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Cynthia R. Mabry

*Washington & Lee University School of Law*

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# Warning! The Manufacturer of This Product May Have Engaged in Cover-Ups, Lies, and Concealment: Making the Case for Limitless Punitive Awards in Product Liability Lawsuits<sup>†</sup>

CYNTHIA R. MABRY\*

## I. INTRODUCTION

Punitive damages, also called exemplary or vindictive damages,<sup>1</sup> are “assessed in addition to compensatory damages [to] . . . punish[] the defendant for aggravated or outrageous misconduct and to deter the defendant and others from similar conduct in the future. [This] . . . is an exception to the general rule that damages are aimed at compensating the victim for his injuries.”<sup>2</sup>

Exemplary awards serve other purposes too. For example, extravagant litigation costs and inconveniences associated with the litigation process discourage some injured consumers and users from seeking redress against manufacturers.<sup>3</sup> In comparison to those reluctant individuals, other more aggressive consumers seek their own personal revenge against companies. The possibility of recovering a vindictive award encourages claimants—reluctant and aggressive ones—to pursue legal causes of action against manufacturers.<sup>4</sup> More important, punishing

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\* Visiting Professor, Washington & Lee University School of Law, Spring 1997; Associate Professor of Law, West Virginia University College of Law; J.D., 1983, Howard University School of Law; LL.M., 1996, New York University School of Law. I am very grateful to Dean Barry Sullivan, Washington & Lee University School of Law, Professor Joyce McConnell, West Virginia University College of Law, and Professor Doug Rendleman, Washington & Lee University School of Law, for their comments and suggestions on earlier drafts.

1. *See* Davis v. Celotex Corp., 420 S.E.2d 557, 559 (W. Va. 1992) (quoting Mayer v. Frobe, 22 S.E. 58 (W. Va. 1895)).

2. Masaki v. General Motors Corp., 780 P.2d 566, 570 (Haw. 1989); *accord* Champagne v. Raybestos-Manhattan, Inc., 562 A.2d 1100, 1113 (Conn. 1989) (punitive damages have the “flavor of punishment”); *see* Boddie v. Litton Unit Handling Sys., 455 N.E.2d 142, 152 (Ill. App. Ct. 1983); Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854, 865 (Iowa 1994); Herman v. Sunshine Chem. Specialties, 627 A.2d 1081, 1085 (N.J. 1993); Fischer v. Johns-Manville Corp., 512 A.2d 466, 473-74 (N.J. 1986); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 9-12 (5th ed. 1984); Joyce E. McConnell, *For Women’s Health: Uncoupling Health Care Reform from Tort Reform, in* MAN-MADE MEDICINE 99, 114-15 (Kary L. Moss ed., 1996); David Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 7-8 (1982). *But see* KENNETH H. YORK ET AL., REMEDIES 129 (5th ed. 1992) (noting that there is a lack of proof that the deterrence objective is actually effective).

3. *See, e.g.*, Wangen v. Ford Motor Co., 294 N.W.2d 437, 454 (Wis. 1980).

4. *See id.*; *see also* Green Oil Co. v. Hornsby, 539 So. 2d 218, 223 (Ala. 1989); Tuttle v. Raymond, 494 A.2d 1353, 1358 (Me. 1985) (holding that “[t]he potential for recovering an exemplary award provides an incentive for private civil enforcement of society’s rules against

outrageous conduct promotes public safety by giving manufacturers the incentive to scrutinize their own plant operations more closely.<sup>5</sup> To summarize, “[p]unitive damages . . . remain[] the most effective remedy for consumer protection against defectively designed mass-produced articles.”<sup>6</sup>

In America, ever since punitive damages were assessed for the first time in 1784, there has been an outcry against these awards.<sup>7</sup> Today, product manufacturers are among those lobbying for abolishment of exemplary awards. Of course, their special interest is narrowly focused on curtailment of punitive damages in product liability cases. This Article emphasizes the persistent need for assessment of punitive damages in product liability lawsuits, especially when a manufacturer conceals information about the dangerousness of its product knowing that the product causes personal injuries and deaths. The first, second, and third Parts of the Article focus on the pros and cons of punitive awards from consumer and manufacturer points of view. Some of the manufacturers’ contentions are weightier than others so they are given more attention. However, the majority of the courts, including the United States Supreme Court, as demonstrated in a 1996 opinion, have not been persuaded by manufacturers’ constant arguments against punitive awards.

The fourth Part of this Article presents a sampling of the more egregious and notorious cover-ups in which manufacturers have engaged. Some high-profile cover-ups involve businesspeople and attorneys who actively conspire to conceal known hazards associated with certain products. This kind of conduct, and the lack of adequate administrative and criminal penalties as alternatives, illustrate why punitive damages remain essential to fulfilling goals of the tort compensation system. Finally, in fairness to manufacturers, methods of limiting punitive awards and protecting manufacturers are offered in the fifth and sixth Parts of the Article. Despite manufacturers’ continuous lobbying for new tort reform, there are enough

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serious misconduct”); *Owens-Corning Fiberglas Corp. v. Wasiak*, 917 S.W.2d 883, 891 (Tex. App. 1996, writ granted); *YORK ET AL.*, *supra* note 2, at 128 (noting that punitive damages give consumers the incentive to litigate).

5. See *Froud v. Celotex Corp.*, 437 N.E.2d 910, 913 (Ill. App. Ct. 1982), *rev’d on other grounds*, 456 N.E.2d 131 (Ill. 1983); *Wangen*, 294 N.W.2d at 452-53; *McConnell*, *supra* note 2, at 116 (arguing that the threat of punitive damages causes corporations to respond).

6. *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 383 (1981).

7. As is the case with many American laws, the punitive damages concept originated in England. See *Huckle v. Money*, 95 Eng. Rep. 768, 769 (K.B. 1763). That was in 1763. Twenty-one years later, in 1784, the first American court awarded punitive damages in a South Carolina case. See *Genay v. Norris*, 1 S.C.L. (1 Bay) 6 (1784) (punishing a doctor for a practical joke—adding Spanish fly to the plaintiff’s wine). *Fleet & Semple v. Hollenkemp*, 52 Ky., (13 B. Mon.) 175 219 (1852), was the first product liability case in which punitive damages were awarded. For more historical information about the origin of punitive damages, see David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1262-64 & nn.17-23 (1976). However, the first punitive award in a product liability case was not documented until 1852. See *Judith C. Glasscock, Emptying the Deep Pocket in Mass Tort Litigation*, 18 ST. MARY’S L.J. 977, 980, 986 (1987) (indicating that the term “exemplary awards” was applied for the first time ever in 1763 and in the first product liability case in 1852).

safeguards already in place to shield manufacturers, when it is appropriate, from huge and unjust awards.

## II. MANUFACTURERS AND CONSUMERS DISAGREE ON THE NECESSITY OF PUNITIVE DAMAGES

For as long as punitive damages have been available, there has been a vigorous debate about whether they should be awarded. Most recently, the efficacy of punitive awards has pitted the President of the United States against the House of Representatives.<sup>8</sup> This section examines arguments for and against these awards. Some arguments are examined in depth while others are summarized.

### *A. Punitive Awards Constitute a Windfall to Plaintiffs*

The gist of the hue and cry against punitive damages is that compensatory damages fully compensate plaintiffs for their injuries. Thus, punitive damages bestow an unfair windfall on claimants.<sup>9</sup> Some exemplary awards do far exceed the plaintiff's actual damages. In *TXO Production Corp. v. Alliance Resources Corp.*,<sup>10</sup> a slander-of-title case, the United States Supreme Court upheld a jury verdict of \$10 million in punitive damages—526 times the actual loss the plaintiff had incurred.<sup>11</sup> Sometimes, the ratio of punitive damages to compensatory damages is markedly disproportionate in product liability cases too. For instance,

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8. See 142 CONG. REC. H4425-26 (daily ed. May 6, 1996) (statement of President Clinton accompanying his veto of the proposed bill for establishing uniform product liability laws).

9. See *Froud*, 437 N.E.2d at 915 (Sullivan, J., concurring); *Fibreboard Corp. v. Pool*, 813 S.W.2d 658, 687 (Tex. App. 1991, writ denied); *Wangen*, 294 N.W.2d at 454; cf. *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 899 (N.D. Cal. 1981) (agreeing that punitive damages do represent a windfall for fully compensated plaintiffs), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982). For a more detailed list of arguments for and against punitive damages, see YORK ET AL, *supra* note 2, at 127-28.

10. 509 U.S. 443 (1993).

11. See *id.* at 462; *accord* *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991) (holding that an award of four times the compensatory award "did not cross the line into the area of constitutional impropriety"); see also *Dunn v. HOVIC*, 1 F.3d 1371, 1383 (3d Cir.) (declaring that multimillion dollar awards were not unique in products liability cases), *modified*, 13 F.3d 58 (3d Cir. 1993); Linda S. Mullenix, *Questions Linger on Punitives and Evidence*, NAT'L L.J., Aug. 23, 1993, at S4 (calling *TXO* a great decision for plaintiffs).

Other courts have recorded and upheld equally disparate verdicts. See, e.g., *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) (awarding \$6 million punitive damages and \$51,146 compensatory damages); *Edwards v. Armstrong World Indus., Inc.*, 911 F.2d 1151, 1153-55 (5th Cir. 1990) (affirming punitive award that was almost seven times the amount of the compensatory award); *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 198 (Colo. 1984) (awarding \$6.2 million punitive damages and \$600,000 compensatory damages); *Tetuan v. A.H. Robins Co.*, 738 P.2d 1210, 1215, 1239-40 (Kan. 1987) (awarding \$1.7 million compensatory damages and \$7.5 million for punitive damages).

Some awards have been less disparate. See, e.g., *Davis v. Celotex Corp.*, 420 S.E.2d 557, 559 (W. Va. 1992) (comparing \$40,000 punitive damage award to \$66,000 compensatory award).

a 1989 district court case survey revealed that in Pennsylvania approved ratios of punitive awards were as high as eleven times the compensatory award.<sup>12</sup>

Still, in light of current statistics, this windfall argument may be one of the manufacturers' weakest contentions. Three contemporary trends weaken this assertion: decreasing frequency and size of awards, mandatory caps, and procedures for diminishing the amount of money plaintiffs receive. Nowadays, punitive damages rarely are awarded.<sup>13</sup> Also, the median for exemplary awards in product liability cases has declined. In one short span of time, the average exemplary award decreased from \$500,000 in 1993 to \$260,000 in 1995.<sup>14</sup> Furthermore, to avoid excessive overpayment, statutory caps limit punitive damages to an amount that is commensurate with the compensatory damages awarded. Usually, the cap is two or three times the amount awarded for the plaintiff's actual losses.<sup>15</sup> Moreover, in some states, a percentage of the amount awarded is distributed to a designated state or agency fund.<sup>16</sup>

In May, 1996, the United States Supreme Court announced another way to reduce the risk of windfalls to claimants. It reviewed a case and offered more helpful, but incomplete, instruction on evaluating punitive damage awards. The dispute in *BMW of North America, Inc. v. Gore*,<sup>17</sup> arose out of a car sale. In 1990, Dr. Ira Gore, Jr., purchased a \$40,750.88 BMW 535i—a luxury sports car imported from Germany. After Gore drove the BMW for nine months, an independent detailer informed him that the car had been repainted. Gore sued BMW of North America, Inc. ("BMW"), the Alabama dealership from which he

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12. See *Friedman v. F.E. Myers Co.*, 710 F. Supp. 118, 124 (E.D. Pa. 1989). *But see* *Cash v. Beltmann N. Am. Co.*, 900 F.2d 109, 111 n.3 (7th Cir. 1990) (finding that the ratio of punitive damages to the manufacturer's net worth was approximately one percent); Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 50-51 (1992) (finding that most punitive awards are commensurate with compensatory awards).

13. See Rustad, *supra* note 12, at 36-45 (finding that "punitive damages are rarely awarded"); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System, And Why Not?*, 140 U. PA. L. REV. 1147, 1254-59 (1992).

14. See Henry J. Reske, *Tort Awards Increasing*, A.B.A. J., May 1996, at 26, 26 (indicating the average exemplary award); accord Saks, *supra* note 13, at 1258-59; see also AMERICAN LAW INST., ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 233-35 (1991) [hereinafter ENTERPRISE RESPONSIBILITY] (citing studies that show the assumption regarding frequent and severe punitive damages is not supported by actual statistics); Rustad, *supra* note 12, at 45-49 (reporting results of an empirical study which indicated that when inflation was considered, "there has been virtually no change in the size of verdicts").

15. See, e.g., CONN. GEN. STAT. ANN. § 52-240b (West 1996) (limiting award to twice the amount of compensatory awards); FLA. STAT. ANN. § 768.73(1)(a) (West 1996) (limiting the award to three times actual damages); OKLA. STAT. ANN. tit. 23, § 9.1(B) (West 1996) (limiting punitive damages to \$100,000 or the value of actual damages awarded); cf. GA. CODE ANN. § 51-12-5.1(f) (1996) (declaring that no limit will be placed on exemplary awards in product liability cases involving intentional harm).

16. See, e.g., UTAH CODE ANN. § 78-18-1(3) (1996) (allocating half the amount that exceeds \$20,000 to the state treasury).

17. 116 S. Ct. 1589 (1996).

had purchased the car, and the German manufacturer. He alleged fraud and demanded compensatory and punitive damages.<sup>18</sup>

Gore discovered that BMW adopted a nationwide policy affecting new cars that were damaged in transit before they were delivered to a dealer. Under the policy, cars that needed repairs exceeding three percent of their suggested retail price were placed in company service and sold as used cars. Cars with repairs that did not exceed three percent of the retail price were restored and sold as new vehicles. Typically, refinishing costs exceeded three hundred dollars per automobile.<sup>19</sup> BMW did not apprise dealers of this policy. Therefore, individual BMW buyers were not informed either.<sup>20</sup>

BMW's estimated \$601.37 cost for repainting Gore's car was only one-and-one-half percent of the manufacturer's suggested retail price. Thus, in accordance with its seven-year-old policy, BMW did not inform the Birmingham dealer that acid rain had damaged Gore's automobile while it was en route from Germany. With the help of a former BMW dealer, Gore estimated that refinished cars depreciated by ten percent before they were sold. Accordingly, Gore claimed that he was entitled to \$4,000 in compensatory damages—ten percent of the \$40,000 purchase price of his car.<sup>21</sup>

In addition, Gore sought punitive damages. He discovered that in a ten-year period, BMW had sold nearly 1000 new cars without revealing that repairs had been made. Fourteen repainted BMWs, including Gore's vehicle, had been sold in Alabama.<sup>22</sup> Based upon those national sales, Gore requested punitive damages that manifested the magnitude and reprehensibility of BMW's fraud on its customers. Gore contended that since BMW had accumulated a \$4 million profit from its fraud, that profit should be a factor in calculating BMW's fine. Otherwise, BMW would not be motivated to change its disclosure policy.<sup>23</sup> So, Gore decided that \$4 million would be an appropriate punitive award.<sup>24</sup>

At the trial, BMW based its defense on four arguments.<sup>25</sup> It denied a legal obligation to disclose minor repairs. It contended that Gore's car was as good as one that was delivered with original factory paint. It argued that a punitive award would be inappropriate because BMW had a good faith belief that repainting did not decrease the value of Gore's BMW. Finally, BMW asserted that sales practices which it exercised in other jurisdictions were legal and punishment for conduct outside of Alabama violated the United States Constitution.<sup>26</sup>

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18. *See id.* at 1593.

19. *See id.*

20. *See id.*

21. *See id.* & n.1.

22. *See id.* at 1593.

23. *See* Brief for Respondent at 7, 16-17, *Gore* (No. 94-896).

24. *See Gore*, 116 S. Ct. at 1593.

25. *See id.*

26. *See id.*; Brief for Petitioner at 13-26, *Gore* (No. 94-896). Despite those arguments at trial, before the judgment was entered, BMW modified its policy and stopped selling refinished BMWs in Alabama and two other states. Five days after the *Gore* verdict, it adopted a nationwide policy of full disclosure regarding repairs. *Gore*, 116 S. Ct. at 1594, 1601 & n.31.

Apparently, Gore's attorney's closing argument at trial was very persuasive. Counsel argued:

"They've taken advantage of nine hundred other people on those cars that were

At the end of the trial, the jury rendered a verdict in Gore's favor. It decided that BMW, the German manufacturer, and the Birmingham dealership were liable to Gore for \$4000 in compensatory damages. Additionally, it found that BMW's repair policy constituted "gross, oppressive or malicious" fraud. Consequently, BMW and the German manufacturer were liable for punitive damages of \$4 million.<sup>27</sup> The trial court denied BMW's posttrial motion to vacate the punitive damages verdict because it did not deem that award excessive.<sup>28</sup>

When the lower court's decision was published, one medical supply company official described the large punitive award as "a paint job that lead to a snow job on American justice."<sup>29</sup> The verdict set off a string of appeals through state and federal court systems. The Alabama Supreme Court affirmed all aspects of the lower court's decision except one. It held that the jury erroneously calculated exemplary damages by multiplying Gore's compensatory damages times the number of refinished car sales in other jurisdictions. Instead, the court held that only cars sold in Alabama should have been variables in the equation.<sup>30</sup> Therefore, the court reduced the punitive award to \$2 million—an amount that was "constitutionally reasonable."<sup>31</sup>

When BMW appealed to the United States Supreme Court, the Court granted certiorari "to illuminate 'the character of the standard that will identify constitutionally excessive awards' of punitive damages."<sup>32</sup> In 1993, the Court already had ruled in *TXO* that the Due Process Clause of the Fourteenth Amendment places substantive limits on the size of punitive awards.<sup>33</sup> Two years earlier, the Court had ruled that using the common law method to assess reasonable punitive damages was not a violation of the Due Process Clause when the jury received adequate guidance in assessing those awards.<sup>34</sup> In *Gore*, the narrower issue before the Court was "whether a \$2 million punitive damages

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worth more. . . . [T]hey have profited some four million dollars on those automobiles. Four million dollars in profits that they have made that were wrongfully taken from people. That's wrong, ladies and gentlemen. . . . You ought to do something about it. . . . I ask you to return a verdict of four million dollars in this case to stop it."

*BMW of N. Am., Inc. v. Gore*, 646 So. 2d 619, 627 (Ala. 1994) (first two omissions in original; third omission added) (alteration in original) (quoting Gore's attorney's closing argument at trial).

27. See *Gore*, 116 S. Ct. at 1593-94. The dealership did not file an appeal. The Alabama Supreme Court ruled that the trial court did not have jurisdiction over the German manufacturer, so it reversed the lower court's judgment against that defendant. See *id.* at 1594 n.6.

28. See *id.* at 1594.

29. 142 CONG. REC. E681-82 (daily ed. May 1, 1996) (testimony of Lewis Fuller, President of the Fuller Medical Company in Alabama).

30. See *Gore*, 646 So. 2d at 625-28 (citing *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21-22 (1991) and *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 223-24 (Ala. 1989)).

31. *Id.* at 629.

32. *Gore*, 116 S. Ct. at 1595 (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 420 (1994)).

33. See *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 454-55 (1993).

34. See *Haslip*, 499 U.S. at 11, 18.

award to the purchaser of [a refinished BMW] exceed[ed] the constitutional limit."<sup>35</sup>

In its 5-4 opinion,<sup>36</sup> the Court reaffirmed previous decisions that acknowledged the states' province to impose punitive damages when it furthered legitimate interests in "punishing unlawful conduct and deterring its repetition."<sup>37</sup> In doing so, the Court also recognized that the appropriate method of measuring punitive damages is within state lawmakers' expertise. Consistent with those principles, the Court ruled that jurors must be instructed to award damages that are reasonably necessary to protect a particular state's interests.<sup>38</sup> Therefore, the *Gore* Court declared that the first part of the analysis regarding excessiveness is to identify the state's interests in punishing a manufacturer for engaging in certain activity. Analogously, the Court decided that the State of Alabama, and all other states, had an interest in protecting their citizens from deceptive trade practices and in requiring the disclosure of repairs.<sup>39</sup>

On the other hand, the Court held that under state sovereignty principles, states "may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States."<sup>40</sup> This means that although Alabama could promulgate and enforce its own disclosure laws, it lacked authority to punish BMW for conduct that occurred outside the territorial boundaries of that state and conduct that otherwise had no impact on Alabama or Alabamians.<sup>41</sup> Consequently, the Court affirmed the Alabama Supreme Court's

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35. *Gore*, 116 S. Ct. at 1593.

36. Justice Stevens wrote the opinion. Justices O'Connor, Souter, and Breyer joined him in a separate concurring opinion. *See id.* at 1604 (Breyer, J., concurring).

37. *Id.* at 1595.

38. *See id.*

39. *See id.* at 1595-96. The Court noted, however, that states have not uniformly provided that protection. Although most states require disclosure, there is a wide disparity in the costs of repair that trigger disclosure. *See id.* at 1596 & n.13 (citing statutes providing "a patchwork of rules"); *see, e.g.*, ARIZ. REV. STAT. ANN. § 28-1304.03 (West 1996) (requiring disclosure of repairs costing more than three percent of the suggested retail price); CAL. VEH. CODE §§ 9990, 9991 (West 1996) (requiring disclosure when repairs exceed three percent or \$500, whichever is greater); IND. CODE ANN. § 9-23-4-4 to -5 (West 1996) (requiring disclosure of repairs costing four percent of the suggested retail price); IOWA CODE ANN. § 321.69 (West 1996) (mandating disclosure of repairs costing \$3000 or more); LA. REV. STAT. ANN. § 32:1260 (West 1996) (requiring disclosure when repair costs exceeded six percent); VA. CODE ANN. § 46.2-1571(D) (Michie 1996) (disclosing costs over three percent of the suggested retail price).

40. *Gore*, 116 S. Ct. at 1597; *see also* *Pennoyer v. Neff*, 95 U.S. 714, 720 (1877) (limiting the power of state courts to exercise jurisdiction over defendants who are not within the state's territorial boundaries); *Geressy v. Digital Equip. Corp.*, 950 F. Supp. 519, 520 (E.D.N.Y. 1997) (describing this theory as "an additional independent limitation on punitive damage awards flow[ing] from a principle of our federal system that state legislation, state policy, and judicial development of state law can only be directed at activities within the state").

41. *See Gore*, 116 S. Ct. at 1597-98. Neither could Alabama legislators attempt to deter conduct that was legal in other jurisdictions. *See id.*



decision that the punitive award should reflect the interests of "Alabama consumers, rather than those of the entire Nation."<sup>42</sup>

After deciding that the State of Alabama held a legitimate interest in the dispute,<sup>43</sup> the *Gore* Court announced the second phase of the excessiveness inquiry. It set forth three "guideposts" for ascertaining whether the size of a punitive award is appropriate: 1) the degree of reprehensibility of the defendant's act, 2) the disparity between the harm or potential harm which the plaintiff suffers and the punitive award, and 3) the ratio between the punitive award and other penalties permitted for comparable misconduct.<sup>44</sup> These criteria were very similar to factors that the Alabama state court had announced in *Green Oil Co. v. Hornsby*<sup>45</sup> in 1989. The Supreme Court had relied upon similar factors in *TXO*,<sup>46</sup> *Pacific Mutual Life Insurance Co. v. Haslip*,<sup>47</sup> and *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*,<sup>48</sup> too. The *Gore* Court explained each prong of the test in detail.

### 1. Degree of Reprehensibility

The Court labeled the degree of reprehensibility as the "most important indicium of the reasonableness of a punitive damages award . . . [because] some wrongs are more blameworthy than others."<sup>49</sup> To illustrate, the Court described specific conduct that it considered reprehensible enough to merit punishment. Intentional malice, trickery, deceit, and disregard for others' health and safety depict more serious and culpable misconduct than mere negligence.<sup>50</sup> Likewise, repetitive acts of prohibited conduct that the defendant knows or suspects is unlawful "would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law."<sup>51</sup> Moreover, intentional economic injury effected by "affirmative acts of misconduct, or . . . target[ing] financially vulnerable [victims], can warrant a substantial penalty."<sup>52</sup>

42. *Id.* at 1598. On the other hand, the manufacturer's out-of-state conduct may be relevant to ascertain the defendant's level of reprehensibility. *See id.* at 1598 n.21.

43. *See id.* at 1598. A state must give fair notice of conduct that will draw punishment and the severity of the penalty that will be imposed. *See id.*

44. *See id.* at 1598-99; see also David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 387 (1994) (calling the "flagrancy of the misconduct . . . the primary consideration").

45. 539 So. 2d 218, 223-24 (Ala. 1989).

46. *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 462 (1993).

47. 499 U.S. 1, 21-22 (1991).

48. 492 U.S. 257, 301 (1989).

49. *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1593, 1599 (1996).

50. *See id.* (citing *TXO*, 509 U.S. at 453, 462, 468); accord *Sears, Roebuck & Co. v. Harris*, 630 So. 2d 1018, 1034-35 (Ala. 1993) (finding reprehensible the refusal of a company to alter a product in light of the knowledge that consumers were not correctly installing the product, and as a result were dying or suffering serious injuries).

51. *Gore*, 116 S. Ct. at 1599 (citing *TXO*, 509 U.S. at 462 n.28).

52. *Id.* (citing *TXO*, 509 U.S. at 453).

Based upon its definition of reprehensibility, the *Gore* Court decided that BMW's conduct was not egregious enough to qualify as reprehensible.<sup>53</sup> BMW reasonably interpreted statutes requiring disclosure of material damage as a safe harbor.<sup>54</sup> Its failure to disclose was not bad faith. It had not perpetuated misconduct that had been adjudged illegal in other states. Furthermore, BMW had not deliberately made false statements, engaged in acts of affirmative misconduct, or concealed evidence of its misconduct.<sup>55</sup>

Nevertheless, the Court upheld the jury's determination that BMW had violated an Alabama statute by suppressing a material fact—that the car had been refinished.<sup>56</sup> The Alabama Deceptive Trade Practices Act provided that “[s]uppression of a material fact which the party is under an obligation to communicate constitutes fraud.”<sup>57</sup> Interpreting the statutory language, the Supreme Court concluded that although suppressing information was less blameworthy than deliberately making a false statement, it was “sufficiently reprehensible to give rise to tort liability.”<sup>58</sup> In spite of that finding, the Court decided that BMW's conduct did not merit a \$2 million punitive award.<sup>59</sup>

## 2. Reasonable Ratio Between Compensatory and Punitive Damages

The Court's ratio “guidepost” addresses opponents' concerns that exemplary awards may be unreasonable or excessive as compared to the actual harm the manufacturer inflicted.<sup>60</sup> To explain this guidepost, the Court quoted *TXO* which held that the proper inquiry is ““whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred.””<sup>61</sup>

Applying this second prong of the analysis to the exemplary award in the lower court and the actual loss that *Gore* incurred, the Court concluded that the Alabama court's reduced award was “breathtaking” and “dramatically greater” than the awards in *Haslip* and *TXO*.<sup>62</sup> In the Court's view, the \$2 million punitive award was 500 times the amount of actual harm that *Gore* sustained.<sup>63</sup> Thus, the Alabama jury's award “raise[d] a suspicious judicial eyebrow.”<sup>64</sup> The Court expounded on its ruling by stating that under other circumstances, a higher ratio

53. At the same time, the Court indicated that under other circumstances, economic harm also could warrant “a substantial penalty.” *Id.*

54. *See id.* at 1600-01.

