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The Need for Reform of Punitive Damages in Mass Tort Litigation: Juzwin v. Amtorg Trading Corp.

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THE NEED FOR REFORM OF PUNITIVE DAMAGES IN MASS TORT LITIGATION: *JUZWIN v. AMTORG TRADING CORP.*

INTRODUCTION

Legal theories must grow and adapt to the social and economic realities of the times. Developments in the scope of commercial trade coupled with innovations in the field of tort litigation[1] have created a strain on the judicial process in many areas, including the mass tort context. The use of punitive damages in mass tort actions have caused several problems that the present legal system may be unable to resolve. These difficulties have prompted one commentator to announce:

> [P]unitive damages are out of control. . . . [T]he explosion in punitive judgments has not been accompanied by a reform of the terms of their imposition. . . . Nowhere is the danger more complete than in products liability and other mass tort cases, where punitive damages may be repetitively invoked against a single course of conduct in unfair and potentially ruinous aggregation.[2]

Problems inherent in the nature of mass tort litigation raise doubts regarding the propriety of punitive damages in such suits.[3] Yet, it seems anomalous that by extending the scope of their tortious conduct, defendants should find a means of escaping liability for punitive damages.[4] Concerns

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1. For an insightful discussion of the modern tort reform movement, see Priest, *Modern Tort Law and Its Reform,* 22 VAL. U.L. REV. 1 (1987). Professor Priest attributes the current flux in the field of tort liability to judicial action in the early 1960's which broadened the scope of liability, particularly for corporations and other business enterprises. *Id.* at 1-2. These developments, in turn, helped trigger a concern over the size and overall costs of damages awards. The difficulties associated with this increase are no longer simply confronted by the relatively small community of business executives who were initially effected by this expansion of liability. The public at large has been forced to deal with the ramifications of these developments in the form of the "insurance crisis" of the 1980s. *Id.*

2. Jeffries, *A Comment on the Constitutionality of Punitive Damages,* 72 VA. L. REV. 139 (1986).

3. *See* Szuch & Shelley, *Mass Cases Prompt Need for Reassessment: Time to Eliminate Punitive Damages?,* NAT'L L.J., Feb. 28, 1983, at 13, col. 1 (suggesting that punitive damages may not accomplish the goal of deterrence and further, the intended punishment does not effect one responsible party, but rather a number of relatively innocent parties, stockholders).

4. *See* Froud v. Celotex Corp., 107 Ill. App. 3d 654, 658, 437 N.E.2d 910, 913 (1st Dist. 1982), *rev'd on other grounds,* 98 Ill. 2d 324, 456 N.E.2d 131 (1983). The court stated:

> [W]e do not believe that defendants should be relieved of liability for punitive damages because, through outrageous misconduct, they have managed to seriously injure a large number of persons. Such a rule would encourage wrongdoers to continue their misconduct because, if they kept it up long enough to injure a large number of people, they could escape liability for *all* punitive damages.

107 Ill. App. 3d at 658, 437 N.E.2d at 913 (Emphasis in original).

regarding the size of damages awards, particularly punitive damages, and their impact on defendants have prompted various state legislatures to establish limits for these remedies in an effort to curb their impact.[5] With respect to mass tort litigation, however, a number of issues peculiar to the complexities of these claims, render the procedural methods of traditional tort litigation ineffective in protecting the interests of a fair trial for all parties involved.

A recent opinion[6] from the District Court for the Northern District of New Jersey highlighted the difficulties courts face when attempting to address the fundamental problems and concerns which have developed in the context of punitive damages in mass tort litigation.[7] In *Juzwin v. Amtorg Trading Corp.*, the district court originally granted the defendants' motion to dismiss all claims for punitive damages in an asbestos-related products liability action.[8] The court based this decision on the belief that such damages violated the defendants' right to due process guaranteed under the fourteenth amendment of the United States Constitution.[9] The court, however, later reversed its denial of the punitive damages claims. On rehearing, the court maintained its assertion that multiple awards of punitive damages based on a single course of conduct are unconstitutional. Yet, owing to limitations within the procedural methods for assessing and awarding such exemplary damages, the court felt compelled to vacate the order barring the punitive claims.[10]

This *Juzwin* court's most recent opinion pointedly focuses the difficulties which have been at the center of an ongoing debate regarding the propriety of punitive damages in mass tort litigation. This Note will examine a number of the issues at the heart of this dialectic. By first examining the traditions

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5. *E.g.*, COLO. REV. STAT. § 13-21-102 (1987) (limiting punitive damages to no more than the amount given in compensatory damages but giving the court discretion to make an addition of up to three times the actual damages in certain cases); FLA. STAT. ANN. § 768.73 (West Supp. 1989) (limiting punitive damage awards to no more than three times the compensatory sum awarded); TEX. CIV. PRAC. & REM. CODE ANN. §§ 41.001-.008 (Vernon Supp. 1990) (limiting punitive damages to four times the actual damages or $200,000, whichever is greater for cases involving fraud or gross negligence but not for cases involving malice or intentional torts). Such reforms have been challenged on various grounds. *See, e.g.*, Wall St. J., Nov. 3, 1989, at B2, col. 3 (Alabama law limiting punitive damages to a maximum of $250,000 subject to state constitutional challenge). For a discussion of damage caps, see generally Ghiardi, *Punitive Damages—Legislative Reform*, 39 FED'N INS. AND CORP. COUNS. Q. 189, 195-97 (1989) (listing state statutes that limit the dollar amount of punitive awards and statutes that require part of punitive awards be paid to a public or state entity).

6. Juzwin v. Amtorg Trading Corp., 718 F. Supp. 1233 (D.N.J. 1989).

7. Punitive damages are also referred to variously as "vindictive," "exemplary," "punitory," "speculative," "imaginary," "presumptive," and "added" damages or, on a few occasions, even as "smart money." This Note will use "punitive" or "exemplary" damages in referring to such awards.

8. Juzwin v. Amtorg Trading Corp., 705 F. Supp. 1053, 1065 (D.N.J.), *vacated on hearing*, 718 F. Supp. 1233 (D.N.J. 1989).

9. *Id.*

10. Juzwin v. Amtorg Trading Corp., 718 F. Supp. 1233, 1236 (D.N.J. 1989).

and problems inherent in the development of punitive damages awards, the Note will establish a background highlighting some of the concerns encountered when imposing these sanctions. Next, the Note will focus on the current phenomenon of mass tort litigation and examine the peculiar difficulties encountered in attempting to satisfy the policies embodied in the due process doctrine. After examining the reasoning of the *Juzwin* court, the Note will examine potential federal legislation intended to alleviate some of the problems identified herein.

I. BACKGROUND

A. Punitive Damages: Definition and Rationales

Punitive damages constitute an exception to the general rule that damages awards are designed to compensate the victim.[11] There are two primary rationales for granting punitive damages: first, to punish the defendant for reprehensible conduct; and second, to deter the defendant and others from engaging in such conduct in the future.[12] Critics of the concept of punitive damages have argued that the civil law should not be concerned with punishing parties but should be limited to reparation for actual injuries.[13]

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11. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 266-67 (1981).

12. *Id.* at 266-67; W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS § 2, at 9 (5th ed. 1984) [hereinafter PROSSER]. "Punitive 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." RESTATEMENT (SECOND) OF TORTS § 908 (1979). Thus, by definition, punitive damages are not concerned with the extent of harm suffered by the plaintiff as a measurement of the award. Rather, they are based on the aggravated misconduct or the egregious mental state of the defendant. *E.g.*, Pacemaker Food Stores, Inc. v. Seventh Mont Corp., 143 Ill. App. 3d 781, 789, 493 N.E.2d 390, 391 (2d Dist. 1986) (allegations that defendants "acted with a conscious disregard and indifference to the rights of the plaintiff" did not set forth conduct which would justify the imposition of punitive damages); Williams v. Steves Indus., 699 S.W.2d 570, 572 (Tex. 1985) (punitive damages may be awarded only upon a showing of gross negligence). *See also* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.9, at 204-205 (1973) (the court must determine if there is sufficient proof of aggravated misconduct to warrant punitive damages).

In most jurisdictions, punitive damages awards are based on conduct that is willful, wanton, or in conscious disregard of the consequences. C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 79, at 280-82 (1935). In First Nat'l Bank of Des Plaines v. Amco Engineering Co., 32 Ill. App. 3d 451, 455, 335 N.E.2d 591, 594 (2d Dist. 1975), the court stated that punitive damages "are assessed in the interest of society to punish the defendant and to warn him and others that his acts are offensive to society. Where a wrongful act is accompanied by aggravating circumstances such as wilful, wanton, malicious or oppressive conduct, punitive damages should be allowed." *Cf.* City of Newport v. Fact Concerts, Inc., 453 U.S. at 267 (punitive damages cannot be assessed against a municipality because it is not capable of misconduct).

13. Miller v. Kingsley, 194 Neb. 123, 124, 230 N.W.2d 472, 474 (1975) (recovery in civil cases is limited to compensation for the injury sustained) (citations omitted); *see also* Fay v. Parker 53 N.H. 342, 382 (1872) (punishment is confined to criminal law and should not be used as a civil remedy); Stanard v. Bolin, 88 Wash. 2d 614, 621, 565 P.2d 94, 98 (1977) (no statutory provision allowing punitive damages).

Punishment, it is claimed, should be left to the functions of the criminal courts which provide procedural safeguards not present in civil proceedings.[14] Proponents of exemplary damages respond that such criticism is the product of an unnecessarily narrow conception of the function and purpose of civil law.[15]

Courts and commentators have advanced various justifications for punitive damages, including the belief that exemplary damages are, in part, compensatory "in the limited sense that they may provide damages for the wounded feelings of the plaintiff."[16] The belief that punitive damages are needed in order to compensate the plaintiff for intangible harm such as pain and

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14. *See, e.g.*, Ghiardi, *Should Punitive Damages be Abolished?—A Statement in the Affirmative*, 1965 A.B.A. PROCEEDINGS, SECTION OF INS. NEGLIGENCE AND COMPENSATION LAW, 282, 287-88. Professor Ghiardi argues that exemplary damages, which are by definition intended to punish are thus akin to criminal sanctions. He maintains that the imposition of such sanctions absent the procedural safeguards afforded the criminal defendant is "uncivilized." The criminal courts are better equipped to effectuate the vindication of social interests because they are endowed with "flexibility in sentencing, . . . vast experience with wrongdoers, and . . . [a] staff of parole, probation and other experts." *Id.* at 287. Furthermore, before punishment is imposed, a civil defendant should be afforded the constitutional guarantees protecting a criminal defendant including: an elevated burden of proof, freedom from self-incrimination, right to counsel, and freedom from double jeopardy when he has previously been punished for his conduct. *Id.* Professor Ghiardi contends the experience and expertise of the criminal courts in dealing with matters of punishment is preferred to the unguided "whimsy" and "irrational prejudices" which often mark the decisions of juries in matters regarding punitive damages. *Id.* If the defendant's actions do not amount to a crime, he should not be punished. *Id.* at 288. Compensatory damages are themselves sufficient to protect the plaintiff's interests and, should additional measures be needed in order to effectuate deterrence, plaintiffs may seek alternate relief, including equitable remedies. *Id. See also* Long, *Punitive Damages: An Unsettled Doctrine*, 25 DRAKE L. REV. 870, 885 (1976) (the absence of procedural safeguards in civil litigation leave the punitive damages defendant extremely vulnerable).

15. *See, e.g.*, Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173 (1931). According to Professor Morris, civil law properly serves two functions: reparative and admonitory. The primary goal of tort law is to provide compensation for injured plaintiffs; that is, to achieve reparative ends. *Id.* While the desire to compensate an injured party provides a rationale for giving the plaintiff a monetary award, it does not alone support the practice of taking those damages from the defendant. *Id.* Therefore, in a large proportion of tort cases, a degree of culpability on the part of the defendant must be established in order for the plaintiff to recover. *Id.* at 1174. The finding of a requisite degree of fault (or other grounds for liability such as strict liability) justifies taking damages from the defendant and, Morris argues, the requirement "might discourage a repetition of his wrongful conduct and serve as a warning to others who are inclined to commit similar wrongs." *Id.* The tort laws governing liability therefore have been established in order to protect the economic interests of the injured plaintiff as well as promoting the interests of society by "discouraging conduct which is likely to prove injurious and is not worth the risk it entails." *Id.* at 1174-75. *See also* United States *ex rel.* Marcus v. Hess 317 U.S. 537, 554 (1943) (Frankfurter, J., concurring) (civil proceedings may include punitive awards); Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 647-48 (1980) (civil law is shaped in order to enforce rules of behavior and punitive damages are often the only deterrent available, particularly when the conduct has not violated any criminal provisions).

16. D. DOBBS, *supra* note 12, § 3.9, at 205 (citing Loeblich v. Garnier, 113 So. 2d 95 (La. App. 1959)).

suffering and emotional distress was indeed a factor in the historical development of exemplary awards[17] and a few courts have recognized a compensatory element in punitive damages.[18] Although punitive damages may no longer be necessary as a compensatory tool with respect to intangible losses that are now recoverable in modern courts,[19] exemplary awards may yet provide a secondary means of compensation by effectively sidestepping the American rule which requires each party to pay her own costs of litigation. Attorney's fees and other litigation expenses are not included as part of a compensatory award, prompting some observers to contend punitive damages provide a fund out of which these expenses may be paid.[20]

Another theory supporting punitive damages is that the availability of such added sanctions will provide an incentive for the plaintiff to bring suit where such action is desirable because of the egregious nature of the defendant's conduct.[21] In cases where compensatory damages alone are likely to

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17. At common law, courts refused damages for nonpecuniary injuries such as insult, hurt feelings and mental suffering. A desire to compensate for such injuries encouraged courts to apply punitive damages in cases where the defendant's conduct was particularly egregious. 1 L. SCHLUETER & K. REDDEN, PUNITIVE DAMAGES § 2.2(C) (2d ed. 1989).

18. *E.g.*, Doroszka v. Lavine, 111 Conn. 575, 578, 150 A. 692, 693 (1930) (the purpose of punitive damages is not punishment, but compensation of the plaintiff for his injuries; therefore, punitive damages cannot exceed the amount of the plaintiff's expenses of litigation, minus taxable costs); Wise v. Daniel, 221 Mich. 229, 233, 190 N.W. 746, 747 (1922) (punitive damages enlarge the compensatory allowance but are not considered a separate sum to punish or make an example of the defendant); Fay v. Parker 53 N.H. 342, 355 (1873) ("one hundred twenty years ago the term *smart money* was employed in a manner entirely different from the modern signification which it has obtained, being then used as indicating compensation for the smarts of the injured person, and not, as now, money required by way of punishment, and to make the wrongdoer smart") (emphasis in original). *But see* Harris v. County of Racine, 512 F. Supp. 1273, 1283 (E.D. Wis. 1981) (punitive damages historically have not been considered to have a compensatory function).

19. Current damages procedures routinely provide a means for the plaintiff to recover intangible losses through awards for injuries such as pain and suffering, mental anguish and humiliation. *E.g.*, Ard v. Samedan Oil Corp., 475 So. 2d 384, 386 (La. App. 1985) (it is within the court's discretion to award damages for mental anguish, humiliation, and embarrassment), *aff'd in part*, 483 So. 2d 925 (La. 1986). Commentators suggest it seems unnecessary to provide additional damages in order to compensate for losses which are already directly addressed through formulas that account for that injury. *See, e.g.*, C. MCCORMICK, *supra* note 12, at 276. The author points out that exemplary damages are not justified on the basis of inadequacy of actual damages, which may include compensation not only for physical injury and monetary loss, but for "pain, mental suffering, humiliation, indignity, and loss of reputation" as well. *Id.*

20. *See, e.g.*, Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 KY. L.J. 1, 6 n.21 (1985) (providing citations for authorities addressing viability of awarding punitive damages in an attempt to defray litigation expenses); *see also* D. DOBBS, *supra* note 12, at 221 (suggesting that some of the impetus for punitive damages would diminish if there was an effective scheme for financing reasonable litigation).

21. D. DOBBS, *supra* note 12, at 205. *See* Marvex Processing & Finishing Corp. v. Allendale Mut. Ins. Co., 91 Misc. 2d 683, 684, 398 N.Y.S.2d 464, 466 (1977) (courts will uphold punitive damage where the defendant's conduct involved a high degree of moral culpability and constituted a fraud on the public).

be modest, the prospect of receiving punitive damages may encourage individuals to uphold legal norms by bringing suit, thus acting as "private attorney generals."[22] In light of the social benefits realized through civil proceedings and their admonitory functions, providing incentives to pursue these goals is important, particularly where the promise of compensatory recovery is insufficient to stir the plaintiff to action and no criminal provisions address the conduct in question.[23]

Various additional theories have influenced the development of punitive damages and provide at least peripheral support to the doctrine. A desire to redress unequal punishment at criminal law has been asserted as an impetus behind the development of punitive damages.[24] A disparity between the penalties available for minor offenses to property, as compared to minor offenses to the person, which could be obtained in criminal law in theory, prompted courts to allow punitive damages in civil cases. This reflected an attempt by the judiciary to achieve a greater balance between the remedies available for property and personal injuries. Though reasonable, this argument has provided only theoretical support for the punitive damages doctrine.[25]

Punitive damages are also alleged to satisfy a need for revenge and provide a forum for expressing public outrage.[26] By providing the plaintiff a means to extract some revenge, the punitive damages award offers the aggrieved party a viable alternative to indulging in some form of unlawful retribution. The prospect of receiving an exemplary award encourages the party to bring her claim before a court for resolution according to accepted rules of law.[27] This dissuasion of unlawful activity has prompted a number of courts to

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22. *See* Walker v. Sheldon, 10 N.Y.2d 401, 403, 179 N.E.2d 497, 498, 223 N.Y.S.2d 488, 490 (1961) (a punitive action against the defendant serves the public interest and encourages the plaintiff to bring civil and criminal prosecution). Punitive damages enforce the law by encouraging private individuals to uphold legal norms. Specifically, such damages help offset the expense of prosecuting worthy claims which entail only modest compensatory damages. *See* Ausness, *supra* note 20, at 5. Exemplary damages also serve to bring to justice a tortfeasor whose conduct is particularly offensive. Because the plaintiff may recover an amount in excess of actual damages, he is encouraged to bring such an action. Mallor & Roberts, *supra* note 15, at 649-50.

