MISSOURI LAW REVIEW

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Volume 68 Summer 2003 Number 3

MISSOURI
LAW REVIEW

VOLUME 68 SUMMER 2003 NUMBER 3

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I. INTRODUCTION

In recent decades, the United States has experienced a "dramatic increase" in the incidence and size of punitive damages verdicts.[1] The United States

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1. George L. Priest, *The Problem and Efforts to Understand It, Introduction* to CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE 1 (2002).

Supreme Court has expressed concern that punitive damages in this country are "skyrocketing"[2] and have "run wild."[3] States have responded by enacting various punitive damages reform laws.[4] For example, many states have chosen to raise the burden of proof or standard of liability that must be met before punitive damages can be awarded.[5] Other states have addressed the problem of runaway punitive damages by limiting the amount that can be imposed.[6] Some states have adopted a procedural reform called bifurcation to prevent evidence that is highly prejudicial and relevant only to the issue of punishment from being heard by jurors and improperly considered when they are determining liability for compensatory damages.[7] Finally, a handful of states have decided to become "free riders" by requiring successful plaintiffs to share a portion of any punitive damages recovery with the state (or a state-specified fund).[8]

This Article will provide a brief review of the purpose and history of punitive damages. It will then examine the various reforms adopted by the states, with a particular focus on "split-recovery" laws that require punitive damages recoveries to be shared with the state or a state-specified fund. This Article explains that such laws may actually fuel, rather than curb, punitive damages awards. The Article also explains that these laws are ethically and constitutionally problematic. This Article concludes that states seeking to reform their punitive damages laws would be better served by (1) adopting a heightened burden of proof and liability standard for punitive damages claims, (2) enacting statutory caps to ensure greater proportionality between punitive and compensatory damages awards, and (3) providing for a bifurcated trial at a defendant's request. The split-recovery approach should be rejected.

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2. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part & dissenting in part).

3. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).

4. *See* Victor E. Schwartz et al., *Reining in Punitive Damages "Run Wild": Proposals for Reform By Courts and Legislatures*, 65 BROOK. L. REV. 1003 (1999). In Nebraska, punitive damages are constitutionally prohibited. *See* Distinctive Printing & Packaging Co. v. Cox, 443 N.W.2d 566, 574 (Neb. 1989). In Louisiana, Massachusetts, New Hampshire, and Washington, punitive damages are permitted only if expressly authorized by statute. *See* Ross v. Conoco, Inc., 828 So. 2d 546, 555 (La. 2002); Pine v. Rust, 535 N.E.2d 1247, 1249 (Mass. 1989); N.H. REV. STAT. ANN. § 507:16 (1997); WASH. REV. CODE ANN. § 64.34.100(1) (West 1994). Michigan prohibits punitive damages awards, but does permit exemplary damages to compensate plaintiffs for the sense of humiliation and indignity for injury maliciously or wantonly inflicted. *See* Fellows v. Superior Prods. Co., 506 N.W.2d 534, 536 (Mich. Ct. App. 1993); Veselenak v. Smith, 327 N.W.2d 261, 264 (Mich. 1982); Kewin v. Mass. Mut. Life Ins. Co., 295 N.W.2d 50, 55 (Mich. 1980).

5. *See infra* notes 35-38 and accompanying text.

6. *See infra* notes 39-46 and accompanying text.

7. *See infra* notes 47-50 and accompanying text.

8. *See infra* Part IV.

II. OVERVIEW OF PUNITIVE DAMAGES

A. The Purpose of Punitive Damages

Punitive damages are not ordinary civil or tort law damages. Unlike compensatory damages, which provide payment for economic losses (e.g., lost wages and medical expenses) and noneconomic injuries (e.g., pain and suffering), punitive damages are not awarded to compensate for a harm.[9] Instead, they are awarded "to further the aims of the criminal law: 'to punish reprehensible conduct and to deter its future occurrence.'"[10] They provide a "windfall" recovery for plaintiffs.[11] As the Iowa Supreme Court observed, "punitive damages are not intended to be compensatory and . . . a plaintiff is a fortuitous beneficiary of a punitive damages award simply because there is no one else to receive it."[12]

B. A Brief History of Punitive Damages

Punitive, or exemplary, damages were first recognized by the English common law in the mid-eighteenth century in two cases involving illegal searches and seizures by officers of the Crown, *Huckle v. Money*[13] and *Wilkes v. Wood*.[14] In those cases, the English courts expressed for the first time that a "jury [shall] have it in their power to give damages for more than the injury received . . . as punishment to the guilty, to deter from any such proceeding in the future, and as proof of the detestation of the jury to the action itself."[15]

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9. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) (noting that punitive damages "are not compensation for injury . . . [but] are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence"); *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 9 (W. Page Keeton ed., 5th ed. 1984) (stating that punitive damages are awarded to punish the defendant, teach the defendant not to "do it again," and deter others from engaging in similar misconduct).

10. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 297 (1989) (O'Connor, J., concurring in part & dissenting in part) (quoting Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 87 (1988) (O'Connor, J., concurring in part & concurring in the judgment)).

11. Smith v. Wade, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting); City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 270 (1981).

12. Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs., Inc., 473 N.W.2d 612, 619 (Iowa 1991) (citing Berenger v. Hatt, 314 N.W.2d 388, 391 (Iowa 1982)).

13. 95 Eng. Rep. 768 (C.P. 1763).

14. 98 Eng. Rep. 489 (C.P. 1763).

15. *Id.* at 498-99.

Historically, in England and then America, punitive damages were available only in a small class of lawsuits, "the traditional intentional torts," designed to punish an individual's purposeful bad act against another.[16] These included "assault and battery, libel and slander, malicious prosecution, false imprisonment, and intentional interferences with property."[17]

In the late 1960s, however, American courts radically expanded the availability of punitive damages beyond the traditional intentional torts.[18] Lesser misconduct now could merit punitive damages. "Reckless disregard" became a popular standard for punitive damages liability;[19] even "gross negligence" became enough to support a punitive damages award in some states.[20] A number of states instituted the "triple trigger" approach of "willful, wanton, or reckless disregard," providing plaintiffs with three separate paths to obtain punitive damages.[21] In addition, the advent of "mass tort" litigation resulted in an increase in punitive damages claims against manufacturers,[22] including the possibility of repeated imposition of punitive damages for an alleged risk in a *single* product line or resulting from a *single* act or course of conduct.[23]

Changes in punitive damages law and practice have impacted both the incidence and size of punitive damages verdicts. Until 1976, for example, there were only three reported appellate court decisions upholding awards of punitive damages in product liability cases, and the punitive damages award in each case was modest in proportion to the compensatory damages awarded.[24] As United

16. Schwartz et al., *supra* note 4, at 1006-07.

17. Schwartz et al., *supra* note 4, at 1007 (citations omitted).

18. In 1967, a California court of appeals held for the first time that punitive damages were recoverable in a strict product liability action. *See* Toole v. Richardson-Merrell Inc., 60 Cal. Rptr. 398, 414 (Cal. Ct. App. 1967).

19. *See, e.g.*, UTAH CODE ANN. § 78-18-1(1)(a) (2002) ("willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others").

20. *See, e.g.*, Wisker v. Hart, 766 P.2d 168 (Kan. 1988).

21. *See* MISS. CODE ANN. § 11-1-65(1)(a) (2003); *see also* Scott v. Fruehauf Corp., 396 S.E.2d 354, 357 (S.C. 1990) (recognizing that punitive damages are recoverable in South Carolina for "willful, wanton, or malicious violation of the plaintiff's rights").

22. "Mass tort" litigation began in the late 1960s with cases involving the sale of the anti-cholesterol drug MER/29. *See* Paul D. Rheingold, *The MER/29 Story: An Instance of Successful Mass Disaster Litigation*, 56 CAL. L. REV. 116 (1968).

23. Schwartz et al., *supra* note 4, at 1029-34. *See generally* Mark A. Behrens & Barry M. Parsons, *Responsible Public Policy Demands an End to the Hemorrhaging Effect of Punitive Damages in Asbestos Cases*, 6 TEX. REV. L. & POL. 137 (2001).

24. *See* Gillham v. Admiral Corp., 523 F.2d 102, 104 (6th Cir. 1975) (awarding $125,000 compensatory damages, $50,000 attorneys' fees, and $100,000 punitive damages); Toole v. Richardson-Merrell, Inc., 60 Cal. Rptr. 398, 403 (Cal. Ct. App. 1967) (awarding $175,000 compensatory damages and $250,000 punitive damages); Moore v. Jewel Tea Co., 253 N.E.2d 636, 638 (Ill. App. Ct. 1969) (awarding $920,000

States Supreme Court Justice Sandra Day O'Connor recognized, "As little as 30 years ago, punitive damages were 'rarely assessed' and usually 'small in amount.'"[25] By the late 1970s and early 1980s, "unprecedented numbers of punitive awards in product liability and other mass tort situations began to surface,"[26] and the size of punitive damages awards "increased dramatically."[27]

The explosion of punitive damages that began in the 1970s shows no signs of slowing down. "Today, hardly a month goes by without a multimillion-dollar

compensatory damages and $10,000 punitive damages), *aff'd*, 263 N.E.2d 103 (Ill. 1970).

25. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 500 (1993) (O'Connor, J., dissenting) (citations omitted); *see also* RICHARD L. BLATT ET AL., PUNITIVE DAMAGES: A STATE BY STATE GUIDE TO LAW AND PRACTICE § 1.2, at 5 (1991) ("[G]enerally before 1955, even if punitive damages were awarded, the size of the punitive damages award in relation to the compensatory damage award was relatively small, as even nominal punitive damages were considered to be punishment in and of themselves.").

26. John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 142 (1986); *see also* Philip Borowsky & Lee K. Nicolaisen, *Punitive Damages in California: The Integrity of Jury Verdicts*, 17 U.S.F. L. REV. 147, 148 (1983) (noting trend of "juries . . . award[ing] substantial punitive damages with increasing frequency").

27. George L. Priest, *Punitive Damages and Enterprise Liability*, 56 S. CAL. L. REV. 123, 123 (1982).

punitive damages verdict."[28] In fact, multi-billion dollar verdicts are no longer unheard of.