55. *See id.* at 1601.

56. *See id.*

57. ALA. CODE § 6-5-102 (1993).

58. *Gore*, 116 S. Ct. at 1601.

59. *See id.*

60. *See id.*

61. *Id.* at 1602 (emphasis omitted) (quoting *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460 (1993) (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21 (1991))).

62. *See id.* at 1602-03.

63. *See id.* at 1603.

64. *Id.* (alteration added) (quoting *TXO*, 509 U.S. at 482 (O'Connor, J., dissenting)).

between a compensatory award and a punitive award could be upheld. Examples of situations which may justify a higher ratio include the following: 1) a defendant engaged in a "particularly egregious act," 2) the injury inflicted was not easily detectable, or 3) the monetary value of the noneconomic harm was difficult to measure.<sup>65</sup>

Yet, as it did in *Haslip* and *TXO*, the Court declined to announce one precise formula for calculating punitive damages in all cases. In explanation, the Court reiterated the position it took in *Haslip*: "We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that [a] general concern of reasonableness . . . properly enter[s] into the constitutional calculus."<sup>66</sup>

### 3. Sanctions for Comparable Misconduct

The third guidepost the Court pronounced was that the exemplary award should comport with civil or criminal penalties which could be assessed for comparable misconduct.<sup>67</sup> In making the comparison, courts should give deference to statutory sanctions regulating the forbidden conduct.<sup>68</sup> In relation to BMW's policy, the comparable state statute was the Alabama Deceptive Trade Practices Act. The maximum penalty for suppressing information was only \$2000 per violation.<sup>69</sup> Analogously, the *Gore* Court decided that the \$2 million sanction imposed on BMW was substantially greater than the fine that was permissible under the Alabama statute. In the Supreme Court's view, the punitive sanction imposed on BMW was "tantamount to a severe criminal penalty."<sup>70</sup> Moreover, the statutory language did not give BMW notice that it could be held liable for such a substantial sum.<sup>71</sup>

In summary, as a result of this three-pronged analysis, for the first time in the history of punitive damages in American courts, the Supreme Court declined to affirm a punitive award that bestowed a windfall on a plaintiff. The Court reasoned that "there is no basis for assuming that a more modest sanction would not have been sufficient to motivate full compliance with the disclosure requirement."<sup>72</sup> It decided that BMW's repainting policy was not sufficiently injurious to justify the stiff punishment BMW received.<sup>73</sup> Because the award

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65. *Id.* at 1602.

66. *Id.* at 1602-03 (omission and alterations in original) (quoting *TXO*, 509 U.S. at 458 (quoting *Haslip*, 499 U.S. at 18)).

67. *See id.* at 1603. *But see* Tuttle v. Raymond, 494 A.2d 1353, 1358 (Me. 1985) (finding punitive damages in civil actions can serve to augment criminal law).

68. *See Gore*, 116 S. Ct. at 1603 (citing *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989)).

69. *See* ALA. CODE § 8-19-11(b) (1993).

70. *Gore*, 116 S. Ct. at 1604.

71. *See id.*

72. *Id.* at 1603.

73. *See id.* at 1604.

“transcend[ed] the constitutional limit,” the Court reversed the judgment and remanded the matter for further proceedings.<sup>74</sup>

Justices Scalia, Thomas, Ginsburg, and Chief Justice Rehnquist dissented from the majority opinion which Justice Stevens had written.<sup>75</sup> The dissenters opined that the Court should not have intervened. Without addressing whether the punitive award against BMW was appropriate, the dissenters relied upon the traditional notion that controlling punitive damages is a matter that has always been reserved for state domain.<sup>76</sup>

On a few occasions, before *Gore* was decided, the Court refused to limit punitive damages according to a specific formula.<sup>77</sup> Consistent with the previous opinions, the *Gore* Court correctly declined to set forth a formula. It would be unfair to potential claimants and defendants if the Court dictated a mathematical

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74. *Id.* Upon remand, the Supreme Court of Alabama affirmed the denial of BMW's motion for a new trial if *Gore* agreed to a remittitur of damages to \$50,000. *See* BMW of N. Am., Inc. v. *Gore*, No. 1920324, 1997 WL 233910, at \*8 (Ala. May 9, 1997).

75. *See* 116 S. Ct. at 1610-14. Justices O'Connor, Kennedy, Souter, and Breyer joined Justice Stevens's opinion. *See id.* at 1592. Also, Justice Breyer wrote a separate concurring opinion that Justices O'Connor and Souter joined. *See id.* at 1604 (Breyer, J., concurring).

Justice Scalia wrote a dissenting opinion that Justice Thomas joined. *See id.* at 1610 (Scalia, J., dissenting). Finally, Justice Ginsburg wrote a separate dissenting opinion that Chief Justice Rehnquist joined. *See id.* at 1614 (Ginsburg, J., dissenting).

76. *See id.* at 1610-11, 1614-15. Attorneys also expressed their reactions to the majority decision. While critiquing the Supreme Court's opinion, Steve Bokas, general counsel for the United States Chamber of Commerce, proclaimed the opinion as “the victory business has been waiting for.” David G. Savage, *Justices Reject Size of Punitive Damage Verdict*, L.A. TIMES, May 21, 1996, at A1.

When the United States Supreme Court decision was rendered, Pam Liapakis was the president of the Association of Trial Lawyers of America. She did not share Bokas's sentiment. She pointed out that, painstakingly, the Court distinguished economic harm from personal injury. *See* Henry J. Reske, *Guidelines Instead of Bright Lines*, A.B.A. J., July 1996, at 36. “Manufacturers who think this will potentially limit exposures when knowingly marketing unsafe products that kill or injure can't get away with that.” *Id.* at 36; *see also* Victor Schwartz, *BMW v. Gore: What Does it Mean for the Future*, PRODUCT LIABILITY L. & STRATEGY, July 1996, at 1, 3 (calling the guidelines “a litigator's delight”).

Other critics agreed that the opinion would not affect litigants' abilities to collect punitive damages when there is an injury or death, but complained that the Court should have decided whether a ceiling should be placed on punitive damages. *See* Kevin Z. Smith, *Lawyers See Little Change After Court Ruling on Damages*, DOMINION POST (Morgantown, W. Va.), May 22, 1996, at 1A. The decision has not quelled the debate about how fair punitive awards should be assessed. *See also* Geressy v. Digital Equip. Corp., 950 F. Supp. 519, 521 (E.D.N.Y. 1997) (describing the three guideposts as “the touchstone in evaluating a punitive damage award under the Constitution”); Editorial, *A New Approach to Punitive Damages*, N.Y. TIMES, May 22, 1996, at A16 (declaring that the Court's three guideposts were “common-sense factors for state courts to weigh in order to keep awards from being arbitrary and overstepping constitutional bounds”); Linda Greenhouse, *For First Time, Justices Reject Punitive Award*, N.Y. TIMES, May 21, 1996, at A1 (indicating *Gore* “has become something of a poster child of the debate”); Barry Meier, *Companies Likely to Seek Federal Court Reviews*, N.Y. TIMES, May 21, 1996, at A19 (quoting defense and plaintiffs' lawyers who disagree on the impact of the decision).

77. *See, e.g.*, TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 458 (1993); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).

application of punitive damages. General mathematical calculations could not take into consideration how many claimants were injured, the extent of their injuries, how long the manufacturer knew about the hazard that its product caused, and particularities regarding how the manufacturer concealed defects and the personal harm its product caused. These are key factors in determining the size of punitive awards. "The wrongfulness of a defendant's conduct will normally be subject to varying assessments depending on the degree to which the dangers of its product were known at a particular time and the deliberateness of its conduct in declining to warn or even concealing dangers of which it was aware."<sup>78</sup>

Moreover, some manufacturers' conduct will be more egregious than others and the level of injury they cause will be more destructive than others. A mathematical formula could not acknowledge those disparate degrees of reprehensibility. It is impossible to develop a formula that would encompass the plethora of variations presented in all product liability disputes.

Each assessment of punitive damages must be based upon the factfinder's weighing of the totality of the circumstances. Therefore, a case-by-case analysis regarding the propriety of punitive damages is appropriate and a bright line formula or mathematical calculation is inappropriate. The trier of fact must determine whether each defendant's conduct justifies levying a punitive award.<sup>79</sup> Then, using the Supreme Court's recently announced guideposts, the trier of fact must award an amount that is sufficient to penalize the defendant and to deter other manufacturers from engaging in similar conduct, without exceeding constitutional limitations.

In *Gore*, the Supreme Court did not address all of the issues surrounding punitive damages. Admittedly, *Gore*, the Supreme Court's fourth decision on punitive damages in recent years, leaves a wide margin on the spectrum between acceptable awards and unacceptable awards. The Supreme Court still leaves it to the state courts and the state legislators to close that gap. Needless to say, litigants will continue to argue this issue in state and federal trial and appellate courts. On the other hand, the decision does provide much needed guidance for courts to ascertain whether a manufacturer's conduct merits punitive relief and whether a particular award is an excessive windfall.

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78. *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 281 (2d Cir. 1990); see also *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 442 (Wis. 1980); cf. Victor E. Schwartz & Mark A. Behrens, *Punitive Damages Reform—State Legislatures Can and Should Meet the Challenge Issued by the Supreme Court of the United States in Haslip*, 42 AM. U. L. REV. 1365 (1993) (suggesting reform for clearer laws on punitive awards because the purposes have become blurred and have resulted in skyrocketing awards); Sheila L. Birnbaum & Gary E. Crawford, *Justices May End Confusion on Punitives*, NAT'L L.J., Mar. 15, 1993, at 20 (discussing need for constitutional standards for evaluating punitive damage awards). See generally Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393 (1993) (indicating importance of punitive awards).

79. See *TXO*, 509 U.S. at 457 (imposing punitive damages "based on a host of facts and circumstances unique to the particular case"); see also *Simpson*, 901 F.2d at 280-81 (noting punitive damages are based on a number of varying assessments of defendant's conduct); *Wangen*, 294 N.W.2d at 457 (shaping the award to fit the case).

*B. As Punishment for Making One Defective Product,  
Manufacturers May Become Liable for Multiple Punitive  
Awards*

As a result of a few highly publicized cases, manufacturers, their lobbyists, and their defense counsel have banded together and protested against punitive awards. Usually, manufacturers and their representatives argue in a choral refrain that punitive damages should be excluded altogether in mass tort cases.<sup>80</sup> They contend that multiple awards threaten their companies' financial stability.<sup>81</sup>

The voices of this chorus began in 1967 when Judge Friendly of the Second Circuit Court of Appeals wrote the majority opinion in *Roginsky v. Richardson-Merrell, Inc.*<sup>82</sup> At trial, Roginsky was one of hundreds of plaintiffs who filed personal injury claims against Richardson-Merrell, Inc. ("RMI"). Each plaintiff submitted a demand for relief requesting punitive, as well as compensatory, damages. Like many others, Roginsky alleged that MER/29, a drug RMI manufactured, caused him to develop cataracts. He asserted that RMI acted with such negligence that its conduct constituted irresponsibility, justifying the imposition of punitive damages.<sup>83</sup> Apparently the jury agreed. It awarded Roginsky \$17,500 in compensatory damages and \$100,000 in punitive damages.<sup>84</sup>

Roginsky's victory celebration was short-lived. On appeal, Judge Friendly applied a "careful scrutiny" standard and concluded that there was insufficient proof that RMI had acted with reckless or wanton disregard for consumers' rights. Therefore, he reasoned, punitive damages were not warranted.<sup>85</sup> Judge Friendly concluded that although RMI had been careless on several occasions, it had conducted premarket tests to ensure MER/29's safety. He also noted that two RMI executives had enough faith in the drug to ingest it themselves. Moreover, Judge Friendly noted that RMI did not attempt to conceal the unhealthy side effects of taking MER/29 when that information became available.<sup>86</sup> In dicta, however, Judge Friendly expressed concern that there were serious consequences of awarding punitive damages in mass product liability cases. To the delight of manufacturers everywhere, Judge Friendly declared that he had "the gravest

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80. See *Champagne v. Raybestos-Manhattan, Inc.*, 562 A.2d 1100, 1126 (Conn. 1989) (noting the defendant's argument that punitive damages are "inappropriate in multi-plaintiff litigations"). See generally Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 FORDHAM L. REV. 37, 39 n.11 (1983) (identifying numerous cases against Johns-Manville Corporation where claimants were awarded over \$3 million in punitive damages).

81. See, e.g., *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 898 (N.D. Cal. 1981) (stating punitive damages have the potential to financially cripple defendants), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982); see also *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. 357, 388 (E.D. Pa. 1982) (offering evidence of over 9500 asbestos lawsuits).

82. 378 F.2d 832 (2d Cir. 1967).

83. See *id.* at 838.

84. See *id.* at 834.

85. See *id.* at 842-51.

86. See *id.*

difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation c[ould] be so administered as to avoid overkill."<sup>87</sup>

About thirty years after *Roginsky*, some advocates of *Roginsky* still contend that multiple punitive awards in mass tort cases do present a serious problem.<sup>88</sup> One court explained that "[t]he purpose of punitive damages is to sting, not kill, a defendant."<sup>89</sup> Another court decided that absent tort or constitutional law reform, "the time will arrive when [a corporation's] liability for punitive damages imperils its ability to pay compensatory claims and its corporate existence. Neither the company's innocent shareholders, employees and creditors, nor future . . . claimants will benefit from this death by attrition."<sup>90</sup>

Several manufacturers have been named in numerous individual lawsuits filed in different cities across the United States. For example, by 1987, more than 12,000 Dalkon Shield cases had been filed against A.H. Robins Co., Inc. ("Robins"). During a fifteen-year period, eleven punitive damage verdicts totaling \$17,327,005 were issued against Robins. At that time, the largest punitive award was \$7.5 million, and the smallest amount awarded was \$5.<sup>91</sup> Only sixty-one percent of the claims settled, leaving nearly 5000 claims for disposition through trial.

Similarly, many asbestos cases have been and continue to be filed against asbestos manufacturers.<sup>92</sup> In 1988, Celotex Corporation lamented that 65,000 asbestos cases were pending against it and that complainants were filing new

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87. *Id.* at 839. On the other hand, after he published this edict, Judge Friendly admitted that there was no basis for his prediction that New York courts would adopt a rule that would preclude punitive damages in mass tort cases. *See id.* at 840. Still, although dicta is not law, Judge Friendly's opinion has been cited by defense attorneys as well as judges. *See* *Champagne v. Raybestos-Manhattan, Inc.*, 562 A.2d 1100, 1126 (Conn. 1989) (noting that Judge Friendly's statements regarding punitive damages were dicta, not holding).

Perhaps defense counsel so often rely upon *Roginsky* because punitive damages were not allowed in that case. However, punitive damages were disallowed in *Roginsky* not because the court decided that punitive damages should not be permitted in mass tort litigation, but because the plaintiff failed to prove that punitive damages were warranted. *See Roginsky*, 378 F.2d at 844.

88. *See Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 865 (Iowa 1994).

89. *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 899 (N.D. Cal. 1981), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982).

90. *Edwards v. Armstrong World Indus., Inc.*, 911 F.2d 1151, 1155 (5th Cir. 1990).

91. *See Tetuan v. A.H. Robins Co.*, 738 P.2d 1210, 1243-44 (Kan. 1987). In 1987, only \$11 million of those damages had been paid. *See id.* at 1243; *see also* *Dunn v. HOVIC*, 1 F.3d 1371, 1388 (3d Cir.) (admitting plaintiffs do not receive all the money awarded), *modified*, 13 F.3d 58 (3d Cir. 1993).

92. *See Eagle-Picher Indus., Inc. v. Balbos*, 578 A.2d 228, 231 (Md. Ct. Spec. App. 1990) (facing "an apocalypse in the guise of asbestos cases"), *aff'd in part and rev'd in part*, 604 A.2d 445 (Md. 1992); *see also Delaware Jury Awards \$8.2 Million in Damages in 3 Mesothelioma Cases*, MEALEY'S LITIG. REP.: ASBESTOS, Mar. 21, 1997, at 24 (reporting the award of \$1.5 million to each of three plaintiffs); *Fifth Circuit OK's Streamlined Claims Process*, NAT'L L.J., Dec. 28, 1992, at 6, 6 (counting 18,000 claimants from an oil refinery explosion); *Owens Corning Hit With \$31 Million Punitive Verdict in Palm Beach*, MEALEY'S LITIG. REP.: ASBESTOS, Jan. 24, 1997, at 19.

cases at an alarming rate of 16,000 per month.<sup>93</sup> Two years later, approximately 90,000 asbestos cases were pending in federal and state courts.<sup>94</sup> Product manufacturers opine that the threat of exemplary awards in situations like those "create[] . . . a serious business risk."<sup>95</sup> They argue that without legislative intervention each individual plaintiff in mass product liability cases potentially could recover a substantial award and bankrupt the wealthiest companies.<sup>96</sup>

Some manufacturers really are groaning under the weight of bankrupting awards as unfavorable verdicts severely decrease their cash flow. Conceivably, one huge verdict could destroy a business.<sup>97</sup> However, proponents of punitive damages usually contend that the bankruptcy allegation is speculative and exaggerated.<sup>98</sup> In response, corporate representatives point to multiple awards that act as a catalyst to total depletion of corporate assets.<sup>99</sup> Corporate representatives argue that financial destruction is a present, rather than a speculative, reality.<sup>100</sup> Undaunted, proponents of punitive awards propose another remedy. They assert

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93. See *King v. Armstrong World Indus., Inc.*, 906 F.2d 1022, 1033 (5th Cir. 1990) (noting that Celotex had settled approximately 27,000 more cases for \$250 million which amounts to almost twice Celotex's reported net worth of \$149 million).

94. See *Dunn*, 1 F.3d at 1394 (Weis, J., dissenting); see also *In re Dow Corning Corp.*, 187 B.R. 919, 921-22 (E.D. Mich. 1995) (indicating that 19,000 individual suits had been filed against Dow Corning and that the number had risen from 50 to 19,000 in eight years), *rev'd*, 103 F.3d 129 (6th Cir. 1996); Jasmina A. Theodore, *Asbestos Litigants Required to File All Pleadings Electronically*, LITIG. NEWS, July 1996, at 2, 2 (counting between 4000 and 5000 asbestos cases in the maritime industry).

95. Susan J. Becker, *Attempted Cap on Punitive Damages Continues to Spark Debate*, LITIG. NEWS, May 1996, at 3, 6 (quoting attorney Susan Stevens Dunn).

96. See *Froud v. Celotex Corp.*, 437 N.E.2d 910, 913 (Ill. App. Ct. 1982), *rev'd on other grounds*, 456 N.E.2d 131 (Ill. 1983).

97. See 142 CONG. REC. H4756, H4760 (daily ed. May 9, 1996) (testimony of Congressman Meyers of Kansas supporting efforts to override the president's veto of the Common Sense Product Liability Legal Reform Act of 1996).

98. "[I]f serious societal difficulties do *in fact* arise, they can be addressed by less drastic means than a complete bar to the availability of punitive damages as a matter of law." *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 406 (5th Cir. 1986) (emphasis in original); *accord Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 477-78 (N.J. 1986); *State ex rel. Young v. Crookham*, 618 P.2d 1268, 1271 (Or. 1980) (showing that the projected destruction "did not come to pass"); *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 455 (Wis. 1980) (referring to an argument that bankruptcy was "more theoretical than real"); see *Brotherton v. Celotex Corp.*, 493 A.2d 1337, 1344 (N.J. Super. Ct. Law Div. 1985).

99. See *Man v. Raymark Indus.*, 728 F. Supp. 1461, 1467 (D. Haw. 1989) (rejecting bankruptcy argument); see also *Davis v. Celotex Corp.*, 420 S.E.2d 557, 564 (W. Va. 1992) (declining to address the argument that multiple damage awards are fundamentally unfair due to insufficiency of facts).

100. See *Froud*, 437 N.E.2d at 914-915 (Sullivan, J., concurring); see also *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 898 (N.D. Cal. 1981) (recognizing defendants' finances could be "severely damage[d]"), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982); *cf. id.* at 893 (stating that court's calendar would also be "bankrupt[ed]" by the number of cases).



that in the unlikely event of actual bankruptcy, the bankruptcy courts could design a payment plan for compensating injured plaintiffs as well as other creditors.<sup>101</sup>

Still, the fact that some companies have initiated bankruptcy proceedings cannot be ignored. After losing several asbestos lawsuits, and anticipating that it would be named in 32,000 more lawsuits, Johns-Manville Sales Corporation led the way by filing a bankruptcy petition on August 26, 1982.<sup>102</sup> A few years later, on August 21, 1985, Robins filed a petition to reorganize.<sup>103</sup> By 1991, an airplane manufacturing company and fourteen asbestos companies had filed bankruptcy petitions because of the mammoth number of claims that had been lodged against them.<sup>104</sup> Then, on May 15, 1995, Dow Corning Corporation followed the parade of companies into the bankruptcy court. Tens of thousands of silicone breast implant recipients had filed lawsuits against Dow Corning Corporation.<sup>105</sup>

It is important to note, however, that a company voluntarily seeks protection under Chapter 11.<sup>106</sup> Furthermore, Chapter 11 status does not mean that a company is insolvent or in dire financial straits.<sup>107</sup> Robins's postbankruptcy

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101. See *Man*, 728 F. Supp. at 1467; *Fischer*, 512 A.2d at 480 n.5 (suggesting that bankruptcy courts could reduce priority for payment of punitive awards); see also *YORK ET AL.*, *supra* note 2, at 136 (stating that "[p]unitive damages . . . should survive the defendant's bankruptcy"); *Owen*, *supra* note 7, at 1325 (advising curtailment of punitive damages "once the bankruptcy of the defendant manufacturer appears to be a real and imminent possibility").

102. See *In re Johns-Manville Corp.*, 26 B.R. 420, 422 (Bankr. S.D.N.Y. 1983); see also *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 862 (Iowa 1994). Johns-Manville emerged from Chapter 11 in 1988 and still had not paid any punitive damages. See *id.* at 862-63. In 1983, Johns-Manville had been named as a defendant in more than 11,000 cases. During reorganization efforts, new claims against Johns-Manville were stayed. See *id.*; *Fischer*, 512 A.2d at 477; see also Georgia Sargeant, *Third Time's The Charm? Manville Trust Restructured*, TRIAL, Nov. 1994, at 114 (reporting that court approved settlement of thousands of claims for company with \$1.8 billion to \$2.2 billion in assets).

103. See *In re A.H. Robins Co.*, 880 F.2d 694, 696 (4th Cir. 1989). At the time, 195,000 individual claims for personal injury had been filed against the corporation. See *id.* at 697; see also *In re A.H. Robins Co.*, 88 B.R. 742, 743 (E.D. Va. 1988). See generally Sharon Youdelman, Note, *Strategic Bankruptcies: Class Actions, Classification and the Dalkon Shield Cases*, 7 CARDOZO L. REV. 817, 827 (1986).

104. See Report of the Chief Justice of the United States and Members of the Judicial Conference of the United States (Mar. 1991), reprinted in ASBESTOS LITIG. REP., Mar. 14, 1991, at 22,705; Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL'Y 541, 555 (1992); see also 142 CONG. REC. S2341-43 (daily ed. Mar. 20, 1996) (statement of Senator Gorton arguing that Piper Aircraft Co. had gone bankrupt because of the high number of lawsuits claiming negligence).

105. See, e.g., *Lindsey v. O'Brien (In re Dow Corning Corp.)*, 86 F.3d 482, 486 (6th Cir. 1996); *In re Dow Corning Corp.*, 187 B.R. 919, 921-22 (E.D. Mich. 1995), *rev'd*, 103 F.3d 129 (6th Cir. 1996).

106. See 11 U.S.C. § 301 (1994).

107. See *Tetuan v. A.H. Robins Co.*, 738 P.2d 1210, 1244 (Kan. 1987) (doubting whether a company reorganizing under the protection of the bankruptcy court but continuing to reap millions of dollars in profit was insolvent); see also *In re Johns-Manville Corp.*, 36 B.R. 727, 732 (Bankr. S.D.N.Y. 1984); Youdelman, *supra* note 103, at 827 (arguing that Robins was attempting to force claimants to proceed through bankruptcy court in a de facto class action since the district court had refused to certify a class action on the punitive damages issue).

financial status supports this theory. Immediately after Robins filed its petition, it experienced phenomenal economic growth.<sup>108</sup>

In any event, the question remains, "How can a Fortune 500 company, making annual revenues of billions of dollars, be deterred from placing a dangerous product on the market[?]"<sup>109</sup> In some situations, one punitive damage award may be enough to encourage a manufacturer to design a safer product or to recall a defective one. In other cases, it may not. When manufacturers operate with an indifference toward human safety, for the protection of consumers and users, continued reliance upon punitive awards, even when prior awards have been assessed against the manufacturer, is required. Potential bankruptcy should not preclude a trier of fact from assessing punitive damages when a manufacturer intentionally endangers human lives. If punitive awards force such companies out of business, it is good riddance and the public would be much safer.

*C. Future Claimants' Ability to Collect Compensatory Awards May Be Jeopardized*

A more compelling argument which corporate defendants make against punitive damages is that excessive awards in multiple cases threaten a plaintiff's ability to collect any damages, compensatory or otherwise. Some plaintiffs may not recoup any compensation, corporate defendants contend, because prior punitive awards will have depleted the manufacturers' limited funds.<sup>110</sup> Factually, however, that argument is flawed. It is the manufacturer's burden to show that future plaintiffs would be unable to collect compensatory damages from its depleted coffers. Often, manufacturers have failed to demonstrate that they were unable to pay compensatory damages. Moreover, empirical studies show that most injured persons, about eighty-seven percent, do not file claims and that the remaining percentage of persons who do file are undercompensated.<sup>111</sup>

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108. See *Tetuan*, 738 P.2d at 1240 (reporting that in 1985, Robins's stock traded at \$23 per share, it had \$563,500,000 in net sales in 1983, and its worth in April, 1985 was \$584,798,000); accord *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 480 n.5 (N.J. 1986) (reducing priority of punitive damages claims in bankruptcy court); see also Youdelman, *supra* note 103, at 824 (accusing Robins of implementing a de facto class action by forcing claimants to pursue their claims through bankruptcy court).

109. 142 CONG. REC. H4758 (daily ed. May 9, 1996) (statement of Mr. Conyers, ranking member of the Committee on the Judiciary).

