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IMPROVING THE EFFECTIVENESS OF
SOUTH KOREAN PRODUCT LIABILITY INCLUDING PUNITIVE DAMAGES:
A COMPARATIVE ANALYSIS
BETWEEN THE UNITED STATES AND SOUTH KOREA

Minsung Kim

Submitted to the faculty of Indiana University Maurer School of Law

in partial fulfillment of the requirements

for the degree

Master of Laws – Thesis

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Accepted by the faculty, Indiana University Maurer School of Law, in partial fulfillment
of the requirements for the degree of Master of Laws – Thesis.

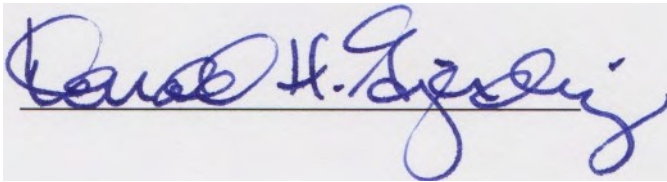
Thesis Committee

A handwritten signature in black ink, appearing to read 'JK', is written over a horizontal line.

Jayanth K. Krishnan

Professor of Law and Charles L. Whistler Faculty Fellow

Indiana University Maurer School of Law

A handwritten signature in blue ink, appearing to read 'Donald H. Gjerdingen', is written over a horizontal line.

Donald H. Gjerdingen

Professor of Law, Indiana University — Bloomington

A member of the Graduate Faculty at Indiana University

[Submission date of thesis – August 2017]

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To my parents and the memory of my grandparents

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Minsung Kim

IMPROVING THE EFFECTIVENESS OF SOUTH KOREAN PRODUCT LIABILITY
INCLUDING PUNITIVE DAMAGES: A COMPARATIVE ANALYSIS BETWEEN
THE UNITED STATES AND SOUTH KOREA

As South Korean Product Liability Act was revised to adopt the U.S. doctrine of punitive damages, there is a theoretical necessity of reviewing the relations between the theory of product liability and the U.S. doctrine of punitive damages. The theory of product liability is closely related to the strict liability but the doctrine of punitive damages has been developed to regulate malicious misconducts. Due to the different basic concepts, the strict liability and malicious misconducts, the theory of product liability might not include the doctrine of punitive damages. In addition to the compatibility issue, functions of the punitive damages are another issue. Although the punitive damages are regarded not as a criminal issue, but as torts, the punitive damages function as punishment, deterrence, retribution, and so on. With the issues about compatibility and functions, this thesis suggests two implications for improving the revised South Korean Product Liability Act. The first implication for the revised South Korean Product Liability Act is that implementing the punitive damages of South Korea within the three times of compensatory damages regardless of the degree of malicious misconducts is not fit for regulating various types of malicious misconducts. Therefore, there is a necessity for reforming the three-time's cap of South Korean punitive damages. The second is that South Korean manufacturers have a responsibility to consider their products' safety.

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I. INTRODUCTION

In the South Korean legal system, even though the U.S. doctrine of punitive damages was enacted as a special rule in the several special acts,¹ there was a dispute over whether the U.S. doctrine of punitive damages could be introduced into South Korean Product Liability Act.² After policymakers of South Korea considered the U.S. doctrine and its pros and cons, the doctrine was introduced into the revised South Korean Product Liability Act.³ Before the U.S. doctrine of punitive damages was enacted in the revised South Korean Product Liability Act, the ex-Act⁴ could not regulate

¹ Hadogeubgeorae Gongjeonghwaee Kwanhan Beobryul [Fair Transaction in Subcontracting Act], Act No. 3779, Dec. 31, 1984, partially amended by Act No. 14143, Mar. 29, 2016, art. 25–3 (S. Kor.); Gaeinjeongbo Bohobeob [Personal Information Protection Act], Act No. 10465, Mar. 29, 2011, partially amended by Act No. 14107, Mar. 29, 2016, art. 39 (S. Kor.); Daerijeomgeoraeui Gongjeonghwaee Gwanhan Beobryul [Fair Agency Transaction Act], Act No. 13614, Dec. 22, 2015, new enactment, art. 34 (S. Kor.); Sinyongjeongboui Iyong Mit Bohoe Gwanhan Beobryul [Credit Information Use and Protection Act], Act No. 4866, Jan. 5, 1995, partially amended by Act No. 14823, Apr. 18, 2017, art. 43 (S. Kor.); Jeongbotongsinmang Iyongchokjin Mit Jeongboboho Deunge Gwanhan Beobryul [Act on Promotion of Information and Communications Network Utilization and Information Protection, etc.], Act No. 3848, May. 12, 1986, partially amended by Act No. 14080, Mar. 22, 2016, art. 32 (S. Kor.); Giganje Mit Dansigangeulloja Boho Deunge Gwanhan Beobryul [Act on the Protection, etc. of Fixed-Term and Part-Time Workers], Act No. 8074, Dec. 21, 2006, partially amended by Act No. 12469, Mar. 18, 2014, art. 13 (S. Kor.).

² See e.g., Yong-Seok Yoon, *Jingbeoljeok Sonhaebaesange Kwanhan Mikookeu Choikeun Donghyang* [Punitive Damages in USA torts system], Jaesanbeobyeongoo Je23Kwon Je1Ho [PROP. L. REV. vol. 23–1] 247, 270–72 (2006) (S. Kor.); Se-il Ko, *Daeryukbeobeseo Jinbeoljeok Sonhaebaesang Noneu* [Discussions of Punitive Damages in the Civil Law Countries – A perspective of Civil Law –], Beobjo Je688Ho [LAW. ASS'N J. vol. 688] 142, 180–83 (2014) (S. Kor.); Tae-Sun Kim, *Jingbeoljeok Sonhaebaesangjaedoe Daehan Gochal – Minbeobgaejeonge Ddareun Doipnoneuwa Gwanryeonhaye* [A Study on Punitive Damages: Introducing punitive damages into Korean Law], Minsabeobhak Je50Kwon [KOR. J. CIVIL L. vol. 50] 235, 268–70 (2010) (S. Kor.). But see e.g., Seok-Chan Yoon, *Jingbeoljeok Sonhaebaesange Kwanhan Sogo; Dokilbeobchegyeyoeu Kwanjeomeseo* [The Liability of Punitive Damages; based on the German Legal System], Jaesanbeobyeongoo Je29Kwon Je4Ho [PROP. L. REV. vol. 29–4] 141, 152–53 (2013) (S. Kor.); Jong-Goo Lee 1, *Mikookeseoui Volkswagenui Jadongcha Baegigas Sagisosongkwa Sisajeom* [Vol[k]swagen's Diesel Emission Cheating Litigation in the U.S. and its Implication], Hankook Kieup beobhakhoe Je30Kwon Je3Ho [BUS. L. REV. vol. 30–3] 271, 294–95 (2016) (S. Kor.); Jae-Ok Chang & Eun-Ok Lee, *Jingbeoljeok Sonhaebaesang Gaenyeomeu Sooyoungganeungseong* [Acceptability of Concept of Punitive Damages], Beobhaknonmoonjip Je39Jip Je3Ho [CHUNG-ANG J. LEGAL STUD. vol. 39–3] 81, 109–10 (S. Kor.).

³ Jaejomool Chaekimbeob [Product Liability Act], Act No. 6109, Jan. 12, 2000, amended by Act No. 14764, Apr. 18, 2017 (S. Kor.).

⁴ Jaejomool Chaekimbeob [Product Liability Act], Act No. 6109, Jan. 12, 2000, amended by Act No. 11813, May. 22, 2013 (S. Kor.).

manufacturers' outrageous or malicious misconducts properly. For example, when a manufacturer maliciously causes consumers to get injured, the manufacturer just provides injured consumers with compensatory damages.⁵ Considering the result of the example, the U.S. doctrine of punitive damages could be expected as a proper regulation for protecting South Korean consumers in product liability actions.

As the doctrine of punitive damages is enacted in the revised Product Liability Act,⁶ the apparent legal purpose of regulating malicious manufacturers' wrongdoing will be solved by the revised Act. However, there is a legal question regarding whether the revised Product Liability Act might protect right of a consumer because the adopted punitive damages award into the revised Act is restricted to three times of compensatory damages. Compared with the U.S. punitive damages, South Korean punitive damages might be less effective than the U.S. ones. The restricted punitive damages of South Korea could not function as the original meaning of the U.S. punitive damages. The restricted punitive damages award has a less influence on outrageous or malicious wrongdoing. Due to the possibility of a huge amount of punitive damages awards, the punitive damages could become effective.

Before the revised Product Liability Act is enforced, there is necessary of reviewing the revised Act with the U.S. dispute over product liability including punitive damages to improve effectiveness of South Korean punitive damages in the revised Act for protecting right of a consumer. With the perspective of comparative law, there are two main categories about punitive damages between the United States and South Korea. The

⁵ *Id.*; Minbeob [Civil Act], Act No. 471, Feb. 22, 1958, amended by Act. No. 13125, Feb. 3, 2015, art. 750, art. 393, 750, and 763. (S. Kor.).

⁶ Jaejomool Chaekimbeob [Product Liability Act], *supra* note 3, art. 3 (art. 3 and art. 3-2 were amended in Apr. 18, 2017 and the Act will be enforced in Apr. 19, 2018).

first category is compatibility between product liability and punitive damages. The second is applicability of punitive damages to product liability. After that studying the relation between effectiveness of South Korean punitive damages and restriction of the punitive damages award is for improving right of a consumer.

Considering the revised South Korean Product Liability Act and its influence, there are several legal issues in detail: (1) While the doctrine of punitive damages has been developed by the U.S. common law legal system, South Korean Civil Act is established not by the common law, but by the continental law system; (2) When the U.S. courts assess an award of punitive damages against a wrongdoer, the wrongdoer could possibly become bankruptcy because of a huge amount of punitive damages. Therefore, establishing the optimal level of punitive damages is needed for achieving the purpose of punitive damages; (3) Since product liability actions are generally related to the theory of strict liability, the doctrine which regards wrongdoer's subjective intention as an important factor for imposing punitive damages on him or her would not be mingled with the product liability. Furthermore, there is a dispute over whether the imposition of punitive damages could be regarded as an object of warranty action in product liability litigation because the doctrine is familiar with torts rather than contracts; (4) Since the doctrine of punitive damages has several functions such as punishment, deterrence, law enforcement, and compensation, considering the influence of these functions on product liability litigation in South Korea is also necessary; and (5) reviewing the U.S. standard for product liability including punitive damages by comparative analysis of law helps the revised Act to improve effectiveness of punitive damages for protecting right of a consumer as well as to regulate malicious manufacturers effectively.

II. INTRODUCTION OF THE U.S. DOCTRINE OF PUNITIVE DAMAGES INTO SOUTH KOREA

A. U.S. DOCTRINE OF PUNITIVE DAMAGES

i. ORIGIN OF THE U.S. DOCTRINE OF PUNITIVE DAMAGES

Punitive damages, which are called as exemplary damages or vindictive damages, or “smart money”, are thought to have originated in the English common law legal system for regulating outrageous misconducts that government officers commit by abusing their authority.⁷ The doctrine of punitive damages in the English common law legal system was articulated by the English courts.⁸ In 1760’s aggravating cases, the court awarded punitive damages, which were determined by juries, to those who caused outrageous misconducts.⁹ At that time, the punitive damages formulated by the English courts played a role as compensating for plaintiffs’ intangible damages and as punishing defendants’ outrageous misconducts because the concept of actual damages did not cover intangible damages.¹⁰ However, throughout the 19th century, since the attitude of the English and the U.S. courts over punitive damages had gradually begun to regard intangible damages as actual damages, after all punitive damages did not play a role as compensation for intangible damages anymore.¹¹

In 1784, the U.S. court firstly mentioned punitive damages in the case about the

⁷ Huckle v. Money, 95 Eng. Rep. 768 (C.P. 1763); VICTOR E. SCHWARTZ, KATHRYN KELLY, & DAVID F. PARTLETT, PROSSER, WADE, AND SCHWARTZ’S TORTS CASES AND MATERIALS 572 (13th ed. 2015); David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1263 (1975); Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1290–1291 (1993).

⁸ *Id.*

⁹ Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 519 (1957); SCHWARTZ, KELLY, & PARTLETT, *supra* note 7, at 572; Owen, *supra* note 7, at 1262, 1263.

¹⁰ Note, 70 HARV. L. REV. 517, *supra* note 9, at 519.

¹¹ Note, 70 HARV. L. REV. 517, *supra* note 9, at 520; Brewer v. Second Baptist Church, 32 Cal. 2d 791, 801 (1948); Motor Equipment Co. v. McLaughlin, 156 Kan. 258, 274 (1943).

defendant's practical joke¹² and in 1851, Supreme Court of the U.S. accepted the doctrine of punitive damages as a matter of law.¹³ When punitive damages were adopted into the U.S. legal system, an emphasized role of punitive damages was mainly to compensate for defendants' mental anguish, personal indignity, and disgrace.¹⁴ This is because, at that time, intangible damages were not included in actual damages.¹⁵ With the double purposes of punitive damages, compensation and punishment, the early U.S. punitive damages was developed. Due to the double purposes of punitive damages, there were debates over the validity of the doctrine between the legal formalism and the legal realism.¹⁶ The legal formalism, which sharply distinguished between civil and criminal process, thought of punitive damages as a usurpation of the functions of the criminal law.¹⁷ This is because the legal formalism thought that the imposition of punitive damages by civil process was regarded as a violation of the separation between civil and criminal process.¹⁸ Another reason why the legal formalism denied punitive damages in the U.S. common law legal system was that admitting punitive damages in the civil process could violate the rights guaranteed by criminal process.¹⁹

Even though the legal formalism logically denied punitive damages as a matter of

¹² Owen, *supra* note 7, at 1262; *Genay v. Norris*, 1 S.C.L. 6, 7 (C.P. and Gen. Sess. 1784).

