any windfall that comes as a result of a punitive damage award now falls into the coffers of the state treasury. This

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10. *Compare* Sloane, *supra* note 7, at 493 (proposing that plaintiff should pay attorney out of plaintiff's share of the punitive damage award), *with* Grube, *supra* note 7, at 856 (proposing that state should pay plaintiff's attorney an amount equal to the costs of arguing the case for imposing punitive damages).

11. This note refers to statutes which allocate a portion of the punitive damages to the state as "allocation statutes." Other commentators refer to "split recovery statutes" or "split award statutes." All such terminology refers to the same phenomenon: a statute which awards a certain percentage of each punitive damage award away from the plaintiff.

12. House Enrolled Act 1741 did four things. First, it addressed products liability, limiting which manufacturers can be held responsible for defective products. IND. CODE ANN. § 33-1-1.5-3 (West Supp. 1996). Second, it introduced comparative fault in product liability actions. IND. CODE ANN. § 34-4-33-5 (West Supp. 1996). Third, it capped punitive damages and allocated 75% of any punitive damage award to a state-run fund for victims of violent crime. IND. CODE ANN. §§ 34-51-3-4 to -6 (West Supp. 1998). Finally, it addressed offers of settlement and provided sanctions for failing to settle. IND. CODE ANN. § 34-50-1-1 (West Supp. 1998). *See also* Frederick R. Hovde, *Analysis of Indiana Tort Reform 1995: The Effects of House Enrolled Act 1741*, 29 IND. L. REV. 365 (1995); James L. Petersen, *Tort Reform, Act No. 1741*, RES GESTAE, Sept. 1995, at 24; Andrew P. Wirick & Ann Marie Waldron Piscione, *Tort Law Reform (?) and Other Developments in Indiana Tort Law*, 29 IND. L. REV. 1097 (1996). Only the statutory cap on punitive damages and the allocation of the award are within the scope of this note.

13. IND. CODE ANN. § 34-51-3-4 (West Supp. 1998).

14. IND. CODE ANN. § 34-51-3-6(b)(2) (West Supp. 1998). The fund was established by IND. CODE ANN. § 5-2-6.1-40 (West Supp. 1997) and is funded through various sanctions and fines. IND. CODE ANN. § 5-2-6.1-41 (West Supp. 1997). Awards are made to victims of violent crime who meet certain criteria and cover medical and, in some cases, burial expenses. IND. CODE ANN. § 5-2-6.1-21 (West Supp. 1997). A party awarded compensation under the fund may apply to receive attorney's fees "commensurate with services rendered to the claimant." IND. CODE ANN. § 5-2-6.1-37 (West Supp. 1997).

15. IND. CODE ANN. § 34-51-3-6(b)(1) (West Supp. 1998). The Act makes exception for damages awarded in actions brought under the Hazardous Substances Response Act. Punitive damages from settlements or judgments brought pursuant to this Act get deposited in the Hazardous Substances Response Trust Fund. IND. CODE ANN. § 13-25-4-1 (West Supp. 1996).

Note proposes changes to the Indiana statute that will continue to encourage plaintiffs' attorneys to seek awards to punish and deter egregious conduct, while maintaining the legitimate aims of the tort reform movement in preventing unjustified windfalls for plaintiffs.[16]

In the last ten years, attempts to limit punitive damage awards have increased.[17] Several cases awarding punitive damages have reached the United States Supreme Court to be scrutinized for constitutionality and have arisen from states with no substantive limitations on the amount of punitive damages awarded by juries.[18] In 1996, Congress proposed, but failed to enact, a tort reform bill that would pre-empt state laws and place both substantive and procedural limits on punitive damage awards.[19]

Some states have enacted statutory caps that place a specific dollar amount on the punitive damages that may be awarded.[20] Reform advocates argue that

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16. *See infra* notes 326-35 and accompanying text.

17. *See* James R. McKown, *Punitive Damages: State Trends and Developments*, 14 REV. LITIG. 419 (1995) (discussing litigation in the state courts). McKown reviews state statutes that share the punitive damage award with the state. *Id.* at 436. The author also details recent state court litigation concerning the factors that will be reviewed when a damage award is appealed. *Id.* at 443-44. State courts are now implementing more difficult burdens for plaintiffs to meet. *Id.* at 455.

18. *See, e.g.*, BMW of North America, Inc. v. Gore, 116 S. Ct. 1589 (1996); Honda Motor Co. v. Oberg, 114 S. Ct. 2331 (1994); TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991).

19. H.R. 956, 104th Cong. (1996). Congressional Republicans included the bill, entitled the Common Sense Legal Reform Act, in their "Contract with America" in 1994. Rustad, *supra* note 6, at 674. President Clinton vetoed the legislation, but strategists in the Republican congressional majority hint that the legislation will be reintroduced. Saundra Torry, *Both Sides Tote up the Votes for Tort Reform Redux*, WASH. POST, Nov. 25, 1996, at F7.

20. Currently, 14 states have enacted statutory caps on punitive damage awards: COLO. REV. STAT. ANN. § 13-21-102(1)(a) (West 1989) (punitive damages may not exceed actual damages); CONN. GEN. STAT. ANN. § 52-240b (West 1991) (in products liability cases, punitive damages may not exceed two times compensatory damages); FLA. STAT. ANN. § 768.73(1)(a & b) (West Supp. 1997) (punitive damage awards over three times compensatory damages create a presumption of excessiveness); GA. CODE ANN. § 51-12-5.1 (Michie Supp. 1997) (no limitation in products liability actions or where there is specific intent; otherwise, punitive damages are capped at $250,000); 735 ILL. COMP. STAT. ANN. 5/2-1115.05 (West Supp. 1997) (punitive damages capped at three times compensatory damages, but not available in legal malpractice or "healing arts" actions); IND. CODE ANN. § 34-51-3-4 (West Supp. 1998) (punitive damages limited to the greater of three times compensatory damages or $50,000); KAN. STAT. ANN. § 60-3701(e) (1996) (punitive damages may not exceed the lesser of the defendant's income, $5,000,000, or one and a half times the profit gained from the tortious activity); NEV. REV. STAT. ANN. § 42.005(1) (Michie 1996) (in certain actions, punitive damages may not exceed three times compensatory damages, if compensatory damages exceed $100,000, or $300,000, if compensatory damages are less than $100,000); N.C. GEN STAT. § 1D-25 (1996) (punitive damages limited to three times compensatory damages or $250,000; exempts drunk driving tort actions from cap); N.D. CENT. CODE § 32-03.2-11(4) (1997) (necessity of compensatory damages; punitive damages capped at twice the compensatory award or $250,000); OHIO REV. CODE ANN. § 2315.21 (D)(1)(a & b) (Banks-Baldwin 1997) (limits punitive

punitive damages are essentially civil fines that should be awarded to the state, and a number of states have responded by enacting allocation statutes that split the recovery and allocate a portion of the punitive damage award to the state.[21] These statutes have survived federal and state constitutional challenges that the allocation effects a taking of the plaintiff's vested property interest in the judgment[22] and an excessive fine in violation of the Eighth Amendment.[23] Because the award now closely approximates a civil penalty paid to the state, defendants may challenge damage awards as excessive fines.[24]

This Note examines Indiana's recently enacted allocation statute and argues in favor of amending the statute to compensate plaintiffs' attorneys for winning the punitive damages allocated to the state under the statute. The Indiana statute currently does not provide an incentive for plaintiffs' attorneys to pursue a claim for punitive damages. Part II of this Note provides an introductory background on the nature and functions of punitive damages[25] and discusses the relevant United States Supreme Court decisions of the last few years.[26] Part III surveys the tort reform movement, discussing various efforts to limit litigation, from

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damages to the greater of three times compensatory damages or $100,000, unless the defendant is categorized as a "large employer," in which case the award may be three time compensatory damages or $250,000); OKLA. STAT. ANN. tit. 23, § 9.1(B) (West 1997) (punitive damages limited to the greater of actual damages or $100,000; when the award results from an intentional offense, punitive damages capped at the greater of twice compensatory damages, $500,000, or the increased financial benefit derived by the defendant or insurer as a direct result of the conduct causing injury to the plaintiff); TEX. CIV. PRAC. & REM. CODE ANN. § 41.008 (West 1997) (punitive damages limited to twice economic damages plus noneconomic loss or $200,000, whichever is greater); VA. CODE ANN. § 8.01-38.1 (Michie 1997) (punitive damages may not exceed $350,000).

21. Nine states have such statutory schemes: FLA. STAT. ANN. § 768.73 (West Supp. 1997); GA. CODE ANN. § 51-12-5.1 (Supp. 1996); 735 ILL. COMP. STAT. ANN. 5/2-1207 (West Supp. 1996); IND. CODE ANN. § 34-51-3-6 (West Supp. 1998); IOWA CODE ANN. § 668A.1(2)(b) (West 1987); KAN. STAT. ANN. § 60-3402(e) (1994); MO. REV. STAT. § 537.675 (Supp. 1997); OR. REV. STAT. § 18.540 (1995); UTAH CODE ANN. § 78-18-1(3) (Michie 1996).

22. *See* Gordon v. State, 608 So. 2d 800 (Fla. 1992) (no vested property right in award of punitive damages); State v. Mosely, 436 S.E.2d 632 (Ga. 1993) (no vested property right in award of punitive damages); Shepherd Components, Inc. v. Brice Petrides-Donohue & Assoc., Inc., 473 N.W.2d 612 (Iowa 1991) (no right to award of punitive damages). *But see* Kirk v. Denver Publ'g Co., 818 P.2d 262 (Colo. 1991) (plaintiff's right to punitive damage award is vested; allocation statute amounts to a taking of that right).

23. McBride v. General Motors Corp., 737 F. Supp. 1563 (M.D. Ga. 1990) (allocation statute transforms punitive damage award into civil fine extracted by state in violation of the Eighth Amendment); Matthew J. Klaben, Note, *Split-Recovery Statutes: The Interplay of the Takings and Excessive Fines Clauses*, 80 CORNELL L. REV. 104, 125 (1994).

24. Klaben, *supra* note 23, at 140. The U.S. Supreme Court rejected an Eighth Amendment excessive fines argument in a case involving civil parties where no portion of the award went to the state in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989). *See infra* notes 102-07 and accompanying text.

25. *See infra* notes 38-61 and accompanying text.

26. *See infra* notes 62-108 and accompanying text.

caps on attorney's contingency fees to the allocation statutes that direct a portion of the punitive damages award to the state.[27] Analyzing other allocation schemes and the challenges to them provides insight into Indiana's newly adopted and as yet unchallenged statute.

Part IV provides an analysis of Indiana's statute, detailing the history of its enactment and critiquing its language.[28] Part V identifies several potential problems with the statute based on the experiences of other states that have adopted allocation statutes.[29] This Note examines the potential problems with the Indiana statute in light of the challenges made to allocation statutes in other states and analyzes Indiana's statute as a violation of the Indiana Bill of Rights.[30] Indiana's statute may be challenged as a taking of a vested property right in the judgment, as has been argued in other states.[31] Then this Note examines the impairment of contracts argument which has also been made.[32] In addition, attorneys have made equitable arguments for fees on the amount of the award allocated to the state.[33] This Note concludes that these three arguments will fail in Indiana as they have in other states. However, one argument that has not been attempted in other states is based on a theory analogous to a section of the Indiana Bill of Rights that prohibits the state from demanding a person's particular services without just compensation.[34] This Note argues that failing to compensate the attorney for arguing the case for punitive damages becomes a demand on the attorney's services which must be compensated.[35]

Part VI proposes amendments to the Indiana allocation statute to remedy these concerns.[36] This Note argues that compensating plaintiffs' attorneys for winning punitive damage awards that are allocated to the state retains the punishment and deterrent functions of punitive damages and priorities of the tort reform movement, encourages plaintiffs to bring suit to punish reprehensible conduct, and avoids potential ethical conflicts between attorneys and clients.[37]

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27. *See infra* notes 109-73 and accompanying text.
28. *See infra* notes 196-233 and accompanying text.
29. *See infra* notes 234-48 and accompanying text.
30. *See infra* notes 241-303 and accompanying text.
31. *See infra* notes 241-45 and accompanying text.
32. *See infra* notes 246-58 and accompanying text.
33. *See infra* notes 252-58 and accompanying text.
34. *See infra* notes 259-81 and accompanying text.
35. *See infra* notes 282-303 and accompanying text.
36. *See infra* notes 319-35 and accompanying text.
37. *See infra* notes 304-10 and accompanying text.

II. AN OVERVIEW OF PUNITIVE DAMAGES

A. The Functions of a Punitive Damage Award

When a defendant's tortious conduct is especially egregious or outrageous, tort law allows for the assessment of a civil fine known as punitive or exemplary damages.[38] By definition, punitive damages are meant to punish the perpetrator of a tort and deter similar egregious conduct from occurring in the future.[39] Unlike compensatory damages, punitive damages are not meant to compensate the victim of a tort.[40] Unlike ordinary civil or criminal fines paid

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38. RESTATEMENT (SECOND) OF TORTS § 908(1) (1979); 1 LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES § 2.1 (1995). Punitive damages have also been referred to as "smart money," "plenary," "aggravated," and "imaginary" damages. Owen, *supra* note 2, at 364 n.1. In theory, punitive damage awards find justification in moral principles. David G. Owen, *The Moral Foundations of Punitive Damages*, 40 ALA. L. REV. 705 (1989). Professor Owen argues that punitive damages should be examined using a "theft" metaphor. *Id.* at 709-10. Because each individual is surrounded by a "bubble of rights space," the tortfeasor who invades this bubble has "stolen" the tort victim's autonomy. *Id.* at 711. This theft is uncompensated by regular compensatory damages, but is compensable through a punitive damage award. Thus, punitive damages which compensate a victim for the loss of autonomy are steeped in the moral foundation of freedom. *Id.* Additionally, punitive damages are justified by the moral foundation of utility. *Id.* at 713. Because punitive damages perform a utilitarian function and provide a net benefit to society—the deterrence of future egregious conduct—punitive damages are morally sound. *Id.* Furthermore, Professor Owen believes that punitive damages serve to reinforce egalitarian notions of balancing power between individuals and help to deter abuses of power and trust. *Id.* at 716.

39. Owen, *supra* note 2, at 377. For a contrary view, see E. Donald Elliott, *Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 ALA. L. REV. 1053 (1989). Elliott argues that, because punitive damages may not be predicted, they have very little deterrent effect on corporate behavior. *Id.* at 1059. Rather, corporations plan accordingly based on "information about the liability of consequences of specific predictability." *Id.* at 1058. Professor Dobbs finds three deterrent capabilities in punitive damage awards: removing the profitability of tortious behavior which is profitable even beyond the compensatory award; serving as an alternative to issuing injunctive orders to cease reprehensible conduct; and serving as an example for others. DOBBS, *supra* note 2, § 3.11(3). In the case of dignitary torts, which are torts that do not require a physical "impact" for the plaintiff to recover damages for emotional distress, the line between compensation for the plaintiff and punishment for the defendant is less clear. *See* DOBBS, *supra* note 2, § 3.3(6).

40. In Michigan, punitive damages are not available unless authorized by statute or as an element of the compensatory damages award. Eide v. Kelsey-Hayes Co., 427 N.W.2d 488 (Mich. 1988). The *Eide* court detailed the curious lineage of the Michigan treatment of punitive damages as an element of the compensatory award, tracing it to Michigan Supreme Court Justice Cooley, who, in a 1884 case, wrote that it was altogether proper that the jury consider the aggravated harm suffered by the plaintiff when estimating compensation. *Eide*, 427 N.W.2d at 498 (citing Stilson v. Gibbs, 18 N.W. 815 (Mich. 1884)). The *Eide* court noted that the precedent remained good law in Michigan, ruling that punitive, or exemplary, damages could not be awarded unless specifically authorized by statute or as an element of the compensatory award. *Eide*, 427 N.W.2d at 501. Similarly, a Connecticut decision is frequently cited as support for the idea that punitive damages have some compensatory functions. Collens v. New Canaan Water Co., 234 A.2d 825 (Conn. 1967). The *Collens* court noted that, while punitive damages are not "nominally compensatory,"

by the defendant to the state,[41] punitive damages are traditionally awarded to the plaintiff along with compensatory damages.[42] Critics characterize an unusually high punitive damage award as an unjustified "windfall" for the plaintiff.[43]

Punitive damages, because they are quasi-criminal penalties inflicted upon a defendant in a civil trial, will always be disputed and their availability questioned.[44] In some states, punitive damages are not allowed.[45] Of the states that allow for the awarding of punitive damages, some require that such punitive damages be prayed for in the complaint.[46] As a result, a request for

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they have the "fact and effect" of being compensation for the plaintiff. *Collens*, 234 A.2d at 831. The court then went on to limit such punitive damages to the costs of litigation. *Id.* at 831-32. See SCHLEUTER & REDDEN, *supra* note 38, § 2.2(B), for a discussion of how punitive damages may help a plaintiff pay litigation costs. This function of punitive damages can be considered compensation for the "private attorney general" function of seeking punitive damages.