- In October of 2002, a Missouri jury awarded $2.2 billion in punitive damages to a cancer patient whose pharmacist diluted drugs to boost profits, even though most of the pharmacist's assets had already been seized.[29] The award was later reduced to $330 million.[30]

- In October of 1999, a Williamson County, Illinois trial court entered a judgment of almost $1.18 billion, including $600 million in punitive damages, against State Farm Mutual Automobile Insurance Company in favor of a nationwide class of State Farm policyholders.[31] The case arose out of a longstanding State Farm practice (also used by other automobile

28. Malcom E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Products Liability Litigation*, 40 ALA. L. REV. 919, 919 (1989) (cited by Justice O'Connor in her dissenting opinion in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 62 (1991)). Several courts awarded large punitive damages awards in 2002. *See, e.g.*, Bender v. Darden Rests. Inc., No. 98-56031, 2002 WL 74441 (9th Cir. Jan. 18, 2002) ($1.8 million punitive damages award against restaurant for denial of meal and rest breaks to workers); Burton v. R.J. Reynolds Tobacco Co., 205 F. Supp. 2d 1253 (D. Kan. 2002) (awarding $15 million in punitive damages); Time Warner Entm't Co. v. Six Flags Over Ga., LLC, 563 S.E.2d 178 (Ga. Ct. App. 2002) (holding that $257 million punitive damages award against general partner of amusement park for unfair and deceptive business practices was not excessive); O'Neill v. Gallant Ins. Co., 769 N.E.2d 100 (Ill. App. Ct. 2002) (affirming $2.3 million punitive damages award in insurer bad faith action); Cooper Tire & Rubber Co. v. Tuckier, 826 So. 2d 679 (Miss. 2002) ($3 million punitive damages award in wrongful death action following rollover of vehicle); Baker v. Nat'l State Bank, 801 A.2d 1158 (N.J. Super. Ct. App. Div. 2002) (affirming remittitur of punitive damages award of $4 million to $1.8 million in employment discrimination case); Williams v. Philip Morris Inc., 48 P.3d 824 (Or. App. 2002) (reversing trial court's reduction of punitive damages award from $79.5 million to $32 million). Two large punitive damages awards were vacated by the Supreme Court for further consideration in light of its decision in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2003). *See* Romo v. Ford Motor Co., 122 Cal. Rptr. 2d 139, 162-63 (Cal. Ct. App. 2002), *vacated by* 123 S. Ct. 2072 (2003) ($290 million punitive damages award stemming from a single automobile accident); Sand Hill Energy, Inc. v. Ford Motor Co., 83 S.W.3d 483 (Ky. 2002), *vacated by* 123 S. Ct. 2072 (2003) ($15 million award against a product liability defendant, the largest punitive damages award in Kentucky history).

29. *See What's News: World-Wide*, WALL ST. J., Oct. 11, 2002, at A1.

30. *See Missouri Award Against Pharmacist Is Reduced*, LIABILITY & INS. WK., Feb. 24, 2003, at 5.

31. *See* Avery v. State Farm Mut. Auto. Ins. Co., 746 N.E.2d 1242, 1246 (Ill. App. Ct. 2001) (finding that $130 million in disgorgement damages was duplicative of the specification damage award, but affirming the trial court judgment in all other respects).

insurers) of using non-Original Equipment Manufacturer (OEM) parts to repair cars after accidents.[32] The practice had been fully disclosed to policyholders. State Farm and others followed this practice to create and assure a competitive market with OEM parts and to reduce repair costs for consumers.[33]

- In July of 1999, a Los Angeles jury ordered General Motors Corporation to pay $4.9 billion to six people who were injured when their vehicle was rear-ended by a speeding drunk driver and caught on fire. The trial judge later reduced the award to $1.2 billion. The case was settled in 2003 for an undisclosed amount.[34]

These astronomical judgments dwarf punitive damages awards that would have been considered extreme even just a few years ago.

III. STATES RESPOND TO PUNITIVE DAMAGES "RUN WILD"

A. Burden of Proof and Liability Requirements

Recognizing that punitive damages are a quasi-criminal penalty, most states have chosen to require plaintiffs to establish proof of punitive damages liability by "clear and convincing evidence."[35] This middle-ground standard falls between the ordinary civil law "preponderance of the evidence" standard and the criminal law standard of "beyond a reasonable doubt." The United States Supreme Court has specifically endorsed the "clear and convincing evidence" burden of proof in punitive damages cases.[36] The standard has also been recommended by the American Bar Association, the American College of Trial Lawyers, and the National Conference of Commissioners on Uniform State Laws.[37]

32. *Id.* at 1247.

33. *See generally* Victor E. Schwartz & Leah Lorber, State Farm v. Avery*: State Court Regulation Through Litigation Has Gone Too Far*, 33 CONN. L. REV. 1215 (2001).

34. *See GM to Settle Case Over Gas Tank Explosion*, L.A. TIMES, July 25, 2003, at B4; Margaret Cronin Fisk, *The Biggest Jury Verdict of 1999: A Typical Verdict Last Year Was Way Up. But Nothing like This One*, NAT'L L.J., Feb. 28, 2000, at A1 (discussing Anderson v. Gen. Motors Corp., No. BC 116 926 (Super. Ct., Los Angeles, Cal. 1999)); Frederic M. Biddle, *GM Verdict Cut $3.8 Billion in Suit Over Explosion*, WALL ST. J., Aug. 27, 1999, at B5.

35. *See* Schwartz et al., *supra* note 4, at 1013.

36. *See* Pac. Mut. Life Ins. v. Haslip, 499 U.S. 1, 23 n.11 (1991) (stating that "[t]here is much to be said in favor of a State's requiring, as many do . . . a standard of 'clear and convincing evidence'").

37. *See* MODEL PUNITIVE DAMAGES ACT § 5, 14 U.L.A. 124 (Supp. 2003)

In addition, Maryland and the District of Columbia have restricted punitive damages awards to cases in which the defendant acted with "actual malice."[38] This standard reflects the intentional tort origins of punitive damages, and it helps courts and jurors separate conduct that is particularly reprehensible and worthy of punishment from that which is not.

B. Caps on Punitive Damages

Proportionality has been an important part of the United States Supreme Court's consideration of the validity of criminal punishment.[39] Even very serious crimes such as larceny, robbery, and arson have sentences with a defined statutory maximum.[40] In the civil context, the Court has ruled that punitive damages must bear some relationship to the actual harm, but has declined "to draw a bright line marking the limits of a constitutionally acceptable punitive damages award."[41] A number of states have acted to provide that clarity by defining the acceptable outer limits of punishment.[42] These statutory limits vary from Colorado, where punitive damages may not exceed compensatory damages,[43] to Kansas, where punitive damages are limited to the lesser of $5 million or the defendant's annual gross income.[44] The most common approach is to limit punitive damages awards to the greater of (1) a ratio of the plaintiff's compensatory damages award (e.g., two times compensatory damages or three times compensatory damages) or (2) a dollar amount set by law (e.g., $250,000).[45] "This flexible approach accomplishes punishment and deterrence in the unusual situation where there is serious misconduct and relatively minor actual damages."[46]

C. Bifurcation

Punitive damages trials often involve evidence that is relevant only to the amount of punishment, if any, to be meted out against the defendant. For example, evidence of a defendant's wealth is irrelevant with respect to the basic issue of whether the defendant caused the plaintiff's alleged harm, but courts frequently admit such evidence for the purpose of allowing the jury to set civil punishment. Net worth evidence is highly prejudicial. If presented to a jury when it is determining compensatory damages liability, such evidence may cause jurors to render a compensatory award simply because they believe that the defendant "can afford it."[47]

Bifurcated trials help prevent that unfair result. In a bifurcated proceeding, the jury first resolves the issue of compensatory damages before determining the amount of punitive damages, if any, to be paid by the defendant. Evidence relevant only to the issue of punishment is inadmissible during the compensatory damages phase of the trial. Bifurcated trials also help jurors "compartmentalize" trial proceedings. By tackling compensatory and punitive issues separately, jurors are better able to separate the burden of proof that is required for

(approved in 1996) [hereinafter MODEL ACT]; Am. Coll. of Trial Lawyers, *Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice*, 1989, at 15-16 [hereinafter ACTL Report]; Special Comm. on Punitive Damages, Section of Litigation, Am. Bar Ass'n, *Recommendations*, 1986, at 19 [hereinafter ABA Report]; *see also* 2 AM. LAW INST., REPORTERS' STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY, APPROACHES TO LEGAL INSTITUTIONAL CHANGE 248-49 (1991) [hereinafter ALI REPORTERS' STUDY].

38. *See* Jonathan Woodner Co. v. Breeden, 665 A.2d 929 (D.C. 1995); Owens-Illinois, Inc. v. Zenobia, 601 A.2d 633 (Md. 1992).

39. *See* Solem v. Helm, 463 U.S. 277, 284 (1983) ("The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence."); Weems v. United States, 217 U.S. 349, 366-67 (1910) (stating that it is "a precept of the fundamental law" as well as "a precept of justice that punishment should be graduated and proportioned to [the] offense").

40. *See* Schwartz et al., *supra* note 4, at 1015 n.58.

41. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 585 (1996); *see also* State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513, 1516 (2003) (stating that "in practice, few awards exceeding a single-digit ratio will satisfy due process").

42. The need for proportionality in punitive damages is supported by academic groups. *See* ALI REPORTERS' STUDY, *supra* note 37, at 258-59 (endorsing concept of ratio coupled with alternative monetary ceiling); ACTL Report, *supra* note 37, at 15 (proposing that punitive damages be awarded up to the greater of two times a plaintiff's compensatory damages or $250,000); ABA Report, *supra* note 37, at 64-66 (recommending that punitive damages awards in excess of three-to-one ratio to compensatory damages be considered presumptively "excessive").

43. *See* COLO. REV. STAT. § 13-21-102(1)(a) (2000).

44. *See* KAN. STAT. ANN. § 60-3701(e) (1994). If the court finds that the profitability of the conduct exceeds the amount of the general limitation, the court may award an amount equal to one and one-half times the amount of the profit which the defendant gained or is expected to gain as a result of the conduct. *Id.* § 60-3701(f).

45. *See, e.g.*, FLA. STAT. ch. 768.73 (Supp. 2003); IND. CODE ANN. § 34-51-3-4 (Michie 1998); NEV. REV. STAT. § 42.005 (2001); N.C. GEN. STAT. § 1D-25(b) (1999).

46. *See* Schwartz et al., *supra* note 4, at 1015.

47. As United States Supreme Court Justice Sandra Day O'Connor observed in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993),

> Corporations are mere abstractions and, as such, are unlikely to be viewed with much sympathy. Moreover, they often represent a large accumulation of productive resources; jurors naturally think little of taking an otherwise large sum of money out of what appears to be an enormously larger pool of wealth. Finally, juries may feel privileged to correct perceived social ills stemming from unequal wealth distribution by transferring money from "wealthy" corporations to comparatively needier plaintiffs.

Id. at 491 (O'Connor, J., dissenting).

compensatory damage awards (i.e., proof by a preponderance of the evidence) from a heightened burden of proof for punitive damages (e.g., proof by clear and convincing evidence).

Recognizing the benefit of bifurcation, some courts have adopted bifurcated trial procedures as a matter of common law reform.[48] Other states have made changes through court rules or legislation.[49] The American Bar Association, the American College of Trial Lawyers, and the National Conference of Commissioners on Uniform State Laws all have supported bifurcated punitive damages trials.[50]

IV. PUNITIVE DAMAGES SPLIT-RECOVERY LAWS

Our experience has been that the public wants to see egregious conduct punished, but people feel uneasy about making a particular plaintiff an overnight millionaire (or billionaire) for acting as a "private attorney general." Reports of individuals receiving enormous sums of money in lawsuits are one reason why many in the public have come to view the civil justice system as a "litigation lottery."[51]

A number of states have acted to address the "windfall" nature of punitive damages by requiring a portion of any such recovery to be shared with the state or directed to a state fund.[52] Split-recovery laws may be driven by other considerations as well. For example, some legislators may view punitive damages awards as a convenient revenue raiser, much like an income tax.[53] Indeed, such laws may be politically popular given the fact that most punitive damages "revenue" is likely to be paid by out-of-state corporate defendants.[54]

48. *See* Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 (Tenn. 1992); Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 30 (Tex. 1994).