23. Mallor & Roberts, *supra* note 15, at 649-50. *See also* Simmons v. Atlas Vac Mach. Co., 475 F. Supp. 1181, 1182 (E.D. Wis. 1979) (punitive damages serve to punish a wrongdoer in situations in which there is no public prosecution); Cieslewicz v. Mutual Serv. Casualty Ins. Co. 84 Wis. 2d 91, 100, 267 N.W.2d 595, 599 (1978) (same proposition).

24. 1 L. SCHLUETER & K. REDDEN, *supra* note 17, at § 1.3(F).

25. *Id.* (pointing out that there is no explicit case support for this position).

26. Syester v. Banta, 257 Iowa 613, 621, 133 N.W.2d 666, 675 (1965) (exemplary damages provide a means of retaliation against the defendant for his antisocial conduct); 1 L. SCHLUETER &. K. REDDEN, *supra* note 17, at § 1.3(G).

27. This subrogation of the individual impulse to social desires provides a general base for the authority of courts of law. *See* O.W. HOLMES, THE COMMON LAW 2-4 (1923) (presenting a general view of the common law following a historical perspective as well as existing theories of legislation).

expressly condone the revengeful nature of punitive damages.[28] Because juries have usually assessed punitive damages,[29] such awards also provided a fitting forum for the expression of public outrage with respect to particularly outrageous or egregious behavior on the part of the defendant.[30] While a wide variety of considerations supported and influenced the development of punitive damages awards,[31] the most widely accepted justification for punitive damages remains the dual interests of punishment and deterrence.[32]

B. The Debate Regarding the Propriety of Punitive Damages

Legal systems providing for recovery of multiple damages surpassing the amount needed for compensation can be traced back to ancient Rome.[33] More recently, punitive damages have an extensive history in the English common law and American jurisprudence.[34] The acceptance of the doctrine of punitive damages has been so widespread that only five jurisdictions refuse to issue such awards[35] and of these, three allow exemplary damages

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28. *See, e.g.*, Merest v. Harvey, 128 Eng. Rep. 761 (1814) (large punitive damages awards serve to discourage dueling).

29. *See infra* notes 42-52 and accompanying text (discussing procedures for awarding punitive damages).

30. 1 L. SCHLUETER & K. REDDEN, *supra* note 17, at § 1.3(G).

31. *See id.* at §§ 1.3, 2.2 (theories behind punitive damages include mental anguish and other intangible harms, deterrence of wrongdoers, redress of inequities in the criminal forum and satisfaction of revenge); D. DOBBS, *supra* note 12, at § 3.9 (punitive damages provide incentive for a plaintiff to sue in a case where public interest requires action against the defendant, yet without a punitive award, the plaintiff is insufficiently encouraged to sue).

32. 1 L. SCHLUETER &. K. REDDEN, *supra* note 17, at § 2.2(A). *See also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) (punitive damages are not compensation for injuries but rather constitute private fines incurred to punish reprehensible conduct).

33. 1 L. SCHLUETER & K. REDDEN, *supra* note 17, at § 1.2. Punitive awards have been recognized for nearly 4000 years. *Id.*

34. Day v. Woodworth, 54 U.S. (13 How.) 362, 371 (1851) (the concept of punitive damages is so well-established within the American legal system that the question of their propriety is not subject to argument). English courts upheld awards of damages in excess of the amount of physical harm suffered well before the eighteenth century. 1 L. SCHLUETER &. K. REDDEN, *supra* note 17, at § 1.3(A). The first reported English case awarding punitive damages occurred in 1763. Wilkes v. Wood, 2 Wils. K.B. 205, 95 Eng. Rep. 767 (1763). In America, one of the earliest recorded awards of punitive damages appeared in 1791. Coryell v. Colbaugh, 1 N.J.L. 90 (1791).

35. Ganapolsky v. Park Gardens Dev. Corp., 439 F.2d 844, 846 n.* (1st Cir. 1971) (applying Puerto Rican law); Caperci v. Huntoon 397 F.2d 799, 801 (1st Cir.) (applying Massachusetts law), *cert. denied,* 393 U.S. 940 (1968); Riard v. State, 390 So. 2d 882, 884 (La. 1980); Prather v. Eisenmann, 200 Neb. 1, 11, 26 N.W.2d 766, 772 (1978); Kammerer v. Western Gear Corp., 27 Wash. App. 512, 521-22, 618 P.2d 1330, 1337 (1980), *aff'd,* 96 Wash. 2d 416, 635 P.2d 708 (1981).

While few jurisdictions have effected a total ban on punitive damages, a growing number are restricting the availability of such awards in specific instances. For example, Illinois has banned punitive damages in medical and legal malpractice actions. ILL. REV. STAT. ch. 110, para. 2-1115 (1987). Oregon similarly refuses such awards in medical malpractice cases provided the physician is licensed and registered or certified. OR. REV. STAT. § 18.550 (Supp. 1987). A

when expressly provided by statute.[36] The case law concerning punitive damages developed in the context of traditional one-on-one litigation,[37] usually involving claims based on an intentional tort with punitive damages assessed on the basis of the egregious conduct or mental state of the defendant.[38] As the development of tort law has traditionally been left to state courts, the punitive damages doctrine has been defined and executed at the state court level.[39]

In spite of the longstanding and extensive recognition of punitive damages, a debate concerning the propriety of the awards has commanded the interest of courts and commentators for more than one hundred years.[40] Attacks on

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number of states have abolished punitive damages in product liability actions against drug manufacturers if the drug was manufactured and labeled under F.D.A. approval or was recognized as safe under F.D.A. regulations. *See, e.g.,* OHIO REV. CODE ANN. § 2307.80 (Anderson 1988); OR. REV. STAT. § 30.927 (Supp. 1987).

36. Alexander v. Burroughs Corp., 359 So. 2d 607, 610 (La. 1978); Boot Mills v. Boston & M.R.R. 218 Mass. 582, 589, 106 N.E. 680, 683-84 (1914); Maki v. Aluminum Bldg. Prods., 73 Wash. 2d 23, 25, 436 P.2d 186, 187 (1968).

37. *See* Mallor & Roberts, *supra* note 15, at 658-60 (discussing punitive damages in the context of tort and contract actions).

38. *Id.* The traditional relegation of punitive damages as a remedy in tort actions is reflected in the generally recognized prohibition against such awards in contract cases. RESTATEMENT (SECOND) OF CONTRACTS § 355 (1979). Exceptions to this restriction have developed. One approach to allowing punitive damages in cases involving breach of contract was employed by the California Supreme Court in Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973). In *Gruenberg,* the court recognized an implied duty of good faith in all insurance contracts and found that a breach of this obligation gave rise to an action in tort as well as contract. *Id.* at 574, 510 P.2d at 1038, 108 Cal. Rptr. at 484. Some courts, however, have taken a more direct approach and assessed punitive damages in contract actions involving malicious or oppressive conduct without implying the existence of a tort. *See, e.g.,* Whitfield Constr. Co. v. Commercial Dev. Corp., 392 F. Supp. 982 (D.V.I. 1982) (punitive damages awarded in an action by a contractor for money due on a contract and damages resulting from breach of the contract); Jones v. Abriani, 169 Ind. App. 556, 350 N.E.2d 635 (Ind. App. 1976) (punitive damages awarded against manufacturer for defects in a mobile home); Eakman v. Robb, 237 N.W.2d 423 (N.D. 1975) (punitive damages awarded where defendant knowingly violated the terms of a restrictive covenant). The direct approach of awarding exemplary damages in contract actions not involving tortious conduct has been applauded on the grounds that the availability of these awards should not depend on technicalities such as which area of substantive law the pleadings relegate the case. Sullivan, *Punitive Damages in the Law of Contract: The Reality and the Illusion of the Legal Change,* 61 MINN. L. REV. 207, 216-20 (1977).

39. *See* Priest, *supra* note 1, at 3 (tort reform has been a product of state legislation).

40. As early as 1851, the Supreme Court recognized authoritative criticisms of the punitive damages doctrine had been advanced by commentators. *See* Day v. Woodworth, 54 U.S. (13 How.) 362, 371 (1851). In that trespass action, however, the Court affirmed the availability of exemplary damages citing an extensive judicial history allowing such awards as "the best exposition of what the law is." *Id.* Since that decision, however, a minority of courts have rejected such awards. *E.g.,* Ellis v. Brockton Publishing Co., 198 Mass. 538, 543, 84 N.E. 1018, 1020 (1908) (exemplary or punitive damages will not be awarded in libel actions); Miller v. Kingsley, 194 Nev. 123, 124, 230 N.W.2d 472, 474 (1975) (stating that it is a fundamental rule of law in Nebraska not to award "punitive, vindictive, or exemplary" damages); Spokane

punitive damages have been grounded in an array of theories including contentions that they provide a windfall to the plaintiff; that no proven deterrent effect has ever been correlated with the imposition of punitive damages; that the measure of damages which usually recognize such intangible losses as pain and suffering are adequate to compensate the plaintiff; and, that lack of clearly defined standards for juries to follow necessarily leads to injustice.[41] Moreover, many of the criticisms leveled against punitive damages are directed at the procedures used in awarding them.

The procedures used to assess and award punitive damages are, allowing for a few modifications, generally the same for all jurisdictions.[42] The initial step in a claim for punitive damages is the determination by the trial judge of whether or not the evidence will support an exemplary award. In a jury trial the court must decide as a threshold matter if the jury will consider the matter of punitive damages.[43] Once this initial burden is satisfied, the trier of fact must determine whether to award punitive damages.[44] Because none of the states allow punitive damages upon demand,[45] juries must, in their discretion, determine on the facts of a specific case whether punitive damages

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Truck & Dray Co. v. Hoefer, 2 Wash. 45, 56, 25 P. 1072, 1075 (1891) (referring to the doctrine of punitive damages as "unsound in principle").

The propriety of punitive damages continues to inspire debate, no less so than at the time of *Day v. Woodworth. See, e.g.,* Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures,* 69 VA. L. REV. 269 n.1 (1983) (citing series of leading cases and scholarly works addressing the criticisms and issues surrounding the propriety of punitive damages).

41. D. DOBBS, *supra* note 12, § 3.9, at 219-20. *See generally* C. MCCORMICK, *supra* note 12, at § 77 (discussing arguments for and against punitive damages).

42. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control,* 52 FORDHAM L. REV. 37, 46 (1983).

43. Ghiardi, *Punitive Damage Awards: An Expanded Judicial Role,* 72 MARQ. L. REV. 33, 33 (1988). This initial review is intended to determine whether or not the case is an appropriate candidate for punitive damages. The court therefore must focus on whether facts indicate the defendant acted intentionally or in a manner which is sufficiently outrageous to warrant the imposition of punitive damages. This initial inquiry is not designed to determine definitively whether punitive damages will be awarded in the case, but is instead intended to determine simply whether the facts could legally support an exemplary award should the jury decide to render one. Should the facts support such a finding, the exemplary damage issue may be submitted to the jury. *Id.* (citing Wangen v. Ford Motor Co., 97 Wis. 2d 260, 298, 194 N.W.2d 437, 457 (1980)); *see also* Jackson v. Pool Mortgage Co., 868 F.2d 1178, 1182 (10th Cir. 1989) (the question of sufficiency of evidence to justify an exemplary award is an issue of law to be determined by the court).

44. Creamer v. Porter, 754 F.2d 1311, 1320 (5th Cir. 1985); Seltzer, *supra* note 42, at 47. It is commonly stated that punitive damages "are not a favorite of the law." *See, e.g.,* Jackson v. Johns-Manville Sales Corp., 727 F.2d 506, 526 (5th Cir. 1984) (punitive damages are not favored by law since they serve as punishment and an example to others). Due to their suspect status, punitive damages are treated cautiously by the courts. Dempsey v. Holiday Utilities Corp., 107 Ill. App. 3d 467, 475, 437 N.E.2d 694, 701 (5th Dist. 1982) (punitive damages may be recovered within narrow limits, although the court must use caution in awarding such measures).

45. D. DOBBS, *supra* note 12, § 3.9, at 204.

are warranted and, if so, what amount to award.[46] The trial judge will normally provide minimal instructions to the jury, such as directing them to consider "the purpose of punitive damages, the culpability of the defendant's conduct, the nature and extent of the plaintiff's injuries and the wealth of the defendant."[47] Should the jury grant the claim for punitive damages, the award is subject to review by the trial and appellate courts.[48] If the reviewing court finds the award is inappropriate in measure, it may reduce the amount,[49] exercise a remittitur[50] or order a new trial.[51] However, the standard used in reviewing punitive awards is deferential, as the jury is considered the body best capable of determining the appropriate level of punishment in a given case.[52]

When analyzing punitive damages awards courts utilize a variety of standards of review, many of which have been criticized as unclear.[53] Professors

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46. *E.g.*, Audiovox Corp. v. Moody, 737 S.W.2d 468, 471 (Ky. Ct. App. 1987) (the court must make clear to the jury that they have discretion to award punitive damages); Briswell v. Duncan, 742 P.2d 80, 86 (Utah 1987) (case law consistently holds that whether punitive damages are awarded is within the discretion of the jury); Seltzer, *supra* note 42, at 47 (discussing the jury's discretion and the court's instructions).

47. Seltzer, *supra* note 42, at 47. The latitude provided juries in assessing punitive damages awards has prompted concern in a number of courts including the United States Supreme Court which stated: "In most jurisdictions, jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).

While the determination of the amount of a punitive damage award is left to the jury's discretion, the instructions regarding whether or not to impose such an award are somewhat more exact. For example, Arkansas requires that in order to justify any award of punitive damages in a negligence action, the plaintiff must prove "(1) negligent or intentional misconduct, (2) that the defendant knew or should have known that the action would naturally or probably result in injury, [and] (3) that the action was continued in reckless disregard for the consequences from which malice can be inferred." Williams v. Union Carbide Corp., 790 F.2d 552, 557 (6th Cir. 1986).

48. Seltzer, *supra* note 42, at 47-48; RESTATEMENT (SECOND) OF TORTS § 908 comment d (1979). *See, e.g.*, Tolliver v. Amici, 800 F.2d 149, 151 (7th Cir. 1986) (an award of punitive damages may be set aside if it exceeds the amount required to achieve the goals of deterrence and punishment); Gray v. Allison Div., Gen. Motors Corp., 52 Ohio App. 2d 348, 359, 370 N.E.2d 747, 754 (1977) (while appellate courts are normally reluctant to interfere with an award of punitive damages, where such awards are the result of jury passion or prejudice, they may be overturned).

49. Pitts Truck Air, Inc. v. Mack Trucks, Inc., 173 Ga. App. 801, 803, 328 S.E.2d 416, 418 (1985) (a court upon its own motion can correct or set aside a judgment for punitive damages if done prior to entrance of final judgment); RESTATEMENT (SECOND) OF TORTS § 908 comment d (1979).

50. Brink's Inc. v. City of New York, 546 F. Supp. 403, 415 (S.D.N.Y. 1982) (court granted remittitur to reduce punitive damage award from $5,000,000 to $1,500,000); RESTATEMENT (SECOND) OF TORTS § 908 comment d (1979).

51. Rosener v. Sears Roebuck & Co., 110 Cal. App. 3d 740, 757, 168 Cal. Rptr. 237, 247 (1980) (case remanded for new trial on issue of punitive damages because award was excessive); RESTATEMENT (SECOND) OF TORTS § 908 comment d (1979).

52. Petsch v. Florom, 538 P.2d 1011, 1014 (Wyo. 1975).

53. *See, e.g.*, Mallor & Roberts, *supra* note 15, at 663 ("[T]here is a danger that the paucity

Schlueter and Redden discuss two standards which have been used in reviewing punitive damages: (1) "passion, prejudice or corruption of the jury"; and, (2) the "reasonable relation rule."[54] Under the first standard, the court will overturn or adjust a verdict if it is found to be the result of appeals to passion or prejudice of the trier of fact.[55] Applications of this rule vary among the courts. Some courts will attempt to determine if prejudice has affected the award by looking only at the total amount of punitive damages.[56] Others compare the punitive award to the amount allowed for compensatory damages in an attempt to find some reflection of prejudice or passion.[57] However, most courts utilizing this approach will not attempt to determine any specific factor which introduced prejudice into the deliberations of the jury.[58]

The second standard of review, the reasonable relation rule,[59] requires the amount of punitive damages to bear some reasonable relation to the award given for actual damages. Courts have not established any standard ratio to use when determining this elusive standard, but rather, have tailored the concerns of reasonableness to the facts of the case at hand.[60] This has led some critics to argue that the standard is little more than a means of rationalizing awards rather than actually determining them.[61] Proponents of

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of standards regarding punitive damages may cause the judge to hesitate to disturb the jury's award, feeling that his or her judgment is no better than the jury's.").

54. 1 L. SCHLUETER & K. REDDEN, *supra* note 17, at § 6.1(B)-(C).

55. *E.g.*, Curtis Publishing Co. v. Butts, 388 U.S. 130, 160 (1967) (even if punitive damages are warranted, a court cannot uphold a verdict based on prejudice); Minneapolis, St. Paul & Sault St. Marie Ry. v. Moquin, 283 U.S. 520, 521 (1931) (a verdict based on passion or prejudice cannot stand); Nevada Nat'l Leasing Co. v. Hereford, 36 Cal. 3d 146, 153, 680 P.2d 1077, 1081, 203 Cal. Rptr. 118, 123 (1984) (an award of punitive damages should be set aside only when the entire record, when viewed most favorable to the defendant, indicates the jury was influenced by passion or prejudice).