¹³ *Day v. Woodworth*, 54 U.S. 363 (1851); Owen, *supra* note 7, at 1263.

¹⁴ Note, 70 HARV. L. REV. 517, *supra* note 9, at 519; Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 12–20 (1982); Rustad & Koenig, *supra* note 7, at 1290–92 (1993); *Fay v. Parker* 53 N.H. 342, 380–381 (1872).

¹⁵ Note, 70 HARV. L. REV. 517, *supra* note 9, at 519, 520.

¹⁶ Rustad & Koenig, *supra* note 7, at 1298; Owen, *supra* note 7, at 1263; SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 246 n.2 (16th ed. 1899); THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES ch.16 (9th ed. 1912).

¹⁷ Rustad & Koenig, *supra* note 7, at 1298–1299; Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1425 (1982); Owen, *supra* note 7, at 1264; *Fay v. Parker* *supra* note 14, at 382, 397.

¹⁸ Rustad & Koenig, *supra* note 7, at 1298–1299; GREENLEAF, *supra* note 16, at § 253, at 240 n.2; Horwitz, *supra* note 17, at 1425.

¹⁹ Horwitz, *supra* note 17, at 1425; Owen, *supra* note 7, at 1264; *Fay v. Parker* *supra* note 14, at 382, 397.

law, those who agreed with adopting punitive damages into the U.S. common law legal system practically argued that punitive damages served as well-recognized social functions.²⁰ Not only did the imposition of punitive damages provide plaintiffs hurt by outrageous misconducts with satisfaction, but it also had a positive influence on the community.²¹ This is because the imposition of punitive damages served as an example to the community for deterring them from committing a similar misconduct.²²

The debates over the validity of punitive damages between the legal formalism and the legal realism was reflected to judicial decisions.²³ Even though a few states restricted the doctrine of punitive damages,²⁴ most states confidently established the doctrine of punitive damages in the common law legal system.²⁵

ii. DEFINITION OF THE U.S. DOCTRINE OF PUNITIVE DAMAGES

Punitive damages are not awarded against the defendant for the plaintiffs' harm suffered, but rather for punishing the defendant's outrageous misconducts, for retribution, for admonishing the defendant not to let the misconducts happen again, and for deterring others like the defendant from analogous misconducts in the future.²⁶ The imposition and

²⁰ Rustad & Koenig, *supra* note 7, at 1300; SEDGWICK, *supra* note 16, at § 474, at 904.

²¹ Owen, *supra* note 7, at 1263; Rustad & Koenig, *supra* note 7, at 1301; SEDGWICK, *supra* note 16, at § 347, at 687.

²² *Id.*

²³ Rustad & Koenig, *supra* note 7, at 1301; Owen, *supra* note 7, at 1263.

²⁴ SCHWARTZ, KELLY, & PARTLETT, *supra* note 7, at 574 (explaining that Nebraska constitutionally prohibits punitive damages and that Louisiana, Massachusetts, New Hampshire, and Washington allow the trier of fact to assess punitive damages against the defendant only if expressly authorized by statute.); Rustad & Koenig, *supra* note 7, at 1301; O'Reilly v. Curtis Publishing Co., 31 F. Supp. 364, 364 (D. Mass. 1940); Burton v. Levitt Stores Corp., 179 A. 185, 186 (N.H. 1935).

²⁵ Owen, *supra* note 7, at 1263–1264.

²⁶ Restatement (Second) of Torts § 908 (1) (Am. Law Inst. 1979) (reporting that “[p]unitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.”); BRYAN A. GARNER ET AL., BLACK’S LAW DICTIONARY 211 (5th pocket ed. 2016) (explaining that punitive damages are [d]amages awarded in addition to actual damages when the defendant acted with recklessness, malice, or deceit; specif., damages assessed by way of penalizing the wrongdoer or making an example to others.”);

the determination of the amount of punitive damages are determined by the jury's discretion with reflection to consider the character of the defendants' misconducts, the nature and extent of the plaintiff's damages caused by the defendant, and the wealth of the defendant.²⁷ For example, under the settled rule prevailing in South Carolina, the jury's discretion for the imposition and the determination of punitive damages is the duty as well as the right of the jury to assess punitive damages against the defendants.²⁸

To understand the doctrine of punitive damages, figuring out the purpose of compensatory and punitive damages as well as distinguishing between the characteristic of them are necessary. The U.S. judicial system distinguishes between compensatory and punitive damages, when the plaintiff is damaged by the defendants' outrageous misconduct.²⁹ The purpose of compensatory damages³⁰ is to redress the actual damages caused by the defendants' misconduct. Punitive damages, on the other hand, are designed to punish outrageous misconducts for retribution, to deter its similar conducts, and to compensate for the plaintiff's excess actual damages.³¹ Since there are different purposes between compensatory and punitive damages, the courts separately decide the amount of

SCHWARTZ, KELLY, & PARTLETT, *supra* note 7, at 572; Owen, *supra* note 7, at 1265; Corbert McClellan, *Exemplary Damages in Indiana*, 10 IND. L. J. 275, 276 (1935); Exxon Shipping Co. v. Baker, 554 U.S. 471, 492–93 (2008).

²⁷ Owen, *supra* note 7, at 1265–67; Restatement (Second) of Torts, *supra* note 26, at § 908, comment *d, e*; Note, *Exemplary Damages in the Law of Torts*, *supra* note 9, at 529–30; Thomas v. Mickel, 214 Miss. 176, 188 (1952).

²⁸ Owen, *supra* note 7, at 1265–67; Sample v. Gulf Ref. Co., 183 S.C. 399, 410 (1937). *But see* SCHWARTZ, KELLY, & PARTLETT, *supra* note 7, at 575; Cheatham v. Pohle, 789 N.E.2d 467, 472 (Ind. 2003).

²⁹ SCHWARTZ, KELLY, & PARTLETT, *supra* note 7, at 574; State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003); Cooper Indus. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 432 (2001); BMW of N. Am. v. Gore, 517 U.S. 559, 568 (1996); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19 (1991).

³⁰ GARNER ET AL., *supra* note 26, at 209 (explaining that compensatory damages are “[d]amages sufficient in amount to indemnify the injured person for the loss suffered”).

³¹ SCHWARTZ, KELLY, & PARTLETT, *supra* note 7, at 574; State Farm Mut. Auto. Ins. Co. v. Campbell, *supra* note 29, at 416; Cooper Indus. v. Leatherman Tool Grp., Inc., *supra* note 29, at 432; BMW of N. Am. v. Gore, *supra* note 29, at 568; Pac. Mut. Life Ins. Co. v. Haslip, *supra* note 29, at 19.

compensatory and punitive damages.³²

With the purpose of punitive damages such as punishment, deterrence, and retribution, the doctrine of punitive damages mainly served as retribution for the defendants' outrageous misconduct during the nineteenth century.³³ When the defendant outrageously sold the defective products to the plaintiff with violating community norms, as the judges awarded punitive damages to the defendant, the imposition of punitive damages could achieve retribution for the outrageous misdeed.³⁴ In addition to the retribution, the doctrine of punitive damages played a critical role in protecting consumers as the courts expanded the applicability of the doctrine during the early twentieth century.³⁵ When the plaintiff was damaged by a merchant's malice, fraud, insult, reckless, or wanton misconducts during the commercial transactions, the imposition of punitive damages regulated these merchant's misconducts.³⁶

iii. OPTIMAL LEVEL OF PUNITIVE DAMAGES

One of the critical disadvantages of the U.S. doctrine of punitive damages is an unexpected award. Due to the unexpected punitive damages award, decision-makers are

³² *Id.*

³³ Rustad & Koenig, *supra* note 7, at 1304; MORTON J. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960 113 (1992).

³⁴ Rustad & Koenig, *supra* note 7, at 1304; *Greene v. Keithley*, 86 F.2d 238, 242 (8th Cir. 1936); *Luikart v. Miller*, 48 S.W.2d 867, 871 (Mo. 1932); *Southern Bldg. & Loan Ass'n v. Dinsmore*, 144 So. 21, 23 (Ala. 1932); *Saberton v. Greenwald*, 66 N.E.2d 224, 229 (Ohio 1946); *Lufty v. R.D. Roper & Sons Motor Co.*, 115 P.2d 161, 165 (Ariz. 1941); *Jones v. West Side Buick Co.*, 93 S.W.2d 1083, 1099 (Mo. Ct. App. 1936); *Hunt Battery Mfg. Co. v. Stovall*, 80 P.2d 623, 624 (Okla. 1938); *Hobbs v. Smith*, 115 P. 347, 349 (Okla. 1911).

³⁵ Rustad & Koenig, *supra* note 7, at 1304.

³⁶ Rustad & Koenig, *supra* note 7, at 1303; *Oklahoma Fire Ins. Co. v. Ross*, 170 S.W. 1062, 1064 (Tex. Civ. App. 1914); *Huffman v. Moore*, 115 S.E. 634, 635 (S.C. 1923); *State Mut. Life & Annuity Ass'n v. Baldwin*, 43 S.E. 262, 264 (Ga. 1903); *Hays v. Anderson*, 57 Ala. 374, 376 (1876); *Owen*, *supra* note 7, at 1265–1266.

worried about the imposition of punitive damages when they consider their company's profits.³⁷ Specifically compared with compensatory damages, the amount of punitive damages is far larger than them.³⁸ The sum of punitive damages depends on the discretion of the jury, when the trier of fact assesses punitive damages against the defendant who causes outrageous misconducts.³⁹ Due to the discretion of the jury, the problem is a proper scope of punitive damages. Since the jury's feelings and sentiments have much more influence on the imposition of punitive damages than the award of compensatory damages, the discretion of the jury about the imposition of punitive damages is much wider and less credibility than the discretion of assessing compensatory damages.⁴⁰

In light of the huge amount of them, when the trier of fact assesses punitive damages against the wrongdoer, since the due Process clause of the Fourteenth Amendment hinders the U.S. states from assessing a grossly huge amount of punitive damages as a punishment against a wrongdoer, the judge has instructed the guideline

³⁷ Steven Garber, *Product Liability, Punitive Damages, Business Decisions and Economic Outcomes*, 1998 WIS. L. REV. 237, 251, 284–86 (1998) (explaining if decision-makers outrageously or maliciously ignored results of their misconducts for their company's profits and led to negative influence on the society, injured people could require the amount of punitive damages award of the malicious company, consequently, the doctrine of punitive damages has influence on behaviors of decision-makers who follow incentives); see Michael D. Murray, *The Great Recession and The Rhetorical Canons of Law and Economics*, 58 LOY. L. REV. 615, 640 (2012).

³⁸ SCHWARTZ, KELLY, & PARTLETT, *supra* note 7, at 572–73; See, e.g., *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003) (upholding the jury's verdict that the jury assessed \$5,000 in compensatory damages and \$186,000 in punitive damages against the defendant); *BMW of N. Am. v. Gore*, 701 So. 2d 507, 515 (Ala. 1997) (upholding the sum of \$ 50,000 in punitive damages since Supreme Court of the U.S. regarded reduced punitive damages by the appellate court as the violation of due process rule and denied the appellate court decision that the awards of punitive damages should be reduced from \$ 4,000,000 to \$ 2,000,000); *State Farm Mut. Auto. Ins. Co. v. Campbell*, *supra* note 29, at 415–16 (reversing the judgement of Supreme Court of Utah which upheld the sum of \$ 145,000,000 in punitive damages and \$ 1,000,000 in compensatory damages).

³⁹ Restatement (Second) of Torts, *supra* note 26, at § 908, comment *d, e*; Note, *Exemplary Damages in the Law of Torts*, *supra* note 9, at 529–30; *Thomas v. Mickel*, *supra* note 27, at 188.

⁴⁰ Note, *Exemplary Damages in the Law of Torts*, *supra* note 9, at 529–30; see *Thomas v. Mickel*, *supra* note 27, 188. *But see* SEDGWICK, *supra* note 16, at § 474, at 904.

suggested by Supreme Court of the U.S., which helps the jury to determine how much the amount of punitive damages is proper.⁴¹ The guideline consists of three standards: “(1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.”⁴² Among the three standards, Supreme Court of the U.S. regards the first standard, the degree of reprehensibility of the defendant’s misconduct, as the most important standard for measuring the amount of punitive damages.⁴³ The degree of reprehensibility of defendant’s misconduct is determined by five determinative factors:

whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.⁴⁴

With considering the five determinative factors, Supreme Court of the U.S. mentioned that “punitive damages should only be awarded if the defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.”⁴⁵

⁴¹ U.S. CONST. amend. XIV, § 1; *State Farm Mut. Auto. Ins. Co. v. Campbell*, *supra* note 29, at 418; *Cooper Indus. v. Leatherman Tool Grp., Inc.*, *supra* note 29, at 440; *BMW of N. Am. v. Gore*, *supra* note 29, at 574–75; Restatement (Second) of Torts, *supra* note 26, at § 908 (2); *GARNER ET AL.*, *supra* note 26, at 211.

⁴² *Id.*

⁴³ *State Farm Mut. Auto. Ins. Co. v. Campbell*, *supra* note 29, at 419; *BMW of N. Am. v. Gore*, *supra* note 29, at 575–77.

⁴⁴ *State Farm Mut. Auto. Ins. Co. v. Campbell*, *supra* note 29, at 419.