49. *See, e.g.*, CAL. CIV. CODE § 3295(d) (West 1997); MINN. STAT. ANN. § 549.20 (West 2000); MISS. CODE ANN. § 11-1-65(1) (1972).

50. *See* MODEL ACT, *supra* note 37, at § 11; ALI REPORTERS' STUDY, *supra* note 37, at 255 n.41; ACTL Report, *supra* note 37, at 18-19; ABA Report, *supra* note 37, at 19.

51. *See generally* CATHERINE CRIER, THE CASE AGAINST LAWYERS 9 (2002).

52. *See generally* Douglas McCollam, *Damaging Justice*, WALL ST. J., Oct. 31, 2002, at A18 (advocating the adoption of split-recovery statutes that fund indigent defender programs coupled with a contingency fee limit for punitive damages recoveries).

53. *See* McBride v. Gen. Motors Corp., 737 F. Supp. 1563, 1568 (M.D. Ga. 1990) (stating that one of the purposes of Georgia's split-recovery statute was the "governmental interest in generating revenue").

54. *See* Eric Hellend & Alexander Tabarrok, *The Effect of Electoral Institutions on Tort Awards*, 4 AM. L. & ECON. REV. 341 (2002) (empirical study suggesting that partisan elected judges have an incentive to distribute wealth from out-of-state defendants to in-state plaintiffs); Alexander Tabarrok & Eric Hellend, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157 (1999) (empirical study indicating that civil awards are higher in states when the defendant is an out-of-state business, especially in states where judges are elected); *see also infra* note 84.

Others may believe that the number of punitive damages awards will go down if the monetary incentive to pursue such claims is reduced. Some legislators, therefore, may see punitive damages split-recovery laws as helpful "tort reform."[55]

Currently, eight states—Alaska, Georgia, Illinois, Indiana, Iowa, Missouri, Oregon, and Utah—require plaintiffs to share punitive damages awards with the state.[56] The Ohio Supreme Court recently stated that it will decide on a case-by-case basis whether to order a portion of any punitive damages award to be directed to "a place that will achieve a societal good."[57] Five other states had similar requirements that expired by their own terms, were declared unconstitutional, or were otherwise abandoned.[58]

55. *See McBride*, 737 F. Supp. at 1570 (describing Georgia's split-recovery law as "a thinly disguised arbitrary restraint in favor of business seeking to deter punitive damage actions against egregious business practices by reducing incentives for injured plaintiffs to take action to punish and deter such practices"); *see also* Gordon v. State, 608 So. 2d 800, 802 (Fla. 1992) (recognizing that one purpose of Florida's split-recovery statute was to discourage punitive damage claims); Smith v. Dep't of Ins., 507 So. 2d 1080, 1084 (Fla. 1987) (describing the purpose of Florida's 1986 Tort Reform and Insurance Act, of which the split-recovery statute was a part, as addressing the rising cost of liability insurance).

56. *See* ALASKA STAT. § 09.17.020(j) (Michie 2002); GA. CODE ANN. § 51-12-5.1(e)(2) (2000) (applies only to product liability cases); 735 ILL. COMP. STAT. ANN. 5/2-1207 (West Supp. 2003); IND. CODE § 34-51-3-6 (1998); IOWA CODE ANN. § 668A.1(2)(b) (West 1998); MO. REV. STAT. § 537.675(2) (2002); OR. REV. STAT. § 18.540(1) (2001); UTAH CODE ANN. § 78-18-1(3) (2002).

57. *See* Dardinger v. Anthem Blue Cross & Blue Shield, 781 N.E.2d 121, 146 (Ohio 2002). *Dardinger* involved a bad faith claim against a health insurer alleging that its failure to timely pay a claim of a person with brain cancer ultimately led to the plaintiff dying sooner and more painfully than had she been able to pay for the requested treatment. *See id.* at 131. The jury awarded $49 million in punitive damages, which, even after the Ohio Supreme Court remitted to $30 million, was the largest verdict in Ohio history. The Ohio Supreme Court then distributed $10 million of the $30 million award to the plaintiff and ordered the distribution of the remaining $20 million, after payment of attorney fees and court costs, to a cancer research fund at Ohio State University established in the plaintiff's name. *See id.* at 146. Chief Justice Moyer issued a strong dissent regarding the majority's "unprecedented alternative distribution of punitive damages," which he found "fraught with unintended and undesirable consequences." *Id.* at 147 (Moyer, C.J., concurring in part & dissenting in part); *see also* Victor E. Schwartz, *Ohio Court Overreaches*, USA TODAY, Jan. 9, 2003, at 10A (noting that the court's decision trespasses on the legislative role and arguing in opposition to split-recovery laws).

58. A New York law requiring sharing of awards expired in 1994. *See* N.Y. C.P.L.R. 8703 (expired 1994). A Florida law "sunset" in 1995. *See* Act effective July

A. Differences Between Split-Recovery Statutes

1. Percentage to the State

State split-recovery statutes vary widely in the percentage of a punitive damages award that the plaintiff must share with the state or a state-established fund. Georgia, Indiana, and Iowa take seventy-five percent of a plaintiff's punitive damages award.[59] Oregon takes sixty percent.[60] Alaska, Missouri, and Utah provide for a fifty-fifty split of the award between the plaintiff and the state after subtraction of attorney fees and costs.[61] Illinois provides its judges with discretion to decide how much of a punitive damages award should be directed to the state.[62]

2. Allocation to the General Treasury or to a Specific Fund

Split-recovery statutes also vary in the public purpose that they are designed to support. Three states—Alaska, Georgia, and Utah—deposit their share of punitive damages awards into a large pot known as the "general fund."[63] In these states, punitive damages awards are not earmarked for any particular purpose, but rather provide a new revenue source for the state treasury.

Several other states deposit their portion of punitive damages awards into a fund designated to further a particular social good. For example, Iowa deposits its bounty into a "Civil Reparations Trust Fund" administered by the state court administrator for indigent civil litigation programs or insurance assistance programs if the defendant's conduct was not directed specifically at the

1, 1995, ch. 92-85, § 3, 1992 Fla. Laws 821, 822 (providing repealer clause for FLA. STAT. § 768.73). A Kansas split-recovery law applicable only to medical malpractice cases expired in 1989. *See* KAN. STAT. ANN. § 60-3402(e) (expired 1989). A split-recovery law in Colorado has been declared unconstitutional. *See* Kirk v. Denver Publ'g Co., 818 P.2d 262 (Colo. 1991). For a short time, the Alabama Supreme Court required the splitting of punitive damages awards with the state or a state fund. *See* Life Ins. Co. of Ga. v. Johnson, 684 So. 2d 685 (Ala.), *vacated by* 519 U.S. 923 (1996). However, the court reconsidered and abandoned this policy following the United States Supreme Court's decision in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). *See* Life Ins. Co. of Ga. v. Johnson, 701 So. 2d 524 (Ala. 1997).

59. GA. CODE ANN. § 51-12-5.1(e)(2) (2000) (applies only to product liability cases); IND. CODE § 34-51-3-6 (1998); IOWA CODE ANN. § 668A.1(2)(b) (West 1998).

60. *See* OR. REV. STAT. § 18.540(1)(b) (2001).

61. *See* ALASKA STAT. § 09.17.020(j) (Michie 2002); MO. REV. STAT. § 537.675(2) (2002); UTAH CODE ANN. § 78-18-1(3) (2002) (fifty percent of punitive damages in excess of $20,000).

62. *See* 735 ILL. COMP. STAT. ANN. 5/2-1207 (West Supp. 2003).

63. *See* ALASKA STAT. § 09.17.020(j) (Michie 2002); GA. CODE ANN. § 51-12-5.1(e)(2) (2000); UTAH CODE ANN. § 78-18-1(3) (2002).

plaintiff.[64] Missouri places punitive damages awards receipts into a "Tort Victims' Compensation Fund," which provides compensation to individuals who have sustained personal injuries and are unable to collect the full amount of a judgment.[65] Missouri further allocates twenty-six percent of the "Tort Victims' Compensation Fund" to a "Legal Services for Low-Income People Fund" that is distributed among legal service organizations.[66] Oregon provides for the allocation of award money to a "Criminal Injuries Compensation Account" which provides eligible crime victims and their survivors with medical and hospital expenses, counseling expenses, loss of earnings, rehabilitation, and funeral expenses.[67] Indiana's punitive damages allocation statute provides that an award of punitive damages is to be paid to the clerk of the court, and the clerk is to pay seventy-five percent of it to the state's "Violent Crime Victims' Compensation Fund" and twenty-five percent to the plaintiff.[68] Illinois sends its allocation of punitive damages awards to the State Department of Human Services.[69] In a case alleging a health insurance company's bad faith denial of a claim related to the plaintiff's cancer treatment, the Ohio Supreme Court ordered the distribution of two-thirds of the punitive damages award into a cancer research fund at a state institution.[70]

3. Calculation of the Attorney's Contingency Fee

Split-recovery statutes also differ in how the prevailing contingency fee attorney computes his or her fee. Most states have chosen to protect an attorney's compensation and incentive to sue by permitting an attorney to receive a contingency fee based on the gross punitive damages award.[71] As former Alabama Supreme Court Justice Janie Shores advocated, "The plaintiff's attorney should be awarded a fee from the punitive damages award based upon the full amount of the jury's verdict, because it is through the attorney's efforts that the general public has benefitted by the jury's action."[72] By way of contrast, Oregon requires any contingency fee to be paid solely out of the plaintiff's share

64. *See* IOWA CODE ANN. § 668A.1(2)(b) (West 1998).

65. *See* MO. REV. STAT. §§ 537.675(1)(6), 537.675(2) (2002).

66. *Id.* § 537.675(5).

67. *See* OR. REV. STAT. §§ 18.540(1)(b), 147.005-147.365 (2001).

68. *See* IND. CODE § 34-51-3-6 (1998).

69. *See* 735 ILL. COMP. STAT. ANN. 5/2-1207 (West Supp. 2003).

70. *See* Dardinger v. Anthem Blue Cross & Blue Shield, 781 N.E.2d 121, 146 (Ohio 2002).

71. *See* ALASKA STAT. § 09.60.080 (Michie 2002); GA. CODE ANN. § 51-12-5.1(e)(2) (2000); IOWA CODE ANN. § 668A.1(2)(b) (West 1998); MO. REV. STAT. §537.675(3) (2002); UTAH CODE ANN. § 78-18-1(3) (2002).

72. Justice Janie L. Shores, *A Suggestion for Limited Tort Reform: Allocation of Punitive Damage Awards to Eliminate Windfalls*, 44 ALA. L. REV. 61, 92 (1992).

of the punitive damages award and further limits the contingency fee to no more than twenty percent of that amount.[73]

V. SPLIT-RECOVERY LAWS POSE NUMEROUS PROBLEMS

Statutes requiring the plaintiff to share punitive damages with the state may have a superficial appeal to state legislators for the reasons stated earlier in this Article. Such laws, however, come with their own set of problems. As explained below, split-recovery statutes may exacerbate the problem of runaway punitive damages, may introduce prejudice into civil trials, and are socially, ethically, and constitutionally problematic.

