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PUNITIVE DAMAGES IN MASS TORT LITIGATION *FROUD V. CELOTEX CORP.*

James Froud, John Friday and Wyatt Williamson were asbestos workers who allegedly contracted peritoneal mesothelioma and bronchogenic carcinoma from prolonged exposure to asbestos products which had been manufactured and sold by twenty-four companies.¹ After filing actions against all twenty-four companies, Froud and Friday died.² Administrators were appointed to continue the actions on behalf of their estates. Williamson died before bringing an action and his administrator filed an action on behalf of his estate.³

Each complaint contained three counts against the defendants: one in negligence, one in strict tort liability and one seeking punitive damages.⁴ In each action, the defendants moved to dismiss the punitive damages count on the ground that common law actions for punitive damages abated at the time of the death of the injured party.⁵ Relying on case law construing the Illinois Survival Act,⁶ the trial court reluctantly granted the defendants' motions to dismiss.⁷ Plaintiffs appealed the dismissal orders, arguing that

1. Peritoneal mesothelioma is a rare cancer of the peritoneum, which is the lining of the abdomen. It has been estimated that in approximately 85% of all mesothelioma cases, asbestos exposure will be found in the patient's past. Currently, treated or untreated cases of mesothelioma generally result in death approximately one year from its onset. 4A R. GRAY, ATTORNEYS' TEXTBOOK OF MEDICINE § 205C.72 (1982). Bronchogenic carcinoma is a form of lung cancer originating in the bronchi. 5A LAWYERS' MEDICAL CYCLOPEDIA OF PERSONAL INJURIES AND ALLIED SPECIALTIES § 33.39 (rev. ed. 1972). The relationship between lung cancer and asbestos exposure was confirmed in 1955; even short durations (of several weeks) of exposure carry the risk of lung cancer. 4A R. GRAY, ATTORNEYS' TEXTBOOK OF MEDICINE § 205C.71 (1982).

2. The 24 companies named as defendants were: Raybestos-Manhattan, Inc., Standard Asbestos Mfg. & Insulating Co., Keene Corp., Grant Wilson, Inc., Armstrong Cork Co., A&M Insulation Co., AARCO Products Corp., Mauritzon, Inc., Union Carbide Corp., Ruberoid, Inc., Ryder Cement, Flintkote Co., H.K. Porter Co., Owens-Corning Fiberglas Corp., Forty-eight Insulation, Owens-Illinois, Inc., Nicolet Industries, Inc., Johns-Manville Sales Corp., Celotex Corp., Pittsburgh Corning Corp., Combustion Engineering Corp., Fibreboard Corp., UNARCO Industries, Inc., and Eagle-Picher Industries, Inc. Froud's, Friday's, and Williamson's suits were consolidated on appeal. *Froud v. Celotex Corp.*, 107 Ill. App. 3d 654, 656, 437 N.E.2d 910, 911 (1st Dist. 1982), *appeal granted*, 91 Ill. 2d 569 (1982).

3. 107 Ill. App. 3d at 656, 437 N.E.2d at 912.

4. *Id.*

5. *Id.*

6. ILL. REV. STAT. ch. 110½, § 27-6 (1981). The Illinois Survival Act provides: "In addition to the actions which survive by the common law, the following also survive: actions . . . to recover damages for an injury to the person (except slander and libel). . . ." The Survival Act thus allows personal injury actions which have accrued before the injured party's death to be brought by the injured party's estate. For a discussion of cases involving the Survival Act, see *infra* notes 11-41 and accompanying text.

7. 107 Ill. App. 3d at 657, 437 N.E.2d at 912. The trial judge, Judge Elward, made the following statement:

the Survival Act no longer is construed as requiring the abatement of claims for punitive damages.⁸ Stating that the Survival Act is a "neutral vehicle" which neither "authorizes nor prohibits punitive damages,"⁹ the appellate court concluded that common law actions for punitive damages survive the death of the injured party and, accordingly, reversed the trial court's dismissal orders.

The *Froud* decision overrules more than one hundred years of Illinois case law rejecting claims for punitive damages under the Survival Act.¹⁰ The decision has special significance for corporate defendants facing multiple claims in products liability actions.¹¹ To analyze the impact of the *Froud* decision adequately, it is necessary to consider the history of the Survival Act. Next, the *Froud* court's analysis will be examined. This examination will be followed by a discussion of the concept of punitive damages in the products liability/mass tort situation.¹² Finally, various proposals for the control of punitive awards will be suggested.

The Court, therefore, will grant the motion to dismiss Count III as to punitive damages with a great deal of reluctance and with an open invitation that the Court has not heretofore made in any of the cases it's heard in the four and a half years in this court; that this Court would urge one or more of the parties, the plaintiff involved in this case, perhaps, or some other plaintiff, to seek an early appeal of this decision. In my opinion, as a matter of law what I have done is right. As a matter of justice, what I am doing is wrong.

Brief for Appellant at 9, *Froud v. Celotex Corp.*, 107 Ill. App. 3d 654, 437 N.E.2d 910 (1st Dist. 1982), *appeal granted*, 91 Ill. 2d 569 (1982).

8. 107 Ill. App. 3d at 657, 437 N.E.2d at 912; *see National Bank of Bloomington v. Norfolk & W. Ry.*, 73 Ill. 2d 160, 383 N.E.2d 919 (1978) (punitive damages claim allowed in statutory personal injury action); *Howe v. Clark Equip. Co.*, 104 Ill. App. 3d 45, 432 N.E.2d 621 (4th Dist. 1982) (punitive damages claim allowed in common law personal injury action).

9. 107 Ill. App. 3d at 658, 437 N.E.2d at 913 (citing *National Bank of Bloomington v. Norfolk & W. Ry.*, 73 Ill. 2d 160, 174, 383 N.E.2d 919, 924 (1978)).

10. *See National Bank of Bloomington v. Norfolk & W. Ry.*, 73 Ill. 2d 160, 179, 383 N.E.2d 919, 927 (1978) (Ryan, J., dissenting) (for over 100 years, recovery under the Survival Act has been limited to compensatory damages); *Mattyasovszky v. West Towns Bus Co.*, 61 Ill. 2d 31, 33, 330 N.E.2d 509, 510 (1975) (the Survival Act "has never been thought to authorize the award of punitive damages"); *see also In re Air Crash Disaster Near Chicago, Ill.* on May 25, 1979, 644 F.2d 594 (7th Cir. 1981) (based on the *Mattyasovszky* and *National Bank* decisions, Illinois does not allow punitive damages in wrongful death or survival actions); *Hamrick v. Lewis*, 515 F. Supp. 983, 988 (N.D. Ill. 1981) ("Illinois law is clear that punitive damages may not be recovered under either the Survival Act [citations omitted] or the Wrongful Death Act."); *In re Johns-Manville Asbestosis Cases*, 511 F. Supp. 1235, 1240 (N.D. Ill. 1981) ("Illinois law does not permit the recovery of punitive damages . . . either under the Wrongful Death Act or the Survival Act.").

11. For a discussion and analysis of the problems with punitive damage awards in products liability actions, see *infra* notes 43-86 and accompanying text.

12. The phrase "mass tort situation" will be used to describe those products liability cases in which a single product has caused injuries to many plaintiffs in different locales over an extended period of time. Examples of mass tort situations include the asbestos, Dalkon Shield IUD, DES, and Agent Orange cases. The mass tort situation is distinguishable from the mass disaster, which occurs in a single locale at a single time. Examples of mass disaster situations include airline crashes and the Kansas City Hyatt skywalk collapse.

HISTORY OF THE ILLINOIS SURVIVAL ACT

The Survival Act has a history of rather confused interpretations, beginning with its relation to the Wrongful Death Act.¹³ The Illinois Supreme Court first distinguished the Survival Act from the Wrongful Death Act in *Holton v. Daly*.¹⁴ The *Holton* court held that the Wrongful Death Act was the exclusive remedy for damages resulting from personal injuries which caused the decedent's death, and that recovery for such injuries was limited to pecuniary damages.¹⁵ Consequently, recovery under the Survival Act was limited to damages for injuries sustained by the decedent which did not directly cause his or her death.¹⁶ Thus, personal injury damages for medical bills, pain and suffering, and lost wages were not recoverable if the decedent's death was caused by those injuries because the Wrongful Death Act limited recovery to pecuniary damages. Conversely, those same damages were recoverable under the Survival Act, but only if the decedent's death resulted from a cause other than the personal injuries on which the suit was based.¹⁷

This distinction was expressly overruled ninety-two years later in *Murphy v. Martin Oil Co.*¹⁸ The *Murphy* court declared that to allow recovery only for a decedent's death, and not for the personal injuries which caused the death, provided inadequate justice.¹⁹ To remedy this injustice, the court held

13. ILL. REV. STAT. ch. 70, § 1 (1981). The Illinois Wrongful Death Act provides: Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

Id.

14. 106 Ill. 131 (1882). In *Holton*, the plaintiff had been injured while employed by the defendant. During the course of his suit for damages, the plaintiff died from his injuries. His wife was substituted as plaintiff under the Survival Act. The defendant appealed the judgment in favor of the plaintiff's wife, alleging that because the plaintiff died from his injuries, his wife could recover only under the Wrongful Death Act, since the Survival Act was limited to actions where the decedent had died from a cause other than the injuries on which the suit was based. *Id.* at 132-34.

15. *Id.* at 137-38.

16. *Id.*; see also *Susemihl v. Red River Lumber Co.*, 376 Ill. 138, 33 N.E.2d 211 (1941) (any deviation from the *Holton* doctrine must originate from the legislature); *Wilcox v. International Harvester Co.*, 278 Ill. 465, 116 N.E. 151 (1917) (following the *Holton* rule).

17. *Murphy v. Martin Oil Co.*, 56 Ill. 2d 423, 426-27, 308 N.E.2d 583, 584-85 (1974).