⁴⁵ *Id.*

The second standard is the ratio between harm and punitive damages. In order to set the amount of punitive damages properly, the judge considers the “reasonable relationship” between actual and punitive damages and then the jury shall be instructed the disparity between compensatory damages and punitive damages.⁴⁶ Although the jury’s feeling and sentiment for the imposition of punitive damages are regarded as the important element to achieve the purpose of punitive damages,⁴⁷ the judge could modify the scope of punitive damages by his or her judicial experiences because the judge is well known about the average of the awards.⁴⁸ When the judge modifies the amount of punitive damages assessed by the jury under the “reasonable relationship” rule, the judge declines to fix the mathematical ratio between compensatory and punitive damages.⁴⁹ This is because the standard of the fixed mathematical ratio, a bright-line ratio, cannot reflect all circumstances about the misconduct.⁵⁰

The disparity between the amount of punitive damages and the “civil penalties authorized or imposed in comparable cases”⁵¹ is the third standard for measuring the

⁴⁶ Note, *Exemplary Damages in the Law of Torts*, *supra* note 9, at 530. *But see Developments in the Law – Defamation*, 69 HARV. L. REV. 875, 938–39 (1956) (explaining that since the relation between the amount of actual and punitive damages focuses not on the admonitory function of tort law, but on the actual results, the “reasonable relationship” rule cannot achieve the purpose of punitive damages); Jonathan Kagan, *Toward a Uniform Application of Punishment: Using the Federal Sentencing Guidelines as a Model for Punitive Damages Reform*, 40 UCLA L. REV. 753, 757 (1993).

⁴⁷ Note, *Exemplary Damages in the Law of Torts*, *supra* note 9, at 529–30 (As the trier of fact assesses punitive damages against the wrongdoer, the purpose of punitive damages such as punishment could be achieved effectively, and consequently community sentiment could be reflected by the imposition of punitive damages based on the jury’s feelings and sentiment); *See* text at note 82–86 *infra*.

⁴⁸ Note, *Exemplary Damages in the Law of Torts*, *supra* note 9, at 530 (explaining that one of the functions of punitive damages, the admonitory function of tort law, could be better achieved by the judge than the jury).

⁴⁹ *Id.*; *see e.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, *supra* note 29, at 424–25.

⁵⁰ Note, *Exemplary Damages in the Law of Torts*, *supra* note 9, at 530; *Bell v. Preferred Life Assurance Soc’y*, 320 U.S. 238, 242–43 (1943). *But see* *State Farm Mut. Auto. Ins. Co. v. Campbell*, *supra* note 29, at 424–25 (mentioning that practically “...few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.”).

⁵¹ *State Farm Mut. Auto. Ins. Co. v. Campbell*, *supra* note 29, at 428; *BMW of N. Am. v. Gore*, *supra* note 29, at 575.

imposition of punitive damages properly.⁵² The meaning of the third standard is that if the imposition of punitive damages, which is processed by the civil procedural, is substituted for the criminal penalty, the wrongdoer's constitutional right could be violated by the imposition of punitive damages.⁵³ This is because the criminal procedure, compared with civil procedure, promises the heightened protections and the higher standards of proof for the guilty. Additionally, the imposition of punitive damages does not automatically serve as the method of regulating outrageous misconducts when there is a less possibility of imposing criminal sanctions on the wrongdoer.⁵⁴

The Model Punitive Damages Act hinders short of offering caps on punitive damages award with various controls on it.⁵⁵ According to Section 7 of the Model Punitive Damages Act,⁵⁶ when the juries shall be instructed by the court, they determine

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See Unif. Law Comm'rs, The Nat'l Conference of Comm'rs on Unif. State Laws, Summary: Punitive Damages Act, Model (1996),

<http://www.uniformlaws.org/ActSummary.aspx?title=Punitive%20Damages%20Act,%20Model>.

⁵⁶ Unif. Law Comm'rs' Model Punitive Damages Act § 7 (approved by the Nat'l Conference of Comm'rs on Unif. State Laws in July 18, 1996),

<http://www.uniformlaws.org/Act.aspx?title=Punitive%20Damages%20Act,%20Model>,

(a) If a defendant is found liable for punitive damages, a fair and reasonable amount of damages may be awarded for the purposes stated in Section 5(a)(3). The court shall instruct the jury in determining what constitutes a fair and reasonable amount of punitive damages to consider any evidence that has been admitted regarding the following factors:

- (1) the nature of defendant's wrongful conduct and its effect on the claimant and others;
- (2) the amount of compensatory damages;
- (3) any fines, penalties, damages, or restitution paid or to be paid by the defendant arising from the wrongful conduct;
- (4) the defendant's present and future financial condition and the effect of an award on each condition;
- (5) any profit or gain, obtained by the defendant through the wrongful conduct, in excess of that likely to be divested by this and any other actions against the defendant for compensatory damages or restitution;
- (6) any adverse effect of the award on innocent persons;
- (7) any remedial measures taken or not taken by the defendant since the wrongful conduct;
- (8) compliance or noncompliance with any applicable standard promulgated by a governmental or other generally recognized agency or organization whose function it is to establish standards; and
- (9) any other aggravating or mitigating factors relevant to the amount of the award.

a fair and reasonable amount of punitive damages. Among factors described in the Section 7 (a) of the Model Punitive Damages Act, the first three factors, Section 7 (a)(1), (2), and (3) are fundamentally identical with the three guidelines mentioned above.⁵⁷ There is a dispute over Section 7 (a)(4) of the Model Punitive Damages Act. Since each defendant has their own financial condition and the burden of punitive damages awards depends on the defendant's financial condition, the court shall consider its financial condition for achieving the purpose of punitive damages such as punishment and deterrence.⁵⁸ For example, if the trier of fact imposed punitive damages awards on the defendant regardless of his or her financial condition, a conglomerate would feel less burdensome than an ordinary corporation. Remaining factors, from Section 7 (a)(5) to (9), for punitive damages award, also help the juries to assess the amount of punitive damages against the defendant reasonably.

In addition to the standard suggested by Supreme Court of the U.S. and the Model Punitive Damages Act, at the U.S. federal or state level, a total amount of punitive

(b) If an award of punitive damages is authorized or governed by another statute of this State, any requirement as to amount or method of calculation established by that statute governs the award.

(c) If the amount of punitive damages is decided by the court, the court upon motion of a party shall make findings showing the basis for the amount awarded against each defendant and enter its findings in the record.

⁵⁷ See *id.* § 7 (a) comment at 19.

⁵⁸ See text at *supra* note 27; Keith N. Hylton, *A Theory of Wealth and Punitive Damages*, 17 WIDENER L.J. 927, 948 (2008). *But see* Yong-Seok, *supra* note 2, at 269 (explaining that the statute of California, the U.S. restricts to consider the defendant's financial condition to protect the defendant from the previous disclosure of his or her financial position); *City of El Monte v. Superior Court*, 29 Cal. App. 4th 272, 276 (1994); CAL. CIV. CODE § 3295 (d) (West 2016):

The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud.

damages could be controlled by a cap or a ratio.⁵⁹ When a trier of fact assesses a punitive damages award against a malicious wrongdoer within the restriction set by the caps or the ratio, the trier of fact considers several factors which are determined by a state statute or its case law.⁶⁰ While these several factors for the imposition of punitive damages awards are similar with the standard of Supreme Court of the U.S. and the Model Punitive Damages Act, article 7 (a), setting the cap or the ratio for limiting punitive damages awards could weaken the deterrent effect because a liable manufacturer feels less burden on the limited imposition of punitive damages than on the unlimited the awards. Another method of controlling punitive damages awards is that a certain percentage of the awards is paid to the state governmental branch.⁶¹ Even though this method does not use the cap

⁵⁹ See Andrew F. Popper, *Capping Incentive, Capping Innovation, Courting Disaster: The Gulf Oil Spill and Arbitrary Limits on Civil Liability*, 60 DEPAUL L. REV. 975, 978 (2011) (mentioning that both the U.S. states and federal government have restricted the amount of punitive damages by establishing caps on civil liability. While caps of the federal level normally serve as a cap on punitive damages caused by a specific activity or a particular industry, caps of the state level function as a cap on that except to medical malpractice); see e.g., CAL. CIV. CODE § 3333.2 (West 2016); IDAHO CODE § 6–1603 (2010); KAN. STAT. ANN. § 60–1903 (2005); LA. STAT. ANN. § 40:1231.2 (2016); MONT. CODE ANN. § 25–9–411 (West 2015); N.D. CENT. CODE § 32–42–02 (2010); S.D. CODIFIED LAWS § 21–3–11 (2016); ALA. CODE § 6–11–21 (LexisNexis 2014). See also e.g., 15 U.S.C. § 6604(b)(1) (2012).

⁶⁰ See SCHWARTZ, KELLY, & PARTLETT, *supra* note 7, at 589 Notes and Question n. 5; see e.g., *Coats v. Construction & Gen. Laborers Local No. 185*, 15 Cal.App.3d 908, 916 (1971) (stating that “the trier of fact can properly consider the character of the defendant’s act, the nature and extent of the harm to the plaintiff which the defendant caused or intended to cause, and the wealth of the defendant.”); *Atlas Food Sys. and Svcs., Inc. v. Crane Nat. Vendors, Inc.*, 99 F.3d 587, 593–94 (4th Cir.1996); *Joab, Inc. v. Thrall*, 245 So.2d 291, 293 (Fla. Dist. Ct. App. 1971); OR. REV. STAT. § 30.925 (2) (2015):

- (a) The likelihood at the time that serious harm would arise from the defendant’s misconduct;
- (b) The degree of the defendant’s awareness of that likelihood;
- (c) The profitability of the defendant’s misconduct;
- (d) The duration of the misconduct and any concealment of it;
- (e) The attitude and conduct of the defendant upon discovery of the misconduct;
- (f) The financial condition of the defendant; and
- (g) The total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant’s and the severity of criminal penalties to which the defendant has been or may be subjected.

⁶¹ SCHWARTZ, KELLY, & PARTLETT, *supra* note 7, at 575–75; see e.g., *Cheatham v. Pohle*, *supra* note 28, at 470; IND. CODE § 34–51–3–6 (2014):

- (a) Except as provided in IC 13–25–4–10, when a judgement that includes a punitive damages award is entered in a civil action, the party against whom the judgement was entered shall pay the punitive damage award to the clerk of the court where the action is pending.

or the ratio for restricting the amount of punitive damages awards, the optimal level of punitive damages awards could be achieved by paying a certain percentage of the award to the treasurer of state.

B. SOUTH KOREAN DOCTRINE OF PUNITIVE DAMAGES

i. BACKGROUND

The Seoul Eastern District Court in South Korea firstly mentioned the doctrine of punitive damages when the court dealt with an enforcement of a foreign judgement.⁶² At that time, the court did not approve the doctrine of punitive damages as a matter of the principle of South Korean Civil Act.⁶³ This is because South Korean Civil Act did not regulate the doctrine of punitive damage and only codified limited compensatory damages in the torts part.⁶⁴ After the case mentioned above, Supreme Court of South Korea still does not regard the doctrine of punitive damages as a matter of the Civil Act because of the same reasons suggested by the District Court.⁶⁵ However, according to a survey conducted by the Seoul Bar Association of South Korea, of 1545 lawyers who participated in the survey, 1417 agreed to adopt the U.S. punitive damages into the South Korean legal system, even though there are different opinions about how to enact

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

⁶² Yong-Seok, *supra* note 2, at 247; Seoul Eastern District Court [Dist. Ct.], 93Ga-Hap1906, Feb. 10, 1995 (S. Kor.).

⁶³ Seoul Eastern District Court [Dist. Ct.], *supra* note 62.

⁶⁴ *Id.*; Minbeob [Civil Act], *supra* note 5.

⁶⁵ Supreme Court [S. Ct.], 2015Da207747, Jan. 28, 2016 (S. Kor.); Supreme Court [S. Ct.], 2015Da1284, Oct. 15, 2015 (S. Kor.).

punitive damages.⁶⁶ In light of the necessity of the U.S. doctrine of punitive damages, South Korean legislature enacted punitive damages into several special acts of South Korea in order to regulate malicious misconducts.⁶⁷

ii. NECESSITY OF THE U.S. DOCTRINE OF PUNITIVE DAMAGES

Since punitive damages was mentioned by the Seoul Eastern District Court of South Korea,⁶⁸ the issue has been whether the doctrine of punitive damages should be introduced into the South Korean legal system. The opinions supporting the case of the Seoul Eastern District Court of South Korea are that there is no need to introduce punitive damages into the South Korean legal system.⁶⁹ To be specific, since South Korean Civil Act is based on the continental law legal system, punishing and deterring malicious misconducts is expected not by the Civil Act, but by the Criminal Act, and thus the doctrine of punitive damages could not be adopted into the Civil Act.⁷⁰ Furthermore, punitive damages could be substituted by consolation money which is codified in South Korean Civil Act, article 751 and 752.⁷¹

In contrast, the doctrine of punitive damages should be adopted into the South

⁶⁶ *Jingbeoljeok Sonhaebaesangjaedo Doipe Byeonhosa 91.7% Chanseong [91.7% of Korean Lawyers Agree with Introduction of the Doctrine of Punitive Damages]*, Daehanbyeonhyeobsinmoon [News Koreanbar] (June 20, 2016), <http://news.koreanbar.or.kr/news/articleView.html?idxno=14789>; Min-Jo Kim, *Punitive damages may become a reality in Korea*, About Korean Law (June 15, 2016), <http://www.aboutkoreanlaw.com/2016/06/punitive-damages-may-become-reality-in.html>; Hyeon-Soo Son, *Byeonhosa 10myeong Joong 9myeong, "Jingbeoljeok Sonhaebaesang Jaedo Doip Chanseong" [9 of 10 lawyers, "Agree with Introduction of the Doctrine of Punitive Damages"]*, Beobryulsinmoon [Law Times] (June 15, 2016), <https://www.lawtimes.co.kr/Legal-News/Legal-News-View?serial=101154>.