A. Punitive Damages Sharing Laws May Fuel the Problem of Runaway Awards

Our experience has been that state legislators are often drawn to split-recovery statutes because they believe such laws may curb excessive punitive damages awards. Many legislators, therefore, may be surprised to learn that these laws can actually bring about the opposite result. In practice, such laws may worsen, rather the curb, the problem of punitive damages "run wild."[74]

1. Addressing the "Windfall" Nature of Punitive Damages May Result in Larger Awards

In the absence of a split-recovery statute, jurors may be tempered in awarding large punitive damages awards because they are uncomfortable with giving a single successful plaintiff an enormous windfall. As the American College of Trial Lawyers questioned, "Does the fact that a punitive award is a 'windfall' of sorts currently cause the jury, on occasion, to limit the award to an amount smaller than might otherwise be awarded?"[75] Split-recovery statutes may undermine this tempering effect and embolden jurors to award even larger recoveries than they do today.

2. States May Become Reliant on Punitive Damages Awards for Revenue

Another major problem with split-recovery laws is that they may lead states to become more reliant on punitive damages to either supplement the state

73. *See* OR. REV. STAT. § 18.540(1)(a) (2001).
74. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).
75. ACTL Report, *supra* note 37, at 20.

treasury or to fund social programs. This reliance could encourage states to expand the availability of punitive damages awards or to undertake policies that promote such awards.

For example, attorneys general, agencies, or departments in states with split-recovery laws might be expected to file more *amicus curiae* briefs favoring plaintiffs in private disputes. Some of these cases may not implicate any state interest other than the collection of revenue. For example, in *Miele v. Prudential-Bache Securities, Inc.*,[76] the Florida Department of Banking and Finance argued in an *amicus* brief to the Florida Supreme Court that Florida's split-recovery statute should apply to arbitration awards as well as court judgments.[77] The case involved a private dispute between an investment company and an account holder. The Department suggested that its interpretation would further the legislature's goal of discouraging punitive damages claims by making them less remunerative to the plaintiff and the plaintiff's attorney.[78] Given the Department's statutory role in collecting the state's share of punitive damages, however, its motive in filing the brief was transparent. The Department would receive less revenue if the court deemed arbitration awards to fall outside the split-recovery statute. The Florida Supreme Court ultimately rejected the Department's approach,[79] but the case demonstrates that states will aggressively seek to promote their interest in receiving punitive damages "revenue."

One might expect some state executives to become even more aggressive in their "tax collector" role. Rather than simply filing an *amicus* brief in support of a plaintiff in a punitive damages case and relying on the skill or experience of a private attorney to obtain a judgment, state executives may seek to intervene directly in private lawsuits, bringing the resources and experience of the state to bear in a case. Such direct state involvement would significantly change the dynamics of civil litigation and would have a serious adverse effect on defendants, not only with respect to the issue of punitive damages, but also to the basic issue of compensatory damages liability.

Currently, most split-recovery statutes do not give the state the power to intervene in private litigation,[80] but those laws can be amended and similar

76. 656 So. 2d 470, 473 (Fla. 1995) (per curiam).
77. *See* Brief of Amicus Curiae Dept. of Banking and Finance, Miele v. Prudential-Bache Sec., Inc., Case No. 81,467 (filed May 27, 1993) (on file with authors).
78. *See id.* at 2.
79. *See Miele*, 656 So. 2d at 473.
80. *See, e.g.*, ALASKA STAT. § 09.17.020(j) (Michie 2002) ("This subsection does not grant the state the right to file or join a civil action to recover punitive damages."); GA. CODE ANN. § 51-12-5.1(e)(2) (2000) ("This paragraph shall not be construed as making the state a party at interest and the sole right of the state is to the proceeds as provided in this paragraph."); MO. REV. STAT. § 537.675(4) (2002) ("The state of Missouri shall have no interest in or right to intervene at any stage of any judicial

language may be left out of future enactments. Sooner or later, state executives may seek legislative authority to intervene in private litigation for the purpose of representing the state's interest in a punitive damages recovery, and they may get it—particularly since the targets of state involvement invariably will be out-of-state corporate defendants.[81]

3. Judges May Be Influenced to Rule Against Certain Defendants

Split-recovery laws also may encourage courts to expand the availability of punitive damages awards or to sustain enormous punitive damages awards on appeal in order to promote local state interests at the expense of out-of-state or otherwise unpopular defendants. Most state trial judges in this country are elected.[82] Although commentators often observe that "judges are different" than those elected to executive or legislative offices,[83] the fact remains that as elected officials, state court judges must have some degree of responsiveness to the voters who elect them or they will be voted off the bench.

Judges are called upon to make pretrial and evidentiary rulings and approve jury instructions that may impact the outcome of a case, including the availability and size of a punitive damages award. Research suggests that elected judges may favor in-state plaintiffs, who vote and have friends and relatives who vote, over out-of-state corporations.[84] Split-recovery statutes provide further potential

proceeding pursuant to this section, except to enforce its lien rights.").

81. *See* Victor E. Schwartz, *The Remoteness Doctrine: A Rationale For a Rational Limit on Tort Liability*, 27 PEPP. L. REV. 759, 767 (2000) (noting that in the state attorneys general litigation against the tobacco industry, Florida, Maryland, and Vermont passed statutes to amend the common law to give the states a direct cause of action); Victor E. Schwartz, *The Remoteness Doctrine: A Rational Limit on Tort Law*, 8 CORNELL J.L. & PUB. POL'Y 421, 438 (1999) (noting the same).

82. *See generally* Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL'Y 273, 314-60 (2002) (providing detailed summary of the judicial selection methods in each of the fifty states and the District of Columbia).

83. *See, e.g.*, David B. Rottman & Roy A. Schotland, *What Makes Judicial Elections Unique?*, 34 LOY. L.A. L. REV. 1369, 1370 (2001).

84. *See* John L. Dodd et al., The Federalist Soc'y, *White Paper: The Case for Judicial Appointments*, *available at* http://www.fed-soc.org/Publications/White%20Papers/judicialappointments.htm (last visited Aug. 11, 2003). One reason for the bias against out-of-state businesses was stated by elected Justice Richard Neely of the West Virginia Supreme Court of Appeals. He explained:

> As long as I am allowed to redistribute wealth from out-of-state companies to in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will reelect me.

Id.; *see also* Garnes v. Fleming Landfill, Inc., 413 S.E.2d 897, 905 (W. Va. 1991) ("State courts have adopted standards that are, for the most part, not predictable, not consistent and not uniform. Such fuzzy standards inevitably are most likely to be applied arbitrarily against out-of-state defendants."); Blankenship v. Gen. Motors Corp., 406 S.E.2d 781, 786 (W. Va. 1991) ("[W]e do not claim that our adoption of rules liberal to plaintiffs comports, necessarily, with some Platonic ideal of perfect justice. Rather, for a tiny state incapable of controlling the direction of national law in terms of appropriate trade-offs among employment, research, development, and compensation for the injured users of products, the adoption of rules liberal to plaintiffs is simple self-defense."). There is evidence to support bias of elected judges against out-of-state corporations, a category of defendants already unpopular with juries. A recent study found that tort awards against out-of-state defendants in states with elected judiciaries were approximately $365,000 above average, while awards in states with appointed judiciaries were approximately $220,000 above average. *See* Dodd et al., *supra* note 84.

for judicial bias. Even the most well-intentioned judge may find a large punitive damages verdict easier to accept if the judge knows that the award will help reduce the tax burden on voters in his or her county or support a "good cause."

4. Split-Recovery Laws Do Not Result in Fewer Punitive Damages Claims

Some legislators may appreciate that split-recovery laws create the potential for larger awards, but believe that threat is offset by the possibility that lawyers will pursue punitive damages in fewer cases.[85] In sum, they may believe the "good" outweighs the "bad." As a practical matter, however, this is not true. The only way to reduce the number of punitive damages claims is to reduce the monetary incentive to pursue them, and that rarely occurs. As explained above, most split-recovery laws provide for contingency fee attorneys to be paid based on the full amount of the award, before any subtraction for the state's share. Thus, the monetary incentive for attorneys to pursue such claims is preserved. As long as attorneys are permitted to receive large contingency fees from punitive damages awards, the problematic trends in punitive damages will continue.

Efforts to abolish contingency fee recoveries for punitive damages judgments have not been successful as a political matter and may not be desirable as a policy matter.[86] Totally removing the incentive to seek punitive damages for egregious and intentional wrongdoing could, in effect, immunize such misconduct from punishment. Once legislators appreciate this fact they

85. *See* Patrick White, Note, *The Practical Effects of Split-Recovery Statutes and Their Validity as a Tool of Modern Day "Tort Reform"*, 50 DRAKE L. REV. 593, 609 (2002).

86. *See* ALI REPORTERS' STUDY, *supra* note 37, at 259 n.49 ("If the plaintiff (or rather the plaintiff's attorney) will not collect the benefits from the effort to establish the stiffer legal grounds for punitive damages, the case for such damages will not likely be made.").

generally decide to allow contingency fees to be recovered in punitive damages cases, and the mechanism that would result in fewer claims is lost.

B. Split-Recovery Laws May Foster "Regulation Through Litigation"

The state attorneys general Medicaid recoupment litigation against the tobacco industry was the genesis of a new trend that former Clinton Administration Secretary of Labor Robert Reich called "regulation through litigation."[87] Secretary Reich was describing a willingness by some state executives to use the threat of massive liability exposure to force behavioral changes in an entire industry.[88] The trend is built upon a powerful new alliance between state executives and politically influential personal injury lawyers.[89]

In the state attorneys general tobacco litigation, the partnership between state executives and private personal injury lawyers was unprecedented, powerful, and lucrative. Ultimately, the litigation resulted in a global settlement which included $248 billion in damages and $8.2 billion in fees for the private attorneys—most of whom worked on a contingent fee basis.[90] That cash will undoubtedly help finance new contingency fee projects. It also may be used to finance the political campaigns of candidates who may hire the lawyers to bring new cases in the future.[91]

Evidence of "regulation through litigation" can be found all across the nation. Local governments have hired private attorneys to sue gun manufacturers in a number of cities.[92] Rhode Island retained a well-known plaintiffs' firm to assist in an effort to hold former manufacturers of lead paint liable for

87. Robert B. Reich, *Regulation is Out, Litigation is In*, USA TODAY, Feb. 11, 1999, at 15A ("The era of big government may be over, but the era of regulation through litigation has just begun."). Secretary Reich later observed, "The strategy may work, but at the cost of making our frail democracy even weaker. . . . This is faux legislation, which sacrifices democracy to the discretion of administration officials operating in secrecy." Robert B. Reich, *Don't Democrats Believe in Democracy?*, WALL ST. J., Jan. 12, 2000, at A22.