Changes made to the False Claims Act, 31 U.S.C. § 3730 (1988), in 1986 made "whistleblowing" a rewarding endeavor. Elletta Sangrey Callahan & Terry Morehead Dworkin, *Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act*, 37 VILL. L. REV. 273 (1992). The False Claims Act was originally a response by the federal government to the multitude of padded invoices during the Civil War. *Id.* at 302. Citizens were encouraged to bring actions on behalf of the government, exposing fraudulent claims made by contractors. *Id.* As a reward for such "whistleblowing," the citizens were allowed to keep a portion of the recovered funds. *Id.*

41. In Indiana, penalties or fines may be imposed for a wide variety of civil or criminal misdemeanors or felonies, ranging from speeding tickets to fines for felonious assault. *See, e.g.*, IND. CODE ANN. § 13-30-4-1 (West Supp. 1996) (violations of environmental management laws); IND. CODE ANN. § 6-7-3-11 (West Supp. 1996) (failure to pay controlled substance excise tax); IND. CODE ANN. § 35-50-2-4 (West Supp. 1996) (fines as alternative penalties for the commission of a class A felony).

42. DOBBS, *supra* note 2, § 3.1 (1993). Although a plaintiff seeks to be made whole, or recover all that has been taken as a result of the tort, the underlying reality is that the plaintiff will never be put in the same position as before the tort. *Id.* at 281 n.17. The plaintiff will have some costs associated with recovering what has been lost or taken. Because each side is responsible for paying their own attorney's fees and court costs, the plaintiff would have to recover an amount over and above simple compensatory damages. *Id.* at 282.

43. *See Economic Analysis, supra* note 8, at 1903. Much has been made about the plaintiff's windfall in a case involving punitive damages. Critics refer to a case involving punitive damages as the chance of a lifetime for plaintiffs. *See* Richard D. Walton, *Rhetoric Heats up as Senate Considers Tort Reform Bill*, INDIANAPOLIS STAR, Mar. 21, 1995, at C3 (quoting Indianapolis attorney Ronald Gifford as saying punitive damages "have become the judicial equivalent of playing the Hoosier Lottery").

44. *See* Shores, *supra* note 7, at 70-90 (discussing the rhetoric of the critics of punitive damages and efforts to reform the tort liability system).

45. N.H. REV. STAT. ANN. § 507:16 (Michie 1997). Louisiana civil law does not allow punitive damages. LA. CIV. CODE ANN. ART. § 2315 (West 1979 & Supp. 1997). Massachusetts, Alabama, and Washington interpret statutory law only to allow for compensatory damages, with some exceptions. Owen, *supra* note 2, at 369-70 n.30.

46. *See* SCHLUETER & REDDEN, *supra* note 38, § 4.2(A)(3).

punitive damages can often be a tool used by plaintiffs to reach a quick settlement with defendants.[47] However, substantive and procedural limitations do exist.[48] The conduct for which punitive damages may be awarded usually must be "egregious" and must be demonstrated by "clear and convincing" proof.[49] Many states require actual damages before punitive damages will be awarded.[50] Still, the fact that punitive damages are available in civil actions as an added source of potential liability for defendants makes punitive damage awards an obvious target for tort reformers.[51] Indeed, while compensatory awards are difficult to cap,[52] caps on punitive damage awards, which are arbitrarily fixed, are a means to decrease a defendant's total financial tort liability.[53]

Defendants frequently challenge punitive damage awards on constitutional grounds.[54] Most frequently, high punitive damage awards are appealed as violations of the Due Process Clause of the Fourteenth Amendment[55] or state

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47. James A. Breslo, Comment, *Taking the Punitive Damage Windfall away from the Plaintiff: An Analysis*, 86 NW. U. L. REV. 1130, 1158 (1992).

48. *See* McKown, *supra* note 17, at 446-61 (discussing state reform efforts, including the bifurcation of trials, and articulating standards of proof necessary for awards of punitive damages).

49. DOBBS, *supra* note 2, § 3.11(4). For a discussion of the "elevated" burden of proof required and examples of jury instructions for several states, see SCHLUETER & REDDEN, *supra* note 38, § 5.3(H). Indiana requires the same "clear and convincing" evidentiary standard of proof. Erie Ins. Co. v. Hickman, 622 N.E.2d 515, 520 (Ind. 1993).

50. Indiana requires at least a nominal compensatory award before punitive damages may be awarded. Arlington State Bank v. Colvin, 545 N.E.2d 572 (Ind. Ct. App. 1989) (adopting the Seventh Circuit reasoning that at least one dollar in compensatory damages must be awarded before a plaintiff may recover punitive damages). *See also* DOBBS, *supra* note 2, § 3.11(10).

51. *See* Elliott, *supra* note 39, at 1058.

52. In 1975, Indiana enacted a cap on damages in medical malpractice actions. IND. CODE ANN. § 34-18-14-3 (West Supp. 1998). The amount of damages recoverable are now capped at $750,000 per occurrence. *Id.* For an analysis of the effects of the cap in relation to other midwest states without medical malpractice caps on damages, see Eleanor D. Kinney et al., *Indiana's Medical Malpractice Act: Results of a Three-Year Study*, 24 IND. L. REV. 1275, 1295-99 (1991). The Indiana Supreme Court upheld the act against an array of constitutional challenges in *Johnson v. St. Vincent Hosp., Inc.*, 404 N.E.2d 585 (Ind. 1980).

53. *See* DOBBS, *supra* note 2, § 3.11(15) (summarizing the arguments made on both sides of the debate over reforming punitive damage awards).

54. *See generally* DOBBS, *supra* note 2, § 3.11(12); SCHLUETER & REDDEN, *supra* note 38, § 3.0; Bruce J. Ennis, *Punitive Damages and the U.S. Constitution*, 25 TORT & INS. L.J. 587 (1990) (arguing that the U.S. Supreme Court would be unlikely to issue a ruling which would substantially change punitive damages litigation based on the Excessive Fines, the Due Process, or the Contract Clauses).

55. SCHLUETER & REDDEN, *supra* note 38, §§ 3.3, 3.4. *See, e.g.*, TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993) (holding that the Due Process Clause puts a substantive limit on how much a jury can award in punitive damages).

constitutional equivalents.[56] Most juries are given guidelines for the awarding of punitive damages, and these damages are often considered in bifurcated proceedings.[57] Unbridled discretion given to juries to award punitive damages violates due process when the damages are "grossly excessive."[58] On appeal, punitive damage awards are scrutinized for "reasonableness."[59] State courts must first reviewed damage awards in accordance with state common law or statutory standards.[60] Occasionally, a punitive damage award leveled by a state jury and reviewed through the state appellate process is nonetheless challenged as grossly excessive in violation of the U.S. Constitution.[61]

B. Recent Supreme Court Developments

In several high profile cases in the last ten years, the U.S. Supreme Court has affirmed three basic principles concerning punitive damage awards. First, punitive damages are not meant to compensate plaintiffs.[62] Second, the traditional common law method of allowing juries to award punitive damages is not a per se unconstitutional violation of procedural due process, although individual awards may violate due process if "grossly excessive."[63] And, third, when awards are made to private plaintiffs in civil lawsuits, they may not be challenged as violations of the Excessive Fines Clause of the Eighth Amendment.[64] Along the way, the Court has expressed concern about the increasing frequency and size of punitive damage awards, but, in general, the awards have been upheld.[65]

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56. *See* Lazarus Dept. Store v. Sutherlin, 544 N.E.2d 513 (Ind. Ct. App. 1989) (award of punitive damages challenged as violation of Due Process Clause of the U.S. Constitution and violation of Article 1, Section 16 of the Indiana Constitution which prohibits excessive fines).

57. *See* SCHLUETER & REDDEN, *supra* note 38, § 4.2(B) (discussing the defendant's motion to bifurcate).

58. BMW of North America, Inc. v. Gore, 116 S. Ct. 1589, 1592, 1609 (1996).

59. In *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996), the U.S. Supreme Court discussed three factors in considering the reasonableness of a punitive damage award: the degree of reprehensibility of the defendant's conduct; the ratio of punitive damages to actual compensatory damages; and equivalent sanctions for comparable misconduct.

60. In Indiana, awards of punitive damages will only be sustained in cases where there is "clear and convincing" proof of conduct requiring punishment and deterrence. Bud Wolf Chevrolet, Inc. v. Robertson, 519 N.E.2d 135, 137 (Ind. 1988). Appellate review of an award of punitive damages will uphold an award if reasonable. *Id.*

61. SCHLUETER & REDDEN, *supra* note 38, § 3.4.

62. O'Gilvie v. United States, 117 S. Ct. 452, 457 (1996).

63. *BMW*, 116 S. Ct. at 1595.

64. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 260, 263-64 (1989).

65. Until 1996, the Supreme Court refused to strike a state jury award of punitive damages as a violation of due process. *See* BMW of North America, Inc. v. Gore, 116 S. Ct. 1589 (1996) (overturning a punitive damage award of $2 million, stating that the award was grossly excessive in violation of the Due Process Clause).

In the recent case, *O'Gilvie v. United States*,[66] the Court stated decisively that punitive damages are not meant to compensate plaintiffs.[67] At issue was a damage award in a tort action that the plaintiff reported as income on a joint tax return.[68] Later, the plaintiff sought to have the amount refunded pursuant to the tax code exemption for damages awarded as a result of personal injuries or sickness.[69] The Court held that, for tax purposes, punitive damages are not received on account of personal injuries.[70] To demonstrate congressional intent to hold punitive damages taxable, the Court relied on amendments to the tax code enacted in 1989 that specifically included punitive damages as taxable income.[71] However, the decision merely restated the commonly held notion that punitive damages are not meant to compensate plaintiffs.[72]

While the non-compensatory nature of punitive damages may no longer be an issue, defendants have challenged the manner in which punitive damages are awarded as a violation of due process in *Pacific Mutual Insurance Co. v. Haslip*.[73] The *Haslip* defendant, an insurance company whose agent had breached a fiduciary duty by not applying premium payments to insured customers' accounts,[74] challenged an award of $840,000 in punitive

66. 117 S. Ct. 452 (1996).

67. *See supra* note 40 and accompanying text for a discussion of the compensation debate concerning punitive damages.

68. *O'Gilvie*, 117 S. Ct. at 452. In the underlying action, the survivors of a woman who died from toxic shock syndrome recovered $1,525,000 in actual damages and $10 million in punitive damages. *Id.*

69. At the time of the award, punitive damages were not expressly taxable, nor excluded from taxation, as "any damages received (whether by suit or agreement and whether as lump sums or periodic payments) on account of personal injuries or sickness." 26 U.S.C. § 104 (a) (2) (1988).

70. *O'Gilvie*, 117 S. Ct. at 457.

71. *Id.*

72. Writing for the Court, Justice Breyer said that "[punitive] damages are not a substitute for any normally untaxed personal (or financial) quality, good, or 'asset.' They do not compensate for any kind of loss." *Id.* at 456.

73. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991). The *Haslip* case gave the Supreme Court the opportunity to review an individual punitive damage award as a violation of due process. Two years earlier, in *Browning-Ferris Ind. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), the Court reviewed a punitive damage award for a potential violation of the Eighth Amendment Excessive Fines Clause. *Id.* at 263-64. The Court did not address a challenge under the Due Process Clause of the Fourteenth Amendment because the issue had not been raised in the lower courts. *Id.* at 276. Each of the justices who wrote opinions in the *Browning-Ferris* case (Blackmun, Brennan, and O'Connor) expressed concerns about the due process implications of a large punitive damage award. Brennan concurred "on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties." *Id.* at 280.

74. *Haslip*, 499 U.S. at 5-6. A minor issue in the case was whether the insurance company, as a corporation, could be held liable for punitive damages for the acts of its agent. *Id.* at 13-14. Applying traditional principles of agency law, the Court answered in the affirmative. *Id.* at 14. The Court also rejected a related argument that imposing exemplary damages on a corporation for the

damages.[75] The Court upheld the award of punitive damages, saying that a balance was achieved between the defendant's interest in rational decision making and the State of Alabama's interest in deterrence and retribution which was individually tailored.[76] In upholding the award, the Court noted the procedural safeguards, such as the post-trial review authority given to the judge,[77] and the appellate review available.[78] The *Haslip* decision constituted a plaintiff's victory because the Court rejected the argument that punitive damage awards are per se unconstitutional.[79] The real issue in *Haslip* was the specific manner in which the jury was instructed to award punitive damages. The majority and dissenting opinions differed over how much discretion juries may be granted before due process is denied.[80] But, the majority held out the possibility that an award could be excessive in violation of the Due Process

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acts of its agent violated due process. *Id.* at 14-15.

75. *Id.* at 5-6. The city clerk paid insurance premiums on behalf of the plaintiff, Ms. Haslip, payments which were never credited to Ms. Haslip's insurance policy. *Id.* at 5. When the policy went unpaid, the agent who misappropriated the premiums failed to forward the overdue notices to Ms. Haslip. *Id.* Ms. Haslip became ill and needed hospital treatment. *Id.* The hospital requested payment and sought to collect from Ms. Haslip, which adversely affected her credit. *Id.* Her out-of-pocket expenses were $4000; total compensatory damages were $200,000. *Id.* at 6 & n.2.

76. *Id.* at 19-20. These interests, according to the Court, were reflected in the instructions given to the jury. *Id.* at 20.

77. *Id.* The post-trial review comes in the forms of remittitur and addititur. *See* SCHLUETER & REDDEN, *supra* note 38, § 6.2. Remittitur literally calls for the plaintiff to "remit" a portion of the damages back to the defendant, depending upon the amount the court deems excessive. *Id.* Otherwise, the court will order a new trial on the issue of damages, with instructions as to the limitations. *Id. See* ALA. CODE § 12-22-71 (1995) (on appeal of a damage award as excessive, court has power of remittitur). Addititur is the power of the court to add to the judgment, or call for a new trial in the alternative. SCHLUETER & REDDEN, *supra* note 36, § 6.2. This power is not available in federal cases. 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2816 (2d ed. 1995).

78. *Haslip*, 499 U.S. at 20-21. Justices Scalia and Kennedy, writing individual concurring opinions, both referred to the long-standing tradition of punitive damages. *See id.* at 24-42. Justice Scalia wrote that "a process that accords with such a tradition and does not violate the Bill of Rights necessarily constitutes 'due' process." *Id.* at 25. Justice Kennedy concurred that "[j]ury determination of punitive damages has such long and principled recognition as a central part of our system that no further evidence of its essential fairness or rationality ought to be deemed necessary." *Id.* at 40.

79. *Id.* at 17. The common law method for assessing punitive damages does not itself constitute a per se violation of due process. *Id.* In fact, even Justice O'Connor would not go as far as announcing that awarding punitive damages is per se unconstitutional, although she suggested that the Court "permit the States to experiment with different methods and to adjust these methods over time." *Id.* at 64.

80. Justice O'Connor ridiculed "amorphous" jury instructions which merely "restate the overarching principles of punitive damages awards—to punish and deter—without adding meaning to these terms." *Id.* at 48.

Clause of the Fourteenth Amendment.[81] However, the Court agreed upon no such standard for excessiveness.

