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Punitive Damages in Minnesota Products Liability Cases: A Judicial Perspective

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PUNITIVE DAMAGES IN MINNESOTA PRODUCTS LIABILITY CASES: A JUDICIAL PERSPECTIVE

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I. INTRODUCTION

Punitive damages are quasi-criminal in nature, seeking not to compensate the complainant but to punish and deter the defendant.¹ Because a punitive damages award need not be related to the claimant's actual damages or need only be "reasonably" related to the compensatory damage award, permitting a punitive damages case to go to the jury involves a significant risk of an excessive or otherwise errant verdict. Punitive damages are not deemed excessive as easily as an ordinary compensatory award, which can be measured more closely against the evidence of actual damages. Thus, punitive damages claims require more frequent and more calculated exercise of judicial control.

Punitive damages have become commonplace in products liability litigation. By adding a punitive damages claim, the plaintiff can convert relatively simple litigation into a significant threat to the defendant. Cynics and commentators have referred to punitive damages claims as attempts to circumvent the "American Rule" which generally bars an award of attorneys' fees to a prevailing party in litigation.²

1. See Haugen & Tarkow, *Punitive Damages in Minnesota: The Common Law and Developments Under section 549.20 of the Minnesota Statutes*, 11 WM. MITCHELL L. REV. 353, 357-59 (1985).

2. The "American Rule" on recovery of attorneys' fees in civil litigation requires parties to bear their own expenses, including attorneys' fees, unless a statute or contract of

The addition of a punitive damages claim also carries the potential of turning the litigation into a mere "strike suit,"³ much like purported class actions alleging securities fraud.⁴ The strike suit potential of securities class actions, however, is muted by local rules regarding the posting of security for costs⁵ and by the prerequisites to a class action contained in rule 23 of the Federal Rules of Civil Procedure. Moreover, rule 9(b) of the Federal Rules of Civil Procedure requires that fraud be pleaded with particularity,⁶ preventing plaintiffs from filing actions and then conducting discovery to determine whether a cause of action for fraud exists.⁷ In the relatively younger field of punitive damages, few such institutional restraints exist.

Due to this lack of institutional restraints, punitive damages claims must be kept in proper perspective through the judge's exercise of discretion and intelligent case management. The judge, at a number of critical stages in the litigation, determines whether punitive damages will fulfill their true purpose of providing legitimate punishment and deterrence or whether punitive damages claims are interposed merely for confusion, prejudice, or settlement value.

the parties specifically provides for recovery of attorneys' fees. The rule distinguishes American practice from that of England, where a prevailing party will normally be awarded the costs and attorneys' fees incurred in the litigation. The "American Rule" is widely followed in the United States and has been recently reaffirmed by the United States Supreme Court. *See, e.g., Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). The rule is also followed in Minnesota courts. *See Fownes v. Hubbard Broadcasting, Inc.*, 310 Minn. 540, 246 N.W.2d 700 (1976).

3. "Strike suit" is a popular phrase to describe actions brought for the purpose of obtaining a settlement based not on the merits of the claims advanced but on the cost or embarrassment that defending the action would bring. In the context of class actions, strike suits also include actions brought to obtain a large settlement for a few parties in order to prevent the further prosecution of the action.

4. According to the United States Supreme Court in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), nuisance or "strike" suits produce the possibility of vexatious litigation by "frustrat[ing] and delay[ing] normal business activity of the defendant which is totally unrelated to the lawsuit," *id.* at 740, and permitting "a plaintiff with a largely groundless claim to simply take up the time of a number of other people." *Id.* at 741.

5. *See, e.g., E.D. WASH. R. 23* (defendant may demand security for costs and charges from plaintiff who is an out of state resident or foreign corporation).

6. Rule 9(b) of the Federal Rules of Civil Procedure provides that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

7. *See, e.g., Seattle-First Nat'l Bank v. Carlstedt*, 101 F.R.D. 715 (W.D. Okla. 1984) (counterclaim defective for vagueness and non-particularity which alleged only generalities and not particular facts and circumstances).

This Article focuses on the special problems that punitive damages claims create in the management and trial of a products liability case and the approaches used by courts to deal with these problems. Many of the case management decisions the court makes in punitive damages cases are based, at least in part, on the the judge's "impression" of the punitive damages claim. This Article explores this judicial "impression" and explains it to the extent it is capable of explanation. The Article also explores how the court exercises the close control over punitive damages awards required by the Minnesota and federal appellate courts.

This Article does not attempt to provide a judicial perspective on management and trial of products liability cases generally and many issues raised in products liability actions will not be discussed. A punitive damages claim may, however, add an additional level of complexity to a products liability action, and specialized procedures may be required by the court in these actions.⁸

With that perspective in mind, this Article is relatively concise, since punitive damages cases are not significantly different from other products liability and tort actions. Punitive damages actions are managed using essentially the same pretrial proceedings, discovery, and calendaring of actions for trial, and many of the same evidentiary and trial issues are presented.

II. OVERVIEW OF PUNITIVE DAMAGES CASES

Punitive damages have long been available under Minnesota law⁹ and were recently made available to products liability plaintiffs.¹⁰ In 1978 the Minnesota Legislature enacted a statute codify-

8. See generally Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1 (1982); Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 FORDHAM L. REV. 37 (1983).

9. See, e.g., *E.H. Boerth Co. v. LAD Properties*, 82 F.R.D. 635, 646 (D. Minn. 1979) (punitive damages awarded in conjunction with breach of contract); *Caspersen v. Webber*, 298 Minn. 93, 99, 213 N.W.2d 327, 330-31 (1973) (punitive damages awarded in assault case); *Kirschbaum v. Lowrey*, 165 Minn. 233, 236, 206 N.W. 171, 173 (1925) (lower court erred by instructing jury in assault case that plaintiff was necessarily entitled to punitive damages); *Lynd v. Pickett*, 7 Minn. 184, 200-02, (Gil. 128, 142-44) (1862) (sustaining punitive damage award based on improper levy of attachment upon property by sheriff).

10. See, e.g., *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727 (Minn.), cert. denied sub nom. *Riegel Textile Corp. v. Gryc*, 449 U.S. 921 (1980); see generally Haugen & Tarkow, *supra* note 1, at 360-61; Comment, *Punitive Damages in Products Liability Actions: A Look at Newly Extended Doctrine—Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727 (Minn. 1980), 7 WM. MITCHELL L. REV. 185 (1981).

ing the common law standards developed by courts addressing punitive damages issues.¹¹ Minnesota Statutes section 549.20 establishes the burden of proof that a party seeking punitive damages must meet,¹² the standard of conduct justifying an award of punitive damages,¹³ the factors to be considered in determining the appropriate amount of punitive damages,¹⁴ and standards for imposing punitive damages on a principal for the misconduct of an agent.¹⁵ Under the *Erie* doctrine,¹⁶ Minnesota law applies to most products actions tried in federal court in Minnesota.

In addition to the guidelines established by section 549.20, the Minnesota Supreme Court has dictated that trial courts should exercise "close control over the imposition and assessment of punitive damages."¹⁷ The trial judge's role in a punitive damages case is not limited to deciding narrowly drawn issues submitted by pre-trial motion or presiding over a trial to the ultimate factfinder, usually a jury. In both state and federal courts, the trial judge

11. See Act of Apr. 5, 1978, § 4, 1978 Minn. Laws 836, 838 (codified at MINN. STAT. § 549.20 (1982)); see also Haugen & Tarkow, *supra* note 1, at 365-92.

MINN. STAT. § 549.20 (1982) provides:

Subdivision 1. Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show a willful indifference to the rights or safety of others.

Subd. 2. Punitive damages can properly be awarded against a master or principal because of an act done by an agent only if:

(a) the principal authorized the doing and the manner of the act, or
 (b) the agent was unfit and the principal was reckless in employing him, or
 (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
 (d) the principal or a managerial agent of the principal ratified or approved the act.

Subd. 3. Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public arising from the defendant's misconduct, the profitability of the misconduct to the defendant, the duration of the misconduct and any concealment of it, the degree of the defendant's awareness of the hazard and of its excessiveness, the attitude and conduct of the defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of the defendant, and the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the defendant may be subject.

12. MINN. STAT. § 549.20, subd. 1 (1982) (clear and convincing evidence).

13. *Id.* (willful indifference to the rights and safety of others).