88. *See* Michael DeBow, *The State Tobacco Litigation and the Separation of Powers in State Governments: Repairing the Damage*, 31 SETON HALL L. REV. 563 (2001); William H. Pryor, Jr., Comment, *Tort Liability, the Structural Constitution and the States*, 31 SETON HALL L. REV. 604 (2001).

89. *See* Victor E. Schwartz et al., *Tort Reform Past, Present and Future: Solving Old Problems and Dealing With "New Style" Litigation*, 27 WM. MITCHELL L. REV. 237, 255-57 (2000).

90. *See* Elaine McArdle, *Trial Lawyers, AGs Creating a New Branch of Government*, LAW. WKLY. USA, July 12, 1999, at B3.

91. *See* Mark A. Behrens & Rochelle Tedesco, *Addressing Regulation Through Litigation: Some Solutions to Government Sponsored Lawsuits*, 3 ENGAGE 109 (2002).

92. *See* Jeff Reh, *Social Issue Litigation and the Route Around Democracy*, 37 HARV. J. ON LEGIS. 515 (2000).

government healthcare costs.[93] Other states are reportedly considering similar actions.[94] Several local governments have filed or plan to file their own lead paint lawsuits.[95] Rhode Island's attorney general even suggested that "going after the latex rubber industry" could recoup "a couple of billion dollars."[96]

The list may not stop there. Part of the 1998 tobacco settlement included a payment of $50 million into an enforcement fund to be used by the National Association of Attorneys General.[97] While this payment might not be used to fund litigation against other industries, it provides a strong incentive for state attorneys general to attempt to repeat their success with the tobacco litigation. In fact, in June of 1999, fifty state attorneys general held a strategy session to discuss future targets.[98] Reports suggest that these targets could include health insurers, manufacturers of automobiles, chemicals, alcoholic beverages, and pharmaceuticals, Internet providers, "Hollywood," video games, and the casino gaming industry.[99] Even producers of fatty foods face the challenge of regulation by litigation.[100]

93. *See* Milo Geyelin, *Mistrial Declared in Landmark Lead-Paint Suit*, WALL ST. J., Oct. 30, 2002, at D2.

94. *See* Robert A. Levy, *Turning Lead Into Gold*, LEGAL TIMES, Aug. 23, 1999, at 21; *see also* Richard L. Cupp, Jr., *State Medical Reimbursement Lawsuits After Tobacco: Is the Domino Effect for Lead Paint Manufacturers and Others Fair Game?*, 27 PEPP. L. REV. 685, 691 (2000).

95. *See* Scott Winokur, *S.F., Oakland Join Suit Over Lead Paint/Redress Sought for Health Costs*, S.F. CHRON., Jan. 22, 2001, at B1; Greg Borowski, *Council Oks Lead Paint Lawsuit*, MILWAUKEE J. SENTINEL, Oct. 20, 2000, at B1; Norm Parish, *City's Lead Paint Suit Is Almost Identical to One in Rhode Island; Team Handling That Case Was Rejected Here; Harmon Selected More Costly Firm*, ST. LOUIS POST-DISPATCH, Feb. 24, 2000, at B1.

96. Letter from Rhode Island Attorney General Sheldon Whitehouse, to Idaho Attorney General Alan G. Lance (Aug. 27, 1999) (on file with authors).

97. *See* Samuel Goldreich, *Small Farmers Stand Against Big Tobacco's Settlement: $246 Billion Deal Burns Independent Growers*, WASH. TIMES, Apr. 26, 1999, at D11.

98. *See* Mark Curriden, *Fresh Off Tobacco Success, State AGs Seek Next Battle; United Front Puts Businesses on the Defensive*, DALLAS MORNING NEWS, July 10, 1999, at 1A.

99. *See* John Fund & Martin Morse Wooster, *The Dangers of Regulation Through Litigation: The Alliance of Plaintiffs' Lawyers and State Governments* (Am. Tort Reform Found., 2000); Schwartz et al., *supra* note 4. *See generally* Victor E. Schwartz, *Pushing Regulation Through Litigation to the Edge: The Gaming Industry, Fast Food and Alcoholic Beverages*, 4 ALEC POL'Y FORUM 54 (Summer/Fall 2002), *available at* http://www.alec.org/meSWFiles/pdf/APFSummerFall02.pdf.

100. *See* John Berlau, *Big Food Fight*, INSIGHT ON THE NEWS, June 15, 2002, at 2; Shelly Branch, *As Obesity Concerns Mount, Companies Fret Their Snacks, Drinks May Take the Blame*, WALL ST. J., June 13, 2002, at B1; Lance Gay, *Is There a 'Fat Tax' in Your Future? Could be, Experts Say; Obesity to Blame, but Food Industry Scoffs*, SEATTLE POST-INTELLIGENCER, Apr. 30, 2002, *available at*

Split-recovery statutes provide new potential for regulation by litigation. As explained, such laws create incentives for state executives to become more engaged in private litigation for the purpose of representing the state's interest in punitive damages "revenue."[101] The more state executives and plaintiffs' lawyers work together in litigation, the more likely it is that bonds will be formed that may result in new litigation—when you put matches and fuel together, you are more likely to get fire.

C. Split-Recovery Laws Can Create Conflicts of Interest Between Plaintiffs' Lawyers and Their Clients

"There is an inherent conflict between lawyers and their clients when entering into fee agreements."[102] A plaintiff's attorney who enters into a contingency fee agreement with a client has, in effect, purchased a portion of the client's cause of action. In return for being granted one-third to one-half of the claim, the lawyer agrees to perform legal services without charge and, in some cases, to advance out-of-pocket costs. The interests of a lawyer who has purchased a share of her client's cause of action will inevitably clash with the client's own interests. In his book, *The Litigation Explosion: What Happened When America Unleashed the Lawsuit*, Manhattan Institute scholar Walter Olson explains how this happens: once a lawyer has invested the time and money in

http://seattlepi.nwsource.com/national/68445_fattax30.shtml.

101. For example, a bill introduced in the Utah legislature during the 2002 session would have required a plaintiff to notify the state attorney general of a request for punitive damages within seven days of trial. *See* S.B. 141, 54th Leg. (Utah 2002). If the plaintiff failed to provide this notice, then he or she would have been prohibited from receiving a punitive damages award. The bill also would have required the clerk of the court to notify the state treasurer of any punitive damages award over $20,000 and provided that the treasurer may request the attorney general's assistance in collecting the state portion. *See id.* In what may have been its most unusual provision, the Utah bill required that "[a]ny settlement reached by the parties after the notice [of a request for punitive damages seven days prior to trial] is given shall require the attorney general's or court's approval." *Id.* This provision would have involved the attorney general in settlement decisions between private parties in an effort to protect the state's share of a punitive award. Although a substitute bill, which was enacted into law, provided only that the court must notify the attorney general and state treasurer immediately upon a punitive damages verdict and again within five days of the entry of judgment, the intent of the bill as introduced is unmistakable. It sought to increase the attorney general's involvement in private litigation for the purpose of regulating conduct and generating revenue for the state.

102. Victor E. Schwartz et al., *Consumer Protection in the Legal Marketplace: A Legal Consumer's Bill of Rights Is Needed*, 15 LOY. CONSUMER L. REV. 1, 11 (2003).

a lawsuit, the lawyer has a personal stake in the outcome of the litigation and the client is no longer solely in control.[103]

State split-recovery statutes broaden this conflict by pitting lawyer against client in deciding whether or not to settle a case or go to trial. In many cases, it may be in the best interest of the plaintiff to settle the case to ensure at least some recovery for his or her harm. Furthermore, in a state with a split-recovery law, settlement may be particularly appropriate for plaintiffs because any settlement amount that reflects the "shadow effect" of punitive damages would be kept by the plaintiff and not shared with the state.[104]

The contingency fee attorney's incentives may be altogether different, because most split-recovery laws protect an attorney's right to receive his or her contingency fee based on the gross amount of the punitive damages award, rather than just the portion allocated to the plaintiff. In other words, the lawyer, unlike the plaintiff, does not have to share any portion of his or her share of the punitive damages award with the state. Such laws may make the lawyer the primary beneficiary of any punitive damages recovery. This may encourage some lawyers to counsel their clients to proceed to trial when a settlement might be in the client's best interest. As a report published by the prestigious American Law Institute (ALI) explained, "allowing the plaintiff's attorney some contingent share of the state's award creates a potential conflict with the interests of the plaintiff."[105] For this reason, the reporters for the ALI project concluded: "We are *not* in favor, then, of paying punitive damages to the state."[106]

D. Allocation of Punitive Damages May Prejudice the Jury

Punitive damages split-recovery laws also may inject an irrelevant factor into the jury's determination of liability and damages. Juries may render inflated awards or provide for an unwarranted punitive award for reasons that have nothing to do with the reprehensibility of the defendant's conduct. For example, jurors may be influenced by charitable instinct to fulfill a social good, or their own self-interest in balancing the state budget on the back of an out-of-state corporate defendant.[107]

103. *See* WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT 41-43 (1991).

104. As Yale law professor George Priest has observed: "[T]he availability of unlimited punitive damages affects the 95% to 98% of cases that settle out of court prior to trial. It is obvious and indisputable that a punitive damages claim increases the magnitude of the ultimate settlement and, indeed, affects the entire settlement process." George L. Priest, *Punitive Damages Reform: The Case of Alabama*, 56 LA. L. REV. 825, 830 (1996).

105. ALI REPORTERS' STUDY, *supra* note 37, at 259 n.49.

106. ALI REPORTERS' STUDY, *supra* note 37, at 259 n.49.

107. *See* ACTL Report, *supra* note 37, at 20 ("If [the punitive damage award] is

Recognizing the unfairness of such a situation, every appellate court that has considered whether it was error for a trial court to provide an instruction to the jury explaining the allocation of the punitive damages award has required a new trial.[108] Likewise, an attorney's reference to the allocation of punitive damages to the state during a closing argument has also been found to be cause for a mistrial.[109]

The Oregon Supreme Court was the first to consider the issue. In *Honeywell v. Sterling Furniture Co.*,[110] the trial court instructed the jury, over the defendant's objection, that a portion of any punitive damages award would be paid to the state's "Criminal Injury Compensation Account."[111] The Oregon Supreme Court found this instruction to be a reversible error, holding that:

> [I]nstructing a jury that a portion of any punitive damage award will be used to pay the plaintiff's attorney or to contribute to a worthy cause, such as help for victims of crime, does nothing to further or even to inform the jury as to the proper goals of punitive damage awards. Instead, the instruction distracts the jury from the appropriate line of analysis that this Court has said a jury should follow in cases involving potential awards of punitive damages: . . . deterring future similar misconduct by the defendant or others.[112]

The United States Court of Appeals for the Eighth Circuit reached the same conclusion in a strict product liability action applying Iowa law.[113] In *Burke v. Deere & Co.*, the plaintiff was awarded $650,000 in compensatory damages and $50 million in punitive damages against Deere for injuries sustained when an auger on a combine cut his hand.[114] The trial court provided the jury with a verdict form, over the defendant's objection, that stated, "if your answer to [a question regarding whether the conduct was directed at the plaintiff] is no, a portion of the punitive damages award to be fixed by the court will be paid into a civil trust fund administered by this court."[115] To make matters worse, the

distributed to an authority which levies taxes, will jurors see an opportunity to relieve the taxpayer of the burden?").