In *TXO Production Corp. v. Alliance Resources Corp.*, a defendant in a slander of title case raised due process challenges to a punitive damage award, arguing that the award was excessive and produced by an unfair procedure.[82] The Supreme Court in *TXO* addressed whether the punitive damage award that the defendant claimed was not based on objective criteria could withstand a challenge that it violated due process.[83] The defendant contended that the punitive damage award should be reviewed pursuant to the rational basis standard applied in reviewing legislation, while the plaintiff argued that the punitive damage award should be scrutinized more strictly than legislative penalties.[84] The majority rejected both arguments and suggested that a punitive damage award made in the course of fair procedure with judicial review was entitled to a presumption of validity.[85] The Court, consistent with *Haslip*, refused to set down a "bright line test" to determine the point at which a punitive damage award became constitutionally unacceptable.[86] Again, the

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81. *Id.* at 18-19. In speaking about the "extreme results that might jar one's constitutional sensibilities," the Court apparently rejected ratios by stating that it cannot "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." *Id.* at 18. The *Haslip* decision upheld a punitive to compensatory damages ratio of 210 to 1 ($4000 out of pocket loss compared with $840,000 punitive damages) or 4 to 1 ($200,000 compensatory damages compared with $840,000 punitive damages). *See id.* at 23. Or, as the majority approached the issue, it addressed whether the result could be squared with the process and the factors of the case. *See id.* at 18. *Haslip* does not announce factors for excessiveness. *Haslip* only states that excessive judgments may exist. *See id.* at 18-19.

82. 509 U.S. 443 (1993). Both issues were raised by the defendant, who had been found liable for common law slander of title in a West Virginia state court. *Id.* at 446-47.

83. *Id.* at 453-55. TXO and Alliance had an agreement for TXO to obtain oil and gas development rights. *Id.* at 447. Although it knew that Alliance had good title to the land, TXO brought a quiet title action in order to renegotiate the royalty arrangement. *Id.* at 448-49. The West Virginia Supreme Court reviewed the award and affirmed it because the court found that a reasonable relationship existed between the award amount and (1) the potential harm to Alliance; (2) the malice on the part of TXO; and (3) the penalty necessary to discourage TXO from acting in a similar way in the future. *Id.* at 452-53.

84. *Id.* at 455. The plaintiff argued that a heightened scrutiny should be applied and that objective criteria should be utilized to determine whether the notion of "fundamental fairness" had been violated. *Id.*

85. *Id.* at 456-57.

86. *Id.* at 458. The damage award in this case, $10 million, equaled 526 times the compensatory damages suffered by Alliance. The compensatory award resulted from the costs of defending the quiet title action brought in bad faith by TXO. *Id.* at 451. The Court ignored the numbers, however, noting:

> The punitive damages award in this case is certainly large, but in light of the amount of money potentially at stake, the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and petitioner's wealth, we are not persuaded that the award was so "grossly excessive" as

Court resisted analyzing the amount of the punitive damage award, or the ratio of punitive damages to compensatory damages as a specific yardstick to measure a violation of due process.[87] In fact, after *TXO*, there still existed no standards for courts to deal with an individual award or the manner by which that award was determined.

BMW of North America, Inc. v. Gore[88] finally allowed the Court to determine the standard by which to judge the process of awarding punitive damages.[89] *BMW* concerned an award of punitive damages against an automobile manufacturer which had not disclosed to a purchaser that his car had been repainted.[90] In arguing for punitive damages, the plaintiff's attorney urged the jury to award damages according to the total number of cars that had been sold in the United States under BMW's alleged policy of non-disclosure.[91] According to the Court, the award was "grossly excessive," thus violating substantive due process.[92] The case marked the first instance of the Court overturning a punitive damage award based on the Fourteenth Amendment.[93]

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to be beyond the power of the State to allow.

Id. at 462.

87. The ratio of punitive damages to compensatory damages in *TXO* (526 to 1) dwarfed the amount in *Haslip* (200 to 1), causing Justice Scalia to remark: "The plurality's decision is valuable, then, in that the great majority of due process challenges to punitive damages awards can henceforth be disposed of simply with the observation that 'this is no worse than TXO.'" *Id.* at 472. Justice Scalia's point is that, in reviewing punitive damage awards, procedural due process, and not substantive due process, should concern the Court. Substantive due process, as applied to punitive damages, implies that there is some amount at which a punitive damage award becomes unconstitutional; procedural due process is concerned with the method of awarding the damages. Because traditional judicial review of the damages exists, at the trial level and on appeal, due process (procedural) is satisfied. Thus, the evident frustration in Scalia's comment is that he sees the Court continuing to search for the elusive "bright line" test rejected in *Haslip*. *Id.* at 470-72.

88. 116 S. Ct. 1589 (1996).

89. The Court granted certiorari to "illuminate" the standard with which to review punitive damages awards. *Id.* at 1595.

90. A former BMW dealer testified that repainting the car devalued it 10%; on a purchase price of $40,000, that amounted to $4000 in compensatory damages. *Id.* at 1593. The purchaser brought the action under an Alabama fraud statute, claiming that failure to disclose that the car had been repainted amounted to a suppression of material fact. *Id.*

91. A total of 983 cars were sold this way, a total number that led to the original $4 million punitive damage award. *Id.* The trial judge denied the defendant's motion to set aside the verdict and the award. *Id.* at 1594. The Alabama Supreme Court, applying factors enunciated in *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989), reduced the amount to $2 million. BMW of North America, Inc. v. Gore, 646 So. 2d 619 (Ala. 1994). *Gore*, 116 S. Ct. at 1594-95.

92. *Id.* at 1598. Although a state may further "legitimate interests in punishing unlawful conduct and deterring its repetition," an award which is "grossly excessive" in comparison to those interests begins to "enter the zone of arbitrariness" which violates due process. *Id.* at 1595.

93. Justice Scalia, writing in dissent, noted that no precedent existed for federalizing this particular aspect of tort law. *Gore*, 116 S. Ct. at 1610-11. Also dissenting, Justice Ginsburg referred to reforms already underway in many states, characterizing the decision as an unwise

Furthermore, the case established three factors to be used in analyzing an award of punitive damages.[94] First, the defendant's degree of reprehensibility should be examined.[95] In *BMW*, the Court found no particularly aggravating factors usually associated with punitive damages;[96] the harm inflicted by BMW on the automobile purchaser was strictly economic.[97] Second, punitive damages should bear a "reasonable relationship" to compensatory damages.[98] A punitive damage award of $4 million, compared to actual damages of $4000, qualified as "breathtaking" in the Court's opinion.[99] Finally, the punitive damage award must be compared with civil or criminal sanctions for comparable misconduct.[100] In this case, the maximum fine the Court mentioned for similar conduct was a $10,000 penalty for deceptive trade practices in Arkansas.[101]

In fact, Supreme Court opinions have likened punitive damages more to fines or penalties imposed on defendants, than to extra compensation for plaintiffs.[102] Along with challenging punitive damage awards as a violation of due process, a defendant in an antitrust action challenged a punitive damage award as an excessive fine in violation of the Eighth Amendment in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*[103] The defendants argued that an award of punitive damages should be subject to the Excessive Fines Clause of the Eighth Amendment because the Clause has its roots in limiting *amercements*[104] payable to the crown.[105] The Court rejected this

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venture "into territory traditionally within the States' domain." *Id.* at 1614.

94. *Id.* at 1598-99.

95. *Id.* at 1599.

96. *Id.* at 1599, 1601. The Court determined that BMW's conduct was "not sufficiently reprehensible to warrant imposition of a $2 million exemplary damages award." *Id.* at 1601.

97. *Id.* at 1599.

98. *Id.* at 1602. The Court's reasoning is troublesome, especially when it relies on the *TXO* decision for support of this proposition. *Id.* at 1602 n.34. Damages which Alliance would have suffered in *TXO* were speculative. TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. at 451. Actual damages were the $19,000 expended on legal fees defending the quiet title action. *Id.* Of course, at issue in *TXO* was the method of awarding damages, and one of the factors used by the West Virginia court was potential harm. *Id.* at 453.

99. *BMW*, 116 S. Ct. at 1603.

100. *Id.*

101. *Id.* at 1603 n.40. The maximum penalty in Alabama for deceptive trade practices was $2000. *Id.* at 1603.

102. *See, e.g.*, TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 454 (1993) (citing cases imposing limits on "penalties"); Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 259 (1989) (holding that punitive damages are not subject to the Excessive Fines Clause of the Eighth Amendment).

103. 492 U.S. 257 (1989).

104. "A pecuniary penalty imposed by a judicial tribunal." 1 BOUVIER'S LAW DICTIONARY 187 (8th ed. 1914). "A money penalty in the nature of a fine imposed upon an officer for some misconduct or neglect of duty." BLACK'S LAW DICTIONARY 75 (5th ed. 1979). Amercements are

argument, noting the long history of the Excessive Fines Clause as suggesting that its limits are confined to criminal prosecutions, or cases in which the state has some active prosecutorial role.[106] However, the Court held out the possibility that the Excessive Fines Clause could apply to a situation in which the state assessed the punitive damage award or took a share of the proceeds.[107] Although the Court demonstrated in 1996 that an individual award can be grossly excessive, tort reformers could not count on the Court to place substantive restrictions on juries.[108] And so, tort reform moved to the battlefield of the legislature.

III. REFORMING PUNITIVE DAMAGES

A. Reform Efforts at the National Level

Although punitive damages in state tort actions are imposed pursuant to state statutory or common law, recent tort reform proposals at the national level have considered pre-empting state tort law.[109] Major efforts to reform the way punitive damages are awarded began after then-Vice President Dan Quayle's Council on Competitiveness issued a fifty-point proposal on tort reform.[110] Among the proposals was a cap on punitive damages.[111] Aligning against reform efforts were the American Trial Lawyers' Association and consumer groups, like Public Citizen, who charged the White House with pandering to

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traced from the Magna Carta to the ratification of the Excessive Fines Clause in Andrew M. Kenefick, Note, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 85 MICH. L. REV. 1699, 1714-19 (1987).

105. 492 U.S. at 268-69. *See also* Kenefick, *supra* note 104, at 1701 (challenging the conventional wisdom that the Eighth Amendment applies only in criminal cases on the basis that punitive damages blur the criminal/civil distinction).

106. 492 U.S. at 263-64.

107. *Id.*

108. *See* Rustad, *supra* note 6, at 724-28 (reviewing the history concerning various tort reform movements).

109. *Id.* at 674.

110. PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA (Aug. 1991). The Council suggested increasing the frequency of alternative dispute resolution, reforming discovery practices and the use of expert witnesses, and implementing a modified "English Rule" for awarding attorney's fees. *Id.* Quayle presented the highlights from the proposal to the 1991 annual meeting of the American Bar Association. *See* Dan Quayle, *Civil Justice Reform*, 41 AM. U. L. REV. 559 (1992).

111. The Agenda proposed increasing the standard of proof to require intent; a bifurcated proceeding in which, after the jury determined that punitive damages were necessary, punitive damages would be determined by the court; a clear and convincing evidentiary standard to support the award; and limiting the punitive award to amounts equal to compensatory damages. Quayle, *supra* note 110, at 565.

business interests in the formulation of the proposal.[112] The ABA soon called for cooperation with the Administration's efforts.[113] Despite the efforts of the Vice President and others, attempts to reform the tort system at the national level have been unsuccessful.[114]

In May 1996, President Clinton vetoed a bill that would have capped punitive damages at the greater of two times the economic loss to the plaintiff or $250,000.[115] The bill also called for a "clear and convincing" standard of proof that the defendant's conduct was carried out "with a conscious, flagrant indifference to the rights or safety of others."[116] Exceptions were carved out for cases of "egregious" conduct and allowed courts to determine that the defendant's conduct required an award above the statutory cap.[117] Finally, the bill would have allowed states to enact tougher tort reform.[118] The National Conference of Commissioners on Uniform State Law recently drafted a "Model Punitive Damages Act" which contains no cap on the amount of punitive damages, but instead instructs the jury to award punitive damages based on a number of factors, including the nature of the defendant's conduct, how the conduct affected others, whether the defendant profited from the behavior, the amount of compensatory damages awarded, and the defendant's wealth.[119]

B. State Tort Reform

1. Placing Caps on Attorney's Fees

While most plaintiffs see the inside of the courtroom only once, the attorneys who bring the lawsuits return again and again. Not surprisingly, several tort reform proposals in recent years have included provisions aimed at

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112. *See* Andrew Blum, *Quayle's Proposals Still Making Waves*, NAT'L L.J., Sept. 16, 1991, at 3.

113. *See* Andrew Blum, *Upset Staffers: ABA Takes Softer Stand on Quayle*, NAT'L L.J., Oct. 14, 1991, at 3.

114. *See* Rustad, *supra* note 6. After the 1996 elections, tort reform once again headed the list of congressional priorities. Torry, *supra* note 19, at F7.

115. H.R. 956, 104th Cong. (1996). *See also* Marshall S. Turner & Andrew T. Houghton, *Punitive Damages Reform Moves to the State Arena*, NAT'L L.J., July 29, 1996, at B7. President Clinton specifically cited his opposition to "arbitrary ceilings on punitive damages, because they endanger the safety of the public. Capping punitive damages undermines their very purpose, which is to punish and thereby deter egregious misconduct." *Message of the President of the United States* (May 6, 1996), *in* COLLECTED PAPERS OF WILLIAM JEFFERSON CLINTON.

116. H.R. 956, 104th Cong. § 108(a) (1996).

117. H.R. 956, 104th Cong. § 108(b)(3) (1996).

118. H.R. 956, 104th Cong. § 108(b)(3)(D) (1996).

119. MODEL PUNITIVE DAMAGES ACT (Tentative Draft 1996). *See* Marcia Coyle, *Model Act Would Tighten Punies*, NAT'L L.J., Aug. 5, 1996, at A12.

curbing attorney's desires to bring suit by limiting contingent fee contracts.[120] An attorney working for a "contingent" fee is compensated by a portion of the successful recovery.[121] On the other hand, for an attorney working "hourly" or "on retainer," a certain amount of money has been deposited as a "down payment" to secure services without regard to the outcome of a lawsuit, and the client is billed for each hour of service with the billed amount paid from the retainer.[122] A contingent fee contract, stipulating that a percentage of the total recovery will be paid as compensation for services, motivates the attorney to push for higher damages. The higher the damage award, the higher the fee. Contingency contracts are defended on the grounds that they make litigation affordable for those who might be unable to post a large retainer up front.

Contingent fee contracts are not allowed in actions where they are found void as against public policy.[123] Although the only limit on the percentage of the judgment that an attorney may charge is the "reasonableness" standard mentioned by most state professional responsibility codes, most states agree that fifty percent of the total judgment would be excessive or unreasonable.[124] In some actions, the percentage an attorney can charge is limited by statute.[125]

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120. *See* Richard M. Birnholz, Note, *The Validity and Propriety of Contingent Fee Controls*, 37 UCLA L. REV. 949 (1990) (discussing the constitutionality of reform efforts in California and other states, arguing that attempts to limit contingency fee contracts may be unconstitutional for various reasons, including substantive due process and equal protection concerns, as well as access to courts and attorneys' free speech rights).

121. 1 STUART M. SPEISER, ATTORNEY FEES § 2:1 (1973 & 1994 Supp.).

122. *Id.* § 1:4.

123. *Id.* §§ 2:4-2:8 (listing domestic relations, actions to secure legislation, contracts to prosecute or defend in criminal actions, and representing a trustee in a bankruptcy matter as traditionally held void as against public policy). Most state Rules of Professional Conduct also specifically prohibit contingency contracts in these areas. *See, e.g.*, IND. R. PROF. CONDUCT § 1.5(d).

124. SPEISER, *supra* note 121, § 2:10.

125. Attorneys fees are specifically limited by statute in many federal causes of action. *See* Annotation, *Effect of Contingent Fee Contract on Fee Award Authorized by Federal Statute*, 76 ALR Fed. 347 (1986 & Supp. 1996). Many states limit the percentage an attorney may recover from state-administered funds, such as medical malpractice funds. *See, e.g.*, IND. CODE ANN. § 34-18-18-1 (West Supp. 1998) (attorneys limited to 15% of any recovery from the patients' compensation fund).

Generally, each party to the litigation must pay for his own attorney, and clients may shop around for the best bargain.[126] When the court awards attorney's fees to the victorious party, the amount awarded is the "lodestar," an amount equal to a reasonable rate times a reasonable number of hours.[127] When an attorney is working on contingency, this amount is more difficult to determine. In *City of Burlington v. Dague*,[128] the U.S. Supreme Court rejected the argument that a lodestar fee must take into account the risk of failure which means no recovery for the attorney working on contingency. In *Dague*, the Court held that enhancement of the lodestar was not available to an attorney working under a contingent fee contract to compensate for the risk of non-recovery.[129] However, the awarding of attorney's fees to the victorious party remains rare, generally limited to contract disputes and actions where fees are awarded pursuant to statute.[130]

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126. Plaintiffs often have no choice but to offer a contingent fee to an attorney. This reality often leads to the "no fee unless you collect" type of advertising. *See* Kathleen E. Payne, *Linking Tort Reform to Fairness and Moral Values*, 1995 DET. C.L. MICH. ST. U. L. REV. 1207, 1233 (arguing that tort reformers receive support from a public that believes the television commercials which preach that any injury is compensable and that "the litigation explosion is causing all of the country's economic problems").