56. *E.g.*, Twin City Bank v. Isaacs, 283 Ark. 127, 136, 672 S.W.2d 651, 656 (1984) (punitive award not "grossly excessive" or prompted by passion or prejudice); Crutcher-Rolfs-Cummings, Inc. v. Ballard, 540 S.W.2d 380, 389 (Tex. Civ. App. 1976) (measure of punitive damages award is within discretion of the jury and should not be set aside unless it is so large as to indicate it was the result of passion or prejudice).

57. *E.g.*, Molex, Inc. v. Nolen, 759 F.2d 474, 480 (5th Cir. 1985) (exemplary damages of twice the compensatory award not so large as to indicate the verdict was a result of passion, caprice or prejudice); Petsch v. Florom, 538 P.2d 1011, 1014 (Wyo. 1975) (there is no fixed ratio between actual and punitive damages but the award must not be so disproportionate as to be a result of passion or prejudice).

58. *Compare* Dean v. Mitchum-Thayer, Inc., 450 F. Supp. 1, 2 (E.D. Tenn. 1978) (determination that the punitive damages award was based on passion or prejudice from excessive amount of the award) *with* Puz v. McDonald, 140 Ariz. 77, 79, 680 P.2d 213, 215 (Ariz. Ct. App. 1977) (the sole fact that a punitive damages award exceeded the defendant's present assets was not necessarily grounds to set aside the award); *see also* 1 L. SCHLUETER & K. REDDEN, supra note 17, at § 6.1(B) (providing citations to courts applying the standard).

59. 1 L. SCHLUETER & K. REDDEN, *supra* note 17, at § 6.1.

60. Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 819, 174 Cal. Rptr. 348, 388 (1981); Cruz v. Montoya, 660 P.2d 723, 726 (Utah 1983).

61. Morris, *supra* note 15, at 1180.

the rule contend it provides the courts with a rough, yet effective device for paring down excessive awards.[62]

The standards and procedures used to assess and award punitive damages have been attacked on a variety of constitutional grounds and provisions.[63] The fourteenth amendment's equal protection clause has provided one source of criticism.[64] First amendment concerns figure prominently in discussions of punitive damages in defamation actions.[65] Focusing on the punitive goals of exemplary damages, commentators have compared the awards to quasi-criminal sanctions and questioned whether the criminal safeguards found in the fourth, fifth and sixth amendments should be applied to claims for punitive damages.[66] This Note will limit its examination of the constitutionality of punitive damages to the requirements of three specific provisions: the double jeopardy clause of the fifth amendment, the excessive fines clause of the eighth amendment, and the due process clause of the fourteenth amendment.

1. The Double Jeopardy Clause

The United States Constitution provides that no person shall twice be put in jeopardy of punishment for the same offensive conduct.[67] The principle aim of exemplary damages is clearly punitive in nature.[68] Therefore, the very language of the double jeopardy clause would seem to preclude bringing a claim for punitive damages if the defendant has previously been subject to criminal prosecution or civil punishment for the same conduct. The Supreme

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62. Boise Dodge, Inc. v. Clark, 92 Idaho 902, 908-909, 453 P.2d 551, 557-58 (1969).

63. *See generally* Wheeler, *supra* note 40 (discussing due process and excessive fine considerations).

64. *See, e.g.*, Leitner, *Punitive Damages: A Constitutional Assessment*, 38 FED'N. INS. CORP. COUNS. Q. 119, 132-33 (1988). The author argues that punitive damages are similar to criminal sanctions for purposes of constitutional analysis. Criminal sanctions cannot be meted out according to the wealth of the defendant. Williams v. Illinois, 399 U.S. 235, 243 (1970). Thus, to issue a punitive damages award based on the wealth of the defendant violates the concept of equal protection. Leitner, *supra*, at 133.

65. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974) (due to their chilling effect on constitutionally protected speech, punitive damages cannot be awarded in defamation cases absent a showing of actual malice); Comment, *The Constitutionality of Punitive Damages in Libel Actions*, 45 FORDHAM L. REV. 1382 (1977) (punitive damages should be abolished in public figure libel actions in order to protect the interest in free speech and debate guaranteed by the first amendment).

66. *See generally* Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408 (1967). Although punitive damages bear a striking similarity to criminal sanctions, fundamental policy considerations underlying criminal safeguards do not apply to claims for exemplary awards. Examination of the nature and consequences of punitive damages does, however, call for protections such as an increased burden of persuasion for the plaintiff and the right to trial by jury. *Id.* at 1 L. SCHLUETER & K. REDDEN *supra* note 17, at § 7.2(A) (discussing criminal procedure safeguards).

67. U.S. CONST. amend. V.

68. *See supra* note 12 and accompanying text.

Court, however, has held that the concerns addressed by the double jeopardy clause are limited to the context of criminal proceedings and therefore has refused to extend its protections to a case involving civil punishment.[69]

This distinction between civil and criminal punishment has been critical in the Court's application of double jeopardy protections.[70] In the Court's analysis, "[j]eopardy describes the risk . . . traditionally associated with a criminal prosecution."[71] In *Breed v. Jones* the Court explained that the protections of the double jeopardy clause were established to protect the defendant from twice being subjected to the difficulties associated with defending against an action brought by the government. The purpose and potential consequences of a criminal proceeding, coupled with the resources of the State, inject into the criminal trial pressures—psychological, physical and financial—not normally associated with private civil litigation. Such concerns justified the protections of the double jeopardy clause.[72] These specific pressures are not present when the party is defending against a civil claim rather than a criminal charge and therefore no double jeopardy protection is invoked in the civil context. Public disapprobation and long lasting stigmatization generally do not accompany an assessment of punitive damages as they do a criminal conviction.[73] Therefore, the distinction between criminal and civil punishment has generally precluded the application of the double jeopardy clause to cases involving punitive damages.

While the double jeopardy clause generally does not apply to cases other than criminal prosecutions, courts have recognized proceedings in which the protections of the double jeopardy clause may apply.[74] In quasi-criminal proceedings, courts analyze the nature of the punishment involved and the purpose of the civil sanctions in order to determine whether the punishment is so penal in nature as to require the application of the double jeopardy

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69. *E.g.*, Rex Trailer Co. v. United States, 350 U.S. 148, 150-51 (1956) ("Congress may impose both a criminal and civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice or attempting a second time to punish criminally for the same offense.").

70. *See, e.g.*, Breed v. Jones, 421 U.S. 519, 528 (1975) (the risk involved in double jeopardy is apparent only in criminal proceedings).

71. *Id. See also* One Lot Emerald Cut Stones & One Ring v. United States, 409 U.S. 232, 235-36 (1972) (risk encompassed in double jeopardy clause is not present in proceedings which are not essentially criminal in nature).

72. Breed v. Jones, 421 U.S. at 530.

73. As one commentator has mentioned, "[t]here is no blank on a job application for listing past punitive damage judgments." Comment, *supra* note 66, at 411. *But see* Wheeler, *supra* note 40, at 283 (although there is a stigma associated with the word "criminal," despite the nature of the crime itself, the stigma arising from a punitive damage award may be of greater or equal magnitude).

74. *See, e.g.*, United States v. LaFranca, 282 U.S. 568, 572-77 (1931) (although double jeopardy issue not resolved, civil action to recover taxes under the Willis-Campbell Act is punitive in nature and barred by a prior criminal conviction for the same offense); Coffey v. United States, 116 U.S. 436, 442-45 (1886) (criminal acquittal on charge of failure to pay taxes on liquor barred subsequent *in rem* action for the forfeiture of liquor and stills).

clause.[75] However, those suits which the Court has recognized as quasi-criminal involved statutory provisions which had granted the government an option between criminal or civil remedies.[76] The defendants in these cases were therefore faced with the pressures and disadvantages inherent in opposing the government, and the concerns of double jeopardy were thus implicated. However, in a case involving punitive damages between private litigants, no such concerns arise since the government plays no role as an interested party. Therefore, the special concerns which are implicated when defending against the government do not arise in a civil case between private litigants. Thus, in spite of the analogies between punitive damages and criminal or quasi-criminal sanctions, the double jeopardy clause generally does not apply to cases of punitive damages between private litigants.[77]

2. The Excessive Fines Clause

A second argument against the constitutionality of punitive damages and the procedures for awarding them is based on the eighth amendment's excessive fines clause.[78] This amendment provides in part: "[E]xcessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishment inflicted."[79] In light of the increasing severity and magnitude of punitive awards, concerns regarding the excessiveness of such damages are well-founded.[80] Courts, however, have been generally unreceptive to the

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75. In Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), the Court set out considerations for determining whether a sanction was sufficiently penal for purposes of applying the procedural protections of the fifth and sixth amendments. The *Mendoza-Martinez* Court reasoned that when deciding whether to apply these provisions a court must consider:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment, retribution, and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

Id. at 168-69.

76. *E.g.*, United States v. LaFranca, 282 U.S. 568 (1931).

77. United States v. Halper, 109 S. Ct. 1892, 1903 (1989) (the double jeopardy clause does not apply to litigation between private parties); *see also* McMahon Food Co. v. Call, 406 N.E.2d 1206, 1208 (Ind. Ct. App. 1980) (punitive damages may be awarded even though the same illegal act may subject the defendant to criminal liability); *but see* C. MCCORMICK, *supra* note 12, § 77, at 276 (facing civil punitive damages and criminal prosecution violates the spirit—if not the letter—of the double jeopardy clause).

78. *See, e.g.*, Jeffries, *supra* note 2, at 151-58 (arguing against the use of punitive damages on the basis of the excessive fines clause).

79. U.S. CONST. amend. VIII.

80. A statistical study showed the average recorded punitive damage award in Cook County Illinois rose from $4,000 in 1960-64 to $489,000 in 1980-84. M. PETERSON, PUNITIVE DAMAGES: PRELIMINARY EMPIRICAL FINDINGS 11 (1985). Whereas multimillion dollar awards were previously the rare exception, they are becoming increasingly commonplace and punitive damages have even topped the billion dollar plateau. *See* Texaco, Inc., v. Penzoil Co., 729 S.W.2d 768 (Tex. Ct. App. 1987) (compensatory damages of $7.53 billion affirmed, remittitur of $2 billion reduced punitive damages to $1 billion), *cert. dismissed,* 108 S. Ct. 1305 (1988).

argument that punitive damages violate the excessive fines clause and a recent Supreme Court decision expressly rejected this argument.

In *Browning-Ferris Industries v. Kelco,*[81] the Court rejected the claim that the excessive fines clause barred a six million dollar punitive damages award in litigation between private parties. In rejecting this contention, the Court examined the provisions of the eighth amendment in light of its language and history,[82] the traditions developed at English common law which shaped the background against which the amendment was adopted,[83] and any considerations which may be presented in the current context of the litigation, which were not evident at the time the amendment was framed.[84] The Court

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81. 109 S. Ct. 2909 (1989). The important questions of constitutional law addressed in that case arose from an unlikely source: the waste-disposal business. *Id.* at 2912. Browning-Ferris Industries operated a nationwide waste collection business and was involved in a price reduction campaign aimed at driving its competitor, Kelco Disposal, Inc., out of the Burlington market. Kelco consequently sued Browning-Ferris, alleging violations of the federal antitrust and state tort laws. Kelco won a jury verdict for $51,146 in compensatory damages and $6,000,000 in punitive damages. *Id.* at 2913.

82. *Id.* at 2914-15. The Court indicated that although the ratification of the amendment created little debate and thus a sparse record on which to determine the intent of its framers, the widely-accepted definition of "fine" limited the term to payments made to the government for some offense. Such sanctions, historically, were imposed only in criminal actions. *Id.* This factor, combined with the impulses that inspired the adoption of the Bill of Rights—a distrust of governmental power and a demand for limitations against its abuse—prompted the Court to read the eighth amendment as a check on the prosecutorial power of the government and not as a provision affecting civil damages. *Id.* at 2915.

The *Browning-Ferris Industries* Court found the historical development of the amendment provided added support for limiting the applications of the excessive fines clause. The eighth amendment was based directly on the Virginia Declaration of Rights which in turn was based on the English Bill of Rights. That document was designed to curb the excesses of the English judges under the reign of James II and the framers of the Constitution were clearly aware of this history when adopting the eighth amendment. *Id.* at 2916. Thus, the Court concluded that the history and language of the excessive fines clause limit the application of that provision to fines exacted by and paid to the government. *Id.*

83. 109 S. Ct. at 2916-19. In an attempt to influence the Court's interpretation of the amendment, Browning-Ferris argued that English history prior to the adoption of the Magna Carta and the ensuing responses to the abuses of that period dictated applying the eighth amendment to civil penalties as well as criminal. *Id.* at 2916-17. During this period, the English crown held, and often abused, the power to impose the penalty of amercements on its subjects. This punishment, which was ostensibly a fine payable to the crown, was applied to criminal as well as civil offenses. The arbitrary imposition of these penalties led to the adoption of several provisions in the Magna Carta which limited the use of amercements and served as the forerunner to the protections embodied in the excessive fines clause. *Id.* at 2917-18. The Court, however, found the mere fact that the amercements were a civil as well as criminal remedy failed to justify the extension of the excessive fines clause to civil actions. The dispositive fact, rather, was that the amercements were paid to the government and the provisions which were later aimed at restricting the abuse of the power of amercement were aimed at limiting governmental power. *Id.* at 2918-19.

84. *Id.* at 2919-20. While the Court found the excessive fines clause was intended by its framers to serve as a check on governmental prosecutions, historical considerations alone were not sufficient to foreclose its application in cases involving private civil litigation. Because it

found that the guiding factor in the application of eighth amendment protections was a concern with the limitation of governmental action. Absent state abuse of power the safeguards of the excessive fines clause are simply not implicated. The mere facts that punitive damages are imposed through the authority of the courts and that governmental interests are advanced through the admonitory functions of the awards fail to raise the requisite concern over governmental prosecutorial abuses which the Court finds central to the eighth amendment.[85] Therefore, the excessive fines clause is not intended to address any problem which may exist in the procedure for awarding punitive damages between private parties.[86]

Throughout its opinion, the *Browing-Ferris Industries* Court indicated that the case law concerning the application of the eighth amendment generally had been limited to concerns "with criminal process and with direct actions initiated by government to inflict punishment."[87] However, the Court explicitly refused to determine whether the eighth amendment was limited only to criminal cases, and instead held only that it did not apply to punitive damages in a suit where the government played no role in the litigation and had no right to a share of the award.[88] By analyzing the history and development of the eighth amendment's excessive fines clause, the Court determined the provision was intended as a check against governmental abuse of power and the concerns embodied in the clause were therefore not implicated in a suit between private litigants.[89] The analysis applied in *Browning-Ferris Industries* and the general interpretation given to the criminal safeguards such as the double jeopardy clause outlined above, indicate that the protections of the fifth and eighth amendments will not have any direct bearing on punitive damages litigation.[90]

3. *The Due Process Clause*

Courts and commentators have questioned whether current punitive damages procedures violate the due process clauses of the fifth and fourteenth

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was attempting to determine the scope of constitutional protections, the Court was obligated to consider more than the "mischief which gave it birth." *Id.* at 2919 (quoting Weems v. United States, 217 U.S. 349, 373 (1910)). Therefore, the Court examined the history of the punitive damages doctrine in order to determine if developments subsequent to the adoption of the eighth amendment dictated extending its application to cover such awards. The concept of punitive damages, however, was already well-established at the time the eighth amendment was adopted. *Id.* at 2919. Although the protections of the eighth amendment may be properly extended beyond the particular context to which the framers intended them to apply, the Court found the context of punitive damages awards in litigation between private parties an inappropriate case for this extension. *Id.* at 2920.

85. 109 S. Ct. at 2920.

86. *Id.* at 2920.

87. *Id.* at 2912. *Cf. supra* note 69 and accompanying text (double jeopardy clause applied only to criminal proceedings).

88. 109 S. Ct. at 2914.

89. *Id.* at 2920.

90. *See generally* Comment, *supra* note 66, at 434-35 (fundamental differences between punitive damages and criminal sanctions prohibit extension of constitutionally based procedural safeguards to civil context).

amendments.[91] Such appraisals focus on the current procedures for assessing exemplary damages and ask if they satisfy the due process demand for fundamentally fair proceedings and guarantee each party an opportunity to present her case and receive a ruling on its merits.[92] When determining if the standards of the due process clause are satisfied in any given factual context, one must first determine whether those criteria are invoked in the particular case.[93]

In order to trigger application of due process concepts, two requisites must be satisfied. First, there should be some form of government action and, second, there must be an attempted deprivation of a "life, liberty or property" interest.[94] The state action requirement prevents due process concerns from playing a role in a solely private transaction.[95] Yet the state action requirement is less strenuous than the demands of the double jeopardy and excessive fines clauses. Those provisions require the government to assume the interests of an adversary party before their protections are implicated.[96] While due process concerns are triggered if the state is involved as a party to the litigation in either a criminal prosecution or a civil proceeding,[97] these standards also come into play where the government merely transfers property between individuals pursuant to its enforcement power.[98] The due process

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91. *See* Browning-Ferris Indus. v. Kelco Disposal, Inc., 109 S. Ct. 2909, 2923 (Brennan, J., concurring) (current punitive damages procedures provide insufficient guidance to jury to avoid difficulty of arbitrary imposition of awards); Bankers Life & Casualty v. Crenshaw, 108 S. Ct. 1645, 1654-56 (1988) (O'Connor, J., dissenting) (jury discretion in awarding punitive damages may violate due process clause); *In re* School Asbestos Litigation, 789 F.2d 996, 1004 (3d Cir.) (substantive due process may prohibit punitive damages claims in asbestos-related product liability cases), *cert. denied,* 479 U.S. 915 (1986); Celotex Corp. v. School District of Lancaster, 479 U.S. 852 (1986). *See also* Wheeler, *supra* note 40, at 272 (current procedures violate substantive due process considerations elaborated by the Supreme Court in *Mathews v. Eldridge*).