108. *See* Burke v. Deere & Co., 6 F.3d 497, 512 (8th Cir. 1993); Ford v. Uniroyal Goodrich Tire Co., 476 S.E.2d 565, 570 (Ga. 1996); Honeywell v. Sterling Furniture Co., 797 P.2d 1019, 1022 (Or. 1990).

109. *See Burke*, 6 F.3d at 513.

110. 797 P.2d 1019 (Or. 1990).

111. *See id.* at 1021-22.

112. *Id.* (quoting State *ex rel.* Young v. Crookham, 618 P.2d 1268, 1274 (1980)) (internal quotations omitted).

113. *See Burke*, 6 F.3d at 501.

114. *Id.*

115. *Id.* at 512 (alterations in original).

plaintiff's attorney instructed the jury during closing argument that seventy-five percent of the punitive damages award "will go into a civil trust fund to help prevent this sort of thing in a different way and that 75 percent will go into a special fund, a special trust fund, to be administered by the courts for others than Burke."[116]

The Eighth Circuit ruled that the court's instruction and the plaintiff's closing statement prejudiced the jury.[117] The court found that "the size of the verdict leads us to conclude that the jury indeed sought to create some sort of injury fund or to improperly engage in a social reallocation of resources for the benefit of parties not properly before the court."[118] Because of this and other errors, the court ordered the entire case to be retried.[119]

The Georgia Supreme Court has also concluded that a jury instruction informing jurors about the allocation of punitive damages to the state required a new trial, but for a different reason. In *Ford v. Uniroyal Goodrich Tire Co.*,[120] involving separate product liability actions by parents and their child against a tire manufacturer for injuries they received when a car with allegedly defective tires hit their stalled van, a Georgia trial court instructed the jury in the child's case that Georgia law provides that seventy-five percent of any amount awarded as punitive damages, less a proportionate part of the costs of litigation, including reasonable attorneys' fees, shall be paid into the state treasury.[121] Following this instruction, the jury returned a $25 million punitive damages verdict against the defendant.[122] The Georgia Supreme Court ruled that this instruction constituted reversible error, not because of the bias caused by the instruction's appeal to the jurors' charitable instincts, but because the instruction improperly focused the jury on the plaintiff's compensation rather than the defendant's conduct:

> As the [punitive damage] statute repeatedly states, the purpose of punitive damages is to punish and deter the defendant, not to compensate the victim. As we have previously stated, the 75-percent allocation rule was enacted to fulfill this purpose, not to generate additional state revenue. Given the unquestioned purpose of the punitive damage statute, the sole issue for a jury is the amount of money necessary to punish the defendant and deter future misconduct. Therefore, it is irrelevant who will be compensated by the award or how much the plaintiff will ultimately receive. By instructing the jury on the statutory scheme for allocating a punitive damages award, the

116. *Id.* at 513 (quoting transcript) (internal quotations omitted).

117. *See id.*

118. *Id.*

119. *See id.* at 513-14.

120. 476 S.E.2d 565 (Ga. 1996).

121. *See id.* at 567.

122. *See id.*

trial court improperly shifted the jury's focus from the critical question of the defendant's conduct to the inappropriate question of the plaintiff's compensation.[123]

These cases make clear that split-recovery statutes pose special problems for courts that must be addressed in order to prevent jurors from meting out punishment based on irrelevant considerations.

E. Split-Recovery Statutes May Foster Due Process Challenges

Jury instructions that purport to focus the jury on the defendant's conduct may not be enough to cure the problem of irrelevant considerations infecting punitive damages awards in states with split-recovery statutes. Regardless of the instruction given at trial, jurors in states with split-recovery laws are likely to know that their decision to award punitive damages will supplement the state treasury or fulfill a socially laudable goal. Jurors should not be presumed to be ignorant of the law. The potential prejudice to defendants created by such laws may give rise to due process challenges.

1. Background on United States Supreme Court Punitive Damages Jurisprudence

For over a decade, the United States Supreme Court has emphasized its concern that punitive damages awards should not be assessed in an arbitrary or capricious fashion. In *Pacific Mutual Life Insurance Co. v. Haslip*,[124] the Court acknowledged that excessive punitive damages awards could violate the Due Process Clause of the Fourteenth Amendment, although the Court held that the award in that particular case did not violate due process.[125] In a subsequent case, *TXO Production Corp. v. Alliance Resources Corp.*,[126] a plurality of the Court held for the first time that "grossly excessive" punitive damages awards violate due process, but declined to adopt a bright-line test for making such a determination.[127]

123. *Id.* at 570.
124. 499 U.S. 1 (1991).
125. *Id.* at 18.
126. 509 U.S. 443 (1993).
127. *See id.* at 455-56; *cf.* Pulla v. Amoco Oil Co., 72 F.3d 648, 661 (8th Cir. 1995) (opinion by former Supreme Court Justice White, striking down punitive damages award as "excessive, unreasonable and violative of due process"). In a dissenting opinion in *TXO*, Justice O'Connor, joined by Justices White and Souter, noted that the Court's decision provided "not a single guidepost to help other courts find their way through this area." *TXO*, 509 U.S. at 480 (O'Connor, J., dissenting). The dissenting justices suggested that the Court should consider adopting objective factors by which to judge

Three years after *TXO*, the Court granted certiorari in *BMW of North America, Inc. v. Gore*[128] in order to "help to illuminate 'the character of the standard that will identify unconstitutionally excessive awards.'"[129] The *Gore* Court offered three "guideposts" for determining whether a punitive damages award is "unconstitutionally excessive."[130] First, "[p]erhaps the most important indicium [of the appropriateness of the] award is the degree of reprehensibility of the defendant's conduct."[131] Second, the most commonly cited indicium of the reasonableness of the punitive damages award is the ratio of actual damages to punitive damages.[132] The third factor is a comparison to "civil or criminal penalties that could be imposed for comparable misconduct."[133]

In *Cooper Industries, Inc. v. Leatherman Tool Group Inc.*,[134] the Court reaffirmed *Gore*, and provided lower courts with additional guidance for reviewing punitive damages awards.[135] The Court held that appellate courts must engage in de novo review of punitive damages awards to determine if an award is unconstitutionally excessive.[136]

Most recently, in *State Farm Mutual Automobile Insurance Co. v. Campbell*,[137] the Court held that punitive damages may not be imposed to punish a defendant for out-of-state conduct and provided a presumption that single digit multipliers of the ratio between compensatory and punitive damages are more likely to comport with due process than those with greater disparity.[138]

This jurisprudence invites two distinct due process challenges to punitive damages awards in states with split-recovery laws. The first potential challenge is that a jury's decision to impose punitive damages was based upon bias or prejudice resulting from the split-recovery law (e.g., the jurors' desire to levy punitive damages against an out-of-state or unpopular industry as a form of "tax relief" or to fund a social program). A second, related challenge is that the amount of the punitive damages award is unconstitutionally excessive because it is the product of considerations unrelated to the defendant's conduct.

whether punitive damages awards are unconstitutionally excessive. *See id.* at 475-83.
128. 517 U.S. 559 (1996) (quoting Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 420 (1994)).
129. *Id.* at 568.
130. *Id.* at 560-61.
131. *Id.* at 575.
132. *Id.* at 580.
133. *Id.* at 583.
134. 532 U.S. 424 (2001).
135. *See id.* at 433.
136. *See id.*
137. 123 S. Ct. 1513 (2003).
138. *See id.* at 1516.

2. Punitive Damages Awards Influenced by Bias or Prejudice Violate Due Process

The United States Supreme Court has repeatedly emphasized that punitive damages awards infected with bias, passion, or prejudice violate constitutional due process. In *TXO*, for example, Justice Anthony Kennedy stated: "When a punitive damages award reflects bias, passion, or prejudice on the part of the jury, rather than a rational concern for deterrence and retribution, the Constitution has been violated, no matter what the absolute or relative size of the award."[139] Justices Sandra Day O'Connor, Byron White, and David Souter likewise noted: "Influences such as caprice, passion, bias, and prejudice are antithetical to the rule of law. If there is a fixture of due process, it is that a verdict based on such influences cannot stand."[140] The Court reaffirmed this fundamental principle in *Gore* when it held that a punitive damages award based on conduct unrelated to the plaintiff's harm enters the "zone of arbitrariness" that violates due process.[141]

Split-recovery laws provide the jury with a motive for awarding punitive damages other than for punishment or deterrence. The opportunity to require an out-of-state defendant to "take a load off" local taxpayers or to fulfill socially beneficial goals may be a powerful and attractive incentive for a jury to impose a punitive damages award when not necessitated by the defendant's conduct. This is not to say that jurors are mischievous or scheming; their motivations simply may reflect human nature. Nevertheless, such motivations reflect a bias that may result in a due process violation.

3. Excessive Punitive Damages Awards Violate Due Process

Split-recovery laws also may foster due process challenges asserting that a punitive damages award is unconstitutionally excessive. As explained above, the *Gore* Court set forth three "guideposts" for determining whether punitive awards are unconstitutionally excessive: reprehensibility, ratio of punitive to compensatory damages, and comparable civil or criminal penalties.[142] Each of these guideposts flows from the wrong done to the plaintiff. Accordingly, if it appears that the jury may have been influenced by other factors, such as the

139. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 467 (1993) (Kennedy, J., concurring in part & concurring in the judgment); *see also* Pac. Mut. Life Ins. v. Haslip, 499 U.S. 1, 41 (1991) (Kennedy, J., concurring in the judgment) ("A verdict returned by a biased or prejudiced jury no doubt violates due process.").

140. *TXO*, 509 U.S. at 475-76 (O'Connor, J., dissenting).

141. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996).

142. *See id.* at 575.

desire to fulfill a particular social good through an award of punitive damages, the award should be deemed unconstitutional.

4. Courts Should Raise a Suspicious Judicial Eyebrow When Examining Punitive Damages Awards in States With Split-Recovery Statutes

The existence of a split-recovery law, coupled with a large punitive damages award, should raise a "suspicious judicial eyebrow" that the jury may have awarded punitive damages for improper purposes, or decided upon an inflated award for the same reasons.[143] Jury awards based wholly or in part on the potential good that might come out of redistributing wealth to public programs or social causes should be struck down as violating due process.

It may be particularly difficult for courts to assess the legitimate portion of a punitive damages award meant to punish or deter intentional or egregious bad conduct from the constitutionally questionable portion that may be awarded for the improper purpose of funding government programs or services.[144] "But fundamental fairness requires that impermissible influences such as bias and prejudice be discovered nonetheless, by inference if not by direct proof."[145]

Courts in states with split-recovery laws must closely scrutinize punitive damages awards to make sure that punishment was meted out for the right reasons and in an amount appropriate under the circumstances. Legislators also should appreciate that split-recovery laws may complicate judicial review of punitive damages, foster appeals, and increase delays and costs in civil litigation.