18. *Id.* at 430-31, 308 N.E.2d at 586. In *Murphy*, the plaintiff's decedent was injured in a fire on the defendant's premises and died of those injuries nine days later. The plaintiff brought an action for pecuniary damages under the Wrongful Death Act, and for damages for the decedent's conscious pain and suffering, loss of wages, and property damage during the nine day interval between the injury and death. *Id.* at 425, 308 N.E.2d at 583-84.

19. *Id.* at 431, 308 N.E.2d at 587. The *Murphy* court believed that the *Holton* rule provided inadequate justice because it denied recovery for expenses incurred while the decedent was still alive, and denied recovery of lost earnings during any period between the injury and the death. *Id.*

that an action for personal injuries, even injuries directly resulting in the decedent's death, should not abate.²⁰ Consequently, such an action could be brought by the decedent's estate under the Survival Act. Moreover, the *Murphy* court held that an action for personal injuries may be maintained under the Survival Act concurrently with an action for pecuniary loss under the Wrongful Death Act.²¹

The question left unanswered by the *Murphy* decision, however, was exactly what types of damages are recoverable under the Survival Act. The Wrongful Death Act limits recovery to pecuniary loss.²² A common law action for personal injuries, on the other hand, allows recovery of pecuniary loss as well as damages such as medical bills, lost wages, and general damages for pain and suffering.²³ In certain circumstances, punitive damages are also recoverable in a common law personal injury action.²⁴ Although the *Murphy* court determined that damages for personal injuries were recoverable after the injured person's death, the court left unresolved whether all damages recoverable in a common law action—including punitive damages—also would be recoverable in a Survival Act action.

This question was answered in *Mattysovszky v. West Towns Bus Co.*,²⁵ in which the Illinois Supreme Court held that punitive damages were

20. *Id.*

21. *Id.*

22. *See, e.g.*, *Rusher v. Smith*, 70 Ill. App. 3d 889, 388 N.E.2d 906 (5th Dist. 1979) (damages are limited to pecuniary loss of decedent's spouse and next of kin); *Baird v. Chicago, B. & Q.R.R.*, 11 Ill. App. 3d 264, 296 N.E.2d 365 (4th Dist. 1973), *aff'd*, 63 Ill. 2d 463, 349 N.E.2d 413 (1976) (recovery under the Wrongful Death Act is strictly limited to pecuniary injuries resulting from the death); *Illinois Cen. R.R. Co. v. Ashline*, 56 Ill. App. 475 (2d Dist. 1894) (damages can only be measured on the basis of pecuniary loss sustained). Punitive damages are not recoverable under the Wrongful Death Act. *Conant v. Griffin*, 48 Ill. 410, 412-13 (1868); *see also infra* note 43.

23. *See, e.g.*, *Central Ry. Co. v. Serfass*, 153 Ill. 379, 39 N.E. 119 (1894) (loss of earnings, medical expenses, pain and suffering); *Lawson v. Belt Ry. Co.*, 34 Ill. App. 3d 7, 339 N.E.2d 381 (1st Dist. 1975) (loss of earnings, medical expenses, pain and suffering, and other deprivations caused by the injury); *see also* Kiely, *Damages, Equity, and Restitution—Illinois Remedial Options*, 24 DEPAUL L. REV. 274, 279 (1975) (traditional common law action for personal injuries includes recovery for pain and suffering plus special damages, including medical expenses and lost wages) [hereinafter cited as Kiely].

24. *See, e.g.*, *Spence v. Staras*, 507 F.2d 554 (7th Cir. 1974) (punitive damages recoverable under "certain aggravating circumstances"); *Chicago Union Traction Co. v. Lauth*, 216 Ill. 176, 74 N.E. 738 (1905) (punitive damages recoverable when wilful, malicious or wanton conduct is shown); *Moore v. Remington Arms Co.*, 100 Ill. App. 3d 1102, 427 N.E.2d 608 (4th Dist. 1981) (punitive damages are awarded if the injury is attributable to conduct that reflects a "flagrant indifference to the public safety"); *Moore v. Jewel Tea Co.*, 116 Ill. App. 2d 109, 253 N.E.2d 636 (1st Dist. 1969), *aff'd*, 46 Ill. 2d 288, 263 N.E.2d 103 (1970) (circumstances under which punitive damages are recoverable in products cases include: when the corporation had knowledge of danger inherent in the product, when the corporation failed to warn the public of the danger, and when the corporation had notice of prior claims of accidents identical to the plaintiff's); *Madison v. Wigal*, 18 Ill. App. 2d 564, 153 N.E.2d 90 (2d Dist. 1958) (aggravating circumstances under which punitive damages will be awarded include wantonness and wilfulness, malice, fraud, oppression, violence, and recklessness).

25. 61 Ill. 2d 31, 330 N.E.2d 509 (1975).

unavailable under the Survival Act. In affirming the trial court's vacation of punitive damages awarded by the jury, the Illinois Supreme Court stated that the Survival Act "has never been thought to authorize the award of punitive damages."²⁶ The *Mattyasovszky* court interpreted the *Murphy* decision as "intrinsically . . . emphasiz[ing] the compensatory nature of damages authorized under the Survival Act."²⁷ Thus, the court rejected the plaintiff's argument that the *Murphy* decision authorized the recovery of punitive damages.²⁸

The *Mattyasovszky* decision has been criticized for misinterpreting the Survival Act as creating a new cause of action in itself. Rather, the better interpretation is that the Survival Act merely permits the decedent's personal representative to maintain the statutory and common law actions which the decedent possessed at the time of his death—actions which otherwise would have abated at common law.²⁹ This latter interpretation of the Survival Act was enunciated in *National Bank of Bloomington v. Norfolk & Western Railway Co.*³⁰ In that case the Illinois Supreme Court permitted punitive damages, which were available to the decedent under the Public Utilities Act,³¹ to be recovered in an action brought by the decedent's representative under the Survival Act. The *National Bank* court recognized that the Survival Act does not create a new cause of action; rather, it is merely the vehicle by which those statutory or common law actions, already accrued

26. *Id.* at 33, 330 N.E.2d at 510. The *Mattyasovszky* court cited no authority for this proposition.

27. *Id.* The court did not give a basis for its interpretation.

28. *Id.*

29. Kiely, *supra* note 22, at 281. Two cases have adopted this interpretation of the Survival Act. *National Bank of Bloomington v. Norfolk & W. Ry.*, 73 Ill. 2d 160, 172, 383 N.E.2d 919, 923 (1978); *Howe v. Clark Equip. Co.*, 104 Ill. App. 3d 45, 50, 432 N.E.2d 621, 624-25 (4th Dist. 1982). The defendants in *Froud* argued in their brief to the Illinois Supreme Court that the *Mattyasovszky* court's interpretation of the Survival Act is correct. In support of this argument, they noted that the Survival Act has been reenacted several times without change. They additionally noted that less than one year after the *Mattyasovszky* decision, a bill introduced in the Illinois House, which would have specifically added punitive damages to those claims listed in the Survival Act, died in committee. The defendants interpreted this legislative history as indicating that recovery under the Survival Act is limited to those types of claims expressly listed in the text of the act, effectively creating a new cause of action rather than simply maintaining any claims existing before death. Brief for Appellant at 18, *Froud v. Celotex Corp.*, 107 Ill. App. 3d 654, 437 N.E.2d 910 (1st Dist. 1982), *appeal granted*, 91 Ill. 2d 19 (1982).

30. 73 Ill. 2d 160, 383 N.E.2d 919 (1978).

31. ILL. REV. STAT. ch. 111 ½, § 77 (1981). The Public Utility Act provides in pertinent part: In case any public utility shall do, cause to be done or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or thing required to be done either by any provisions of this Act or any rule, regulation, order or decision of the Commission, issued under authority of this Act, the public utility shall be liable to the persons or corporations affected thereby for all loss, damages or injury caused thereby or resulting therefrom, and if the court shall find that the act or omission was wilful, the court may in addition to the actual damages, award damages for the sake of example and by the way of punishment. . . .

Id.

to the plaintiff before he dies, survive his death.³² The court expressly stated that the "Survival Act itself neither authorizes nor prohibits punitive damages."³³ In making this statement, the *National Bank* court could be interpreted as designating the Survival Act a vehicle for all personal injury causes of action which survive the death of the injured party—including a cause of action for punitive damages in situations where the injured party would have been entitled to punitive damages had he lived.

The *National Bank* court determined that the *Mattyasovszky* decision did not stand for the broad proposition that punitive damages are unavailable when the injury results in death.³⁴ Rather, the court interpreted the *Mattyasovszky* decision as holding only that punitive damages were improper when the party whose conduct primarily was responsible for the injury has been dismissed from the action.³⁵ In the *National Bank* case, however, the responsible parties had not been dismissed from the action. The *National Bank* court further distinguished *Mattyasovszky* as a case involving a common law action for punitive damages,³⁶ whereas *National Bank* involved a statute which expressly authorized punitive damage awards.³⁷ This distinction between common law and statutory law left unclear whether the court was limiting its holding to statutory causes of action for punitive damages brought by representatives of the decedent under the Survival Act. Moreover, this distinction contradicts the broad statement made by the court that the Survival Act neither authorizes nor prohibits punitive damages. These ambiguities were resolved in *Froud v. Celotex Corp.*³⁸

32. 73 Ill. 2d at 172, 383 N.E.2d at 923. In *National Bank*, the decedent was injured when the defendant's train hit the decedent's car as it crossed the railroad tracks. The decedent died seven days later. The plaintiff, as administrator of the decedent's estate, charged the defendant with failure to keep its right-of-way clear of obstructions, and sought punitive damages under the Public Utilities Act. *Id.* at 165-66, 383 N.E.2d at 920-21.

33. *Id.* at 174, 383 N.E.2d at 924.

34. *Id.*

35. *Id.* *Mattyasovszky* involved a boy who was run over and killed by a bus. The claim against the bus driver was dismissed by the plaintiff prior to the case going to jury. Thus, the only defendant was the bus company, based on vicarious liability. 61 Ill. 2d at 32, 37, 330 N.E.2d at 510, 512.