92. Logan v. Zimmerman Brush Co., 455 U.S. 422, 433 (1982).

93. Heese v. DeMatteis Dev. Corp., 417 F. Supp. 864, 870-71 (S.D.N.Y. 1976) (question of whether due process applies is separate and distinct from what process is due).

94. Banks v. Block, 700 F.2d 292, 295 (6th Cir.), *cert. denied,* 464 U.S. 934 (1983). *See* U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property without due process of law"); *id.* amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty or property, without due process of law").

The scope of the protections provided by the due process clauses is defined in part by the word "person." This term has been given a broad definition by the courts. Tucker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 511 (1969) (covering minors); Mathews v. Diaz, 426 U.S. 67, 77 (1976) (covering illegal aliens); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 784 (1978) (corporate speech is guaranteed through the protection of liberty in the due process clause of the fourteenth amendment).

95. Krynicky v. University of Pittsburgh, 742 F.2d 94, 97 (3d Cir. 1984) (the fifth and fourteenth amendments protect individuals only from governmental action), *cert. denied,* 471 U.S. 1015 (1985).

96. *See supra* notes 70-73, 81-86 and accompanying text (the dangers addressed by the double jeopardy and excessive fines clauses are not normally a part of private civil litigation).

97. *E.g.,* Giaccio v. Pennsylvania, 382 U.S. 399, 402-03 (1966).

98. Wheeler, *supra* note 40, at 277. The author cites Supreme Court cases outlining due

clause therefore, may protect civil defendants who are hoping to protect their property, and civil plaintiffs attempting to redress grievances.[99]

The second requirement is that the state action be used to deprive the party of her life, liberty or property. Before state authority can be invoked in order to deprive a party of a constitutionally protected interest, a hearing must be held.[100] Those interests which are protected by due process are not created by the Constitution but rather are defined by independent rules such as state laws.[101] A person has property interests sufficient to invoke due process protections where rules which she may invoke at a hearing support her claim of entitlement to that benefit.[102] The parties' interests in a claim for a punitive damages award (which is based on state law) therefore qualify as a property interest for purposes of due process analysis. The due process clause thus, has been held to protect defendants in punitive damages actions.[103]

Provided the threshold requirements of the due process clause are satisfied, one must next ask exactly what process is due. The due process clause requires the government to provide fundamentally fair proceedings whenever its qualifying factors are satisfied,[104] and thus acts as a "fundamental guarantee of fairness, our protection against arbitrary, capricious, and unreasonable" deprivations.[105] This requires that each participant be provided a suitable opportunity to present her case and have the court judge its merits.[106] The demands of the due process clause, however, escape precise definition. It is not a technical conception with a fixed content, but is related to time, place and circumstances.[107] The flexible nature of due process demands, therefore, calls for consideration of an independent sense of justice—one that exists independent of any judicial procedures—when determining whether the procedures of a given case reflect a sense of fundamental fair play.[108] Various factors, including the degree of potential deprivation the party may suffer, must be considered in this analysis.[109]

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process considerations involved in property transfers, including: North Ga. Finishing, Inc. v. Di-Chem, 419 U.S. 601 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969). *See also* Wheeler, *supra* note 40, at 278 n.40 (when a court compels a defendant to relinquish his property to a plaintiff, this necessarily constitutes state action).

99. Logan v. Zimmerman Brush Co., 455 U.S. 422, 429 (1982).

100. Goldberg v. Kelly, 397 U.S. 254, 264-71 (1970).

101. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538 (1985).

102. FDIC v. Morrison, 747 F.2d 610, 614 (11th Cir. 1984), *cert. denied,* 474 U.S. 1019 (1985).

103. Wheeler, *supra* note 40, at 277 (citing *Logan,* 455 U.S. at 419).

104. Lassiter v. Department of Social Servs., 452 U.S. 18, 24 (1981).

105. Board of Regents v. Roth, 408 U.S. 564, 589 (1972) (Marshall, J., dissenting).

106. *Logan,* 455 U.S. at 433.

107. Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961).

108. *See* Wheeler, *supra* note 40, at 277 (despite the fact that a specific procedural safeguard was not required in the past, present circumstances may dictate such a requirement).

109. Goldberg v. Kelly, 397 U.S. 254, 261-64 (1970).

In an effort to provide a clear methodology for ascertaining the adequacy of the procedural protection afforded in a given case, the Supreme Court has established a three-step test designed to determine the fundamental fairness of specific procedures. In *Mathews v. Eldridge,*[110] the Court stated:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[111]

In the context of punitive damages actions, the private interest involved is the money which constitutes the punitive award; the risk of erroneous deprivation of this interest is introduced through the vague standards generally used in assessing punitive damages.[112] The government's interest in applying punitive damages through these procedures does not weigh heavily against changes that may eliminate current inequities without creating undue strains on the judicial process.[113]

Given the interplay between these interests, it has been questioned whether current procedures used to assess punitive damages violate due process requirements by failing to provide sufficient guidance to the jury entrusted with the responsibility of applying these sanctions.[114] While the Supreme Court has not yet directly addressed the question of whether unchecked jury discretion in awarding punitive damages violates the due process clause,[115]

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110. 424 U.S. 319 (1976).

111. *Id.* at 335.

112. *See supra* note 47 and accompanying text (discussing jury discretion).

113. *See generally* Wheeler, *supra* note 40, at 303-11 (discussing the government's interest in imposing punitive damages).

114. *Browning-Ferris Industries,* 109 S. Ct. at 2923 (Brennan, J., concurring) (the guidance given to the jury in the form of an instruction informing them that they may take into account "the character of the defendants, their financial standing, and the nature of their acts" was "scarcely better than no guidance at all"). *See also* D. DOBBS, *supra* note 12, at § 3.9 (jury granted discretion in assessing punitive damages but has no objective basis by which to measure the award, thus inviting prejudice and irrationality). *See generally* Wheeler, *supra* note 40 (requirements of the due process clause demand additional procedural safeguards for punitive damages defendants).

115. *Browning-Ferris Industries,* 109 S. Ct. at 2921. While the Court has not yet specifically addressed this issue, it has indicated a willingness to consider what limits the due process clause place on awarding punitive damages. *See* Banker's Life & Casualty Co. v. Crenshaw, 108 S. Ct. 1645, 1650 (1988) (noting that a vague appeal to constitutional principles based on the amount of a punitive damages award was insufficient to preserve the issues on appeal); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 828 (1986) (noting that the lack of sufficient standards governing punitive damages gives rise to due process and other constitutional concerns). After denying certiorari in a number of cases which presented due process challenges to punitive damages procedures, on April 2, 1990 the Court agreed to hear arguments on this issue. *See* Pacific Mutual Life Ins. Co. v. Haslip, No. 89-1279 (WESTLAW, S CT library).

strong arguments support the need for reform.[116] The concerns implicated under the due process clause are even more acute in cases involving mass tort litigation.

C. *Mass Tort Litigation and Specific Problems of Punitive Damage Procedures*

An array of situations may give rise to multiple lawsuits against a limited number of defendants arising out of a single course of conduct. This Note will refer to such claims as mass tort litigation. Airplane crashes,[117] structural collapses,[118] and defective consumer products[119] are all examples of situations engendering numerous claims against a limited number of defendants.[120] The magnitude of mass tort litigation has created strains on the judicial system and prompted courts and commentators to question the efficacy of current procedures in addressing these claims.[121]

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116. *See* Wheeler, *supra* note 40, at 278-84. Professor Wheeler provides a sustained analysis of current punitive damages procedures in light of the *Mathews* requirements. The private interest involved in the awarding of punitive damages includes both monetary loss and the stigma attending such a judgement. *Id.* Current procedures create a substantial risk of erroneous deprivation by allowing factors such as imprecise standards for assessing and reviewing the awards. Also problematic is the practice of admission into evidence of facts directed toward establishing punitive damages claims prior to the determination on any underlying claim of liability and compensatory damages. *Id.* at 284-93. Professor Wheeler provides a number of procedural safeguards which may alleviate the risks of erroneous decisions. These include eliminating the availability of punitive damages in selected classes of cases, allowing evidence of prior punitive damages imposed for the same conduct, increasing the burden of proof, establishing legislative limits on punitive awards, bifurcating punitive damages trials, or leaving the determination of punitive damages to the court. *Id.* at 293-303. While government interests in imposing punitive damages include deterrence, retribution and compensation, these interests need not be sacrificed in order to implement a number of the reforms Wheeler suggests. *Id.* at 304-22.

117. *E.g., In re* Air Crash Disaster Near Chicago, Illinois On May 25, 1979, 701 F.2d 1189 (7th Cir.) (diversity suit involving wrongful death claims filed by survivors of victims of the crash of American Airlines DC-10 on take-off from O'Hare International Airport), *cert. denied,* 464 U.S. 866 (1983).

118. *E.g., In re* Federal Skywalk Cases, 680 F.2d 1175 (8th Cir.) (diversity suit filed by victims and survivors of collapse of two skywalks at the Kansas City Hyatt), *cert. denied,* 459 U.S. 988 (1982).

119. *E.g., In re* Northern District of California "Dalkon Shield" I.U.D. Products Liability Litigation, 526 F. Supp 887 (N.D. Cal. 1981), *vacated,* 693 F.2d 847 (9th Cir. 1982).

120. Perhaps the most often cited and extensive example of mass tort litigation is the current deluge of suits engulfing the asbestos industry. In a 1986 opinion, the Third Circuit described the maelstrom of litigation surrounding this industry as unparalleled in American tort law. *See In re* School Asbestos Litigation, 789 F.2d 996, 1000 (3d Cir), *cert. denied,* 479 U.S. 915 (1986). As of 1986, over 30,000 personal injury suits had been filed against asbestos manufacturers and producers and estimates indicated an additional 180,000 such claims would be filed by the year 2010. Celotex Corp. v. School Dist. of Lancaster, 479 U.S. 852 (1986).

121. *See, e.g.,* Roginsky v. Richardson-Merrell, 378 F.2d 832, 838-42 (2d Cir. 1967) (punitive damages rendered in jurisdictions throughout the country cannot be administered so as to avoid overkill); Walbrun v. Berkel, Inc. 433 F. Supp. 384, 385 (E.D. Wis. 1976) (punitive damages

1. Cumulative Effects of Multiple Awards

The problems associated with mass tort litigation and the scale of punitive and compensatory awards which accompany them are a recent phenomenon.[122] The first instance of mass tort litigation in the context of products liability actions involved the MER/29 cases. Over 1,500 personal injury and products liability suits were brought against the manufacturer of MER/29, a drug designed to lower blood cholesterol levels which was subsequently found to cause cataracts. In spite of its knowledge of the risks associated with the drug, the manufacturer, Richardson-Merrell, delayed sending out a warning letter and did not withdraw the drug from the market for over one year after learning of its serious side effects.[123] Nearly all of the plaintiffs in the MER/29 cases filed claims for punitive damages. The degree of potential liability prompted the Second Circuit, in the case of *Roginsky v. Richardson-Merrell,* to express concern over the implications and possible results should a majority of these claims succeed.[124]

Central to the *Roginsky* court's concern was the problem of overkill, whereby the cumulative effects of the punitive and compensatory claims would bankrupt the defendant. This problem was most acute in light of the possibility that punitive claims from earlier suits could have exhausted the resources of the defendants resulting in an inability to satisfy substantiated claims for compensatory damages in actions which were filed later in the overall course of the litigation.[125] Perhaps because of these issues, over 95% of the MER/29 cases were eventually settled out of court and only three jury verdicts rendered punitive awards.[126] These results led to speculation that the concern regarding overkill was not justified. Yet, the large increase in multiple punitive damages verdicts in mass tort cases nevertheless makes the possibility of overkill impossible to ignore.[127]

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are available under Wisconsin law only in cases involving intentional torts; products liability case therefore did not justify a claim for punitive damages because the conduct involved was no more than gross negligence); Ausness, *supra* note 20, at 93-120 (punitive damages are ineffective in the context of products liability cases and reforms are needed to alleviate excesses inherent in the remedy as applied); Ghiardi & Kircher, *Punitive Damages Recovery in Products Liability Cases,* 65 MARQ. L. REV. 1, 5-43 (1981) (examining various theories and developments in punitive damages doctrines and application in products liability actions); Rabin, *Dealing with Disasters,* 30 STAN. L. REV. 281, 283 (1978) (mass disasters often present unprecedented difficulties which diminish efficacy of judicial systems); Sales, *The Emergence of Punitive Damages in Product Liability Actions: A Further Assault on the Citadel,* 14 ST. MARY'S L.J. 351, 388-403 (1983) (punitive damages are incompatible with products liability litigation due to social costs associated with overkill and conceptual incongruities with strict liability standards).

122. PROSSER, *supra* note 12, § 3, at 14.

123. Roginsky v. Richardson-Merrell, 378 F.2d 832, 835-36 (2d Cir. 1967).

124. *Id.* at 838-42 (the vast liability of defendant and the decentralization of the overall litigation could result in extreme levels of damages, and current litigation procedures are ineffective in avoiding this problem of overkill).

125. *Id.* at 839.

126. *See* Seltzer, *supra* note 42, at 54 (of the three punitive damage awards, the award in *Roginsky* was reversed, and those in the other two cases were significantly reduced).

127. *Id.*

In addition to the ill-defined standards generally characteristic of punitive damages claims,[128] the problems evident in managing the profusion of litigation deriving from mass tort situations present further challenges to the concerns of due process.[129] Characteristics of decentralization innately associated with current litigation procedures, such as multiplicity of juries hearing the cases and the variety of standards used in jurisdictions, produce difficulties in awarding punitive damages in mass tort cases.[130] The current procedures for administering these claims leave courts ill-equipped to deal with problems such as coordinating awards in the various courts, instructing juries as to punitive awards presented in previous cases, distributing the awards among the plaintiffs and effectively dealing with the threat of overkill.[131] Whether justice is truly served under the current system of individual litigation is questionable, as procedures often lead to the problem of anomalous results in similar cases.[132]

The substantive tort law which determines the outcome of the individual cases that comprise the overall mass litigation phenomenon is determined by the individual state jurisdictions. Therefore, communication between the courts hearing the various cases is hampered.[133] Juries carry the burden of assessing damages in an amount sufficient to punish and deter the defendant in light of his entire course of conduct. However, they are inherently unable to know what punitive awards, if any, will be administered by juries in other states in cases yet to be tried.[134] Furthermore, the jury is often ignorant as to the punitive awards rendered by previous juries hearing related cases, unless the defendant were to provide such information during the trial—a highly unattractive strategy which may only invite larger punishments.[135] This

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128. *See supra* notes 47-66 and accompanying text (the jury's discretion is usually limited only by the general rule not to award excessive damages).

129. Seltzer, *supra* note 42, at 40.

> Such decentralization raises important issues including the extent to which a defendant may be punished for a single course of tortious conduct, what the jury should be told about previous awards by other juries or about other punitive damages claims against the same defendant, and how awards should be distributed . . . .

Id.

130. *Id.*

131. *See* D. DOBBS, *supra* note 12, at § 3.9 (current state procedures are unequipped to handle recent phenomena of mass tort litigation); Seltzer, *supra* note 42, at 40 (possible solutions to correct the problem are establishing ceilings on punitive damages and eliminating the jury's role in determining the amount of punitive damages).

132. *See* 1 L. SCHLUETER & K. REDDEN, *supra* note 17, at § 4.4(A)(5)(b)(2) (discussing the disparity among the verdicts in the MER/29 cases). *See also* RAND CORPORATION, ASBESTOS IN THE COURTS 42 (1985) ("sick people and people who died a terrible death from asbestos are being turned away from the courts, while people with minimal injuries who may never suffer severe asbestos disease are being awarded hundreds of thousands of dollars, and even in excess of a million dollars").

133. *See Roginsky,* 378 F.2d at 839 (the solution, which is not feasible, is for a single court to handle all cases).

134. *Id.*

135. *Punitive Damages: A Constructive Examination,* 1986 A.B.A. SEC. LITIG., SPECIAL COMMITTEE ON PUNITIVE DAMAGES 72 [hereinafter, A.B.A., PUNITIVE DAMAGES].

dearth of information will limit the jury's ability to make an informed decision regarding just what amount of damages is needed to properly punish the defendant without overreaching the level of reasonable retribution.[136] Even if an individual court were to decide a defendant had received sufficient punishment, it would be limited to merely instructing the jury as to the proper considerations which effect a punitive damages award; it has neither the opportunity nor the incentive to take corrective action to avoid overkill.[137]

The *Roginsky* court illustrated the limitations inherent in the current state-based jurisdictional approach.[138] Prior to the *Roginsky* decision, the defendants had been found liable for punitive damages to claimants in California and New York.[139] Yet, in spite of its expressed concern regarding the possibility that the defendant may be rendered insolvent by the punitive and compensatory liability it would face as a result of its production of MER/29, the Second Circuit court knew "of no principle whereby the first punitive award exhausts all claims for punitive damages and would thus preclude future judgments."[140] Indeed, the only potential check on continued punitive awards, a factor the court saw as a threat to the likelihood of future claimants satisfying their compensatory claims, was a voluntary cessation of such exemplary damages in all subsequent cases. This alternative was unworkable, however, since courts handling later MER/29 suits would be unlikely to deny local claimants punitive awards because prior claimants in remote jurisdictions had "stripped the cupboard bare."[141] The *Roginsky* court thus found itself with no workable method for avoiding what it perceived as a real threat to the just resolution of all the claims related to the production of MER/29. The *Roginsky* decision therefore makes it clear that the national scope of mass tort litigation places strains on current state-based methods for assessing punitive damages by stretching the entire litigation process beyond its traditional jurisdictional limits.[142]

2. *Multiple Awards and Due Process Issues*

The threat of overkill inherent in mass tort litigation presents additional problems in satisfying due process demands. Punitive damages are intended

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136. *See Roginsky*, 378 F.2d at 840 (discussing limitation on jury instructions). *But see* Wangen v. Ford Motor Co., 97 Wis. 2d 260, 294 N.W.2d 437 (1980) (danger of excessive multiple punitive damages can be avoided if the jury considered the wealth of the defendant as well as the compensatory and punitive damages, and fines and forfeitures already imposed or likely to be imposed on the defendant).