⁶⁷ See text at *supra* note 1.

⁶⁸ Seoul Eastern District Court [Dist. Ct.], *supra* note 62.

⁶⁹ Yong-Seok, *supra* note 2, at 271; Se-il, *supra* note 2, at 183; Tae-Sun, *supra* note 2, at 269.

⁷⁰ Yong-Seok, *supra* note 2, at 249, 270; Se-il, *supra* note 2, at 181; Tae-Sun, *supra* note 2, at 246.

⁷¹ Yong-Seok, *supra* note 2, at 271–272; Se-il, *supra* note 2, at 182.

Korean legal system for preventing malicious conductors.⁷² There are four reasons. First, the scope of compensatory damages is limited.⁷³ Even though consumers who severely injured by a manufacturer get compensatory damages, the amount of compensatory damages might not be enough to recover their damages because the compensatory damages are restricted by the defendant's responsibility in the South Korean Civil system.⁷⁴ Therefore, malicious wrongdoers have frequently made bad use of the limitation of compensatory damages.⁷⁵ Second, the idea that punitive damages could be substituted by the consolation money is not proper to protect injured people because the scope of consolation money is also limited like compensatory damages.⁷⁶ Third, if the doctrine of punitive damages is adopted into the South Korean legal system, the doctrine will play an important role in a class-action suit because it provides an injured person with a great motivation for filing a lawsuit against malicious conductors.⁷⁷ Last, as the South Korean economic market has been influenced by the U.S. one, South Korean

⁷² See SABEOLJAEDO GAEHYEOK CHOOJIN WIWONHOE [PRESIDENTIAL COMMITTEE ON JUDICIAL REFORM], JINGBEOLJEOK BAESANGJAEDO CHANGOJARYO [THE DOCTRINE OF PUNITIVE DAMAGES LEAFLET] at 43, 63 (2006); Jung-Hwan Yoon, *Jingbeoljeok Sonhaebaesange Gwanhan Yeongoo* [A Study on Punitive Damages], Minsabeobhak Je17Kwon [KOR. J. CIVIL L. vol. 17] 58, 87-88 (1999) (S. Kor.); Jeom-In Lee, *Jingbeoljeok Sonhaebaesangeu Doip Pilyoseonggwa Ganeungseunge Daehan Ilgochal* [A Study on Necessity and Possibility on the Introduction of Punitive Damages], Dongabeobhak Je38Kwon [DONG-A L. REV. vol. 38] 187, 235-238 (2006) (S. Kor.); Sang-Chan Kim & Choong-Eun Lee, *Jingbeoljeok Sonhaebaesangeu Doipel Wihan Bigyobeobjeok Gochal* [Comparative Study for Introduction of the Punitive Damages System], Beobhakyongoo Je35Kwon [L. REV. vol. 35] 163, 180 (2009) (S. Kor.); Deok-Hwan Lee, *Jingbeoljeok Sonhaebaesange Gwanhan Ilgochal* [A Study on the Punitive Damages], Beobhaknonchong Je24Kwon [L. REV. vol. 24-3] 563, 583 (2007) (S. Kor.); Seok-Chan, *supra* note 2, at 155; Jong-Goo 1, *supra* note 2, at 295; Jae-Ok & Eun-Ok, *supra* note 2, at 110; Minsung Kim, *Jingbeoljeok Sonhaebaesang Chaekimron* [A Dispute of Liability for Punitive Damages], 49 (Feb. 2013) (unpublished LL.M. thesis, Pusan National University) (on file with Jangeon-Campus the First Library, Pusan National Library).

⁷³ Sung-Chun Kim, *Jinbeoljeok Sonhaebaesangjedowa Sobijapihaegooje* [Punitive Damages and Consumer Redress], in HANKOOKSOBIJAWON JEONGCHAKYEONGGOOBOGOSEO 354-55 [in KOREAN CONSUMER AGENCY POLITICAL RESEARCH REPORT 347] (2003).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Jung-Hwan, *supra* note 72, at 86-87.

corporation laws have been continuously modified to regulate transactions and corporations.⁷⁸ On the contrary, without improving regulations for protecting consumers, South Korean regulations on the economic market is likely to be unfair for South Korean consumers. For example, under the same business, when defective products cause consumers to get hurt, the U.S. consumers' damages could be recovered by punitive damages as well as compensatory damages, but South Korean consumers damaged by the same manufacturer could be compensated by only compensatory damages. Considering this example, the result is unfair for South Korean consumers. Therefore, introducing the U.S. doctrine of punitive damages into South Korean legal system is reasonable for protecting South Korean consumers.

iii. HOW TO APPLY THE U.S. PUNITIVE DAMAGES TO SOUTH KOREA

As the doctrine of punitive damages was adopted into the South Korean legal system to regulate modern torts effectively, another issue is how to apply the doctrine of punitive damages to the South Korean legal system. To be specific, the issue is whether South Korean Civil Act could include the U.S. doctrine of punitive damages as a matter of law. If not, South Korean policymakers might consider which special acts need to adopt the U.S. doctrine of punitive damages to regulate malicious misconducts.

The first method is that South Korean Civil Act should be revised to directly introduce the doctrine of punitive damages into the Civil Act.⁷⁹ This is because South

⁷⁸ SABEOBJAEDO GAEHYEOK CHOOJIN WIWONHOE [PRESIDENTIAL COMMITTEE ON JUDICIAL REFORM], *supra* note 72, at 61–62.

⁷⁹ Jung–Hwan, *supra* note 72, at 87–88; Jeom–In, *supra* note 72, at 235–238; Sang–Chan & Choong–Eun, *supra* note 72, at 180; Deok–Hwan, *supra* note 72, at 583.

Korean Civil Act codified limited compensatory damages.⁸⁰ The second method is that South Korean legislature refers to the U.S. Model of Punitive Damages Act and independently enacts Punitive Damages Act which is distinguished from the Civil Act.⁸¹ If South Korean legislature enacts the Punitive Damages Act, the Act will be able to regulate malicious misconducts effectively.⁸² This means that Punitive Damages Act can include various types of liabilities caused by malicious misconducts and can codify exceptions against general rules of the Civil Act.⁸³ The third method is that adopting punitive damages not into the Civil Act, but into each special act is imperative of regulating malicious misconducts.⁸⁴ Considering these three methods, the method of introducing punitive damages into each special act is much more reasonable than other methods. The South Korean legal system could be divided into two parts, a general act and each special act. Each special act serves as an act that regulates touch legal issues toward social problems and codifies exceptions against the principles of the general act.

III. EXTENDING PUNITIVE DAMAGES TO PRODUCT LIABILITY

A. PRODUCT LIABILITY INCLUDING PUNITIVE DAMAGES

i. STANDARD OF PRODUCT LIABILITY INCLUDING PUNITIVE DAMAGES

The standard of product liability including punitive damages should be established with the flexible definition of malicious misconducts and the adequate

⁸⁰ Minbeob [Civil Act], *supra* note 5.

⁸¹ *See* text at *supra* note 55–56. SABEOBJAEDO GAEHYEOK CHOOJIN WIWONHOE [PRESIDENTIAL COMMITTEE ON JUDICIAL REFORM], *Jingbeoljeok Baesangjaedo Changojaryo*, *supra* note 72, at 43, 63.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Seok–Chan, *supra* note 2, at 155; Jong–Goo 1, *supra* note 2, at 295; Jae–Ok & Eun–Ok, *supra* note 2, at 110; Minsung Kim, *supra* note 72, at 38–49.

notice for hindering manufacturers from marketing defective products because of the different degree of the manufacturer's responsibility and because of the doctrine's quasi-criminal character.⁸⁵ With the imposition of punitive damages in product liability actions, the degree of responsibility depends on a manufacturer's a conscious and reckless indifference to consumers' safety related to their dangerous products.⁸⁶ Additionally, adequate notice by the standard could play an essential role in preventing manufacturers from marketing ultra-hazardous products because the notice warns against the marketing of this products with a high possibility of imposing punitive damages on wrongdoers.⁸⁷

With judicial experiences, the vague standard of product liability including punitive damages could be refined and developed.⁸⁸ This standard is articulated by an examination of the recurring forms of manufacturers' wrongdoing, and consequently the examination about manufacturers' misconducts could be categorized into five types of misconducts:

(1) Fraudulent-type misconduct; (2) knowing violations of safety standards; (3) inadequate testing and manufacturing procedures; (4) failures to warn of known dangers before marketing; and (5) post-marketing failures to remedy know dangers.⁸⁹

In addition to the categorized misconducts, manufacturers grossly intend to

⁸⁵ Owen, *supra* note 7, at 1326.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 1326–28, n.333–34 (mentioning various types of reported and unreported cases as well as additional information gathered on reported cases to articulate and to develop the standard of product liability including punitive damages).

⁸⁹ *Id.* at 1326–29.

abuse their position:

- (1) by failing to acquire sufficient product safety information through tests, inspections or post–marketing safety monitoring; (2) by failing to remedy an excessively dangerous condition known to exist in a product by altering its design, adding warnings or instructions, or recalling the product for repair; or
- (3) by knowingly misleading the public concerning the product’s safety.⁹⁰

While those who commit the (3) form of misconduct in a product liability action naturally deserve to be imposed on a punitive damages award, the (1) and (2) forms of manufacturers’ misconducts could be regarded as mere negligence.⁹¹ Distinguishing between the (3) form and the others is necessary because the fact of mere negligence is similar to that of punitive damages in product liability actions.⁹² There are two subjective elements for the imposition of punitive damages on a manufacturer: one is the manufacturer’s awareness of an unnecessary risk of injury culpably and another is that the manufacturer has to intransigently reject to take safety measures for preventing dangerous circumstances as well as knows the riskiness of its products.⁹³ These subjective elements could be determined by several factors which determine whether “a flagrant indifference to the public safety” is included in the manufacturer’s awareness.⁹⁴

⁹⁰ *Id.* at 1361.

⁹¹ *Id.* at 1361–62.

⁹² *Id.*

⁹³ *Id.* at 1362, n.495, n.496 (explaining the meaning of the manufacturer’s awareness and of wantonness. The manufacturer’s awareness is that those who are generally responsible for product safety know its problems. For example, each member of upper management, the great majority of middle management, and designated management about concerned problems is regarded as the standard of the its awareness. If the responsibility were not related to the product safety problems, those who are more directly related to such matters should be responsible for them. Wantonness is defined as “a realization of the imminence of damage to others and a restraint from doing what is necessary to prevent the damage because of indifference to whether it occurs”).

⁹⁴ *Id.* at 1368–69.

According to these factors, the trier of fact could properly impose punitive damages on the manufacturer's wrongdoing. Several factors include:

(1) the existence and magnitude in the product of a danger to the public; (2) the cost and feasibility of reducing the danger to an acceptable level; (3) the manufacturer's awareness of the danger, of the magnitude of the danger, and of the availability of a feasible remedy; (4) the nature and duration of, and the reasons for, the manufacturer's failure to act appropriately to discover or to reduce the danger; and (5) the extent to which the manufacturer purposefully created the danger.⁹⁵

A plaintiff should prove several facts for the imposition of punitive damages on a manufacturer in product liability actions. The plaintiff proves the fact that defective products lead to his or her injury that the manufacturer is aware of the defect, and that the manufacturer can control the feasibility of preventing the defect from threatening public safety by taking proper measures.⁹⁶ However, the plaintiff does not necessarily demonstrate the manufacturer's actual awareness of this feasibility. Since the manufacturer is an expert about their products and its marketing, its awareness would be presumed.⁹⁷ Causation in fact is another requirement for the imposition of punitive damages on the manufacturer committing wrongdoing. There are two causation requirements, which are that the plaintiff's injury is "attributable to"⁹⁸ the

⁹⁵ *Id.* at 1369, n.529 (with these factors, the author comments that many considerations for taking a pertinent measurement of punitive damages award are included).

⁹⁶ *Id.* at 1363.

⁹⁷ *Id.*

⁹⁸ *Id.* at 1367 (explaining that the causal correlation of the alleged its misconducts and the injury could be explained well by the phrase "attributable to" rather than the phrase "caused by" in order to underline that the U.S. court does not reject the plaintiff's action in a product liability action including punitive damages

manufacturer's defective product: the first causation in fact is whether the manufacturer's defective product brings about the plaintiff's injury and the second is whether causal correlation of the alleged its misconducts and the injury is a substantial factor in causing an accident.⁹⁹

As the standard of product liability including the U.S. doctrine of punitive damages has been refined and established well by courts of the U.S. and by secondary resources, outrageous and malicious misconducts can be regulated well by the doctrine.¹⁰⁰ Due to the standard, not only do manufacturers try to maintain and to develop the quality of their products for public safety, but they are also likely to regard damages of consumers as their damages.

ii. ANALYZING THE REVISED PRODUCT LIABILITY ACT OF SOUTH KOREA

South Korean legislature adopted the doctrine of punitive damages into each special act.¹⁰¹ However, before the U.S. punitive damages were enacted into South Korean Product Liability Act, since its Civil Act and Product Liability Act could not fully regulate product liability attributable to malicious misconducts,¹⁰² adopting the U.S.

even though the plaintiff has trouble in proving the causation in fact for the imposition of punitive damages under the strict common-law principles which are applied to compensatory damages).

⁹⁹ *Id.* at 1367-68; see MCCORMICK, *supra* note 113, at § 83. *But see e.g.*, Gill v. Manuel, *supra* note 68, at 802.