14. *Id.*, subd. 3; see *supra* note 11 (text of section 549.20).

15. MINN. STAT. § 549.20, subd. 2.

16. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

17. *Eisert v. Greenberg Roofing & Sheet Metal Co.*, 314 N.W.2d 226, 229 (Minn. 1982) (quoting Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HAST. L.J. 639, 670 (1980)).

exercises an increasingly broad range of responsibilities that may broadly be characterized as "managing" a case.¹⁸ Although the desirability of this role for the judiciary has engendered debate, the fact that judges perform a managerial role cannot be seriously disputed.¹⁹ Rule 16(b) of the Federal Rules of Civil Procedure requires the judge to perform case management activities.²⁰

The judge's managerial functions may be exercised in docket management, during the consideration of motions submitted to the court for decision, by the court's *sua sponte* exercise of its inherent powers, and by its involvement in pretrial conferences and settlement conferences.²¹ The court's involvement in these aspects of case management may vary from case to case and from judge to judge, but will be present in some way in every case. In punitive damages cases, these managerial activities may be especially important.

One facet of judicial decisionmaking and case management that is largely undocumented, and rarely admitted, is the inevitable role of an "impression" or early subjective evaluation of the validity and relative strength of a punitive damages claim.²² This "impression" may be based upon the oral and written submissions of the parties, the court's experience in similar matters, an accurate or inaccurate understanding of the applicable law, and various subjective and often unidentifiable influences.²³

Judges' impressions of the validity of punitive damages claims play an important role in determining the subsequent course of the proceedings. Early in a case, the judge determines whether a punitive damages claim appears appropriate. The judge does not

18. See Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770 (1981). See generally Schwarzer, *Managing civil litigation: the trial judge's role*, 61 JUDICATURE 400 (1978). Judge Schwarzer urges "that judges intervene in civil litigation and take an appropriately active part in its management from the beginning." *Id.* at 402.

19. See Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

20. Rule 16(b) was amended in 1983 to require, except in certain circumstances, that the judge enter a scheduling order within 120 days after the complaint is filed "that limits the time (1) to join other parties and to amend the pleadings; (2) to file and hear motions; and (3) to complete discovery." FED. R. CIV. P. 16(b). According to the advisory committee notes, this rule "is necessary to encourage pretrial management that meets the needs of modern litigation." *Id.* advisory committee notes.

21. See Resnik, *supra* note 19, at 378-79.

22. The nature of a judicial "impression" is more substantial than mere intuition or "hunch." See Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1929).

23. See *id.*

make an ultimate factfinding decision as to whether punitive damages should be awarded in the case, but may make a threshold determination of whether litigation of the punitive damages issue is appropriate. The process may be compared with the judicial determination of "probable cause" in a criminal case.²⁴ The court essentially asks: Is this a "real" punitive damages claim? Is this claim being advanced sincerely by the plaintiff, or is it included in the case for in terrorem or settlement value? Is it a "reflex" claim, or is it grounded in the defendant's conduct? Is discovery sought to determine and obtain evidence of improper conduct or is improper conduct alleged in an attempt to expand the scope of discovery?

Since the process for preliminary determination of the propriety of a punitive damages claim is not formally accepted, there is no stated jurisprudence to guide a court in making this early determination. The courts infer a standard, based upon all information available to the court, including the court's experience, to form an early impression. The judge essentially determines whether a particular set of facts constitutes a punitive damages case based upon the court's confidence that it can recognize a punitive damages case when it sees one.²⁵

Because this judicial impression may significantly affect decisions in a punitive damages case, trial counsel should attempt to mold the court's impression at an early stage in the proceedings. The content and tone of oral argument and the briefs and other written submissions to the court should be directed, at least in part, at nurturing the court's impression of the punitive damages issues.

24. Although the "probable cause" analogy is applicable to much judicial decision-making, it is especially appropriate to the decision of punitive damages claims because of their quasi-criminal nature. *See generally* Haugen & Tarkow, *supra* note 1, at 357-59.

25. This approach, although not recognized in this particular context, has ample judicial recognition, beginning no later than Justice Stewart's famous statement regarding hard-core pornography: "But I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). This jurisprudence has also been followed by the Minnesota Supreme Court. *See, e.g.*, *Ideal Life Church of Lake Elmo v. County of Washington*, 304 N.W.2d 308 (Minn. 1981) (whether an organization practiced religion and therefore deserved a property tax exemption); *State v. Hoyt*, 286 Minn. 92, 174 N.W.2d 700 (1970) (whether books were hard-core pornography).

III. SPECIAL PROBLEMS DURING EARLY PRETRIAL STAGES

A. Initial Motions

1. Motion to Dismiss a Punitive Claim

Because the Minnesota Supreme Court has recognized the availability of punitive damages in products liability actions,²⁶ the federal court is rarely allowed to dismiss a punitive damages claim for failure to state a claim pursuant to rule 12(b)(6) of the Federal Rules of Civil Procedure. If, however, the claim is poorly pleaded or if punitive damages are not recoverable as a matter of law, a motion to dismiss the claim might be appropriate.

Circumstances where punitive damages are not recoverable as a matter of law are limited. For example, in *Eisert v. Greenberg Roofing & Sheet Metal Co.*,²⁷ the Minnesota Supreme Court held that punitive damages are not recoverable in strict liability in tort where the only damage involved is damage to property.²⁸ Accordingly, dismissal of a punitive damages claim would be appropriate in a property damage products liability case alleging only strict liability in tort.²⁹ If, however, negligence, breach of warranty, or misrepresentation claims were present in the case, the punitive damages allegation would be proper and not subject to dismissal.

2. Summary Judgment

Summary judgment is available in punitive damages cases. The standard for obtaining summary judgment, however, is an onerous

26. See, e.g., *Gryc*, 297 N.W.2d 727, noted in 4 HAMLINE L. REV. 351 (1980); see also Comment, *supra* note 10.

27. 314 N.W.2d 226 (Minn. 1982).

28. *Id.* at 228. The court stated that:

Although the nature of the plaintiff's injury is not always listed as a factor in determining how to assess punitive damages . . . it may reasonably be taken into account in deciding where punitive damages will be allowed Where that injury is limited to property damage, the public interest in punishment and deterrence is largely satisfied by the plaintiff's recovery of compensatory damages. Punitive damages represent an extraordinary measure of deterrence.

Id. at 229. Similarly, punitive damages are not available in contract actions in Minnesota. *Minnesota-Iowa Television Co. v. Watonwan T.V. Improvement Ass'n*, 294 N.W.2d 297 (Minn. 1980).

29. *Eisert*, 314 N.W.2d at 228-29. The court's decision in *Eisert* does not clearly indicate whether punitive damages are recoverable under theories other than strict liability in tort where the only damage is to property. The court did not overrule its earlier decisions in which punitive damages for property damage were awarded under different theories. It makes little theoretical sense, however, to bar punitive damages under one theory and permit their recovery under a theory bearing a different name but requiring proof of essentially the same facts.

one, and a summary judgment disposing of such claims will rarely be granted. The Eighth Circuit has stated that summary judgment is an extreme remedy that should not be granted unless the party is entitled to judgment beyond all doubt.³⁰ That court has directed that summary judgment is “not to be granted unless the movant has established his right to a judgment with such clarity as to leave no room for controversy and that the other party is not entitled to recover under any discernible circumstances.”³¹ The Minnesota Supreme Court has also followed a restrictive view on granting summary judgment and applies a stringent standard in its review of a trial court’s grant of summary judgment.³²

Notwithstanding the stringent standard applied to summary judgment motions, there are punitive damages cases in which summary judgment is appropriate. Counsel must bear in mind the standard of rule 56(c) of the Federal Rules of Civil Procedure, which permits a motion for summary judgment to be granted only if the factual record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”³³ The moving party must show the absence of any genuine issue of material fact, and must be prepared to respond to any issues raised by the opposing party.

After the parties have engaged in discovery it may be possible to determine, as a matter of law, that insufficient facts exist to permit submission of the punitive damages claim to the jury. This deter-

30. *City Nat'l Bank v. Vanderboom*, 422 F.2d 221 (8th Cir.), *cert. denied*, 399 U.S. 905 (1971). The court held that:

Summary judgment would be entered only when the pleadings, depositions, affidavits, and admissions filed in the case show that [except as to the amount of damages] there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Id. at 223 (citing *Poller v. Columbia Broadcasting Sys.*, 368 U.S. 464 (1962)).