137. Jeffries, *supra* note 2, at 141-42.

138. *Roginsky*, 378 F.2d at 839-40.

139. *Id.* at 834 n.3. In addition to the California suit, Richardson-Merrell had also been found liable for punitive damages in a New York state court proceeding which occurred before the *Roginsky* case. *Id.*

140. *Id.*

141. *Id.*

142. Seltzer, *supra* note 42, at 51-54 (discussing the scope of the *Roginsky* suit).

to punish the wrongdoer but should not be so extreme as to bankrupt the defendant.[143] Historically, the due process clause guarantees the right to a fundamentally fair proceeding[144] which has included freedom from judicially imposed bankruptcy.[145] The difficulties involved in coordinating the various cases and awards arising in mass tort circumstances have recently attracted attention.[146] The current trend toward increased damages awards has helped make real the threat that the defendant's aggregate liability will lead to bankruptcy.[147] Because the geographical and commercial context of a given

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143. Wynn Oil Co. v. Purcolator Chem. Corp., 403 F. Supp. 226, 232 (M.D. Fla. 1974); Maxwell v. Aetna Life Ins. Co., 143 Ariz. 205, 219, 693 P.2d 348, 362 (Ariz. Ct. App. 1984); International Union of Operating Eng'rs Local 675 v. Lassiter, 295 So. 2d 634, 640 (Fla. Dist. Ct. App. 1974). *See also* Ratner v. Sioux Nat'l Gas Corp., 719 F.2d 801, 805 (5th Cir. 1983) (excessive punishment is antithetical to the objectives of punishment and deterrence which are effectuated by punitive awards).

The prohibition against threatening the economic viability of a civil defendant has deep roots in the Anglo-American legal tradition. The English history surrounding the Magna Carta and its relationship to the tradition of amercements engendered the basic tenet that punishment should not destroy a defendant's means of making a living in a particular business. *See* Jeffries, *supra* note 2, at 156. Professor Jeffries provides a description of the history of amercements, a fine paid to the crown as a penalty for a broad range of offenses. Widespread abuse of this power lead to three separate chapters in Magna Carta which limited the power of amercement. *Id.*

144. Lassiter v. Department of Social Servs., 452 U.S. 18, 24 (1981).

145. *See* Jeffries, *supra* note 2, at 159 (due process of law concepts adopted as components of the Constitution are the fundamental liberties and protections secured by the Magna Carta, including the right to be free of judicially imposed bankruptcy). Through the Bill of Rights, the framers of the Constitution embodied certain guarantees which had long been recognized as essential in American and English society. Robertson v. Baldwin, 165 U.S. 275, 281 (1897). The fifth and fourteenth amendments, with their guarantee of "due process of law," incorporate these traditions in the Constitution. *See* Twining v. New Jersey, 211 U.S. 78 (1908) (fundamental principles of process of law driving from the Magna Carta are established in the due process clause of the fifth amendment), *overruled,* Malloy v. Hogan, 378 U.S. 1 (1964); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856) (fundamental principles, which protect citizens' privacy and guard them from arbitrary governmental actions, are incorporated under the due process clause of the fourteenth amendment).

146. *See supra* notes 121-42 and accompanying text (concerns raised over excessive punitive damages in a growing number of mass tort cases).

147. Defendants in asbestos related litigation have resorted to the protection of Chapter XI of the federal bankruptcy code in a number of circumstances. Corporate giants, including Johns-Manville, Amatex Corp., and U.N.R., have all resorted to bankruptcy courts seeking reorganization in order to obtain relief from liability in numerous outstanding personal injury claims. *See* Seltzer, *supra* note 42, at 39 n.12.

Perhaps the most notable use of the bankruptcy courts is the Johns-Manville case. In 1982 Johns-Manville and approximately twenty of its affiliates filed for reorganization in the United States Bankruptcy Court for the Southern District of New York seeking relief from the continuing burden of litigation costs related to asbestos exposure. Johns-Manville was a named defendant in over 16,000 asbestos suits with estimates stating that figure could rise as high as 34,000. Figures set the average cost of defending each of these cases at $40,000. 10 Prod. Safety & Liability Rep. (BNA) 573 (Aug. 27, 1982). In an effort to "preserve its continuing operations, protect its assets and achieve even-handed treatment of asbestos-health lawsuits and the claims of its lending institutions and trade auditors," an executive committee decided to resort to

situation has an impact on due process theory application,[148] current procedures used in mass tort litigation present a series of difficulties. Decisions among the circuits are unclear as to whether these procedures satisfy the demands of due process in mass tort claims.[149]

The Sixth Circuit Court of Appeals considered the issue of due process in reaction to multiple exemplary awards in *Cathey v. Johns-Manville Sales Corp.*[150] The case involved two separate suits in which plaintiffs brought actions for personal injuries against various manufacturers of asbestos-containing insulation products. The cases were consolidated for appeal, and the appellate court squarely rejected the defendants' assertion that punitive damages in multiple civil suits arising from a single course of conduct violated the due process clause.[151] The *Cathey* court found the requirements of fundamental fairness were satisfied as a matter of law if the defendant was able to litigate the propriety of a punitive damages award before an impartial fact-finder.[152] The court supported this finding with its belief that the defen-

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court-supervised reorganization. *Id.* This recourse was sought in spite of the fact that the corporation held assets of over $2 billion and faced liabilities aside from those associated with the asbestos litigation of only $1 billion. *Id.* at 574.

The staggering figures in the Johns-Manville case help to illustrate the degree of liability faced by the defendants of asbestos litigation and the severe strains this phenomenon is placing on litigants and courts alike. While some need for systematic control over mass tort litigation has been expressed, it is questionable whether resort to bankruptcy courts is a suitable alternative. *See* Roe, *Corporate Strategic Reaction to Mass Tort,* 72 VA. L. REV. 1 (1986) (resort to bankruptcy court is often not the best alternative for the defendant, the plaintiff, or the court system in a mass tort suit). Additionally, bankruptcy courts are of limited jurisdictional authority. *See* Newman, *Constitutional Law: Jurisdiction of Bankruptcy Courts; Bankruptcy Reform Act's Broad Grant of Jurisdiction Violates Article III,* 60 U. DET. J. URB. L. 288 (1983). Furthermore, the bankruptcy system itself faces an already high case load. Los Angeles Daily J., Dec. 15, 1986, at 1, col. 6 (bankruptcy court system swamped by high caseload; inexperienced bench with high turnover contributes to difficulties). The combination of these factors raise questions whether the bankruptcy courts are a proper venue for settling the problems of coordination faced in mass tort litigation. Additionally, corporate and market based considerations discourage officers from pursuing such a course. *See* Roe, *supra,* at 7-29 (discussing corporate and market considerations affecting mass tort bankruptcy). These issues, however, are beyond the necessarily limited scope of this Note as they extend into questions of coordinating compensatory as well as punitive awards. For a discussion of some of the problems faced in the resort to bankruptcy, see George, *Bankruptcy for Nonbankruptcy Purposes: Are There Any Limits?,* 6 REV. LITIGATION 95 (1987) (two problems are the potential conflict with bankruptcy goals and the violation of the insolvency requirement).

148. Parcel Tankers, Inc. v. Formosa Plastics Corp., 569 F. Supp. 1459, 1461 (S.D. Tex. 1983).

149. *Compare* Cathey v. Johns-Manville Sales Corp., 776 F.2d 1565, 1571 (6th Cir. 1985) (due process requires no more than allowing defendants to present their case before a neutral judicial body under accepted procedures), *cert. denied,* 478 U.S. 1021 (1986) *with In re* School Asbestos Litigation 789 F.2d 996, 1003-04 (3d Cir. 1986) (substantive due process may require greater protections for the punitive damages defendant in mass tort context).

150. 776 F.2d 1565 (6th Cir. 1985).

151. *Id.*

152. *Id.*

dant should not be relieved of liability for punitive damages simply because his behavior caused harm to a large number of people rather than only a few.[153]

A subsequent Third Circuit decision questioned the analysis of the *Cathey* court.[154] The *In re School Asbestos* decision involved the review of a nationwide class action certified in order to handle all punitive damages claims stemming from the removal of asbestos insulation in Pennsylvania school districts. In that case, the district court certified a class action due to the strong possibility that the awarding of punitive damages to individual plaintiffs early would make it difficult for future claimants to do the same.[155] The appellate court discussed a number of rationales for preventing multiple assessments of punitive damages against a single defendant and recognized that "powerful arguments have been made that as a matter of federal constitutional law or substantive tort law, the courts shoulder some responsibility for preventing repeated awards of punitive damages for the same acts or series of acts."[156] In dictum, the Third Circuit expressed concern that the *Cathey* decision took an unnecessarily limited approach to the question of whether multiple punitive awards violated the due process clause by assuming that any procedural method for litigating the defendants' interests was sufficient to provide due process.[157] Under the broader doctrine of substantive due process, the court must determine under the factual context of a given case whether the procedures implemented will lead to fundamentally unfair or arbitrary results.[158] The *In re School Asbestos* court was concerned with the adequacy of the current case by case adjudication of punitive claims, but was unwilling to allow the class action vehicle to be used to remedy the difficulties associated with punitive damages. The court found that a class action for punitive damages would pose the problems of underinclusiveness and conflicts between various state laws.[159] The court therefore decertified the punitive damages class action initiated by the district court.[160]

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153. *Id.* (citing Froud v. Celotex Corp., 107 Ill. App. 3d 654, 658, 437 N.E.2d 910, 913 (1st Dist. 1982), *rev'd on other grounds,* 98 Ill. 2d 324, 456 N.E.2d 131 (1983)).

154. *In re* School Asbestos Litigation, 789 F.2d 996, 1004 (3d Cir. 1986).

155. *In re* School Asbestos Litigation, 104 F.R.D. 422, 437 (E.D. Pa. 1984).

156. 789 F.2d at 1005.

157. *Id.*

> The due process clause of the fourteenth amendment provides three distinct constitutional protections: it incorporates various provisions from the Bill of Rights thereby extending their application to the states, it guarantees procedural safeguards intended to secure a fair trial, and assures " 'substantive due process' which bars certain arbitrary government actions regardless of the fairness of the procedures used to implement them."

Daniels v. Williams, 474 U.S. 327, 337 (1986) (Stevens, J., concurring).

158. *See Daniels,* 474 U.S. at 337 (Stevens, J., concurring).

159. 789 F.2d at 1007.

160. *Id.* For further discussion of the use of class actions in the mass tort context, *see infra* notes 163-76 and accompanying text.

3. *The Class Action Approach*

The problems associated with mass tort litigation place heavy burdens on the judicial system as well as on the industries and individual defendants subject to such suits.[161] The mass of litigation involving the asbestos industry prompted one federal judge to state, "it is not an overly pessimistic prediction that, absent some legislative or judicial solution, our attempt to try these virtually identical lawsuits, one-by-one, will bankrupt both the state and federal court systems."[162] In an effort to manage the sheer volume of cases arising out of similar factual circumstances, various courts have used an approach similar to that used by the district court in the *In re School Asbestos* case and have established class actions, at least with respect to all punitive damages claims.[163]

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161. RAND CORPORATION, *supra* note 132, at 42 ("On the average, the total cost to plaintiffs and defendants of litigating a claim was considerably greater than the amount paid in compensation.").

162. Williams, *Mass Tort Class Actions: Going, Going, Gone?*, 98 F.R.D. 323, 324 (1983).

163. *E.g.*, *In re* School Asbestos Litigation, 789 F.2d at 1002-08; *In re* "Agent Orange" Product Liability Litigation, 580 F. Supp. 690, 705-06 (E.D.N.Y. 1984). A class action is a procedural device which allows a group of plaintiffs with similar causes of action to sue through one or more representatives without each of the class members being required to join the suit. *See* Comment, *Federal Rules of Civil Procedure—Litigation of Mass Air Crashes*, 29 RUTGERS L. REV. 425, 427-28 (1976). While a class action can determine all issues in a dispute, it need not dispose of an entire controversy and can be limited to those issues for which the procedure is proper. *See* Ausness, *supra* note 20, at 101. Because it can be limited to defined issues, a class action could address only the issue of punitive damages leaving the concerns of compensatory liability to the individual courts which try those claims.

The requirements for establishing a class action are set out in Federal Rule of Civil Procedure 23. The analysis for determining whether such an action is suitable in a given case is a two step process. Ausness, *supra* note 20, at 102. The federal court must first be convinced that the four requirements of Rule 23(a) are satisfied. This portion of the rule is satisfied if:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a)(1)-(4). If these prerequisites are satisfied, a class action may be maintained provided the case qualifies for one of the categories set out in Rule 23(b). Ausness, *supra* note 20, at 104. Those provisions most suitable to a punitive damages class action are 23(b)(1)(B) and 23(b)(3). *Id.*

Rule 23(b)(1)(B) provides for class actions where recovery by individual members of the class would jeopardize the ability of other class members to satisfy their claims. FED. R. CIV. P. 23(b)(1)(B). This qualification, sometimes referred to as the limited fund class, is applicable to mass tort litigation where the defendant faces an aggregate level of liability which threatens to surpass the defendant's assets. *See* Roginsky v. Richardson-Merrell, 378 F.2d at 839-41 (providing punitive damages to early plaintiffs threatens later plaintiffs ability to recover compensatory awards). Under Rule 23(b)(3), the court may sustain a class action if common questions of law or fact predominate over any questions affecting only individual members, and if a class action is superior to all other methods available for trying the issues. FED. R. CIV. P. 23(b)(3). The common question class may be suitable to all punitive damages claims in a mass tort case, but some of the advantages of the class action are lost with a 23(b)(3) class because members may opt out and pursue their individual claims independently. Ausness, *supra* note 20, at 119-20.

Proponents of class actions in mass tort litigation contend the procedure will benefit all parties. Plaintiffs are assured an adequate opportunity to present their claims, can pool their resources and pay only a portion of the litigation expenses, and avoid potential conflicts of interest among their counsel.[164] Defendants benefit from the decreased risk of overkill and reduced cost of litigation.[165] The procedure would also promote judicial economy by eliminating repetitive litigation of similar facts and issues.[166]

However, at least two circuit decisions reflect the difficulties involved in establishing class actions in mass tort litigation.[167] In an effort to avoid exhausting available funds and depriving later plaintiffs of complete recovery on their compensatory awards, the Federal District Court for the Northern District of California certified a class in the *Dalkon Shield* case with respect to all punitive damages arising out of the manufacture and distribution of a contraceptive device later found to cause sterility and other health problems in the women using them.[168] The Ninth Circuit Court decertified this class because whether the funds available were insufficient to satisfy all claims was wholly speculative, particularly in light of the possibility that not all plaintiffs would receive punitive awards.[169] In addition, the court held that even if a limited fund could be established, the commonality of claims requirement[170] could not be satisfied because the plaintiffs in these actions resided in fifty different states which applied a variety of punitive damages standards.[171]

Similarly, the Federal District Court for the Western District of Missouri certified a limited fund class[172] to encompass the issues of liability for compensatory and punitive damages and the amount of punitive damages

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164. *Id.* at 102.

165. *Id.*

166. *Id.*

167. *See In re* Northern District of California, Dalkon Shield IUD Products Liability Litigation, 693 F.2d 847, 851-52 (9th Cir. 1982) (complexity of issues involved with individual claims precluded aggregation of all plaintiffs into a class partial recovery; since all states did not apply same punitive damages standard, typicality was a significant problem), *cert. denied,* 459 U.S. 1171 (1983); *In re* Federal Skywalk Cases, 680 F.2d 1175, 1191-92 (8th Cir. 1982) (legitimate concern for efficient management of mass tort litigation did not override fundamental principle of a dual system of courts to resolve legal disputes), *cert. denied,* 459 U.S. 988 (1982).

168. 521 F. Supp. 1188, 1192-94 (N.D. Cal. 1981).

169. 693 F.2d at 853. The court indicated the requirements of Rule 23(b)(1)(B) required the record to show separate punitive awards would inescapably affect later awards. *Id.* at 851.

170. *See* FED. R. CIV. P. 23(a)(2) (one prerequisite for a class action is that questions of law and fact are common to the class); *see also supra* note 163 (mass tort litigation may be advantageous in light of common questions regarding punitive damages claims).

171. 693 F.2d at 850.

172. *See* FED. R. CIV. P. 23(b)(1)(B) (one prerequisite for class actions is the fact that multiple separate actions may impair the interests of other litigants); *see also supra* note 163 (regarding consequences resulting from defendants' potential inability to satisfy an aggregate level of liability).

arising out of the collapse of a walkway at the Kansas City Hyatt.[173] The court of appeals subsequently reversed this certification concluding that a mandatory class in this instance violated the Anti-Injunction Act.[174] Critics have rebuked these decisions for going too far in limiting the means available to the federal courts for dealing with demands of mass litigation.[175] However, courts generally reject class certification in the context of mass litigation involving personal injury actions.[176]

The ineffectiveness of the class action procedure in personal injury mass tort claims underscores the trial courts' inability to exercise control over the overall punitive liability in such litigation. The procedures used to litigate these exemplary awards were developed in the context of more traditional one-on-one litigation. With the advent of mass tort claims, the shortcomings inherent in punitive procedures are only exacerbated by the decentralization which results from this litigation phenomenon. Courts are thus faced with a growing problem as punitive damages awards increase with no effective means of control available to check their possible abuse.