127. A lodestar is a "guiding principle." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1076 (3d ed. 1992).

128. 505 U.S. 557 (1992).

129. For criticism of *Dague*, see Charles Silver, *Incoherence and Irrationality in the Law of Attorneys' Fees*, 12 REV. LITIG. 301 (1993). Silver reviews the *Dague* decision and the Supreme Court decision in *Kay v. Ehrler*, 499 U.S. 432 (1991), noting that the opinions of the justices regarding the fee awards may have been influenced by the justices' attitudes toward the substantive cause of action:

> In the federal courts, statutes authorize judges to grant fee awards mainly when plaintiffs win public interest cases that are thought to confer substantial external benefits on society at large. These laws are politically controversial and certain Justices who object to them may be deciding fee award cases in ways calculated to discourage their enforcement.

Id. at 304-05. For a discussion of the role of risk in the contingent fee contract, see SPEISER, *supra* note 121, § 8:10, at 319-20. *See also* Lester Brickman, *Contingency Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. REV. 29 (1989). Professor Brickman argues against contingent fee contracts in cases where there is no contingency, or no risk of non-recovery. *Id.* at 33. Such cases result in overcompensation for the attorney. *Id.* at 35.

130. SPEISER, *supra* note 121, § 13:1. The "American Rule," by which each party is expected to pay their own attorney's fees, remains quite firmly entrenched. For a discussion of why punitive damages do not encompass attorney's fees, see Comment, *Critical Reappraisal of Punitive Damages Encompassing Attorneys' Fees: Normative Analysis and Pragmatic Concerns*, 42 BAYLOR L. REV. 737 (1990).

Several states have attempted to reform the contingency fee contract.[131] California voters recently rejected a ballot initiative that would have capped contingency fees in early settlements.[132] Proponents say that contingency contracts discourage settlement because of the built in incentive for the plaintiff's attorney to go to trial, especially in cases that seem to offer sure victory. To prevent instances where the plaintiff's attorney might refuse to settle with a willing defendant, several states have attempted to enact statutes that penalize this refusal to settle.[133]

A proposal by the think tank Manhattan Institute called for enforcing existing ethical bars against "unreasonable" fees as a way of limiting contingency fees.[134] Citing examples of settlements producing astronomical fees for plaintiffs' attorneys working on contingency, the group formulated an elaborate method of calculating exactly when a fee becomes unreasonable and, therefore, contrary to existing state bars on unreasonable fee arrangements.[135] However, the plaintiffs' bar and others have attacked the proposal, and efforts in most states to limit contingency contracts have been rejected, as in California.[136]

2. Allocating Punitive Damages to the State

An increasing number of states are implementing reform measures.[137] One recent trend in state tort reform efforts is to direct a portion of the punitive damage awards away from plaintiffs.[138] Supporters of this type of reform point out that punitive damages are not meant to compensate tort victims, who

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131. Birnholz, *supra* note 120, at 950. Such efforts have been challenged on constitutional grounds, although lawyers, as officers of the court, may be subject to broader regulations imposed by courts and legislatures. *Id.* at 959.

132. Victoria Slind-Flor, *Tort Revision "Lost Cause" in California? Voters Reject Capped Fees, No-Fault and Loser Pays*, NAT'L L.J., Apr. 8, 1996, at B1. Proposition 202 would have capped contingent fees in the case of an early settlement at 15%. *Id.*

133. Indiana's House Enrolled Act 1741 contained a failure to settle provision that would apply when the final judgment is less favorable to the party refusing to settle: "If a recipient does not accept a qualified settlement offer and the final judgment is less favorable to the recipient than the terms of the qualified settlement offer, the court shall award attorney's fees, costs and expenses to the offeror upon the offeror's motion." IND. CODE ANN. § 34-50-1-6(a) (West Supp. 1998). The amount of fees, costs, and expenses may not exceed $1000. IND. CODE ANN. § 34-50-1-6(b) (West Supp. 1998).

134. LESTER BRICKMAN ET AL., RETHINKING CONTINGENCY FEES 15-16 (1994).

135. *Id.* at 22-23. *See also* Michael Horowitz, *Making Ethics Real, Making Ethics Work: A Proposal for Contingency Fee Reform*, 44 EMORY L.J. 173, appendix (1995).

136. *See* Horowitz, *supra* note 135, at 182-92; Peter Passell, *Windfall Fees in Injury Cases Under Assault*, N.Y. TIMES, Feb. 11, 1994, at A1.

137. *See* McKown, *supra* note 17 (surveying state legislative and judicial activity).

138. *Id.* at 436. *See also* Owen, *supra* note 2, at 410. For a constitutional analysis of "split-recovery" statutes, see Klaben, *supra* note 23.

are otherwise made whole through compensatory damage awards.[139] Instead, they argue, punitive damages amount to windfalls for plaintiffs.[140] By directing punitive damage awards away from plaintiffs and into state-administered funds, the deterrent effect of punitive damages remains intact without plaintiffs receiving undeserved windfalls.[141]

Nine states have enacted statutes that allocate a portion of any punitive damage award to the state.[142] These states have legislatively determined that plaintiffs in tort actions should not receive "windfalls" by being awarded punitive damages.[143] Because punitive damages are essentially civil fines, these reformers argue that the proper beneficiaries of such penalties are the states.[144] In Kansas, a similar statute that applies to medical malpractice claims allocates fifty percent of any punitive damage award to the state treasury.[145] In some instances, the awards are designated to achieve some

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139. For the theoretical arguments in favor of such a scheme, see Sloane, *supra* note 7, at 490. For a rebuttal against such arguments, see Owen, *supra* note 2, at 410.

140. *See Economic Analysis*, *supra* note 8, at 1903-11. This article analyzes punitive damages from an economic efficiency model, concluding that punitive damages windfalls "provide inefficient compensation, encourage risk-seeking behavior, and misallocate legal resources." *Id.* at 1907. For a counterpoint to the idea that plaintiffs actually "seek" risk in order to receive punitive damage awards, see Rustad, *supra* note 6, at 720. Professor Rustad notes that "[t]ort reform uses corporate executives as poster children, creating the appearance that unworthy plaintiffs harass 'deep-pocket' corporations by filing frivolous lawsuits," and that reform advocates employ "the basic strategy of 'blaming the victim' to attack injured plaintiffs and their lawyers." *Id.* at 720-21.

141. Sloane, *supra* note 7, at 490.

142. *See supra* note 21.

143. Sloane, *supra* note 7, at 490; Grube, *supra* note 7, at 850-52. In 1996, the Alabama Supreme Court allocated one half of a punitive damages award to the state in *Life Ins. Co. of Ga. v. Johnson*, 684 So. 2d 685 (Ala. 1996). Justice Shores, also the author of an article advocating the allocation of punitive damages to the state (*see* Shores, *supra* note 7), writing the opinion, awarded the plaintiff half of a $12.5 million punitive damages award, and awarded the other half to the state general fund. *Id.* at 698. Before splitting the award between the state and the plaintiff, the court announced that the costs of the litigation and reasonable attorney's fees were to be awarded from the punitive damage award. *Id.* at 699. Justice Shores noted the risk of failure which is placed on the attorney who takes such cases for plaintiffs. *Id.* at 693. In dissent, Justice Maddox criticized the decision, arguing that such a determination should be left to the Alabama legislature. *Id.* at 704. Mirroring arguments made against the statutes which have been enacted, Justice Maddox argued that the decision usurped legislative power to enact revenue raising legislation. *Id.* at 707-08. In addition, the allocation, according to Justice Maddox, may implicate the Excessive Fines Clause. *Id.* at 708-09. Finally, Justice Maddox argued that the decision may be subject to the Double Jeopardy Clause. *Id.* at 710. Similar arguments have been addressed in Sloane, *supra* note 7.

The Texas Supreme Court suggested to its legislature that it "enact a law apportioning one-half of punitive damage awards to the State" in *General Resources Org., Inc. v. Deadman*, 932 S.W.2d 485, 486 (Tex. 1996). The decision expresses the generally accepted notion that punitive damage awards are not meant as compensation, lists the states with such statutes, and notes the challenges which have been made. *Id.* at 486.

144. *See* Shores, *supra* note 7, at 91; Sloane, *supra* note 7, at 505.

145. KAN. STAT. ANN. § 60-3402(e) (1996).

perceived social good; other statutes merely deposit awards into the state treasuries.[146] The amount of the award that the state takes varies, ranging from fifty to seventy-five percent in some states to an amount to be determined by the court in other states.[147]

Plaintiffs have challenged such statutes on several grounds.[148] First, plaintiffs have argued that such statutes effect a taking of a vested property interest in the judgment.[149] Typically, these statutes, which allocate a portion of the award to the state, are challenged as improper state revenue generating devices or improper "user fees" that exact a "price on judgment."[150] Second, the statutes have also been challenged as impairing access to the courts, especially for plaintiffs who cannot afford attorney's fees and pay on a contingency basis.[151] Finally, these schemes have been challenged as

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146. In Florida, when a case awarding punitive damages involves personal injury or death, the portion payable to the state goes to a Public Medical Assistance Fund. FLA. STAT. ANN. § 768.73(2)(b) (West 1997). In Georgia, the amount is paid to the Office of the Treasury and Fiscal Services. GA. CODE ANN. § 51-12-5.1 (Supp. 1997). The Illinois statute provides that, at the discretion of the court, a portion may be allocated to the Department of Human Services. 735 ILL. COMP. STAT. ANN. 5/2-1207 (West Supp. 1997). Indiana deposits a portion of the award into the Violent Crime Victims Fund. IND. CODE ANN. § 34-51-3-6(b)(2) (West Supp. 1998). In Iowa, the state's share goes to a Civil Reparations Trust Fund. IOWA CODE ANN. § 668A.1(2)(b) (West 1987). Missouri deposits its portion into the Tort Victims' Compensation Fund. MO. STAT. ANN. § 537.675 (Supp. 1997). In Oregon, funds are placed into a Criminal Injuries Compensation Account. OR. REV. STAT. § 18.540 (1995). And in Utah, the amount awarded to the state goes in to the state's general fund. UTAH CODE ANN. § 78-18-1(3) (Michie 1996).

147. In Florida, 65% of the award goes to the plaintiff and 35% to the state. FLA. STAT. ANN. § 768.73 (West Supp. 1997). Georgia, Indiana, and Iowa split the award as follows: 75% to the state and 25% to the plaintiff, except that Iowa allows the entire amount to go to the plaintiff in cases where the behavior leading to the award was specifically aimed at the plaintiff. GA. CODE ANN. § 51-12-5.1 (Supp. 1997); IND. CODE ANN. § 34-51-3-6 (West Supp. 1998); IOWA CODE ANN. § 668A.1(2)(b) (West 1987). The issue of specifically directed tortious behavior has been litigated in Iowa. *See* Fernandez v. Curley, 463 N.W.2d 5 (Iowa 1990) (negligent behavior of drunk driver not aimed specifically at plaintiff to justify no allocation). Oregon allocates 60% of the award to the state and 40% to the plaintiff. OR. REV. STAT. § 18.540 (1995). Missouri splits the award equally between the state and the plaintiff. MO. ANN. STAT. § 537.675 (West Supp. 1997). In Utah, the plaintiff recovers the first $20,000 of any punitive damage award; then the state and the plaintiff split the remainder evenly. UTAH CODE ANN. § 78-18-1(3) (Michie 1996). Illinois grants the court discretion to split the award. 735 ILL. COMP. STAT. ANN. 5/2-1207 (West Supp. 1996).

148. *See generally* Klaben, *supra* note 23.

149. *See, e.g.*, Kirk v. Denver Publ'g Co., 818 P.2d 262 (Colo. 1991) (declaring Colorado allocation statute unconstitutional). *But see* Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs., 473 N.W.2d 612 (Iowa 1991) (finding no vested right to punitive damage award).

150. *See, e.g.*, Gordon v. State, 608 So. 2d 800 (Fla. 1992) (holding allocation statute not an unconstitutional user fee).

151. *See, e.g.*, State v. Moseley, 436 S.E.2d 632 (Ga. 1993) (ruling that allocation statute does not deny access to courts).

impairing existing contracts.[152] Most challenges have failed, and several commentators have conceded that statutes that allocate a portion of the punitive damage award to the state will continue to be upheld.[153] Those cases that have declared allocation schemes unconstitutional have been weakened by subsequent, stronger rulings in other states that have distinguished and diluted any possible precedential value.[154]

The first case to analyze a statute allocating a portion of the punitive damage award to the state, *McBride v. General Motors Corp.*,[155] examined a Georgia statute that allocated seventy-five percent of the punitive damage award to the state and granted the state status as a non-party judgment creditor.[156] The federal district court in *McBride* held that the statute was unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment because it distinguished between plaintiffs in products liability actions who may receive punitive damages and plaintiffs in all other actions who may receive punitive damages.[157] The court also held that the statute violated the Excessive Fines Clause of the Eighth Amendment and the Double Jeopardy Clause of the Fifth Amendment, pointing out that the statute transformed punitive damage awards into fines that benefit the state.[158] Suddenly, the new paradigm for reviewing punitive damages awards was no longer the Due Process Clause but the Excessive Fines Clause.[159] The *McBride* court described the

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152. *Gordon*, 608 So. 2d at 802 (finding no impairment of existing fee contract where statute existed before fee arrangement entered).

153. *See* Janet V. Hallahan, *Social Interests Versus Plaintiff's Rights: The Constitutional Battle over Statutory Limitations on Punitive Damages*, 26 LOY. U. CHI. L.J. 405, 434 (1995) ("underpinning each decision lies the courts' implicit recognition of the legislative power to subordinate the traditional purposes of punitive damages to the social need to rein them in").

154. *Id.* at 427 (noting that "numerous decisions subsequent to *McBride* and *Kirk* undermine the precedental value of these early decisions").

155. 737 F. Supp. 1563 (M.D. Ga. 1990).

156. GA. STAT. ANN. § 51-12-5.1 (Supp. 1996). Both the "single award" and the allocation provisions in the Georgia statute were challenged. *McBride*, 737 F. Supp. at 1565. A "single award" provision allows plaintiffs in a class action to recover only one punitive damage award against a defendant. *See* McKown, *supra* note 17, at 459-61. Indiana does not allow multiple punitive damages awards. *Id.* at 459 (citing *Taber v. Hutson*, 5 Ind. 322 (1854)). In January 1997, Senator Orrin Hatch (R-Utah) introduced a bill into the U.S. Senate which would eliminate multiple punitive damages awards. *See* Orrin Hatch, *Statement on Introduction of the Multiple Punitive Damages Fairness Act of 1997*, 1997 WL 4428785, at *1.

157. *McBride*, 737 F. Supp. at 1569. Plaintiffs in *McBride* sought to have the Georgia tort reform act declared unconstitutional as violative of the Equal Protection, Due Process, the right to jury trial, the Excessive Fines Clauses, and the single subject law provision of the Georgia constitution. *Id.* at 1567. The plaintiffs alleged that rear seat belts in General Motors vehicles were defective. *Id.* at 1566.

158. *Id.* at 1578.

159. *See* Klaben, *supra* note 23, at 126-29 (reviewing the cases which have analyzed the "split-recovery statutes" using the Excessive Fines Clause).

statute as an arbitrary, unreasonable provision designed to take away any incentive injured plaintiffs might have to bring suit to punish big businesses and deter future misconduct.[160]

The year following *McBride*, the Colorado Supreme Court in *Kirk v. Denver Publishing Co.*[161] struck down a similar statute, which allocated one-third of any punitive damage award to the state, as an unconstitutional taking of the plaintiff's vested property right in the punitive damage award.[162] Because the one-third allocation applied to all punitive damage awards, the Colorado statute, unlike the statute in *McBride*, was not analyzed on equal protection grounds. The court ruled that the statute constituted a taking of a vested property right because the state's right to the award came about only as a result of the plaintiff's effort and time.[163] Thus, the court held that punitive damages could be considered vested property in the judgment creditor (the plaintiff) after the judgment was entered.[164] The court was unable to find a reasonable relationship between the government services utilized by the litigants and the amount awarded to the state.[165]

Kirk is the only state supreme court case to strike down a punitive damage allocation statute.[166] Subsequent courts in different states have found no vested property right in a punitive damage award and therefore no "takings" problem. In *Mack Trucks, Inc. v. Conkle,*[167] the Georgia Supreme Court reviewed the

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160. *McBride*, 737 F. Supp. at 1578.