31. *Robert Johnson Grain Co. v. Chemical Interchange Co.*, 541 F.2d 207, 209-10 (8th Cir. 1976).

32. *See, e.g., Rathbun v. W.T. Grant Co.*, 300 Minn. 223, 230, 219 N.W.2d 641, 646 (1974) (any doubt as to the existence of a genuine issue of material fact must be resolved in favor of finding that the fact issue exists); *Schmidt v. Smith*, 299 Minn. 103, 107, 216 N.W.2d 669, 671 (1974) (before granting summary judgment, court must consider all pleadings, depositions, answers to interrogatories, admissions, and affidavits to see if any material issue of fact exists); *Abdallah, Inc. v. Martin*, 242 Minn. 416, 424, 65 N.W.2d 641, 646 (1954) (court must consider all pleadings, depositions, answers to interrogatories, admissions, and affidavits; great care must be exercised to permit the litigant a right to trial where there is reasonable doubt as to the facts). *See generally* Pielemeier, *Summary Judgment in Minnesota: A Search for Patterns*, 7 WM. MITCHELL L. REV. 147 (1981).

33. FED. R. CIV. P. 56(c). Under rule 56(c), a court will base its determination of the existence of a material fact on any pleadings, depositions, answers to interrogatories, admissions, or affidavits. *Id.*

mination would result in entry of a partial summary judgment.³⁴ If punitive damages are legally available under only one theory, however, it may become clear that that theory is subject to summary judgment, thereby removing the issue of punitive damages from the case.

3. *Partial Summary Judgment*

Rule 56 of the Federal Rules of Civil Procedure permits a court to enter summary judgment in favor of either party on one or more claims in an action.³⁵ Although this motion may be appropriate in punitive damages cases, the moving party bears the same onerous burden as in a motion for summary judgment on all issues.³⁶ Despite the limitations on its availability, partial summary judgment is the most effective tool for attacking a punitive damages claim.

A motion for partial summary judgment may be used to obtain dismissal of a claim for punitive damages that are not recoverable as a matter of law. In this role, the motion for partial summary judgment is essentially identical to a motion to dismiss for failure to state a claim.³⁷

Partial summary judgment also permits the court to determine, based on the entire factual record, whether punitive damages are wholly inappropriate, even though they may be properly pleaded. Partial summary judgment should be available in this circumstance to permit the court to discharge its obligation of exercising "close control" over punitive damages claims.³⁸

Partial summary judgment motions provide a good example of a situation in which a judicial impression³⁹ may be important to the result. If the court has formed an impression that a punitive damages claim is proper, then it should not grant a partial summary judgment dismissing it. Conversely, if the court has formed an impression that the punitive damages claim is not valid or not brought for a proper purpose, the partial summary judgment stage

34. See *infra* notes 35-39 and accompanying text.

35. FED. R. CIV. P. 56. Rule 56(c) states that a claimant may move for summary judgment "in his favor upon all or any part [of his claim]." *Id.* Rule 56(b) applies the same standard to defending parties. *Id.*

36. See *supra* notes 30-32 and accompanying text.

37. See *supra* notes 26-29 and accompanying text.

38. See *supra* note 17 and accompanying text.

39. See *supra* notes 22-25 and accompanying text.

of the proceedings may be a logical place to remove the claim from the case.

B. Class Action Certification

Courts have recently considered the potential use of class actions for handling mass disaster cases generally and, in particular, punitive damages claims in such cases. The class certification procedure presents unique problems in a punitive damages/products liability action, but also provides a solution to some of the difficult policy issues surrounding punitive damages claims in multiple plaintiff cases.

The class action has historically been regarded as ill-suited and inappropriate for mass tort litigation.⁴⁰ Courts have considered the many unique fact issues of a claimant's action sufficient to warrant denial of motions to certify a class of mass disaster plaintiffs. The development of litigation involving hundreds of virtually identical products liability claims is prompting a general reconsideration of the class action as a device to foster the just, speedy, and inexpensive resolution of mass disaster litigation.⁴¹

Punitive damages claims have played a central role in this reconsideration. The existence of a punitive damages claim in a products liability case produces the potential for inconsistent verdicts, even when claims are based on an identical defect. The punitive damages claim presents a Janus-like danger of imposing multiple penalties on a party for a single act or course of conduct and the converse risk that an early judgment winner will recover a bonanza while later judgment winners will be limited to an award of compensatory damages. Since the punitive damages award focuses on the defendant's conduct, and not the plaintiff's, it is argued that there is little justification for inconsistent awards of punitive damages.

Despite courts' continued reluctance to certify classes of tort

40. *See, e.g., In re Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig. v. A.H. Robins Co.*, 693 F.2d 847, 852 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983) (class certification in mass tort actions has been denied by many courts, especially where defendant allegedly acted negligently for an extended period of time); *In re Federal Skywalk Cases*, 680 F.2d 1175, 1180 (8th Cir.), *cert. denied sub nom. Rau v. Stoner*, 459 U.S. 988 (1982) (vacating order certifying class which improperly enjoined state plaintiffs from pursuing pending state actions on compensatory and punitive damages issues).

41. *See* FED. R. CIV. P. 1. Rule 1 states that the Federal Rules of Civil Procedure shall be "construed to secure the just, speedy, and inexpensive determination of every action." *Id.*

plaintiffs,⁴² commentators have urged that such classes be allowed.⁴³ Some courts, however, have certified classes of tort claimants.⁴⁴ One court has recently certified a massive class action solely on the issue of punitive damages.⁴⁵ The presence of significant punitive damages issues in a multiple plaintiff products liability action may make the court more inclined to consider certification of a class action.

C. *Non-Class Consolidation and Consolidation for Trial*

Even if a case is not certified as a class action under rule 23, it is possible for multiple litigation involving punitive damages claims related to a single product to be consolidated for pretrial discovery or for trial. Courts have long recognized that consolidation procedures offer significant efficiencies in the management of some punitive damages cases.

Discovery of a manufacturer's records may be expensive and time-consuming for both the plaintiff and the defendant. In many cases, the parties will present the same experts. Consolidation for discovery may permit the discovery in twenty cases to be only marginally more expensive than it would have been in any one case. This efficiency is required by sound judicial management policies and is consistent with the Rules of Civil Procedure mandate that civil litigation be conducted as efficiently and inexpensively as possible.⁴⁶

The Judicial Panel on Multidistrict Litigation has frequently consolidated products liability cases involving punitive damages

42. *In re Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d at 852-54.

43. The Honorable Scott O. Wright, who presided over the federal court cases arising from the collapse of the skywalk in the Kansas City Hyatt Regency Hotel in 1981, and Joseph A. Colussi wrote a useful article discussing the advantages of using class actions in mass tort litigation. See Wright & Colussi, *The Successful Use of the Class Action Device in the Management of the Skywalks Mass Tort Litigation*, 52 UMKC L. REV. 141 (1984); see also Seltzer, *supra* note 8, at 61; Note, *Federal Mass Tort Class Actions: A Step Toward Equity and Efficiency*, 47 ALBANY L. REV. 1180, 1180-81 (1983); Note, *Class Certification in Mass Accident Cases Under Rule 23(b)(1)*, 96 HARV. L. REV. 1143 (1983).

44. The Honorable Jack B. Weinstein of the United States District Court for the Eastern District of New York certified a class action of over 40,000 claimants who claimed to be injured by the use of Agent Orange, a chemical defoliant, in the Vietnam War. *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718 (E.D.N.Y. 1984). The action was subsequently settled. See generally Note, *The Punitive Damage Class Action: A Solution to the Problem of Multiple Punishment*, 1984 U. ILL. L. REV. 153.

45. See *In re "Bendectin" Prods. Liab. Litig.*, 102 F.R.D. 239, 241 (S.D. Ohio 1984) (class of over 700 members certified).