II. *Juzwin v. Amtorg Trading Corp.*

A. Juzwin I

The *Juzwin* case involved a products liability action filed against asbestos-product manufacturers.[177] Defendants filed motions to dismiss the plaintiff's claims for punitive damages arguing that such awards were unconstitutional in the context of mass tort litigation. Defendants based their constitutional challenge on three distinct provisions: the double jeopardy clause of the fifth

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173. *In re* Federal Skywalk Cases, 93 F.R.D. 415, 418-19 (W.D. Mo. 1982), *vacated,* 680 F.2d 1175 (8th Cir), *cert. denied,* 459 U.S. 988 (1982).

174. *In re* Federal Skywalk Cases, 680 F.2d 1175, 1177 (8th Cir.), *cert. denied,* 459 U.S. 988 (1982). The federal Anti-Injunction Act prohibits actions by federal courts interfering with the proper conduct of business in state courts unless necessary in the aid of the federal court's jurisdiction. 28 U.S.C. § 2283 (1982). The Eighth Circuit held the class interfered with the continuation of all claims already filed in state courts thus violating the Anti-Injunction Act. 680 F.2d at 1183.

175. *See Tort Class Actions Doomed? Two Appellate Rulings Seem to Abort Innovative Procedure,* NAT'L L.J., July 5, 1982, p.3, col. 1; Seltzer, *supra* note 42, at 78-79.

176. Seltzer, *supra* note 42, at 69. *See In re* School Asbestos Litigation, 789 F.2d 996, 1002-08 (3d Cir. 1986) (affirming denial of certification of an asbestos-related action); *see also* Jackson v. Johns-Manville Sales Corp., 727 F.2d 506, 527 (5th Cir. 1984) ("A single class action for recovery of one award of punitive damages might be an attractive alternative from a theoretical point of view, but does not appear feasible."), *rev'd on other grounds,* 781 F.2d 394 (5th Cir. 1986) (en banc); Yandle v. PPG Indus. Inc., 65 F.R.D. 566, 571 (E.D. Tex. 1974) (court denied plaintiffs' motion for class certification because questions of law and fact were not predominantly common, and class action was not superior method of adjudication).

177. Juzwin v. Amtorg Trading Corp., 705 F. Supp. 1053, 1054-56 (D.N.J.), *reh'g granted,* 718 F. Supp. 1233 (D.N.J. 1989). The trial court's initial decision will be referred to as *Juzwin I* and the opinion on rehearing will be referred to as *Juzwin II.*

amendment, the excessive fines clause of the eighth amendment and the due process clause of the fourteenth amendment.[178] The district court separately addressed each challenge.

In their double jeopardy argument, the defendants emphasized the parallels between exemplary damages and criminal fines by focusing on the common rationales underlying each sanction: deterrence and retribution. On this basis, the defendants contended the double jeopardy protections immunized a party from defending against punitive claims once the defendant established that it had already faced punitive claims in a previous case arising from the same course of conduct.[179] The court, however, rejected this argument stating, that the double jeopardy clause is strictly limited to criminal proceedings.[180] Although the Supreme Court has extended the protections of the double jeopardy clause to cover quasi-criminal civil proceedings,[181] this application has been allowed most frequently in government suits in which the government was bringing an action for criminal and civil sanctions under a statute that provided for both penalties.[182] Because punitive damages are a judicial rather than legislative creation, the court found exemplary awards could not constitute a quasi-criminal punishment.[183] Notwithstanding the close analogy between punitive damages and criminal sanctions,[184] the district court found the psychological, physical and financial concerns associated with criminal prosecutions were not present in a claim for punitive damages and therefore refused to apply the protections of the double jeopardy clause to a civil suit for punitive damages between private parties.[185]

Again relying on the similarity between criminal sanctions and punitive damages, defendants argued that the eighth amendment prohibits imposing multiple punitive damages awards in mass tort cases because over the course of the entire litigation, their aggregate effect would result in the violation of the excessive fines clause.[186] The *Juzwin I* court stated that while the Supreme Court had restricted the cruel and unusual punishment prohibition to application in criminal cases, whether the clause is also limited to criminal proceedings is not clear.[187] The court again examined the defendants' claim that punitive damages amount to a quasi-criminal sanction and thus require

178. *Juzwin I*, 705 F. Supp. at 1057.

179. *Id.*

180. *Id.* at 1058.

181. *See supra* notes 74-77 and accompanying text (although the double jeopardy clause may apply to quasi-criminal proceedings, the clause is not applicable to cases involving punitive damage claims between private litigants).

182. *Juzwin I*, 705 F. Supp. at 1058.

183. *Id.* at 1058-59.

184. *Id.* at 1058. Punitive damages are not compensatory in nature; rather, they constitute "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." Gertz v. Robert Welch, Inc. 418 U.S. 323, 350 (1974)).

185. *Juzwin I*, 705 F. Supp. at 1058-59.

186. *Id.* at 1059.

187. *Id.* at 1059 (citing Ingraham v. Wright, 430 U.S. 651, 664 (1977)).

specific constitutional restrictions. The defendants argued that whether a given sanction was quasi-criminal in part depends on whether the punishment appears excessive in relation to the purpose it is intended to achieve.[188] The court found this analysis inapposite, however, as "[i]t would be the height of circular reasoning to conclude that the Eighth Amendment prohibition of 'excessive fines' applies to 'quasi-criminal' sanctions and that 'quasi-criminal' sanctions are those which are excessive."[189] Therefore, rather than resolving the ambiguity regarding the scope of the excessive fines clause, the court disposed of this argument on evidentiary grounds. It stated that at this early stage of the litigation, there had been no showing that the previous awards assessed against the defendant were "excessive" and, therefore, the excessive fines clause could not constitute a basis for striking the claims for punitive damages.[190]

While the court found that multiple awards of punitive damages for a single course of conduct do not violate the double jeopardy clause or the excessive fines clause, it concluded they did violate the 'fundamental fairness' requirement of the due process clause.[191] Distinctions between criminal, quasi-criminal and civil proceedings were irrelevant with respect to application of the due process clause.[192] The procedures used in assessing punitive damages therefore must satisfy the fundamental fairness requirements of the due process clause.

Although the methods for awarding punitive damages may be sufficient in protecting the interests of fairness in traditional one-on-one lawsuits, the court recognized these concerns must be reexamined in view of the recent increase in mass tort litigation.[193] Inherent in the requirement of due process is a protection from the arbitrary exercise of government powers.[194] The *Juzwin I* decision held current punitive damages procedures failed to satisfy this requirement because they allowed a series of juries to award punitive damages without providing any reasonable means by which to coordinate the awards and realistically check the potentially unlimited extent of liability incurred.[195] Such procedures failed to satisfy the expectations of the due

188. *Id.* at 1060 (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 169 (1963)).

189. *Id.* at 1060.

190. *Id.*

191. *Id.* at 1061.

192. *Id.* at 1060 ("The Due Process Clause of the Fourteenth Amendment requires that adjudicatory proceedings be fundamentally fair, whether those proceedings be in a criminal or civil context." (quoting Lassiter v. Department of Social Services, 452 U.S. 18, 24 (1981))).

193. *Id.* at 1061.

194. *Id.* at 1062 (citing Daniels v. Williams, 474 U.S. 327, 331 (1986)). *See also* Jeffries, *supra* note 2, at 156-57 (discussion of legal principle regarding reasonable relationship between punishment and particular offense).

195. *Juzwin I,* 705 F. Supp. at 1056. The court examined the various means currently available for attempting to diminish the amount of punitive damages awarded in order to reflect an offset for those damages already suffered by the defendant. One such method would be for the defendant to introduce evidence at trial which establishes the amount of exemplary awards

process clause which inquire whether the government has dealt with someone fairly.[196] While earlier courts had been reluctant to find that the indefinite rules governing punitive damages awards violated due process requirements, recent decisions in various courts indicated a growing concern among the judiciary with the propriety of these standards.[197] Most efforts to satisfy the demands of fundamental fairness in the mass tort context have involved efforts to establish class actions. Limitations inherent in the nature of class actions, however, frustrated these attempts, particularly with respect to the field of asbestos litigation.[198] Thus, efforts to tailor existing punitive damages procedures to the demands of fundamental fairness in mass tort situations have been unsatisfactory.

The court rejected the argument that providing an impartial judicial proceeding was in itself enough to guarantee the defendant's due process interests. The court determined that simply guaranteeing the defendant his day in court was insufficient if the standards and procedures employed in the litigation were no longer sufficient to protect the defendant's interest in a fundamentally fair proceeding.[199] The *Juzwin I* court held that the fundamental fairness demands of the due process clause dictated that a party could not be subject to repetitive awards of punitive damages arising out of a single course of conduct absent a class action or appropriate legislation. The court granted the motion to dismiss all punitive claims against each defendant if that party had already been subject to an exemplary award in previous litigation related to the production and distribution of asbestos products.[200]

B. Juzwin II

Following the *Juzwin I* decision, the defendants would have been able to escape punitive liability by producing evidence of a verdict providing an

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exacted in previous actions. However, such recourse provides little more than a self-defeating option to a defendant attempting to successfully defend his case with respect to compensatory liability. *Id.* The court also found the vagueness in the standards of review and limitations on the use of class actions for products liability claims rendered those alternatives for controlling punitive awards inadequate. *Id.* at 1056-57 n.1.

196. *Id.* at 1061 (quoting Brennan, *Reason, Passion and "The Progress of the Law"*, 10 CARDOZO L. REV. 3, 15-16 (1988)).

197. *See id.* at 1062-63 (discussing recent mass tort cases in which the courts questioned the acceptability of current procedures in light of fundamental fairness requirements).

198. *Id.* at 1063. In the context of asbestos litigation, proponents of class actions face difficulties related to proving limited funds, satisfying commonality requirements and establishing a class that would not be fatally underinclusive, which render the procedure ineffective and thus improper. *See supra* notes 167-76 and accompanying text (referring to the two circuit court decisions which decertified class actions seeking punitive damages).

199. *Juzwin*, 705 F. Supp. at 1061 ("Officials cannot always silence these questions solely by pointing to rational action taken according to standard rules." (quoting Brennan, *supra* note 196, at 15-16)).

200. *Id.* at 1065.

exemplary award from any previous lawsuit arising from the conduct which prompted the *Juzwin* claim.[201] Upon motion by the plaintiff, the court reconsidered this ruling and reinstated the claims for punitive damages.[202] The court maintained that the due process analysis set out in *Juzwin I*—that multiple awards of punitive damages violate the fundamental fairness requirement of the due process clause—was correct. Nevertheless, two considerations militated against barring the exemplary claims: first, it was not clear that any prior exemplary awards were intended to address the entire scope of the defendant's conduct[203]; and, second, limitations on authority prevented the court from adequately enforcing its bar on subsequent punitive awards in proceedings held outside the jurisdiction.[204]

The *Juzwin II* court went on to explain that the trier of fact in any one mass tort case may award punitive damages that are intended to address either the entirety of the defendant's offensive conduct or only that portion of the tortious act that caused the injury to the particular plaintiff then before the court. Unless an award from a previous case was clearly intended to address the entire scope of the defendant's conduct, including all past, present and future claimants, a subsequent award of punitive damages in a later trial based on the same tortious course of action would not necessarily violate the fundamental fairness requirement of the due process clause.[205] In order to determine whether an exemplary award granted in any previous litigation was intended to be conclusive as to the entire course of the defendant's conduct, the court established four criteria:

> 1. A full and complete hearing must be held, after adequate time has elapsed to investigate and discover the full scope and consequences of such conduct and during which all relevant evidence is presented regarding the conduct of the defendant against whom the claim is made;
> 2. Adequate representation is afforded to the plaintiff, with an opportunity for plaintiffs similarly situated and their counsel to cooperate and contribute towards the presentation of the punitive damages claim, including presentation of the past and probable future consequences of the defendant's wrongful conduct;
> 3. An appropriate instruction to the jury that their award will be the one and only award of punitive damages to be rendered against the company for its wrongful conduct;
> 4. Such other conditions as will assure a full, fair and complete presentation of all the relevant evidence in support of and in opposition to the claim.[206]

In the *Juzwin* case, the defendants could not establish that these criteria were satisfied in any previous trial so there was no guarantee that any

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201. *Id.*

202. Juzwin v. Amtorg Trading Corp., 718 F. Supp. 1233 (D.N.J. 1989).

203. *See id.* at 1235 (admitting that it is unclear whether procedural safeguards were satisfied in *Juzwin I*).

204. *Id.* at 1236.

205. *Id.* at 1235.

206. *Id.* at 1234.

previous punitive awards were not intended to address the entire course of the defendants' conduct rather than that portion related to an individual plaintiff.[207]

Furthermore, even if these criteria had been satisfied, the court went on to state that current jurisdictional restrictions emasculate its ability to effectively enforce any order barring subsequent punitive claims.[208] The reasoning behind the dismissal of punitive claims in *Juzwin I* reflected a desire to spare the defendants from a procedure for assessing damages which the court found to be fundamentally unfair; that is, to safeguard the due process rights of the defendant.[209] Yet the court lacked any authority to prohibit punitive awards in other courts.[210] Therefore, even had the court upheld its decision to ban punitive claims, the defendants' due process rights would not necessarily be vindicated. Limitations on the court's authority prohibited it from fashioning an effective remedy.[211] Therefore, the *Juzwin II* court reversed its prior ruling and denied the defendants' motion to dismiss all punitive damage claims.[212]

III. ANALYSIS

The double jeopardy and excessive fines clauses, in light of their histories and interpretations, are not proper bases on which to rest a successful constitutional challenge against claims for punitive damages in mass tort litigation. The language and case law of these provisions indicates that their proper scope is limited to cases involving interested governmental action and the resulting difficulties the defendant must face in such cases.[213] While *Juzwin I* effectively evaded determining just what role the excessive fines clause plays in private litigation, its disposition of the argument on grounds of prematurity was adequate, particularly in light of the due process analysis on which the court ultimately rested its decision. Had the *Browning-Ferris Industries* decision been rendered prior to *Juzwin I,* the issue would have been foreclosed as that decision clearly stated that the excessive fines clause was not "intended to apply to damages awarded in disputes between private parties."[214] Although *Juzwin I* did not resolve the scope of the excessive fines clause in relation to private litigation, its disposition of the defendant's eighth amendment challenge was consistent with the *Browning-Ferris Indus-*

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207. *Id.*

208. *Id.*

209. *See supra* notes 190-99 and accompanying text.

210. *Juzwin,* 718 F. Supp. at 1235.

211. *Id.* ("Until there is uniformity, either through a Supreme Court decision, or national legislation, this court is powerless to fashion a remedy which will protect the due process rights of this defendant or other defendants similarly situated.").

212. *Id.* at 1236.

213. *See supra* notes 67-90 and accompanying text.

214. Browning-Ferris Indus. v. Kelco, 109 S. Ct. 2909, 2916 (1989).

tries holding.[215] The *Juzwin* court's rejection of the eighth amendment challenge was thus proper.

The double jeopardy and excessive fines discussions are not what makes the *Juzwin* case notable. Rather the key to this decision is obviously the due process analysis. Prior to *Juzwin,* only one federal court of appeals had directly addressed the question of whether a defendant was deprived of due process by multiple civil punishment for a single course of conduct, and that court found that current procedures which allow for repeated punitive awards satisfied constitutional requirements.[216] The approach adopted in *Juzwin I* was thus in opposition to the only federal appellate level case which has directly decided this important issue.[217] The due process analysis used in *Juzwin* is preferable to the narrow reading of due process requirements adopted by the Sixth Circuit in *Cathey.*

Under the *Cathey* approach, a court need go no further than to provide access to its halls in order to satisfy a party's right to due process. In light of the circumstances, this minimal provision is insufficient.[218] The procedures for assessing punitive damages are a product of state law developed generally in the context of one-on-one tort litigation.[219] The current development of mass tort litigation with its peculiar problems and demands have effectively changed the manner in which the game is played; the fact that some form of process is provided does not necessarily mean that is the process due. As the court noted:

> Due process asks whether government has treated someone fairly. . . . Officials cannot always silence these questions solely by pointing to rational action taken according to standard rules. . . . [T]he due process clause demands of judges more than proficiency in logical analysis. It requires that [they] be sensitive to the balance of reason and passion that mark a given age, and the ways in which that balance leaves its mark on the everyday exchanges between government and citizen.[220]

Due process doctrines must be considered in relation to both the geographical and commercial contexts in which they are applied.[221] The scope of mass

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215. *See supra* notes 81-90 and accompanying text.

216. *See* Cathey v. Johns-Manville Sales Corp., 776 F.2d 1565, 1571 (6th Cir. 1985).

217. *Compare Juzwin I,* 705 F. Supp. at 1061 (holding that multiple awards of punitive damages for a single course of conduct absolutely violate the fundamental fairness requirement of the due process clause) *with Cathey,* 776 F.2d at 1571 (holding that there is no violation of the defendant's procedural due process rights as long as he is afforded the opportunity to litigate the propriety of a punitive damages award before the court).

218. *See In re* School Asbestos Litigation, 789 F.2d 996, 1004 (3d Cir.) (because mass tort litigation is highly prevalent, a defendant is constantly exposed to repetitious punishment for the same culpable conduct), *cert. denied,* 479 U.S. 915 (1986); Jeffries, *supra* note 2, at 139-40 (criticizing current constitutional protections afforded punitive damages defendants).