161. 818 P.2d 262 (Colo. 1991).

162. The plaintiff in *Kirk*, a newspaper delivery contractor, sued the newspaper company for malicious prosecution and received an award of $288,000 in compensatory damages and $160,500 in punitive damages, which was later reduced to $118,900 to equal actual damages. *Id.* at 264. The plaintiff filed a post-trial motion to invalidate the Colorado allocation statute as unconstitutional. *Id.*

163. *Id.* at 266-67.

164. *Id.* at 268.

165. *Id.* at 270. An attorney who represented a plaintiff whose award was allocated to Colorado in accordance with the then-valid statute attempted to file an attorney's lien on the amount of the punitive damages allocated to the state in *Schenck v. Minolta Office Sys., Inc.*, 873 P.2d 18 (Colo. Ct. App. 1993). The attorney had a contingency fee contract with his client and filed a lien for the same fee on the $100,000 awarded to the state (50%). *Id.* Eight months after the attorney filed his lien against the state, the Colorado Supreme Court announced the *Kirk* decision, and the attorney moved to foreclose on the lien. *Id.* The trial court held that the validity of the lien depended upon whether the attorney's client had any right to the amount of the award payable to the state. *Id.* The court also determined that the attorney had been reasonably compensated by the fee agreement with the plaintiff. *Id.* at 19.

On appeal, the attorney raised two issues: first, the attorney claimed that he was entitled to fees based on the "equitable fund" doctrine; second, the attorney claimed an ownership interest in the award, much like the attorney had in *Kirk*. *Id.* The court rejected both arguments.

166. The Supreme Court denied the petition for certiorari for *State v. Moseley*, 114 S. Ct. 2101 (1994).

167. 436 S.E.2d 635 (Ga. 1993).

same statute declared unconstitutional in *McBride* three years earlier.[168] The *Conkle* court held that the allocation of punitive damages to the state did not violate state or federal equal protection guarantees.[169] The court announced that no right to an award of punitive damages exists under Georgia state law.[170] A companion case, *State v. Mosely*,[171] held that the statute did not effect a takings violation.[172] Because the plaintiff has no right to an award of punitive damages, the state need only advance a rational argument to limit the awarding of punitive damages.[173]

a. Allocation Statutes and Attorney's Fees

For the purpose of this Note, the importance of these state statutory schemes lies in the provisions that mention attorney's fees. In Georgia, seventy-five percent of a punitive damage award is allocated to the state, but not before a proportionate amount of the litigation costs, including attorney's fees, are first paid to the plaintiff.[174] Similarly, Iowa provides that costs and attorney's fees will be paid for the plaintiff before seventy-five percent of the award is allocated to the state.[175] In Missouri, after payment of expenses and counsel fees, fifty percent of the punitive damage award is given to the Tort Victims' Compensation Fund.[176] Illinois law allows courts to determine the exact allocation of the punitive damage award between the plaintiff, the plaintiff's attorney, and the Illinois Department of Human Services.[177]

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168. 737 F. Supp. 1563 (M.D. Ga. 1990).

169. 436 S.E.2d at 639. A tractor-trailer accident occurred as the result of a crack in the right frame rail. *Id.* at 636. The plaintiff in *Conkle* sued the truck manufacturer on a theory of strict liability and for a negligent failure to recall or warn. *Id.* The plaintiff's damage award was reduced by 15% for comparative negligence. *Id.* Compensatory damages were over $180,000; punitive damages equaled $2 million. *Id.* at 637.

170. *Id.* at 639.

171. 436 S.E.2d 632 (Ga. 1993).

172. *Id.* at 634.

173. *See, e.g.*, Gordon v. State, 608 So. 2d 800, 802 (Fla. 1992).

174. "Seventy-five percent of any amounts awarded under this section as punitive damages, less a proportionate part of the costs of litigation, including reasonable attorney's fees, all as determined by the trial judge, shall be paid into the treasury of the state." GA. CODE ANN. § 51-12-5.1(e)(2) (Supp. 1996).

175. "[A]fter payment of all applicable costs and fees, an amount not to exceed twenty-five percent of the punitive or exemplary damages awarded may be ordered paid to the claimant, with the remainder of the award to be ordered paid into a civil reparations trust fund administered by the state court administrator." IOWA CODE ANN. § 668A.1(2)(b) (West 1987).

176. "Fifty percent of any final judgment awarding punitive damages after the deduction of attorney's fees and expenses shall be deemed rendered in favor of the state of Missouri." MO. REV. STAT. § 537.675(2) (Supp. 1997).

177. "The trial court may also, in its discretion, apportion the punitive damage award among the plaintiff, the plaintiff's attorney and the State of Illinois Department of Human Services." 735 ILL. COMP. STAT. ANN. 5/2-1207 (West Supp. 1996).

Allocation statutes in other states are silent as to the payment of counsel for winning a punitive damage award.[178] While *Kirk v. Denver Publishing Co.*[179] mentioned the effort that the plaintiff expends in obtaining a punitive damage award as part of the reason for finding a property interest in that award, the court did not reach the issue of whether the statute operated as an impairment of the attorney-client contingency contract.[180] The Florida Supreme Court in *Gordon v. State*[181] found no impairment of an existing contract.[182] However, the statute at issue in *Gordon* explicitly forbade an existing contingency contract to include the amount of any punitive damage award going to the state.[183] Because the implicit purposes behind such statutes is to reduce litigation, a rational interpretation of such statutes would not provide an award of attorney's fees in the portion allocated to the state.[184]

b. Allocation Statutes and State Involvement

The process by which the state collects its portion of an award and the proper role of the state in the collection and appeal of an award has been litigated in several states. In *Finley v. Empiregas Inc.*,[185] the State of Missouri moved to have a district court disburse a portion of a punitive damage award owed to the state under a statute that awarded a percentage of any punitive

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178. *See, e.g.*, OR. REV. STAT. § 18.540(1)(b) (1995): "Sixty percent shall be paid to the Criminal Injuries Compensation Account." Oregon further limits the attorney's compensation on the amount of punitive damages awarded to the plaintiff: "Forty percent shall be paid to the prevailing party. The attorney for the prevailing party shall be paid out of the amount allocated under this paragraph, in the amount agreed upon between the attorney and the prevailing party. However, in no event may more than 20 percent of the amount awarded as punitive damages be paid to the attorney for the prevailing party." OR. REV. STAT. § 18.540(1)(a) (1995).

179. 818 P.2d 262 (Colo. 1991).

180. *Id.* at 265.

181. 608 So. 2d 800 (Fla. 1992).

182. *Id.* at 802.

183. The Florida statute was amended to read:

> Claimant's attorney's fees, if payable from the judgment, are, to the extent that they are based on the punitive damages, calculated based on the portion of the judgment payable to the claimant as provided in sub-section (2). Nothing herein limits the payment of attorney's fees based on the award of damages other than punitive damages.

FLA. STAT. ANN. § 768.73 (7) (West Supp. 1997).

184. *But see* Grube, *supra* note 7, at 856 (arguing that, under such a statute, the state should pay the plaintiff's attorney).

185. 28 F.3d 782 (8th Cir. 1994). In *Finley*, the plaintiff had sued alleging gender discrimination under both federal and state law. *Id.* at 783. The court awarded the plaintiff $4250 in actual and $125,000 in punitive damages. *Id.* The defendant counter-claimed fraud and conversion and was awarded $401 in compensatory and $20,000 in punitive damages. *Id.* Only the award to the plaintiff was appealed. *Id.*

damage award to the state.[186] The court declined to address the constitutionality of the statute.[187] The case raised the question, however, of how a state enforces its claim to the portion of the punitive damage award. The court held that the state could not intervene in the action to collect the punitive damage award and left it to the legislature to determine how the state could collect an award in an action where the state was not a party until the awarding of punitive damages.[188] A Florida appeals court reached a somewhat opposite conclusion in *Sontag v. State Department of Banking and Finance*[189] holding that the state was entitled to recover its sixty percent of a punitive damage award where parties settled after the verdict but before satisfaction of judgment.[190] The court agreed that the settlement agreement and satisfaction of judgment "were a subterfuge to dispossess the Department of its portion of the award of punitive damages."[191]

Tort reformers have been much more successful in the state legislatures, enacting limitations on compensatory and punitive damages and, in some cases, enacting limits on attorneys' fees.[192] A recent trend in tort reform, allocating by statute a percentage of the punitive damage award away from the plaintiff and to the state, transforms the punitive damage award from a "windfall" for the plaintiff into a penalty or fine imposed by the state.[193] Most state allocation

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186. According to the Missouri statute:

> (2) Fifty percent of any final judgment . . . shall be deemed rendered in favor of the state of Missouri. The circuit clerks shall notify the attorney general of any final judgment awarding punitive damages rendered in their circuits. With respect to such fifty percent, the attorney general shall collect upon such judgment, and may execute or make settlements with respect thereto as he deems appropriate for deposit into the fund.
>
> (3) The state of Missouri shall have no interest in or right to intervene at any stage of any judicial proceeding under this section.

MO. REV. STAT. § 537.675 (Supp. 1997).

187. The court noted: "Although several states in addition to Missouri have enacted statutes that award a portion of punitive damages to the state, the constitutional issues Finley raises have received limited and desultory treatment in the courts." *Finley*, 28 F.3d at 784.

188. *Id.* at 785.

189. 669 So. 2d 283 (Fla. Dist. Ct. App. 1996).

190. *Id.*

191. *Id.* at 284. Most allocation statutes allow for the state to intervene, or have been interpreted to allow the state to intervene to collect its portion of the judgment. However, in *Eulrich v. Snap-On Tools Corp.*, 798 P.2d 715 (Or. Ct. App. 1990), the state of Oregon intervened to collect its portion of the judgment pursuant to the state allocation statute. *Id.* at 716. Once the defendant appealed the judgment, the issue before the court was whether the state had an interest in the appeal such that its "claim" for its portion had to be adjudicated. *Id.* The court held that the state did not have an interest in the underlying action until there existed a fund capable of distribution. *Id.*

192. *See supra* notes 120-36 and accompanying text.

193. *See supra* notes 137-73 and accompanying text.

statutes mention exactly how plaintiffs' attorneys are to receive compensation on the amount allocated to the state.[194] Some allocation statutes address the state's newfound involvement in the award by detailing the collection process.[195] The next Section of this Note discusses the adoption of the Indiana statute, an allocation statute that does not mention anything about awarding attorneys compensation for arguing the case for punitive damages.

IV. THE INDIANA PUNITIVE DAMAGES ALLOCATION STATUTE

A. Background of the Indiana Allocation Statute

When the Indiana General Assembly decided to take up tort reform, limiting punitive damages quickly became the focal issue, and soon a bill was drafted.[196] The insurance and manufacturer's lobbies and the Indiana Chamber of Commerce supported the bill; opposed were the Indiana Trial Lawyers' Association, the AARP, and a consumer group called the Hoosier Alliance for Consumer Rights.[197] Both sides aired television and radio advertisements in an effort to conjure constituent support.[198] Indiana Governor Evan Bayh

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194. *See supra* notes 185-91 and accompanying text.

195. *See supra* notes 174-84 and accompanying text.

196. Perhaps because dollars and limitations on the amount of recovery are easier to report and easier to digest, many of the stories and editorials concerning HB 1741, as it moved through the legislature, revolved around the punitive damage cap. Editorials spoke of the need to curb "frivolous suits" and about the scourge of "contingency-fee attorneys, who, getting a percentage of the take, have a direct interest in jacking up damages." Editorial, *Lawsuit Explosion*, EVANS. COUR., Mar. 14, 1994, at A8.

Another reason the punitive damage provision received so much attention was that it was a specifically raised concern of a key voting member of the Senate committee which considered the bill. *See* Richard D. Walton, *Tort Reform Bill Stalls in Senate Panel*, INDIANAPOLIS STAR, Apr. 4, 1995, at B4. State Senator John Waterman (R-Shelburn) expressed concern that the original language of the punitive damage cap (limiting punitive damages at three times compensatory) would not be adequate in cases where compensatory damages were low but punishment and deterrence necessary. An amendment was added to address these concerns (allowing the greater of three times compensatory or $50,000), and Waterman voted for the bill to leave committee. Eight days later, HB 1741, complete with the amendment, passed on a largely party line vote, with one Republican—Senator John Waterman—voting against the bill on the Senate floor. *See* Richard D. Walton, *Senate Passes Bill to Limit Punitive Damages in Lawsuits*, INDIANAPOLIS STAR, Apr. 13, 1995, at C4.

197. For a discussion of the influence of lobbyists and money on the consideration of House Enrolled Act 1741, see Cam Simpson, *Lawsuit Reform Battle Rages; Legislation Pits Consumers Against State Businesses*, INDIANAPOLIS NEWS, Mar. 20, 1995, at A1 (detailing how four of Indiana's top campaign contributors from 1992 lobbied extensively for or against the bill).

198. *Id.* at A1 (describing one particular television commercial which warned of lawsuits for improperly cutting hair); Cam Simpson, *Lawsuit Reform Bill Overcomes Radio Foes, Clears House*, INDIANAPOLIS NEWS, Apr. 18, 1995, at B4 (describing a last-minute radio campaign aimed at one of the bill's opponents).

vetoed the bill,[199] but the legislature overrode the veto.[200]

B. Specific Provisions

House Enrolled Act 1741 became law and amended Indiana's Product Liability and Comparative Fault Acts.[201] The Act provides a mild sanction for failing to settle a case where one party proposes settlement and the final judgment amounts to less than the proposed settlement.[202] The Act also limits punitive damage awards to the greater of three times compensatory damages or $50,000.[203] If a jury awards an amount that exceeds the limitation, the court must reduce the award.[204] After a judgment including punitive damages is entered, the judgment debtor is required to pay the punitive award to the clerk of the court.[205] The clerk then pays the judgment creditor twenty-five percent of the award.[206] The remaining seventy-five percent of the award is paid to the state treasurer, who is directed to deposit the funds into a state-administered fund to benefit victims of violent crime.[207] The jury is not to be informed of the statutory limitation on the award or of the allocation of the award to the state.[208]

The following two cases illustrate the statute's impact. In October 1974, the Indiana and Michigan Electric Company (IMEC) surveyed some land in order to prepare for a proposed electrical transmission facility.[209] Along the survey route, on Jack Stevenson's land, IMEC slashed twenty-three saplings and

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199. Richard D. Walton, *Bayh Vetoes Bills About Union Fees, Legal Reform*, INDIANAPOLIS STAR, Apr. 22, 1995, at C1 (Bayh declared that he had no trouble limiting punitive damages but did not want to take decision-making power from juries).

200. Richard D. Walton, *Senate Follows House, Overrides Tort Reform Veto*, INDIANAPOLIS STAR, Apr. 28, 1995, at B3. The House voted to override first, with intense lobbying from former Vice President Dan Quayle. Richard D. Walton, *Quayle Weighs in on Tort Bill; Ex-Vice President Lobbies Lawmakers to Override Veto of Lawsuit Legislation*, INDIANAPOLIS STAR, Apr. 27, 1995, at B1.

201. The Act limits strict liability to manufacturing defects. Hovde, *supra* note 12, at 367. Actions based on design defects or a failure to warn must now be determined according to negligence standards. *Id.* The Act also enumerated defenses, including conformity with federal or state regulations. *Id.* at 368. "Manufacturer" is defined by the Act, effectively limiting who may be sued in strict liability claims. *Id.* at 367. Comparative fault will now apply in strict liability and breach of warranty cases. *Id.* at 369-71; Petersen, *supra* note 12, at 28-30.

202. IND. CODE ANN. § 34-50-1 (West Supp. 1998). *See* Wirick and Piscione, *supra* note 12, at 1103-04.

203. IND. CODE ANN. § 34-51-3-4 (West Supp. 1996).

204. *Id.* § 34-51-3-5.

205. *Id.* § 34-51-3-6(a).

206. *Id.* § 34-51-3-6(b)(1).

207. *Id.* § 34-51-3-6(b)(2).

208. *Id.* § 34-51-3-3.