110. See, e.g., *Dunn v. HOVIC*, 1 F.3d 1371, 1393-96 (3d Cir.) (Weis, J., dissenting), modified, 13 F.3d 58 (3d Cir. 1993); *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 403 (5th Cir. 1986); *Leonen v. Johns-Manville Corp.*, 717 F. Supp. 272, 282 (D.N.J. 1989); *Fibreboard Corp. v. Pool*, 813 S.W.2d 658, 687 (Tex. App. 1991, writ denied). See generally Andrea G. Nadel, Annotation, *Propriety of Awarding Punitive Damages to Separate Plaintiffs Bringing Successive Actions Arising out of Common Incident or Circumstances Against Common Defendant or Defendants ("One Bite" or "First Comer" Doctrine)*, 11 A.L.R.4th 1261, 1262 (1982 & Supp. 1993).

111. See *Saks*, *supra* note 13, at 1184-85, 1287; cf. *Dunn*, 1 F.3d at 1389-90 (rejecting company's claim that funds were depleted); *Jackson*, 781 F.2d at 406-07. But see *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 893 (N.D. Cal. 1981) (stating court's concern that plaintiffs may be deprived of redress), vacated on other

*D. Lack of Insurance Makes Punitive Awards  
Unpredictable*

Manufacturers also complain that their inability to insure themselves against exemplary awards makes them more susceptible to financial destruction. This assertion is buttressed by the fact that public policy prohibits manufacturers from insuring themselves against liability for punitive damages arising out of their own intentional misconduct.<sup>112</sup> Judge Sullivan, in his concurring opinion, suggested that in light of the unavailability of insurance, the product liability concept should be reexamined to determine whether initial justifications for awarding punitive damages still exist. Alternatively, reformists should consider the feasibility of promulgating statutes to identify appropriate standards for punitive damages, limit awards, or require payment to a public fund.<sup>113</sup> Conversely, other advocates vehemently plead for continuance of the policy against insurance to ensure the public's protection from unscrupulous manufacturers:

[T]he precise magnitude of cost to the offending party is impossible to project. This uncertainty of cost will undoubtedly affect a manufacturer's decision to introduce a product in the marketplace. If punitive damages are predictably certain, they become just another item in the cost of doing business, much like other production costs, and thereby induce a reluctance on the part of the manufacturer to sacrifice profit by removing a correctible defect.<sup>114</sup>

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*grounds*, 693 F.2d 847 (9th Cir. 1982).

112. See *Froud v. Celotex Corp.*, 437 N.E.2d 910, 915 (Ill. App. Ct. 1982) (Sullivan, J., concurring), *rev'd on other grounds*, 456 N.E.2d 131 (Ill. 1983); *Owens-Corning Fiberglas Corp. v. Wasiak*, 917 S.W.2d 883, 891 (Tex. App. 1996, writ granted) (noting that liability insurance may be inadequate when the manufacturer sustains several large verdicts); see also *YORK ET AL.*, *supra* note 2, at 132 (indicating that insurance carriers do not always pay punitive damages); *Owen*, *supra* note 2, at 11 & n.57 (stating that most companies are insured); cf. *ENTERPRISE RESPONSIBILITY*, *supra* note 14, at 251-52 (indicating that insurance companies rarely assume responsibility for the type of misconduct that warrants punitive damages and suggesting that courts should not interfere with the manufacturer's right to contract with an insurance company); LINDA L. SCHLUETER & KENNETH R. REDDEN, *PUNITIVE DAMAGES* § 17.2(C), at 238-46 (3d ed. 1995) (finding that only a minority of jurisdictions prohibit insurance for punitive damages when intentional misconduct is not involved); *McConnell*, *supra* note 2, at 115 (stating that "liability insurers typically exclude punitive damages from coverage").

113. See *Froud*, 437 N.E.2d at 915-16 (Sullivan, J., concurring).

114. *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 218 (Colo. 1984); *accord* *Germanio v. Goodyear Tire & Rubber Co.*, 732 F. Supp. 1297, 1302-03 (D.N.J. 1990) (noting that the indeterminate nature of punitive damages promotes safety); see *Man v. Raymark Indus.*, 728 F. Supp. 1461, 1467 (D. Haw. 1989) (arguing that refusing to limit punitive damages protects the public from the "coldblooded calculation" to pay claims instead of correcting defects); *Neal v. Canadian Mines, Ltd.*, 548 F. Supp. 357, 378 (E.D. Pa. 1982) (arguing that punitive damages "provide a useful function in . . . deterring product suppliers from making economic decisions to not remedy the defects"); see also *Marcia Coyle, Punitives at Issue, Yet Again*, NAT'L L.J., Mar. 29, 1993, at 1 (reporting on the continuing debate about punitive damages).

*E. Punitive Awards Force Manufacturers to Increase the Price of Their Products*

Some manufacturers warn that their inability to insure themselves against liability for vindictive awards forces them, through price increases, to pass the cost of satisfying judgments to innocent consumers.<sup>115</sup> To stay afloat in the industry and to pay damages of unpredictable sums, manufacturers argue that increases in the cost of their products become necessary consequences. As a result, consumers ultimately pay more for products as companies struggle to absorb punitive awards and cover litigation expenses.<sup>116</sup>

Cost increases are likely in some instances. However, manufacturers will be unable to raise the price of their products beyond a certain amount because their charges must remain competitive with other manufacturers' figures. Already, American manufacturers concede that higher prices make American merchants less competitive with international traders.<sup>117</sup> Furthermore, at some level, cost increases may make the product too expensive for the targeted consumers to purchase. If the price of the product is higher than consumers are willing to pay, the manufacturers will lose business anyway.

*F. Cessation of Production Should Avert Punitive Awards*

In their battle against exemplary awards, manufacturers assert that the future deterrence objective becomes moot when a manufacturer discontinues its wrongful conduct or terminates sale of the defective product.<sup>118</sup> Courts do not agree that this attempt to mitigate losses, after massive destruction has been done, should shield manufacturers from punitive damages. The general rule is that,

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115. See *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 452 (Wis. 1980).

116. See 142 CONG. REC at E682 (daily ed. May 1, 1996) (testimony of Lewis Fuller, president of Fuller Medical Company).

117. See *id.* at H4757 (daily ed. May 9, 1996) (testimony of Congressman Hyde advocating passage of the Common Sense Product Liability Legal Reform Act of 1996 in spite of the president's veto). *But see* Rustad, *supra* note 12, at 21 (citing other reasons for American manufacturers' inability to compete).

118. See *Tetuan v. A.H. Robins Co.*, 738 P.2d 1210, 1246 (Kan. 1987). The Supreme Court of Kansas called the suggestion "truly remarkable" but found that punitive damages were appropriate under the circumstances because A.H. Robins did not recall its product or warn users and physicians until the Food and Drug Administration ordered it to take the device off the market. Then, the company continued to sell the remainder of the product to overseas customers. See *id.* at 1245-46; see also *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 899 (N.D. Cal. 1981) (holding that punitive damages in one action constitute a reasonable deterrent), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982); Barbara J. Feder, *Implant Industry Is Facing Cutback by Top Suppliers*, N.Y. TIMES, Apr. 25, 1994, at A1 (reporting on industry's threat to stop delivering valuable materials for heart valves because of fear of product liability cases); *cf.* Owen, *supra* note 2, at 13-14 (stating that manufacturers could be punished for defective products that were developed under less stringent standards).

[t]he element of deterrence is still present in an award of punitive damages and to suggest that maximum deterrence may have been attained in the past and that the particular corporate conduct meriting punitive damages may have been discontinued is no answer in every case where such damages are sought.<sup>119</sup>

If they were not caught, some manufacturers would continue to produce unsafe products without abatement. Even when the product that is the subject of litigation is no longer on the market, punitive damages are still necessary to punish companies that brazenly conceal their misconduct and lie to consumers about the safety of their product.<sup>120</sup> Moreover, the second purpose of punitive damages—detering *others* from engaging in the same or similar conduct—is still justification for assessing punitive damages after a product is recalled.<sup>121</sup>

*G. Attorneys and Courts Receive a Larger Share of  
Punitive Awards Than Plaintiffs Receive*

Another argument that manufacturers offer is that most of the money they pay in punitive damages usually goes to the victims' attorneys as compensation for legal services and to courts for administrative costs. Unfortunately, statistics support that proposition. One study shows that in the mid-1980s, for each dollar awarded, plaintiffs received forty-three cents while their attorneys received twenty cents for legal fees and costs. An additional eighteen cents was allocated to the defendant's fees and costs and twenty cents more were expended for other costs.<sup>122</sup> Former Senator Hyde of Illinois testified that plaintiffs "collect less than half of every dollar spent on the civil justice system."<sup>123</sup>

Unless a statute, court rule, or contract provides otherwise, litigants are responsible for payment of their own litigation expenses and attorneys' fees.<sup>124</sup> Generally, in personal injury cases, attorneys and their clients enter into a contingent-fee agreement in which the attorney will take some fraction, usually one-third, of the full amount that the client recovers. Absent some overreaching on the attorney's part or a determination that the fee is either unreasonable or

119. *Champagne v. Raybestos-Manhattan, Inc.*, 562 A.2d 1100, 1127 (Conn. 1989); *see also Woman Awarded \$16.5 Million in Accident Lawsuit*, WASH. POST, Apr. 24, 1997, at D6 (reporting on recent \$6.5 million punitive damage award).

120. *See Wammock v. Celotex Corp.*, 826 F.2d 990, 993 (11th Cir. 1987) (rejecting the manufacturer's argument that punitive damages as a specific deterrent are no longer necessary because the manufacturer no longer makes products containing asbestos).

121. *See Tetuan*, 738 P.2d at 1246 (noting A.H. Robins's less-than-commendable reaction prior to the imposition of punitive damage awards).

122. *See generally Saks*, *supra* note 13, at 1283 (concluding that lawyers and insurers are principal beneficiaries and that "[t]he injury victims themselves take a more modest slice").

123. 142 CONG. REC. H4756 (daily ed. May 9, 1996) (testimony of Senator Hyde). Now the Internal Revenue Service is claiming a piece of the pie too. *See O'Gilvie v. United States*, 117 S. Ct. 452, 454-58 (1996) (holding that punitive damages are taxable under 26 U.S.C. § 104(a)(2) (1988)).

124. *See YORK ET AL.*, *supra* note 2, at 136; *see, e.g.*, Civil Rights Act of 1964, 42 U.S.C. § 1988 (1994); FED. R. CIV. P. 11(c)(2), 16(f), 26(g)(3), 37(a)(4), 37(b), 37(c), 37(d), and 37(g).

excessive, fees should be awarded as the lawyer and the client agreed.<sup>125</sup> On the other hand, in some cases, class actions for example, courts have begun to reject bills for exorbitant attorney fees.<sup>126</sup>

*H. The Potential Liability for Punitive Awards Makes  
Manufacturers Leery of Creating New Products and Has  
Detrimental Effects on the Larger Community*

Some manufacturers also claim that the possibility of having to pay excessive punitive awards discourages them from creating new products or causes them to remove lifesaving products from the market.<sup>127</sup> “Businesses act defensively, avoid innovation as too risky, and devote enormous numbers of personnel and resources to litigation.”<sup>128</sup> They say that some of these products, like heart valves and other medical devices, are invaluable to the consumer. Moreover, when a product is removed from the market, it has a societal domino effect that begins with the manufacturer downsizing operations. Next, workers are laid off. Then, in the final stages, plants are shut down.<sup>129</sup>

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125. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106 (A)-(B) (1980) (requiring reasonable fees as determined by specified factors); ENTERPRISE RESPONSIBILITY, *supra* note 14, at 265 (indicating that attorneys receive one-third of the recovery).

126. See generally Office of Disciplinary Counsel v. Galinas, 666 N.E.2d 1083 (Ohio 1996) (suspending an attorney for attempting to collect excessive fees); White v. McBride, 937 S.W.2d 796, 800-01 (Tenn. 1996) (denying compensation based on an excessive contingent-fee agreement); Henry J. Reske, *Two Wins for Class Action Objectors*, A.B.A. J., June 1996, at 36, 36 (indicating that judges have awarded far less than the amount of fees lawyers requested in class actions).

127. See 142 CONG. REC. H4756-57 (daily ed. May 9, 1996); *id.* at E682 (daily ed. May 1, 1996); Michael Rustad & Thomas Koenig, *Punitive Damages in Products Liability: A Research Report*, 3 PRODUCTS LIABILITY L.J., Feb. 1992, at 85, 85.

128. 142 CONG. REC. E681 (daily ed. May 1, 1996) (statement of Dick Thornburg quoting Senator Lieberman).

129. See *id.* at H4758, H4760-61 (daily ed. May 9, 1996) (testimony of Mr. Bliley, Chairman of the Committee on Commerce, to the effect that a 1988 survey indicated that 36% of the CEOs had reduced production operations, 15% had laid off employees and 8% had closed factories to avoid product liability lawsuits)

Moreover, some parts suppliers refuse to provide parts for devices or go out of business to avoid being subjected to joint and several liability with manufacturers for whom they have produced parts. See *id.* at H4760-61; *id.* at E682 (daily ed. May 1, 1996) (reporting, through the testimony of a mother, that three major suppliers had restricted or stopped supplying shunt manufacturers and that companies are more threatened by multiple lawsuits than outrageous punitive awards).

At a May 1, 1996 hearing, Lewis Fuller, President of Fuller Medical Company (“Fuller Medical”), testified. Fuller told House Speaker Newt Gingrich that Fuller Medical stopped producing baby monitors in 1993 because it could not afford to pay its insurance premiums. These monitors were used to warn parents that their babies could be dying from Sudden Infant Death Syndrome. See *id.* at E681-82.

Fuller Medical terminated its van conversion business, too. Fuller Medical installed hand controls to enable disabled persons to maneuver vans. Fuller intimated that joint and several liability principles made his company susceptible to lawsuits involving any design defect in the van regardless of whether the conversion process was faulty. As a result of Fuller’s withdrawal

Proponents are not advocating needless eradication of companies or their products. If the products that these manufacturers consider so essential for human life were manufactured properly, neither producers nor suppliers would have to be concerned with punitive awards. In such cases, consumers who filed lawsuits would not be able to prove entitlement to punitive damages and the companies could continue to offer their unmodified products for sale.

*I. Manufacturers Consistently Make Three Constitutional Arguments Against Large and Multiple Punitive Awards*

1. Due Process Guarantees of Fairness Are Violated

Manufacturers argue that multiple punitive awards are fundamentally unfair under the Due Process Clause of the Fourteenth Amendment.<sup>130</sup> They assert that multiple awards are tantamount to punishing them thousands of times for a single act. Thus, manufacturers contend, the Due Process Clause bars further assessment of punitive damages when an award has already been made for the same conduct.<sup>131</sup>

The Supreme Court has not decided whether multiple punitive awards for one defective product violate the Due Process Clause. However, in analyzing an Alabama statute for conformance with due process principles, the Court provided some guidance on the kind of award that is constitutionally acceptable. In Alabama, juries were instructed to issue an award by considering the gravity of the manufacturer's wrongdoing and the need to deter others from similar conduct. As an added safeguard, Alabama verdicts were subject to "meaningful and adequate" posttrial review.<sup>132</sup> Alabama's common law method of assessing punitive damages passed constitutional muster. Therefore, according to the Court, the punitive award that was four times the compensatory award and 200 times the plaintiff's out-of-pocket expenses did not "cross the line to the area of constitutional impropriety."<sup>133</sup>

Lower court rulings are split, but an overwhelming majority have not been persuaded that multiple awards infringe due process guarantees.<sup>134</sup> Generally,

of this product, consumers are now deprived of this service. *See id.* at E682.

130. The Due Process Clause, which was adopted in 1868, forbids states from "mak[ing] or enforc[ing] any law which shall . . . deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV, § 1.

131. *See Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 280 (2d Cir. 1990).

132. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 20 (1991).

133. *Id.* at 23-24; *cf. Carey v. Piphus*, 435 U.S. 247 (1978) (discussing due process considerations associated with nonpunitive damages).

134. *See Dunn v. HOVIC*, 1 F.3d 1371, 1385-86 (3d Cir.) (refusing to strike repetitive awards), *modified*, 13 F.3d 58 (3d Cir. 1993); *Simpson*, 901 F.2d at 280-82; *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 402-07 (5th Cir. 1986); *Man v. Raymark Indus.*, 728 F. Supp. 1461, 1465-68 (D. Haw. 1989); *Leonen v. Johns-Manville Corp.*, 717 F. Supp. 272, 284-87 (D.N.J. 1989); *Campbell v. ACandS, Inc.*, 704 F. Supp. 1020, 1021-23 (D. Mont. 1989); *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. 357, 376-78 (E.D. Pa. 1982); *Froud v. Celotex Corp.*, 437 N.E.2d 910, 913 (Ill. App. Ct. 1982), *rev'd on other grounds*, 456 N.E.2d 131 (Ill. 1983); *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 475-80 (N.J. 1986); *Owens-*

their justification is that society is primarily concerned with caring for injured consumers and protecting them from outrageous conduct instead of a company's financial status.<sup>135</sup> Justice Miller of the Supreme Court of Appeals of West Virginia acknowledged the conflicting interests of consumers and manufacturers. He explained why the law favors awards of punitive damages to each injured consumer regardless of how many consumers are injured:

[I]t seems highly illogical and unfair for courts to determine at what point punitive damage awards should cease. Obviously, those plaintiffs whose cases were heard first would gain the punitive monetary advantage. Certainly, it would be difficult to determine where the cutoff line should be drawn as between the first, tenth, or hundredth punitive damage award. Moreover, because . . . trials are held nationwide, it is doubtful that one state's ruling would necessarily bind other jurisdictions.<sup>136</sup>

In several cases, the courts' propensity for rejecting the due process assertion was based upon a finding that the corporation was not punished for a single act, as it claimed, but for several negligent or reckless acts committed over an extended period.<sup>137</sup> Even when there are multiple lawsuits, the manufacturer owes a separate and distinct duty to each plaintiff to refrain from injurious conduct. Therefore, each award reflects only the harm that the plaintiff in that particular lawsuit sustained. It has no bearing on previous or subsequent claims by other plaintiffs.<sup>138</sup>

Another common due process argument is that standards for awarding punitive damages are so vague that they contravene due process protections.<sup>139</sup> Manufacturers suggest that nebulous criteria make it difficult for them to discern which conduct is prohibited. Unconvinced, courts have ruled that the standard for outrageous conduct (willful, malicious disregard for the plaintiff's safety) gives

Corning Fiberglas Corp. v. Wasiak, 917 S.W.2d 883, 888-90 (Tex. App. 1996, writ granted); Keene Corp. v. Kirk, 870 S.W.2d 573, 581-82 (Tex. App. 1993, no writ); Davis v. Celotex Corp., 420 S.E.2d 557, 564-66 (W. Va. 1992); Wangen v. Ford Motor Co., 294 N.W.2d 437, 466 (Wis. 1980). *But see* Juzwin v. Amtorg Trading Corp., 705 F. Supp. 1053, 1060-64 (D.N.J.) (holding that multiple awards of punitive damages for a single course of conduct violates the Due Process Clause), *vacated in part on reconsideration*, 718 F. Supp. 1233 (D.N.J. 1989).

135. *See generally* State *ex rel.* Young v. Crookham, 618 P.2d 1268, 1271 (Or. 1980).

136. *Davis*, 420 S.E.2d at 565-66.

137. *See, e.g.*, Tetuan v. A.H. Robins Co., 738 P.2d 1210, 1245 (Kan. 1987) (punishing A.H. Robins for a series of corporate fraudulent actions spanning a decade).

138. *See* King v. Armstrong World Indus., Inc., 906 F.2d 1022, 1030 (5th Cir. 1990); *see also* *Dunn*, 1 F.3d at 1385-86 (rejecting claims that asbestos manufacturers have been punished enough and therefore should not be subject to subsequent compensatory claims); *Neal*, 548 F. Supp. at 377-78 (asserting that each tort is "separate and distinct with respect to each individual plaintiff").

139. *See, e.g.*, *Neal*, 548 F. Supp. at 377 (allowing judges and jurors freedom to decide without any "legally fixed standards"); Campus Sweater & Sportswear Co. v. M.B. Kahn Constr. Co., 515 F. Supp. 64, 108 n.129 (D.S.C. 1979) (rejecting contentions that the doctrine of punitive damages suffers from an unconstitutional vagueness), *aff'd*, 644 F.2d 877 (4th Cir. 1981).



manufacturers sufficient notice that if they manufacture products in such a manner, they may be liable for punitive damages.<sup>140</sup>

## 2. Excessive and Multiple Awards Violate the Fifth and Eighth Amendments

Manufacturers espouse two additional constitutional arguments based on the Fifth and Eighth Amendments of the United States Constitution. In most products liability cases, company representatives unsuccessfully, but persistently, invoke traditional criminal defenses of double jeopardy and excessive fines as reasons for precluding multiple and large awards.<sup>141</sup> First, manufacturers contend that multiple punitive awards constitute double jeopardy because they are punished over and over for the same misconduct.<sup>142</sup> The Double Jeopardy Clause of the Fifth Amendment provides, in relevant part, that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb."<sup>143</sup> The vast majority of courts reject this contention and hold that double jeopardy is applicable only in criminal cases.<sup>144</sup> One court explained why retaining the option of multiple awards principles was necessary:

[W]e do not believe that defendants should be relieved of liability for punitive damages merely because, through outrageous misconduct, they may

140. *See, e.g., Neal*, 548 F. Supp. at 377 (finding that such a standard provides sufficient notice).

141. Although they are never successful, these are standard arguments that defendants make in these cases. *See, e.g., Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 260 (1989); *United States v. Halper*, 490 U.S. 435, 451 (1989); *Edwards v. Armstrong World Indus., Inc.*, 911 F.2d 1151, 1154-55 (5th Cir. 1990); *Mack Trucks, Inc. v. Conkle*, 436 S.E.2d 635, 640 (Ga. 1993); *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 868-69 (Iowa 1994).

142. *See, e.g., Hansen v. Johns-Manville Prods. Corp.*, 734 F.2d 1036, 1042 (5th Cir. 1984); *Leonen v. Johns-Manville Corp.*, 717 F. Supp. 272, 287 (D.N.J. 1989); *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053, 1057 (D.N.J.), *vacated in part on reconsideration*, 718 F. Supp. 1233 (D.N.J. 1983); *Campus Sweater & Sportswear Co.*, 515 F. Supp. at 108; *see also Continental Casualty File TXO Amicus Briefs*, MEALEY'S LITIG. REP.: BREAST IMPLANTS, Feb. 8, 1993, at 25 (advocating a "one bite rule"—one award precludes any future awards).

143. U.S. CONST. amend. V.

144. *See, e.g., Halper*, 490 U.S. at 450-51; *Hansen*, 734 F.2d at 1042; *Man v. Raymark Indus.*, 728 F. Supp. 1461, 1465 (D. Haw. 1989); *Leonen*, 717 F. Supp. at 287; *Juzwin*, 705 F. Supp. at 1059; *Campus Sweater & Sportswear Co.*, 515 F. Supp. at 108 n.129; *Champagne v. Raybestos-Manhattan, Inc.*, 562 A.2d 1100, 1126-27 (Conn. 1989); *Tuttle v. Raymond*, 494 A.2d 1353, 1357-58 (Me. 1985) (distinguishing punitive awards for "private wrong[s]" from criminal prosecution—an action "brought solely on the behalf of the public"); *see also Fibreboard Corp. v. Pool*, 813 S.W.2d 658, 687 (Tex. App. 1991, writ denied) (deciding that there is no violation of due process).

Still, the Supreme Court has not determined whether due process law limits multiple exemplary awards in mass-tort litigation. Although lower courts have expressed concern about the ultimate consequences of these awards, the majority of them have decided against striking an award solely because it was geared to assess punishment for the same conduct. *See, e.g., Dunn v. HOVIC*, 1 F.3d 1371, 1385-86 (3d Cir.), *modified*, 13 F.3d 58 (3d Cir. 1993); *accord Keene Corp. v. Kirk*, 870 S.W.2d 573, 581-82 (Tex. App. 1993, no writ).

have managed to seriously injure a large number of persons. Such a rule would encourage wrongdoers to continue their misconduct, because if they kept it up long enough to injure a large number of people, they could escape *all* liability for punitive damages.<sup>145</sup>

Manufacturers further urge lawmakers to control large awards because they are inconsistent with and unconstitutional under the Cruel and Unusual Punishment Clause of the Eighth Amendment.<sup>146</sup> Manufacturers claim that large awards are incongruous with the Eighth Amendment's prohibition against imposing "[e]xcessive bail" and "excessive fines."<sup>147</sup> On the contrary, just as they decided the due process issue in the consumers' favor, courts have held that the framers of the Eighth Amendment did not intend for it to shield manufacturers from assessment of punitive damages in civil disputes. Rather, "[n]ot only the connotation of the words "bail," and "fine," but the legislative history concerning enactment of the bill of rights supports an argument that the Eighth Amendment was intended to be applied only to punishment invoked as a sanction for criminal conduct."<sup>148</sup>

Neither of these constitutional provisions forbids assessment of punitive awards to claimants in civil cases. Repeatedly, courts, including the United States Supreme Court, have held that punitive damages are intended to penalize wrongdoers. However, manufacturers improperly compare these awards with punishment that comes under the auspices of the Fifth and Eighth Amendments. Double jeopardy and excessive fines safeguards are reserved exclusively for criminal proceedings. Thus, multiple and excessive punitive damage awards in civil lawsuits do not violate double jeopardy and excessive fines proscriptions.<sup>149</sup>

145. *Froud v. Celotex Corp.*, 437 N.E.2d 910, 913 (Ill. App. Ct. 1982) (emphasis in original), *rev'd on other grounds*, 456 N.E.2d 131 (Ill. 1983); *accord* *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 405 (5th Cir. 1986); *Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565, 1571 (6th Cir. 1985); *Man*, 728 F. Supp. at 1467-68; *State ex rel. Young v. Crookham*, 618 P.2d 1268, 1271 (Or. 1980).

146. *See, e.g.*, *King v. Armstrong World Indus., Inc.*, 906 F.2d 1022, 1030 (5th Cir. 1990); *Juzwin*, 705 F. Supp. at 1059; *Campus Sweater & Sportswear Co.*, 515 F. Supp. at 108.

147. U.S. CONST. amend. VIII.

148. *Electro Servs., Inc. v. Exide Corp.*, 847 F.2d 1524, 1530 (11th Cir. 1988) (quoting *Ingraham v. Wright*, 525 F.2d 909, 912-13 (5th Cir. 1976)); *see also* *McCleary v. Armstrong World Indus., Inc.*, 913 F.2d 257, 260-61 (5th Cir. 1990) (denying state constitutional claim of excessive fine).