36. 73 Ill. 2d at 173-74, 383 N.E.2d at 924. The *Mattyasovszky* court did not state why punitive damages in a common law action are not recoverable under the Survival Act, other than by explaining that the Act "has never been thought to authorize the award of punitive damages." 61 Ill. 2d at 33, 330 N.E.2d at 510. That case did not address the question of whether the Survival Act would permit recovery where a statute specifically authorized punitive damage awards.

37. 73 Ill. 2d at 173-74, 383 N.E.2d at 924. The *National Bank* court stated that to deny punitive damages when the statute expressly authorized their recovery would pervert the statute's intention. *Id.* at 174, 383 N.E.2d at 924. The court, however, did not state why a case involving statutory authorization of punitive damages should be distinguished from a case where the defendant's conduct could justify punitive damages under the common law. Justice Ryan, dissenting in *National Bank*, noted that nothing in the Survival Act allowed punitive damages recovery in a statutory action but not in a common law action. *Id.* at 178, 383 N.E.2d at 926 (Ryan, J., dissenting).

38. 107 Ill. App. 3d 654, 437 N.E.2d 910 (1st Dist. 1982), *appeal granted*, 91 Ill. 2d 569 (1982).

THE FROUD DECISION

The *Froud* case involved common law actions for personal injuries and punitive damages brought pursuant to the Survival Act. Because the actions were based on the common law rather than on a statute, the *Froud* court might have been expected to follow the *Mattyasovszky* decision and hold that punitive damages were not recoverable. Instead, the appellate court in *Froud* considered the *National Bank* decision to be "binding precedent" for the proposition that both common law and statutory actions for punitive damages survive the death of injured persons.³⁹ The *Froud* court noted that there was no logical basis for distinguishing between statutory and common law actions for punitive damages; the goal of punitive damages is identical in both instances.⁴⁰ The *Froud* court was persuaded that the *National Bank* holding was based on an interpretation of the Survival Act as a neutral vehicle which neither authorized nor prohibited punitive damages.⁴¹ Thus, the court concluded that although *National Bank* had distinguished statutory from common law, its holding was not limited to statutory actions for punitive damages.⁴² As a result, if the decedent could have recovered punitive damages, either by common law principles or by statute, the *Froud* decision permits the decedent's survivor to recover those same punitive damages.⁴³

The significance of the *Froud* decision is magnified because *Froud* involved a mass tort situation. The defendant asbestos manufacturers and sellers, in their consolidated brief to the appellate court, maintained that punitive damages in mass tort situations would violate public policy because of the possibility that several plaintiffs recovering substantial punitive damage awards could bankrupt even the wealthiest company.⁴⁴ The *Froud* court rejected this argument, stating that relieving companies of their liability for punitive damages because they injured a large number of people would encourage wrongdoers to continue their misconduct until it reached mass tort proportions.⁴⁵ The court, however, did recognize that some judicial protection might be necessary to prevent the "execution" of defendants in mass

39. *Id.* at 658, 437 N.E.2d at 913.

40. *Id.* The goal of punitive damages was stated to be "to promote public safety by punishing outrageous misconduct." *Id.*

41. *Id.*

42. *Id.* The *Froud* court rejected the common law/statutory distinction used by the *National Bank* court to distinguish *Mattyasovszky*. *Id.* For a discussion of this distinction, see *supra* note 36. If the *Froud* interpretation is adopted, *Mattyasovszky* would either be overruled or limited to cases where the person responsible for the injury is not a party to the suit.

43. This interpretation of the *National Bank* decision was adopted in another recent Illinois appellate court decision, *Howe v. Clark Equip. Co.*, 104 Ill. App. 3d 45, 432 N.E.2d 621 (4th Dist. 1982). The *Howe* decision also maintains the dichotomy between the Survival Act and the Wrongful Death Act as to punitive damages recovery. Thus, Illinois still does not allow recovery of punitive damages in an action brought under the Wrongful Death Act.

44. 107 Ill. App. 3d at 658, 437 N.E.2d at 913. The court noted the Dalkon Shield IUD litigation as an example of the possibility of bankrupting the defendant (\$2.3 billion worth of punitive damage claims, but net worth of only \$280,394,000). *Id.* at 659, 437 N.E.2d at 913.

45. *Id.* at 658, 437 N.E.2d at 913.

tort cases caused by excessive punitive damage awards.⁴⁶ The court noted the recent Dalkon Shield IUD litigation in California,⁴⁷ and its approach of creating a class action for the question of punitive damages only, but would not express an opinion on the merits of this approach.⁴⁸

The *Froud* court's decision to permit survival of punitive damage claims is a reform long overdue in Illinois civil litigation. Previously, when punitive damage claims were not held to survive the death of the injured party, the old adage that it is cheaper to kill than to injure applied in Illinois.⁴⁹ Moreover, there has never been any basis given for the argument that the Survival Act prohibits punitive damages, other than the fact that courts theretofore had not awarded punitive damages in survival actions. Accordingly, the *Froud* decision should be upheld. In so doing, however, it will be necessary for the Illinois Supreme Court to consider means to control punitive damage awards in mass tort cases, so that defendants will not be "executed" by excessive damages awards. A review of the concept of punitive damages is necessary before considering means for their control.

THE CONCEPT OF PUNITIVE DAMAGES

Punitive damages serve several functions in products liability law. The primary functions are to punish the defendant manufacturer for marketing a highly unsafe product and to deter the manufacturer from engaging in similar conduct in the future.⁵⁰ Punitive damages are believed to be the best means of achieving the goals of punishment and deterrence because they

46. *Id.* at 659, 437 N.E.2d at 914. For a discussion of possible solutions to this problem, see *infra* notes 88-127 and accompanying text.

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

48. 107 Ill. App. 3d at 659, 437 N.E.2d at 914. For a discussion of the Dalkon Shield litigation, and of class actions in general, see *infra* notes 105-11 and accompanying text.

49. 107 Ill. App. 3d at 657, 437 N.E.2d at 912.

50. In *Beaver v. Country Mut. Ins. Co.*, 95 Ill. App. 3d 1122, 420 N.E.2d 1058 (5th Dist. 1981), the court stated that punishment and deterrence are the only recognized purposes of punitive damages in Illinois, as well as in most jurisdictions. *Id.* at 1123, 420 N.E.2d at 1059 (citing ILLINOIS PATTERN JURY INSTRUCTIONS CIVIL, No. 35.01 (2d ed. 1971) and *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 187-88, 384 N.E.2d 353, 360 (1978)). The *Beaver* court rejected the theory that punitive damages function as additional compensation to plaintiffs. *Id.*; see *infra* note 54 and accompanying text. In *Moore v. Remington Arms Co.*, 100 Ill. App. 3d 1102, 427 N.E.2d 608 (4th Dist. 1981), the court held that the goals of punitive damages in products liability cases are the same, punishment and deterrence, but the focus is on deterring manufacturer misconduct by making the conduct unprofitable to an unpredictable degree. *Id.* at 1113, 427 N.E.2d at 616. For a general discussion of the functions of punitive damages, see J. GHIARDI & J. KIRCHNER, PUNITIVE DAMAGES, Table 4.1 (1981) [hereinafter cited as GHIARDI & KIRCHNER]; Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 647-50 (1980) [hereinafter cited as Mallor & Roberts]; Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1277-99 (1976) [hereinafter cited as Owen]; Robinson & Kane, *Punitive Damages in Product Liability Cases*, 6 PEPPERDINE L. REV. 139, 142-43 (1978) [hereinafter cited as Robinson & Kane]; Note, *Mass Liability and Punitive Damages Overkill*, 30 HASTINGS L.J. 1797 *passim* (1979) [hereinafter cited as Note, *Mass Liability*].

remove the incentive which caused the manufacturer to engage in the misconduct: additional profits to be made by marketing the product in its unsafe condition.⁵¹ Another function attributed to punitive damages is that the availability of such damages will induce plaintiffs to bring suits, and thereby, aid in the enforcement of the law.⁵² The premise of this argument is that without the availability of punitive damages, the costs of litigation will deter legitimate plaintiffs from bringing suit against a large corporate entity.⁵³ Punitive damages, however, would further compensate plaintiffs whose actual damages exceed those recoverable by law or whose compensatory recovery is substantially reduced by attorney fees.⁵⁴ Thus, if the potential plaintiff knows that he has a good chance of recovering punitive damages, he may be more willing to file an action.

To justify an award of punitive damages, the defendant manufacturer must be shown to have engaged in some sort of "reckless disregard" for the public's safety or "flagrant misconduct."⁵⁵ Examples of such misconduct include: falsifying test data,⁵⁶ advertising misrepresentations as to the product's safety,⁵⁷ violating compulsory safety standards,⁵⁸ demonstrating a

51. See Robinson & Kane, *supra* note 50, at 140. Other authors, while not recognizing punitive damages as the best means, have found them to be an important means of achieving deterrence because they attack the profit incentive. See Mallor & Roberts, *supra* note 50, at 649; Owen, *supra* note 50, at 1285-86; Note, *Mass Liability*, *supra* note 50, at 1802.

52. See Mallor & Roberts, *supra* note 50, at 649-50; Owen, *supra* note 50, at 1278; Robinson & Kane, *supra* note 50, at 142.

53. See Mallor & Roberts, *supra* note 50, at 649-50; Owen, *supra* note 50, at 1287-88; Robinson & Kane, *supra* note 50, at 142-43.

54. See, e.g., Mallor & Roberts, *supra* note 50, at 643 (recognizing a compensatory function of punitive damages). Four states, Connecticut, Georgia, Michigan and New Hampshire, have explicitly treated punitive damages as additional compensation that a plaintiff may recover. See *Collens v. New Canaan Water Co.*, 155 Conn. 477, 234 A.2d 825 (1967); *Westview Cemetery, Inc. v. Blanchard*, 234 Ga. 540, 216 S.E.2d 776 (1975); *Johnson v. Morris*, 158 Ga. 403, 123 S.E. 707 (1924); *McFadden v. Tate*, 350 Mich. 84, 85 N.W.2d 181 (1957); *Wise v. Daniel*, 221 Mich. 229, 190 N.W. 746 (1922); *Vratsenes v. N.H. Auto, Inc.*, 112 N.H. 71, 289 A.2d 666 (1972); *Fay v. Parker*, 53 N.H. 342 (1872); see also GHIARDI & KIRCHNER, *supra* note 50, at §§ 4.02-4.06.