46. FED. R. CIV. P. 1.

claims for management of pretrial proceedings by a single judge.⁴⁷ The Judicial Panel's willingness to consolidate products liability actions, however, is limited. The Panel has denied consolidation of multiple actions involving the same product.⁴⁸

Consolidation of pretrial proceedings before a single judge is also effective for cases within a single judicial district. The United States District Court for the District of Minnesota has used this approach to manage a large number of products liability cases including punitive damages claims relating to the Dalkon Shield intrauterine contraceptive device.⁴⁹ The actions were consolidated for pretrial purposes before one judge, and subsequently assigned to all judges in the district for trial. Although coordinated management of products liability actions involving punitive damages claims will often be initiated by the court, counsel may move the court for consolidation.⁵⁰

In addition to consolidation or coordination of pretrial proceedings, it is possible for multiple products liability cases to be consolidated for trial.⁵¹ This procedure has not been used extensively but may offer some efficiencies. Consolidation for trial may solve the problem of one party recovering a disproportionate share of any

47. See, e.g., *In re Richardson-Merrell Inc.*, 533 F. Supp. 489, 491 (J.P.M.D.L. 1982) (45 actions pending in 22 districts concerning birth defects resulting from ingestion of Bendectin consolidated); *In re Celotex Corp. "Technifoam" Prods. Liab. Litig.*, 424 F. Supp. 1077 (J.P.M.D.L. 1977) (transfer of action to join previously consolidated claims ordered to "best serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation").

48. See, e.g., *In re Rely Tampon Prods. Liab. Litig.*, 533 F. Supp. 1346 (J.P.M.D.L. 1982) (denying consolidation of 92 actions noting that discovery in many cases was well advanced and that pretrial proceedings were completed in some actions); *In re Asbestos & Asbestos Insulation Material Prods. Liab. Litig.*, 431 F. Supp. 906 (J.P.M.D.L. 1977) (noting that where necessary, voluntary sharing of discovery had already occurred). Denial of transfer in these cases was based on the almost unanimous opposition to transfer expressed by the parties and the predominance of factual questions unique to each action.

49. See, e.g., *Junkermeier v. A.H. Robins*, Civ. No. 3-82-1811 (D. Minn. Dec. 13, 1983) (initial pretrial order ordering, inter alia, consolidation of 20 cases). The *Junkermeier* court ordered consolidation, pursuant to rule 42(c) of the Federal Rules of Civil Procedure, "[b]ased upon the necessity for our courts to provide access to justice for all parties in a reasonably expeditious and economic manner, and in the interest of the efficient administration of justice." *Id.* (pretrial order at 3).

The judges of the United States District Court for the District of Minnesota provide for reassignment of "companion cases" to the judge to whom the first similar case was randomly assigned. See Amended Order *In re: Assignment of Cases*, July 1, 1982 (D. Minn.).

50. See FED. R. CIV. P. 42(a).

51. See, e.g., *Junkermeier*, Civ. No. 3-82-1811 (D. Minn. Dec. 13, 1983) (initial pretrial order).

recovery. Consolidations for trial may unduly complicate the litigation, however, especially if the underlying liability cases present significant individual fact disputes.

D. Third-Party Practice

Punitive damages cases rarely present difficult questions concerning third-party practice. As in many products cases without punitive damages claims, motions to implead additional parties for contribution or indemnity are common. Although contribution and indemnity are probably not available with respect to the punitive damages portion of a defendant's claim, this rule does not prevent impleader for the compensatory portions of the claim.

As a practical matter, third-party complaints are frequently served in punitive damages actions. Service occurs in part because of the inherent complexity of these cases and the relatively large amount of compensatory damages frequently involved. A defendant faced with punitive damages claims may also find it strategically desirable to join third parties in order to diminish the apparent culpability of the defendant's conduct.

E. Insurance

Insurance issues may impinge on the trial of a punitive damages action, although these issues will normally be resolved prior to trial. If questions exist as to the insurer's coverage of punitive damages claimed in an action, a liability insurer should commence a declaratory judgment action to resolve those questions. If a declaratory judgment action is brought, the coverage question will be resolved at an early stage in the litigation. The Minnesota Supreme Court has expressed its disapproval of insurers trying a case and then raising the coverage dispute.⁵² If the insurer does not bring a declaratory judgment action it may be necessary or desirable for the defendant to retain separate counsel to represent its interests which are arguably not insured. This second attorney representing a party to the action may complicate the mechanical

52. *See, e.g.,* Prahm v. Rupp. Constr. Co., 277 N.W.2d 389 (Minn. 1979). The court recognized that the third-party defendant insurance company would face a conflict of interest at trial because the company could be forced to take opposing positions. First, the insurer would have to defend its insured against the plaintiff's claim. Second and concurrently, the company would have to defend itself against the insured's claim. The court suggested, therefore, that the insurer should instead bring a declaratory judgment action prior to trial to determine the coverage dispute. *Id.* at 391 & n.2.

aspects of the trial, but generally will not have a significant impact.

Insurance issues also exist in the background in many punitive damages cases. Coverage for punitive damages may be disputed, either on public policy or insurance policy language grounds.⁵³ These coverage disputes are also normally resolved prior to trial.

The presence of a valid punitive damages claim may greatly enhance the likelihood that the case will be settled before trial. Because Minnesota has recognized an insurer's obligation to pay excess damages if it fails to settle a case within the policy limits,⁵⁴ an opportunity to settle a case for an amount less than the available insurance limits must be carefully considered by a liability insurer. In cases where an award of punitive damages is likely, the potential for excess liability provides a tremendous incentive to settle within the policy limits.

IV. DISCOVERY

Discovery disputes unique to punitive damages cases usually relate to special evidentiary issues discussed in this section. Rule 26 of the Federal Rules of Civil Procedure defines the scope of discovery generally as relating to admissible evidence or materials that may lead to the discovery of admissible evidence.⁵⁵ Thus, discovery disputes may require a preliminary ruling on the potential scope of admissibility at trial.

A. Net Worth and Financial Information

Discovery of net worth and other financial information is con-

53. *See, e.g.*, *Taylor v. Superior Court*, 24 Cal. 3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1979) (punitive damage award traditionally nullifies all insurance coverage); *Beaver v. Country Mut. Ins. Co.*, 95 Ill. App. 3d 1122, 420 N.E.2d 1058 (1981) (public policy prohibits insurance against liability for punitive damages arising out of one's own conduct); *Wojciak v. Northern Package Corp.*, 310 N.W.2d 675 (Minn. 1981) (in most situations insurance coverage for punitive damages is void as against public policy). *But see* *Dayton Hudson Corp. v. American Mut. Liab. Ins. Co.*, 621 P.2d 1155 (Okla. 1980) (public policy does not preclude insurance coverage for punitive damages assessed against a corporation based on respondeat superior). *See generally* Ellis, *Punitive Damages in Iowa Law: A Critical Assessment*, 66 IOWA L. REV. 1005 (1981); Note, *An Overview of the Insurability of Punitive Damages Under General Liability Policies*, 33 BAYLOR L. REV. 203 (1981).

54. *See* *Short v. Dairyland Ins. Co.*, 334 N.W.2d 384 (Minn. 1983) (court requires insurer to exercise good faith in considering offers to compromise); *see also* *Continental Casualty Co. v. Reserve Ins. Co.*, 307 Minn. 5, 238 N.W.2d 862 (Minn. 1976) (insurer's bad faith rejection of insured's offer to settle within policy limits exposes insurer to judgment in excess of limits).

55. FED. R. CIV. P. 26.

troversial. The controversy exists not because of the burden of collecting the information, but because of the sensitive nature of the information and the risk of dissemination. In the absence of extraordinary circumstances, discovery of financial information is generally allowed in punitive damages cases.⁵⁶

The most effective means of seeking relief from discovery directed solely at punitive damages issues is to seek a protective order pursuant to rule 26(c).⁵⁷ There is no fixed rule for determining whether protective relief is appropriate. Courts balance the discovering party's need for information against the burden or other harm that would be borne by the party to whom the discovery requests are directed.

Parties occasionally claim that discovery of net worth and other financial information should be deferred until a prima facie showing of entitlement to punitive damages is made.⁵⁸ Since this approach requires a preliminary determination of the plaintiff's punitive damages claim, this limitation is not generally ordered.