209. Indiana & Mich. Elec. Co. v. Stevenson, 363 N.E.2d 1254 (Ind. Ct. App. 1977).

trees standing in the sight line of their survey.[210] IMEC failed to obtain the landowner's permission before going onto the land and cutting the saplings and trees.[211] Stevenson brought a trespass action against IMEC and introduced evidence that IMEC knew of other methods of surveying the land that would not require trespass onto the farmer's property or destruction of the saplings and trees.[212] IMEC was found guilty of trespass and for the destruction of Stevenson's saplings and trees was ordered to pay $300 in compensatory and $50,000 in punitive damages.[213] On appeal, the damage award was upheld.[214]

When St. Vincent Hospital began construction of a professional building, it used a mortar additive known as Sarabond manufactured by the Dow Chemical Company.[215] When pieces of the brickwork began falling from the building in 1976, investigations into the problem identified Sarabond as excessively corrosive.[216] Subsequently, St. Vincent brought an action against Dow.[217] At trial, plaintiffs introduced evidence that Dow had knowledge of the corrosiveness of Sarabond as early as 1970, two years before construction of the professional building, but failed to warn purchasers of Sarabond of its corrosiveness.[218] St. Vincent won a judgment of $1,690,895 in compensatory damages and $5,000,000 in punitive damages.[219] On appeal, the defendants challenged the award as excessive,[220] but the judgment was affirmed.[221]

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210. Another neighboring farmer brought a similar trespass action against Indiana & Michigan Electric for damage to his corn field. *Id.* at 1257. Lloyd Collins alleged that his fields sustained $120 worth of damage when the electric company cut the corn without his permission because, like Stevenson's saplings, the corn stood in the way of the company's sight line. *Id.* Collins was awarded $60,000 in punitive damages. *Id.* The actions were consolidated for the sake of appeal. *Id.*

211. *Id.*

212. *Id.* at 1260.

213. *Id.* at 1257.

214. *Id.* at 1261.

215. Dow Chem. Co. v. St. Vincent Hosp., 553 N.E.2d 144 (Ind. Ct. App. 1990).

216. *Id.* at 146.

217. *Id.* at 147. St. Vincent alleged in their complaint negligence, strict liability, implied warranty, and fraud. *Id.* Most importantly, however, was the issue of how much Dow knew and when they knew it. *Id.*

218. *Id.* at 146. Dow conducted research on Sarabond after receiving reports about its excessive corrosiveness as early as 1970. *Id.* As early as 1971, Dow knew that Sarabond was not affected by rust inhibitors, yet as late as 1977 Dow made no warnings in its Sarabond sales literature about this fact. *Id.*

219. *Id.* at 145.

220. *Id.* at 150. The court noted that Dow attempted to argue that the award was excessive "via several evidentiary errors," such as tendered jury instructions. *Id.* Although Dow failed to raise excessiveness as a substantive issue, the court addressed the issue, noting Dow's wealth and its knowledge of Sarabond's corrosive properties. *Id.* at 151.

221. *Id.*

Consider how the newly enacted Indiana scheme would apply to these two cases. In the first action, the plaintiff would be limited to receiving the greater of three times the compensatory damages or $50,000.[222] Although the farmer suffered low compensatory damages,[223] the jury would still be allowed to award the same amount of punitive damages as it did, or $50,000. Of this $50,000 punitive damage award, the state would take seventy-five percent, or $37,500, for deposit in the victims of violent crime fund.[224] The remaining twenty-five percent for the plaintiff would equal $12,500. Combined with the compensatory award of $300, the total amount payable to the plaintiff would be $12,800.[225] The plaintiff and his attorney may have a contingency contract for the payment of fees.[226] Most contingency contracts average thirty-three percent and may be as high as fifty percent should the judgment be appealed.[227] Of the award to the plaintiff, the attorney will be paid $5,120, leaving $7,680 for the plaintiff.

In the second action, there is also no reduction in the amount of punitive damages.[228] Because the statute allows the greater of three times the compensatory damages or $50,000, the jury is allowed to award an amount of $5,072,000. The jury awarded less than three times compensatory damages, and no remittitur by the judge would be required. In this case, the state would receive seventy-five percent of the $5,000,000 punitive award, or $3,750,000.[229] The plaintiff, St. Vincent, would receive the remaining

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222. IND. CODE ANN. § 34-51-3-4 (West Supp. 1998).

223. *Stevenson*, 363 N.E.2d at 1257. The plaintiff suffered property damage, including the loss of saplings estimated at $300. *Id.*

224. IND. CODE ANN. § 34-51-3-3 (West Supp. 1998).

225. Presumably, these damages are now subject to taxation. *See* O'Gilvie v. United States, 117 S. Ct. 452 (1996).

226. *See generally* SPEISER, *supra* note 121, § 2:1 (discussing of the contingency contract). *See also* Lester Brickman, *On the Relevance of the Admissibility of Scientific Evidence: Tort System Outcomes Are Principally Determined by Lawyers' Rates of Return*, 15 CARDOZO L. REV. 1755 (1994) (arguing that attorneys fix their fees according to the risk associated with any given case and then may attempt to line up expert witnesses if the potential payoff is relatively high).

227. SPEISER, *supra* note 121, § 2:26.

228. The awarded amount of $5 million was, until recently, the largest punitive damage award in Indiana history. This case was appealed five years before the statutory cap was enacted. Had the cause occurred after July 1995, a jury could have awarded three times compensatory damages, and the award would equal $5,072,000. In July 1996, an Indiana jury awarded a plaintiff a $58 million punitive damage award against Ford Motor Co. for an accident involving a Bronco II truck. 24 Prod. Safety & Liab. Rep. (BNA) No. 27, at 639 (July 12, 1996). The trial judge cut the award down to $13.8 million, or the equivalent of retooling the manufacturing process to avoid the cause of the accident. *Id.* The $58 million reflected the costs to change the design of each vehicle times the number of similar vehicles sold in the United States, and the defendant argued that the reasoning in BMW—that Ford should not have to "pay" for out-of-state vehicles—should apply. *Id.* The cause originated before the inclusive date of the statute at issue in this note.

229. The state takes nothing from the compensatory award.

twenty-five percent, or $1,250,000, plus the compensatory damages, for a total of $2,940,895. Assuming counsel for the hospital works on retainer, there is no percentage distribution with the attorney. However, the statute provides no assistance from the state when the defendant appeals the award and no compensation for the attorney who wins the award, even though the state's share of the punitive damage award is larger than the hospital's total compensatory and punitive damage award.

As these examples illustrate, the Indiana statutory allocation of the punitive damage award still allows an award of some punitive damages to the plaintiff, albeit a much smaller amount.[230] The examples also illustrate that the state has acquired an interest in the collection of a punitive damage award.[231] By failing to expressly provide whether an attorney may collect a percentage of the punitive damage award allocated to the state,[232] and by failing to address how a state is involved in the collection of the punitive damage award allocated to the state,[233] the statute creates ambiguities that Indiana courts will need to address. The following Section addresses these problems with the Indiana statute.

V. PROBLEMS WITH THE INDIANA STATUTE

The section of the Indiana statute that allocates a portion of the award to the state does not specifically allow for attorney's fees to be taken from the state's share.[234] The fact that the statute does not address the compensation of an

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230. *See supra* note 43 and accompanying text.

231. The text of the statute reads:

> (a) . . . when a judgment that includes a punitive damage award is entered in a civil action, the party against whom the judgment was entered shall pay the punitive damage award to the clerk of the court where the action is pending.
>
> (b) Upon receiving the payment described in subsection (a), the clerk of the court shall:
>
> (1) pay the person to whom the punitive damages were awarded twenty-five percent (25%) of the punitive damage award; and
>
> (2) pay the remaining seventy-five percent (75%) of the punitive damage award to the treasurer of the state, who shall deposit the funds into the violent crime victims compensation fund established by IC 5-2-6.1-40.

IND. CODE ANN. § 34-51-3-6 (West Supp. 1998).

232. *See supra* notes 174-84 and accompanying text.

233. *See supra* notes 185-91 and accompanying text.

234. *Compare* IND. CODE ANN. § 34-51-3-6 (West Supp. 1998), *with* Oregon's allocation statute:

> Forty percent shall be paid to the prevailing party. The attorney for the prevailing party shall be paid out of the amount allocated under this paragraph, in the amount agreed upon between the attorney and the prevailing party. However, in no event may more than 20 percent of the amount awarded as punitive damages be paid to the attorney for the prevailing party.

OR. REV. STAT. § 18.540 (1)(a) (1995).

attorney for winning punitive damages, or the payment of attorney's fees prior to the allocation, was most likely a deliberate omission.[235] The omission raises several questions about the plaintiff's attorney who argues the case for punitive damages. Most likely, victorious plaintiffs who have surrendered a portion of the damage award to the state will challenge the statute. However, as has occurred in other states, the plaintiff's attorney working on contingency may also challenge the statute.

The following discussion analyzes three challenges that attorneys will likely make to the statute and is based on litigation in other states with allocation statutes. First, in other states, allocation statutes have been challenged as a taking of not only the plaintiff's right in a judgment, but also the attorney's contingent right in that judgment.[236] Second, attorneys have argued that such statutes impair existing fee contracts.[237] Third, attorneys have argued that they should be compensated based on equitable theories.[238] While these three arguments may very well fail in Indiana as they have failed in other states, a fourth, and more successful argument, is that the statute demands the attorney's services without just compensation in violation of the Indiana Bill of Rights.[239] This Section concludes by examining the state's interest in the judgment that is created by the statute, identifying problems similar to those litigated in other states.[240]

A. Challenges Unsuccessful in Other States

Although plaintiffs have challenged allocation statutes as an unconstitutional taking of vested property rights in punitive damage awards, the plaintiffs' attorneys have not seriously challenged such statutes as an unconstitutional "taking."[241] For an attorney, any "right" to a judgment is a derivative right.

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235. Prior bills proposed in the Indiana Senate specifically provided for attorneys to be compensated from the amount of punitive damages allocated to the state. Senate Bill 101 provided that an "amount of attorney's fees that may be paid from the state's share of a punitive damage award . . . may not be greater than thirty-three and one-third percent (33 1/3%) of the state's share." S. 101, 108th Gen. Ass., 2d Sess. (Ind. 1994). Senate Bill 545 was virtually identical. S. 545, 108th Gen. Ass., 1st Sess. (Ind. 1991). Senate Bill 606 introduced in 1991 allocated 75% of the punitive damage award to the state but allowed a plaintiff to "retain an amount equal to reasonable attorney's fees." S. 606, 107th Gen Ass., 1st Sess. (Ind. 1990). The bill which later became House Enrolled Act 1741, however, made no mention of attorney's fees from the first date of its introduction. *See* H.R. 1741, 109 Gen. Ass., 1st Sess. (1995).

236. Kirk v. Denver Publ'g Co., 818 P.2d 262 (Colo. 1991).

237. Gordon v. State, 608 So. 2d 800 (Fla. 1992).

238. Schenck v. Minolta Office Sys., Inc., 873 P.2d 18 (Colo. Ct. App. 1993) (attorney arguing for compensation under the "equitable fund" doctrine).

239. IND. CONST. art. 1, § 21.

240. *See infra* notes 311-18 and accompanying text.

241. *Kirk*, 818 P.2d at 262. The court did not reach the issue.

That is, if a plaintiff has a right to a punitive damage award, then a right exists in the plaintiff's attorney, so long as a valid contract calls for compensating the attorney from the award. However, this issue is likely to be resolved in Indiana as it has been resolved in the other states that have addressed the issue.[242] Indiana law creates a vested property right in a compensatory damage award,[243] but Indiana courts have long held that punitive damages are not meant to compensate the plaintiff.[244] Because punitive damages are awarded at the jury's discretion, no right to an award of punitive damages arises.[245]

Whether allocation statutes interfere with existing contingency fee contracts has been raised in several cases. The plaintiff's attorney in *Kirk v. Denver Publishing Co.*[246] challenged the statute based on the issue, but the court declared the statute unconstitutional on other grounds. In *Gordon v. State,*[247] the statute at issue had been amended prior to the signing of the attorney-client contract to read specifically that an attorney could not claim a contingent percentage of the amount of the award allocated to the state.[248] Should the Indiana statute be challenged by an attorney seeking to recover a percentage on the amount allocated to the state, most likely impairment of existing contract will be argued.

Plaintiffs' attorneys challenged the Indiana Medical Malpractice Act[249] as an impairment of their right to contract for services in *Johnson v. St. Vincent Hospital.*[250] In *Johnson*, the Indiana Supreme Court rejected attorney's claims that the Medical Malpractice Act in any way impaired their right to contract with plaintiffs, finding a reasonable exercise of the state's regulatory power and

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242. *See supra* notes 161-73 and accompanying text.

243. Indiana, B. & W. Ry. Co. v. Allen, 15 N.E. 451 (Ind. 1888).

244. Miller Brewing Co. v. Best Beers of Bloomington, Inc., 608 N.E.2d 975 (Ind. 1993) (no right to punitive damages); Carroll v. Statesman Ins. Co., 509 N.E.2d 825 (Ind. 1987) (punitive damages not meant to compensate victim); Orkin Exterminating Co. v. Traina, 486 N.E.2d 1019 (Ind. 1986) (punitive damages are meant to deter defendant from engaging in egregious conduct and not meant as compensation).

245. *See* Budget Car Sales v. Stott, 656 N.E.2d 261 (Ind. Ct. App. 1995) (additional damages beyond amount to compensate the victim a "windfall").

246. 818 P.2d 262 (Colo. 1991).

247. 608 So. 2d 800 (Fla. 1992).

248. *Id.* at 802. *See supra* note 187.

249. IND. CODE ANN. § 34-18-1-1 (West Supp. 1998). The Act limited recovery in malpractice actions to $500,000 (now $750,000). IND. CODE ANN. § 34-18-14-3 (West Supp. 1998). *See also* Kinney et al., *supra* note 52 (analyzing Indiana malpractice claims after enactment of the Act with similar claims in surrounding states).

250. 404 N.E.2d 585 (Ind. 1980). Challenges to the Act ranged from violations of due process and equal protection to legislative usurpation of the judicial role. *Id.* at 590. The Act limited plaintiffs' attorneys to 15% of the damages after the first $100,000. *Id.* at 602.

a valid legislative purpose furthered by the limitation.[251] Reducing needless punitive damage litigation is likely to be argued as a valid legislative purpose. Limiting the amount of recovery an attorney may take from the amount allocated to the state is likely to be considered a rational exercise of the state's regulatory power.

The equitable argument for compensating attorneys who successfully win punitive damage awards is quasi-contract.[252] The elements involved in a quasi-contract claim for relief include: (1) work performed (2) without a contract (3) where denying compensation would render an injustice.[253] In *Timothy F. Kelly and Associates v. Illinois Farmers Insurance*,[254] an attorney sought compensation for a settlement reached between the victims of an automobile accident and the defendant's insurer, claiming that the subrogation statute[255] gave attorneys the right to receive compensation on settlements.[256] The attorney also argued that he was entitled to compensation on the theory of quasi-contract.[257] The court rejected the argument saying that, while quasi-contract operates to promote equity where there has been some unjust enrichment, the attorney could prove no express or implied request for services.[258] Like the attorney in *Kelly*, an attorney arguing that quasi-contract requires the payment of fees on the amount allocated to the state must argue that the statute creates the implied request for services. A better argument is that the statute effects a taking of the attorney's services without compensation.

B. Taking the Attorney's Particular Services Without Just Compensation

The section of the Indiana statute that allocates a portion of the punitive damage to the state does not specifically allow the winning attorney to collect fees on the state's share. An argument that may allow for compensation, which

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251. *Id.* at 603. The court cited *Buckler v. Hilt*, 200 N.E. 219 (Ind. 1936), which held that a statute limiting the amount an attorney could charge in a workmen's compensation case did not violate due process or equal protection. *Johnson*, 404 N.E.2d at 603.

252. 1 SAMUEL WILLISTON & WALTER H.E. JAEGER, A TREATISE ON THE LAW OF CONTRACTS § 1:6 (4th ed. 1990) (calling quasi-contractual obligations "restitutionary in nature, with the goal of the courts being to award the plaintiff the reasonable value of the benefit conferred upon the defendant").

253. Indianapolis v. Twin Lakes Enters., Inc., 568 N.E.2d 1073 (Ind. Ct. App. 1991). The court discusses the difference between quasi-contract and *quantum meruit*. *Id.* at 1078.

254. 640 N.E.2d 82 (Ind. Ct. App. 1994).

255. IND. CODE ANN. § 34-53-1-2 (West Supp. 1998).

256. *Kelly*, 640 N.E.2d at 84.