55. The phrase "flagrant misconduct" has been adopted by the Fourth District of the Illinois Appellate Court as the standard for recovery of punitive damages in products liability suits. *Moore v. Remington Arms Co.*, 100 Ill. App. 3d 1102, 1115, 427 N.E.2d 608, 617 (4th Dist. 1981). For a discussion of the "flagrant misconduct" standard, see *infra* notes 90-102 and accompanying text. The "reckless disregard" standard has been adopted by the Products Liability Act which is pending before the United States Senate. S. 2631, 97th Cong., 2d Sess. (1982). For a jurisdictional summary of the various types of conduct justifying punitive damages, see L. FRUMER & M. FRIEDMAN, 3 PRODUCTS LIABILITY § 36A (1982); GHIARDI & KIRCHNER, *supra* note 50, at § 5.01.

56. See, e.g., *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967) (test data submitted to FDA falsified).

57. See, e.g., *d'Hedouville v. Pioneer Hotel Co.*, 552 F.2d 886 (9th Cir. 1977) (carpet manufacturer misrepresented fiber as nonflammable).

58. See, e.g., *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967) (violation of FDA requirements).

callous attitude toward the potential harm,⁵⁹ and utilizing inadequate testing or manufacturing procedures.⁶⁰ Additionally, to prove the required "flagrancy," it must be shown that the manufacturer was aware of, or indifferent to, an unnecessary risk of injury and refused to reduce the danger to an acceptable level.⁶¹ Juries can award punitive damages as a means of communicating their unwillingness to allow companies to continue extraordinarily wrongful business practices. Under these circumstances, punitive damages have been deemed desirable to exemplify the social outrage aimed at the manufacturers. Consequently, the concept of punitive damages can serve a valuable function in products liability/mass tort situations.

Opponents of punitive damages, however, direct their arguments not to the function of punitive damages, but to the lack of controls over awards. The most oft-cited attack on punitive damages in products liability cases is found in *Roginsky v. Richardson-Merrell, Inc.*⁶² Judge Friendly, writing for the majority, listed three factors which preclude achievement of the objectives of punitive damages in products cases: (1) the questionable fairness of punishing innocent shareholders for conduct in which they took no part; (2) the probability that the manufacturers have insured themselves against punitive damages; and (3) the difficulties in measuring and controlling the amount of the punitive damage awards.⁶³

In the years following the *Roginsky* decision, these factors have been criticized as either irrelevant or non-prohibitive.⁶⁴ First, it has been argued that the profits resulting from the sale of excessively dangerous products are "excessive profits."⁶⁵ Under this analysis, punitive damages amount to only a recoupment of an unjust enrichment of the manufacturer corporation and its shareholders. Therefore, there is no justification for viewing shareholders as innocent victims of unscrupulous corporate management.⁶⁶

59. See, e.g., *Grimshaw v. Ford Motor Co.*, No. 19-77-61, slip op. (Super. Ct., Orange County, Cal., Feb. 7, 1978), *aff'd as amended*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981) (callous attitude toward potential danger as represented in a cost-benefit analysis memorandum).

60. See, e.g., *Moore v. Jewel Tea Co.*, 116 Ill. App. 2d 109, 253 N.E.2d 636 (1st Dist. 1969), *aff'd*, 46 Ill. 2d 288, 263 N.E.2d 103 (1970) (failure to test can cap and seams for ability to withstand internal chemical pressure).

61. See *Owen*, *supra* note 50, at 1362.

62. 378 F.2d 832 (2d Cir. 1967).

63. *Id.* at 838-50.

64. See *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 289-98, 294 N.W.2d 437, 453-57; see also *Owen*, *supra* note 50, at 1299-1325 (detailed critique of *Roginsky*, concluding that the benefits resulting from punitive damage awards greatly outweigh such "occasional harms"); *Robinson & Kane*, *supra* note 50, at 141-44 (concerns expressed in *Roginsky* are outweighed by the benefits of imposing punitive damages in products liability cases).

65. *Owen*, *supra* note 50, at 1304. Such profits are excessive because they represent money which should have been put into the manufacture or marketing of the products in order to make them more safe.

66. See *Pease v. Beech Aircraft Corp.*, 38 Cal. App. 3d 450, 466, 113 Cal. Rptr. 416, 427 (1974) ("No sufficient reason appears why shareholders should be seen as captive innocent hostages to the inhuman management of a corporate juggernaut"); *Owen*, *supra* note 50, at

Second, unlike many states, Illinois does not allow insurance coverage for punitive damages.⁶⁷ In *Beaver v. Country Mutual Insurance Co.*,⁶⁸ it was held that public policy prohibits insurance against liability for punitive damages arising out of one's misconduct.⁶⁹ Thus, Judge Friendly's argument that insurance coverage would preclude the achievement of the goals of punitive damages is inapplicable in Illinois.

Finally, several approaches for measuring punitive damage awards have been suggested,⁷⁰ with some elements common to all. Those jurisdictions which recognize an inherently compensatory nature to punitive damages may

1304 (shareholders should not be viewed as innocent insofar as punitive damages are concerned because punitive damages do not assign blame to shareholders personally, but rather only "deplete the corporate treasury," and also because it is shareholders who reap the profits of marketing excessively dangerous products); Robinson & Kane, *supra* note 50, at 143 ("Shareholders of errant corporations are thus hardly more 'innocent' than the absentee slaveholder who hires an overseer to drive his slaves and to forward resulting profits, but who claims 'innocence' because he has not himself wielded the whip.").

67. Nineteen states allow insurance coverage against punitive damage judgments: Arkansas, Arizona, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maryland, Minnesota, Mississippi, New Mexico, Oregon, Tennessee, Texas, Vermont, Virginia, West Virginia, and Wisconsin. Nine states prohibit such coverage as being against public policy: California, Colorado, Connecticut, Illinois, Kansas, New Jersey, New York, Oklahoma, and Pennsylvania. Florida and Missouri have case law both allowing and prohibiting insurance coverage against punitive damages. GHIARDI & KIRCHNER, *supra* note 50, at §§ 7.29-7.30; see also Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 71 (1982) (the majority of states allow insurance coverage of punitive damages).

68. 95 Ill. App. 3d 1122, 420 N.E.2d 1058 (5th Dist. 1981). *Beaver* involved a garnishment action by the plaintiff against his insurer to recover the amount of a punitive damages verdict levied against him. The court held that punitive damages may not be insured in Illinois because the function and nature of punitive damages prohibits insurance against them. *Id.* at 1124, 420 N.E.2d at 1060. The *Beaver* court stated that its holding did not affect the rule established by *Scott v. Instant Parking, Inc.*, 105 Ill. App. 2d 133, 245 N.E.2d 124 (1st Dist. 1969), that an employer may insure himself against vicarious liability for punitive damages assessed against him by virtue of an employee's misconduct. *Beaver*, 95 Ill. App. 3d at 1125, 420 N.E.2d at 1061. The court reasoned that this type of insurance did not violate public policy because the employer is not the one who committed the wrongful act, and thus, is not the one against whom punishment should be levied. *Id.*

69. *Id.* at 1125, 420 N.E.2d at 1060. The *Beaver* court found this decision to be consistent with the goals of punitive damages in Illinois: punishment and deterrence. *Id.*; see *infra* notes 49 & 67.

70. See Owen, *supra* note 50, at 1315-18 (factors to be considered in measuring punitive damages include: costs of litigation to plaintiff, effects of particular award amounts on the related goals of deterrence and law enforcement, specific evidence that the defendant manufacturer might repeat the misconduct, and the punishment function as determined by the wealth of the particular defendant); Mallor & Roberts, *supra* note 50, at 666-69 (suggested guidelines include the severity of harm which has either actually occurred or is likely to occur, degree of reprehensibility of the defendant's conduct, profitability of the conduct, financial position of the defendant, amount of compensatory damages assessed, costs of litigation, potential criminal sanctions and other civil actions pending against the defendant based on the same conduct); Robinson & Kane, *supra* note 50, at 145-46 (considerations in measuring punitive damages include wealth of the defendant, ease with which the defendant may pass the cost along to others, extent to which the conduct in question had a business motive, degree of outrageousness of the defendant's conduct, and the defendant's amenability to reformation).

prefer a method which designates reimbursement of the plaintiff's litigation costs as the minimum amount recoverable.⁷¹ The "reasonable relationship" test also may be utilized. This test holds that punitive damages must bear a reasonable relation to the plaintiff's actual damages.⁷² The "reasonable relationship" test, however, has been severely criticized as being artificial and meaningless, and as possibly undercutting the deterrent effect of punitive damages.⁷³ Although the measurement of punitive damages poses the greatest problem to their assessment, several commentators feel that it is not insurmountable.⁷⁴

Another criticism of punitive damages is that although they are a part of the civil system, they are penal in nature. Opponents of punitive damages argue that the judge in a civil trial does not have the safeguards and standards followed by the sentencing judge in criminal actions, such as legislatively determined minimum and maximum penalties and sentencing hearings in which evidence excluded from the trial is available to the judge.⁷⁵ Furthermore, several safeguards available to the criminal defendant are not available to the civil defendant in a products liability case, including the protection against double jeopardy, the higher standard of proof, and the requirement of a unanimous verdict.⁷⁶ Nevertheless, there are certain criminal safeguards which are available to the punitive damages defendant, either by law or by practice. Criminal safeguards generally available to defendants in punitive damages cases include de facto confrontation of adverse witnesses and the right to trial by jury.⁷⁷ In any event, it is questionable whether criminal

71. See Owen, *supra* note 50, at 1315-16.

72. Mallor & Roberts, *supra* note 50, at 666-67; see, e.g., *Sturm, Ruger & Co. v. Day*, 594 P.2d 38 (Alaska 1979) (punitive damages should be reasonably related to the plaintiff's actual damages so the defendant is not punished for all wrongs committed against all purchasers and users of its product), *modified*, 615 P.2d 621 (Alaska 1980); *Liodes v. Sahadi*, 19 Cal. 2d 278, 562 P.2d 316, 137 Cal. Rptr. 635 (1977) (a punitive damage award should have some reasonable relation to actual damages).