219. *See supra* notes 37-39 and accompanying text; Comment, *Mass Liability and Punitive Damages Overkill,* 30 HASTINGS L.J. 1797, 1798 (1979).

220. *Juzwin I,* 705 F. Supp. at 1061 (quoting Brennan, *supra* note 196, at 16).

221. Parcel Tankers, Inc. v. Formosa Plastics Corp., 569 F. Supp. 1459, 1459 (S.D. Tex. 1983).

tort litigation is radically different from that of one-on-one litigation which fostered the development of current punitive procedures.[222] As presently applied, procedures used to determine a claim for punitive damages call for juries to apply vague standards when deciding the proper amount of damages necessary to punish and deter a particular defendant.[223] These imprecise measures are than exacerbated as each individual jury in the overall course of cases comes to an independent decision as to what punitive damages, if any, will be awarded based on the relatively narrow facts presented to it. In addition, the jury may be unable to take into consideration any awards that may have been exacted in previous cases or may be granted in cases yet to be tried. Therefore, to simply accept these procedures as adequate without examining the demands of this new setting is insufficient to meet the constitutional demands of due process.[224] Rather, it is a neglect of judicial duty.[225]

A. Punitive Damages and the Mathews *Test of Fundamental Fairness*

While the approach used in *Cathey* may be constitutionally insufficient, it does not necessarily follow that the *Juzwin II* due process analysis is proper. In order to properly assess the *Juzwin II* court's holding, one must examine current punitive damages procedures in light of the due process criteria set out by the Supreme Court in *Mathews v. Eldridge*.[226] Those factors which must be assessed are: (1) the defendant's private interest; (2) the risk of erroneous results and the probable value of additional or substitute procedures; and, (3) the government interest in protecting the functions involved in light of any additional burdens alternate procedures may demand.[227]

1. The Defendant's Private Interest

In instances of mass tort litigation, the private interest at stake with respect to punitive damages involves, at a minimum, the total fiscal liability the defendant will incur throughout the course of litigation arising from the tortious conduct. When examined in light of the potential severity of punitive awards, this interest, in the overall course of the litigation, can amount to a threat against the continued viability of the defendant corporation. In a

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222. Mass tort litigation is unique in that it takes the question of a party's liability for a given act and splits it among a variety of independent jurisdictions for determination.

223. *See supra* note 47 and accompanying text.

224. *Cf.* Lassiter v. Department of Social Servs., 452 U.S. 18, 34 (1981) (the fourteenth amendment imposes on a state the standards necessary to ensure judicial proceedings are fundamentally fair); Handel v. Artukovic, 601 F. Supp. 1421, 1436 (C.D. Cal. 1985) (in order to insure due process, the court must find that the judicial system under which judgment was rendered was essentially fair).

225. *See supra* note 220 and accompanying text.

226. 424 U.S. 319 (1976).

227. *See supra* note 112 and accompanying text.

very real sense, the ultimate interest at stake is thus the continued existence of the enterprise.[228] While the question of whether civil litigation can properly offer a remedy which results in the bankruptcy of a defendant is not at issue here, it seems only reasonable that any sanction with such awesome potential, should only be available through procedures which clearly allow for the thorough consideration of all relevant factors.[229]

2. *Risk of Erroneous Results and Substitute Procedures*

The current case-by-case method for assessing punitive damages presents an unacceptable threat of erroneous deprivation of the defendant's interest in the mass tort context. In an individual case, the question of whether a punitive award should be made and, if so, for what amount, is normally left to the ultimate discretion of the jury.[230] Because punitive damages ultimately serve the public interests of retribution and deterrence,[231] it is proper to leave this function to the jury, which by definition represents the public.[232] In each individual case, the jury is allowed to assess punitive damages, yet receives little guidance as to just how to determine the proper size of such an award.[233] The trial and appellate courts then have the opportunity to either reduce or eliminate the award granted by the jury, yet the vagueness surrounding the standards of review severely limits any control the court may have over a jury award.[234] While these shortcomings alone may not be sufficient to deprive a defendant of due process, they are effectively multiplied across the course of the entire litigation and are augmented by the difficulties of inter-jurisdictional control characteristic of a mass tort case.[235]

The jury will often be uninformed as to the punitive damages already awarded and thus incapable of granting the defendant an offset for that amount unless the defendant chooses the self-destructive option of informing

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228. *See* Seltzer, *supra* note 42, at 51 (noting that although single awards appear reasonable, when aggregated, they can threaten the very survival of a business entity).

229. *Juzwin I*, 705 F. Supp. at 1055-56 (the court stated that even if we allow the jury the power to punish a company by awarding punitive damages, it should award these damages intentionally, and not inadvertently by unknowingly combining its award with others in the past and future).

230. Jos. Schlitz Brewing Co. v. Central Beverage Co., 172 Ind. App. 81, 111, 359 N.E.2d 566, 581 (1977); RESTATEMENT (SECOND) OF TORTS § 908(2) (1979).

231. *See supra* note 12 and accompanying text.

232. *See* COMM. ON THE OPERATION OF THE JURY SYSTEM, JUDICIAL CONFERENCE OF THE U.S., THE JURY SYSTEM IN FEDERAL COURTS 5 (1973) ("[T]he jury is the democratic way of involving the public in the judicial process.").

233. *See supra* note 47 and accompanying text.

234. *See supra* notes 48-52 and accompanying text; Mallor and Roberts, *supra* note 15, at 663 (the lack of standards for punitive damages may cause the judge to hesitate to disturb the jury's award, reasoning that her judgment can be little better than the jury's).

235. *See supra* notes 121-42 and accompanying text.

the jury himself.[236] Further, the jury will be incapable of predicting the exemplary damages any future juries might exact. Finally, self-interest and an inability to establish effective punitive limits for the entire course of litigation provide individual jurisdictions with no incentive to halt these damages should they reach the level of overkill.[237] These difficulties, particularly in light of the lack of guidance which plagues individual exemplary awards,[238] increase the possibility that an erroneous deprivation of the defendant's property will occur, since any punitive award that goes beyond the amount needed to deter or punish the defendant is excessive and therefore unjustified.

That an erroneous deprivation of the defendant's interests may result is not in itself enough to satisfy the second step of the *Mathews* test; one must also determine whether any alteration of current procedures would improve on the results of the current system. A variety of proposals for addressing the difficulties of punitive damages in mass tort litigation have been suggested.[239] The strengths and weaknesses of a number of the reform proposals will be addressed below. For the current analysis, it is sufficient to conclude that alternate procedures are available which would decrease the possibility of the defendant suffering an erroneous deprivation of its interests in the overall litigation.

3. *Governmental Interests*

The final *Mathews* factor requires consideration of the government interests involved and the burdens of instituting any change. The state does have some limited interests in imposing punitive damages in mass tort cases. These include encouraging the enforcement of legal norms,[240] discouraging manufacturers and other business enterprises from abusing the trust of the marketplace,[241] and venting public outrage over egregious conduct.[242] It is proper for the state to attempt to achieve these goals but they are served only if the amount of damages awarded is closely tailored to that amount needed to effectuate the state's aims. For example, the state has no interest in a system which imposes damages which are excessive in relation to the need

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236. As the *Juzwin I* court observed, "[t]o require a defendant to present such prejudicial information to a jury as its only alternative is to place it between Scylla and Charybdis." 705 F. Supp. at 1056. *See also* Seltzer, *supra* note 42, at 59-60 (knowledge of previous punitive awards may bias the jury against the defendant who therefore often would prefer to take his chances with an uninformed jury).

237. *See supra* notes 138-42 and accompanying text.

238. *See supra* notes 44-47 and accompanying text.

239. *See infra* notes 257-74 and accompanying text.

240. *See supra* notes 21-23 and accompanying text.

241. *Juzwin I*, 705 F. Supp. at 1064 (potential and actual punitive damage awards do serve an important function in establishing standards of conduct and insuring a means to punish and deter those who deviate from those standards).

242. *See supra* notes 26-30 and accompanying text.

for deterrence.[243] While the state does have an interest in imposing punitive damages, the interest is thus limited in that an exemplary award should not be unrelated to the amount needed to achieve the policy considerations supporting such damages.[244] Government interests are therefore not sufficient to outweigh any need for reform in the current system. In many respects, reform would only enhance the protection of government interests because it may serve to alleviate the current risks of overdeterrence and underterrence.[245]

Given the foregoing analysis, it is evident the current case-by-case approach for awarding punitive damages does not satisfy the *Mathews* test for fundamental fairness in the mass tort context. The *Juzwin I* decision, which stated that multiple punitive awards assessed through individual and independent juries are unconstitutional,[246] thus was important because it recognized that the current economic scope of mass tort litigation has outstripped the traditional one-on-one setting in which punitive damages are assessed. The *Juzwin II* decision to reinstate the claims for punitive damages therefore seems unsatisfactory; it makes little sense to allow a remedy to be assessed through procedures that are deemed unconstitutional. Yet the court's decision to allow the plaintiff's punitive damages claims is defensible in at least two respects.

First, it is important to keep in mind the procedural status of this case which involved a pretrial motion for the dismissal of claims. Because the district court was dealing with an unsettled area of the law, the constitutionality of punitive procedures in mass tort litigation, it was likely the decision would be reviewed on appeal. By upholding the litigation of the claims, the court allowed the issue of punitive damages to go to the jury. The jury would thus be left with the decision of whether to grant an exemplary award (assuming the facts warranted submission of the claim to the jury). If the jury returned no such award, the point would be moot. If the jury granted punitive damages, the trial court would then be free to vacate this award. Should the lower court refuse to vacate the award and the defendants appeal, the court of appeals could reverse the *Juzwin I* decision, accept the more narrow due process approach adopted by the *Cathey* court, and find the procedures for punitive damages constitutional. Should this happen, the record on appeal would already contain a jury

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243. Wheeler, *supra* note 40, at 306.

244. *Id.* The goal of deterrence, as well as other government interests, is usually not considered important enough to find that the state has a substantial interest in imposing punitive damages. *Id.* at 304.

245. *Id.* at 306-09. Overdeterrence is possible because a jury can decide the amount of punitive damages without being subject to meaningful review, and is subject to emotion and prejudice. *Id.* at 307. Underdeterrence occurs when individuals assume they will be the beneficiaries of jury bias, and therefore would not be subject to punitive damage awards. *Id.* at 308.

246. *Juzwin,* 705 F. Supp. at 1061.

verdict as to the punitive award and there would be no need for a remand. The court's somewhat confusing position on rehearing thus provides a means of avoiding a retrial on the issue of punitive damages and gives a reviewing court a basis for vacating any exemplary award that may be entered, thereby conserving judicial resources.

Second, the court held that the *procedures* for awarding punitive damages were unconstitutional, not necessarily the punitive damages themselves.[247] Punitive damages are indeed proper should procedures provide for one authoritative determination regarding the defendant's punitive liability.[248] In *Juzwin,* however, there was no evidence such an authoritative remedy had already been provided since there was no showing a previous jury award had satisfied the criteria set out in *Juzwin II.*

Furthermore, the unconstitutional aspects of punitive damages procedures are a product of the national scope of mass tort litigation. While current procedures are constitutionally defective and reform is possible, jurisdictional shortcomings cripple the lower court's ability to fashion an effective remedy. The *Juzwin* court thus faced the dilemma of denying the punitive damages and thereby sacrificing the interests of the plaintiff and government in seeing such sanctions enforced or allowing the claims and perpetuating the deficiencies of the current system. Even if the court were to deny the defendant's claims, the constitutional defects in the procedures would not be cured as other jurisdictions would not be obligated to follow the decision. Because the defect in the litigation process is at the national level and the district court can only operate on the local level, the course taken on rehearing represents the lesser of two evils.

While the resolution of the issue of punitive damages in *Juzwin II* was rational, it is not satisfying. The district court's hands are effectively tied: it declares a procedure to be constitutionally insufficient yet is impotent to establish a system which better serves justice in this case. It can only provide justice on the local level and therefore the defendant's right to due process is sacrificed. Jurisdictional considerations frustrate attempts to certify class actions[249] and prohibit the court from conclusively enforcing any punitive award it renders.[250] The *Juzwin II* criteria for ensuring a conclusive award of punitive damages[251] cannot be met under present procedures. Therefore, the *Juzwin* decision highlights the need for procedural reform which has been advocated for a number of years.[252]

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247. *Id.* at 1064-65.

248. *Id.* at 1065.

249. *See In re* School Asbestos Litigation, 789 F.2d at 1002 (difficulty of obtaining class certification in diversity jurisdiction asbestos action); *but see* Seltzer, *supra* note 42, at 61 (the circumstances in some mass tort cases may lend themselves to resolution of punitive damages issues by a class action).

250. *See* Roginsky v. Richardson-Merrell, 378 F.2d 832, 839-40 (2d Cir. 1967) (difficulty enforcing punitive damages awards of hundreds of plaintiffs in many jurisdictions).

251. *See supra* note 205 and accompanying text.

252. *See, e.g.,* Flaherty, *Mass Torts (The Year in the Law),* NAT'L L.J., Dec. 31, 1984, p.

IV. IMPACT

Punitive damage procedures have recently received significant legislative attention at the state level.[253] However, these revisions have not successfully addressed the concerns highlighted in the criteria set out by the *Juzwin* court. Furthermore, reforms on the state level will be necessarily insufficient in alleviating the current problems due to the jurisdictional restrictions highlighted in the *Roginsky v. Richardson-Merrell* and *Juzwin II* decisions. National reforms which would require action at the federal level are necessary.[254] This would call for either a Supreme Court decision or congressional legislation that addresses the issue.[255] Since the Supreme Court is not scheduled to address this specific issue in the near future, congressional action would provide a more direct and immediate cure. Furthermore, under the aegis of the commerce clause, Congress is vested with the broad authority necessary to effectively address this problem.[256]

A. Suggested Reforms

Commentators have suggested a variety of adjustments for the methods of awarding punitive damages in mass tort litigation. One such proposal calls for the complete abolition of punitive damages in the mass tort con-

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16, col. 2 (discussing settlement of several mass tort cases associated with difficulties present in mass tort trials).

253. *See generally* Ghiardi, *supra* note 5, at 195. Professor Ghiardi surveys legislative alterations in punitive damages procedures including: (1) changes in the burden of proof, *see, e.g.*, N.J. STAT. ANN. § 2A:58C-5 (West 1987) (in products liability action, plaintiff may receive punitive damages if he can show by preponderance of evidence that defendant acted with actual malice or wanton disregard of safety); OHIO REV. CODE ANN. § 2307.80 (Anderson Supp. 1988) (plaintiff in products liability claim must show right to punitive award by clear and convincing evidence); (2) changes in pleading requirements, *see, e.g.*, ILL. REV. STAT. ch. 110, para. 2-604.1 (1987) (in certain actions, initial pleadings may not contain a prayer for punitive damages; they may be requested by motion after a hearing); (3) changes in proving the defendant's wealth, *see, e.g.*, FLA. STAT. ANN. § 768.72 (West Supp. 1989) (discovery regarding wealth of defendant available only after plaintiff establishes a reasonable basis for punitive damages); (4) abolishment of exemplary awards, *see, e.g.*, OR. REV. STAT. § 18.550 (1987) (punitive damages not available in medical malpractice actions where defendant is licensed, registered or certified); (5) limitations on the amount recoverable, *see, e.g.*, ALA. CODE § 6-11-21 (Supp. 1989) (punitive damages cannot exceed $250,000 unless there is intentionally wrongful conduct, malice, or defamation); COLO. REV. STAT. § 13-21-102 (1987) (punitive damages cannot exceed the amount of compensatory damages); (6) bifurcation of trials, *see, e.g.*, CAL. CIVIL CODE § 3295 (West Supp. 1990); and, (7) changes in the conduct requirement, *see, e.g.*, KY. REV. STAT. ANN. § 411.184 (Baldwin Supp. 1988) (defendant's conduct must reflect oppression, fraud or malice). *See also* 1 L. SCHLUETER & K. REDDEN, *supra* note 17, at § 18.1 (providing citations and annotations of significant legislative developments for the various jurisdictions punitive damages procedures).

254. Jeffries, *supra* note 2, at 147.

255. *Juzwin II*, 718 F. Supp. at 1235.

256. *See* Wickard v. Filburn 317 U.S. 111, 124 (1942). The Court explained that power under the commerce clause is not limited to congressional regulation of commerce between states. It extends to any activities which effect interstate commerce. *Id.*

text.[257] Claiming current procedures are inherently ineffective and incapable of meaningful reform,[258] adherents of this view turn to the functions served by punitive damages. Focusing on the goal of deterrence, they claim punitive damages are unnecessary as the enormous level of compensatory liability facing defendants is itself sufficient to dissuade participation in conduct which may lead to mass tort liability.[259] In the mass tort context, compensatory claims will often exceed any coverage provided by a corporate insurance policy and thus insurance would not undermine the deterrent effect of compensatory damages in this situation. Furthermore, even if defendants were able to insure for the full extent of their compensatory liability, increased costs of attaining this insurance coupled with the unrecoverable costs of litigation and disruption to the corporate enterprise would deter a party from breaching its duty of care.[260]

While the case for abolishing punitive damages in the mass tort context is impressive, it is fatally flawed in that it fails to recognize that an award of punitive damages can serve interests other than deterrence and retribution. While these goals provide the primary justification for an exemplary award,[261] they are not the exclusive rationales supporting the remedy. Important intangible concerns such as expressing the outrage of the community and more practical concerns such as sidestepping the American rule regarding litigation expenses—and thus ensuring that an innocent party is not left inadequately compensated after the traditional contingency fee has been extracted from the compensatory award—are also served by punitive damages awards.[262] It also seems anomalous that a party could avoid punitive liability by continuing its misconduct until a large number of people are injured rather than just a few.[263] The elimination of punitive damages from mass tort litigation therefore is not necessary to assure fundamental fairness in such cases.