¹⁰⁰ Jay M. Zitter, Annotation, *Allowance of Punitive Damages in Motor Vehicles Products Liability Cases*, 17 A.L.R. 7th Art. 4 (2016); J. G. Wahlert, Annotation, *Constitutional Issues Concerning Punitive Damages – Supreme Court Cases*, 1 A.L.R. Fed. 2d 529 (2005).

¹⁰¹ See text at *supra* note 1.

¹⁰² Jung-Soo Kwak, *Why have Korean victims of humidifier disinfectant not received compensation?*, HANKYOREH (May. 11, 2016), http://english.hani.co.kr/arti/english_edition/e_international/743377.html; Min-Jo, *supra* note 145; Dae-Seon Hong, *How far will Volkswagen Korea's emissions scandal go?*, HANKYOREH (July 13, 2016), http://english.hani.co.kr/arti/english_edition/e_national/752206.html; Young-Jin Oh, *Catching VW*, THE KOREA TIMES (Aug. 3, 2016), http://www.koreatimes.co.kr/www/news/opinion/2016/11/202_211062.html.

punitive damages into South Korean Product Liability Act was required. For example, when decision-makers of a manufacturer decide for marketing its products regardless of defects, they can compare its benefit and compensatory damages caused by its defective products. If the benefit is larger than compensatory damages, decision-makers are not reluctant to pay compensatory damages to victims and market the defective products. Therefore, as the U.S. doctrine of punitive damages was introduced into the revised South Korean Product Liability Act,¹⁰³ the revised Act helps consumers to be protected by manufacturers' malicious misconducts through the imposition of punitive damages.

By revising South Korean Product Liability Act, article 3¹⁰⁴ and adding the article 3-2¹⁰⁵ into the revised Act, the U.S. doctrine of punitive damages was introduced

¹⁰³ Jaejomool Chaekimbeob [Product Liability Act], *supra* note 3, since the revised Product Liability Act is not yet translated by Ministry of Government Legislation of South Korea, translated Product Liability Act, articles mentioned in *infra* note 104-105, 125, and 129 are referred by the prior version of the Act.

¹⁰⁴ *Id.* art. 3 (Product Liability):

(1) A manufacturer is responsible for the person's life, personal injury, or property loss, except to the loss over the product itself, which are caused by the manufacturer's defective product.

(2) In spite of the prior, if a manufacturer, who is aware of defective products, does not take a proper measure to preventing the injury or loss inflicted upon the person and causes the person to become severely injured by its defective products, the manufacturer shall be liable to compensate the injury or property damage to the extent that the amount of compensation does not exceed three times of inflicting the injury on person or the property loss. A court shall take the following matters into consideration when it determines the amount of compensation under this article:

1. The degree of intention;
2. The degree of the damage caused by the manufacturer's defective product;
3. Economic benefit that the manufacturer gained by supplying its defective product;
4. The degree of the criminal penalty or the administrative disposition, if the manufacturer is imposed on that because of its defective products;
5. The duration of supplying the defective product and the scale of its supplement;
6. The manufacturer's financial standing;
7. The degree of the manufacturer's effort to remedy the injury and loss caused by its defective product.

(3) If the injured person cannot find the manufacturer of the defective product, those who market this product to the injured person for benefit are responsible for product liability. But if the injured person or his or her agency is notified of the manufacturer or another supplier by whom the defective products was sold, the supplier who benefited from marketing of the defective product is not liable to product liability.

¹⁰⁵ *Id.* art. 3-2 (Presumption of the Defect etc.) If the injured person proves the following matters, the causation that the manufacturer's products had defects when the products were supplied and caused the

into the revised Act. As the National Assembly of South Korea passed the revised Product Liability Act in the plenary session, the main expected effects of the revised Act are the protection of consumers and the improvement of the quality of products made by South Korean manufacturers and of its competitiveness.¹⁰⁶ With the revised South Korean Product Liability Act, article 3 and added 3–2, analyzing a comparison between the U.S. legal issue about product liability including punitive damages and the revised South Korean Product Liability Act helps the revised Act of South Korea to develop itself and to regulate malicious misconducts.

The revised South Korean Product Liability Act, article 3 states possibility of the imposition of punitive damages on a manufacturer who caused the injury or loss inflicted upon a person. When the South Korean courts assess a punitive damages award against the manufacturer, because of the Act, article 3, the punitive damages award would be restricted to the extent that the amount of compensation does not exceed three times of inflicting the injury on person or property loss. With the restriction of the amount of punitive damages within three times of compensatory damages, the legal issue is whether the restriction could achieve two goals, which are the optimal level of punitive damages and the functions of punitive damages such as punishment and deterrence. South Korean lawmakers might think that establishing the optimal level of punitive damages through

injury or loss shall be presumed. But if the manufacturer proves that the injury or loss happened not because of its products, but because of another reason:

1. The fact that the injury or loss happened when the product was used under normal condition;
2. The above injury or loss was caused by the reason that the manufacturer could practically control in its area;
3. The above injury or loss generally does not happen without the defective product.

¹⁰⁶ GONGJEONGGEORAEWONHOE [FAIR TRADE COMM'N], "JINGBEOLJEOK SONHAEBAESANGJE" DOIP DEUNG JEJOMUL CHAEGIMBEOP GAEJEONGAN GUKOE TONGGWA [INTRODUCTION OF THE DOCTRINE OF PUNITIVE DAMAGES AND THE NATIONAL ASSEMBLY OF SOUTH KOREA PASSED THE REVISED PRODUCT LIABILITY ACT] 2 (2017), http://www.ftc.go.kr/news/ftc/reportView.jsp?report_data_no=7234.

the restriction of the amount of punitive damages is likely to be essential for controlling the amount of punitive damages as well as for preventing a manufacturer from being far more burdensome compared with the manufacturer's misconduct.

For the imposition of punitive damages on the liable manufacturer in South Korea, a plaintiff is basically responsible for proving: (1) the product's defect; (2) the injury or loss inflicted upon the plaintiff; and (3) the causation that the product's defect lead to the injury or loss inflicted upon the plaintiff. The plaintiff hardly proves these three factors because product liability actions are generally related to professional and specialized knowledge. Considering the difficulty of proving these facts by the plaintiff, before South Korean Product Liability Act was revised, the case law established by Supreme Court of South Korea allow the presumption in the product liability action.¹⁰⁷ If the plaintiff proves the fact that the injury and loss happened when the product was used under normal condition, the courts of South Korea presume the product's defect and the causation between the defect and the injury or loss inflicted upon the plaintiff. As the case law developed by Supreme Court of South Korea was enacted as the article 3-2 of the revised South Korean Product Liability Act, the plaintiff's responsibility for proof can be relieved.

The added article 3-2 presumes the product defect and its causation if a plaintiff proves: (1) the fact that the plaintiff's injury or loss caused by the defective product under normal condition; (2) the fact that the aforesaid injury or loss happened under the control of the liable manufacturer or supplier and its area; and (3) the fact that the aforesaid

¹⁰⁷ See e.g., Supreme Court [S. Ct.], 2003Da16771, Mar. 12, 2004 (S. Kor.); Supreme Court [S. Ct.], 98Da15934, Feb. 25, 2000 (S. Kor.); Jin-Su Yune, *Jejomoolchaegimui Juyo Jaengjeom – Choeggeunui Nonuireul Jungsimeuro* – [The Main Issues of the Product Liability], *Beobhakyongoo Je21Kwon Je3Ho* [YONSEI L. REV. vol. 21 no. 3] 47-48 (2011) (S. Kor.); Cf., text, at *supra* note 94-97.

injury or loss does not happen without the defective product.¹⁰⁸ In contrast, for balancing between the plaintiff and the manufacturer or suppliers, the revised South Korean Product Liability Act, article 3–2 allows the manufacturer or suppliers to be excused from product liability by proving the injury or loss inflicted upon the plaintiff was caused by the plaintiff’s intention over the defect, by the negligence, or any other reasons.

In principle, the courts of South Korea impose compensatory or punitive damages on a liable manufacturer. However, if an injured person does not know the manufacturer causes the injury or loss inflicted upon the person, the revised South Korean Product Liability Act, article 3 (3) basically imposes compensatory or punitive damages on a supplier regardless of the supplier’s awareness of whether or not the supplier knew or could know the liable manufacturer.¹⁰⁹ As the revised Act extends the scope of the subject who is responsible for the injury or loss, the plaintiff will be able to be protected firmly.

B. COMPATIBILITY OF PUNITIVE DAMAGES WITH PRODUCT LIABILITY

i. COMPATIBILITY IN THE UNITED STATES

For the imposition of punitive damages in product liability cases, there are two legal problems. The first is whether the doctrine of punitive damages could be applied to the strict product liability. While the doctrine has been developed to regulate malicious misconducts by wrongdoers, the theory of strict liability has been established not by the wrongdoers’ degree of care, but by products itself. The second is related to warranty

¹⁰⁸ See Jaejomool Chaekimbeob [Product Liability Act], *supra* note 3.

¹⁰⁹ *Id.* at art. 3 (3).

actions. As the doctrine of punitive damages could not be applied to contracts, an injured consumer could not be recovered by the imposition of punitive damages in a warranty action caused by contracts and product liability.

1. PRINCIPLE OF STRICT LIABILITY OVER PUNITIVE DAMAGES

Extending the doctrine of punitive damages to product liability is a complicated issue, considering the development of the doctrine and the argument of the legal formalism over it.¹¹⁰ Since the doctrine of punitive damages has been developed for regulating malicious misconducts,¹¹¹ there is a dispute regarding whether the doctrine of punitive damages could be compatible with strict liability in the field of products liability litigation.¹¹² In light of the requirement of defendant's fault, the incompatibility argument over the dispute seems to be reasonable because those who agree the incompatibility argument thought that the strict liability is determined not by the

¹¹⁰ Owen, *supra* note 7, at 1267–68, n.41 (explaining that “the most frequently cited purported flaws in the doctrine” of punitive damages are that: (1) punitive damages are anomalous; (2) imposing punitive damages on the wrongdoer without the criminal procedural safeguards could be unconstitutional because they are originated from a criminal fine; (3) there is possibility that the plaintiff would benefit from a huge amount of punitive damages because they are not regarded as compensatory damages; (4) without specific standards for assessing punitive damages against the wrongdoer, there is possibility that the defendant should bear over assessed punitive damages award). *See* text at *supra* note 17–19 (explaining the attitude of the legal formalism over the doctrine of punitive damages is against assessing punitive damages award for regulating misconducts); *see also* Kagan, *supra* note 46, at 779–80 (introducing the opinion about the abolition of punitive damages, which argues that the problems are caused by the huge amount of punitive damages and reputing that opinion).

¹¹¹ *See* text at *supra* note 26.

¹¹² *Compare* Owen, *supra* note 7, at 1269–71, with Donald M. Haskell, *The Aircraft Manufacturer's Liability for Design and Punitive Damages – The Insurance Policy and the Public Policy*, 40 J. AIR. L. & COM. 595, 620 (1974) (concerning whether the doctrine of punitive damages could be applied to the act related to mere proof that a defendant manufactures and distributes defective products because the doctrine of punitive damages is construed as the legal tool for regulating reprehensible misconducts), and Forrest L. Tozer, *Punitive Damages and Product Liability*, 39 INS. COUNSEL J. 300, 301 (1972) (asserting “[s]trict liability and punitive damages will not mix. In strict liability[,] the character of the defendants’ act is of no consequence; in the punitive damages claim the character of the act is paramount.”), and David A. Rice, *Exemplary Damages in Private Consumer Actions*, 55 IOWA L. REV. 307, 315 (1969) (arguing that exemplary damages cannot be allowed for mere negligence unless a specific statute permit to assess the damages against a wrongdoer).

defendant's degree of care, but by the product and its defectiveness.¹¹³

However, those who agree with the dispute over the compatibility point out that the incompatibility argument misunderstands the notion of fault in strict liability.¹¹⁴ The theory of strict liability developed the notion of fault by including the product and its defectiveness into the legal consequence fault regardless of the manufacture's fault rather than by giving up the degree of care exercised by the manufacture.¹¹⁵ Another compatibility argument is that the incompatibility argument relies invalidly on the assumption that punitive damages should be awarded by the identical facts for compensatory damages based on the underlying theory of its liability.¹¹⁶ When the court considered imposing punitive damages on the defendant due to the trespass, the court decided that: "[W]hether exemplary damages should or should not be given does not depend on the form of action so much as upon the extent and nature of the injury done and the manner in which it was inflicted, whether by negligence, wantonness, or with or without malice."¹¹⁷

In addition to the two logical reasons mentioned above, the U.S. courts has thought of a punitive damages award as a cause of action based on the principles of strict liability in many cases such as nuisance, trespass to land and liability for ultra-hazardous activities, negligence *per se*, defamation, and implied warranty in the sale of drugs.¹¹⁸

¹¹³ Owen, *supra* note 7, at 1268–69; Haskell, *supra* note 112, at 620; Tozer, *supra* note 112, at 301; Rice, *supra* note 112, at 315.

¹¹⁴ Owen, *supra* note 7, at 1268–71.

¹¹⁵ *Id.* at 1269.

¹¹⁶ *Id.* *see* Gill v. Manuel, 488 F.2D 799, 802 (9th Cir. 1973) (stating that “[a]n award of compensatory damages is not a prerequisite to an award of punitive damages.”)

¹¹⁷ Owen, *supra* note 7, at 1269–71; Fleet v. Hollenkemp, 52 Ky. 219, 225–26 (1852). *See* Drake v. Wham–O Manufacturing Co., 373 F. Supp. 608, 611 (E.D. Wis. 1974) (explaining that a claim for punitive damages is not part of the claim itself).