73. See Mallor & Roberts, *supra* note 50, at 666-67. For a summary of how various jurisdictions view the reasonable relationship test, see GHIARDI & KIRCHNER, *supra* note 50, at § 5.39. Other approaches to measuring punitive damages include the following concepts: the award should be of a sufficient sum to encourage plaintiffs to sue; the award should be in relation to the magnitude of risk to which the general public was exposed by the defendant's misconduct, rather than to the extent of harm suffered by the particular plaintiff, in order to attack the profit incentive that led to the manufacturer's misconduct; the award should correspond to the manufacturer's degree of awareness of the seriousness of the risk of injury from the product; and the award should be tailored to the wealth of the defendant to optimize the goals of punishment and deterrence. See Owen, *supra* note 50, at 1316-18, 1316 n.286.

74. For a detailed discussion of approaches to measurement and control of punitive damages, see *infra* notes 101-28 and accompanying text.

75. See Mallor & Roberts, *supra* note 50, at 663.

76. See Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408, 413-18, 424-26 (1967) [hereinafter cited as Comment, *Criminal Safeguards*].

77. *Id.* at 412, 418-24. The de facto confrontation of adverse witnesses arises because plaintiffs will usually testify, giving the defendant the opportunity to cross-examine at trial and take depositions during discovery. *Id.*

safeguards are necessary in products cases, since no loss of liberty is involved, or even desirable in light of the inherent flexibility of tort law.

The primary criticism of punitive damages in products liability/mass tort situations is the fear of punitive damages "overkill" against the manufacturer.⁷⁸ Overkill reflects the fear that a manufacturer involved in a mass tort situation may have so many punitive damage judgments entered against it that the company will be forced into bankruptcy.⁷⁹ A review of the litigation surrounding the drug MER/29,⁸⁰ the only products liability/mass tort situation to have been fully litigated, suggests that this fear of overkill may be unfounded. Only eleven of approximately one thousand MER/29 cases went to a jury; of these, four verdicts were for the defendant and seven for the plaintiff.⁸¹ Only three juries awarded punitive damages; one of the awards was reversed on appeal, and the other two were upheld as reduced on remittitur by the trial judge.⁸² Thus, the total amount of punitive damages levied against Richardson-Merrell, the manufacturer of MER/29, was one million dollars. This figure was hardly large enough to bankrupt Richardson-Merrell, which was forced to pay out only seven million dollars of its own reserve of forty-two million dollars from surplus earnings for settlements and judgments.⁸³

Although the MER/29 experience may not be indicative of current mass

78. The following have all noted the overkill argument: Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1967); *In re* Northern District of California "Dalkon Shield" IUD Products Liability Litigation, 526 F. Supp. 887, 899 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982); Note, *Mass Liability*, *supra* note 50, at 1799. Professor Owen also discussed the overkill argument in his recent article, *Problems in Assessing Punitive Damages Against Manufacturers of Unsafe Products*, 49 U. CHI. L. REV. 1 (1982) [hereinafter cited as Owen 1982]. This article is a follow-up to his seminal work on punitive damages in products liability cases. See Owen, *supra* note 50. Both articles are very comprehensive and are recommended reading on the issue of punitive damages.

79. Mallor & Roberts, *supra* note 50, at 663; Owen, *supra* note 50, at 1325; Owen 1982, *supra* note 78, at 6; Note, *Mass Liability*, *supra* note 50, at 1799.

80. For a comprehensive review of the MER/29 litigation, see Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CALIF. L. REV. 116 (1968) [hereinafter cited as Rheingold]. MER/29 was a prescription drug intended to reduce cholesterol levels which was marketed by Richardson-Merrell, Inc., and which caused cataracts. Richardson-Merrell apparently knew of this side effect but did not warn physicians or consumers, and withheld this knowledge from the Food and Drug Administration.

81. *Id.* at 132-33.

82. Roginsky v. Richardson-Merrell, Inc., 254 F. Supp. 430 (S.D.N.Y. 1966) (jury punitive award of \$100,000), *aff'd in part, rev'd in part*, 378 F.2d 832 (2d Cir. 1967) (compensatory award affirmed, punitive award reversed); Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967) (remittitur of \$500,000 jury punitive award to \$250,000 affirmed); Ostopowitz v. Wm. S. Merrell Co., N.Y.L.J., Jan. 11, 1967, at 21, col. 3 (Sup. Ct., Westchester County, N.Y. 1967) (remittitur of \$850,000 jury punitive award to \$100,000).

83. The seven million dollars was the amount which Richardson-Merrell paid out after the depletion of its fifteen million dollars in liability insurance. Thus, although Richardson-Merrell had to pay only seven million dollars out of its own assets, the total amount of settlements and judgments against the corporation was twenty-two million dollars. Rheingold, *supra* note 80, at 137-41.

tort cases, especially since juries are awarding ever increasing amounts for punitive damages,⁸⁴ it seems to demonstrate that the possible bankruptcy of the defendant manufacturers is far from certain. Additionally, in many mass tort situations there are several defendants. Consequently, where apportionment among joint tortfeasors is permitted,⁸⁵ it is likely that each defendant will be liable for only a percentage of the amount awarded. No single company would take the full brunt of the punitive damages claims. Coupled with the fact that payment of a punitive damages judgment is ordinarily tax deductible to the defendant corporation,⁸⁶ the effect of such awards on the financial integrity of the manufacturer may not be as devastating as manufacturers suggest.⁸⁷

The above arguments illustrate that the difficulties with punitive damages in products liability/mass tort situations do not lie in their existence, but rather in their control. If controlled to prevent punitive damages overkill, such awards will be justified by their effectiveness in promoting product

84. See, e.g., *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981) (jury punitive award of \$127,000,000 remitted to \$3,500,000); *Palmer v. A.H. Robins Co.*, No. C60442 (Dist. Ct. Denver County, Colo., filed July 30, 1979) (jury punitive award of \$6,200,000); *Stambaugh v. International Harvester Co.*, 106 Ill. App. 3d 1, 435 N.E.2d 729 (5th Dist. 1982) (jury punitive award of \$15,000,000 remitted to \$7,500,000; further remitted to \$650,000 by appellate court, an amount equal to the compensatory damages award), *appeal granted*, 91 Ill. 2d 581 (1982); *Ford Motor Co. v. Nowak*, No. 23,608, slip op. (Dist. Ct. Matagorda County, Tex., May 29, 1980) (jury punitive award of \$4,000,000). For a discussion of the recent large punitive damage awards in products liability cases, see Owen 1982, *supra* note 78, at 2-6. One recent study has found that "[t]here were more punitive damage awards in 1980 and 1981 than in the entire history of the United States." Wheeler, *Symposium Discussion*, 56 S. CAL. L. REV. 155, 160 (1982) (data based on a Lexis search of punitive awards in products liability cases).

85. Courts are widely divided as to whether, in an action against joint tortfeasors, punitive damages may be apportioned among the defendants. California, Kentucky, Maryland, Minnesota, Missouri, Montana, Nevada, New Mexico, New York, North Dakota, Ohio, South Carolina, Tennessee, Texas, Virginia, and the federal courts allow apportionment of punitive damages based on the differing degrees of culpability. Georgia, Illinois, Oregon, Pennsylvania, Rhode Island, and Vermont do not allow apportionment of punitive damages. See generally Annot., 20 A.L.R.3d 666 (1968). Under the Illinois rule, if the evidence justifies damages against only some defendants, the plaintiff is not allowed to recover punitive damages from any of the defendants unless those liable are sued separately. *Pardridge v. Brady*, 7 Ill. App. 639 (1st Dist. 1881). This rule would help prevent overkill because it forces the plaintiff to bring separate actions to prove punitive damages against each defendant, something plaintiffs may not want to do if they have already recovered compensatory damages. The rule does not, however, preclude overkill if the evidence justifies punitive damages against each defendant.

86. See Owen 1982, *supra* note 78, at 20 n.92; Phillips, *The Tax Consequences of a Punitive Damages Award*, 31 HASTINGS L.J. 909 (1980). Phillips suggests that there may be a growing trend toward denying deductions of punitive damage awards based on the premise that such deductions violate public policy. *Id.* at 911.

87. See *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W.2d 437 (1980) (detailed evaluation of the bankruptcy argument). The *Wangen* court reviewed various studies on the effect of punitive damages in products liability cases on the financial integrity of defendant manufacturers, and found that "the data do not give credence to the manufacturer's dire predictions." *Id.* at 294, 294 N.W.2d at 455.

safety. Thus, while the Illinois Supreme Court should affirm the *Froud* decision, it also should address the question of how to control awards of punitive damages in the products liability/mass tort situation.