257. *Id.* at 85.

258. *Id.* at 86.

has not been raised and may be unique to Indiana,[259] is that the statute constitutes a taking of the attorney's services without just compensation in violation of the Indiana Constitution, Article 1, Section 21. This Section of the Note will analyze the unique problem of the Particular Services Clause of the Indiana Constitution. This Section concludes that the statute's failure to provide attorney's fees on the share allocated to the state makes the statute an unconstitutional "demand" on the attorney's particular services without just compensation.

The Particular Services Clause of the Indiana Constitution prevents the state from demanding the particular services of an individual that could not be demanded of any other class of citizens without offering just compensation.[260] Thus, while the state can demand that a person serve on a jury, the state cannot demand that a doctor serve as an expert witness in a criminal trial.[261] The test established by the Indiana Supreme Court in *Bayh v. Sonnenburg*[262] determines whether a person's particular services have been demanded without just compensation. In *Sonnenburg*, a group of mental patients sought payment for tasks performed while hospitalized at state mental institutions.[263] The patients sought recovery on six theories of relief, including claims under the Fair Labor Standards Act,[264] the Thirteenth Amendment of the U.S. Constitution, 42 U.S.C. § 1983, a common law claim of unjust enrichment, and state claims under the Indiana Patient Remuneration act. The plaintiffs also alleged a violation of the Indiana Constitution's Particular Services Clause.[265] The *Sonnenburg* court dismissed the other claims individually but spent considerable

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259. Only Indiana, Oregon, and Tennessee have such constitutional prohibitions against taking a person's particular services. *See* IND. CONST. art. 1, § 21; OR. CONST. art. I, § 18; TN. CONST. art. I, § 21. While Oregon has enacted an allocation statute, there has been no litigation about the statute taking an attorney's particular services.

260. IND. CONST. art. 1, § 21 reads in part: "No person's particular services shall be demanded without just compensation." Section 21 also contains the state "takings" clause: "No person's property shall be taken by law, without just compensation; nor, except in the case of the State, without such compensation first assessed and tendered." The "takings" clause has received much more attention than the Particular Services Clause, for obvious reasons, serving as the cognate of the federal Fifth Amendment. The only scholarly analysis of the Particular Services Clause of Section 21 is Robert Twomley, *The Indiana Bill of Rights*, 20 IND. L.J. 211, 248-49 (1945).

261. Twomley, *supra* note 260, at 248.

262. 573 N.E.2d 398 (Ind. 1991).

263. The class was certified at 7419 patients, who requested compensation for such tasks as cooking and serving meals, washing dishes, cutting hair, mowing lawns, laundry, maintaining bowling alleys, and providing services to fellow patients. *Id.* at 412.

264. 29 U.S.C. §§ 206, 207 (1988).

265. Orr v. Sonnenburg, 542 N.E.2d 201, 203-04 (Ind. Ct. App. 1989).

effort on the particular services claim.[266] In order to prevail on the claim that the state demanded services without just compensation, the plaintiffs had to demonstrate: (1) that they performed particular services (2) demanded by the state (3) without just compensation.[267] According to the court, the plaintiff group in *Sonnenburg* failed to meet this burden.

The first issue was whether the services that the patients performed could be characterized as particular services within the meaning of Article 1, Section 21.[268] The court then engaged in a lengthy analysis of the re-drafting of the 1851 version of the Indiana Constitution that led to the phrase "particular services" being retained from the 1816 version of the Indiana Constitution.[269] In doing so, the court sought to interpret the Indiana Constitution in a way to reconcile the meaning of those who drafted the constitution with those who ratified it.[270] The court concluded that services were "particular" for the purposes of the amendment if they had historically been compensated[271] and

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266. As for the 42 U.S.C. § 1983 claim, the Court rejected the plaintiffs' contention that the named defendants were "persons" for the purposes of the statute. *Sonnenburg*, 573 N.E.2d at 403. The plaintiffs could not claim a violation of the Indiana Patient Remuneration Act because the remuneration schedule had not gone into effect when the cause accrued. *Id.* at 404. The court hesitated to apply the Fair Labor Standards Act retroactively because of the ruling in *National League of Cities v. Usery*, 426 U.S. 833 (1976). *Id.* at 408. As for the unjust enrichment claim, the Court concluded that the plaintiffs could not demonstrate an expectation of payment at the same time they were claiming to be coerced into rendering services. *Id.* at 408. Finally, the Court could not affirm the trial court on the Thirteenth Amendment issue. *Id.* at 411.

267. *Id.* at 411.

268. *Id.*

269. *See* 1 DEBATES IN INDIANA CONVENTION 1850, at 353-75 (1850). The debate continued for several days, with some delegates wishing to replace the phrase "particular services" with "personal services." *Id.* at 359 (remarks of Delegate Clark) ("I take it that the word *particular*, in the old Constitution, means, not that general service which every citizen is bound to render, but something specific"). *See also* 1 CHARLES KETTLEBOROUGH, CONSTITUTION MAKING IN INDIANA 300 (1916) (1971 reprint).

270. *Sonnenburg*, 573 N.E.2d at 412. *See* Rosalie Berger Levinson, *State and Federal Constitutional Law Developments Affecting Indiana Law*, 25 IND. L. REV. 1129, 1134 (1991) (commenting that the *Sonnenburg* case "suggests the significance of re-examining the report of the debates and proceedings of the 1850 convention as a means of rejuvenating and providing substance to Indiana's Bill of Rights"). *See also* Randall T. Shepard, *Indiana Law, the Supreme Court, and a New Decade*, 24 IND. L. REV. 499, 504 (1991) (recognizing in the late 1980's a willingness of the Indiana Supreme Court to resolve issues with the Indiana Bill of Rights that previously would have been resolved only by reference to the U.S. Constitution). *See also* Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575, 578 (1989) (noting that over "a century before *Gideon v. Wainwright* was decided in 1963, the Indiana Supreme Court held that a criminal defendant had the right to an attorney at public expense" under section 21 of the Indiana Bill of Rights).

271. The court determined that the 1850 Convention's "preference for 'particular' over 'personal' is critical in this case. It is clear that the framers did not intend this clause to create new rights to compensation for services provided to the State that had gone historically uncompensated." *Id.* at 413.

could not be considered "general" services.[272] Because no history existed of paying patients for the work performed, and because the work was not the result of an unreasonable demand upon the patients, the services performed by the plaintiffs were not "particular."[273]

The court determined that the evidence suggested that the state placed a "demand" for the services performed by the patients.[274] Some of the patients had testified that they felt threatened into doing the work or felt they would be punished if they refused.[275] Thus, because the patients reasonably felt that a refusal to do the work might result in physical violence or other intimidation, the court concluded that the services were performed because of a demand.[276] However, the *Sonnenburg* court rejected the patients' claim that they were denied "just compensation" for the work they performed, citing the benefits that the patients received as part of their incarceration.[277] Under Indiana's Just Compensation Clause, the court pointed out that, where the value of the extrinsic benefits received is greater than the value of the services or property demanded of the individual, the state owes no compensation.[278]

This three-part approach to the Particular Services Clause established in *Sonnenburg* was applied by the Indiana Court of Appeals in *Gorka v. Sullivan*[279] in 1996. *Gorka* involved a plaintiff group challenging the Medicaid agency's transportation rates on a number of grounds, including the Particular

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272. The court considered work done as "part of the social compact" to be "general services." *Id.* at 416. To recover, the plaintiffs would have had to show that the work they performed was the result of "the State's isolated and unreasonable demand upon their services which ought to be paid for by the public at large." *Id.* Further, the court felt that the patients were the "primary beneficiaries of the work product." *Id.* Thus, the services were general and not particular.

273. *Id.* at 417.

274. *Id.* at 418.

275. *Id.* at 417-18. Although none of the patients who testified at the trial actually refused to work, they testified about feeling coerced and that they believed that patients who did refuse suffered drastic consequences. *Id.* at 417.

276. According to the court, "[a] request becomes a 'demand' when it is backed up with the use or threatened use of physical force or legal process which creates in the citizen a reasonable belief that he is not free to refuse the request." *Id.*

277. The court referred to the improved living environment which resulted from the work performed. *Id.* at 420. In addition, the court noted that the costs associated with housing and providing for the patients more than outweighed the amount of payment sought: "Although there is no direct evidence from which to calculate the exact worth of the first of these two benefits, it is apparent that the two combined exceed the value of the plaintiffs' labor." *Id.* at 421.

278. *Id.*

279. 671 N.E.2d 122 (Ind. Ct. App. 1996).

Services Clause.[280] In this case, the issue was whether the state had actually demanded the services of the transportation providers. Because the providers voluntarily assented to the contracts to provide transportation, the court held that no "demand" of the services was made.[281]

An attorney challenging the Indiana allocation statute as an unconstitutional taking of particular services will need to meet the three-part test established by *Sonnenburg* and followed in *Gorka*. The attorney whose fee has been allocated to the state without compensation must establish: (1) that the services performed were particular services (2) demanded by the state (3) without just compensation.[282] In the right situation, the statute may be declared unconstitutional. The following analysis demonstrates how.

Indiana case law has consistently recognized that attorneys' services may not be demanded without just compensation because these are "particular" services, as opposed to general services.[283] However, the last case to rule this

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280. A group of Medicaid transportation providers brought an action against the Medicaid agency in Marion County after new, lower rates were announced. *Id.* at 124. The providers claimed that the rates should have been established by the Indiana Department of Revenue. *Id.* at 124-25. The providers asked for the higher rates which would have been paid them under the old system and challenged the rule-making procedure which led to the lower rates. *Id.* Because the providers considered the lower rates a taking of their services without *just compensation*, Article 1, Section 21 of the Indiana Bill of Rights was invoked. *Id.* at 130.

281. "Here the State has requested the Providers' services by offering a contract to transport Medicaid patients. The Providers were free to reject the offer, or to cancel their existing contracts. The freedom to reject the offer or cancel the contract establishes that the State has not demanded the Providers' services." *Id.* at 131.

282. Bayh v. Sonnenburg, 573 N.E.2d 398, 411 (Ind. 1991).

283. *See* Twomley, *supra* note 260, at 249 (noting "an attorney's services are 'particular' services"). The case law is plentiful, beginning with *Webb v. Baird*, 6 Ind. 13 (1854), where an attorney who defended a man against burglary charges filed a petition to recover the $25 allowance set aside by the county. *Id.* at 14. The auditor of the county refused to order payment, saying the county did not have the authority to issue payment for the defense of a pauper. *Id.* The court ordered payment, citing Article 1, Section 21 of the Indiana Bill of Rights and rejecting the idea that an attorney's services could be gratuitously expected by the county or labeled an "honorary duty." *Id.* at 16. The court noted the changing role of the profession: "The legal profession having been thus properly stripped of all its odious distinctions and peculiar emoluments, the public can no longer justly demand of that class of citizens any gratuitous services which would not be demandable of every other class." *Id.* at 16-17.

The constitutional prohibition against demanding the particular services of attorneys has been held to apply mainly in cases of defending paupers. *See, e.g.*, Knox County Council v. State *ex rel.* McCormick, 29 N.E.2d 405 (Ind. 1940) (attorneys brought action to compel county for payment of costs and fees for defending pauper defendant in murder trial); Knight v. Board of Comm'rs, 179 Ind. 568 (1913) (although attorneys not required to defend suspect without compensation, attorneys voluntarily assisted suspect; thus State did not demand services).

The prohibition against taking an attorney's services also applies to assisting the county in a prosecution. *See* Board of Comm'rs v. McGregor, 171 Ind. 634 (1908) (no recovery of attorney's

way was decided in 1940, and the majority of the cases that have so held concerned payment of counsel for defending paupers against criminal charges.[284] "Particular services" as defined by the *Sonnenburg* court means (1) services that have historically been compensated and (2) services that are not general services, do not place an unreasonable demand upon the individual, and do not solely benefit the individual.[285] The attorney who argues for an award of punitive damages can claim to have been historically compensated for winning such awards, but only when they have been awarded in full to the plaintiff. When the punitive damage award becomes a fine, the plaintiff's attorney becomes, in a sense, a fine collector for the state.[286] On the other hand, the attorney could also be considered a quasi-attorney general,[287] arguing cases on the state's behalf to deter and punish the egregious behavior of certain defendants. This task may not be an unreasonable demand upon the attorney,

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fees warranted where attorney voluntarily assisted the county in the prosecution of a murder suspect). The court in *McGregor* noted "[t]he State is abundantly able to compensate all of its servants, and should make provision for such services as may be deemed necessary in the interests of the public peace and welfare." *Id.* at 641.

284. *But see* Hoey v. McCarthy, 124 Ind. 464 (1890). In *Hoey*, the plaintiff sought to bring a civil action *in forma pauperis* under a state statute which allowed such actions to state residents. *Id.* at 464. Because the plaintiff was allegedly not a state resident, the complaint was dismissed. *Id.* at 465. Under the statute, costs would be paid, and the plaintiff would be appointed an attorney. *Id.* The court refused to appoint counsel, noting:

> There is probably no profession where benefactions to the poor, in the way of gratuitous services, as well as in other material respects, exceed those of the legal profession, and while an attorney can not, even upon the order of the court be compelled to render services gratuitously (*Webb v. Baird*, 6 Ind. 13), it may be doubted whether a suitor with a meritorious cause ever failed to secure a hearing because of his inability to employ an advocate.

Id. at 466.

285. Bayh v. Sonnenburg, 573 N.E.2d 398, 414-16 (Ind. 1991). The court interpreted the drafters of the 1850 Constitution as being especially concerned with creating "new rights to compensation for services provided to the State that had gone historically uncompensated." *Id.* at 413.

286. Case law in Indiana suggests that the clause does not apply to those who are made to collect excise taxes or income taxes for the state. Such is not a "particular service" demanded and deserving of just compensation. *See* Welsh v. Sells, 192 N.E.2d 753 (Ind. 1963) (rejecting challenge to excise tax as violation of Article 1, Section 21 because no party to the action could claim to have rights violated); Akers v. Handley, 149 N.E.2d 692 (Ind. 1958) (cleaners sought injunctive relief from Indiana Revenue Board that withholding income taxes was a violation of Article 1, Section 37, the Involuntary Servitude Clause of the Indiana Constitution). The *Akers* court quoted favorably from an Illinois case, *Crews v. Lundquist*, 197 N.E. 768 (Ill. 1935), which denied a public administrator's claim for compensation for handling the estate of a deceased war veteran, even though a statute allowed for veterans' estates to be handled free of charge. *Id.* at 769, 772. The administrator brought the challenge under the Thirteenth Amendment of the U.S. Constitution. *Id.* at 772.

287. *See* Owen, *supra* note 2, at 380-81 (discussing the law enforcement function of a punitive damages award; awarding punitive damages to a plaintiff rewards those who do a public good in deterring egregious conduct).

and certainly the attorney receives some compensation that benefits the attorney.[288] But, it is possible to conceive of a situation where the state receives a majority of the benefit from the attorney's work product, especially for the attorney being paid a percentage of the damage award, when compensatory damages are low but punitive damages are high.[289] In this situation, the attorney is not the sole recipient of the benefit, and the state's demand upon the attorney's time and effort appears to be unreasonable.

The second prong of the *Sonnenburg* "particular services" test requires the party to demonstrate that its services were demanded by the state in a manner that would suggest that the individual was unable to refuse because of threat of force or legal action.[290] In *Sonnenburg*, the Indiana Supreme Court agreed that some of the patients may have felt like they had no choice but to do the work under threat of violence or coercion.[291] However, the Indiana Court of Appeals in *Gorka v. Sullivan*[292] rejected a claim that the services of the transportation providers were "demanded," calling attention to the freedom of contract and the option to cancel the Medicaid contract.[293] While attorneys do not have to argue for punitive damages, those who do are placed in service to the state by the statute. The attorney who refuses to argue for punitive damages is under no threat, but the attorney has no option to cancel the "contract" with the state in the event punitive damages are argued and awarded. The "contract" operates by law, providing, as the court in *Sonnenburg* said, "the use, or threatened use of . . . legal process which creates in the citizen a reasonable belief that he is not free to refuse the request."[294] A statute that limited attorney's fees in workers' compensation cases survived scrutiny under the Particular Services Clause in *Buckler v. Hilt*.[295] This case, however, appears to have misstated Indiana law when it announced that Article 1, Section 21 "applies only to the taking of private property under the power of eminent

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288. The argument in *Sonnenburg* was that the plaintiffs were the sole beneficiaries of the work performed. *Sonnenburg*, 573 N.E.2d at 416.