¹¹⁸ Owen, *supra* note 7, at 1270–71; *see* Nevada Cement Co. v. Lemler, 89 Nev. 447, 450–53 (1973); Milford v. Tidwell, 276 Ala. 110, 113–14 (1963); Lueck v. Southern Pac. Transp. Co., 111 Ariz. 560, 570–71 (1975);

Considering the notion of fault in product liability and the invalid assumption established by the incompatibility argument, prohibiting punitive damages in product liability is unreasonable.¹¹⁹

2. WARRANTY ACTIONS FOR PUNITIVE DAMAGES AWARDS

Since cases about product liability in the sale of drugs and defective products related to physical harms sometimes happen after buying defective products for so long, injured consumers cannot bring an action because of a shorter tort statute of limitations or procedural bar except for warranty. Even though injured consumers barely bring an action in warranty, they may not require punitive damages because warranty actions are generally derived from contracts and because the imposition of punitive damages is not allowed in litigation about solely contract.¹²⁰ The Restatement of Contract(second) § 355 explains that the doctrine of punitive damages is applied to a breach of contract only if the breach of contract is also regarded as a tort. Considering the Restatement of Contract(second) § 355, if a warranty action in product liability is related to a tort and an injured consumer proves malicious misconducts about defective products, he or she can argue the imposition of punitive damages even in the warranty action.

As warranty actions in product liability litigation are generally regulated by Uniform Commercial Code § 2–313, § 2–314, and § 2–315, the problem is the interruption of Uniform Commercial Code § 1–305.¹²¹ The official comments of

Reynolds v. Pegler, 123 F. Supp. 36, 38–40 (S.D.N.Y. 1954); Fleet v. Hollenkemp, *supra* note 69, at 225–26.

¹¹⁹ Owen, *supra* note 7, at 1271.

¹²⁰ Michael Carlton Garrett, *Allowance of Punitive Damages in Products Liability Claims*, 6 GA. L. REV. 613, 627 (1972). See the Restatement of contract(second) § 355.

¹²¹ Owen, *supra* note 7, at 1275.

Uniform Commercial Code § 1–305 (a) explains that one of the propositions of § 1–305 (a) is “to make it clear that compensatory damages are limited to compensation.” In light of the official comment of this subsection (a), Uniform Commercial Code § 1–305 (a) is likely to hinder the imposition of punitive damages for product liability. However, the § 1–305 (a) could be interpreted such that there is the possibility of recovering punitive damages for breach of warranty by a specifically provided section in Uniform Commercial Code or by other rule of law.¹²² In addition to the interpretation of the section, as manufacturers’ activity that they maliciously ignore product safety causes consumers to get physical or mental damages, their activity could be regarded as a tortious conduct regulated by the “other rule of law”.¹²³

With the interpretation of the Restatement of Contract and the Uniform Commercial Code, even though warranty actions are derived from the contract and the doctrine of punitive damages could not be applied to issues about contract, the product liability case combined with warranty and tortious conducts could be regulated by the doctrine of punitive damages.

ii. COMPATIBILITY IN SOUTH KOREA

The purpose of comparative analysis between the U.S. and South Korea legal issue about punitive damages and their compatibility of product liability is to study the revised South Korean Product Liability Act. While the theory of product liability is established by strict liability, the doctrine of punitive damages is based on a wrongdoer’s

¹²² Owen, *supra* note 7, at 1275–76; John A. Jr. Parkins, *Punitive Damages for Wrongful Dishonor of a Check*, 28 WASH. & LEE L. REV. 357, 360 (1971).

¹²³ Owen, *supra* note 7, at 1277.

misconduct.¹²⁴ The revised South Korean Product Liability Act, article 2 (2) explains the meaning of “defect.”¹²⁵ A manufacturer’s misconduct in the article 2 (2)(a) is regarded as strict liability but the misconduct violating the article (2)(b) and (c) is considered as negligence *per se*.¹²⁶ According to the revised South Korean Product Liability Act, article 2 (2)(a), if “defect in manufacturing” brings about the injury or loss inflicted upon the consumer, the manufacturer shall be responsible for product liability regardless of the manufacturer’s negligence. Therefore, the U.S. dispute over the doctrine and its compatibility of product liability could be applied to the revised Act of South Korea, article 2 (2)(a).¹²⁷

Since the theory of strict liability has been developed by extending the legal consequence from the degree of care exercised by the manufacturer to the product and its defectiveness, the doctrine of punitive damages can be theoretically introduced into the revised South Korean Product Liability Act. Applying the doctrine to the revised Act has

¹²⁴ See text at *supra* note 26, 112–113.

¹²⁵ Jaejomool Chaekimbeob [Product Liability Act], *supra* note 3, at art. 2 (2):

(a) The term “defect in manufacturing” means the lack of safety caused by manufacturing or processing of any product not in conformity with the originally intended design, regardless of whether the manufacturer faithfully performed the duty of care and diligence with respect to the manufacturing or processing of the product;

(b) The term “defect in design” means the lack of safety caused by failure of a manufacturer to adopt a reasonable alternative design in a situation where any damage or risk caused by the product would otherwise have been reduced or prevented if an alternative design had been adopted;

(c) The term “defect in indication” refers to cases where damages or risks caused by a product could have been reduced or avoided if a manufacturer had given reasonable explanation, instructions, warnings or other indications on the product but he/she fails to do so.

¹²⁶ See Jong-Hyun Kim, *Jejomool Gyeolhame Daehan Jejoepjau Mugwasilchaegim – Ipjeungchaegim Wanhwa Banganeul Jungsimeuro [Manufacturer’s Strict Liability Caused by Defective Products – Focus on a Relief of Responsibility for Proof]*, Beobhakyongoo 44 [LAW. REV. vol. 44] 59, 62–63 (2011) (S. Kor.); Jin-Su, *supra* note 107 at 1, 18–41; Jong-Goo Lee 2, *Jisi, Gyeonggo(pyosi)sangui Gyeolhamgwa Jejomoolchaegim [Instruction and Warning Defects in the Product Liability Act of Korea]*, Jeoseutiseu Je97Ho [JUSTICE L. REV no. 97] 46, 51 (2007) (S. Kor.). See also e.g., Supreme Court [S. Ct.], 2002Da17333, Sept. 5, 2003 (S. Kor.); Supreme Court [S. Ct.], 2003Da16771, *supra* note 106; Supreme Court [S. Ct.], 2005Da31361, Mar. 10, 2006 (S. Kor.).

¹²⁷ See text at *supra* note 60–61, 110–107.

a positive influence on protecting consumers from misconducts committed by a malicious manufacturer. On the contrary, product liability caused by “defect in design” of the revised South Korean Product Liability Act, article 2 (2)(b) and “defect in indication” of the article 2 (2)(c) is based on the standard of care exercised by the manufacturer.¹²⁸ If the manufacturer violates the article 2 (2)(b) and (c), the violation of these two types of product liability consists of negligence *per se*, and thus the doctrine of punitive damages can be theoretically compatible with the theory of product liability.

The revised South Korean Product Liability Act, article 7 is about the statute of limitation.¹²⁹ If the statute of limitation is expired, the plaintiff cannot bring an action and require compensatory or punitive damages against the malicious manufacturer. Since the litigation about product liability such as medical malpractice generally happens after long periods, the plaintiff’s right of claim for damages normally depends on warranty. According to the U.S. legal issue and implication about the warranty action for a punitive damages award, the imposition of punitive damages on malicious misconducts is basically beyond the doctrine of punitive damages because the doctrine is for regulating torts rather than contracts. But if the legal issue about contracts is mingled with the torts,

¹²⁸ See Jin-Su, *supra* note 107, at 21–22, 34.

¹²⁹ Jaejomool Chaekimbeob [Product Liability Act], *supra* note 3, at art. 7:

(1) The right of claim for damages under this Act shall be extinguished by the completion of prescription if the injured person or his/her legal representative does not exercise his/her rights within three years from the date on which the injured person or his/her legal representative becomes aware of both of the following facts:

(a) Damages;

(b) The person liable for the damages pursuant to Article 3

(2) The right of claim for damages under this Act shall be exercised within 10 years from the date on which the manufacturer supplied the product which caused the relevant damages: Provided, That with respect to damages caused by any substances which are accumulated in the body and, in turn, hurt the relevant person’s health, or any other damages the symptoms of which appear after a lapse of a certain latent period, the aforesaid period shall be reckoned from the date on which the damage occurs actually.

the doctrine of punitive damages can be exceptionally applied to this issue. Considering the conflictual relations between the statute of limitation and the doctrine of punitive damages in the warranty action for product liability including a punitive damages award, the U.S. issue and its implication for warranty actions help the revised South Korean Product Liability Act to settle the conflictual relations.

According to the revised South Korean Product Liability article 7, the statute of limitation will run from the plaintiff's awareness of damages and the liable manufacturer including suppliers or from the date on which the manufacturer marketed the product causing the plaintiff's injury or loss. The statute of limitation based on the plaintiff's awareness is that his or her right of claim for compensatory or punitive damages should be exercised within 3 years,¹³⁰ whereas another based on the date is that the plaintiff can exercise his or her claim for that within 10 years. In addition to two types of statute of limitation, the Act provides an exception about them. The exception is about personal damages which are caused by any accumulated substances in body or about any other damages that the symptoms of damages could be discovered after a lapse of a certain latent period.¹³¹ The statute of limitation over the exceptional conditions will run from the occurrence of these damages actually.¹³² As the Act extends the period of statute of limitation over the above exceptional circumstances, the injured plaintiff can bring an action for a punitive damages award within the extended statute of limitation. However, since the plaintiff's right of claim for damages which are not included in the statute of limitation and exceptional conditions mentioned above should depend on the warranty,

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

the U.S. legal issues over the doctrine of punitive damages and its compatibility of the theory of product liability in warranty action¹³³ can be discussed in South Korea for the revised Product Liability Act. Since the cases of product liability including malicious misconducts in South Korea also consist of contracts and torts like the U.S. warranty actions,¹³⁴ the U.S. legal issue and implication for the doctrine and its compatibility of product liability can be applied to South Korean Product Liability Act, and consequently consumers in South Korea will be firmly protected by the revised Product Liability Act as well as the U.S. legal issue and its implication of a punitive damages award in warranty actions.

C. FUNCTIONS AND THEIR APPLICABILITY TO PRODUCT LIABILITY

i. FUNCTIONS AND APPLICATION IN THE UNITED STATES

Considering the definition and concept of the doctrine of punitive damages defined by primary and secondary materials,¹³⁵ the functions of the doctrine could be divided into the prominent and less prominent functions.¹³⁶ To specify the functions of it, the prominent functions are for punishing the defendant's outrageous misconducts with retribution and for deterring similar misconducts in the future.¹³⁷ The less prominent

¹³³ See text at *supra* note 118–120.

¹³⁴ *Id.*

¹³⁵ Restatement (Second) of Torts, *supra* note 26, at § 908; SCHWARTZ, KELLY, & PARTLETT, *supra* note 7, at 572; Cheatham v. Pohle, *supra* note 28, at 471. Owen, *supra* note 7, at 1265; Corbert McClellan, *supra* note 26, at 276 (1935); Exxon Shipping Co. v. Baker, *supra* note 26, at 492–93.

¹³⁶ See Owen, *supra* note 7, at 1277–99. *But see* Rustad & Koenig, *supra* note 7, at 1318–28; Note, 70 HARV. L. REV. 517, *supra* note 9, at 520–24.

¹³⁷ SCHWARTZ, KELLY, & PARTLETT, *supra* note 7, at 574; Cheatham v. Pohle, *supra* note 28 at 471–72; Owen, *supra* note 7, at 1277; Campbell Estates, Inc. v. Bates, 517 P.2d 515, 521 (1973); Schmidt v. Cent. Hardware Co., 516 S.W.2d 556, 560 (Mo. Ct. App. 1974); Jolley v. Puregro Co., 496 P.2d 939, 945–46 (1972);

functions are for stimulating private persons to enforce the rules of law and for reimbursing the plaintiff's excess of actual damages such as substantial legal fees.¹³⁸

1. PUNISHMENT AND RETRIBUTION

One of the most prominent functions is to punish the defendant who outrageously or maliciously injured the plaintiff.¹³⁹ As the courts impose punitive damages on the defendant because of the outrageous misconducts, the punishment of them leads to the individual satisfaction of the plaintiff, the maintenance of public peace, and the positive influence indirectly on the law-abider.¹⁴⁰ Most of all, the individual satisfaction of the plaintiff by the imposition of punitive damages gives a pleasure of vengeance to the injured defendant.¹⁴¹ This is because one of the objectives of tort law is that the court let the plaintiff give up self-help through the satisfactory legal procedure and punishment.¹⁴² Rationally, allowing the injured to give any chance of private revenge against the wrongdoer is hardly justified in a modern legal system.¹⁴³ However, in light of the

¹³⁸ Owen, *supra* note 7, at 1278; Rustad & Koenig, *supra* note 7, at 1321–26.

¹³⁹ Owen, *supra* note 7, at 1279–81; Campbell Estates, Inc. v. Bates, *supra* note 137, at 521; Schmidt v. Cent. Hardware Co., *supra* note 137, at 560; Jolley v. Puregro Co., *supra* note 137, at 945–46; Rustad & Koenig, *supra* note 7, at 1318–21; JAMES D. GHIARDI & JOHN J. KIRCHER, PUNITIVE DAMAGES: LAW AND PRACTICE §§ 2.02, 2.06, 4–5, 13–14 (1985 & Supp. 1991).

¹⁴⁰ Owen, *supra* note 7, at 1279–81.