F. Constitutional Questions Regarding Split-Recovery Laws

Statutes requiring successful plaintiffs to surrender a portion of their punitive damages award to the state not only suffer from practical difficulties, but also face broad constitutional challenges.[146] Aside from due process implications, split-recovery statutes are most often challenged under the Takings Clause, as an excessive fine, or as a violation of equal protection under the United States Constitution or equivalent provisions of state constitutions. Split-recovery statutes are also subject to challenge under state constitutional

143. *TXO*, 509 U.S. at 481 (O'Connor, J., dissenting).

144. *See id.* at 476 (O'Connor, J., dissenting) ("Of course, determining whether a verdict resulted from improper influences is no easy matter.").

145. *Id.* (O'Connor, J., dissenting).

146. *See generally* Clay R. Stevens, Comment, *Split-Recovery: A Constitutional Answer to the Punitive Damages Dilemma*, 21 PEPP. L. REV. 857 (1994); Paul F. Kirgis, Note, *The Constitutionality of State Allocation of Punitive Damage Awards*, 50 WASH. & LEE L. REV. 843 (1993).

protections that do not have a federal corollary. Court decisions regarding the constitutionality of split-recovery statutes are mixed. Thus far, seven state supreme courts have upheld such laws,[147] and one state supreme court has declared its state's law to be unconstitutional.[148] A federal district court has also found a sharing statute unconstitutional,[149] but that state's supreme court declined to follow the federal decision.[150]

1. Takings Challenges

The Fifth Amendment prohibits the government taking of private property for public use without just compensation.[151] For this reason, the compelled sharing of punitive damages with the state is most frequently challenged as an unconstitutional taking of property.[152] These attacks often fail because longstanding United States Supreme Court precedent provides that property rights are created by operation of state law.[153] Thus, a plaintiff who wins a lawsuit does not have a property right in the full punitive damages award if a statute provides that a portion of the award belongs to the state.[154] That plaintiff, having never received a judgment for the full amount of the punitive damages award, does not have a "vested" property right for more than his or her share of the award.[155] As the Georgia Supreme Court recognized, "A plaintiff has no vested property right in the amount of punitive damages which can be awarded

147. *See* Evans *ex rel.* Kutch v. State, 56 P.3d 1046 (Alaska 2002) (plurality opinion); Gordon v. State, 608 So. 2d 800 (Fla. 1992); Mack Trucks, Inc. v. Conkle, 436 S.E.2d 635 (Ga. 1993); State v. Moseley, 436 S.E.2d 632 (Ga. 1993); Cheatham v. Pohle, 789 N.E.2d 467 (Ind. 2003); Shepherd Components, Inc. v. Brice Petrides-Donohue & Assoc., Inc., 473 N.W.2d 612 (Iowa 1991); Hoskins v. Bus. Men's Assurance, 79 S.W.3d 901 (Mo. 2002); Fust v. Attorney General, 947 S.W.2d 424 (Mo. 1997); DeMendoza v. Huffman, 51 P.3d 1232 (Or. 2002).

148. *See* Kirk v. Denver Publ'g Co., 818 P.2d 262 (Colo. 1991) (en banc).

149. *See* McBride v. Gen. Motors Corp., 737 F. Supp. 1563 (M.D. Ga. 1990).

150. *See Mack Trucks*, 436 S.E.2d at 635; *Moseley*, 436 S.E.2d at 632.

151. U.S. CONST. amend. V.

152. *See Kirk*, 818 P.2d at 267-73; *Mack Trucks*, 436 S.E.2d at 639; *Cheatham*, 789 N.E.2d at 470; *Shepherd Components*, 473 N.W.2d at 619; *Fust*, 947 S.W.2d at 431.

153. Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972) (stating that property rights are not created by the United States Constitution, but "[r]ather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.").

154. *See* Hoskins v. Bus. Men's Assurance, 79 S.W.3d 901, 904 (Mo. 2002) (finding no due process violation where the statute specifies the state's share of the punitive damages award and the defendant is liable for the full amount of the award whether or not the state has a lien on a portion of the judgment).

155. *See* McCollough v. Virginia, 172 U.S. 102, 123-24 (1898) (noting that the legislature may not take property rights that have been vested by a judgment).

in any case, and the legislature may lawfully regulate the amount of punitive damages which can be awarded."[156] Moreover, the Indiana Supreme Court has held, it stands to reason that if it is within a state's discretion to limit or completely eliminate punitive damages awards, then it may also decide to allocate a portion of an award to a state fund.[157]

Colorado is the only state to invalidate a sharing statute as an unconstitutional taking.[158] That statute, however, was unique in that it operated to require a claimant to remit a portion of the punitive damages award to the state *after* obtaining a judgment.[159] Since the claimant had already acquired a vested right to the property, the Colorado Supreme Court ruled in *Kirk v. Denver Publishing Co.*, the state could not constitutionally require the claimant to then surrender a portion of the award to the state.[160] Most other state statutes avoid this constitutional infirmity by providing that the claimant and the state acquire their property interest in the judgment simultaneously upon entrance of the verdict[161] or through the court's construing the statutory allocation "as a cap on punitive damages, limiting them *before* they are awarded to successful plaintiffs."[162]

2. Equal Protection

Split-recovery statutes are also frequently challenged under the federal Equal Protection Clause and equivalent state protections, such as those barring "special laws."[163] The Fourteenth Amendment's guarantee of "equal protection under the laws" means that "[s]tates must treat like cases alike but may treat unlike cases accordingly."[164] If a classification "neither burdens a fundamental right nor targets a suspect class" courts usually will uphold it "so long as it bears

156. *Mack Trucks*, 436 S.E.2d at 639; *see also* Gordon v. State, 608 So. 2d 800, 801-02 (Fla. 1992) ("The right to have punitive damages assessed is not property; and it is the general rule that, until judgment is rendered, there is no vested right in a claim for punitive damages.") (quoting Ross v. Gore, 48 So. 2d 412, 414 (Fla. 1950)); *Shepherd Components*, 473 N.W.2d at 619 (stating that "punitive damages are not allowed as a matter of right and are discretionary").

157. *See Cheatham*, 789 N.E.2d at 472.

158. *See* Kirk v. Denver Publ'g Co., 818 P.2d 262, 267-73 (Colo. 1991).

159. *See id.* at 272.

160. *See id.* at 273.

161. *See* Fust v. Attorney General, 947 S.W.2d 424, 431 (Mo. 1997) (comparing Missouri and Colorado split-recovery statutes); DeMendoza v. Huffman, 51 P.3d 1232, 1247 (Or. 2002) (comparing Oregon and Colorado split-recovery statutes).

162. Evans *ex rel.* Kutch v. State, 56 P.3d 1046, 1058 (Alaska 2002).

163. *See* Gordon v. State, 608 So. 2d 800, 802 (Fla. 1992); Mack Trucks, Inc. v. Conkle, 436 S.E.2d 635, 639 (Ga. 1993); *Fust*, 947 S.W.2d at 432.

164. Vacco v. Quill, 521 U.S. 793, 799 (1997) (citing Plyler v. Doe, 457 U.S. 202, 216 (1982)).

a rational relation to some legitimate end."[165] Equal protection attacks on split-recovery statutes have not been successful.

For example, in *Mack Trucks, Inc. v. Conkle*, a Georgia plaintiff challenged that state's sharing provision, which applies only to product liability actions, as arbitrarily discriminating between product liability claimants and other claimants.[166] The plaintiff, who alleged that he was injured when the tractor trailer he was driving overturned due to a defect, received a $2 million punitive damages award.[167] The claimant challenged the Georgia statute on the grounds that requiring him to give seventy-five percent of his punitive damages award to the state, but not requiring claimants in other cases to do the same, violated equal protection.[168] The Georgia Supreme Court disagreed. The court ruled that so long as similarly situated plaintiffs, such as those involved in product liability actions, are treated the same, the statute does not run afoul of equal protection.[169]

The Missouri Supreme Court addressed a different equal protection challenge to the Missouri sharing statute in *Fust v. Attorney General*.[170] The *Fust* claimants argued that the statute unconstitutionally discriminates against plaintiffs who do not settle because the law only gives the plaintiff a portion of the punitive damages awarded by a final judgment.[171] The court upheld the law, noting that "social and economic legislation [such as the sharing statute] 'that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate governmental purpose.'"[172]

3. Excessive Fines

Plaintiffs have also challenged split-recovery statutes under the Excessive Fines Clause of the Eighth Amendment.[173] In a 1989 case, *Browning-Ferris*

165. *Id.* (quoting Romer v. Evans, 517 U.S. 620, 631 (1996)).

166. *See Mack Trucks*, 436 S.E.2d at 639; *see also* James E. Lee II, Note, Mack Trucks, Inc. v. Conkle*: The Georgia Supreme Court Tells the Legislature to Keep on Truckin' When Appropriating Punitive Awards to the State Treasury*, 45 MERCER L. REV. 1439 (1994).

167. *See Mack Trucks*, 436 S.E.2d at 636-37.

168. *See id.* at 637-38.

169. *See id.* at 639.

170. *See* Fust v. Attorney General, 947 S.W.2d 424, 432 (Mo. 1997). *See generally* Benjamin F. Evans, Note, *"Split-Recovery" Survives: The Missouri Supreme Court Upholds the State's Power to Collect One-Half of Punitive Damage Awards*, 63 MO. L. REV. 511 (1998).

171. *See Fust*, 947 S.W.2d at 432.

172. *Id.* (quoting Hodel v. Indiana, 452 U.S. 314, 331 (1981)).

173. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, not cruel and unusual punishments inflicted."). For historical background

Industries of Vermont, Inc. v. Kelco Disposal, Inc.,[174] the United States Supreme Court rejected a claim that a $6 million punitive damages award was unconstitutional under the Excessive Fines Clause.[175] The Court ruled that the Excessive Fines Clause "appl[ies] primarily, and perhaps exclusively, to criminal prosecutions and punishments" and its "primary focus" was not concerned with civil damages.[176] The Court qualified its ruling, however, noting that the Excessive Fines Clause "does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action *nor has any right to receive a share of the damages awarded*."[177] The Court's language in *Browning-Ferris* invites Eighth Amendment challenges to split-recovery statutes.[178]

A Missouri plaintiff seized upon the Court's invitation in *Browning-Ferris* to challenge that state's split-recovery statute.[179] In *Hoskins v. Business Men's Assurance*, an engineer who was diagnosed with demoplastic mesothelioma, a form of cancer associated with asbestos exposure, received a judgment for compensatory and punitive damages against the owner of the building in which he had been exposed to asbestos during his employment.[180] When the state asserted its lien for fifty percent of the punitive damages award, Hoskins and his wife challenged the constitutionality of the statute under various theories, including the Excessive Fines Clause.[181] The Missouri Supreme Court held that because the statute did not implicate the state's prosecutorial power or provide the state with any interest in the punitive damages award prior to a final judgment, the statute did not run afoul of the Excessive Fines Clause.[182]

Two federal district courts have also evaluated the constitutionality of sharing provisions under the Excessive Fines Clause and reached opposite results. In *McBride v. General Motors Corp.*,[183] a federal district court ruled that the Georgia statute allocating seventy-five percent of punitive damages awards to the state's general fund was unconstitutional.[184] The court reasoned:

on the Excessive Fines Clause, see Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons From History*, 40 VAND. L. REV. 1233 (1987).