289. The hypothetical situation at the beginning of this note serves as a good example of this possible situation, where the amount awarded to the state is much higher than the amount awarded to the plaintiff, and the time necessary to spend on the case outweighs the potential payout for the attorney. *See also* Indiana & Mich. Elec. Co. v. Stevenson, 363 N.E.2d 1254 (Ind. Ct. App. 1977), discussed *supra* notes 209-29 and accompanying text (compensatory damages of $300 and $120, punitive damages of $50,000 and $60,000 respectively).

290. *Sonnenburg*, 573 N.E.2d at 417.

291. *Id.* at 418 (referring to the rumors of loss of privileges, isolation, and electric shock which created the impression in the patients' minds that they were not free to refuse the demands to work).

292. 671 N.E.2d 122 (Ind. Ct. App. 1996).

293. *Id.* at 131.

294. *Sonnenburg*, 573 N.E.2d at 417.

295. 200 N.E. 219 (Ind. 1936).

domain."[296] Many cases in Indiana have announced that the Particular Services Clause is applicable to an individual's services demanded by the state, including *Bayh v. Sonnenburg*[297] and *Gorka v. Sullivan,*[298] the most recent cases.[299]

The final element of the *Sonnenburg* test is to determine if the plaintiff has been adequately compensated by the extrinsic benefits of the services performed.[300] The plaintiffs in *Sonnenburg* failed to meet this burden because the court found that the patients were the sole beneficiaries of the work performed.[301] An award of punitive damages under the Indiana allocation statute benefits the state, the plaintiff, and the plaintiff's attorney, if working on contingency.[302] Unlike the plaintiffs in *Sonnenburg*, the plaintiff's attorney can claim that the state's demand interferes with his ability to make a living.[303]

C. Ethical Conflicts Between Attorneys and Clients

If Indiana courts do not interpret the statute to allow reasonable compensation for the attorney for arguing the case for punitive damages, punitive damages claims might not be sought.[304] Attorneys working on contingency fee cases, especially, will evaluate whether it is better to argue for punitive damages that would be awarded to the state or, instead, to try to

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296. Few decisions have cited to *Buckler*, but one which does is noteworthy. In *Johnson v. St. Vincent Hosp., Inc.*, 404 N.E.2d 585 (Ind. 1980), the Indiana Supreme Court upheld the Indiana medical malpractice cap, but the case also involved an attorney's claim for fees beyond the limit prescribed by the statute. The *Johnson* court cited *Buckler* as standing for the proposition that limitations on attorney's fees is a valid exercise of the State's police power. *Id.* at 603. The attorney also argued that the statute interfered with the right to contract. *Id.* at 602.

297. 573 N.E.2d 398 (Ind. 1991).

298. 671 N.E.2d 122 (Ind. Ct. App. 1996).

299. The *Sonnenburg* court acknowledged that the Particular Services Clause has been applied to attorneys. *Sonnenburg*, 573 N.E.2d at 414.

300. *See supra* notes 277-78 and accompanying text.

301. *Sonnenburg*, 573 N.E.2d at 420-21.

302. *See supra* notes 230-31 and accompanying text.

303. The *Sonnenburg* court stated that "one of the purposes of the particular services clause is to protect a citizen's ability to earn a living, services that do not interfere with that ability have usually been characterized as general." *Id.* at 417. This line of reasoning seems to comport with the older cases which distinguished between "particular" and "general" services as splitting along the issue of what could be expected of everyone as opposed to what could only be expected of a select group of citizens. *See* Webb v. Baird, 6 Ind. 13, 17 (1854) (stating "the public can no longer justly demand of that class of citizens any gratuitous services which would not be demandable of every other class").

304. Wirick and Piscione, *supra* note 12, at 1102.

increase compensatory damages.[305] Under either type of damage award—compensatory or punitive—the defendant will still pay. Where that award goes is more important to the plaintiff and the attorney.[306] Because the Indiana statute does not contain a provision like the Florida statute at issue in *Sontag v. State Department of Banking and Finance*,[307] allowing the state to recover regardless of whether the parties have settled, the statute must be interpreted as either giving the state an interest in the settlement or not.[308] Attorneys, and their clients, may be more willing to settle before going to trial to avoid having the state assert its interest in the award.[309]

There is also the concern of attorneys taking advantage of clients during the fee contract drafting stage. Indiana's statute, unlike the other allocation statutes, does not clearly define from which portion an attorney's fee may be taken.[310] While an attorney and client may come to an agreement that the fee will be taken from the "total judgment," fee contracts will need to specify whether an attorney can receive compensation based on the total amount, including that amount awarded to the state, regardless of the amount eventually awarded to the plaintiff.

D. The State as Non-Party Judgment Creditor

The two courts that have dealt with the state's interest in an award of punitive damages reflect the growing acceptance of such statutory schemes. *Finley v. Empiregas Inc.*[311] held that, while the statute allocating a portion of punitive damages to the state was constitutional, the district court was under no

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305. *Id.* Wirick and Piscione argue that punitive damages claims will drop out of the action when the parties fail to settle. Instead, the attorney will make a concerted effort to argue for intangible loss, like aggravated pain and suffering. *Id.* Wirick and Piscione state: "Plaintiffs may decide that aggravating factors which might otherwise justify punitive damages could be used instead to increase compensatory damages." *Id.* at 1102. *See also* Breslo, *supra* note 47, at 1152 (maintaining that attorneys working on contingency influence client decisions; thus settlement is usually a decision based on rate of return).

306. *See* Breslo, *supra* note 47, at 1152-53 (concluding that it is unclear whether a plaintiff's attorney would be more or less willing to bring a claim for punitive damages under an allocation statute).

307. 669 So. 2d 283 (Fla. Dist. Ct. App. 1996).

308. *See infra* notes 311-18 and accompanying text.

309. Wirick and Piscione ask when the state may assert its "enforceable property interest." Wirick and Piscione, *supra* note 12, at 1102. Presumably, however, the state would not have an enforceable property interest in a punitive damages award, just as no plaintiff has such an enforceable property interest in an award of punitive damages. *See supra* notes 241-45 and accompanying text.

310. *See supra* notes 174-84 and accompanying text.

311. 28 F.3d 782 (8th Cir. 1994).

statutory obligation to allow the state to intervene.[312] This case demonstrates the importance of precision in such statutes. While a definite state interest is created in the allocation of the award, there is no mechanism for the state to collect its share.[313] The Indiana statute does not allow for the state to intervene in an action at any stage of the proceeding.

Sontag v. State Department of Banking & Finance[314] also illustrates the importance of precise statutory language. After a judgment was entered but before the satisfaction of judgment, the two parties agreed to a settlement that did not include the amount of punitive damages to be awarded to the state under the Florida statute.[315] The state subsequently brought an action to recover its sixty percent share under the statute.[316] In affirming a grant of summary judgment for the state, the court agreed with the trial court's assessment of the situation: "the settlement agreement and the satisfaction of judgment were a subterfuge to dispossess the Department of its portion of the award of punitive damages."[317] Although the Indiana statute specifically routes the payment of the punitive damage award from the defendant to the clerk of the court, there is no provision for allocating any awards resulting from settlement offers that occur after the verdict but before the satisfaction of the judgment.[318]

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312. *Id.* at 784-85.

313. *Id.*

314. 669 So. 2d 283 (Fla. Dist. Ct. App. 1996).

315. FLA. STAT. ANN. § 768.73 (West 1997).

316. *Id.*

317. *Sontag*, 669 So. 2d at 284. The statute was amended to include pre-satisfaction of judgment settlements. The statute now reads:

> A settlement agreement entered into between the original parties to the action after a verdict has been returned must provide a proportionate share payable to the fund specified in paragraph (2) (b). For purposes of this subsection, a proportionate share is a 35-percent share of that percentage of the settlement amount which the punitive damages portion of the verdict bore to the total of the compensatory and punitive damages in the verdict.

FLA. STAT. ANN. § 768.73 (West Supp. 1997). Apparently, the Florida legislature realized that parties could avoid payment of any amount of the share to the state simply by coming to a settlement after the verdict was reached, but before the judgment was "satisfied" in the court. This was the case with the parties in *Sontag*.

318. The statute provides that "when a judgment that includes a punitive damage award is entered in a civil action," the defendant "shall pay the punitive damage award to the clerk of the court." IND. CODE ANN. § 34-51-3-6(a) (West Supp. 1998). A defendant could appeal the judgment, and in the intervening time the plaintiff and the defendant could settle as occurred in *Sontag*. Presumably, the State becomes a party to the action at final judgment and has an interest in the judgment at that time, regardless of whether an appeal is taken. Interest on the punitive damage award would not be available for the period between the final judgment and the consideration of the appeal. *See* IND. CODE ANN. § 34-51-4-3 (West Supp. 1998).

VI. A PROPOSAL TO REFORM INDIANA'S ALLOCATION STATUTE

With the exception of the Particular Services Clause, the issues discussed above[319] have been litigated in other states with allocation statutes. The Colorado statute struck down in *Kirk v. Denver Publishing Co.*[320] was flawed for a number of reasons, according to the Colorado Supreme Court, but especially because it constituted a taking of the plaintiff's vested property interest.[321] The Florida, Georgia, and Iowa statutes, however, have survived such constitutional challenges.[322] The lesson to be taken from those cases is that, although an allocation statute does not amount to a taking of a plaintiff's vested property interest, the statute must make clear the state's involvement in the judgment and include a method of collecting payment in the case of pre-satisfaction of judgment settlements.[323] In addition, allocation statutes should clearly identify how the attorney who argues the case for punitive damages, which will be allocated to the state, is to be compensated for the effort. Otherwise, such statutes create ethical conflicts between the attorney and the client at the fee contract and settlement stages of litigation, or may result in punitive damages not being argued at all.[324] In Indiana, failing to provide compensation for the attorney in service to the state makes the allocation statute illegal as a "taking" of the attorney's particular services.[325] This Note proposes several changes to the statute to balance these concerns with the legitimate goals of Indiana's allocation statute. Furthermore, this Note proposes to clear up ambiguous provisions in order to compensate the attorney for the effort expended to win the award and make clear the extent of the state's interest in the award in case of a settlement offer before judgment is satisfied.

A. Compensating Attorneys

Proposal 1

> *(a) After a jury determination of the amount of punitive damages, which shall not exceed the greater of three times compensatory or*

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319. *See supra* part V(A).

320. 818 P.2d 262 (Colo. 1991).

321. *Id.* at 265.

322. *See supra* notes 148-73 and accompanying text.

323. *See supra* notes 185-95 and accompanying text.

324. *See supra* notes 304-10 and accompanying text. *See also* Breslo, *supra* note 47 (detailing the "ramifications of a plan that retains punitive damages, but does not give the award to the plaintiff"). Breslo examines several alternatives to awarding punitive damages to the plaintiff, including having the state take over as prosecutor in a separate action. *Id.* at 1148. Breslo identifies procedural difficulties with that solution, including the realities associated with attorneys working on contingency and the effects such a plan would have on settlement conferences. *Id.* at 1157.

325. *See supra* notes 259-303 and accompanying text.

$50,000, the trial judge shall divide the award of damages between the Victims of Violent Crime Fund and the plaintiff, based on a determination of the following factors:

(1) the extent to which the plaintiff is fully compensated after receiving compensatory damages and paying litigation costs;

(2) the time and effort spent by the plaintiff's attorney arguing the case for punitive damages.

(b) If the defendant's egregious behavior was directed specifically at the plaintiff, the judge may award the entire amount to the plaintiff.

Proposal 2

(a) A jury award of punitive damages may not exceed the greater of three times compensatory damages or $50,000. After a jury determination of punitive damages, the court shall order the defendant to pay to the clerk of the court the full amount of punitive damage.

(b) The clerk of the court shall then divide the punitive damage award in the following manner:

(1) Seventy-five percent to the Victims of Violent Crime Fund;

(2) The remaining twenty-five percent to the plaintiff.

(c) The administrator of the Victims of Violent Crime Fund shall award the attorney who argued the claim for punitive damages a reasonable fee, not to exceed, in total, thirty-three percent of the award allocated to the Fund.

Commentary

The current Indiana statute does not mention compensating the successful attorney for arguing the case for punitive damages where a defendant's conduct has been especially deserving of punishment and deterrence.[326] Common sense would dictate that if attorneys do not consider the time and effort worthwhile, the time and effort will not be expended.[327] Cases will be examined based on the rate of return, and defendants in actions like the hypothetical at the beginning of this Note[328] will go unpunished. Because no right to an award of punitive damages exists, states may eliminate their recovery.[329] Indiana could have legislatively determined to eliminate punitive damages, but instead decided to retain such damages to punish and deter egregious behavior.

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326. *See supra* notes 234-35 and accompanying text.
327. *See supra* notes 305-08 and accompanying text.
328. *See supra* note 1 and accompanying text.
329. *See supra* notes 241-45 and accompanying text.

The first proposed statute allows the judge a vast amount of discretion to determine where the award goes, and how much to compensate the attorney arguing the case. In some ways, it resembles the Illinois statute,[330] which allows the judge to award as much or as little of the punitive damage award to the plaintiff and gives the judge discretion on how the plaintiff's attorney shall be compensated. However, such a statute does not clearly establish, for purposes of planning litigation, what type of fee an attorney will take from any given case, unless the case involves tortious behavior directed specifically at the plaintiff.[331]

The second proposed statute resembles Indiana House and Senate bills that were not enacted in favor of the current statute.[332] In this proposal, the state fund is required to reimburse the attorney for arguing the case. Like any client, the state may not be merely a passive beneficiary. The attorney's services would not be taken by the state without just compensation, and the attorney would be able to structure a fee agreement with the plaintiffs in reliance upon a potential recovery from the amount paid to the state.

B. The State's Interest

Proposal

> *(a) The state's interest in a punitive damage award as determined in sections (a) and (b) shall vest at the time of the verdict.*
>
> *(b) Any settlements between the defendant and the plaintiff after the determination of a verdict imposing punitive damages shall be subject to the trial court's determination of the state's interest in the award.*
>
> *(c) The state shall not participate in any action under this section at any time to recover its share of a judgment of punitive damages.*

Commentary

The other concern of this Note is the state's interest in the award before the judgment is satisfied. The proposal makes clear to litigants what will happen should they try to settle after a verdict is rendered, but before the judgment is satisfied. At the point a verdict is handed down, litigants should not be able to try to escape payment of a portion of the award to the state.[333] Ample

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330. 735 ILL. COMP. STAT. ANN. 5/2-1207 (West Supp. 1996).

331. In which case, the award would resemble Iowa's statute. *See* IOWA CODE ANN. § 668A.1 (2)(b) (West 1987).

332. *See supra* note 235.

333. *See supra* notes 185-91 and accompanying text.

opportunities for settlement arise before trial, and the proposed amendment encourages those settlements to occur before trial. Plaintiffs with legitimate punitive damage claims will be able to collect those damages without awarding a portion to the state, and plaintiffs' attorneys will be more likely to take settlement offers seriously.[334] In addition, the proposal makes it clear that the state is not to intervene in an action involving punitive damages, even on appeal.[335]

VII. CONCLUSION

Regardless of the accuracy of claims of a nationwide "litigation explosion" or "tort crisis," legitimate concerns about awarding quasi-criminal damages to the plaintiff in a civil action rather than the state will lead other states to reform their tort liability systems to award punitive damages to the state. If punitive damages are meant to punish reprehensible conduct and deter its occurrence in the future, reformers will continue to argue that the same result will follow awarding those damages to the state. After all, the consensus is that punitive damages are not meant as compensation for the plaintiff, and the defendant paying damages is not concerned with who gets paid.

But, because some reprehensible conduct cannot be punished if plaintiffs do not bring claims, the tort liability system should not discourage its "private attorneys general" from bringing legitimate claims. Unfortunately, as this Note suggests, the Indiana tort reforms in 1995 have the effect of stifling legitimate claims by effectively limiting the amount of return an attorney can realize in a case involving punitive damages. Further, the Indiana split recovery statute does so in an ambiguous manner that necessitates further legislative action or judicial interpretation. This Note proposes changes in the Indiana split recovery statute that draws upon the experiences of other states that have enacted such statutes. Punitive damages exist to discourage reprehensible conduct; limitations on punitive damages should not serve to encourage reprehensible conduct.

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334. *See* Breslo, *supra* note 47, at 1152.
335. *See supra* note 318.