149. *See* *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.* 492 U.S. 257, 260 (1989); *accord* *King*, 906 F.2d at 1030-31; *Racich v. Celotex Corp.*, 887 F.2d 393, 397 (2d Cir. 1989); *Leonen*, 717 F. Supp. at 286-87; *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 217 (Colo. 1984) (refusing to apply "traditional safeguards" to civil proceedings); *Tetuan v. A.H. Robins Co.*, 738 P.2d 1210, 1245-46 (Kan. 1987); *Unified Sch. Dist. No. 490 v. Celotex Corp.*, 629 P.2d 196, 206 (Kan. Ct. App. 1981); *cf. In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 899 (N.D. Cal. 1981) (holding that "a defendant in a civil action has a right to be protected against double recoveries not because it violates 'double jeopardy' but simply because overlapping damage awards violate that sense of 'fundamental fairness'"), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982).

Although Fifth Circuit judges agreed with the Supreme Court, they were reluctant to do so:

We have misgivings, however, because we are acutely conscious of the prophetic words Judge Henry Friendly used twenty-three years ago: "The legal difficulties

Among other things, judges and jurors must balance competing interests when they are determining whether punitive damages should be awarded. They must weigh the injured consumers' or users' interest in safety against the manufacturers' interests in maintaining a thriving and profitable business. Sometimes, for safety's sake, the individual-consumers'/users' rights must outweigh the manufacturers' interests.

### III. DEFINITIONS OF PUNISHABLE CONDUCT AND FACTORS FOR QUANTIFYING DAMAGES VARY FROM STATE TO STATE AND FROM COURT TO COURT

Although plaintiffs have no constitutional entitlement to exemplary awards, they do have a right to seek that relief.<sup>150</sup> Contrary to popular belief, however, punitive damages are not recovered in every case in which they are sought.<sup>151</sup> Actually, statistics show that in product liability lawsuits punitive damages are awarded in a minuscule number of cases—only two percent.<sup>152</sup> That is, in only approximately fourteen cases per year do plaintiffs recover exemplary awards.<sup>153</sup> The number of punitive awards is de minimis because these awards are

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engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering. . . . We have the greatest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill."

*King*, 906 F.2d at 1033 (omission in original) (quoting *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967)).

150. *Jackson*, 781 F.2d at 404 (ensuring awards in egregious cases only); *In re Dalkon Shield*, 526 F. Supp. at 898 & n.37 (concluding that there is no right to punitive damages); *Mack Trucks, Inc., v. Conkle*, 436 S.E.2d 635, 638 (Ga. 1993); *Masaki v. General Motors Corp.*, 780 P.2d 566, 570 (Haw. 1989) (awarding punitive damages "only when egregious nature of defendant's conduct makes such a remedy appropriate").

151. *See, e.g., Roginsky*, 378 F.2d at 850-51 (denying recovery of punitive damages because plaintiff did not show reckless disregard for human safety); *Uniroyal Goodrich Tire Co. v. Ford*, 461 S.E.2d 877, 883-84 (Ga. Ct. App. 1995) (finding no evidence to support a punitive award); *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 446 (Wis. 1980) (stating that punitive damages are not recoverable for mere negligence); *see also Occidental Not Liable for Love Canal*, WASH. TIMES, Mar. 18, 1994, at A8 (reporting that plaintiffs' failure to prove reckless disregard for safety resulted in no recovery of punitive damages).

152. *See, e.g., In re Dalkon Shield*, 526 F. Supp. at 892 (mentioning infrequent but prevalent punitive awards); *Wangen*, 294 N.W.2d at 456 (acknowledging the number of cases in which punitive damages are imposed is insubstantial); *Owen, supra* note 2, at 10 & n.49 (indicating defendants won 50-75% of these cases); *see also* 142 CONG. REC. H4761 (daily ed. May 9, 1996) (testimony of Congressman Watt against overriding the president's veto, and denying the existence of a "litigation explosion" in product liability cases). *See generally* *Rustad, supra* note 12, 24-37.

153. *See* 142 CONG. REC. H4758 (daily ed. May 9, 1996); *see also* Larry S. Stewart, *Damage Caps Will Hurt Injured Consumers*, TRIAL, Dec. 1994, at 68, 69 (citing studies finding that only 355 punitive damage awards were made in products liability cases between 1965 and 1990).

permissible only when the claimant proves that the defendant manufacturer engaged in conduct that is punishable under applicable state law.<sup>154</sup>

To determine whether punitive awards are warranted, states apply similar, but somewhat divergent standards. Customarily, something more than mere negligence is necessary to support an award, but the degree of contumacious conduct that would justify an exemplary award varies from state to state. Generally, the standards fit into one of three categories: "malice-only," "malice or reckless disregard," and "gross negligence."<sup>155</sup> Most states, however, require proof of some kind of willful misconduct such as fraud, oppression, malice, or wantonness.<sup>156</sup>

The manufacturer's lack of regard for human safety is seriously considered in many states. Ohio legislators, for example, require proof of "flagrant disregard" for the safety of persons who may be harmed by the product,<sup>157</sup> while Connecticut and Oklahoma legislators mandate that fact finders look for evidence of "reckless disregard" for human safety.<sup>158</sup> In comparison, Minnesota legislators established a standard of "deliberate disregard" for the safety of others.<sup>159</sup> Finally, the *Restatement (Second) of Torts*'s definition encompasses some of the terms that appear in state statutes. Its description includes adjectives like "outrageous," "evil," and "reckless indifference" for discerning whether a manufacturer's conduct merits punitive relief.<sup>160</sup>

In states where the legislature has not promulgated detailed criteria for assessing punitive awards, judges have set the standard. At the time the *TXO* case was tried in the West Virginia state court system, West Virginia judges had been applying a "reasonable relationship" standard. That is, exemplary damages had to be reasonably related to the actual damages or harm the defendant inflicted.<sup>161</sup> When the case reached the Supreme Court of Appeals of West Virginia, Justice Neeley announced a nontraditional standard. He placed defendants in three categories: "really stupid," "really mean," and "really stupid defendants who could have caused a great deal of harm by their actions but who actually caused

154. See, e.g., *Jackson*, 781 F.2d at 408.

155. See, e.g., *Smith v. Wade*, 461 U.S. 30, 56 (1983) (announcing an "evil motive or intent," or a "reckless or callous indifference" standard); *Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985) (announcing a "malice-only" standard); *Mobil Oil Corp. v. Ellender*, 934 S.W.2d 439, 448 (Tex. App. 1996, n.w.h.) (applying a gross negligence standard).

156. See, e.g., CAL. CIV. CODE § 3294(a) (West Supp. 1997) (requiring "oppression, fraud, or malice"); FLA. STAT. ANN. § 768.73(1)(a) (West 1996) (including "gross misconduct" as another consideration); GA. CODE ANN. § 51-12-5.1(b) (Supp. 1997) (adding "entire want of care which would raise the presumption of conscious indifference to consequences" as a factor); MINN. STAT. ANN. § 549.20(1)(a) (West Supp. 1997) (setting a standard of "deliberate disregard for the rights or safety of others").

157. OHIO REV. CODE ANN. § 2307.801(A) (Anderson Supp. 1996); see also *Owen*, *supra* note 2, at 21 (concluding that "flagrant indifference to the public safety" is a proper standard).

158. CONN. GEN. STAT. ANN. § 52-240b (West 1996); OKLA. STAT. ANN. tit. 23, § 9.1(B) (West Supp. 1997).

159. MINN. STAT. ANN. § 549.20(1)(a).

160. RESTATEMENT (SECOND) OF TORTS § 908 (1979).

161. See *Games v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 908 (W. Va. 1991) (establishing the reasonable relationship standard).

minimal harm.”<sup>162</sup> Analyzing the verdict in *TXO*, Justice Neeley concluded that a large award was needed “to deter future evil acts by [‘really mean’] defendants.”<sup>163</sup> When the verdict was appealed to the United States Supreme Court, Justice O’Connor lambasted Justice Neeley for his “cavalier standards [because] so much [was] at stake.”<sup>164</sup>

A court in the State of Maine announced a standard different from the norm. The Supreme Judicial Court of Maine renounced the reckless disregard standard as too vague and uncertain for proper measurement of punitive awards.<sup>165</sup> The court reasoned that the reckless standard “overextends the availability of punitive damages, and dulls the potentially keen edge of the doctrine as an effective deterrent of truly reprehensible conduct.”<sup>166</sup>

In place of the reckless disregard standard, the Maine court held the proper standard for determining punitive damages awards was based on an analysis of the express or implied malicious conduct of defendants. After analyzing precedent in several Maine cases where punitive awards were upheld, the court discerned that malice was a “common thread” among the rulings.<sup>167</sup> The court went on to describe the kind of malicious conduct that would support punitive awards in Maine. If the defendant acted with ill will toward the plaintiff when it engaged in tortious activity, malice existed. Moreover, the court recognized that, in some instances, the defendant’s deliberate conduct could be so outrageous that malice should be implied.<sup>168</sup>

Over the years, judges, through their opinions, and legislators, through statutes, have enumerated other considerations for punitive damage awards. Criteria have been listed to assist judges and jurors in making determinations regarding the size of punitive damage awards. These elements, some of which are listed in the *Restatement (Second) of Torts*, include:

- (1) the nature, extent, and enormity of the wrong committed;
- (2) the manufacturer’s knowledge of the hazard;
- (3) the amount of profit the manufacturer acquired from its misconduct;
- (4) the circumstances surrounding the transaction;
- (5) the manufacturer’s wealth;
- (6) the manufacturer’s scienter;

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162. *TXO Prod. Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870, 887-88 (W. Va. 1992), *aff’d*, 509 U.S. 443 (1993).

163. *Id.* at 889.

164. *TXO*, 509 U.S. at 473 (O’Connor, J., dissenting).

165. *See Tuttle v. Raymond*, 494 A.2d 1353, 1360-61 (Me. 1985) (finding reckless disregard standard too broad).

166. *Id.* at 1361.

167. *Id.* at 1361-62.

168. *See id.* (deciding the evidence did not meet new standard because there was no evidence of malice, either express or implied); *cf. Johns-Manville Sales Corp. v. Janssens*, 463 So. 2d 242, 247 (Fla. Dist. Ct. App. 1984) (inferring malice from the defendant’s wanton conduct).

- (7) the actual damages recovered;
- (8) the date that the misconduct was terminated; and,
- (9) the effect and severity of other punishment the manufacturer either received or could receive.<sup>169</sup>

Furthermore, the Supreme Court and at least nine states require consideration of whether the manufacturer intentionally concealed a known danger and the manufacturer's attitude when the cover-up was detected. In California, Kansas, Kentucky, Minnesota, Mississippi, Ohio, Oklahoma, Oregon, and West Virginia, the factfinder may assess punitive damages based on a manufacturer's concealment.<sup>170</sup> Similarly, in three punitive damages decisions, the Supreme

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169. See RESTATEMENT (SECOND) OF TORTS § 908 cmt. e (1979); see, e.g., KAN. STAT. ANN. § 60-3702(b) (1995); KY. REV. STAT. ANN. § 411.186(2) (Michie 1996); MINN. STAT. ANN. § 549.20(3) (West 1996); MISS. CODE ANN. § 11-1-65(1)(e) (1996); OHIO REV. CODE ANN. § 2307.80(B) (Banks-Baldwin 1996); OKLA. STAT. ANN. tit. 23, § 9.1(A) (West 1996); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21-22 (1991); Dunn v. HOVIC, 1 F.3d 1371, 1384 (3d Cir.) (considering ability to pay), *modified*, 13 F.3d 58 (3d Cir. 1993); Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854, 867 (Iowa 1994); Tetuan v. A.H. Robins Co., 738 P.2d 1210, 1238-39 (Kan. 1987); Owens-Corning Fiberglas Corp. v. Wasiak, 917 S.W.2d 883, 889-92 (Tex. App. 1996, writ granted) (applying these factors to conclude that the punitive award was constitutional); see also *Janssens*, 463 So. 2d at 247-48; *Davis v. Celotex Corp.*, 420 S.E.2d 557, 559-60 (W. Va. 1992); *Owen*, *supra* note 7, at 1314-19.

According to the *Restatement*, the following factors should be considered in making the determination to award punitive damages: (1) the act itself, including the motives of the wrongdoer, the relations between the parties, and provocation or want of provocation; (2) the extent of harm to the injured person, including the expense to which plaintiff has been put in bringing a lawsuit; (3) the wealth of the defendant; and (4) the existence of multiple claims. See RESTATEMENT (SECOND) OF TORTS § 908 cmt. e.

In *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989), another famous punitive damages case, the Alabama Supreme Court listed seven factors for ascertaining whether punitive awards were appropriate in Alabama product liability cases. First, a reasonable relationship must exist between the harm the manufacturer's conduct was likely to cause and the harm that actually occurred. Second, the award should reflect the degree of reprehensibility of the manufacturer's conduct. Third, to ensure that the manufacturer suffered a loss, the award had to exceed the manufacturer's profit. Fourth, in doing the economic analysis, the manufacturer's financial status had to be considered. Fifth, the extent of the manufacturer's litigation costs was weighed. The sixth and seventh considerations were mitigation factors: (1) whether criminal sanctions had been imposed against the manufacturer, and (2) whether other civil actions against the same manufacturer for the same conduct had been filed. See *id.* at 223-24; see also *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1605-09 (1996) (Breyer, O'Connor, Souter, JJ., concurring) (analyzing the Alabama standard for constraining punitive awards); *Alley v. Gubser Dev. Co.*, 569 F. Supp. 36, 40 (D. Colo. 1983) (stating factors which Colorado courts consider to determine if punitive damage awards are excessive); *Alamo Nat'l Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981) (reciting the State of Texas's criteria).

170. See, e.g., CAL. CIV. CODE § 3294(c)(3) (West 1996) (defining fraud to include purposeful concealment); KAN. STAT. ANN. § 60-3701(b)(4) (1995); KY. REV. STAT. ANN. § 411.186(2)(d) (Michie 1996); MINN. STAT. ANN. § 549.20(3) (West 1996) (including consideration of the number of employees involved in the cover-up); MISS. CODE ANN. § 11-1-65(1)(f)(ii)(2) (1996); OHIO REV. CODE ANN. § 2307.801(B)(3) (Banks-Baldwin 1996); OKLA. STAT. ANN. tit. 23, § 9.1(A) (West 1996); OR. REV. STAT. § 30.925(3)(d) (1995); *Garnes v.*

Court deemed concealment punishable conduct. In *Haslip*, the Supreme Court included concealment as a factor to consider in awarding punitive damages.<sup>171</sup> The *Gore* Court mentioned concealment as conduct that is reprehensible enough to justify punitive liability.<sup>172</sup> Also, in *TXO*, deceit, a similar factor, was among the elements the Court considered.<sup>173</sup>

State legislators have delineated standards for punitive damages and factors for valuing punitive damages. The *Gore* decision holds that in making determinations regarding punitive damages, decisionmakers should consider only three factors. Although those factors are important considerations, the Supreme Court left out essential elements which state courts and legislators have relied upon for fair assessments of these awards. Because the Supreme Court's three-part analysis in *Gore* does not consider essential factors enumerated in statutes, litigation regarding how punitive damages are quantified will continue.

#### IV. PUNITIVE AWARDS STILL SERVE SOCIETAL NEEDS FOR PROTECTING INNOCENT CONSUMERS FROM UNSCRUPULOUS MANUFACTURERS

Consumers and consumer advocates urge continuation of punitive damages because without unlimited potential liability for such awards, many corporations would manufacture unsafe products with reckless abandonment.<sup>174</sup> Some manufacturers consistently operate in such a careless manner that something more than a sting is needed to deter future wrongdoing. Under those extreme circumstances, exemplary awards serve a great societal need.<sup>175</sup>

Manufacturers should be put on notice that they may pay a high penalty if they conceal the dangerousness of a product when they know the products are injuring and killing people. In each instance, the punitive award should be commensurate with the length of concealment, the particular circumstances surrounding the

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Fleming Landfill, Inc., 413 S.E.2d 897, 909 (W. Va. 1991) (inviting jury to consider whether the defendant concealed or attempted to conceal its actions or the harm caused).

171. See *Haslip*, 499 U.S. at 21-22.

172. See *Gore*, 116 S. Ct. at 1601.

173. See *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 462 (1993).

174. See *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 383 (Ct. App. 1981) (concluding that punitive damages provide "the most effective remedy for consumer protection"); Owen, *supra* note 2, at 15 (noting that supporters believe punitive damages are "an important bulwark to protect the public from manufacturers who are too powerful to fear any other penalty"); Becker, *supra* note 95, at 6 (quoting Susan Stevens Dunn, co-chair of the Products Liability Litigation Committee of the ABA Section on Litigation).

175. See *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 403 (5th Cir. 1986); *Froud v. Celotex Corp.*, 437 N.E.2d 910, 915 (Ill. App. Ct. 1982) (Sullivan, J., concurring), *rev'd on other grounds*, 456 N.E.2d 131 (Ill. 1983); see also *Boddie v. Litton Unit Handling Sys.*, 455 N.E.2d 142, 145, 152 (Ill. 1983) (holding that failure to install proper guard on conveyor belt despite corporate knowledge that it would prevent serious injury to Litton employees precluded summary judgment on issue of punitive damages); *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 462 (Wis. 1980) (holding that allegations of corporate knowledge about car defects before manufacture and about serious injuries after manufacture were sufficient to state a claim for punitive damages).

concealment, and the extent and number of injuries and deaths occurring from the first day of concealment through judgment. When manufacturers have engaged in repetitive and purposeful concealment, multiple and huge civil penalties should be assessed.

It has been suggested that, "the flagrancy of [a manufacturer's] misconduct is . . . the primary consideration in determining the amount of punitive damages."<sup>176</sup> Several examples of the kind of flagrant deceitfulness and concealment of hazards which merit assessment of punitive awards have been documented. This Part highlights some incidents that demonstrate why continuation of punitive awards is necessary to protect the public from conscienceless manufacturers.

A.H. Robins Co., Inc. ("Robins") purposely caused serious and permanent injuries to millions of women who used its Dalkon Shield—an intrauterine contraceptive device designed to prevent pregnancy. Robins intentionally and knowingly concealed unequivocal evidence that its product was not as safe as Robins steadfastly represented. From the beginning, Robins demonstrated its disregard for women's safety when it marketed the Dalkon Shield without testing it to ensure its safety for human use.<sup>177</sup>

Then, Robins altered the original design and an internal memorandum showed that Robins intentionally withheld information about those changes. This was noteworthy because Robins marketed the Dalkon Shield using a questionable study that was performed on one of the original, unchanged devices.<sup>178</sup> The study Robins publicized indicated that women who used the Dalkon Shield had an extremely low pregnancy rate of 1.1%.<sup>179</sup> One year after Robins began to sell the device, doctors who prescribed it for their patients informed Robins that it was not as effective as Robins had indicated earlier. The actual pregnancy rate was believed to be around 7-8%—much higher than 1.1%.<sup>180</sup>

Physicians notified Robins that many of their patients had become seriously ill while using the Dalkon Shield. Robins's executives ignored the doctors' evidence that the Dalkon Shield caused unwanted pregnancies, septic abortions, severe pelvic infections, excruciating pain, and several deaths.<sup>181</sup> Thousands of women needed hysterectomies to cure or relieve chronic side effects.<sup>182</sup> Despite its knowledge, Robins callously continued sales and advertising without correcting

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176. Owen, *supra* note 4, at 363, 387.

177. See *Tetuan v. A.H. Robins Co.*, 738 P.2d 1210, 1217-18 (Kan. 1987).

178. See *id.* at 1218; see also RICHARD B. SOBOL, *BENDING THE LAW* 22 (1991) (stating that Robins concealed the change to avoid the Food and Drug Administration's requirement that Robins prove the product's safety before marketing it).

179. See *Tetuan*, 738 P.2d at 1218.

180. See *id.*

181. See *id.* at 1218-20 (quoting correspondence from physicians across the nation about their patients' conditions because of the Dalkon Shield); see also SOBOL, *supra* note 178, at 7-9, 11, 22 (describing the lack of efficacy and the illness the Dalkon Shield caused).

182. See *Tetuan*, 738 P.2d at 1215-20 (recounting different side effects of Dalkon Shield). The plaintiff in *Tetuan* had surgery including a complete removal of her uterus, Fallopian tubes, and ovaries. The operation made her feel less than a woman. In addition, she was required to take synthetic hormones for the rest of her life. The seriously dangerous side effects of the hormones were: cancer, liver disorder, gall bladder disease, and blood clotting. See *id.* at 1216.



defects in the product or warning women and their physicians about potential problems.<sup>183</sup> One federal court concluded there was evidence of “a pervasive picture of covering up a defective product and continuing to merchandise it by misrepresenting both its efficacy and its safety.”<sup>184</sup>

Not only did Robins fraudulently mislead millions of women who used its product, it also deceived doctors by assuring them the device was safe.<sup>185</sup> Despite painful episodes of serious illness, Loretta Tetuan followed her physician’s advice and kept a Dalkon Shield in her body from 1971 until 1980.<sup>186</sup> After she sued Robins, the Supreme Court of Kansas decided there was sufficient evidence of Robins’s fraud on Dalkon Shield customers and physicians. It affirmed the jury verdict of \$1.7 million in compensatory damages and \$7.5 million in punitive damages.<sup>187</sup>

Robins’s officials were stubborn. They defied one physician’s recommendation to withdraw the Dalkon Shield from the market in 1972.<sup>188</sup> Two years later, the United States Food and Drug Administration ordered Robins to suspend distribution.<sup>189</sup> Still, it took Robins six more years to advise doctors to remove its product from women displaying asymptomatic signs.<sup>190</sup> Even after Robins ceased distribution, it failed to prevent further injury to women who still had the device implanted in their bodies. It refused to recall the product.<sup>191</sup> This is a persuasive example to support the argument that withdrawal of a product should not preclude assessment of punitive awards against the manufacturer.

The Robins cover-up regarding the Dalkon Shield had been implemented years before cessation of production. Roger Tuttle, a Robins attorney in charge of product liability cases, testified that in 1975, Chief Counsel Forrest ordered him to find and destroy documents which memorialized deficiencies in the Dalkon

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183. *See id.* 1218-20; SOBOL, *supra* note 178, at 7 (discussing Robins’s ignorance of “danger signs”). When evidence was publicized that Robins ignored information that its intrauterine device caused serious infections, congressional sponsors for tort reform withdrew their support for pending legislation. *See also* PETER H. SCHUCK, TORT LAW AND THE PUBLIC INTEREST 257 (1991).

184. *Craig v. A.H. Robins Co.*, 790 F.2d 1, 4 (1st Cir. 1986) (rejecting Robins’s argument that evidence regarding the Dalkon Shield’s pregnancy rate was irrelevant).

185. *See Tetuan*, 738 P.2d at 1228-29. The court ruled that “where a patient relies on a physician for treatment or advice as to an ethical or prescription device, justifiable reliance by the physician on misrepresentations or concealment by the manufacturer of that device constitutes justifiable reliance by the patient.” *Id.* at 1228.

186. *See id.* at 1215-16. The court noted that Ms. Tetuan had relied upon Robins’s “malicious silence” about the true nature of its product. *Id.* at 1228.

187. *See id.* at 1240 (listing Robins’s fraudulent acts including “consign[ing] hundreds of documents to the furnace rather than inform women that the Dalkon Shield carried inside their bodies was a bacterial time bomb which could cause septic abortions, PID, and even death”).

188. *See id.* at 1219 (noting physician’s recommendations to Robins to test, amend advertising, provide cautionary statements to physicians, and withdraw the product).

189. *See id.* at 1220.

190. *See id.* at 1220-21.

191. *See* SOBOL, *supra* note 178, at 11 (surmising that approximately three million women continued to rely upon the device).

Shield.<sup>192</sup> Forrest informed Tuttle that he had discussed the plan for document destruction with W.L. Zimmer, III, Robins's president. Forrest blamed Tuttle "for allowing [a] memorandum . . . to come to light in the [first case that was tried against Robins]. Forrest . . . did not ever want anything like that to happen again, and the only way to ensure that was if the documents no longer existed."<sup>193</sup> Tuttle, who secretly retained some of the documents which he was supposed to have eliminated, received confirmation that hundreds of documents were burned in a furnace.<sup>194</sup>

Another shocking concealment implicates the entire asbestos industry. Asbestos manufacturers concealed the dangers of asbestos for at least four decades. Ruthlessly, they deceived people, including their own employees, and secreted information about dangerous health risks associated with exposure to asbestos.<sup>195</sup> By the early 1930s, what eventually became a voluminous stack of credible documents detailing the hazards of handling asbestos products started to pile up.<sup>196</sup> Yet asbestos industry officials kept this information from consumers, users, and their own employees.<sup>197</sup> Moreover, as a practice, companies terminated employees who insisted upon warning labels or other safety precautions to lessen the risk of injury.<sup>198</sup>

Johns-Manville Sales Corporation ("Johns-Manville") was one asbestos manufacturer named in many lawsuits. Johns-Manville employers intentionally and deliberately participated in a concerted effort to conceal a known danger. The extent of Johns-Manville's corporate knowledge about the harmful effects of asbestos and its willingness to hide disparaging information was well documented. For instance, Johns-Manville was a member of the Industrial Health Foundation ("IHF"). Between 1936 and 1941, IHF distributed eleven articles about the dangerous nature of asbestos to its members and suggested ways to protect employees who handled the product. As an IHF member, Johns-Manville

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192. See *Tetuan*, 738 P.2d at 1223-24. The string that extended from the device helped the user ensure the device was in place. When bacteria developed on the string, the string became the catalyst for a number of illnesses that women were experiencing. See *id.* at 1221-24; see also *Craig v. A.H. Robins. Co.*, 790 F.2d 1, 3 (1st Cir. 1986).

193. *Tetuan*, 738 P.2d at 1224.

194. See *id.*; see also *Craig*, 790 F.2d at 3 (noting that Tuttle was discharged from his employment at Robins).

195. See *Puppe v. A.C. and S., Inc.*, 733 F. Supp. 1355, 1361 (D.N.D. 1990) (declining to categorize several purposeful concealments as one act). For decades, the asbestos industry had known about the dangers involved in using and handling its products. See *Johns-Manville Sales Corp. v. Janssens*, 463 So. 2d 242, 249 & n.5 (Fla. Dist. Ct. App. 1984).

196. See *Janssens*, 463 So. 2d at 249 (revealing evidence that manufacturers and suppliers knew about the hazards of handling asbestos since 1907 when the first report was published); *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 469 (N.J. 1986).

197. Cf. *Man v. Raymark Indus.*, 728 F. Supp. 1461, 1466 (D. Haw. 1989) (observing that defendants could have saved lives by changing their conduct); *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. 357, 381 (D. Pa. 1982) (noting company's refusal to act on doctor's recommendation to warn employees).