SUGGESTED APPROACHES FOR THE HANDLING OF PUNITIVE DAMAGE AWARDS
IN PRODUCTS LIABILITY/MASS TORT SITUATIONS

I. New Definition Approach

It has been suggested that punitive damages can be controlled best by utilizing a new, more specific definition of when they are appropriate in products cases.⁸⁸ The definition suggested by Professor David G. Owen is that "punitive damages may be assessed against the manufacturer of a product injuring the plaintiff if the injury is attributable to conduct that reflects the manufacturer's flagrant indifference to the public safety."⁸⁹ Owen contends that several characteristics of this definition differ from those of definitions currently used by courts. First, this standard does not require that the product be "defective."⁹⁰ The plaintiff seeking punitive damages must have been injured by the product, and must show a causal connection between the alleged marketing misconduct and the injury.⁹¹ The plaintiff does not, however, have to show that the product which caused the injury was defective in itself. According to Owen's definition, the "defect" is the manufacturer's misconduct in marketing the product, and thus, will be included in proving the "flagrant indifference."⁹² Second, Owen's use of the word *reflects* entails an objective standard focusing on the manufacturer's apparent attitude when the product was marketed, rather than the subjective standard of the

88. See Owen, *supra* note 50, at 1366. Owen argues that a new definitional standard to determine when punitive damages are appropriate is needed because the current standards are inadequate in the products liability context. He finds the "traditional punitive damages phraseology" (e.g., "wilful and wanton," "malice, oppression, or gross negligence"), originally designed for intentional tort cases, to be too limited and vague for products cases. Owen also finds fault with recent attempts to define when punitive damages are appropriate in the products liability area. He finds the phrase "*conscious* disregard of the public safety" too restrictive and too difficult to prove. On the other hand, he finds the phrase "*reckless* disregard of the public safety" too easily confused with "truly inadvertent conduct." He believes that a more precise definition is necessary to fairly determine when punitive damages are appropriate in products cases. *Id.* at 1364-66. In his 1982 article, Owen notes the rise of punitive damages judgments in products cases. While continuing to support the "flagrant indifference to the public safety" standard as being well suited to the "special circumstances of most products cases," he now encourages the use of the higher "clear and convincing" standard of proof. Owen 1982, *supra* note 78, at 21, 58-59. Owen concludes this article by stating that he "remain[s] convinced of the need to retain this tool of legal control [punitive damages] over corporate abuses. . . ." *Id.* at 59.

89. Owen, *supra* note 50, 1367. Professor Owen's article provides a detailed comparison between this definition and other definitions currently employed by courts. *Id.* at 1367-69.

90. *Id.* at 1367.

91. *Id.* Marketing misconduct refers to the manufacturer's choice to market an excessively dangerous product.

92. *Id.*

manufacturer's actual "state of mind."⁹³ Furthermore, use of the word *flagrant* does not require a conscious knowledge; awareness of the risks is imputed to the manufacturer when its conduct is obviously and seriously wrong, thereby adding to the objectivity of the definition.⁹⁴ To date, two courts have adopted the flagrant indifference definition.⁹⁵

Professor Owen contends that by utilizing this more specific definition, the number of punitive damage awards will be limited in mass tort situations because a causal link must be proven and "flagrant" misconduct must be shown.⁹⁶ The drawback of this approach, however, is that it does nothing to limit successive punitive damage awards in mass tort situations. Increasingly, plaintiffs in these situations are forming groups to pool information and evidence.⁹⁷ Consequently, as more plaintiffs gain access to the evidence necessary to meet this standard, the possibility increases that subsequent plaintiffs will not be able to recover punitive damages because of the depletion of corporate funds. Some commentators argue that this possibility is justified by the extra amount of time, work, and creativity the initial plaintiffs must devote in order to recover their verdicts.⁹⁸ This view results in one or both of two problems, depending on one's outlook. Subsequent plaintiffs who have legitimate claims, but were unable to obtain judgments as quickly as initial plaintiffs, may be deprived not only of punitive damages, but of compensatory damages as well because of depletion of the defendant's funds. On the other hand, inadequate punishment of defendants may result because judges or juries in subsequent cases will decide that the defendant has been punished enough and, therefore, will refuse to award punitive damages to subsequent plaintiffs or will reduce such awards on remittitur.⁹⁹

II. Limiting the Amount Recoverable for Punitive Damages

A second approach to controlling punitive damage awards is to set a limit on the amount that any single plaintiff may recover. A proposed House Resolution¹⁰⁰ adopts this approach by limiting an individual plaintiff's recovery to the lesser of twice the plaintiff's compensatory damages, or one

93. *Id.* at 1368.

94. *Id.* at 1369. The use of *flagrant*, however, has been criticized as being equally as broad a term as those currently employed. Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 51 (1982).

95. *Moore v. Remington Arms Co.*, 100 Ill. App. 3d 1102, 427 N.E.2d 608 (4th Dist. 1981); *Leichtamer v. A.M.C.*, 67 Ohio St. 2d 456, 424 N.E.2d 568 (1981).

96. See Owen, *supra* note 50, at 1368-69.

97. For example, there is a special litigation reporter for asbestos cases: ASBESTOS LITIG. REP. (Andrews Publication). The type of plaintiffs' group organized during the MER/29 litigation is discussed in Rheingold, *supra* note 80, at 120-21.

98. See Owen, *supra* note 50, at 1325; Robinson & Kane, *supra* note 50, at 144; Note, *Mass Liability*, *supra* note 50, at 1811-12. Subsequent plaintiffs, on the other hand, have the opportunity to gain information from earlier litigation.

99. See Note, *Mass Liability*, *supra* note 50, at 1801 & n.24.

100. H.R. 5214, 97th Cong., 1st Sess. (1981).

million dollars. A related approach establishes a ceiling on the total amount of punitive damages recoverable against the manufacturer in actions arising out of injuries from the same product. For example, the limit might be set at the lesser of five million dollars or five percent of the defendant's net worth; once the ceiling is reached, punitive damages would be limited to the plaintiff's attorney's fees and other costs of litigation, or would be totally prohibited.¹⁰¹

The advantage of setting arbitrary limits on the amounts recoverable as punitive damages is that presumably no defendant will go bankrupt as a result of misconduct in marketing one product. The disadvantages of such an approach, however, are manifold. First, in jurisdictions where apportionment is not allowed, the setting of a single limit would be difficult in mass tort situations in which there are many defendant manufacturers.¹⁰² Second, the established limit might not be high enough for some manufacturers to feel the impact of the damages; thus, the punishment goal might not be achieved.¹⁰³ Third, a set limit would defeat the deterrence goal as well because companies would know just how much could be awarded against them and could adjust their pricing schemes to reflect this knowledge. Finally, such an approach would be very rigid; it would lack the flexibility necessary to determine the appropriate punishment of exceedingly "flagrant" misconduct.

III. Procedural Approaches

Several approaches have been offered which are intended to modify the procedure of awarding punitive damages. Perhaps the best known approach is to create a class exclusively for assessing punitive damages. According to the federal district court in California¹⁰⁴ that adopted this approach, plaintiffs would try their compensatory damages claims separately. Those plaintiffs who successfully prove an injury caused by the manufacturer's grievous misconduct would then be joined in a class action to determine whether punitive damages are appropriate, and if so, in what amount. This proposal appears to be logical, but, as the Court of Appeals for the Ninth Circuit discovered,¹⁰⁵ in reality it is laden with problems. In products

101. See Owen 1982, *supra* note 78, at 49 n.227.

102. If the limit was set for the group of defendants as a whole, inadequate punishment of the manufacturers might result. If, on the other hand, the limit was set for each individual defendant, a method would be required for dividing the amount awarded and allocating a percentage to each defendant.

103. See Robinson & Kane, *supra* note 50, at 145; Note, *Mass Liability*, *supra* note 50, at 1804. Ideally, the computation of punitive damages should include a consideration of the financial position of the defendant so that deterrence is achieved. Owen, *supra* note 50, at 1318-19; Robinson & Kane, *supra* note 50, at 145; Note, *Mass Liability*, *supra* note 50, at 1804. Single limits are not flexible enough to meet this goal.

104. See *In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation*, 526 F. Supp. 887, 897-98 (N.D. Cal. 1981).

105. See *In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation*, 693 F.2d 847 (9th Cir. 1982) (class decertified because of problems with commonality

liability/mass tort situations, unique issues often outnumber common issues. For example, often there is no one set of operative facts establishing liability and no single proximate cause.¹⁰⁶ In addition, issues such as adequacy of warnings, or fraud and conspiracy, may be as different as "individual case histories."¹⁰⁷

There is also a problem with plaintiffs who either opt out or are forced out of the class for jurisdictional reasons: should these plaintiffs be allowed to recover punitive damages on their own, and if so, does that defeat the purpose of creating the class—to reduce the number of suits and awards? A related problem involves the settlement process. When a class is certified for the punitive damages issue, the settlement process slows¹⁰⁸ because plaintiffs are unable to release their punitive damage claims, and defendants are unwilling to pursue only compensatory damages settlements.¹⁰⁹

Another problem involves the determination of when the class would close. Many of the products in mass tort situations are on the market for several years, and the injuries caused by these products may not become evident until long after the product has been taken off the market.¹¹⁰ As the Ninth Circuit concluded, there are too many difficulties with the class action to adopt it as a means to control punitive damages.¹¹¹

Some procedural proposals focus on the roles of the judge and jury. One proposal would utilize a procedure similar to the criminal sentencing hearing. The jury would decide whether punitive damages should be awarded; then, the judge would hold a hearing to determine the amount to be awarded.¹¹² To facilitate his assessment, the judge would consider evidence outside the trial record such as whether previous punitive damage judgments have been levied against the company, the financial situation of the company, and the profits made from marketing the product in question. The

and typicality); see also *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982) (Kansas City Hyatt skywalk collapse); *Ryan v. Eli Lilly & Co.*, 84 F.R.D. 230 (D.S.C. 1979) (DES action); *Mink v. University of Chicago*, 460 F. Supp. 713 (N.D. Ill. 1978) (DES action); *Snyder v. Hooker Chems. & Plastics Corp.*, 104 Misc. 2d 735, 429 N.Y.S.2d 153 (1980) (Love Canal toxic waste action); *Rosenfeld v. A.H. Robins Co.*, 63 A.D.2d 11, 407 N.Y.S.2d 196 (1978) (Dalkon Shield action). Conditional certification was granted in two cases: *In re Agent Orange Products Liability Litigation*, 506 F. Supp. 762 (E.D.N.Y. 1980) (under F.R.C.P. 23(b)(3)); *Payton v. Abbott Labs*, 83 F.R.D. 382 (D. Mass. 1979) (DES action under F.R.C.P. 23(b)(3)).

106. See *In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation*, 693 F.2d at 853. This is due to the fact that products liability litigation involves many individual products used by many persons in different manners.

107. *Id.* at 854.