Postponement of discovery of net worth and other financial information may be appropriate in cases where bifurcation of the punitive damages issues is ordered. Courts have generally recognized their power to defer discovery on issues ordered to be tried after threshold issues are tried.⁵⁹ Although discovery is usually deferred to obviate discovery which may ultimately prove unnecessary,⁶⁰ the deferral may be just as appropriate in a damage context because of the potential sensitivity of the information sought. Discovery of net worth and financial information usually requires the production of only a few documents. For that reason, the judge may defer financial information discovery without unduly delay-

56. *See, e.g.*, Thoresen v. Superior Court, 11 Ariz. App. 62, 461 P.2d 706 (1970); Coy v. Superior Court, 58 Cal. 2d 210, 373 P.2d 457, 23 Cal. Rptr. 393 (1962).

57. Rule 26(c) allows the court, upon motion and for good cause shown, to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." FED. R. CIV. P. 26(c).

58. *See, e.g.*, Leidholt v. District Court, — Colo. —, 619 P.2d 768 (1980) (requires showing of a reasonable likelihood that issue of punitive damages will be submitted to jury for consideration); Breault v. Friedl, 610 S.W.2d 134 (Tenn. Ct. App. 1980) (requires showing of factual basis for punitive damages).

59. *See, e.g.*, Ellingson Timber Co. v. Great N. Ry., 424 F.2d 497, 499 (9th Cir.), *cert. denied*, 400 U.S. 957 (1970).

60. *See, e.g.*, Martin v. Bell Helicopter Co., 85 F.R.D. 654, 658 (D. Colo. 1980) (rules allow "deferral of costly and potentially unnecessary discovery and trial preparation on other phases of the case pending resolution of preliminary dispositive issues"); *see also Ellingson Timber Co.*, 424 F.2d 497.

ing the second part of a bifurcated trial.⁶¹

B. Confidentiality

Punitive damages claims may make otherwise undiscoverable matters discoverable. To the extent this information is confidential or sensitive, an appropriate protective order limiting its dissemination will be routinely granted pursuant to rule 26(c)(7) of the Federal Rules of Civil Procedure.⁶² The court expects the parties and counsel to stipulate to these matters, and many protective orders are entered upon stipulation.

V. FINAL PRETRIAL AND MOTIONS

A. Motions in Limine

Motions in limine are frequently used in products liability cases.⁶³ The particular evidentiary problems that arise in punitive damages cases and products liability cases are discussed as a trial issue below. Each of those problems may, however, be raised in a motion in limine.

Motions in limine will generally not be granted on routine evidentiary questions, particularly those seeking exclusion of broad classes of evidence.⁶⁴ A judge's aversion to motions in limine is well-grounded in human nature. The motion requires the judge to decide an issue, which might not otherwise have to be decided, at an abnormally early stage in the proceedings.⁶⁵ Even experienced

61. *Rupert v. Sellers*, 48 A.D. 2d 265, 368 N.Y.S.2d 904 (1975). Even if a trial delay occurs, such a delay will be compensated by "(1) the protection of defendants from harassment by discovery of their net worth in cases where plaintiffs [have not yet proven] a cause of action for punitive damages and (2) by the time saved in barring such discovery in cases where plaintiff cannot prove that he is entitled to punitive damages." *Id.* at 264, 368 N.Y.S.2d at 913.

62. Rule 26(c)(7) allows the court to make an order "that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way." FED. R. CIV. P. 26(c)(7).

63. These motions include any motion for a preliminary ruling on an evidentiary question. The motion can be offensive, to obtain a ruling that certain evidence will be admissible, or defensive, for a ruling that evidence not be admitted. Motions in limine should only be used in conjunction with a request for an order directing other parties not to disclose to the jury the existence of information subject to an in limine ruling.

64. *See, e.g., Miller v. B-B Distrib. Co.*, 79 F.R.D. 219, 223 (E.D. Tenn. 1978) (blanket exclusion of evidence not practicable where defendants may not even attempt to introduce it).

65. Motions in limine violate the "Lindberg" rule in Judge Alsop's courtroom. That rule, as articulated by his devoted court reporter, Larry Lindberg, states: "Don't decide them if you don't have to." The court's reluctance to grant motions in limine is paralleled

trial judges, adept at deciding evidentiary questions when evidence is offered, find it difficult and unnatural to make similar decisions in such an artificial setting. This aversion is partially due to the difficulty of deciding foundation questions at such an early stage. The drastic relief afforded by limiting evidence in limine will therefore be allowed only in unusual circumstances.⁶⁶

An alternative to granting a motion in limine requesting that certain evidence be declared inadmissible is an order directing the parties not to refer to particular evidence in arguments or in examination of other witnesses. This order would not prejudice the evidentiary issue. It would also prevent premature disclosure of information to the jury⁶⁷ and permit the evidentiary issue, when ultimately decided, to be based upon a complete record.

B. Limitations on Number of Experts

Limitations on the number of expert witnesses are frequently appropriate in products liability cases.⁶⁸ Experts rarely testify on punitive damages issues, however, so the limitation of experts does not often bear directly on these issues.

C. Bifurcation of Compensatory and Punitive Damages Issues

Bifurcation of the compensatory and punitive damages issues may facilitate the fair and efficient handling of punitive damages claims. Rule 42(b) of the Federal Rules of Civil Procedure permits bifurcation of issues "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy." The Eighth Circuit has recognized the trial court's broad discretion to bifurcate claims.⁶⁹

in other areas of law. For example, federal courts are constantly admonished not to decide constitutional law issues if a case can be disposed of on other grounds. *See, e.g.*, *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring). Federal courts may also decline to decide pendent state claims not closely linked to the facts of the federal claim and may dismiss pendent state claims after the federal claims have been adjudicated. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726-27 (1966).

66. *See, e.g.*, *Lewis v. Buena Vista Mut. Ins. Ass'n*, 183 N.W.2d 198 (Iowa 1971). The Iowa Supreme Court stated: "The motion in limine is a useful tool, but care must be exercised to avoid indiscriminate application. . . . Its use should be exceptional rather than general." *Id.* at 200-01.

67. Limitations on the scope of an opening statement are discussed *infra*, section VI (A).

68. The authority to limit experts is well-established in the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 16.

69. *Chicago, R.I. & Pac. R.R. v. Williams*, 245 F.2d 397, 404 (8th Cir.), *cert. denied*, 355 U.S. 855 (1957) (affirming severance of cross-claims from main action).

Bifurcation has long been used to allow trial of liability in an initial trial, thereby avoiding the trial of damages if no liability is found.⁷⁰ Bifurcation will normally be sought by either party to avoid expense or by a defendant to avoid undue prejudice. Even if a party does not move for bifurcation, the court can order bifurcation *sua sponte*.⁷¹

Bifurcation of punitive damages issues may be especially appropriate in products liability actions for two reasons. First, the presence of a punitive damages claim will permit introduction of evidence that would be inadmissible in an ordinary case.⁷² Second, instructions to the jury on punitive damages claims can be confusing both because of the different evidence admissible on the punitive damages claims and because of the differing burden of proof.⁷³

The Minnesota Supreme Court has affirmed the bifurcation of claims and issues in a case involving both wrongful death and dram shop questions.⁷⁴ Bifurcation seems to be even more appropriate in punitive damages cases because of the risk of evidentiary confusion and the differing burdens of proof.

The Seventh Circuit has recognized the right of the trial court to bifurcate punitive damages issues from the liability and compensatory damages issues in a non-products case.⁷⁵ State courts have similarly approved the ordering of separate trials for the punitive damages issues and liability and compensatory damages is-

70. See, e.g., *Nettles v. General Accident Fire & Life Assurance Corp.*, 234 F.2d 243, 247 (5th Cir. 1956) (upholding trial court decision allowing separate trials of the issues of liability and damages). But see *Payne v. A.O. Smith Corp.*, 99 F.R.D. 534 (S.D. Ohio 1983) (bifurcation denied on facts of case). The *Payne* court stated that:

The factors to be balanced against the convenience and economy of one trial include the complexity of legal theories and factual proof, the risk of jury confusion, and whether the advanced disposition of issues in the first trial will dispose of or simplify the issues to be raised in the second trial.

Id. at 536.

71. See, e.g., *Richmond v. Weiner*, 353 F.2d 41, 44 (9th Cir. 1965), *cert. denied*, 384 U.S. 928 (1966); *Moss v. Associated Transp., Inc.*, 33 F.R.D. 335 (E.D. Tenn. 1963), *aff'd*, 344 F.2d 23 (6th Cir. 1965).