198. See *Davis v. Celotex Corp.*, 420 S.E.2d 557, 560 (W. Va. 1992) (noting that the company fired one consultant who recommended protection for workers and suggested a way of limiting liability).

received a copy of all those articles, so it knew or should have known that asbestos was a lethal product.<sup>199</sup>

Before the trade articles were published, Johns-Manville's concealment was already in full effect. In 1933, three years before the first article was delivered, Johns-Manville knew that its employees were getting sick. Johns-Manville's workers had begun to seek workers' compensation benefits for asbestos-related illness. The company reacted by passing a resolution to settle all claims.<sup>200</sup>

After receiving results of industry-wide studies which revealed that prolonged exposure to asbestos caused asbestosis—chronic lung disease caused by inhaling asbestos particles—Johns-Manville conducted its own study.<sup>201</sup> However, before Johns-Manville's results were released, its general counsel, Vandiver Brown, ordered A.J. Lanza, the scientist who conducted the internal study, to alter his report.<sup>202</sup> While editing the initial report, Lanza had deleted statements that minimized the risks and effects of exposure to asbestos. When Brown became aware that Lanza had redacted information, Brown demanded that Lanza put that information back into the report. Brown wanted to retain those statements because he believed that they “presented an aspect of [Lanza's] survey that was favorable to the industry.”<sup>203</sup> Complying with Brown's wishes, Lanza revised his report.<sup>204</sup>

Further evidence of Johns-Manville's concealment appeared in its meeting minutes. After meeting with an asbestos supplier to discuss ways of reducing employee risk, Johns-Manville conducted its own meeting. All participants agreed to adhere to the company's “past policy of keeping this matter confidential.”<sup>205</sup>

Dr. Kenneth Smith, one of Johns-Manville's medical directors, disclosed another “hush-hush” policy that affected employees who had contracted asbestosis. Under that directive, company physicians did not tell an employee when x-rays showed the employee was stricken with asbestosis. The preposterous and selfish reason for withholding this vital information was that it would allow the employee to “live and work in peace and the company can benefit by [the employee's] many years of experience.”<sup>206</sup>

Brown's response to another asbestos supplier's comment was just as startling. It sounded like conspiracy to deceive the public and to conceal harm. The president of an asbestos supplier was quoted as saying, “the less said about asbestos, the better off we are.” Brown's reply was, “I quite agree with you that our interests are best served by having asbestosis receive the minimum of publicity.”<sup>207</sup> When the New Jersey Supreme Court affirmed one punitive damage

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199. See *Fischer*, 512 A.2d at 469.

200. See *id.*

201. See *Janssens*, 463 So. 2d at 249.

202. See *id.* at 249-50.

203. *Id.* at 249-50.

204. See *id.* at 249.

205. *Fischer*, 512 A.2d at 470.

206. *Janssens*, 463 So. 2d at 250, 255, 262 (noting that the policy was enforced from 1949 until the 1960s).

207. *Fischer*, 512 A.2d at 470.

verdict against Johns-Manville, it wrote, "Not only did it fail to warn users of the serious health hazards associated with exposure to asbestos, it actually took affirmative steps to conceal this information from the public. These actions fully warranted the jury's imposition of punitive damages."<sup>208</sup>

Johns-Manville's far-reaching deceit stretched beyond its corporate headquarters and influenced the media. At least one Johns-Manville official strongly suggested that an asbestos trade magazine reporter refrain from publishing negative articles about asbestos.<sup>209</sup> When the same reporter sought feedback on a proposed review of a book that linked asbestos to pneumoconiosis (lung disease), Brown dissuaded her from reviewing the book. He implied that since several of the trade magazine's subscribers would not approve of the book review, it should not be written.<sup>210</sup> Later, Brown intimated that if the industry decided to allow publication of information about asbestosis, manufacturers and suppliers should "warn" magazine editors to use American data that was "milder"—less damaging—than English data.<sup>211</sup>

While this masquerade continued for decades, millions of people who were exposed to asbestos suffered from serious, sometimes fatal, diseases. According to medical experts, there are two progressive, latent, and incurable diseases derived from inhaling asbestos: asbestosis and mesothelioma. Asbestosis is a lung disease that causes the air sacs to constrict so the sufferer's lung capacity and pulmonary function are significantly decreased. Mesothelioma is a fatal tumor of the membrane that lines the walls of the lungs and the abdominal cavity. Further complications, serious ones, develop as side effects of the medication prescribed to relieve the symptoms of asbestosis and mesothelioma. So, in addition to asbestosis and mesothelioma, patients routinely suffer from diabetes, rheumatoid arthritis, and osteoporosis.<sup>212</sup>

Concealment in the asbestos industry remains a modern day phenomenon. In 1996, a jury in a Texas court issued a verdict of punitive damages against a product manufacturer. For fourteen years, Owens-Corning Fiberglas Corporation ("OCF") manufactured Kaylo—a product containing asbestos. OCF's director of product development warned corporate officers, including the president, that asbestos-containing fiberglass products caused lung cancer. Further, at ten-year intervals (in the 1940s, 1950s, and 1960s), executives received correspondence from different physicians detailing the hazards of handling asbestos.<sup>213</sup> Yet OCF continued to conceal a known danger when it published brochures indicating that Kaylo was a nontoxic substance.<sup>214</sup>

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208. *Id.* at 481.

209. *See id.* at 470.

210. *See id.* (quoting a supplier as saying, "I am inclined to believe she will omit any review of the book in question.").

211. *Id.*

212. *See id.* at 475 n.2 (describing asbestosis and mesothelioma); *see also* *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1083-86 (5th Cir. 1973) (describing the effects of asbestosis and mesothelioma).

213. *See* *Dunn v. HOVIC*, 1 F.3d 1371, 1374-76 (3d Cir.) (recounting the company's documented knowledge), *modified*, 13 F.3d 58 (3d Cir. 1993).

214. *Owens-Corning Fiberglas Corp. v. Watson*, 413 S.E.2d 630, 642 (Va. 1992).

Based on the evidence presented, the Court of Appeals of Texas affirmed the jury verdict for \$1.8 million in compensatory damages and \$3.7 million in punitive damages.<sup>215</sup> The court determined that OCF's conduct was reprehensible because it was aware of and concealed the danger of exposure to Kaylo from its users.<sup>216</sup>

Manufacturers hide defects in their products regardless of the devastating impact of the defects on consumers. A prosthetics manufacturer discovered that one component part of its prosthetic knee was too large.<sup>217</sup> For the prosthesis to have worked effectively, correct sizing was critical. If the prosthesis fit properly, it would not protrude and strike the patient's kneecap when the knee was flexed.<sup>218</sup> Rather than notify its sales personnel and medical professionals about its error, Richards Manufacturing Co., Inc. ("Richards") continued to distribute the improperly sized part.<sup>219</sup> Not surprisingly, Richards's ill-sized component part malfunctioned. It caused one recipient to lose a kneecap.<sup>220</sup> A jury awarded him \$25,000 in compensatory damages and \$500,000 in punitive damages.<sup>221</sup> Thousands of others, who were arthritic already, suffered agonizing pain and were immobilized.<sup>222</sup> All of this suffering occurred for the sole reason that Richards wanted to protect its competitive edge on the prosthesis market. It feared that if it took the time to refurbish the part, other companies would lure its customers away.<sup>223</sup>

Some manufacturers are just as insensitive when children's lives are at stake. Riegel Textile Corporation ("Riegel") manufactured flannelette, a cotton material used to make children's pajamas.<sup>224</sup> Riegel knew that many children had suffered severe burns and permanent disfigurement while wearing combustible flannelette garments.<sup>225</sup> Riegel also knew that multiple lawsuits had been filed against it for

215. *See Owens-Corning Fiberglas Corp. v. Wasiak*, 917 S.W.2d 883, 889-92 (Tex. App. 1996, writ granted). During another recent trial against OCF, the plaintiff's counsel made the following accusation in his closing argument:

"Unfortunately, ladies and gentleman, you have heard a story here in this courtroom the last two weeks of corporate manipulation, of corporate suppression, and . . . of corporate lies.

But, what's so bad about that is just not things that occurred over the last 40 or 50 years. But, it's even occurred in this courtroom. . . .

. . . .

You've got to have courage to tell this big multi-national company, that it's not going to come into the Virgin Islands and hurt people and lie about it."

*Dunn*, 1 F.3d at 1376 nn.3-4 (omissions added) (quoting plaintiff's counsel and indicating disapproval of argument but not finding harmful error).

216. *See Wasiak*, 917 S.W.2d at 890.

217. *See Vossler v. Richards Mfg. Co.*, 192 Cal. Rptr. 219, 221 (Ct. App. 1983).

218. *See id.*

219. *See id.* at 221, 227.

220. *See id.* at 222.

221. *See id.* at 221.

222. *See id.* at 227.

223. *See id.* at 221.

224. *See Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727, 729 (Minn. 1980).

225. *See id.* at 729-30, 740.

those children's injuries.<sup>226</sup> A high level official in the company sent an internal memorandum to Linton Reynolds, the person in charge of the research department. In the memorandum entitled "Flammability Liability," the official warned, "[w]e are always sitting on somewhat of a powder keg as regards our flannelette being so flammable."<sup>227</sup> The public was not apprised of the dangers that children were subjected to when they dressed for bed.<sup>228</sup>

While Riegel was endangering children's lives, Admiral Corporation ("Admiral") jeopardized the lives of whole families. Admiral sold defective color television sets to unsuspecting customers. A high voltage transformer in the sets was made of flammable paper and wax materials. Premarket testing was woefully inadequate but after only one heat test, Admiral and its project manager knew that the transformer could catch fire in their customers' homes even after the power had been turned off.<sup>229</sup> Admiral's files contained several complaints about defective televisions and reports of ninety-one fires.<sup>230</sup> Ross Siragusa, Jr., the president of Admiral, randomly kept some summaries of claims against Admiral and discarded other summaries.<sup>231</sup>

When her Admiral television set exploded, Zora Gillham sustained third-degree burns that covered 18.5% of her body. During the eighteen months in which she was hospitalized, Gillham underwent seven operations for her burns and ultimately suffered from a series of complications that rendered her an invalid.<sup>232</sup> A jury awarded her \$125,000 in compensatory damages, \$50,000 in attorneys' fees, and \$100,000 in punitive damages.<sup>233</sup>

Like Robins's executives, Admiral executives and subordinate employees deceived purchasers about the safety of Admiral television sets. One customer refused to accept repossession of a set that Admiral repaired after the transformer caught fire. Admiral employees pressured the customer and assured him that it was safe to take the set back into his home.<sup>234</sup>

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226. *See id.* at 734.

227. *Id.*

228. *See id.* at 739-40. Riegel claimed to research flammability, but no records were kept. During a three-year period, Riegel spent only \$140,000 on researching the flammability of flannelette while spending almost \$2 million on other research. The court determined that \$1 million in punitive damages was appropriate because Riegel did not act to reduce the danger even though it knew about the danger and feasible means for reducing it. Moreover, Riegel received significant profits from the sale of its flammable pajamas. *See id.* at 741.

229. *See Gillham v. Admiral Corp.*, 523 F.2d 102, 105-06 (6th Cir. 1975).

230. *See id.* at 106.

231. *See id.*

232. *See id.* at 104-05 (noting that Gillham suffered from, among other complications, pneumonia, infections, pancreatitis, thrombophlebitis, and colitis). Additionally, in several instances when televisions caught fire, substantial property damage took place at the customers' homes. Sometimes fire and smoke damaged only the interior of the room where the television set was located. In other fires, however, a substantial portion of the dwelling was burned. *See id.* at 106-07.

233. *See id.* at 104.

234. *See id.* at 107 (reassuring a customer that "no more trouble would develop").

Finally, one federal district court judge said that “the tobacco industry may be the king of concealment and disinformation.”<sup>235</sup> Tobacco company whistleblowers have started to blow smoke rings around the industry. Actually, these whistleblowers have blown the roof off tobacco company headquarters and exposed their innermost secrets about the hazards of smoking cigarettes. Former employees, experts, and the owner of the Liggett Group—a small tobacco company—have disclosed information that had been hidden from the public for more than thirty years. Tobacco company officials knew that smoking cigarettes may become addictive behavior. Moreover, they knew that they could reduce the harmful effects of smoking by decreasing the amount of nicotine cigarettes contained.<sup>236</sup> Until recently, none of the information about the addictive traits of cigarette smoking or about the tobacco manufacturers’ efforts to manipulate the nicotine content in cigarettes was shared with the public.<sup>237</sup> To ensure secrecy, some tobacco companies required their employees to sign confidentiality agreements—codes of silence—promising that they would not testify or give interviews about their role in the cigarette business.<sup>238</sup>

Internal documentation that has been released for public perusal shows that tobacco industry executives purposely concealed negative information about cigarettes.<sup>239</sup> Ian Uydess, a former Philip Morris cancer researcher, publicly accused executives of shelving his suggestions for removing poisonous nitrates from tobacco. Philip Morris also silenced scientists who were studying whether nicotine was addictive. Additionally, Uydess alleged that tobacco companies shut down United States laboratories where hundreds of experiments had been conducted. Data regarding sensitive experiments that scientists performed in the United States were transferred to overseas laboratories in Germany and Switzerland where there would be less intrusion from prying lawyers and United States government representatives.<sup>240</sup>

Destruction of documents seems to have been routine at some tobacco companies. At a hearing, another former Philip Morris scientist gave sworn

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235. *Haines v. Liggett Group, Inc.*, 140 F.R.D. 681, 683 (D.N.J.), *vacated*, 975 F.2d 81 (3d Cir. 1992); Christopher Kilbourne, *Tobacco Companies Castigated By Judge—He Orders Release of Studies on Danger*, RECORD, Feb. 7, 1992, at A1. *But see Haines*, 975 F.2d at 88, 97-98 (concluding that there is a basic due process requirement for trial by an impartial judge and removing the judge who made the comment from the case).

236. *See* PHILIP J. HILTS, SMOKESCREEN 42-56 (1996); Tom Lowry, *Liggett Settlement Burns Tobacco Firms*, USA TODAY, Mar. 21, 1997, at 1B (announcing Liggett’s plan to place a warning that smoking is addictive on cigarette packages).

237. *See* Lowry, *supra* note 236, at 1B; *Solo Hailed as ‘Hero’ of Tobacco Litigation*, LAW. WKLY. USA, May 20, 1996, at 486; Sheryl Gay Stolberg, *Turncoats Smoking Out Tobacco Firms’ Secrets*, PITTSBURGH POST-GAZETTE, Apr. 7, 1996, at A20.

238. *See* Stolberg, *supra* note 237, at A20 (reporting that Jeffrey Wigand, a former Brown & Williamson scientist, was sued for breach of contract when he disclosed tobacco industry secrets).

239. *See* Bill Ibelle, *Solo Sues Firms for Tobacco Cover-Up*, LAW. WKLY. USA, Nov. 4, 1996, at B2. The tobacco industry has not paid any damages in the forty-two year history of lawsuits that have been brought against it. *See id.*

240. *See id.*; *see also* Stolberg, *supra* note 237, at A20 (announcing Liggett’s plan to place a warning that smoking is addictive on cigarette packs).

testimony that he shredded data regarding his findings. Dr. William Raymond Morgan tested the level of "tobacco-specific nitrosamine"—a carcinogen—in Virginia Slims cigarettes. He discovered that Virginia Slims cigarettes contained a much higher level of the carcinogen than he had ever witnessed. Morgan testified that his supervisor, Dr. Cathy Ellis, then the manager of the Biochemical Research Division, ordered him to destroy data that he had compiled. Even though Ellis's directive was in complete derogation of a court order, Morgan yielded to her command and shredded the document. Now Ellis is the vice president of research and development.<sup>241</sup>

Tobacco industry officials' disrespect for the law has been pervasive. They conspired against the public and public representatives. On April 14, 1994, top executives from seven tobacco companies testified before the House Subcommittee on Health and the Environment. Before the interrogation began, each executive raised his hand and solemnly gave an oath to tell the truth. Then, one by one, each spoke into a microphone and swore that he believed that nicotine was not addictive.<sup>242</sup> Evidence, released after they testified, showed that those executives lied.<sup>243</sup> Consequently, they may now be subject to criminal prosecution and penalties for perjury as well as punitive damages in civil actions.<sup>244</sup>

Unfortunately, evidence that some attorneys who advise tobacco companies actively encouraged and participated in cover-ups may have been unearthed along with indicia of other corporate misconduct. Tobacco company lawyers, officers of the court, have been accused of deceitful and unethical acts to protect their clients. Reportedly, one attorney coaxed a scientist to revise a report by threatening to withdraw funds that financed the scientist's research project.<sup>245</sup> Other attorneys have hidden a mass of documents containing unflattering information behind a shroud of attorney-client privilege objections.<sup>246</sup> To avoid

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241. See Ibelle, *supra* note 239, at B2; cf. HILTS, *supra* note 236, at 20 (discussing a "scheme for shipping dangerous documents out of the country").

242. See HILTS, *supra* note 236, at 121-23, 147-74 (stating that Thomas Edwin Sandefur, Jr. of Brown & Williamson Tobacco Company testified before Congress and said that he did not believe that nicotine is addictive).

243. See *id.* at 124; Suein L. Hwang & Milo Geyelin, *Liggett May Label Tobacco "Addictive"*, WALL ST. J., Mar. 20, 1997, at A3; Lowry, *supra* note 236, at 1B; John Schwartz, *Internal Papers Fuel Tobacco Debate: Cigarette Firms May Face Turning Point in Regulation, Litigation*, WASH. POST, May 14, 1994, at A1 (reporting about lies, withholding scientific evidence, and closing labs).

244. See Pierre Thomas & John Schwartz, *U.S. Widens Tobacco Investigation*, WASH. POST, Sept. 8, 1996, at A1 (reporting on an investigation of tobacco executives for possible perjury). Perjury is making a false statement, under oath. See, e.g., N.Y. PENAL LAW § 210.15 (McKinney 1988); N.C. GEN. STAT. § 14-209 (1993); TEX. PENAL CODE ANN. § 37.02(a) (West 1994); VA. CODE ANN. § 18.2-434 (Michie 1997); see also *Ganzie v. Commonwealth*, 482 S.E.2d 863 (Va. Ct. App. 1997) (convicting defendant of three counts of false statements).

245. See Ibelle, *supra* note 239, at B2. *But see Tetuan v. A.H. Robins Co.*, 738 P.2d 1210, 1224 (Kan. 1987) (stating that one lawyer secretly saved copies of some documents that were supposed to be destroyed).

246. The privilege protects confidential communications between an attorney and her client that are made for the purpose of obtaining or providing legal assistance. See *Upjohn v. United States*, 449 U.S. 383, 389 (1981). *But see Craig v. A.H. Robins Co., Inc.*, 790 F.2d 1, 4 (1st



disclosure of company documents, tobacco company lawyers have been accused of falsely claiming that the documents were privileged when they knew that no privilege barred disclosure.<sup>247</sup> Unlike Robins's counsel, however, tobacco company attorneys did not require destruction of documents.<sup>248</sup>

Tobacco company executives' mayhem is far-flung. Millions of people are addicted to the nicotine contained in cigarettes.<sup>249</sup> Many of them suffer from debilitating illnesses such as lung cancer, heart disease, and emphysema.<sup>250</sup> Some smokers suffer unnatural and painful deaths.<sup>251</sup> Meanwhile, cigarette manufacturers continue to produce cigarettes, conceal the health risks of smoking cigarettes, and even heartlessly gear advertising toward enticing twelve-year-olds to take their first puff.<sup>252</sup>

A complete discussion of the concealment issue must entail consideration of the reasons that manufacturers conceal and destroy information. A few arguments have surfaced. None are persuasive or acceptable.

A paramount concern with manufacturers is fear of losing sales and profits.<sup>253</sup> Some company officials value sales quotas and stock prices more than consumer safety.<sup>254</sup> "All too often in the choice between the physical health of consumers

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Cir. 1986) (finding that "fraudulent misrepresentation and cover-up vitiates . . . [the] attorney-client privilege [and] work product immunity").

247. See Ibelle, *supra* note 239, at B2; see also HILTS, *supra* note 236, at 20; Hwang & Geyelin, *supra* note 243, at A3; Lowry, *supra* note 236, at 1B.

In addition to restricting disclosure of documents to the public, the company denied some company employees access to this information. "Whole areas of tobacco factories were eventually made out of bounds to other employees." HILTS, *supra* note 236, at 20.

248. See HILTS, *supra* note 236, at 20 (speculating that counsel were either very confident or fearful of "legal retribution").

249. See *id.* at 88.

250. See *id.* at 27, 36.

251. See *id.* at 41.

252. See *id.* at 63-101 (detailing industry's practices of planning advertisements and placing stores to attract young customers); Anita Manning, *Liggett Will Help States in Lawsuits*, USA TODAY, Mar. 21-23, 1997, at 1A (reporting on tobacco companies practice of targeting minors in their sales pitches).

253. See *Johns-Manville Sales Corp. v. Janssens*, 463 So. 2d 242, 250 (Fla. Dist. Ct. App. 1984) (noting company's rejection of doctor's recommendation that warning labels be used on asbestos products because company felt warnings would decrease sales); *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 723, 740 (Minn. 1980) (noting company's fear that warnings would "stigmatize" the product and affect marketing).

254. See *Cippillone v. Liggett Group, Inc.*, 785 F.2d 1108 (2d Cir. 1986); *Cippillone v. Liggett Group, Inc.*, 113 F.R.D. 86, 90 (D.N.J. 1986) (noting company's claim that disclosure of corporate records "might prove embarrassing and affect the market price of defendants' stock"), *mandamus denied*, 822 F.2d 335 (3d Cir. 1987); *Vossler v. Richards Mfg. Co.*, 192 Cal. Rptr. 219, 221, 227 (Dist. Ct. App. 1983) (noting company's concealment of error in prosthetic manufacture "to protect its market position" and to maximize profits); *Amy Johnson, GM Loses \$1.55 Million in Delta 98 Case*, LAW. WKLY. USA, Nov. 4, 1996, at B6 (reporting on company's decision to ignore a computer chip defect that caused frequent stalling problems); see also HILTS, *supra* note 236, at 1-2 (indicating that tobacco company executives had a clandestine meeting because salespersons were concerned and stock values had declined).

and the financial well-being of business, concealment is chosen over disclosure, sales over safety, and money over morality.<sup>255</sup>

Undoubtedly, the strong potential of protracted litigation, losing trials, and accompanying legal fees are driving forces in cover-ups. Dow Corning reported that its litigation costs in 1994 alone exceeded \$200 million.<sup>256</sup> A Robins attorney must have given credence to those concerns because he decided that taking the Dalkon Shield off the market would be viewed as "a 'confession of liability' and Robins would lose many of the pending lawsuits."<sup>257</sup>

Some companies go to great lengths to stave off unwanted publicity. As previously indicated, Vandiver Brown and other asbestos industry personnel manipulated the media and conspired to deprive the public of damaging information about asbestos.<sup>258</sup> Bad press about a product or the company's lack of ethics could sound the death knell for that company.

One writer offered another rationale for covering up product deficiencies or harmful effects of using the product. Once negative information about the product is exposed, there will not be any more speculation about whether the product presents health risks or whether it is dangerous.<sup>259</sup> This implies that concealment allows continuance of production as long as there is a debate about the possibility of harm. On the other hand, if published data unequivocally proves that the product is harmful, it will affect the manufacturers' ability to produce and sell that product.

Other manufacturers do a cost-benefit analysis and consumers lose. A manufacturer could decide that it would be less expensive for it to risk a lawsuit or risk injuring consumers than to redesign the product.<sup>260</sup> Minor repairs can cost millions of dollars. In a letter, one Riegel official wrote that he knew how to produce a safer fabric for children's pajamas but since the flame-retardant chemicals he needed were so expensive, he would not use the chemicals unless federal law required it.<sup>261</sup> While expressing the same concern during a recent congressional debate, Congressman Scott of Virginia complained that

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255. *Haines v. Liggett Group, Inc.*, 140 F.R.D. 681, 683 (D.N.J.), *vacated* 975 F.2d 81 (3d Cir. 1992); *see also* SOBOL, *supra* note 178, at 7 (discussing manufacturer's decision to dismiss idea of any change in the Dalkon Shield because it would delay production).

256. *See In re Dow Corning Corp.*, 187 B.R. 919, 922 (E.D. Mich. 1995); *see also* Johns-Manville Corp. v. Asbestos Litig. Group (*In re Johns-Manville Corp.*), 26 B.R. 420, 422 (Bankr. S.D.N.Y. 1983) (estimating that each suit cost \$40,000 excluding costs of appeals).

257. *Tetuan v. A.H. Robins Co.*, 738 P.2d 1210, 1221 (Kan. 1987) (quoting a Robins "Status Report for the Dalkon Shield" which discussed the legal implications of recalling the product).

258. *See Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 470 (N.J. 1986).

259. *See HILTS, supra* note 236, at 17-20.

260. *See Man v. Raymark Indus.*, 728 F. Supp. 1462, 1467 (D. Haw. 1989) (citing *Leonen v. Johns-Manville Corp.*, 717 F. Supp. 272, 285 n.7 (D.N.J. 1989)); *see also* Stolberg, *supra* note 237, at A20 (discussing tobacco manufacturers' fear of lawsuits as a rationale for maintaining secrecy of tobacco research).

261. *See Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727, 740 (Minn. 1980).

corporations continued to sell highly flammable children's pajamas because it was cheaper to make the unmodified pajamas than to reduce flammability.<sup>262</sup>

Ford Motor Company, also, made a horrific cost-benefit determination. It calculated that a certain number of human lives would be lost when Pinto gas tanks exploded upon impact and caused passengers to burn to death. Rather than redesign the gas tanks at a cost of approximately ten dollars per automobile,<sup>263</sup> Ford representatives performed "a cost-benefit analysis balancing human lives and limbs against corporate profits."<sup>264</sup> Similarly, Robins knew that the string attached to the Dalkon Shield was causing severe medical problems for its three million female customers. However, Robins repeatedly ignored the danger signs and refused to use a slower production method to eliminate the problem.<sup>265</sup>

Finally, the ultimate consequence of liability or disclosure that companies may dread is "death" of the company due to a huge vindictive award or several smaller awards. Consequently, the company could go bankrupt. Moreover, if that company's only product is irretrievably defective, it may be forced to go out of business.<sup>266</sup>

In the business world, paramount concerns are guarding the company and protecting its profits. Whether innocent people are physically or emotionally hurt as a result of the concealment is irrelevant. In the delicate balance of business and safety, business comes first. Although these reasons for concealment may appear laudable to corporate representatives, any and all of them justify punitive awards. Of course, there are some inherently dangerous products, like automobiles, that cannot be rendered risk-free. Despite known risks, however, millions of people make an informed choice to use these products every day. Concealment eliminates the freedom of choice that consumers and users are entitled to make regarding whether they should use a certain product. Moreover, when manufacturers like Robins and Johns-Manville conceal negative effects of product use, they deprive the injured person of the opportunity to seek proper

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262. See 142 CONG. REC. H4760 (daily ed. May 9, 1996) (reporting the testimony of Representative Scott, member of the Committee on the Judiciary, that the pajamas were so flammable that they ignited like newspaper).