108. See *In re Federal Skywalk Cases*, 680 F.2d 1175, 1180 n.12 (8th Cir. 1982).

109. *Id.*

110. A good example of such a product is asbestos. It is still unknown how many future generations may be affected by exposure to asbestos products which have since been replaced by the market.

111. *In re Northern District of California, "Dalkon Shield" IUD Products Liability Litigation*, 693 F.2d 847, 852 (9th Cir. 1982).

112. *Mallor & Roberts*, *supra* note 50, at 665.

judge would issue written findings of fact supporting the amount awarded and these findings would be subject to judicial review.¹¹³

A similar proposal would leave both the determination of whether punitive damages should be awarded and the amount of any award with the jury, subject to the controls of the judge (e.g., remittitur).¹¹⁴ The jury in the first trial against the manufacturer would award whatever amount it considered proper.¹¹⁵ In subsequent trials, the jury would engage in the same process, but at this stage the judge would consider prior punitive damage awards against the manufacturer to determine whether the prior awards, *in toto*, are more or less than this particular jury would award.¹¹⁶ If the prior awards, in aggregate, are equal to, or greater than what this jury awarded, no punitive damages would be awarded. If the prior awards, in aggregate, are less, then the difference between them and the amount this jury awarded would be granted.¹¹⁷ Under this approach, the defendant's punitive damage liability would never exceed the amount thought proper by the harshest jury, nor would the defendant escape punishment. Both of the proposals dealing with the roles of the judge and jury are appealing insofar as they would minimize overkill, but neither completely eliminates the possibility that the manufacturer could be bankrupted, or that it would be punished inadequately. Furthermore, both proposals infringe on the functions and province of the jury by severely limiting its ability to award punitive damages. As a result, both proposals undermine one of the purposes of punitive damages: to show society's outrage at the defendant's conduct.¹¹⁸

IV. A Congressional Response

Senate bill 2631, which was recently introduced,¹¹⁹ is yet another attempt to develop a uniform product liability law.¹²⁰ Section 13 of the bill provides

113. *Id.* at 665-66.

114. Note, *Mass Liability*, *supra* note 50, at 1800-01.

115. *Id.*

116. *Id.* For a review of this approach, see GHIARDI & KIRCHNER, *supra* note 50, at § 5.46.

117. For example, in the first case against the defendant product manufacturer, the jury awards punitive damages of \$1,000,000. This award would stand. In the second case against the same defendant, the jury awards \$1,500,000 in punitive damages. The judge would remit the award to \$500,000 because this is the amount greater than the award in the first case. In the third case, the jury awards \$750,000 in punitive damages. The judge here would vacate the award because it is less than the amount awarded by the harshest jury and, thus, is deemed to be included in the harshest jury's award.

118. It should be noted that some critics of punitive damages believe that it is important to have the high level of control over the amount of punitive awards which is achieved by transferring that decision from the jury to the judge. See Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 55 (1982).

119. S. 2631, 97th Cong., 2d Sess. (1982) [hereinafter cited as S. 2631]. This bill is sponsored by Sen. Robert Kasten, Jr. (R. Wis.) and co-sponsored by several senators, including Sen. Charles Percy (R. Ill.).

120. This bill follows the Department of Commerce's Model Uniform Product Liability Act (1979) and H.R. 7921, 96th Cong., 2d Sess. (1980) (a Federal Uniform Product Liability Act).

for the recovery and control of punitive damages.¹²¹ A higher standard of proof is required to recover punitive damages under this bill than generally is required in civil cases. The bill requires that "reckless disregard of the manufacturer or product seller for the safety of product users, consumers, or persons who might be harmed by the product" be established "by clear and convincing evidence."¹²² This standard appears to fall somewhere between the civil standard of the "preponderance of the evidence" and the criminal standard of proof "beyond a reasonable doubt."¹²³ Senate bill 2631 states that a negligent choice among alternative product designs or warnings, when made in the ordinary course of business, does not constitute, by itself, reckless disregard.¹²⁴ The plaintiff must offer more than the manufacturer's cost-benefit analysis resulting in its choice to use the less safe method of production and marketing. Litigants and courts engaged in cases brought under this statute would face the difficult task of determining when the corporate choice leaves the realm of the "ordinary course of business," and enters the area of "reckless disregard."

Procedurally, Senate bill 2631 adopts the approach of splitting the punitive damage award functions between the judge and jury.¹²⁵ Under this approach, the jury would determine whether punitive damages should be awarded. In making this determination, it would consider the defendant's awareness of the likelihood of serious harm, the conduct of the defendant upon discovery that the product caused harm, the duration of any concealment of the harm by the defendant, and whether the plaintiff was contributorily negligent.¹²⁶ If the jury determined that punitive damages were appropriate, the judge would assess the amount of those damages. The judge would consider all the factors the jury had considered in making the award, plus the profitability of the misconduct to the defendant, and the total effect of any prior punishment imposed on the defendant for the same misconduct. As stated earlier, an approach which divides responsibility between judge and jury is appealing for its ability to minimize punitive damages overkill, but it would not completely eliminate the possibility of overkill,¹²⁷ nor would it guarantee that

121. S. 2631, *supra* note 119, at § 13(A)(1). This section provides:

Punitive damages may be awarded to any claimant who establishes by clear and convincing evidence that the harm suffered was the result of the reckless disregard of the manufacturer or product seller for the safety of product users, consumers, or persons who might be harmed by the product. Punitive damages may not be awarded in the absence of a compensatory award.

Id.

122. *Id.* at § 13(A)(2). This same standard of proof was incorporated into the Department of Commerce's Model Uniform Product Liability Act. 44 Fed. Reg. 62,714, 62,748 (1979).

123. This assumption is based on the definitions given by the Department of Commerce to the Model Uniform Product Liability Act. See Model Uniform Product Liability Act, § 102, 44 Fed. Reg. 62,714, 62,748 (1979).

124. S. 2631, *supra* note 119, at § 13(B).

125. *Id.* at § 13(B)(1).

126. *Id.* at § 13(B)(2).

127. *Id.* Overkill is still possible because the approach does not limit the amount of the final punitive damage award.

the defendant manufacturer or seller would be punished adequately.

CRIMINAL SANCTIONS—AN ALTERNATIVE TO PUNITIVE DAMAGE AWARDS

In recent years, it has been maintained that rather than award punitive damages in civil cases, criminal sanctions should be sought against manufacturers of unsafe products. This approach was taken recently in Indiana's highly publicized Ford Pinto trial,¹²⁸ and is the subject matter of a congressional bill.¹²⁹ Although criminal sanctions cannot punish the corporate defendant to the same monetary degree as punitive damages,¹³⁰ criminal sanctions might deter and punish in other ways. For example, there are intangible effects of a criminal conviction, such as stigma, damaged reputation, and intense media coverage which often fail to accompany punitive damage awards.¹³¹ If the amount of money and time spent by Ford in its defense in the Indiana criminal case is any indication, corporate defendants are going to take these intangible effects seriously.¹³² Whether corporate defendants

128. *Indiana v. Ford Motor Co.*, No. 5324, slip op. (Elkhart Superior Ct. Feb. 2, 1979). See generally L. STROBEL, *RECKLESS HOMICIDE* (1980) (complete account of the Ford Pinto criminal trial). The Ford Motor Company was indicted on three counts of reckless homicide as a result of the deaths of three persons in a Ford Pinto. The victims' Pinto was hit in a rear-end collision, causing the gas tank to rupture; this allowed gasoline to leak into the passenger compartment and resulted in an explosive fire. Evidence in the form of Ford Motor Company documents indicated that Ford knew of the likelihood of gas tank rupture but decided against investing more money to improve the Pinto design. Ford eventually was acquitted of all criminal charges.

129. H.R. 4973, 96th Cong., 1st Sess. (1979). Introduced by Rep. George Miller (D. Cal.), this bill would require corporate managers, officers, and directors to notify employees and appropriate federal agencies of hazards in a product, or in an industrial process. Failure to notify would carry a minimum sanction of \$50,000 in fines and two years in prison for individuals, and a minimum of \$100,000 in fines for a corporation. This bill is discussed in Bodine, *Prosecutors Undeterred by Pinto Acquittal; Defense Bar Says It's in the Driver's Seat Now*, Nat'l. L.J., Mar. 31, 1980, at 3, 17 [hereinafter cited as Bodine].

130. In the Ford Pinto criminal case, Ford faced a total criminal liability of \$35,000, if convicted on all three counts of reckless homicide. Compare this to Ford's liability in the *Grimshaw* civil case, in which Ford faced a punitive damage award of \$3,500,000 (after being remitted from the jury verdict of \$127,000,000 in punitive damages). *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981); see Mallor & Roberts, *supra* note 50, at 657-58. In Illinois, the maximum criminal fine for each count of involuntary manslaughter or reckless homicide is \$10,000. ILL. REV. STAT. ch. 38, § 1005-9-1 (1981).

131. The following articles note the intangible effects of criminal sanctions: Mallor & Roberts, *supra* note 50, at 639; Comment, *Corporate Homicide: The Stark Realities of Artificial Beings and Legal Fictions*, 8 PEPPERDINE L. REV. 367 (1981) [hereinafter cited as Comment, *Corporate Homicide*]; Comment, *Criminal Safeguards*, *supra* note 76, at 411; Note, *Corporate Homicide: A New Assault on Corporate Decision-making*, 54 NOTRE DAME LAW. 911 (1979) [hereinafter cited as Note, *A New Assault*]. See also Ball & Friedman, *The Use of Criminal Sanctions*, 17 STAN. L. REV. 197, 217 (1965) ("Businessmen abhor the idea of being branded a criminal . . . ; [thus] the very fact that a criminal statute has been enacted by the legislature is a powerful factor in the eyes of the potential actor, even where the actor disagrees with the purpose of the law").