72. For example, net worth and financial information may be discoverable and admissible due to a punitive damages claim. See *supra* notes 56-61 and accompanying text.

73. MINN. STAT. § 549.20 (1982) requires conduct permitting the award of punitive damages to be proven by "clear and convincing" evidence. The problems of instructing a jury under this statute are discussed *infra*, section VII (C) & (D).

74. *Fitzer v. Bloom*, 253 N.W.2d 395, 401-02 (Minn. 1977) (dictum) (trial court must balance convenience against possibility of prejudice resulting from severance where difference in measures of damages and availability of defenses may confuse jury).

75. See *Davis v. Freels*, 583 F.2d 337 (7th Cir. 1978).

sues, normally trying the punitive damages issues last.⁷⁶

VI. TRIAL ISSUES

A. *Limitations on Opening Statement*

The determination of whether punitive damages will be submitted to a jury can rarely be made in advance of trial. Accordingly, on occasion it becomes appropriate to restrict counsel's reference to punitive damages, and the evidence relating to punitive damages, in opening statements.

The Eighth Circuit has specifically condemned reference to punitive damages in final argument where the trial court properly decided not to submit the issue of punitive damages to the jury. For the same reasons, reference to punitive damages in an opening statement is inappropriate unless it appears likely that the issue will be submitted to the jury.⁷⁷ An attorney desiring to refer to punitive damages or the proof supporting punitive damages in an opening statement should be certain to disclose that intention to the court so that appropriate ground rules for the trial may be established.

B. *Evidentiary Problems*

1. *Subsequent Remedial Measures*

Evidence of subsequent remedial measures is admissible in products liability actions that include a count for strict liability.⁷⁸ Although this evidence is not admissible to prove negligence,⁷⁹ it may be admissible in a strict liability case.⁸⁰ Evidence of subsequent remedial measures may be admissible to show ownership or

76. See *Hilliard v. A.H. Robins Co.*, 148 Cal. App. 3d 374, 393-94, 196 Cal. Rptr. 117, 129 (Cal. Ct. App. 1983).

77. See *Vanskike v. ACF Indus., Inc.*, 665 F.2d 188 (8th Cir. 1981).

78. See, e.g., *Robbins v. Farmers Union Grain Terminal Ass'n*, 552 F.2d 788, 792 (8th Cir. 1977) (subsequent warning notice sent to sales personnel held inadmissible as evidence of unreasonably dangerous defective product).

79. *Faber v. Roelofs*, 298 Minn. 16, 20, 212 N.W.2d 856, 859 (1973); see also MINN. R. EVID. 407.

80. See *Kehm v. Proctor & Gamble Mfg. Co.*, 724 F.2d 613, 621-22 (9th Cir. 1983) (withdrawal of product from market held inadmissible). But see *DeLuryea v. Winthrop Laboratories*, 697 F.2d 222 (8th Cir. 1983) (subsequent warning notice on prescription drug held inadmissible). The Honorable Donald P. Lay's concurring opinion in *Kehm* contains a complete discussion of the arguments relating to evidence of subsequent remedial measures. 724 F.2d at 628-30 (Lay, C.J., concurring) (disagreeing with majority's analysis on admissibility of product withdrawal).

control;⁸¹ to show the feasibility of additional safety measures;⁸² to impeach statements regarding adequacy of prior measures or warnings;⁸³ or when the measures were taken by a person other than the person against whom the evidence is to be used.⁸⁴

The presence of a punitive damages claim may allow a defendant to introduce evidence of its subsequent remedial measures to prove its good faith and absence of culpability. The defendant's prompt action upon learning of a product defect supports its defense that it was not recklessly indifferent to the rights of others.

2. *Prejudicial Effect*

Many of the evidentiary questions involved in punitive damages claims arise from the expanded admissibility of evidence in these actions. Although the presence of the punitive damages claim may make evidence relevant under rule 401 of the Federal Rules of Evidence,⁸⁵ the mere presence of a punitive damages claim does not diminish the prejudicial effect some evidence intrinsically possesses. Cases with punitive damages claims are, therefore, especially likely to raise issues regarding exclusion of evidence under rule 403 of the Federal Rules of Evidence because the probative value of the evidence is substantially outweighed by its prejudicial effect.⁸⁶

3. *Learned Treatise Problems*

Textbooks and learned treatises are normally inadmissible hearsay. Learned treatises may, however, have an independent basis for receipt in evidence. They may, for example, be admissible to establish state of the art or notice, issues of particular relevance in punitive damages cases. In these cases, the treatises may be re-

81. *See, e.g.*, *Woolard v. Mobil Pipeline Co.*, 479 F.2d 557, 563 (5th Cir. 1973) (subsequent alterations in procedures and equipment admissible as evidence of control over metering station premises).

82. *Sterner v. U.S. Plywood-Champion Paper, Inc.*, 519 F.2d 1352, 1354 (8th Cir. 1975) (adequate warning label used by other manufacturers prior to plaintiff's injury admissible as evidence of availability of better warning); *Faber*, 298 Minn. at 21, 212 N.W.2d at 859 (subsequent changes in procedures admissible as evidence of feasibility of safer procedures).

83. *Love v. Wolf*, 249 Cal. App. 2d 822, 58 Cal. Rptr. 42 (1967).

84. *Farner v. Paccar, Inc.*, 562 F.2d 518 (8th Cir. 1977).

85. Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

86. Rule 403 allows the court to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. FED. R. EVID. 403.

ceived as exhibits in toto. Textbooks, learned treatises, and articles may also be admissible despite their hearsay nature when they are offered as part of expert testimony.⁸⁷ The Federal Rules of Evidence permit the use of inadmissible evidence if it is a type reasonably relied on by experts in the field.⁸⁸ If a learned treatise or article is admitted solely as a basis for expert testimony, the exhibit should be received in evidence for that limited purpose, and an appropriate cautionary instruction should normally be given to the jury.

4. *Other Incidents, Claims, or Lawsuits*

Evidence of other incidents, claims, or lawsuits is generally admissible to establish notice. Clearly, matters brought to the attention of the defendant prior to the sale of the product which is the subject of the case will be admissible. A more difficult question involves matters brought to the attention of the manufacturer after the sale, but before the accident giving rise to the case under consideration. Admissibility of other incidents, claims, or lawsuits during this period will depend upon the defendant's duty to warn of the defect or recall the product during this period. This evidence is particularly subject to time period limitations, and evidence outside a relevant time period should not be received.⁸⁹

5. *Industry Standards*

Industry standards present a difficult issue for the courts in products liability cases. The use of industry standards to establish a standard of conduct for punitive damages is especially troublesome. Standards range from those that are essentially consensual in nature, and of minimal value in establishing a standard, to those having the force of law by adoption in regulations. It is necessary for the party offering the standards to provide a detailed foundation concerning the standards' creation, promulgation, and legal status.

Industry standards may be used by a defendant to show that its conduct is prevalent in the industry. Compliance with industry standards does not, however, establish due care.⁹⁰

87. See FED. R. EVID. 703; see also MINN. R. EVID. 703.

88. *Palmer v. A.H. Robins Co.*, — Colo. —, 684 P.2d 187 (1984).

89. See *infra* section VI(B)(6) (discussion of determination of relevant time period).

90. See *Dorsey v. Honda Motor Co. Ltd.*, 655 F.2d 650, 656-57 (5th Cir. 1981) (evidence that manufacturer complied with federal safety standards did not preclude any finding of recklessness no matter how egregious manufacturer's conduct had been in ignor-

6. Time Period

A frequently disputed issue in a punitive damages trial is the determination of a time period for assessing the culpability of the defendant's conduct. The commencement of the time period will usually be dictated by the facts of the case. The proper ending date, however, is often less clear. Without question the defendant's conduct may be fairly scrutinized until the product leaves the defendant's hands. In the case of many products, however, the product will be sold a substantial time before the incident giving rise to the lawsuit occurs.

It is often not clear what is an appropriate date to cut off evidence of the defendant's conduct. Generally, the court is confronted with evidence of diminishing probative value as time elapses after the sale. The potential prejudicial impact of post-sale and even post-accident evidence may be significant. The court's determination of a time period frequently turns on a balancing of probative value against possible prejudice under rule 403 of the Federal Rules of Evidence. The court must examine the purpose of the evidence and the particular facet of the punitive damages claim upon which the evidence bears.