¹⁴¹ *Id.* at 1279; H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 235–37 (1968); 1 JEREMY BENTHAM, THEORY OF LEGISLATION 309–10 (1931); LON L. FULLER, ANATOMY OF THE LAW 27–30 (1968); OLIVER. W. HOLMES, THE COMMON LAW 40–41 (1881); WOLF MIDDENDORFF, THE EFFECTIVENESS OF PUNISHMENT, ESPECIALLY IN RELATION TO TRAFFIC OFFENSES 51–53 (1968); LEON RADZINOWICZ, IDEOLOGY AND CRIME 115 (1966).

¹⁴² Note, *Exemplary Damages in the Law of Torts*, *supra* note 9, at 521–22; Tozer, *supra* note 112, at 300.

¹⁴³ Owen, *supra* note 7, at 1279; *see, e.g.*, GUIDO. CALABRESI, THE COSTS OF ACCIDENTS 298–99 (1970); U.S. DEPT. OF TRANSP., THE ORIGIN AND DEVELOPMENT OF THE NEGLIGENCE ACTION 35, 37 (1970); Albert A. Ehrenzweig, *A Psychoanalysis of Negligence*, 47 NW. U. L. REV. 855, 865–66 (1952–1953).

plaintiff's emotional equilibrium and the objectives of tort law,¹⁴⁴ the function of the punishment and retribution brings about a positive result in the community.¹⁴⁵

The maintenance of public peace is preserved by the imposition of punitive damages.¹⁴⁶ This means that since an injured person is satisfied with the court's decision assessing punitive damages against the outrageous wrongdoer, the imposition of punitive damages prevents the person with doing self-help for revenge and with dueling between the parties, and consequently it plays an important role in inducing individual vengeance to the courtroom.¹⁴⁷ Additionally, the imposition of punitive damages protects social moral and legal standards.¹⁴⁸ When wrongdoers make a member of society be damaged with the outrageous or malicious intent, the court should decide to punish outrageous misconducts in order to maintain public peace and to rebuild the society's emotional equilibrium.¹⁴⁹

The punishment of the wrongdoer who causes the plaintiff to get hurt has a positive influence on indirectly the law-abider.¹⁵⁰ As the wrongdoer was punished by punitive damages, not only does the law-abider confidently observe social moral and legal standards, but he or she regards them as the fairness of the judicial system.¹⁵¹ In addition to the positive influence on the law-abider, the punishment of the wrongdoer by punitive damages brings about a positive result that he or she could learn and absorb

¹⁴⁴ Owen, *supra* note 7, at 1279; Note, *Exemplary Damages in the Law of Torts*, *supra* note 9, at 521–22.

¹⁴⁵ *Id.*

¹⁴⁶ Owen, *supra* note 7, at 1280–81.

¹⁴⁷ Note, *Exemplary Damages in the Law of Torts*, *supra* note 9, at 521–22; HOLMES, *supra* note 141, at 2–4, 39–42; POLLOCK & MAITLAND, *THE HISTORY OF ENGLISH LAW* 448–51 (2d ed. 1898); *Merest v. Harvey*, 128 Eng. Rep. 761 (C.P. 1814); *Grey v. Grant*, 95 Eng. Rep. 794 (C.P. 1764); Owen, *supra* note 7, at 1280; *Alcon v. Mitchell*, 63 Ill. 553, 554 (1872); Restatement (Second) of Torts, *supra* note 26, at § 908, comment *a*.

¹⁴⁸ Owen, *supra* note 7, at 1280–81; ARTHUR L. GOODHART, *ENGLISH LAW AND THE MORAL LAW* 93 (1953).

¹⁴⁹ *Id.*

¹⁵⁰ Owen, *supra* note 7, at 1281.

¹⁵¹ *Id.*; CHARLES FRIED, *AN ANATOMY OF VALUES* 121–26 (1970).

society's legal value and gives him or her the chance of atoning for his or her misconducts.¹⁵²

The most common cause of product liability is categorized into three factors: the manufacturing defect, the design defect, and the warning defect by manufacturers' minor misconducts.¹⁵³ As each common causation is regarded as a mere error in the product liability action, the court does not need to consider the doctrine of punitive damages for punishment and retribution.¹⁵⁴ However, if a manufacturer knowingly or recklessly ignores the defective product and causes consumers to get injured, the manufacturer's malicious misconduct would be punished with the imposition of punitive damages. As the court imposes punitive damages on the manufacturer for punishing the outrageous misconducts, the injured consumers' emotion of helplessness over the manufacturer's malicious misconducts could be tempered with the award of punitive damages and the imposition of punitive damages deprives the manufacturer of their benefit produced by its outrageous misconducts.¹⁵⁵ Additionally, the imposition of punitive damages on the manufacturer's malicious misconducts reflects the public's criticism and emphasizes the manufacturer's responsibility toward consumers' safety.¹⁵⁶

¹⁵² Note, *Exemplary Damages in the Law of Torts*, *supra* note 9, at 522; Granville Williams, *The Aims of the Law of Tort*, 4 CURRENT LEGAL PROB. 137, 140 (1951); Owen, *supra* note 7, at 1281; H.L.A. HART, *supra* note 141, at 24–27; MIDDENDORFF, *supra* note 141, at 68; HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 53–58 (1968); FRIED, *supra* note 151, at 126; FULLER, *supra* note 141, at 27–28.

¹⁵³ SCHWARTZ, KELLY, & PARTLETT, *supra* note 7, at 788.

¹⁵⁴ Owen, *supra* note 7, at 1282; *see* Roginsky v. Richardson–Merrell, Inc., 378 F.2d 832, 843 (2d Cir. 1967) (stating that “when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists.”)

¹⁵⁵ Owen, *supra* note 7, at 1282; *see* ROBERT L. HEILBRONER, THE NAME OF PROFIT 191, 200 (R. Heilbroner ed. 1973).

¹⁵⁶ Owen, *supra* note 7, at 1282; FULLER, *supra* note 141, at 28; Rice, *supra* note 112, at 312.

2. DETERRENCE

The deterrence is also regarded as one of the most important functions of punitive damages with punishment.¹⁵⁷ The definition of deterrence is the process of discouraging a wrongdoer and members of the social community from committing misconducts by fear of punishment.¹⁵⁸ With the definition of deterrence and the concept of the doctrine of punitive damages, the deterrence is divided into the general and specific deterrence.¹⁵⁹ While the specific deterrence is for preventing the wrongdoer from engaging in similar misconducts again in the future, the general deterrence is for prohibiting the members of the social community from having the similar misconducts in the future.¹⁶⁰

With the general deterrent effect, the U.S. courts have followed the “reasonable relationship” rule, which is based on the comparison between actual harm and the amount of punitive damages. The courts do not set up the specific formula for the proper deterrence under the “reasonable relationship” rule. In contrast, the theory of deterrence criticizes the attitude of the U.S. courts over the general deterrent effect. The theory of deterrence is about “the elaboration of the effect on rational actors of the possible imposition of sanctions for violations of law.”¹⁶¹ The theory explains that the proper deterrence could be achieved by the effort of establishing the specific formula for the

¹⁵⁷ *Campbell Estates, Inc. v. Bates*, *supra* note 137, at 521; *Schmidt v. Cent. Hardware Co.*, *supra* note 137, at 560; *Jolley v. Puregro Co.*, *supra* note 137, at 945–46; *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 20–24 (1991).

¹⁵⁸ GARNER ET AL., *supra* note 26, at 248; Garber, *supra* note 37, at 251. *See* Owen, *supra* note 7, at 1282–83 (explaining the validity of the deterrence that even though there is a debate whether the punishment of misconducts practically leads to the proper result of the deterrence, the punishment of misconducts has a positive influence on the deterrence of similar misconducts).

¹⁵⁹ GARNER ET AL., *supra* note 26, at 248; A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 877–78 (1998); 2 JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM VOL. 1 365, 396 (John Bowring ed., 1962) (1843).

¹⁶⁰ *Id.*

¹⁶¹ Polinsky & Shavell, *supra* note 159, at 877 n.14.

“reasonable relationship” rule.¹⁶² The rule and the vague standard for it bring about either inadequate or excessive deterrence¹⁶³ because the “reasonable relationship” is determined by the judge’s discretion.¹⁶⁴ In addition to the specific formula for the “reasonable relationship” rule, the possibility of escaping liability should be regarded as an important factor to achieve the effect of deterrence properly.¹⁶⁵ The proper effect of the deterrence is related to the optimal level of punitive damages. Since establishing the optimal punitive damages depends on whether the misconducts are certainly revealed or not, the trier of fact separately considers the possibility of escaping liability and the liability with certainty when the amount of punitive damages is determined for deterring the misconducts.¹⁶⁶

In product liability actions, the prediction of the imposition of punitive damages on malicious misconducts is rarely possible for a manufacturer because a manufacturer cannot accurately predict how many consumers get injured by a defective product,¹⁶⁷ although there are the “reasonable relationship” rule suggested by the U.S. court and the theory of specific formula for proper deterrence. Due to the unpredictability of the

¹⁶² Polinsky & Shavell, *supra* note 159, at 877–78 (explaining the origin of the theory of deterrence, which has been developed from the criminal punishment and then the applicability of the theory was extended into the subject of tort liability).

¹⁶³ Garber, *supra* note 37, at 253–55 (explaining the detailed categorization about the deterrent effect such as underdeterrence, overdeterrence, misdeterrence, and absolute deterrence).

¹⁶⁴ Polinsky & Shavell, *supra* note 159, at 898; *But see* text at *supra* note 46–50.

¹⁶⁴ Note, *Exemplary Damages in the Law of Torts*, *supra* note 9, at 530; *Bell v. Preferred Life Assurance Soc’y*, *supra* note 50, at 242–43. *But see* *State Farm Mut. Auto. Ins. Co. v. Campbell*, *supra* note 29, at 424–25 (mentioning that practically “...few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.”); *see also* text at *supra* note 46–50.

¹⁶⁵ Polinsky & Shavell, *supra* note 159, at 898–90 (criticizing the negative attitude of the U.S. courts over the possibility of escaping liability, even though they occasionally consider it); *see* *Gamble v. Stevenson*, 406 S.E.2d 350, 354 (S.C. 1991).

¹⁶⁶ Polinsky & Shavell, *supra* note 159, at 878–96 (explaining the different measurement of optimal punitive damages for the deterrence, caused by the liability with certainty and by the possibility of escaping liability).

¹⁶⁷ Owen, *supra* note 7, at 1285.

amount of punitive damages in the product liability action, the deterrent effect by punitive damages could be achieved by the imposition of them on manufacturers producing ultra-hazardous products for their benefit regardless of consumers' injuries and compensatory damages for consumers' actual damages.¹⁶⁸

3. LAW ENFORCEMENT AND COMPENSATION OVER ACTUAL DAMAGES

The functions of punitive damages as law enforcement and compensation for excess of actual damages are relatively less important than the prominent functions such as punishment and deterrence. However, the less important functions also play a role as useful legal tools. Most of all, the function of the law enforcement has a positive influence on the community as punitive damages serve as “a kind of bounty” which leads the injured plaintiff to bring an action against the wrongdoer.¹⁶⁹ In light of the bounty, the imposition of punitive damages serve as a reward “for his public service in bringing the wrongdoer to account,” and it contributes to the community as the trier of fact assesses punitive damages against the wrongdoer's misconduct which is “beyond the reach of the criminal law and the public prosecutor.”¹⁷⁰ Another less important function is the compensation for excess of actual damages.¹⁷¹ To specify it, since the “American rule” does not allow attorneys to receive awards of attorneys' fees without the statutory

¹⁶⁸ Owen, *supra* note 7, at 1286. *See, e.g.*, Cox v. Stolworthy, 94 Idaho 683, 691 (1972); Walker v. Sheldon, 10 N.Y.2d 401, 406 (1961); Funk v. Kerbaugh, 222 Pa. 18, 19 (1908).

¹⁶⁹ Owen, *supra* note 7, at 1287–88; *see, e.g.*, Fay v. Parker, *supra* note, at 14.

¹⁷⁰ Owen, *supra* note 7, at 1288; Neal v. Newburger Co., 154 Miss. 691, 700 (1929).

¹⁷¹ Owen, *supra* note 7, at 1295–97.

authorization, punitive damages function as the payment of litigation expenses for the plaintiff.¹⁷²

In product liability actions, the imposition of punitive damages helps injured consumers to pay for attorney's fees and costs of preparing for the product liability action¹⁷³ as well as functions as law enforcement for punishing and deterring malicious misconducts by a manufacturer. Compared with another type of action, the action for product liability requires more professional knowledge because discovering and proving defective parts of the product are not easy for consumers, and thus they should hire experts about the defective product.¹⁷⁴ This additional expense for the product liability action is burdensome to the plaintiff who is an injured consumer.¹⁷⁵ However, as the U.S. courts impose an award of punitive damages on the wrongdoer marketing defective products intentionally, the injured consumers could become less burdensome about paying additional money for discovery and proof of the defective parts of the product.¹⁷⁶

4. POSSIBILITY OF BLUNTING THE FUNCTIONAL EFFECTS

The expected effects resulting from functions of the doctrine of punitive damages could be achieved by the imposition of punitive damages on outrageous wrongdoers in product liability actions. As an award of punitive damages becomes burdensome to manufacturers, they try to investigate their products for consumers' safety and to find their defective products. However, a problem is product liability insurance about punitive

¹⁷² Owen, *supra* note 7, at 1297; *see* CHARLES T. MCCORMICK, LAW OF DAMAGES 277 (1935); Restatement (Second) of Torts, *supra* note 26, at § 914 (1), comment *a*.

¹⁷³ Owen, *supra* note 7, at 1293; Donald J. Black, *The Mobilization of Law*, 2 J. LEGAL STUD. 125, 139 (1973).

¹⁷⁴ Owen, *supra* note 7, at 1293–94.