174. 492 U.S. 257 (1989).

175. *Id.* at 260.

176. *Id.* at 262, 266.

177. *Id.* at 264 (emphasis added).

178. *See* Matthew J. Klaben, Note, *Split-Recovery Statutes: The Interplay of the Takings and Excessive Fines Clauses*, 80 CORNELL L. REV. 104 (1994); Recent Case, Gordon v. State, *608 So. 2d 800* (Fla. 1992), 106 HARV. L. REV. 1691 (1993).

179. *See* Hoskins v. Bus. Men's Assurance, 79 S.W.3d 901, 904 (Mo. 2002).

180. *See id.*

181. *See id.*

182. *See id.*

183. 737 F. Supp. 1563 (Ga. 1993).

184. *Id.* at 1578.

> [T]he [Tort Reform] Act, if the subsection allowing the State of Georgia to occupy the status of a judgment creditor entitled to 75% of any award of product liability punitive damages is allowed to stand, converts the civil nature action of the prior Georgia punitive damages statute into a statute where fines are being made for the benefit of the State, contrary to the constitutional prohibitions as to excessive fines and contrary to the double jeopardy clause of the Fifth Amendment to the Constitution of the United States.[185]

In upholding Iowa's sharing statute against a similar challenge, the Southern District of Iowa distinguished its ruling from *McBride*. In *Burke v. Deere & Company*,[186] the district court reasoned that the Iowa statute did not impose an excessive fine because it allocates a portion of the punitive damages award not to the state treasury, as in Georgia, but to a civil reparations trust fund administered by the courts.[187] As discussed *supra*, the Eighth Circuit reversed the district court because it improperly instructed the jury on the allocation of punitive damages to the state fund.[188] Although the court did not reach the constitutionality of the statute under the Due Process or Excessive Fines Clauses, the Eighth Circuit expressed some skepticism in dicta, noting that "this may be the sort of verdict that the Supreme Court has in mind when it referred to 'extreme results that jar one's constitutional sensibilities.'"[189]

4. Various State Constitutional Provisions

Split-recovery statutes have also survived most challenges based on various state constitutional provisions, such as "single subject" rules, requirements that the subject of the bill be adequately expressed in its title,[190] the right to access to courts,[191] restrictions on taxing judgments,[192] separation of powers,[193] the right to trial by jury,[194] a plaintiff's "natural right to the enjoyment of the gains of their industry,"[195] and a prohibition against demanding a "person's particular services . . . without just compensation."[196] For example, the Oregon Supreme Court rejected a challenge to its split-recovery statute under the Remedy Clause of the Oregon Constitution.[197] That clause, which guarantees a remedy for any injury to absolute common law rights respecting a person, property, or reputation, was not implicated, the court ruled, because punitive damages were not necessary to compensate the plaintiff for injury, but were instead intended to punish and deter egregious conduct.[198]

VI. Conclusion

The United States Supreme Court has said that punitive damages have "run wild" in this country.[199] Legislators should respond by adopting reforms that include a higher burden of proof requirement, a heightened liability standard for punitive damages awards, statutory caps to ensure greater proportionality between punitive and compensatory damages, and bifurcated trial procedures at the defendant's request.

Laws requiring a successful plaintiff to share his or her punitive damages award with the state may be superficially attractive to state legislators, but should be rejected. Such laws raise serious concerns, including the potential to make the problem of runaway punitive damages awards even more prevalent. By reducing the "windfall effect" of punitive damages, jurors may be emboldened to award larger recoveries than they do today. Defendants also may suffer

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185. *Id.* The district court also ruled that the Georgia law violated equal protection by requiring allocation of punitive damages to the state in product liability cases but not others, violated the state's constitutional provision prohibiting legislation from addressing more than one subject matter or containing a matter not stated in its title, and violated the Double Jeopardy Clause of the United States Constitution. *See id.* at 1579. The Georgia Supreme Court declined to follow, or even acknowledge, the district court opinion, and found the statute to be constitutional. *See* Mack Trucks, Inc. v. Conkle, 436 S.E.2d 635 (Ga. 1993); State v. Moseley, 436 S.E.2d 632 (Ga. 1993).

186. 780 F. Supp. 1225 (S.D. Iowa 1991), *rev'd on other grounds*, 6 F.3d 497 (8th Cir. 1993).

187. *See id.* at 1242; *see also* Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854, 868-69 (Iowa 1994) (finding that Iowa's recovery of a portion of multiple punitive damages awards against a single defendant for the same course of conduct under its split-recovery statute did not constitute an excessive fine).

188. *See Burke*, 6 F.3d at 497.

189. *See id.* at 512 n.26 (quoting Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 17 (1991)).

190. *See* Evans *ex rel.* Kutch v. State, 56 P.3d 1046, 1069-70 (Alaska 2002); *Mack Trucks*, 436 S.E.2d at 639; *McBride*, 737 F. Supp. at 1578; Fust v. Attorney General, 947 S.W.2d 424, 427-28 (Mo. 1997).

191. *See* State v. Moseley, 436 S.E.2d 632, 634 (Ga. 1993).

192. *See* Gordon v. State, 608 So. 2d 800, 802 (Fla. 1992); Cheatham v. Pohle, 789 N.E.2d 467, 476 (Ind. 2003).

193. *See Fust*, 947 S.W.2d at 430-31.

194. *See Evans*, 56 P.3d at 1058-59; *Gordon*, 608 So. 2d at 802; *Moseley*, 436 S.E.2d at 634.

195. *See Fust*, 947 S.W.2d at 431.

196. *See Cheatham*, 789 N.E.2d at 476.

197. *See* DeMendoza v. Huffman, 51 P.3d 1232, 1237-39 (Or. 2002). *See generally* Junping Han, Note, *The Constitutionality of Oregon's Split-Recovery Punitive Damages Statute*, 38 WILLAMETTE L. REV. 477 (2002).

198. *See DeMendoza*, 51 P.3d at 1237-45. The court also upheld the statute against challenge under the state's takings clause, as an unconstitutional revenue bill or tax, and as violating separation of powers principles. *See id.* at 1245-48.

199. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).

prejudice at the hands of a jury that awards punitive damages, or decides to give a higher award, because the jurors know that a portion of the award will go to the state treasury or to support state programs. Split-recovery statutes also may give states an incentive to further expand the availability of punitive damages awards far beyond their traditional use. They also exacerbate conflicts of interest between plaintiffs and their attorneys, fuel the potential for "regulation through litigation," and foster constitutional litigation.

For all of these reasons, split-recovery laws that require successful plaintiffs to share a portion of any punitive damages recovery with the state (or a state-specified fund) should be rejected. Instead, states seeking to enact punitive damages reforms should: (1) adopt a heightened burden of proof and liability standard for punitive damages claims; (2) set statutory limits to ensure greater proportionality between punitive and compensatory damages awards; and (3) provide for a bifurcated trial at the defendant's request.

of July 15, 2003.

4. He is aware that the Court of Appeals held that a workplace product manufacturer had no duty to warn an employer of the dangers posed by the products the manufacturer sells when the employer is a "learned intermediary" or "sophisticated user." The court said that as a matter of law the Plaintiff's employer - - a foundry - - was a "sophisticated purchaser" and under *Germann v. F.L. Smithe Mach. Co.*, 395 N.W.2d 922, 924 (Minn. 1986), no duty exists to warn of a danger of which the product's purchaser is already aware. *Citing Harmon Contract Glazing, Inc. v. Libby-Owens-Ford Co.*, 493 N.W.2d 146, 151 (Minn. App. 1992), *review denied* (Minn., Feb. 12, 1993).

a. The Court of Appeals compared the asbestos in the silica product in this case to a harmful drug dispensed by a doctor, the court said that as a "learned intermediary" was involved, "the exception shifts liability for harm from the supplier to the intermediary or end user if either is a sophisticated user." *Slip op.* at 6, *citing Smith v. Walter C. Best, Inc.*, 927 F.2d 736, 739 (3rd Cir. 1990). Despite the earlier distinction of this pharmaceutical doctrine from industrial cases in *Todalen v. U.S. Chem. Co.*, 424 N.W.2d 73, 79 (Minn. App. 1988), *review denied* (Minn., June 29, 1998), *overruled on other grnds*, *Tyroll v. Private Label Chems., Inc.*, 505 N.W.2d 54 (Minn. 1993), the court in this case did not apply the distinction. *Comparing Mulder v. Parke Davis & Co.*, 288 Minn. 332, 335-36, 181 N.W.2d 882, 885 (1970) (applying learned intermediary doctrine in case of a doctor prescribing medication that can be used safely with an appropriate prescription). Here the court instead distinguished *Todalen* and said that it was persuaded by the language of foreign decisions

that made the sophisticated intermediary responsible for not passing on warnings to its employees.

b. The reason *Todalen* is so important however, and that foreign cases are of less aid, is that *Todalen* is the only case assessing the implications for the injured employee under Minnesota's workers' compensation laws. Because of the exclusive remedy provisions of MINN. STAT. § 176.031, the current ruling has the impact of now limiting the remedy of any worker exposed to asbestos to only suing his employer for work comp even when it can be shown that the manufacturer of the asbestos-laden product knew of dangers and concealed them from the employer. The rationale for this is that the employer should have known of "all dangers" and didn't need any fine tuning of that information in the form of a warning from the manufacturer.

c. While the Court of Appeals essentially applied the result in the pharmaceutical case of *Mulder* to make the intermediary solely liable, *Mulder* involved a very detailed warning of safe and unsafe uses of the product being passed onto the doctor by the pharmaceutical company. The rationale for *Mulder*, therefore, was that the intermediary had been told all the risks by the manufacturer. In the present case, the manufacturer admitted that at the relevant time frame it never told the intermediary employer anything.

d. The MTLA is an association of attorneys who represent consumers and employees, some of whom are exposed to workplace products including asbestos. The clients represented by MTLA members are directly impacted by the development of the law governing the concept of "sophisticated users" or "learned intermediary" employers.

The proper development and application of the law in this area is a matter of vital interest both to the association and to those people its members represent.

5. Your affiant believes that the Court of Appeals' decision is contrary to precedents established by the Minnesota Supreme Court as described above.

6. The MTLA seeks to submit a brief as *Amicus Curiae* addressing the reasoning and analysis that should be applied in the issues raised by this case should the Supreme Court grant review of this important matter. Its position is most closely aligned with that of the Petitioners.

7. Consistent with *State v. Finley*, 243 Minn. 28, 64 N.W.2d 769 (1954), the requested *amicus* brief will be written to advise, inform and remind the court of legal principles pertinent to the proper development of the law in a non-adversarial manner.

8. The contemplated *amicus* brief will not exceed the twenty page limit set forth in MINNESOTA RULES OF CIVIL APPELLATE PROCEDURE 132.01, subd. 3, and will be due within seven days after the filing of Appellant's brief pursuant to rule 129.02. Further, it is understood that amicus will not participate in oral argument except with further leave of the court per Rule 129.04.

9. A copy of this petition has been served by U.S. Mail on this same date upon the following counsel:

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