7. Conduct of Trial Counsel

A plaintiff may suggest that the jury should consider the conduct of trial counsel in determining whether punitive damages are appropriate. Although this question has not been settled, this suggestion is probably not appropriate because the parties have a legitimate right to deny liability and defend their actions in court.

The Minnesota Supreme Court has intimated, however, that the conduct of the defendant during trial may be relevant.⁹¹ That decision may permit the jury to draw inferences based on the conduct of a party at trial. This decision does not suggest, however, that conduct of trial counsel is relevant.

ing tests indicating design flaws of a different nature); *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727 (Minn.), cert. denied sub nom. *Riegel Textile Corp. v. Gryc*, 449 U.S. 921 (1980) (manufacturer's compliance with federal safety test does not preclude punitive damages award as a matter of law).

91. In *Schoenecke v. Ronningen*, 315 N.W.2d 612 (Minn. 1982), the court suggested that the defendant's nonchalant and "almost arrogant" demeanor was relevant to the punitive damages issue. *Id.* at 615.

C. Cautionary Instructions

Because of the complexity of products liability actions involving punitive damages claims, cautionary instructions are frequently used and offer tactical opportunities to counsel. Cautionary instructions are especially helpful to ensure that the jury considers evidence only for the purpose for which it is properly admitted, and to remind the jury of the proper burden of proof or of differing standards of proof. Because of the usefulness of cautionary instructions in products liability cases involving punitive damages claims, requests for such instructions will rarely be denied.

VII. SPECIAL VERDICT FORMS AND JURY INSTRUCTIONS

A. *Punitive Damages Question: One-Step or Two-Step?*

Punitive damages may be submitted to the jury in one of two ways: as a single question or as two questions. Those forms are as follows:

Single question:

1. What amount is plaintiff entitled to for punitive damages, if any?
\$_____

Two questions:

1. Is plaintiff entitled to an award of punitive damages?
Yes _____ No _____

[If you answer question 1 above "Yes," then answer question No. 2. If you answer question 1 above "No," do not answer the following question.]

2. Amount of Punitive Damages \$_____.

The trial judge will usually choose one of these forms based upon his personal preference. No significant difference exists between them.

The presence of a punitive damages question or questions in a verdict form increases the possibility of an inconsistent verdict. A jury, for example, may find no negligence on the part of the defendant, but nonetheless award punitive damages. It is difficult to reconcile these answers, since the punitive damages award requires a finding of willful or malicious conduct, and the negative answer regarding the existence of negligence constitutes a finding that the defendant did not even fail to use reasonable care.

The increased complexity of a special verdict that includes either one or two punitive damages questions demands great care

on the part of the court and counsel in the return of the verdict. One practical approach to prevent irreconcilable error is to review the verdict returned by the jury before the jury is excused. If the verdict appears to be inconsistent, it may be possible to remedy the error or have the jury clarify its verdict before the jury is discharged. This approach is useful and should be requested by counsel even if the court initially indicates that the jury can be excused.⁹²

B. Instructions to Jury

Charging a jury in a products liability action involving punitive damages claims is a challenging task. Most products liability actions are submitted to the jury on multiple theories of recovery. In some cases, punitive damages are not recoverable under all of the theories.⁹³

In addition, an inherent conflict exists between the levels of culpability necessary for supporting various claims. Strict liability in tort, for example, requires only proof of a defect. Negligence or culpability need not be proven. To recover punitive damages on a strict liability cause of action, however, the plaintiff must establish that the conduct of the defendant showed willful indifference to the rights or safety of others.⁹⁴ These levels of culpability must be clearly explained to a jury to avoid confusion.

Appendix A to this Article contains a sample instruction based on the Minnesota punitive damages statute.⁹⁵ This instruction states the substantive law of Minnesota for use in cases in the federal courts.⁹⁶ A similar charge is contained in Appendix B. That charge shows the preliminary and final instructions that would be used in the punitive damages portion of a bifurcated trial. The

92. A recent decision of the Minnesota Court of Appeals criticized release of the jury before the jury verdict could be reconciled. *See* *Continental Ins. Co. v. Loctite Corp.*, 352 N.W.2d 460, 463 (Minn. App. 1984) ("As a further safeguard against the return of verdicts that cannot be reconciled, it would seem prudent for the trial court to forbear [sic] discharging the jury until the special verdict is examined by court and counsel to determine whether inconsistencies exist").

93. *See, e.g., Eisert v. Greenberg Roofing & Sheet Metal Co.*, 314 N.W.2d 226 (Minn. 1982) (no punitive damages recovery permitted under strict liability in products liability case where plaintiff alleged only property damage).

94. *See* MINN. STAT. § 549.20, subd. 1 (1982).

95. *Id.* § 549.20.

96. Under the *Erie* doctrine, Minnesota law applies to punitive damages cases in Minnesota federal court unless preempted by federal law. *See Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State").

charge is based on Minnesota law prior to the adoption of Minnesota Statutes section 549.20, which became effective on April 15, 1978. Appendix C contains the jury instruction that has been tentatively approved for use by the Minnesota District Judges Association for use in Minnesota trial courts.

C. *Burden of Proof Problems*

The problem of differing thresholds of culpability for compensatory and punitive damages recovery is compounded by differing burdens of proof. Under the Minnesota punitive damages statute, punitive damages must be proven by "clear and convincing" evidence.⁹⁷ Because the balance of the case need only be proven by a simple preponderance of the evidence, it is necessary to differentiate between the two burdens of proof. As indicated above,⁹⁸ this problem may also be addressed by bifurcating trial of the products liability claims from the punitive damages claims.

D. *Control Over the Verdict*

Trial courts exercise significant control over jury verdicts awarding punitive damages. Although there is no fixed standard for determining the excessiveness of punitive damages,⁹⁹ the court may consider whether or not the award is excessive under all of the evidence in the case.¹⁰⁰ The court must consider either granting a remittitur to reduce a verdict to a maximum reasonable size or awarding a new trial.¹⁰¹ Review of excessiveness of a punitive damages verdict may also be conducted by the court of appeals.¹⁰²

97. MINN. STAT. § 549.20, subd. 1; *see supra* note 11 (text of § 549.20).

98. *See supra* notes 69-76 and accompanying text.

99. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 n.1 (Minn. 1982) ("The purpose of punitive damages is to both punish and deter according to the gravity of the act giving rise to a punitive damage award but an award should not exceed the level necessary to properly punish and deter").

100. *See, e.g., Marston v. Minneapolis Clinic of Psychiatry & Neurology, Ltd.*, 329 N.W.2d 306, 312 (Minn. 1982) (as modified on rehearing). The court stated that in "determining whether punitive damages are unreasonably excessive, the court should consider, among other factors, the degree of malice, intent or willful disregard, the type of interest invaded, the amount needed to truly deter such conduct in the future." *Id.* (quoting *Wilson v. City of Eagan*, 297 N.W.2d 146, 150-51 (Minn. 1980)).

101. *See, e.g., Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649 (1977) (federal law governs review of size of jury award); *Warren v. Ford Motor Credit Co.*, 693 F.2d 1373, 1379 (11th Cir. 1982); *Maxey v. Freightliner Corp.*, 665 F.2d 1367, 1374 (5th Cir. 1982).

102. *See, e.g., Rodgers v. Fisher Body Div., General Motors Corp.*, 739 F.2d 1102, 1109 (6th Cir. 1984) ("Appellate courts can properly reverse the punitive damages award as part of their general supervision of the size of jury verdicts").

The willingness of the court of appeals to review punitive damages verdicts encourages trial court judges to exercise that review as well.

VIII. CONCLUSION

Punitive damages claims are not unique to products liability actions and many of the problems in managing products liability actions do not stem solely from their presence. Nonetheless, punitive damages claims in products liability actions present novel problems of judicial administration, or at least make traditional case management problems more acute. Courts are required to exercise a high degree of control over punitive damages claims because of their volatile nature and because the purposes of punitive damages diverge from the purposes of compensatory damages.

Punitive damages have been made available in products liability actions only after the careful consideration of the Minnesota Supreme Court and many other courts. Their availability in appropriate cases reflects the public policy of the state. It is imperative that judicial control not prevent punitive damages awards in cases where they are warranted. Courts must therefore carefully monitor cases involving punitive damages claims. They must exercise discretion at various stages in the proceedings to insure that punitive damages serve a proper role and do not become a source of injustice as severe as the problems they are intended to prevent and punish.