263. See Rustad, *supra* note 12, at 53-54.

264. *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 384 (Dist. Ct. App. 1981) (indicating that Ford decided not to repair the fuel tank of its Pinto automobile based on a cost-benefit analysis); see *Miles v. Ford Motor Co.*, 922 S.W.2d 572, 588-89 (Tex. App. 1996, writ granted) (detailing experts' testimony regarding Ford's "cost-benefit" analysis). At the trial in *Miles*, a case involving defects in Ford's passenger restraint system, an accident reconstruction expert described how Ford's cost-benefit analysis was conducted:

[W]hen Ford identified what it believed was a defective product it would first run a "cost benefit" analysis to see what the cost would be to fix or repair the defect. Next, Ford would assign arbitrary values to each death or serious injury and would predict the number of occurrences which would involve either death or serious injury. Finally, Ford would determine the cost to litigate such deaths and injuries. . . . [I]f the cost to repair the defect exceeded the other costs, Ford would not correct the defect.

*Id.* at 588-89.

265. See SOBOL, *supra* note 178, at 7.

266. See *supra* notes 92-108.

care and treatment for the injury that the product causes.<sup>267</sup> It prevents people like asbestos handlers from taking precautions to protect themselves.<sup>268</sup>

Usually, the doors to corporate boardrooms—where decisions to eradicate documents and to hide information are made—are closed to the general public. Thus, cover-ups may, and do, remain undetected for many years—that is, until someone who was behind one of those doors becomes conscientious and discloses corporate wrongdoing.<sup>269</sup> As a result of these disclosures, it is evident that consumers cannot depend upon manufacturers to monitor their own conduct. Therefore, to protect the public, legislatures, judges, and consumers must endeavor to ensure production and sale of safe products. One way of guaranteeing public safety is through granting punitive awards in appropriate circumstances:

[W]orking American families [have a right] to meaningfully punish huge corporations that put faulty and sometimes deadly products onto the market and hurt American families. Eliminating such protections would give product manufacturers or sellers a green light to cut dangerous corners, to reap higher profits. The result? More deadly products like the Dalkon Shield, exploding Ford Pintos, flammable children's pajamas, defective heart valves and other nightmares that cause serious injury or death.<sup>270</sup>

The case summaries discussed in this section represent only a few corporate incidents which justify assessment of substantial punitive awards. Also, they reveal the courts' and jurors' willingness to assess punitive damages whenever manufacturers conceal harmful defects in products and cause their customers personal harm or death. Intentional and malicious concealment exemplify the type of impropriety that the *Gore* Court described as reprehensible and egregious

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267. See *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 468-69 (N.J. 1986) (noting lower court's observation that company officials suspected pulmonary disease before it was diagnosed).

268. See *id.* at 469-70 (claiming that the cover-up prevented asbestos workers from protecting themselves from prolonged exposure to the product).

269. That is what happened in late 1996. The Texaco cover-up, however, involved racial discrimination rather than a defective product. Nevertheless, it demonstrates that we are living in an era where corporate executives find it more acceptable to destroy documents than to disclose and correct the mistakes that they have committed. It reveals the kind of atmosphere that breeds this misconduct.

In that case, someone audiotaped a Texaco board meeting. Most scrupulous members of this society were appalled when the tape was played for the public. During the meeting, a Texaco official offered to shred or withhold some documents and to lie about the existence of other documents. Texaco had been asked to produce those documents during the discovery phase of a lawsuit in which it was a named defendant. See Jim Fitzgerald, *Ex-Treasurer Accused of Conspiracy—Second Exec Indicted in "Texaco Tape" Case*, CHI. SUN-TIMES, at 14; Jack E. White, *Texaco's White-Collar Bigots Top Executives, Confronting a Discrimination Suit, Talk about Shredding Documents*, TIME, Nov. 18, 1996, at 104. At that time, Robert Ulrich was Texaco's treasurer. On the tape, Ulrich declared, "We're going to purge the [expletive] out of these books. . . . We're not going to have any [expletive] thing that . . . we don't need to be in them." Sharon Walsh, *Destroying Documents and Legal Defenses: Experts Say Texaco Case Points Up How Shredders Can Come Back to Haunt Companies*, WASH. POST, Jan. 26, 1997, at H1.

270. 142 CONG. REC. H4761 (daily ed. May 9, 1996) (testimony of Congressman Markey of Massachusetts).

enough to merit a punitive award that has a high ratio to the compensatory damages awarded.<sup>271</sup> Certainly, it is the kind of conduct that makes continuation of punitive awards, unencumbered by bright line formulas, imperative. Publicizing awards puts the manufacturers and others like them on notice that punitive awards will be forthcoming if they emulate the condemned conduct in the future. Publicizing the outcomes of cases like these can provide “strong incentive” for other manufacturers to refrain from engaging in similar misconduct because they know that they may be required to pay a similar penalty.<sup>272</sup>

Punitive damages play other essential roles in product liability litigation. First, under the “private attorney general” theory, the potential of obtaining punitive damages gives individual consumers or users incentive to commence lawsuits against manufacturers for the public’s benefit. The possibility of recovering these damages encourages private citizens to challenge corporate giants who operate in a manner that results in harm to that citizen and the public at large.<sup>273</sup>

Second, private attorneys general who are willing to fight for the public cannot realistically litigate their claims against manufacturers without legal representation. The possibility of obtaining punitive damages encourages lawyers to provide zealous representation even when a small compensatory award is expected.<sup>274</sup> Also, these private attorneys general may not have the means to finance this litigation. The potential of receiving a large punitive award encourages lawyers to sue manufacturers on a contingent-fee basis. “[L]awyers usually do not accept a case unless they see an acceptable probability of economic success for themselves in doing so.”<sup>275</sup>

Moreover, exemplary damages are necessary because consumers cannot rely upon administrative remedies to protect them from injury. Administrative regulatory provisions are inappropriate substitutes for punitive damages. The Consumer Product Safety Act of 1972 (“CPSA”)<sup>276</sup> is the federal statute that is supposed to protect “the public against unreasonable risks of injury associated with consumer products.”<sup>277</sup> Congress passed the CPSA after it found that federal laws promulgated to protect consumers were ineffectual.<sup>278</sup> However, the CPSA

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271. See *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1599-603 (1996).

272. See KEETON ET AL., *supra* note 2, § 4, at 25; cf. DAN B. DOBBS, *LAW OF REMEDIES* § 3.1, at 282 (2d ed. 1993) (declaring that compensatory damages could have the same effect).

273. See *Baas v. Hoye*, 766 F.2d 1190, 1196 (8th Cir. 1985); *Tuttle v. Raymond*, 494 A.2d 1353, 1358 (Me. 1985); DOBBS, *supra* note 273, § 3.11(3), at 1327-28; Dan B. Dobbs, *Ending Punishment in ‘Punitive’ Damages: Deterrence-Measured Remedies*, 40 ALA. L. REV. 831, 847 (1989) (advocating usage of punitive awards as a “surrogate for attorney fees”); Owen M. Fiss, *The Political Theory of the Class Action*, 53 WASH. & LEE L. REV. 21, 26 (1996) (supporting the incentive argument); see also *Owens-Corning Fiberglas Corp. v. Wasiak*, 917 S.W.2d 883, 891 (Tex. App. 1996, writ granted) (noting Alabama’s policy of including legal fees and expenses in punitive award calculations). See generally ENTERPRISE RESPONSIBILITY, *supra* note 14, at 267-316 (recommending that defendants pay prevailing claimants’ attorneys’ fees and expenses).

274. See *Baas*, 766 F.2d at 1196; DOBBS, *supra* note 273, at 327-28.

275. Saks, *supra* note 13, at 1190.

276. 15 U.S.C. §§ 2051-2084 (1994).

277. *Id.* § 2051(b)(1).

278. See *id.* § 2051(a)(5).

itself has inadequately fulfilled its mission. First of all, a consumer's private cause of action is limited to certain specific claims. Under the CPSA, prohibited conduct is defined as knowing or willful violations of a consumer product safety rule or Consumer Product Safety Commission mandates.<sup>279</sup> Thus, if manufacturers commit any other wrongful act, consumers may not sue them under the CPSA.

The second flaw in the CPSA is that the civil penalty that may be imposed for knowingly or willfully violating a consumer product safety rule is constrained to "damages sustained."<sup>280</sup> Courts have interpreted that phrase to mean that plaintiffs are entitled to recover only compensatory damages, that is, compensation for actual losses they sustained, with no punitive damages available.<sup>281</sup> However, the court has discretion to award legal fees and reasonable expert witness fees.<sup>282</sup> The purposes of the extra penalties are to give potential claimants an incentive to file suit and to discourage defendants from violating the CPSA.<sup>283</sup>

A third shortcoming is that civil penalties that may be paid under the CPSA are insufficient to discourage a manufacturer from endangering consumers. No more than \$2000 may be assessed against a defendant for each civil violation. In addition, the statute places a cap on the total accumulation of damages that manufacturers must pay. Regardless of the number of consumers injured or the extent of their injuries, the maximum amount that manufacturers will pay is \$1.25 million for injuries that the same product may have caused.<sup>284</sup> Such relief is not sufficient to punish or deter manufacturers from producing products that jeopardize consumer safety.

Other penalties under the CPSA are inadequate. For example, under § 2068 of the CPSA, it is illegal to sell a product that is not in conformance with consumer product safety standards.<sup>285</sup> For one violation of that provision, a manufacturer may be fined "not more than \$5,000 or be imprisoned not more than one year, or both."<sup>286</sup> Of course, imprisonment will get manufacturers' attention. However, the fine, which is the likely penalty that a court will assess, is de minimis for corporations which have deep pockets.

Finally, the CPSA does not control risks of injury that all products may cause. The CPSA does not regulate "drugs, devices, or cosmetics."<sup>287</sup> Neither does it regulate "tobacco and tobacco products" that have recently come under

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279. *See Deck v. McBrien*, 759 F. Supp. 454, 455 (C.D. Ill. 1991); *Young v. Robertshaw Controls Co.*, 560 F. Supp. 288, 292 (N.D.N.Y. 1983).

280. 15 U.S.C. § 2072(a).

281. *See Baas v. Hoyer*, 766 F.2d 1190, 1195 (8th Cir. 1985) (quoting *Local 20, Teamsters Union v. Morton*, 377 U.S. 252, 260 (1964), and *Nelson v. Restaurants of Iowa, Inc.*, 338 N.W.2d 881, 885 (Iowa 1983)); *cf. Young*, 560 F. Supp. at 294 (holding that whether punitive damages are recoverable is determined by state law).

282. *See* 15 U.S.C. § 2072(a). *But see id.* § 2072(b) (allowing the court to deny costs if the plaintiff recovers less than \$10,000).

283. *See Wahba v. H & N Prescription Ctr., Inc.*, 539 F. Supp. 352, 356 (E.D.N.Y. 1982).

284. *See* 15 U.S.C. § 2069(a)(1).

285. *See id.* § 2068(a)(1).

286. *Id.* § 2069(a).

287. *Id.* § 2052(a)(1)(H); *accord Deck v. McBrien*, 759 F. Supp. 454, 455 (C.D. Ill. 1991); *see* 16 C.F.R. § 1145 (1997) (listing products which the CPSA regulates).

scrutiny.<sup>288</sup> For the most part, statutes that do control those products are just as ineffective.<sup>289</sup>

When the CPSA was promulgated in 1972, Congress acknowledged that not only were federal laws inadequate to protect consumers, but also that state and local government control of "unreasonable risks of injury associated with consumer products [was] inadequate."<sup>290</sup> The results of a comprehensive study in the early 1990s were consistent with Congress's findings. The study revealed that neither state, local, nor federal government regulators aggressively enforced their authority to prosecute and penalize corporate defendants who threatened public safety. One federal government official even admitted that state and local building officials, insurance companies, product liability suits, and bad publicity were the primary method of pressuring manufacturers to produce safer products.<sup>291</sup>

Criminal statutes are not any more effective at deterring personal injury. Some state statutes provide that, as a mitigating factor, the trier of fact should consider the severity of any criminal penalties to which manufacturers have been subjected before punitive damages are assessed.<sup>292</sup> However, light criminal sanctions and failure to prosecute under applicable criminal statutes do not encourage manufacturers to protect consumers.<sup>293</sup> Usually agencies lack enthusiasm and tenaciousness when investigating or prosecuting company executives who violate criminal laws.<sup>294</sup> When the government prosecuted Richardson-Merrell for violating the false writing statute<sup>295</sup> in the production of its MER/29 drug, the corporate defendants pleaded *nolo contendere*.<sup>296</sup> When they were sentenced, the total fine that all defendants were ordered to pay was only \$80,000.<sup>297</sup> In another matter, Ford Motor Company would have been liable for only \$35,000 if it were convicted of three counts of reckless homicide.<sup>298</sup> When the government rarely

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288. 15 U.S.C. § 2052(a)(1)(B).

289. See generally Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 333 (1994) (listing civil and criminal penalties for various offenses). But see *United States v. Articles of Banned Hazardous Substances Consisting of 1030 Gross (More or Less) of Baby Rattles*, 614 F. Supp. 226, 232-34 (E.D.N.Y. 1985) (banning toy rattles which could choke a baby).

290. 15 U.S.C. § 2051(a)(4).

291. See Rustad, *supra* note 12, at 73-74.

292. See, e.g., MINN. STAT. ANN. § 549.20(3) (West 1988); MISS. CODE ANN. § 11-1-65(f)(ii)(4) (Supp. 1996); OR. REV. STAT. § 30.925(2)(g) (1995); see also *Tuttle v. Raymond*, 494 A.2d 1353, 1358 (Me. 1985). But see *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 (1991) (showing reluctance to compare criminal and civil sanctions because criminal punishment includes imprisonment).

293. See *Tuttle*, 494 A.2d at 1356.

294. See Rustad, *supra* note 12, at 74-75. See generally Jane Mallor & Barry Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 656 (1980).

295. See 18 U.S.C.A. § 1001(a) (West Supp. 1997) (prohibiting fraud and misrepresentation by anyone in any matter within the jurisdiction of the executive, legislative, and judicial branches).

296. See Mallor & Roberts, *supra* note 294, at 657 n.111.

297. See *id.*

298. See Mallor & Roberts, *supra* note 294, at 657.

prosecutes a crime, punitive damages act as a substitute for the criminal system's failure to act.<sup>299</sup>

Too often, criminal fines are trivial. Therefore, they do very little in the way of discouraging manufacturers from creating and marketing products that place consumers at risk. "It is precisely because monetary penalties under government regulations prescribing business standards or the criminal law are so inadequate and ineffective as deterrents against a manufacturer and distributor of mass produced defective products that punitive damages must be of sufficient amount to discourage such practices."<sup>300</sup>

Also, some criminal fines are paid to the state. Of course, this provides financial benefits for the state. However, there may not be sufficient compensation, under these statutes, for the injured consumers' medical expenses or their pain and suffering.<sup>301</sup> Actually, when statutes allow it, punitive damages should be combined with low criminal fines so that the maximum punishment will be meted out.<sup>302</sup> Generally, criminal statutes have not been used in a way that would give manufacturers incentive to produce safer products. If the potential corporate loss was higher and government regulators enforced their own regulations, perhaps manufacturers would feel some sense of urgency about producing safer products.<sup>303</sup>

On a more positive note, there is some evidence of positive impacts that punitive damages have on some companies' business tactics. After an exhausting empirical study, one scholar concluded that

punitive damages played a vital social policy role in discouraging firms from marketing dangerous products or failing to recall them. The vast majority of dangerous products have been recalled, modified, and redesigned by their manufacturers . . . In general, companies think twice about cutting corners on safety when faced with the prospect of indeterminate punitive damages.<sup>304</sup>

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299. See *id.* at 656. The authors further distinguished punitive damages from criminal penalties:

It would be naive to suppose—even where conduct is of a type that is frequently prosecuted—that the criminal system will always fulfill its function. Practices such as plea bargaining, suspending sentences, and granting pardons, immunity, and parole, water down the deterrent effect of the criminal law. Furthermore, maximum criminal penalties, to ensure due process, must be established in advance by the legislature. Punitive damages, on the other hand, can be individualized to provide a deterrent that will be adequate for each case.

*Id.* at 657 (citations omitted).

300. *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 389 (Dist. Ct. App. 1981).

301. See Carl M. Selinger, *Robinson Crusoe Torts*, 96 W. VA. L. REV. 169, 184-89 (1993).

302. See, e.g., *Tuttle v. Raymond*, 494 A.2d 1353, 1358 (Me. 1985) (seeing no reason why imposing a criminal fine should preclude assessment of punitive damages too); *Roshak v. Leathers*, 560 P.2d 275, 279 (Or. 1976) (arguing that elimination of punitive damages would have the result of reducing the maximum punishment which the legislature knew to be applicable).

303. See *Tuttle*, 494 A.2d at 1358.

304. *Rustad*, *supra* note 12, at 79-80.



A few examples support this scholar's position. Although it took some time to do it, Robins finally did recall the Dalkon Shield.<sup>305</sup> Admiral redesigned its television tubes.<sup>306</sup> In fact, after litigation, approximately eighty-two percent of corporate defendants in one study took some step to remedy the danger. Forty-three percent of these defendants took remedial steps before litigation.<sup>307</sup>

There is additional evidence that the purposes of punitive damages are being fulfilled. As discussed in Part I, some companies, including Robins and Johns-Manville, have feared punitive awards so much that they have attempted to shield their assets behind a bankruptcy facade.<sup>308</sup> In addition, the punitive damages issue caused a three-month stalemate during recent negotiations among tobacco company representatives and state representatives for settlement of Medicare reimbursement claims.<sup>309</sup> Tobacco company representatives wanted written assurances that they would not be obligated to pay punitive damages in subsequent lawsuits by individual claimants.<sup>310</sup> For several days, an impasse on that issue threatened to halt negotiations because many of the attorneys general would not agree to limit tobacco companies' liability.<sup>311</sup>

[T]he tort liability system may be doing a better job as a deterrent than it usually receives credit for. . . . [T]he data strongly suggest that our tort system hits, infrequently and lightly. Yet, it has nevertheless somehow succeeded in frightening a great many potential defendants, who seem to go to considerable lengths to avoid becoming actual defendants.<sup>312</sup>

#### V. PROCEDURAL SAFEGUARDS AGAINST EXCESSIVE AND UNJUST AWARDS PROTECT MANUFACTURERS FROM ECONOMIC DISASTER

Having concluded that punitive damages still are necessary deterrents to unscrupulous conduct, it is important to consider some protection for manufacturers. Although some advocates lobby for immediate and drastic changes in the tort system, ample and effective statutes, rules of procedure, and common law already exist for controlling punitive awards. This section highlights some protective measures which shield manufacturers from unreasonable punitive awards, and in some cases, protect them from punitive damages altogether.

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305. *See id.* at 82.

306. *See id.* at 81.

307. *See id.* at 79.

308. *See, e.g., Hansen v. Johns-Manville Prods. Corp.*, 734 F.2d 1036, 1040 n.4 (5th Cir. 1984) (discussing argument that asbestos litigation threatened Johns-Manville's solvency).

309. *See Sandra Torry & John Schwartz, Tobacco Agreement Needed Nudge from White House*, WASH. POST, June 23, 1997, at A6.

310. *See Peter Baker & Sandra Torry, White House Won't Bless Tobacco Deal; Officials Want to See a Final Package Before Backing Liability Limits*, WASH. POST, June 17, 1997, at A1.

311. *See id.*

312. Saks, *supra* note 13, at 1286.

*A. Closer Judicial Supervision Will Help to Control and Prevent Awards*

1. Pretrial Procedures

a. Specificity in Pleading

Control should be exercised at the very beginning of lawsuits against manufacturers. In the first place, some courts have held that punitive damages are special damages under Rule 9 of the Federal Rules of Civil Procedure, requiring a claimant to allege those damages with specificity in the complaint.<sup>313</sup> Under the aegis of Rule 12, if the claim is legally insufficient and it is clear that the claimant cannot recover exemplary damages, that claim should be dismissed.<sup>314</sup> When these rules are enforced, they protect manufacturers from the costly litigation of punitive damages issues when the claimant has failed to state a claim for those damages. On the other hand, an allegation for punitive damages may be sufficient to state a claim where a complainant alleges that a manufacturer knew its product was defectively designed, knew that the defects caused serious human injuries, knew how to prevent those injuries, and intentionally concealed its knowledge of the defects from consumers.<sup>315</sup>

b. Frivolous Demands for Punitive Damages

Rule 11 of the Federal Rules of Civil Procedure acts as a further deterrent against frivolous punitive damage claims. Rule 11(b)(3) mandates that a party certify that her "allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."<sup>316</sup> Thus, this rule protects manufacturers from unsupported claims for punitive damages. Plaintiffs who file such claims may be subject to various sanctions under Rule 11(c).<sup>317</sup>

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313. See FED. R. CIV. P. 8(a)(2), 9(g); see also GA. CODE ANN. § 51-12-5.1(d)(1) (1997) (requiring specific prayer for punitive damages in the complaint); *Daugherty v. Firestone Tire & Rubber Co.*, 85 F.R.D. 693, 695 (N.D. Ga. 1980) (denying motion for more definite statement because fraud claims alleged in support of punitive damages were sufficient); *Worthem v. Gillette Co.*, 774 F. Supp. 514, 517-18 (N.D. Ill. 1991) (finding that plaintiff had stated a sufficient claim for punitive damages).

314. See generally *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 462 (Wis. 1980) (holding that a claim for punitive damages "should be dismissed only if it is clear that the plaintiff cannot recover under any condition").

315. See *id.*; cf. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (holding that a claim "should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim").

316. FED. R. CIV. P. 11(b)(3).

317. FED. R. CIV. P. 11(c).

## c. Class Actions

Class actions present another means of “protect[ing] defendants in mass tort cases from ‘execution’ by punitive damages without granting them immunity from such damages.”<sup>318</sup> Courts and litigants agree that a class action suit is the most acceptable alternative for controlling the effects of multiple punitive damage awards.<sup>319</sup> Rule 23 of the Federal Rules of Civil Procedure governs class actions in the federal court system. Under Rule 23, either the plaintiff or the defendant may ask the trial court to certify that, in one lawsuit, a group of claimants may litigate common issues of fact or law that arise from their use of the same defective product.<sup>320</sup>

A class action has been lauded as “a way of subduing the monster-like qualities of that special type of repetitive litigation so much the result of our modern technological society.”<sup>321</sup> In class actions on the punitive damages issue, jurors would award a single sum to be shared by all potential claimants who prove liability in subsequent proceedings.<sup>322</sup> Submitting to a class action would eliminate the possibility that the manufacturer would be bankrupted by multiple awards and ensure that other claimants would receive some remuneration other

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318. *Froud v. Celotex Corp.*, 437 N.E.2d 910, 914 (Ill. App. Ct. 1982), *rev'd on other grounds*, 456 N.E.2d 131 (Ill. 1983); *see id.* at 913 (suggesting that corporate defendants may want to make a request for certifying a plaintiffs' class action in order to avoid a large number of tort judgments). *But see* FED. R. CIV. P. 23 advisory committee's note (1966 amendments) (deciding that the class action tool was inappropriate for “mass accident” cases because significant questions of liability, damages, and defenses could affect “individuals in different ways”).

319. *See In re Northern Dist. of Cal. “Dalkon Shield” IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 895-900 (N.D. Cal. 1981) (concluding that without it, punitive awards may exhaust funds available for other claimants), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982); *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 479-80 (N.J. 1986) (suggesting that the “most likely solution” could be the use of class actions); *State ex rel. Young v. Crookham*, 618 P.2d 1268, 1272 (Or. 1980) (listing class actions as one possible means of avoiding the problem of multiple punitive damages awards); *Glasscock*, *supra* note 7, at 1005-08 (discussing advantages and disadvantages of class action); *Seltzer*, *supra* note 80, at 61-92 (same). *But see In re American Med. Sys., Inc.*, 75 F.3d 1069, 1086 (6th Cir. 1996) (deciding that plaintiffs failed to meet Rule 23(a) and 23(b) prerequisites); *In re Dalkon Shield*, 693 F.2d at 856-57 (decertifying class that did not meet Rule 23(a) requirements). *See generally In re Asbestos Litig.*, 90 F.3d 963, 972-88 (5th Cir. 1996) (certifying a class to include future claimants who have not been injured).

320. *See* FED. R. CIV. P. 23; *see, e.g., Dante v. Dow Corning Corp.*, 143 F.R.D. 136, 137 (S.D. Ohio 1992) (certifying a class of thousands of women); *Jenkins v. Raymark Indus.*, 109 F.R.D. 269, 277-81 (E.D. Tex. 1985) (certifying class for litigation of common issue on punitive damages), *aff'd*, 782 F.2d 468 (5th Cir. 1986); *Fischer*, 512 A.2d at 479.

321. *In re Dalkon Shield*, 526 F. Supp. at 921 (decertifying class because Rule 23(a) requirements were not met); *see also Georgine v. Achem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996). *But see Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (denying request for certification).

322. *See In re Dalkon Shield*, 526 F. Supp. at 920 (punishing defendant once); *see also RESTATEMENT (SECOND) OF TORTS* § 908 cmt. e (1965) (finding that in a class action, “full assessment of the punitive damages can be made”).

than actual damages.<sup>323</sup> In the Agent Orange litigation, the punitive damages issue was resolved in a class action involving 2.4 million Vietnam veterans.<sup>324</sup> The same methodology was used in assessing punishment for Dow Corning in breast implant litigation involving more than one million women.<sup>325</sup> In one opinion, a district court judge declared that “[a] Rule 23(b)(1)(B) nationwide class action for punitive damages obviates many of the abuses inherent in multiple punitive awards.”<sup>326</sup>

This Rule 23 alternative will benefit the manufacturer by reducing the potential for financial ruin, but it may penalize the innocent consumer.<sup>327</sup> In class action suits, thousands of claimants who prove entitlement to punitive damages, except those who opt out of the class action, must share the award. When one class action was settled in Alabama, class members received two-dollar judgments that netted a negative balance because they owed ninety-one dollars in legal fees.<sup>328</sup> Thus, what appears to be a large award may be divided into very small portions for each claimant.

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323. See *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1340 n.9 (9th Cir. 1976); *Froud*, 437 N.E.2d at 914. But see *Abed v. A.H. Robins Co.*, 693 F.2d 847, 850 (9th Cir. 1982) (noting that different punitive damages standards affect the commonality requirement of Rule 23). See generally *In re A.H. Robins Co.*, 880 F.2d 709, 740 (4th Cir. 1989) (advocating liberal, not restrictive, construction of Rule 23 in mass tort litigation).