¹⁷⁵ *Id.*

¹⁷⁶ Owen, *supra* note 7, at 1293–94, 1299.

damages. Due to the liability insurance, there is a debate over whether the effect of the doctrine's functions could decrease or not.¹⁷⁷ The first opinion is that the liability insurance's influence on product liability actions could hinder the doctrine of punitive damages from achieving their prime purpose in these actions.¹⁷⁸ This means that as a manufacturer committing wrongdoing to consumers takes up an insurance policy for preserving its benefit from the imposition of punitive damages caused by its malicious misconducts, the functions of the doctrine could become less effective.¹⁷⁹ On the contrary, another opinion criticizes the first opinion and argues that the liability insurance has a less negative influence on the doctrine's functions.¹⁸⁰ Research found that the insurance problem makes manufacturers work out a way, such as "risk control techniques," to improve their products' safety and quality.¹⁸¹ In addition to the improvement of safety and quality, due to deductible provisions in the liability insurance, manufacturers cannot help taking care of the insurance problems, if their coverage for liability insurance could not decrease.¹⁸² According to the study report of the U.S. Bureau of Domestic Commerce, since some manufacturers could not take out an insurance policy for product liability because of the decline of insurance partially or

¹⁷⁷ *Id.*, at 1308–13.

¹⁷⁸ John G. Fleming, *The Role of Negligence in Modern Tort Law*, 53 VA. L. REV. 815, 823–24 (1967) (explaining that "[t]he deterrent function of the law of torts was severely, perhaps fatally, undermined by the advent of liability insurance.")

¹⁷⁹ Owen, *supra* note 7, at 1308; UNITED STATES. NATIONAL COMMISSION ON PRODUCT, SUPPLEMENTAL STUDIES: A STAFF REPORT 221, 228 (1970).

¹⁸⁰ Owen, *supra* note 7, at 1309–10.

¹⁸¹ Owen, *supra* note 7, at 1309; U.S. BUREAU OF DOMESTIC COMMERCE, PRODUCT LIABILITY INSURANCE: ASSESSMENT OF RELATED PROBLEMS AND ISSUES 9, 11, 35–36, 56 (1976)

¹⁸² U.S. BUREAU OF DOMESTIC COMMERCE, *supra* note 181, at 32–33, 37, 47, 55, 73–74; Roginsky v. Richardson–Merrell, Inc., *supra* note 154, at 841:

Even though product liability insurance blunts the deterrent effect of compensatory coverage under such policies is often awards to a considerable extent, the total limited, bad experience is usually reflected in future rates, and insurance affords no protection to the damage to reputation among physicians and pharmacists which an instance like the present must inevitably produce.

entirely by insurers, they give up marketing risky products.¹⁸³ In light of the policy of insurers, the functions of the doctrine of punitive damages are not undermined by the insurance problems about product liability actions because the insurers will decline the insurance for the manufacturer committing malicious wrongdoing. Therefore, the manufacturer should be responsible for the product liability including punitive damages regardless of insurance problems.

ii. FUNCTIONS AND APPLICATION IN SOUTH KOREAN REVISED PRODUCT LIABILITY ACT

The U.S. doctrine of punitive damages is introduced into the revised South Korean Product Liability Act. The reason why the revised South Korean Product Liability Act adopts the doctrine is directly related to functions of the doctrine of punitive damages.¹⁸⁴ The doctrine of punitive damages functions as punishment, retribution, deterrence, law enforcement, and compensation for excess of actual damages.¹⁸⁵ According to the reference report released by Fair Trade Commission of South Korea, the main purpose of the revised Act is to deter malicious misconducts committed by a manufacturer.¹⁸⁶ As the revised Act restricts an amount of a punitive damages award within three times of inflicting the injury or loss upon a plaintiff, the legal issue is whether the purpose of deterring malicious misconducts could be achieved. Within the purview of a limited punitive damages award, the imposition of the awards on malicious

¹⁸³ *Id.* at 15, 36, 46–47, 55–56, 68, 72, 81–85.

¹⁸⁴ *See* text at *supra* note 104.

¹⁸⁵ *See* text at *supra* note 123–125.

¹⁸⁶ *See* text at *supra* note 104. Even though this reference report does not mention other functions such as punishment, retribution, law enforcement, and compensation for excess of actual damages, the other functions also could be considered for regulating the malicious misconducts.

misconducts could become a less effective deterrent for manufacturers or suppliers.¹⁸⁷ This is because the limited punitive damages are hardly distinguished with compensatory damages. On the contrary, the Fair Trade Commission of South Korea thinks of three times of inflicting upon a plaintiff's injury or loss as a proper amount of punitive damages award. The Commission considers several factors for establishing the reasonable amount of punitive damages. First, if there is no cap for the punitive damages award, manufacturers' activities shall decrease because they are reluctant to invest their money on developing dangerous products required to install additional safety parts.¹⁸⁸ Second, if a legal action for a punitive damages award causes a liable manufacturer or supplier to become bankruptcy because of the unlimited award, those who do not participate in this legal action cannot require punitive damages of the bankrupted manufacturer.¹⁸⁹ Therefore, the imposition of punitive damages without the cap brings about the inequity issue among consumers injured by a liable manufacturer.¹⁹⁰ Third, considering the relation of other special acts of South Korea to Product Liability Act, Fair Trade Commission of South Korea mentions that the revised South Korean Product Liability Act adopts the doctrine of punitive damages with the three-times' cap. This is because all South Korean special acts adopting punitive damages restrict an amount of punitive damages award within three times of inflicting of injuries or losses upon the plaintiff.¹⁹¹

¹⁸⁷ See GONGJEONGGEORAEWONHOE [FAIR TRADE COMM'N], *supra* note 106, at 11.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*; *cf.* Jung-Hwan, *supra* note 72, at 86–87.

¹⁹¹ See GONGJEONGGEORAEWONHOE [FAIR TRADE COMM'N], *supra* note 106, at 11; *see also* text at *supra* note 2.

IV. FUTURE OF SOUTH KOREAN PUNITIVE DAMAGES

A. NECESSITY OF IMPROVEMENT OF PUNITIVE DAMAGES

A legal dispute over effectiveness of punitive damages in the Product Liability Act of South Korea is whether the essential purpose of protecting consumers from malicious manufacturers could be achieved by the imposition of punitive damages within three times of compensatory damages. When the U.S. doctrine of punitive damages was introduced into the revised Product Liability Act of South Korea, lawmakers restricted a punitive damages award to the three times of compensatory damages.¹⁹² According to Fair Trade Commission, for preventing manufacturers from being bankrupted, the amount of punitive damages should be limited to the three-times' cap.¹⁹³ Moreover, without exception, the cap of all adopted punitive damages in each special act of South Korea is limited to three times of compensatory and thus there is possibility that those who get severely injured by the malicious manufacturer could not be recovered fully within the three times of compensatory damages.¹⁹⁴ Because of concern about manufacturer's bankruptcy without sense of responsibility and a uniform limitation about the imposition of punitive damages, the legal problem caused from the above legal issue is that effectiveness of the South Korean punitive damages could be weakened.¹⁹⁵

To improve effectiveness of punitive damages for guaranteeing right of consumers, the first method is to reform the South Korean punitive damages by

¹⁹² Jaejomool Chaekimbeob [Product Liability Act], *supra* note 3, art.3 (2).

¹⁹³ See text at *supra* note 189.

¹⁹⁴ Jin-Sik Song, *Jingbeoljeok '3Bae' Sonhaebaesang Gwayeon Hyogwa Isseulkka?* [Is the Imposition of Punitive Damages within the Three Times of Compensatory Damages Effective?] THE KYUNGHYANG SHINMUN [THE KYUNGHYNAG NEWSPAPER] (Apr. 3, 2017), http://news.khan.co.kr/kh_news/khan_art_view.html?artid=201704011638001&code=940100&utm_campaign=share_btn_click&utm_source=facebook&utm_medium=social_share&utm_content=khan_view.

¹⁹⁵ Andrew, *supra* note 59, at 979.

reviewing theoretical legal disputes over the doctrine of punitive damages in product liability. The second is that the manufacturer should have sense of responsibility toward consumers rather than concern about bankruptcy caused by the imposition of punitive damages.

B. REFORMING THE THREE-TIMES' CAP OF PUNITIVE DAMAGES

To maintain the original purpose of punitive damages in the revised Product Liability Act which is for guaranteeing right of consumers, restricting the amount of punitive damages uniformly to the three times of compensatory damages is not proper. The limited amount of punitive damages adopted into several special acts of South Korea could not fully satisfy a consumer's damages caused by a malicious manufacturer, if the consumer is severely injured or loses his or her life by the manufacturer. The courts of South Korea follow the enacted punitive damages within the three times' cap and might impose the punitive damages award against the malicious wrongdoer within two or two point five times at the most.¹⁹⁶ Even though the limited amount of punitive damages can prevent manufacturers from being bankrupted and cannot discourage them to invest money on the development of risk products, if the adopted punitive damages of South Korea is not effective for protecting some consumers who are severely damaged or lose their life, the punitive damages of South Korea may not become a practical legal tool, but just a symbol.

There is an implication for reforming punitive damages in South Korea that the

¹⁹⁶ Jin-Sik Song, *supra* note 194.

existed cap should be increased to ten times at the most.¹⁹⁷ However, the best way of guaranteeing the consumer's right is to abolish the fixed cap of punitive damages when the consumer is severely injured or loses his or her life. Since South Korean policymakers and lawmakers considered the guideline for the imposition of punitive damages suggested by Supreme Court of the U.S.,¹⁹⁸ without the cap of punitive damages, the courts of South Korea can decide punitive damages by the judge's discretion.

C. IMPROVEMENT OF MANUFACTURERS' RESPONSIBILITY

If manufacturers have sense of responsibility toward their products, policymakers do not try to establish the doctrine of punitive damages. Improving a manufacturer's sense of responsibility is the best method for protecting consumers from malicious misconducts by manufacturers. For improving the manufacturers' responsibility, the revised Act, article 3 (1) regulates that a punitive damages award will be assessed against all manufacturers.¹⁹⁹ A legal issue about the article 3 (1) is whether this article shall have a negative influence on manufacturers' activity because all manufacturers are affected by the punitive damages award.²⁰⁰ However, the revised Act, article (3) restricts the applicability of the doctrine of punitive damages within the purview of a certain circumstance that a manufacturer intentionally gives a rise to severely personal damages by its defective product, and consequently the adopted punitive damages will have less

¹⁹⁷ *Id.*

¹⁹⁸ See text at *supra* note 104. (Comparing between the guideline suggested by Supreme Court of the U.S. and article 3 (2) in the revised Product Liability Act of South Korea, the guideline and the article 3 (2) are similar with each other.)

¹⁹⁹ Jaejomool Chaekimbeob [Product Liability Act], *supra* note 3. art. 3 (1).

²⁰⁰ See GONGJEONGGEORAEWIWONHOE [FAIR TRADE COMM'N], *supra* note 106, at 11.

negative influence on its marketing than what the manufacturer expect.²⁰¹ As all manufacturers are regulated by the revised Product Liability Act of South Korea, not only will their competitiveness in the domestic and international market be raised, but also their awareness of public safety will be increased by complying with the Act.²⁰² Moreover, if a manufacturer maliciously and outrageously does not consider the fundamental right of a consumer and the product is marketed to the consumer without the manufacturer's sense of responsibility, the courts of South Korea do not need to take the possibility of the manufacturer's bankruptcy into account. If not, the purpose of punitive damages is never achieved and the essential right of the consumer cannot be guaranteed by the revised Product Liability Act of South Korea.

V. CONCLUSION

The U.S. doctrine of punitive damages was finally introduced into the revised South Korean Product Liability Act. Before the introduction of the U.S. doctrine, consumers' personal damages attributable to malicious manufacturers' misconducts was not prevented by the prior South Korean Product Liability Act. Following the South Korean Civil Act, the U.S. doctrine of punitive damages cannot be allowed to regulate manufacturers' misconducts. This is because the prior South Korean Product Liability Act had been established by the principle of the Civil Act, and thus the South Korean courts have imposed compensatory damages within the defendant's responsibility for his or her misconducts only. Even though the introduction of the U.S. doctrine of punitive

²⁰¹ *Id.*

²⁰² *Id.*

damages cannot fundamentally settle the legal problem mentioned above because of confliction between South Korean Civil Act and the U.S. doctrine, the introduction of the U.S. doctrine is practically required to protect consumers from malicious manufacturers. Besides, the revised South Korean Product Liability Act adopts the presumption of proof for consumers. And if consumers cannot know a manufacturer who causes them to be injured by its defective product, the revised Act shall allow them to bring an action for punitive damages against a supplier. The revised South Korean Product Liability Act strongly protects consumers better than before.

Since the cap for limiting punitive damages might hinder effectiveness of the punitive damages award from deterring malicious misconducts committed by a manufacturer, reviewing product liability cases caused by malicious misconducts is necessary. Moreover, a theoretical issue about conflicting the U.S. doctrine of punitive damages and the principle of South Korean Civil Act is not fundamentally settled. The introduction of the U.S. doctrine into each special act of South Korea is likely to escape from this theoretical issue, and thus the principle of South Korean Civil Act cannot be developed. Henceforth, the U.S. legal principles such as the doctrine of punitive damages may be continuously introduced into South Korea. Whenever the U.S. legal principles come into conflict with the principles of South Korean Civil Act, if the U.S. legal principles are not introduced into the South Korean Civil Act, but into each special act of South Korea, the ultimate resolution that the principles of South Korean Civil Act can harmonize with the U.S. legal principles is never achieved. Therefore, policymakers of South Korea might need to keep studying how the principles of South Korean Civil Act can mingle with the U.S. legal principles.

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