Appellate courts are still forming the legal principles which establish the parameters of such discretion. Until these standards become more clearly defined, this exercise of discretion is necessarily largely based on a judicial "impression" of the appropriateness of punitive damages. The role of the advocate is to mold that impression; the role of the trial court is to form it cautiously and wisely.

APPENDIX A

Sample Punitive Damages Charge
[Charge in Unified Trial Applying Standards
Contained in Minnesota Statutes § 549.20]

In addition to actual damages, the law permits the jury, under certain circumstances, to award the injured person punitive damages. These damages are awarded to punish the wrongdoer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct.

If you should find upon clear and convincing evidence that acts or omissions of the defendant, which directly caused actual injury or damage to the plaintiff, showed a willful indifference to the rights or safety of others, then you may, but need not, award such amount as you unanimously agree to be proper as punitive damages.

“Clear and convincing” evidence means exactly what is suggested by the ordinary meanings of the terms making up the phrase. Satisfaction of this standard requires more than proof by the greater weight of evidence but less than proof beyond a reasonable doubt. Clear and convincing proof exists where the truth of the facts asserted is “highly probable.”

In other words, in order to answer any of questions _____ through _____ “Yes,” I told you that you must find that the greater weight of the evidence supports such an answer. I remind you that greater weight of the evidence means that the evidence leads you to believe it is more likely that a fact is true than not true.

But I instruct you now that in order to answer question _____ “Yes,” you must find that clear and convincing evidence supports such an answer. Clear and convincing evidence means that the evidence leads you to believe it is highly probable that a fact is true.

The conduct which justifies an award of punitive damages is more than negligence or carelessness. In order to answer question _____ “Yes,” you must find that defendant’s conduct amounted to action taken with willful indifference to the rights or safety of others.

In questions _____ through _____, I instructed you that the conduct of an officer or employee, acting within the scope of his or her employment, is the conduct of the corporation. In answering question _____, however, the rule is different. Punitive

damages can properly be awarded against a company because of an act done by an employee only if any one of the following is proven:

1. The company authorized the doing and the manner of the act.
2. The employee was unfit and the company was reckless in employing him or her.
3. The employee was employed in a managerial capacity and was acting in the scope of employment.
4. The company or a managerial employee of the company ratified or approved the act.

In determining whether the conduct of the defendant showed willful indifference to the rights or safety of others, and in determining the amount, if any, to award as punitive damages, you should consider those facts which justly bear upon the purpose of punitive damages. Those factors include the following:

1. The seriousness of the hazard to the public arising from the defendant's misconduct;
2. The profitability of the misconduct to the defendant;
3. The duration of the misconduct and any concealment of it;
4. The degree of the defendant's awareness of the hazard and of its excessiveness;
5. The attitude and conduct of the defendant upon discovery of the misconduct;
6. The number and level of employees involved in causing or concealing the misconduct;
7. The financial condition of the defendant; and
8. The total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons.

You should bear in mind the conditions under which, and the purposes for which, the law permits an award of punitive damages to be made. You must also consider the requirement of the law that the amount of such extraordinary damages, when awarded, must be fixed with calm discretion and sound reason. Punitive damages must never be either awarded, or fixed in amount, because of any sympathy, bias, or prejudice with respect to any party to the case.

APPENDIX B

[Preliminary and Final Instructions in Bifurcated Trial] Preliminary Instructions

In view of the answers to the special verdict form that you have returned, it becomes proper that I submit to you for your determination one additional fact issue.

Your jury verdict has resolved the issues between the parties as to whether or not the plaintiffs are entitled to compensatory damages. There is in the law what is known as "punitive damages." This type of damages may be awarded in a proper case to punish a defendant for its wrongful act and to deter the defendant and others from similar wrongful conduct in the future.

Whether or not this is a proper case for the award of such type of damages and, if so, the proper amount thereof, are the remaining issues to be decided by you.

In resolving those issues, you will take into consideration all of the evidence that has already been received in the case. In addition, there will be a brief presentation of additional evidence that will now be presented to you on these issues. We do not anticipate that this presentation will take more than one day.

Following the presentation of that evidence, the attorneys will have the opportunity to argue their positions to you on these issues. I will give you some brief additional instructions on the applicable law, and you will then deliberate and reach a verdict on this additional issue.

Final Instructions

Now that you have heard all of the additional evidence in the case, and the arguments of the attorneys, it becomes my duty to give you these additional instructions as to the law applicable to the issue of punitive damages.

In resolving these issues, you are to consider all of the evidence that you have heard in the case originally, together with the additional evidence that has now been received. It is also your duty to follow the law as set forth in the original charge to you, together with the law set forth in these additional instructions. The rules of law previously given to you regarding your duties as jurors, what constitutes evidence, means of evaluating testimony, and the burden of proof apply to your deliberations in this part of the case

also.¹

The remaining issues in the case will be submitted to you in the form of a special verdict consisting of two questions, the same procedure you used previously. You must answer these questions by applying the facts as you may find them to be. I will give you the rules of law you must apply in arriving at your answers.

[Read Verdict]

Punitive Damages

Punitive damages are damages other than compensatory damages which may be awarded against a defendant to punish it for wrongful acts and to deter the defendant and others from similarly misbehaving in the future. The rule is this: Where the defendant's acts, which are the subject matter of the action, are shown to have been willful, wanton or malicious so as to indicate that it acted in conscious disregard of the rights or safety of others, and if you believe justice requires it, you may in your discretion award to a plaintiff, in addition to compensatory damages, such further reasonable sum as you deem just as punitive damages.

In determining whether defendant has acted in a willful, wanton or malicious disregard of plaintiff's rights or safety, you may consider the following factors:²

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

1. This instruction assumes use of the "preponderance of the evidence" standard as used in the main case. For causes of action arising after April 15, 1978, the "clear and convincing" standard of MINN. STAT. § 549.20 must be used. The substance of a charge under the statute is contained in Appendix A and the jury should be given a preliminary charge on the differing burden of proof.

2. The substantive portion of this charge also draws on pre-statute standards. In a cause of action arising after April 15, 1978, the substantive standard for punitive damages based upon the statute should be taken from Appendix A or C.

If you find that punitive damages can be awarded, their allowance and amount are within your discretion as triers of the facts. In assessing what is a reasonable amount for such damages, you may properly consider the character of the defendant's acts, the nature and extent of the harm to the plaintiff which the defendant caused, or intended to cause, and the wealth of the defendant.

APPENDIX C

JIG 195

Punitive Damages

[Standard Jury Instruction Guide Tentatively Adopted by
Minnesota District Court Judges Association]*

If you find by clear and convincing evidence that the acts of the defendant show a willful indifference to the rights or safety of others, then you may, in addition to other damages to which you find the plaintiff entitled, award the plaintiff an amount which will serve to punish the defendant and deter others from the commission of like acts.

When I say clear and convincing evidence, I mean that the evidence must lead you to conclude that it is highly probable that the defendant acted with willful indifference to the rights or safety of others. Put another way, the evidence must produce in your minds a firm belief or conviction that the defendant acted in willful indifference to the rights or safety of others.

When I say willful indifference, I mean that the defendant acted in deliberate disregard to the rights or safety of others.

If you determine that punitive damages should be awarded, you should consider factors relating to the purpose of punitive damages in determining the amount, including, but not limited to, the following factors:

1. The seriousness of the hazard to the public arising from the defendant's misconduct.
2. The profitability of the misconduct to the defendant.
3. The duration of the hazard and of its excessiveness.
4. The attitude and conduct of the defendant upon discovery of the misconduct.
5. The number and level of employees involved in causing or concealing the misconduct.
6. The financial condition of the defendant.
7. The total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damages awards to the plaintiff and other similarly situated persons.

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8. The severity of any criminal penalty to which the defendant may be subject.

You may award punitive damages against a master or principal because of an act done by an agent only if you find that:

1. The principal authorized the doing and the manner of the act, or
2. The agent was unfit and the principal was reckless in employing him, or
3. The agent was employed in a managerial capacity and was acting in the scope of employment, or
4. The principal or a managerial agent of the principal ratified or approved the act.