324. See generally *In re “Agent Orange” Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984) (describing notice to potential claimants and settlement distribution), *aff’d*, 818 F.2d 145 (2d Cir. 1987); *In re “Agent Orange” Prod. Liab. Litig.*, 100 F.R.D. 718, 724 (E.D.N.Y. 1983), *mandamus denied*, 725 F.2d 858 (2d Cir. 1984).

325. See *Dante*, 143 F.R.D. at 137-38 (certifying class for recipients of silicone gel breast implants and their spouses); see also *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1469 (9th Cir. 1994) (certifying claims for punitive damages associated with torture and illegal arrests); *Jenkins*, 109 F.R.D. 269; *Important Legal Notice, Women with Breast Implants*, WASH. POST, Apr. 24, 1994, at A27 (giving notice to potential claimants regarding worldwide class action settlement of breast implant claims); *Judge Accepts Terms of Implant Settlement*, N.Y. TIMES, Apr. 3, 1994, at 14 (calling the breast implant settlement the “largest class-action settlement in American history”).

326. *In re Dalkon Shield*, 526 F. Supp. at 892, 899 (referring to class action as a “powerful tool”); see *In re Agent Orange*, 100 F.R.D. at 718 (certifying class action for the punitive damages issue); *Froud*, 437 N.E.2d at 913-14; see also *Green*, 541 F.2d at 1340-41 (denying writ of mandamus to decertify class for damages decision). See generally *School Dist. of Lancaster v. Lake Asbestos of Que., Ltd. (In re School Asbestos)*, 789 F.2d 996 (3d Cir. 1986). In *In re Dalkon Shield*, A.H. Robins faced \$2.3 billion in punitive damages while its net worth was only \$280,394,000. Therefore, the trial court certified the class to resolve the issue of punitive damages in one trial to avoid “overkill.” *In re Dalkon Shield*, 526 F. Supp. at 920.

327. See *Froud*, 437 N.E.2d at 914.

328. See *Kamilewicz v. Bank of Boston Corp.*, 92 F.3d 506 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997); see also *Susan Adams, Fighting Back*, FORBES, Apr. 22, 1996, at 129; *Terry Carter, A Divided Front in Tobacco Wars*, A.B.A. J., May 1997, at 32.

#### d. Discovery Limitations

Judges may limit the scope of discovery in accordance with Rule 26(b) of the Federal Rules of Civil Procedure.<sup>329</sup> Discovery limitations shield manufacturers from mandatory disclosure of privileged information or corporate information that is irrelevant to the issue before the court.<sup>330</sup> Limitations on discovery lessen manufacturers' litigation expenses and burdens. They also protect manufacturers from discovery abuses. For instance, for its protection against "annoyance, embarrassment, oppression, or undue burden or expense," a manufacturer may request a protective order under Rule 26(c).<sup>331</sup> On the contrary, when a manufacturer hides evidence that has been requested or resists discovery without justification, a number of sanctions may be imposed including relaying information about the nondisclosure to the jury.<sup>332</sup>

#### e. Consolidation

Under Rule 42(a) of the Federal Rules of Civil Procedure, judges may consolidate cases for a single trial on one or more issues or for completion of pretrial proceedings. When several plaintiffs sue the same defendant and their separate causes of action involve common questions of law or fact, the court may combine the cases to resolve those common issues.<sup>333</sup> Consolidation would save time and litigation expenses for courts and claimants as well as manufacturers.<sup>334</sup>

329. *See* FED. R. CIV. P. 26(b).

330. *See* FED. R. CIV. P. 26(b)(1) (limiting the scope of discovery to relevant matter that is not privileged).

331. *See* FED. R. CIV. P. 26(c). *But see* Cippillone v. Liggett Group, Inc., 113 F.R.D. 86, 88-92 (D.N.J. 1986) (denying motion for protective order for failure to show "good cause" for nondisclosure).

332. *See* Uniroyal Goodrich Tire Co. v. Ford, 461 S.E.2d 877, 889 (Ga. Ct. App. 1995) (deciding that argument to the jury was properly admitted so that the jury could take an "adverse inference" from the nondisclosure); *see also* FED. R. CIV. P. 26(g), 37.

333. Rule 42(a) provides:

When actions involving a common question of law or fact are pending before the court, [the court] may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

FED. R. CIV. P. 42(a); *see* Hilao v. Estate of Marcos, 25 F.3d 1467, 1469 (9th Cir. 1994) (consolidating cases for claimants seeking punitive damages); King v. Armstrong World Indus., Inc., 906 F.2d 1022, 1027 (5th Cir. 1990) (consolidating cases).

334. *See, e.g., In re* New York Asbestos Litig., 145 F.R.D. 644, 654-55 (S.D.N.Y. 1993); Wilson v. Johns-Manville Sales Corp., 107 F.R.D. 250 (S.D. Tex. 1985) (consolidating fifty claimants' actions against the defendants), *aff'd*, 810 F.2d 1358 (5th Cir. 1987); Neal v. Carey Canadian Mines, Ltd., 548 F. Supp. 357, 383 (E.D. Pa. 1982); ACandS, Inc. v. Godwin, 667 A.2d 116, 144-50 (Md. 1995) (concluding that consolidation was not erroneous); *see also* FED. R. CIV. P. 42(a).

#### f. Bifurcation

Bifurcating trials is another way in which courts could administer product liability cases when there is a demand for punitive damages. Federal Rule 42(b) provides that "[t]he court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim."<sup>335</sup> In this context, cases involving demands for punitive damages are tried in two independent phases. First, the court holds a trial on the issue of liability. A finding or verdict of liability would render the claimant eligible for punitive damages. Then the court presides over a second trial that focuses on whether the claimant is entitled to punitive damages.<sup>336</sup>

Bifurcation reduces the risk of prejudice verdicts against a manufacturer. For instance, to decide whether the manufacturer is liable for actual damages, jurors do not need to know the manufacturer's financial condition. If they had that information, jurors could develop a bias against the corporate defendant. Bifurcation allows jurors, in the punitive damages phase of the trial, to consider evidence regarding other satisfied and unsatisfied punitive awards and the manufacturer's financial condition without serious repercussions for the manufacturer.<sup>337</sup>

#### g. Summary Judgment

In appropriate cases, judges may determine that the plaintiff's proffer of evidence with respect to a demand for punitive damages is insufficient to warrant

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335. FED. R. CIV. P. 42(b). See generally Eunice A. Eichelberger, Annotation, *Propriety of Ordering Separate Trials as to Liability and Damages, Under Rule 42(b) of Federal Rules of Civil Procedure, in Actions Involving Personal Injury, Death, or Property Damage*, 78 A.L.R. FED. 890 (1986).

336. See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 58 (1991) (O'Connor, J., dissenting) (offering bifurcation as an alternative); *Gillham v. Admiral Corp.*, 523 F.2d 102, 104 (6th Cir. 1975) (indicating that the liability and damages issues had been tried separately); *Geressy v. Digital Equip. Corp.*, 954 F. Supp. 519, 520 (E.D.N.Y. 1997) (dividing the case into a compensatory damages phase and a punitive damages phase); see also *Hilao*, 25 F.3d at 1469 (bifurcating exemplary damages and compensatory damages determinations); cf. *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 283 (2d Cir. 1990) (denying a request for bifurcation when defendant failed to show a need for it).

337. See, e.g., *Hopkins v. Dow Corning Corp.*, 33 F.3d 1116, 1119 (9th Cir. 1994) (explaining the bifurcation process); *In re Breast Implants*, 942 F. Supp. 958, 962-63 (E.&S.D.N.Y. 1996) (severing injury issues from damage issues); *Puppe v. A.C. and S., Inc.*, 733 F. Supp. 1355, 1364 (D.N.D. 1990) (establishing procedure for trial precluding any mention, by the court or counsel, of the punitive damages claim and allowing a separate proceeding on punitive damages if liability is found); *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 215-16 (Colo. 1984); ENTERPRISE LIABILITY, *supra* note 14, at 253; cf. *Neal*, 548 F. Supp. at 391 (finding that compensatory and punitive issues could be tried together without prejudice to the manufacturer).

submission of the issue to the jury at all.<sup>338</sup> At the end of discovery, or at some other appropriate time, the manufacturer's counsel could move for summary judgment as to all or part of the claims the plaintiff has brought.<sup>339</sup> Here, Rule 56(c), which courts are relying upon more frequently, allows entry of partial summary judgment without a trial.<sup>340</sup> Absent evidence which shows that the manufacturer engaged in conduct that meets the applicable state standard for awarding punitive damages, the trial court should not submit factually insufficient claims for punitive damages to the jury.<sup>341</sup> Likewise, when a manufacturer attempts to warn consumers and users about the potential dangers of using a product, a punitive award is not appropriate and the issue should not be sent to the jury.<sup>342</sup>

Summary judgment disposes of unwarranted claims for punitive damages and "prevent[s] wasteful adjudication of issues having no foundation in law or fact."<sup>343</sup> It is a potent procedural device for relieving defendant manufacturers of an alleged obligation to pay punitive damages. In fact, since this is a pretrial motion, when the court grants the motion for summary judgment on the punitive damages issue, the manufacturer does not have to introduce evidence on that question at the trial.

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338. See *Baker v. Firestone Tire & Rubber Co.*, 793 F.2d 1196, 1200-01 (10th Cir. 1986) (declining to submit punitive damage issue to the jury because no factual basis was established); *Godwin*, 667 A.2d at 139-44 (finding insufficient evidence to present punitive damages issue to the jury); *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 457 (Wis. 1980); see also *Owen*, *supra* note 2, at 36-44 (stating that no punitive damages should be awarded when the product is not defective and listing other reasons for nonliability).

339. See FED. R. CIV. P. 56(b); see also *In re Breast Implants*, 942 F. Supp. at 961; EDWARD J. BRUNET ET AL., SUMMARY JUDGMENT, FEDERAL LAW AND PRACTICE 2 (1994) (calling summary judgment "the single most important pretrial device used today"); Mark Hansen, *Warning: Don't Flick with Bic*, A.B.A. J., Sept. 1996, at 22 (reporting that a manufacturer's motion for summary judgment had been granted).

340. See FED. R. CIV. P. 56(c); see also BRUNET ET AL., *supra* note 339, at 13-14. See generally *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (setting the burden which the movant must meet when filing a motion for summary judgment).

341. See *Sloman v. Tambrands, Inc.*, 841 F. Supp. 699, 703 & n.8 (D. Md. 1993) (granting summary judgment because the manufacturer did not act with "actual malice"); *Wangen*, 294 N.W.2d at 457.

342. See *Toole v. McClintock*, 999 F.2d 1430, 1436 (11th Cir. 1993); *Stanback v. Parke, Davis & Co.*, 657 F.2d 642, 645-46 (4th Cir. 1981) (granting summary judgment because there was insufficient evidence that the manufacturer's failure to warn about the danger caused plaintiff's injury); *Boddie v. Litton Holding Sys.*, 455 N.E.2d 142, 151-52 (Ill. App. Ct. 1983) (finding that the trial court correctly granted one defendant's motion for summary judgment). But see *In re Breast Implants*, 942 F. Supp. at 961 (denying a premature motion for summary judgment); *Gold v. Johns-Manville Sales Corp.*, 553 F. Supp. 482, 485 (D.N.J. 1982) (holding that summary judgment was inappropriate since corporate employers' "state of mind or motive or good faith" was involved).

343. BRUNET ET AL., *supra* note 339, at 4.

#### h. Multidistrict Litigation

For limited purposes, a federal statute, the Multidistrict Litigation Act ("MDL"),<sup>344</sup> enables courts to transfer all lawsuits that have been filed in different districts to one designated district. The MDL allows the Federal Judicial Panel on Multidistrict Litigation to transfer actions involving "one or more common questions of fact."<sup>345</sup> "For the convenience of parties and witnesses and [to] promote the just and efficient conduct of such actions," the matters are transferred for consolidating or coordinating all pretrial proceedings.<sup>346</sup> Some products liability cases have been transferred for these reasons. To illustrate, two well-known cases were transferred under the MDL. The Judicial Panel transferred the Agent Orange litigation to Judge Weinstein in a New York district court.<sup>347</sup> The breast implant litigation was transferred to the Honorable Samuel C. Pointer, Jr. in the Northern District of Alabama for coordinated or consolidated pretrial proceedings.<sup>348</sup>

This is another cost-saving measure for manufacturers. Expenses decrease in MDL litigation because lengthy pretrial proceedings for several separate cases are consolidated and coordinated in one forum. Issues affecting potentially large numbers of claimants are decided at one time instead of in a piecemeal manner by different judges who may render inconsistent opinions.

#### i. Alternative Dispute Resolution

Manufacturers may resort to alternative dispute resolution ("ADR") to avoid an obligation to pay punitive damages. To forgo the trial process entirely, manufacturers and claimants could dispose of claims through arbitration, mediation, or some other method of ADR.<sup>349</sup> Actually, to sidestep the gamble of trials and the accompanying high risk of paying punitive awards, most corporate

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344. 28 U.S.C. § 1407 (1996).

345. *Id.* § 1407(a).

346. *Id.* After pretrial proceedings are completed, the cases are sent back to the district from which they were transferred. *See id.*

347. *See* *Ivy v. Diamond Shamrock Chem. Co.*, 901 F.2d 7, 8-9 (2d Cir. 1990).

348. *See In re Dow Corning Corp.*, 187 B.R. 919, 922 (E.D. Mich. 1995); *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 793 F. Supp. 1098 (J.P.M.L. 1992) (combining cases for pretrial matters). *But see* *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers (In re Dow Corning Corp.)*, 86 F.3d 482 (6th Cir. 1996) (rejecting company's challenge to transfer); Rex Bossert, *Breast Implant Suits: A Bankruptcy Matter?*, NAT'L L.J., Apr. 14, 1997, at A1 (discussing the decision to transfer cases).

349. *See* *King v. Armstrong World Indus., Inc.*, 906 F.2d 1022, 1028 (5th Cir. 1990) (noting parties' prior agreement to participate in ADR); *see also* LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE 17-22 (1994) (describing the different modes of ADR). *See generally* AMERICAN ARBITRATION ASS'N, TASK FORCE ON ALTERNATIVE DISPUTE RESOLUTION AND MASS TORTS, RECOMMENDATIONS (1997) [hereinafter TASK FORCE ON ADR] (recommending use of ADR in mass tort cases).



litigants settle claims.<sup>350</sup> During pretrial negotiations, ninety-five percent of the claims against manufacturers are settled.<sup>351</sup>

For manufacturers, ADR is beneficial in even more ways. “[N]eutrals can be selected to determine fair formulas for allocating fixed amounts of money or to establish procedures for addressing fairness issues. Settlement agreements can provide for ADR procedures to address unanticipated issues.”<sup>352</sup> Also, ADR is a less expensive and more expeditious manner of resolving disputes.<sup>353</sup> Finally, ADR permits companies to maintain some privacy regarding their settlements. To illustrate, as a condition of the settlement, company representatives can, and do, stipulate that the parties may not disclose or publicize the amount of the settlement.<sup>354</sup>

## 2. Trial Procedures

### a. Evidence

Trial judges should exercise their broad discretion in monitoring admission of evidence.<sup>355</sup> For example, evidence should be admitted regarding whether punitive awards already have been levied against a manufacturer in prior cases. The defendant manufacturer’s wealth is a relevant consideration. Evidence of postaccident remedial actions that the manufacturer took should be admitted. If the manufacturer could be penalized further in future proceedings, that evidence is admissible. In addition, most courts agree that information about past awards

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350. See *King*, 906 F.2d at 1028 n.28 (mentioning that all except one defendant had settled); *In re “Agent Orange” Prod. Liab. Litig.* MDL No. 381, 818 F.2d 145, 170-74 (2d Cir. 1987) (approving a \$180 million settlement agreement); *In re Dow Corning Corp.*, 198 B.R. 214 (Bankr. E.D. Mich. 1996) (approving settlement); *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 479-80 (N.J. 1986) (noting that the asbestos industry had established a claims facility for expeditious settlements); *SOBOL*, *supra* note 178, at 22 (mentioning the settlement of 198 cases against Robins for \$38 million); *Saks*, *supra* note 13, at 1212, 1227-28; see also *ACandS, Inc. v. Godwin*, 667 A.2d 116, 154-55, 158-59 (Md. 1995) (advising the jury that some defendants settled after the trial started and encouraging judges to set trial dates to expedite settlements); *Don J. DeBenedictis, Implant Settlement Approved*, A.B.A. J., Oct. 1994, at 34 (announcing a \$4.25 billion settlement and that approximately 14,742 women opted out of the class action); *Sargeant*, *supra* note 102, at 114 (announcing Johns-Manville’s settlements); *Savage*, *supra* note 76, at A1 (reporting that corporate lawyers “offer generous settlements” to avoid punitive awards). *But see New Zealand Women Will Appeal Implant Settlement*, DOMINION POST (Morgantown, W. Va.), Sept. 16, 1994, at A3 (complaining that they would not receive a fair share of the money and threatening to prevent all women from recovering anything).

351. *Saks*, *supra* note 13, at 1213.

352. *TASK FORCE ON ADR*, *supra* note 349, at 11.

353. See *DWIGHT GOLANN, MEDIATING LEGAL DISPUTES* 524 (1996) (describing mediation as “the dispute resolution method of choice”). *But see King*, 906 F.2d at 1028 (noting parties’ failure to cooperate with court-monitored ADR); *Godwin*, 667 A.2d at 119 (indicating that judge’s ADR techniques had “only limited success”).

354. See *Saks*, *supra* note 13, at 1242.

355. See e.g., *Vossler v. Richards Mfg. Co.*, 192 Cal. Rptr. 219, 223 (Ct. App. 1983).

and the negative impact that those awards had on the manufacturer's financial status are relevant and admissible for the trier of fact's consideration.<sup>356</sup>

On the other hand, judges should exclude certain evidence that is not relevant to the issues in the case. For instance, in a case about whether a specific kind of tire manufactured at a certain plant was defective, evidence revealing a recall of other kinds of tires and studies of operations at other plants was held inadmissible.<sup>357</sup> Cumulative and prejudicial evidence showing that the defendant had engaged in improprieties while manufacturing or handling other products may have negatively influenced the jury to dole out a high verdict for punitive damages. As a result, the court held that the defendant tire manufacturer's motion in limine to exclude this type of evidence should have been granted.<sup>358</sup>

#### b. Judgment as a Matter of Law

Alternatively, during trial, as permitted by Rule 50(a) of the Federal Rules of Civil Procedure, the manufacturer may argue a motion for judgment as a matter of law to prevent submission of the exemplary damages issue to the jury. Rule 50(a) provides that if "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party."<sup>359</sup> This means that a judge, viewing the punitive damages evidence in the light most favorable to the plaintiff, may determine that the plaintiff has not provided evidence that satisfies the local standard for punitive damages. If the judge makes such a finding, judgment as a matter of law on the punitive damages issue should be entered for

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356. See *Dunn v. HOVIC*, 1 F.3d 1371, 1391 (3d Cir.), *modified*, 13 F.3d 58 (3d Cir. 1993); *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 407 (5th Cir. 1986); *Acosta v. Honda Motor Co.*, 717 F.2d 828, 839 & n.17 (3d Cir. 1983); *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. 357, 387-88 (E.D. Pa. 1982) (disallowing speculative and vague information but allowing information about involvement in litigation and possible liability); *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 215-16 (Colo. 1984) (informing the jury that the defendant may be subject to other awards); *Johns-Manville Corp. v. Janssens*, 463 So. 2d 242, 248 (Fla. Dist. Ct. App. 1984) (finding information that either aggravates or mitigates admissible); *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 868 (Iowa 1994); *Unified Sch. Dist. No. 490 v. Celotex Corp.*, 629 P.2d 196, 206 (Kan. Ct. App. 1981); *Tuttle v. Raymond*, 494 A.2d 1353, 1356 (Me. 1985); *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 480 (N.J. 1986) (considering "evidence of any criminal punishment imposed for the conduct in question"); *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 447, 459-60 (Wis. 1980) (evidence of prior awards admissible); ENTERPRISE RESPONSIBILITY, *supra* note 14, at 253-55 (advocating admission of evidence regarding profit defendant realized from misconduct but not evidence of defendant's wealth); *cf. Vossler*, 192 Cal. Rptr. at 224 (considering wealth only when making excessiveness determinations).

357. See *Uniroyal Goodrich Tire Co. v. Ford*, 461 S.E.2d 877, 886-87 (Ga. Ct. App. 1995) (holding that evidence about another product that lacked similarity to the product in question should not have been admitted).

358. See *id.*; *cf. Fibreboard Corp. v. Pool*, 813 S.W.2d 658, 668-70 (Tex. App. 1991, writ denied) (finding that papers reflected what the corporation knew and when it received that knowledge).

359. FED. R. CIV. P. 50(a).

the defendant manufacturer.<sup>360</sup> An order that the manufacturer is entitled to judgment as a matter of law would take that issue from the jury and eliminate the risk that the jury would render a verdict for punitive damages.

### c. Jury Instructions

After closing arguments, judges and litigants should ensure that jurors receive appropriate instructions as guidance during their deliberations. A proper instruction for punitive damages would apprise the jury of the purposes for punitive awards, set forth criteria for meting out this type of punishment, clearly define the degree of reprehensibility that merits such an award, and inform jurors that imposition of exemplary damages is not mandatory.<sup>361</sup> At least one author has faith in civil jurors' ability to issue a fair verdict: "For more than 200 years, American juries made up of citizens drawn from the community have meted out justice in a fair and evenhanded manner, regardless of a parties' wealth or social standing."<sup>362</sup> For manufacturers' protection, with the right instructions, jurors will award reasonable punitive damages only when it is appropriate.

## 3. Posttrial Procedures

### a. Motions

When jurors do assess punitive awards, they do not have the last word. Manufacturers who wish to challenge an award have a constitutional right to judicial review. In *Honda Motor Co. v. Oberg*,<sup>363</sup> the Supreme Court ruled that

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360. See, e.g., *Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1059 (11th Cir. 1994); see also *Jackson*, 781 F.2d at 402 n.9; *Acosta*, 717 F.2d at 831-32 (explaining Rule 50); *Knippen v. Ford Motor Co.*, 546 F.2d 993, 1002-03 (D.C. Cir. 1976); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967) (finding insufficient evidence for a punitive damages award); *Uniroyal Goodrich Tire Co.*, 461 S.E.2d at 884-85 (finding that denial of the motion was erroneous). But see *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1591 (1996) (denying the posttrial motion to relieve defendant of the obligation to pay punitive damages); *Gillham v. Admiral Corp.*, 523 F.2d 102, 109 (6th Cir. 1975) (reversing trial court's order of judgment notwithstanding the jury verdict of \$100,000 in punitive damages).

361. See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19-20 (1991) (stating that jurors should be informed of the nature, purpose, and basis for exemplary awards); *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1097 (5th Cir. 1991) (offering a sample jury instruction); *Geressy v. Digital Equip. Corp.*, 950 F. Supp. 519, 521 (E.D.N.Y. 1997) (imploring district court judges to inform juries of their role by including the *Gore* factors in the instructions); *Fischer*, 512 A.2d at 480-81; Lisa A. Bell, *What the Defense Litigator Can Do to Curb Excessive Punitive Damage Awards*, INSIDE LITIG., July 1992, at 17 (offering litigation tips); Owen, *supra* note 2, at 21-22 (finding a malice instruction of "willful, intentional and done in conscious disregard of its possible result" an unacceptable instruction because any person could be held liable under that standard and it does not consider the risk-benefit analysis). See generally RONALD W. EADES, *JURY INSTRUCTIONS ON DAMAGES IN TORT ACTIONS* (3d ed. 1997) (providing sample jury instructions and case citations).

362. Stewart, *supra* note 153, at 71.

363. 512 U.S. 415 (1994).

the State of Oregon's constitution violated the Due Process Clause because it precluded judicial review of the size of exemplary awards.<sup>364</sup> The Court reasoned that judicial review is critical since "[p]unitive damages pose an acute danger of arbitrary deprivation of property . . . [and] judicial review of the amount awarded was one of the few procedural safeguards which the common law provided against that danger."<sup>365</sup> The Court based its conclusion that judicial scrutiny was needed on two grounds. First, jury instructions give jurors unbridled discretion to determine the size of the award. Second, when they receive evidence of a corporation's net worth, jurors tend to develop biases against large corporations.<sup>366</sup>

There are various ways of seeking judicial review of punitive awards. One way is to file a motion for judgment as a matter of law. If the manufacturer requested judgment as a matter of law at the close of all evidence, under Rule 50(b), it could renew that motion within ten days after the unfavorable judgment is entered. At this point, the manufacturer would be asking the trial judge to overturn a jury verdict for punitive damages.<sup>367</sup>

Alternatively, or simultaneously, the defendant may request a new trial. The trial court may exercise its discretion to grant a new trial under Rule 59(a).<sup>368</sup> When a juror, a party, a judge, or a witness has committed some error that affects the punitive damages verdict, a new trial would be proper.<sup>369</sup> These motions enable judges to correct juror, party, judicial, or attorney error that has occurred during trial proceedings.

364. See *id.* at 418 (finding Oregon law unconstitutional).

365. *Id.* at 432.

366. See *id.*; see also *Sturm, Ruger & Co. v. Day*, 594 P.2d 38, 48 (Alaska 1979) (using judicial scrutiny as a way of dispelling concerns about bankruptcy and excessive punishment), *overruled by Dura Corp. v. Harned*, 703 P.2d 396 (Alaska 1985) (overruling to the extent that a failure to exercise ordinary care is not sufficient to raise a jury question on the issue of comparative negligence in a products liability case based on strict liability in tort); *Owen*, *supra* note 2, at 11 (opining that jurors sympathize with the injured consumer).

367. See FED. R. CIV. P. 50(b); see *Newding v. Kroger Co.*, 554 S.W.2d 15, 17-18 (Tex. App. 1977, no writ) (finding that overturning the exemplary damages verdict was proper).

368. See FED. R. CIV. P. 50, 59; see e.g., *Patton v. TIC United Corp.*, 77 F.3d 1235, 1242-43 (10th Cir.) (affirming trial court's denial of motion for new trial on the grounds that the jury's apportionment of fault was not against the weight of the evidence), *cert. denied*, 116 S. Ct. 2525 (1996); *Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1059 (11th Cir. 1994) (concluding that a judgment notwithstanding the verdict should have been granted in the manufacturer's favor); *Sturm, Ruger & Co.*, 594 P.2d at 47-48 (finding that the trial court abused its discretion when it did not reduce the punitive damages or order a new trial); cf. *Gillham v. Admiral Corp.*, 523 F.2d 102, 109 (6th Cir. 1975) (concluding that the motion should not have been granted after the jury verdict was announced).