132. Ford reportedly spent \$1,000,000 on its defense, compared to only \$40,000 spent by the prosecution. Tybor, *How Ford Won the Pinto Trial*, Nat'l. L.J., Mar. 24, 1980, 1, 12. The deterrent effect of these intangibles has been criticized, however, as being dependent on too many uncontrollable variables. These variables are factors external to the criminal pro-

will adjust their manufacturing and marketing decisions as a result of a potential criminal prosecution, or merely attempt to discover ways to keep such decisions from public view, remains to be seen.

There are several advantages to applying criminal sanctions to product liability cases. Unlike civil litigation costs and punitive damage awards, criminal fines and the costs of defending criminal prosecutions are not tax deductible.¹³³ This factor must be considered by a corporation when it engages in cost-benefit analyses to determine manufacturing and marketing choices because potential criminal sanctions represent an added cost. Thus, the deterrent effect of criminal sanctions is enhanced by making the idea of conduct which might lead to the imposition of criminal sanctions less appealing.

There are additional advantages to be gained from imposition of criminal sanctions that benefit both the manufacturer and the public. Since criminal fines are generally smaller than punitive damage awards,¹³⁴ the problem of overkill would be eliminated. Before the risk of punitive damages overkill could be eliminated, however, the general rule that punitive damages in civil suits are not precluded by prior criminal punishment must be abolished.¹³⁵ Another advantage is that the proceeds from a criminal fine do not go to an individual plaintiff as a windfall, but rather, go to the state.¹³⁶ The state might use proceeds received from the successful prosecution of product liability cases to promote product safety or consumer awareness of hazardous products.

The propriety of imposing criminal fines on public corporations has been criticized, as have punitive damages, as being unfair punishment of innocent shareholders lacking any adequate means of control over the corporation's decision-making process.¹³⁷ As noted earlier,¹³⁸ it has been questioned

ceedings, such as the amount of publicity, the accuracy of reporting, the public's knowledge of which company manufactures the defendant's products, and the elasticity of demand for the product involved. Wheeler, *Manufacturers: Wrong Targets for Threat of Criminal Sanctions?*, Nat'l. L.J., Dec. 22, 1980, 24, 26.

133. See Note, *The Tax Consequences of a Punitive Damages Award*, 31 HASTINGS L.J. 909 (1980). Judgments and litigation costs may not be deducted from taxable income only when they arise from a criminal conviction. *Id.* at 920. If the amount Ford spent to defend itself in the Pinto criminal case is an indication of what the average might be, these costs could be a strong deterrent in themselves.

134. For a discussion of Ford's potential criminal, as compared to civil, liability, see *supra* note 130.

135. Comment, *Criminal Safeguards*, *supra* note 76, at 414-15. Only three jurisdictions bar punitive damage awards when the defendant also can be held liable for criminal sanctions: District of Columbia (*Huber v. Teuber*, 10 D.C. (3 MacArth.) 484 (1879)), Indiana (*Taber v. Hutson*, 5 Ind. 332 (1854)), and New Hampshire (*Fay v. Parker*, 53 N.H. 342 (1872)). Illinois does not bar punitive damages when a defendant faces potential criminal liability. *Brannon v. Silvernail*, 81 Ill. 434 (1876).

136. In Illinois, the State's Attorney's Office collects all criminal fines and transfers them to the county treasurer for use in the county's general corporate fund. ILL. REV. STAT. ch. 53, § 18a (1981).

137. See Note, *A New Assault*, *supra* note 131, at 921.

138. See *supra* note 66 and accompanying text.

whether shareholders are really "innocent," insofar as they impliedly consent to any misconduct by seeking a return on their investment.¹³⁹ Furthermore, the impact of criminal liability on shareholders may be minimized in two ways: shareholder losses are limited to the amount of the individual's investment, which the shareholder must be considered to have risked willingly, and shareholders may not feel any loss if the state chooses to prosecute the directors with threat of their imprisonment, rather than with a fine against the corporation.¹⁴⁰

It should be noted that there are conceptual and semantic problems involved in indicting corporations.¹⁴¹ Many statutes define the perpetrator of a homicide as a "person." This definition creates few problems, as many jurisdictions classify a corporation as a "person." A homicide victim, however, is often defined as "another human being"; it is this definition which creates semantic problems in prosecuting a corporation for homicide. It has been argued that by defining the victim as "another human being," the legislature implicitly has required that the perpetrator must also be a "human being," which is different from a "person."¹⁴² The counter argument often expressed is that the reference to "another human being" simply demonstrates the legislature's intention to prevent prosecution for attempted suicide.¹⁴³

The Illinois Criminal Code¹⁴⁴ has been interpreted as providing for the indictment of a corporation for involuntary manslaughter.¹⁴⁵ Nevertheless, it will be a difficult task for a prosecutor to obtain an indictment and conviction of a corporation for homicide in the products liability context, as evidenced by the acquittal of Ford in the Indiana Pinto case. Yet, a survey of prosecutors conducted after the Pinto case revealed that most prosecutors were undeterred by Ford's acquittal,¹⁴⁶ and will continue to prosecute corporations for homicide as circumstances warrant. Thus, the imposition of criminal sanctions against a corporation for its misconduct in marketing a hazardous product may soon be a widespread alternative to the imposition of punitive damages in a civil case.

139. See Comment, *Corporate Homicide*, *supra* note 131, at 405.

140. *Id.* at 405-06.

141. See Maakestad, *A Historical Survey of Corporate Homicide in the United States: Could it be Prosecuted in Illinois?*, 69 ILL. B.J. 772, 776-79 (1981) [hereinafter cited as Maakestad]; Comment, *Corporate Criminal Liability for Homicide: The Controversy Flames Anew*, 17 CAL. W.L. REV. 465, 467-82 (1981); Comment, *Corporate Homicide*, *supra* note 131, at 394-404; Note, *A New Assault*, *supra* note 131, at 912-13.

142. Ford used this argument in the Pinto criminal case. See Note, *A New Assault*, *supra* note 131, at 919-20. The difference between "human being" and "person" is that the latter generally includes corporations, while the former is generally someone who is born and alive.

143. The prosecution used this argument in the Ford Pinto case. See Note, *A New Assault*, *supra* note 131, at 920.

144. ILL. REV. STAT. ch. 38, § 1-1 to 1008-6-1 (1981).

145. See Maakestad, *supra* note 141, at 779 (this interpretation is based on the definitional section of the Criminal Code).

146. See Bodine, *supra* note 129, at 3 (the prosecutors interviewed said that in the proper factual setting they would prosecute a corporation for homicide).

OPTIONS BEFORE THE ILLINOIS COURTS

The best approach Illinois courts could adopt to control the award of punitive damages in products liability/mass tort situations lies in a combination of the suggested approaches. The approach adopted should maintain the flexibility required to deal with defendants of varying size, power, and wealth in the products liability context. A more precise definition of when punitive damages are to be assessed in products cases, perhaps the "flagrant indifference" definition as adopted in *Moore v. Remington Arms Co.*,¹⁴⁷ should be initiated for statewide use. If the chosen definition were combined with a higher burden of proof, such as the "clear and convincing evidence" standard,¹⁴⁸ the awarding of punitive damages would be limited to those cases in which the defendant's misconduct is truly outrageous. The determination of whether, and in what amount, punitive damages should be awarded, should remain with the jury so that the public may demonstrate its attitude toward the defendant's misconduct. Since defendants in products cases are businesses, the maintenance of this arena for the demonstration of public attitude may be one of the strongest deterrents against future abuses.

The utilization of a more precise definition and a higher burden of proof, along with the traditional judicial controls of remittitur and vacation, should protect defendants from punitive damages overkill while maintaining the flexibility needed for any products liability punitive damages standard. Increasing use of criminal sanctions, such as reckless homicide, should also be considered by the Illinois legislature as an alternative to punitive damages when appropriate. The use of criminal sanctions might deter in situations where punitive damages could not, such as when a defendant is wealthy enough to survive punitive awards, but might succumb to the intangible effects of criminal sanctions. Furthermore, the use of criminal sanctions would eliminate the problem of plaintiffs receiving so-called windfalls. A combination of judicial controls in the assessment of punitive damages, and legislation in the use of criminal sanctions as an alternative, would provide Illinois with a comprehensive scheme for the control of punitive damages in products liability/mass tort situations.¹⁴⁹

CONCLUSION

The *Froud* decision, if affirmed by the Illinois Supreme Court, reverses over one hundred years of case law prohibiting the recovery of punitive damages in a personal injury action brought under the Illinois Survival Act.

147. 100 Ill. App. 3d 1102, 1115, 427 N.E.2d 608, 617 (4th Dist. 1981).

148. S. 2631, *supra* note 119, at § 13(A)(2).

149. Perhaps criminal sanctions could replace civil judgments of punitive damages when the defendant's misconduct resulted in death. In that event, the criminal justice system would enter, as it would in any homicide, to determine whether to prosecute. The decedent's survivors would retain a civil remedy under the Wrongful Death Act, but would not be permitted to recover punitive damages.

The impact of *Froud's* expansion of the availability of punitive damages recovery may be profound, particularly in mass tort situations. The Illinois Supreme Court and the Illinois General Assembly will need to address the problems created by an expansion of punitive damages recovery by instituting a system for the control of punitive damage awards. There are several approaches for control within the civil system that Illinois may adopt. Alternatively, it may attempt to achieve the goals of punitive damages through the criminal law. Whether the state adopts one of the approaches outlined above, or another approach, this much is clear: Illinois has the opportunity to be in the vanguard by allowing punitive damages recovery under its Survival Act, and by instituting a uniform system for the control of that recovery.*

Ann Gillespie Pietrick

*Just prior to publication of this Note, the Illinois Supreme Court reversed the appellate court in *Froud v. Celotex Corp.* *Froud v. Celotex Corp.*, Nos. 57087, 57088, 57089 (Ill. Oct. 25, 1983). The supreme court based its decision on statutory interpretation and stare decisis. This Note focuses primarily on the public and judicial policy issues surrounding the awarding of punitive damages in products liability/mass tort situations. Therefore, since the Illinois Supreme Court chose not to address these issues in its opinion, the content of this Note remains unaffected by the reversal of *Froud*.—*Ed.*