A second suggestion calls for a single exemplary award to be issued in the initial case, thereby settling the issue of punitive liability for the entire course

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257. Szuch & Shelley, *supra* note 3, at 13, col. 1.

258. *Id.* at 13, col. 2.

> Not only are the number of potential claimants and the extent of potential injury unknown, the standard of liability to which a manufacturer may be held varies widely from state to state. Moreover, standards of liability continue to undergo change at such a rapid pace that accurate prediction of future liability becomes all but impossible.

Id.

259. *Id.*

260. *Id.*

261. For the goals of, and theories behind, punitive damages, see *supra* note 12 and accompanying text.

262. *See supra* notes 16-32 and accompanying text (discussing reasons advanced for punitive damage awards).

263. Froud v. Celotex Corp., 107 Ill. App. 3d 654, 658, 437 N.E.2d 910, 913 (1st Dist. 1982), *rev'd on other grounds,* 98 Ill. 2d 324, 456 N.E.2d 131 (1983).

of the litigation.[264] This claim would be conclusive as to the issue of punitive damages. Such an approach has been generally discredited, however, as it would award exemplary damages only to the first plaintiff to attain a verdict on her claim.[265] This proposal would also present the culpable defendant with an incentive to forum shop for a sympathetic court in the hopes of maneuvering a small award which will serve to preclude later verdicts.[266] In addition, a system that allows one party to recover a substantial windfall while others similarly situated receive no share of that award would suffer from arbitrariness. Furthermore, the availability of a single exemplary award would place plaintiff's lawyers, many of whom may represent more than one claimant, in a possible conflict of interests when determining which case to try first and what resources to commit to a given case.[267]

An innovative twist given this approach is to adopt an additive method for providing punitive damages claims.[268] In the initial case, the issues would be tried and the jury would award punitive damages if proper. In subsequent cases, during the trial, no evidence would be admitted as to the previous award and a verdict granting exemplary damages could again be returned and adjusted if necessary. Only then would evidence regarding prior punitive damages awards be admitted. If the award set in the present case were greater than the largest prior award, the plaintiff would be granted the difference between the previous and present awards. Thus, the defendant receives an offset for those punitive damages claims it has already satisfied.[269] This proposal, however, runs into the same shortfalls as does limiting punitive damages to only the first plaintiff. First, there is an arbitrary windfall conferred on the first plaintiff.[270] Second, lawyers representing more than one plaintiff, suffer a conflict of interests.

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264. The Senate Committee of Commerce, Science, & Transportation proposed a limit of one punitive damage award per defendant's action in 1984, as part of the proposed Product Liability Act. S. REP. No. 476, 98th Cong., 2d Sess. 13 (1984). Although the committee report indicated this limitation, the bill itself did not contain similar language. S. 44., 98th Cong., 2d Sess. § 13 (1984).

A similar approach is to establish a cap on punitive damages for the entire course of litigation. This limit could be in the form of a preset dollar limit or a multiple of the compensatory damages. *Compare* VA. CODE ANN. § 8.01-38.1 (Supp. 1989) (punitive damages shall not exceed $350,000) *with* COLO. REV. STAT. § 13-21-102 (1987) (punitive damages cannot exceed the amount of actual damages). Such limitations are subject to criticism on the grounds that preset caps frustrate the achievement of deterrence and punishment because not all defendants are alike. *See* Ghiardi, *supra* note 5, at 196. Furthermore, these limits may be quickly exhausted, thus depriving later claimants any opportunity to share in the awards. Seltzer, *supra* note 42, at 56.

265. *Id.*

266. A.B.A., PUNITIVE DAMAGES, *supra* note 135, at 73.

267. Seltzer, *supra* note 42, at 56.

268. *See, e.g.*, Comment, *supra* note 219, at 1800-01.

269. *Id.*

270. *But see id.* at 1811-12 (providing initial plaintiffs with larger punitive awards is justified because they often will carry added expenses of proving issues for first time, thereby establishing precedents which later plaintiffs can exploit in order to reduce their own litigation costs).

The problems of punitive damages procedures in the mass tort context are a product of the decentralization which results from determining the question of punitive liability in each individual case in the overall course of trials. Those difficulties can only be avoided if a system is created which provides sufficient control over the determination of punitive liability for the entire course of conduct. Such control would be best established if a single court is granted exclusive jurisdiction over the issue of punitive liability.[271] This would provide a means of protecting both the interests of the plaintiff and the general public in having punitive damages imposed as well as the defendant's due process right to a fundamentally fair procedure for determining its sanction. Recent proposals have addressed these concerns and suggested implementing a judicial panel which would be empowered to order the consolidation of punitive damages claims in mass tort litigation.[272] The adoption of such a procedure could provide a court with the authority to efficiently control the resolution of punitive claims. In addition, the court would be able to issue a verdict that, under the considerations set out in *Juzwin II,* would consider and account for the entirety of the defendant's conduct.[273]

B. Formation of a Judicial Panel to Oversee National Punitive Damages Cases

A report from the American Bar Association Commission on Mass Torts calls for federal legislation which would establish a judicial panel to oversee litigation in mass tort cases.[274] Under the proposed system, the panel would be authorized to appoint a single court in which to determine the punitive damages question and, in suitable cases, the court would also determine issues such as causation or liability which may be common to all suits. The question of compensatory damages would, however, be left to the authority of individual courts trying the various claims arising out of the defendant's conduct.[275] Current procedures would allow for the formation of a judicial body which could coordinate the determination of punitive damages in mass tort claims, however, legislative action is required to trigger the process.

Federal rules currently allow a trial court to sever certain issues for independent determination[276] In addition, federal law authorizes a judicial panel established by the Chief Justice of the United States to consolidate claims pending in various districts that present common questions of law for

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271. *See* A.B.A., PUNITIVE DAMAGES, *supra* note 135, at 78 (proposing a federal judge control adjudication of punitive damage claims).

272. *Id. A.B.A. Urges Mass-Tort Panel,* Chicago Daily L. Bull., July 17, 1989, at 1, col. 2 [hereinafter, *Mass-Tort Panel*].

273. *See supra* notes 205-12 and accompanying text (discussing the *Juzwin II* due process considerations).

274. *Mass-Tort Panel, supra* note 272, at 1.

275. *Id.*

276. FED. R. CIV. P. 42(b).

pretrial proceedings.[277] Section 1407 of title 28, which deals with multi-district litigation, has been used to authorize retention of the consolidated issues for trial and under current procedures, it is possible to conduct an independent trial on the common issue of punitive damages.[278] Yet a number of issues currently stand in the way of allowing for such a trial in a mass tort situation.

First, a judicial panel with the authority to consolidate the punitive issues must be convened under section 1407 and a triggering device which alerts the panel as to when a given series of cases are sufficient to threaten the concerns of due process must be established.[279] A jurisdictional requirement of 100 cases that each seek a minimum of $50,000 in damages has been suggested.[280] A definite jurisdictional requirement, however, is arbitrary and not likely to protect the interests of a smaller business enterprise which finds itself subject to a series of suits that, while not numbering high enough to reach the jurisdictional trigger, are sufficient to present a true danger of overkill given the defendant's more modest resources. An individualized threshold would therefore be preferable. The American Bar Association, Special Section on Litigation suggests that mass punitive damages trials be invoked upon "a finding by the judge that there is a *reasonable possibility* that adequate compensatory damages will not be available if punitive damages are not brought under control."[281] This flexible formula calls for the panel to consider the characteristics of each series of cases and make a reasonable determination as to the likelihood that the aggregate liability of the defendant will exceed that party's resources and thus threaten the defendant's due process interests as well as the compensatory interests of later plaintiffs.[282] This specialized consideration would provide a superior method for protecting the interests of all involved because an arbitrary cut-off may restrict otherwise qualified cases from receiving the protections of judicial overview while qualifying some cases in spite of the fact the defendant is sufficiently endowed to withstand the number of claims filed against it.

Legislation should also provide federal judges with control over the actions pending in state courts.[283] Unless a court is given control over the entirety of the proceedings in a case, its ability to truly serve its function is likely to be ineffective. An exception to the Anti-Injunction Act which currently frustrates the use of class actions therefore should be established.[284] The

277. 28 U.S.C. § 1407 (1982).

278. A.B.A., PUNITIVE DAMAGES, supra note 135, at 76.

279. In other words, a properly authorized panel must be convened and given sufficient criteria by which they can establish that a series of mass tort claims may threaten the defendant's viability. *Mass-Tort Panel, supra* note 272, at 1.

280. *Id.*

281. A.B.A., PUNITIVE DAMAGES, *supra* note 135, at 79 (emphasis in original).

282. *Id.* at 79-80.

283. *Id.* at 79.

284. *Id.* If plaintiffs were allowed to freely file suits in state courts after there had been a

controlling court must also determine what standard of proof should be met on the issue of punitive liability. In order to ensure that all state levels are satisfied, an elevated burden should be imposed. Suggestions include that during the trial on punitive damages, plaintiff must show the defendant's conduct "showed substantially greater indifference to safety than ordinary negligence and was established under a 'clear and convincing evidence standard.' "[285] Commentators contend this heightened standard would be proper, since the consequences of a punitive damages award are more serious than that of other civil awards.[286] In order to exercise complete control over the issue of punitive damages, the ruling in the consolidated trial must be conclusive for all such claims, including those not yet filed.[287] The timing of the mass trial in this respect is very important. Should the proceeding be held too soon in the development of the litigation, it may be difficult to accurately predict the true extent of the defendant's conduct. If the proceeding were delayed, the earlier plaintiffs will have their right to compensation on their punitive charges needlessly postponed. The panel must therefore be sensitive not only to the threshold requirements of a sufficiently threatening number of claims but also to the timing of its consolidation of those suits.[288] Upon resolution of the consolidated trial, distribution of the award must be managed. Immediate distribution to plaintiffs who have already established their right to a portion of the award should occur once the judgment is final, and trust funds can be established to protect the interests of future recipients.[289]

The implementation of a consolidated trial for all punitive damages claims in mass tort cases would help ensure that an award of punitive damages

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determination by the judicial panel which commits the punitive claims to a certain federal venue, the authority of the panel and the federal court would be easily evaded. Therefore, a limitation on the availability of state court proceedings must be established which would require an exception to the Anti-Injunction statute. *Cf. In re* Federal Skywalk Cases, 680 F.2d 1175, 1183 (8th Cir.) (class action could not be maintained in personal injury suits arising out of walkway collapse because such a class would interfere with state court proceedings and thus violate the Ant-Injunction act), *cert. denied,* 459 U.S. 988 (1982).

285. *Mass-Tort Panel, supra* note 272, at 1, col. 4-5.

286. Comment, *supra* note 66, at 417-18. Although the author notes some similarities between criminal sanctions and punitive damages, the conclusion reached is that the latter does not require the same measure of procedural safeguards. *Id.*

287. A.B.A., PUNITIVE DAMAGES, *supra* note 135, at 81.

288. *Id.* at 80. The concerns reflected in the flexible formula for establishing jurisdiction must be carefully monitored in order to determine when the action is ripe.

289. *Id.* at 81. This presents the problem of whether to provide for a per capita distribution or a division proportionate to the plaintiffs' compensatory claims. *Id.* Because it would be impossible to predict the percentage of overall damages which will be awarded to the plaintiffs in future cases, any attempt to make a proportionate distribution of the punitive award would be mere guesswork. While the damages that may be awarded to future plaintiffs would be difficult to predict, reasonably accurate projections regarding the expected number of prospective plaintiffs could be made. Thus, the per capita distribution is preferable. *Id.* As distribution to future, undetermined plaintiffs, a trust fund may be established which would protect their interests. *Id.*

issued against a defendant in such litigation would be both comprehensive in that it would address the entire scope of the defendant's conduct, and efficient in that it would relieve the individual trial courts of the burden involved in repeatedly resolving similar claims. Furthermore, a panel-initiated consolidation process would achieve these aims in a manner that satisfies the four criteria for a comprehensive punitive damages verdict set out in *Juzwin II*.

The first consideration recognized by the *Juzwin II* court calls for a complete hearing regarding the defendant's conduct to be held after adequate time has elapsed to investigate and discover the full scope of the consequences of that conduct.[290] A judicial panel empowered to oversee and monitor the development of all claims filed against a mass tort defendant would have the flexibility needed to consider various aspects of the overall case and consolidate those actions if it reasonably appears punitive awards could threaten the availability of adequate compensatory damages.[291] Once this determination is made, a single court would be vested with authority to hear all punitive claims. The delay encountered during the decisional period while the panel determines whether to consolidate the punitive claims coupled with the appointed court's authority to freely entertain evidence regarding the effect of the defendant's conduct on a wide range of parties would satisfy the first criterion indicated in *Juzwin II*. Indeed, the scope and timing of the consolidated trial would be certain to provide a more thorough and comprehensive investigation of the defendant's conduct than can be achieved in a series of individual one-on-one trials.

The second consideration calls for adequate representation of all plaintiffs and suitable presentation of all past and future consequences of defendant's conduct.[292] The court hearing a consolidated trial could easily assure adequate presentation of plaintiffs' interests by appointing a representative party to assert the claims of all those filing for punitive damages. The fact that a party would herself be interested in the outcome of the proceeding would ensure adequate advocacy at the consolidated trial. Furthermore, a consolidated trial could provide for greater protection of the interests of plaintiffs who have not yet filed claims against the defendant but would be likely to do so in the future.[293] By consolidating the overall process of litigation against the defendant, the court would be able to gauge the total impact of the defendant's conduct and thus draw reasonable predictions as to the number of possible future claimants. The court could even appoint counsel to represent the interests of those parties and may set aside funds from any judgment against the defendant which could later be distributed to future claimants.[294]

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290. *Juzwin II*, 718 F. Supp. 1233, 1235 (D.N.J. 1989).

291. *See supra* text accompanying note 281.

292. *Juzwin II*, 718 F. Supp. at 1235.

293. *See supra* notes 288-89 and accompanying text.

294. *See* A.B.A., PUNITIVE DAMAGES, *supra* note 135, at 75-77 (discussing centralized determination of punitive damages).

The third criterion for a conclusive verdict recognized by the *Juzwin II* court called for an instruction to the jury that their award would be the only exemplary award rendered against the defendant.[295] This requirement is designed to bring to the attention of the trier of fact the intended impact of the verdict and the finality of their decision. In a case involving a consolidated trial of all punitive damages claims, the fact that the award would be intended to be the one and only punitive damages judgement rendered against the defendant could easily be made clear to the trier of fact. Indeed, the very fact that one consolidated proceeding was being held would only underscore the finality of the verdict rendered.

The final consideration identified by the *Juzwin II* court calls for the punitive award to be rendered under "such other conditions as will assure a full, fair and complete presentation of all relevant evidence in support of and in opposition to the claim."[296] By adopting a panel initiated consolidation procedure, resolution of punitive claims in mass tort cases could be accomplished under conditions which would more effectively provide the fundamentally fair setting which the *Juzwin* court required. By adopting a flexible approach for determining whether to hold a consolidated trial, the panel would be able to evaluate and consider the probable impact of claims and more accurately predict future consequences of the defendant's conduct.[297] Resolving the issue of punitive damages in a proceeding which considered the entirety of the defendant's conduct rather than in the more limited setting of one-on-one litigation would provide the trier of fact a more complete and accurate record on which to base any punitive award it may feel is warranted. In addition to providing a more complete record, a consolidated proceeding would provide a sense of needed control to the resolution of these claims.

The problems of mass tort cases have created difficulties for both the parties litigating the claims and the court systems attempting to facilitate them. A change in the piecemeal fashion in which these claims are tried is needed.[298] Procedural tactics such as the consolidation of similar issues would serve to lessen the strain these suits are creating, and the unification of punitive damages claims is a step which courts should take. However, limitations in the current procedure call for legislative action designed to establish an institutional structure that would enable the court system to gain some sort of control over these cases. The establishment of a judicial panel empowered to oversee instances of mass litigation would help better serve the needs of all parties involved.

V. CONCLUSION

The concept of punitive damages is an important element of the civil law which provides a vital means of expressing societal disapproval towards

295. 718 F. Supp. at 1235.

296. *Id.*

297. A.B.A., PUNITIVE DAMAGES, *supra* note 135, at 75.

298. *See supra* notes 162-63 and accompanying text (financial strain from litigating punitive damage claims individually).

egregious conduct. The development of punitive damages procedures was grounded in one-on-one tort litigation and thus reflects the concerns evident in these traditional disputes. However, recent developments have seen the proliferation of mass tort litigation and the provincial limitations inherent in punitive procedures make their application in these proceedings unsatisfactory, in light of the constitutional guarantee of fundamental fairness in all civil proceedings. In the mass tort context, the breadth of the defendants' conduct has moved the litigation regarding punitive measures from a localized setting of a traditional one-on-one tort claim to a national theater in which the defendants' economic survival may hang in the balance. Current procedures do not and cannot accommodate this fundamental change. Under the current systems, defendants are regularly subjected to repeated punitive claims arising from a single course of conduct. Although restrictions on the double jeopardy and excessive fines doctrines prevent the application of these provisions to civil proceedings, these multiple punishments are, nonetheless, unconstitutional because they violate the due process clause of the fourteenth amendment.

The decision in *Juzwin I* clearly illustrated the shortcomings of the current outdated mode of assessing punitive damages in mass tort cases. In contrast, the *Juzwin II* decision illustrates the trial court's inability to remedy the procedural and structural limitations inherent in the current case-by-case litigation of these claims. As a result of the state based nature of punitive claims, federal and state courts are powerless to individually remedy the shortcomings in mass tort punitive damages procedures. Congress, therefore, must step in to cure the ills of mass tort litigation.

Jim Fieweger