369. See *Atlas Food Sys. & Serv., Inc. v. Crane Nat'l Vendors, Inc.*, 99 F.3d 587, 599-600 (4th Cir. 1996) (affirming order of new trial on punitive damages issue alone); *Hale v. Firestone Tire & Rubber Co.*, 820 F.2d 928, 936-37 (8th Cir. 1987) (giving plaintiffs the choice of remittitur or new trial because of the way counsel handled an exhibit); cf. *Geressy v. Digital Equip. Corp.*, 950 F. Supp. 519, 523 (E.D.N.Y. 1997) (denying motion for new trial).

### b. Remittitur

When a jury's punitive award is excessive, the court may give the plaintiff the option of consenting to a remittitur or undergoing a new trial. Remittitur allows the judge to subtract any portion of an award that exceeds amounts supported by evidence presented at trial.<sup>370</sup> For example, a district court judge in a Pennsylvania court reduced a punitive award from \$750,000 to \$30,000 because it was excessive. The plaintiff had sustained only \$1000 in actual damages.<sup>371</sup> Unlike other procedural tools which remain underutilized by judges, remittitur is often used when exemplary awards exceed reasonableness standards.<sup>372</sup> Remittitur gives added protection from excessive awards and allows a manufacturer some reprieve without additional litigation costs and risks associated with another trial or an appeal.

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370. See FLA. STAT. ANN. § 768.73(1)(b) (West 1997) (allowing the judge to reduce the award); MO. ANN. STAT. § 510.263(6) (West Supp. 1997) (allowing the judge to reduce or add to a punitive award); *Dimick v. Schiedt*, 293 U.S. 474, 485-87 (1935) (finding remittitur constitutional and additur unconstitutional); *Dunn v. HOVIC*, 1 F.3d 1373, 1391 (3d Cir.) (commending district court for reducing the original award from \$25 million to \$2 million and further reducing the district court's award to \$1 million), *modified*, 13 F.3d 58 (3d Cir. 1993); *Hansen v. Johns-Manville Prod. Corp.*, 734 F.2d 1036, 1047 (5th Cir. 1984) (reducing punitive damage award from \$1 million to \$300,000); *Friedman v. F.E. Myers Co.*, 710 F. Supp. 118, 124 (E.D. Pa. 1989) (giving plaintiffs a choice of remittitur or a new trial); *Alley v. Gubser Dev. Co.*, 569 F. Supp. 36, 38-39 (D. Colo. 1983) (quoting *Malandris v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152, 1168 (10th Cir. 1981)), *rev'd on other grounds*, 785 F.2d 849 (10th Cir. 1986); *Campus Sweater & Sportswear Co. v. H.B. Kahn Constr. Co.*, 515 F. Supp. 64, 103 (D.S.C. 1979) (remitting \$26,413.34 of the compensatory damage award), *aff'd*, 644 F.2d 877 (4th Cir. 1981); *Sears, Roebuck & Co. v. Harris*, 630 So. 2d 1018, 1035 (Ala. 1994) (ordering plaintiff to accept a remittitur of compensatory damages or the case would be remanded for a new trial); *Sturm, Ruger & Co.*, 594 P.2d at 48-49; *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 358 (Ct. App. 1981) (citing trial court's decision reducing \$125 million punitive damages award to \$3.5 million); *Stambaugh v. International Harvester Co.*, 435 N.E.2d 729, 747 (Ill. App. Ct. 1982) (reducing \$7.5 million award to \$65,000), *rev'd on other grounds*, 464 N.E.2d 1011 (Ill. 1984); *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 480 (N.J. 1986) (noting that "judicious exercise of remittitur" offers protection against excessive punitive damages). *But see* *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1603 (1996) (holding that when the ratio is in a constitutionally acceptable range, remittitur will not be an appropriate remedy); *State ex. rel. Young v. Crookham*, 618 P.2d 1268, 1272 (Or. 1980) (suggesting remittitur as an alternative); *Saks*, *supra* note 14, at 1280-81 (finding that the larger the award was, the larger the reduction); *Jane Massey Draper*, Annotation, *Excessiveness or Inadequacy of Punitive Damages in Cases Not Involving Personal Injury or Death*, 14 A.L.R.5th 242 (1993) (indicating court's unwillingness to interfere with jury verdicts); *Mark Thompson, Jockeying for Position*, A.B.A. J., May 1997, at 66 (discussing whether caps on punitive damages interfere with the prerogatives of the jury, violating the Illinois constitution).

371. See *Friedman*, 710 F. Supp. at 122-24; *see also* *BMW of N. Am., Inc. v. Gore*, No. 1920324, 1997 WL 233910, at \*8 (Ala. May 9, 1997).

372. See *Rustad*, *supra* note 12, at 51.

### c. Appeals

If all other procedures fail, appellate review affords additional scrutiny to determine whether an award "is . . . reasonable in [its] amount and rational in light of [its] purpose to punish what has occurred and to deter its repetition."<sup>373</sup> Thus, "bad decisions can be reversed and . . . there is no need for extreme legislation, like the kinds being proposed in Congress to limit awards."<sup>374</sup> A significant number of appeals of punitive awards yielded favorable results. Defendants appealed more than fifty percent of punitive awards. Appellate courts reduced or reversed more than half of that fifty percent.<sup>375</sup>

To guard against awards that are not supported by the evidence, litigants and judges involved in product liability litigation have utilized some of the options discussed in this section. If these procedural tools were used more often and more aggressively, further tort reform would be unnecessarily cumulative. With proper judicial supervision, either before, during, or after the trial, reasonable awards that serve the objectives of punitive damages will be assessed.<sup>376</sup> Manufacturers who conceal their misconduct should not leave the courthouse with a slap on the wrist and a strong reprimand. However, as they should with any party who appears before them, members of the judiciary should consider different ways to protect manufacturers from some of the pitfalls associated with punitive damages.

#### *B. Legislators Have Established Strict Dominion over Punitive Awards*

Most courts have taken a hands-off approach and left tort reform to state and federal legislators. In doing so, the courts defer to the legislative branch of

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373. *Pacific Mut. Life Ins. Co. v. Haslip* 499 U.S. 1, 21 (1991); *see also* *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989) (defining the appropriate standards of review for district courts and courts of appeals); *Hopkins v. Dow Corning Corp.*, 33 F.3d 1116, 1126 (9th Cir. 1994) (stating the standards of review for district and appellate courts); *Dunn*, 1 F.3d at 1385 (reviewing an award of punitive damages); *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. 357, 377 (E.D. Pa. 1982) (identifying protection that exists at appellate and district court levels); *Champagne v. Raybestos-Manhattan, Inc.*, 562 A.2d 1100, 1127 (Conn. 1989) (outlining procedural and substantive safeguards against excessive punitive damage awards); *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 866-68 (Iowa 1994) (describing postverdict scrutiny and upholding the award).

374. *Smith*, *supra* note 76, at 3A.

375. *See* *Rustad*, *supra* note 12, at 57; *see, e.g., Gore*, 116 S. Ct. at 1604 (ruling that an award that was "tantamount to a severe criminal penalty" was inappropriate); *Sturm, Ruger & Co.*, 594 P.2d at 49 (finding that the award was disproportionate to actual damages and that the manufacturer was wrong); *Sabich v. Outboard Marine Corp.*, 131 Cal. Rptr. 703, 711 (Ct. App. 1976) (reversing an award of punitive damages because of judicial error); *American Nat'l Bank & Trust Co. v. BIC Corp.*, 880 P.2d 420, 426 (Okla. Ct. App. 1994) (finding remittitur of more than \$2 million dollars for each claimant appropriate). *But see* *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1093 (5th Cir. 1991) (affirming punitive award of twenty times compensatory damages and refusing to "upset the jury's verdict").

376. *See* *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 215-16 (Colo. 1984).

government to deal with controlling verdicts.<sup>377</sup> In a majority of states, several laws already are enforced to protect manufacturers from ramifications discussed in Part IV of this Article. While most statutes address use of procedural techniques which precede the verdict, some are designed to limit the size of an award after the jury reaches its verdict.

### 1. State Legislators

To curtail the devastating impact of punitive damages, some legislators have introduced and passed legislation that places a ceiling on punitive awards. Many states including Colorado, Connecticut, Florida, Georgia, Kansas, Missouri, Nevada, Ohio, Oklahoma, Texas, and Virginia use mathematical calculations to cap these awards. Accordingly, the maximum punitive award is limited to some amount that is proportionate to the plaintiff's actual or compensatory damages. For instance, depending upon the location of the forum, the punitive award may be capped at two, three, or four times the compensatory award.<sup>378</sup>

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377. See *Dunn*, 1 F.3d at 1387 (deferring to Congress or the Virgin Islands' legislature); *Racich v. Celotex Corp.*, 887 F.2d 393, 399 (2d Cir. 1989) (deferring to Congress or some higher judicial authority); *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 406 (5th Cir. 1986) (finding state or federal legislative relief more appropriate); *Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565, 1569-70 (2d Cir. 1985); *Germanio v. Goodyear Tire & Rubber Co.*, 732 F. Supp. 1297, 1306 (D.N.J. 1990); *Man v. Raymark Indus.*, 728 F. Supp. 1461, 1466-67 (D. Haw. 1989); *Spaur*, 510 N.W.2d at 866 (doubting whether legislation would halt the problem of punitive awards); *Davis v. Celotex Corp.*, 420 S.E.2d 557, 565-66 (W. Va. 1992); ENTERPRISE RESPONSIBILITY, *supra* note 14, at 263 (advocating federal legislation for more uniform relief); RICHARD L. BLATT, PUNITIVE DAMAGES § 2.6 n.62 (1991) (predicting that the "battle" over punitive damages, will shift from the courts to the state legislature); Robert E. Riggs, *Constitutionalizing Punitive Damages: The Limits of Due Process*, 52 OHIO ST. L.J. 859, 914 (1991) (advocating legislation as the more appropriate remedy); *cf.* *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053, 1065 (D.N.J.) (dictating what the statute must indicate regarding whether punitive damages should be allowed in mass tort cases and setting explicit standards), *vacated in part on reconsideration*, 718 F. Supp. 1233 (D.N.J. 1989); *Tuttle v. Raymond*, 494 A.2d 1353, 1360-63 (Me. 1985) (establishing standard for determining punitive damages and burden of proof).

378. See, e.g., COLO. REV. STAT. ANN. § 13-21-102(1)(a), (3) (West 1997); CONN. GEN. STAT. ANN. § 52-240b (West 1991) (limiting award to twice the compensatory damages in product liability cases); FLA. STAT. ANN. § 768.73(1)(a) (West 1997) (limiting punitive awards to three times compensatory damage); KAN. STAT. ANN. § 60-3702(e) (1994) (setting the cap at the defendant's annual gross income or \$5 million, whichever is the lesser amount, or one-and-one-half times the profit the manufacturer accrued); MO. ANN. STAT. § 510.263(4) (West Supp. 1997) (allowing posttrial hearing on crediting defendant for prior punitive awards arising out of same conduct); NEV. REV. STAT. ANN. § 42.005(1) (Michie 1996) (establishing cap based upon the amount of compensatory damages); N.D. CENT. CODE § 32.03.2-11(4) (1996); OKLA. STAT. ANN. tit. 23, § 9.1(C) (West Supp. 1997); OR. REV. STAT. § 30.925(3) (Supp. 1996); TEX. CIV. PRAC. & REM. CODE ANN. §§ 41.001-.008 (West Supp. 1997) (limiting punitive awards to four times actual damages or \$200,000, whichever is greater); VA. CODE ANN. § 801-38.1 (Michie 1996). *But see* DOBBS, *supra* note 272, at 349-50 (asserting that caps raise issues of constitutionality and construction); Stewart, *supra* note 153, at 68 (calling damage caps "arbitrary and capricious").

In other states, the plaintiff does not receive the entire exemplary award. A percentage of each award is allocated to a designated government agency or a compensation fund.<sup>379</sup> In Iowa, for example, the state disburses twenty-five percent of a punitive award to the plaintiff, deducts litigation costs, then deposits the remainder in civil reparations trusts. Money from the trusts may be disbursed "only for . . . indigent civil litigation programs or insurance assistance programs."<sup>380</sup> Plaintiffs may decry the automatic award reductions, but courts in Florida, Georgia, and Iowa have upheld these statutes as constitutional.<sup>381</sup>

Another way of reducing the risk that jurors will render an excessive verdict is to prevent jurors from determining the amount of damages. Thus, in some states, upon receiving a verdict for punitive damages, the court itself is charged with setting the monetary amount. In Connecticut and Kansas, judges calculate the sum of exemplary damages that defendants must pay.<sup>382</sup> Other states allow the court to hold two separate proceedings. One proceeding involves the manufacturers' liability for the plaintiffs' injuries. If they are found liable, the same fact finders would determine whether the complainants are entitled to punitive damages.<sup>383</sup> Bifurcation avoids prejudice to the manufacturers because evidence about their

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379. *See, e.g.*, FLA. STAT. ANN. § 768.73(2) (West 1997) (allocating 35% of the award to the General Revenue Fund or Public Medical Assistance Trust Fund); GA. CODE ANN. § 51-12-5.1(e)(2) (Supp. 1997) (paying 75% of punitive awards to the Office of Treasury and Fiscal Services, less litigation costs and attorneys' fees); 735 ILL. COMP. STAT. 5/2-1207 (West Supp. 1997); IOWA CODE ANN. § 668A.1(2)(b) (West 1997); KAN. STAT. ANN. § 60-3402(e) (1994); MO. REV. STAT. § 537.675 (West Supp. 1997) (paying attorneys' fees and expenses, then apportioning 50% of the remainder to the Tort Victims' Compensation Fund); UTAH CODE ANN. § 78-18-1(3) (1996) (allocating half of the amount that exceeds \$20,000 to the state treasury).

380. IOWA CODE ANN. § 668A.1(2)(b).

381. *See* Gordon v. State, 585 So. 2d 1033, 1035-38 (Fla. Dist. Ct. App. 1991), *aff'd*, 68 So. 2d 8 (Fla. 1992); Mack Trucks, Inc. v. Conkle, 436 S.E.2d 635, 637-39 (Ga. 1993); Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs., Inc., 473 N.W.2d 612, 619 (Iowa 1991).

382. *See* CONN. GEN. STAT. ANN. § 52-240b (West 1991); KAN. STAT. ANN. § 60-3702(b) (1994); OHIO REV. CODE ANN. § 2307.80(B) (Anderson Supp. 1996); *see also* ENTERPRISE LIABILITY, *supra* note 14, at 256 (suggesting that judges impose the award); *cf.* Zoppo v. Homestead Ins. Co., 644 N.E.2d 397, 401-02 (Ohio 1994) (holding that allowing judges to make the decision violates the right to jury trial). *cf.* Smith v. Printup, 866 P.2d 985, 994 (Kan. 1993) (deciding that the judicial determination was not unconstitutional).

383. *See, e.g.*, CAL. CIV. CODE § 3295(d) (West Supp. 1997) (requiring bifurcation upon defendant's request); GA. CODE ANN. § 51-12-5.1(d)(1) (Supp. 1996) (trying liability first whenever punitive award is sought); KAN. STAT. ANN. § 60-3702(a)-(b) (1994) (giving the court authority to determine the amount after the trier of fact determines liability); MINN. STAT. ANN. § 549.20(4) (West Supp. 1997) (mandating separate proceedings if either party requests it); MO. ANN. STAT. § 510.263(1) (West Supp. 1997) (mandating bifurcation upon either party's request); MONT. CODE ANN. § 27-1-221(7)(a) (1995) (authorizing jurors to determine the amount of the punitive award in a separate proceeding); N.J. STAT. ANN. § 2A:58C-5(b), (d) (West 1996); N.D. CENT. CODE § 32-03.2-11(2) (1996); *cf.* KY. REV. STAT. ANN. § 411.186(1) (Michie 1996) (determining all issues concurrently).



finances and the seriousness of their misconduct is inadmissible in the liability phase of the trial.<sup>384</sup>

Another measure that states frequently use to control punitive awards is application of a more stringent standard of evidentiary proof for punitive damages claims. Rather than proof by a preponderance of the evidence, the claimant must prove entitlement to punitive damages by a higher standard, that is, by clear and convincing evidence.<sup>385</sup> The clear-and-convincing standard "reduce[s] the risk that the defendant's reputation will be tarnished erroneously."<sup>386</sup> Other courts have decided that a higher standard is needed because, as a remedy, punitive damages are extraordinary and harsh.<sup>387</sup>

Some state legislatures make it even more difficult for plaintiffs to obtain punitive awards. In Louisiana, Massachusetts, New Hampshire, and Washington, exemplary awards are not allowed in tort actions, or any other actions, unless an express statutory provision allows such awards.<sup>388</sup> In comparison, punitive damages have been banned completely in Nebraska.<sup>389</sup>

The statutory provisions discussed in this Part were enacted to diminish and regulate punitive damage awards. Often, those objectives are fulfilled. "Since the primary purpose of punitive damages is to punish the defendant and deter similar

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384. See, e.g., MINN. STAT. ANN. § 549.20(4); MO. ANN. STAT. § 537.263(2) (West Supp. 1997).

385. See BLATT, *supra* note 377, § 2.6 n.62; see, e.g., ALASKA STAT. § 9-17.020 (Michie 1996); CAL. CIV. CODE § 3294(a) (West Supp. 1997); FLA. STAT. ANN. § 768.73(1)(b) (West 1996); GA. CODE ANN. § 51-12-5.1(b) (Supp. 1996); KAN. STAT. ANN. § 60-3702(c) (1995); MINN. STAT. ANN. § 549.20(1)(a) (West Supp. 1997); MISS. CODE ANN. § 11-1-65(1)(a) (Supp. 1997); OHIO REV. CODE ANN. § 2307.80(A) (Anderson Supp. 1996); OKLA. STAT. ANN. tit. 23, § 9.1(B) (West Supp. 1996); see also *Acosta v. Honda Motor Co.*, 717 F.2d 828, 839 (3d Cir. 1983); *Man v. Raymark Indus.*, 728 F. Supp. 1461, 1465 (D. Haw. 1989); *Tuttle v. Raymond*, 494 A.2d 1353, 1363 (Me. 1985) (heightening the standard in Maine from a preponderance-of-the-evidence standard to a clear-and-convincing-evidence standard); *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110-11 (Mo. 1996) (changing the standard of proof); ENTERPRISE RESPONSIBILITY, *supra* note 14, at 264; cf. *Geressy v. Digital Equip. Corp.*, 950 F. Supp. 519, 523 (E.D.N.Y. 1997) (applying a preponderance standard "since the substantive standard for punitive damages is already so high").

386. *Addington v. Texas*, 441 U.S. 418, 423 (1979).

387. See, e.g., *Rodriguez*, 936 S.W.2d at 110.

388. See, e.g., MASS. ANN. LAWS ch. 231, § 93 (Law. Co-op. 1986) (denying punitive damages in slander and libel actions); N.H. REV. STAT. ANN. § 507:16 (1997); *Philippe v. Browning Arms Co.*, 375 So. 2d 151, 157 (La. Ct. App. 1979) (recovering punitive damages only when there is a specific provision allowing recovery), *aff'd*, 395 So. 2d 310 (La. 1980); *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 726 P.2d 8, 23 (Wash. 1986); *Barr v. Interbay Citizens Bank*, 635 P.2d 441, 443 (Wash. 1981), *modified*, 649 P.2d 827 (Wash. 1982); see also Malcolm E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 ALA. L. REV. 919, 955 n.94 (1989). *But cf.* *Froud v. Celotex Corp.*, 437 N.E.2d 910, 915 (Ill. App. Ct. 1982) (Sullivan, J., specially concurring) (noting that Massachusetts, Washington, Louisiana, and Nebraska disallow punitive damages, and that England only allows them in specific circumstances), *rev'd on other grounds*, 456 N.E.2d 131 (Ill. 1983).

389. See *Miller v. Kingsley*, 230 N.W.2d 472, 474 (Neb. 1975).

wrongdoing in the future, the 'sword' must be used to deter the wrongdoer, not kill him."<sup>390</sup>

## 2. Federal Legislators

Every year since 1976, congressional attempts at establishing uniform constraints on punitive damages in product liability cases have failed.<sup>391</sup> On May 2, 1996, President William Clinton vetoed the Common Sense Product Liability Legal Reform Act of 1996.<sup>392</sup> The focus of the 1996 legislation was upon capping punitive awards and establishing uniform state laws regarding punitive damages.<sup>393</sup> To accomplish those goals, several proposals were made. The proposed burden of proof was clear-and-convincing evidence "that conduct carried out by the defendant with a conscious, flagrant indifference to the rights or safety of others" caused the claimant's injuries.<sup>394</sup> Factors that would be considered in assessing awards included concealment of misconduct.<sup>395</sup> Also, the bill proposed a \$250,000 cap on punitive awards or the plaintiff could receive twice the sum of the award for economic and noneconomic damages, whichever was greater.<sup>396</sup> An additional amount could be added for egregious misconduct.<sup>397</sup> If the corporation's conduct caused a person's death, the cap would not apply at all.<sup>398</sup>

When he vetoed the bill, President Clinton referred to the traditional principle that state legislators had the authority to decide which conduct is punishable and how awards should be calculated. So, the president concluded that Congress' proposed legislation improperly usurped the province of state legislators. Furthermore, the president opposed the limit on punitive damages because "arbitrary ceilings . . . endanger the safety of the public. Capping punitive damages undermines their very purpose, which is to punish and thereby deter egregious misconduct . . . . There is nothing common sense about such reforms

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390. *Thiry v. Armstrong World Indus.*, 661 P.2d 515, 517 (Okla. 1983).

391. See Linda Lipsen, *The Evolution of Product Liability as a Federal Policy Issue*, in TORT LAW AND THE PUBLIC INTEREST 247 (Peter H. Schuck ed., 1991) (noting that manufacturers, sellers, and insurers had lobbied for legislation to limit their liability); see also Rustad, *supra* note 12, at 10-12 (discussing unsuccessful efforts to legislate uniform product liability laws). For a Senate history of attempts to reform products liability, see 142 CONG. REC. S2300-01 (daily ed. Mar. 19, 1996).

392. See Message on Returning Without Approval to the House of Representatives of the Common Sense Product Liability Legal Reform Act of 1996, 32 WEEKLY COMP. PRES. DOC. 780 (May 2, 1996) [hereinafter Veto Message].

393. See Common Sense Product Liability Legal Reform Act of 1996, H.R. 956, 104th Cong. § 102(a)(1) (1995).

394. See *id.* § 108(a).

395. See *id.* § 108(b)(3)(B)(v).

396. See *id.* § 108(b)(1)(A)-(B). Businesses with fewer than 25 employees, and individuals with a net worth of \$500,000 or less potentially would be liable for a lower award—\$250,000 or twice the plaintiff's compensatory damages, whichever was the lesser amount. See *id.* § 108(b)(2).

397. See *id.* § 108(b)(3).

398. See *id.* § 109.

to product liability law."<sup>399</sup> Efforts to override the President's veto failed on May 9, 1996.<sup>400</sup>

Members of Congress are unrelenting in their attempts to reform product liability law. On January 21, 1997, Senator John Ashcroft, a Republican from Missouri, introduced the Product Liability Reform Act of 1997,<sup>401</sup> some of whose provisions are very similar to sections in the Common Sense Product Liability Legal Reform Act. For example, the proposed cap of \$250,000 or two times noneconomic or economic damages is the same.<sup>402</sup> Also, plaintiffs must show "a conscious, flagrant indifference to the rights or safety of others" by clear and convincing evidence.<sup>403</sup> Current or subsequent concealment is still one among several factors.<sup>404</sup> Because the new bill is so similar to the Common Sense Product Liability Legal Reform Act that President Clinton vetoed just months before the most recent bill was introduced, it is highly improbable that he will sign it.

### CONCLUSION

The threat of multiple and substantial punitive awards remains necessary to promote public safety by deterring bad acts by manufacturers.<sup>405</sup> "While punitive damages may not be a logically perfect method of remedying . . . unavoidable flaws in our system of justice, they are a useful surrogate."<sup>406</sup> The kind of flagrant and reprehensible misconduct that the *Gore* Court described still abounds in the business world. Moreover, administrative and criminal remedies that should be useful deterrents are woefully inadequate to protect consumers. Thus, punitive damages play a vital role in punishing some manufacturers and deterring others from endangering consumers and users.

Manufacturers who hunger for a competitive edge on the market and large monetary profits have turned a blind eye to the human suffering, deaths, and other destruction that their products have caused. Their actions are in complete disregard for human safety and they must be held accountable without arbitrary limits on punitive awards. Accordingly, on a case-by-case basis, punitive damages should be awarded as often as necessary and in amounts large enough to encourage manufacturers to take better care in designing, producing, and marketing products.

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399. Veto Message, *supra* note 392, at 780-81.

400. *See* 142 CONG. REC. H4756-04 (daily ed. May 9, 1996) (reporting legislative failure to override the presidential veto, 258 votes in favor of overriding to 163 votes against and 13 abstentions).

401. The Product Liability Reform Act of 1997, S. 5, 105th Cong. (1997); *see* 143 CONG. REC. S158 (daily ed. Jan. 21, 1997); *see also* Rhonda McMillion, *Seeking Cures for a Veto*, A.B.A. J., May 1997, at 102 (discussing Congress's attempt to draft another bill that President Clinton would sign).

402. *See* S. 5 § 108(b).

403. *Id.* § 108(a).

404. *See id.* § 108(3)(B)(v).

405. *See* *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 452-53 (Wis. 1980).

406. *Acosta v. Honda Motor Co.*, 717 F.2d 828, 837 (3d Cir. 1983).

One woman who testified before the Senate Subcommittee on Science and Transportation said:

In your perfect world, manufacturers would not change the results of their own product research. They would spend some time and money tracking their own medical devices, and issue recalls when it becomes obvious that one of their products is threatening consumer health and safety. . . .

But in the real world, product liability and punitive damages are the motivators that send the designers back to the drawing board.<sup>407</sup>

In our imperfect world—the real world—manufacturers engage in cover-ups, lies, and concealment of information about their hazardous products. Consequently, innocent consumers and users are maimed and killed. Without the threat of punitive damages, the maiming and killing will continue. “The doctrine which allows a jury to award exemplary damages to the sufferer by wrongful acts which the public is strongly interested to punish . . . furnishes the most efficient, if not the only, means of correcting many very serious social abuses.”<sup>408</sup>

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407. S. 565, *The Product Liability Fairness Act of 1995: Hearing Before the Subcomm. on Consumer Affairs, Foreign Commerce, and Tourism of the Comm. on Commerce, Science, and Transp.*, 104th Cong. 215 (1995) (testimony of Gail Armstrong, Founder and Director of the National Breast Implant Coalition).

408. *Taylor v. Grand Trunk Ry. Co.*, 48 N.H. 304, 320 (1869).

