WG8 TOPIC GROUPS

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WG8 PURPOSE OF PUNITIVE DAMAGES

I. INTRODUCTION AND EXECUTIVE SUMMARY

A. What Are Punitive Damages?

Punitive damages are damages awarded above and beyond that which is intended to compensate concrete harms. They are designed to punish and deter egregious misconduct, particularly conduct that is harmful to society and might otherwise not be discouraged through the payment of compensatory damages. They "have been described as 'quasi-criminal' operate as 'private fines' intended to punish the defendant and to deter future wrongdoing." *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001). Because punitive damages are said to vindicate society's interest in deterring misconduct, plaintiffs who seek punitive damages are often acting in a fashion akin to a private attorney general. *See, e.g.*, *DeMendoza v. Huffman*, 51 P.3d 1232, 1243 (Or. 2002).

B. A Short History of Punitive Damages

Punitive damages originated in the common law.[1] In 1763, English courts firmly established the legitimacy of punitive or exemplary damages as a common-law device within the jury's province to award. *Huckle v. Money*, 95 Eng. Rep. 768 (C.P. 1763); *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763). In *Wilkes*, Lord Chief Justice Pratt announced: "[A] jury shall have it in their power to give damages for more than the injury received as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to

[1] 1 Linda L. Schlueter & Kenneth R. Redden, Punitive Damages § 1.0, at 1 (4th ed. 2000) (finding that punitive damages "evolved from the common law . . . to meet certain societal needs such as compensation for mental anguish or other intangible harms, punishment and deterrence of wrongdoers, and as a substitute for revenge"). Schlueter and Redden also note that use of multiple damages for these purposes existed at least as far back as the Code of Hammurabi in 2000 B.C. *Id.*

the action itself." *Id*. at 498-99. *Wilkes*, which involved a lawsuit by a member of Parliament who had published a pamphlet critical of the British government for which he had been arrested, was considered a vindication of liberties by the founding generation in the United States. *See City of West Covina v. Perkins*, 525 U.S. 234, 247 (1999).

Soon after *Wilkes*, American courts began to award punitive damages. *See Genay v. Norris*, 1 S.C.L. (1 Bay) 6 (S.C. 1784); *Coryell v. Colbaugh*, 1 N.J.L. 77 (N.J. 1791). These early cases established that punitive damages were a prerogative of the jury. In *Coryell*, as it was to be in other states, the jury was instructed "not to estimate the damage by any particular proof of suffering or actual loss; but to give damages for example's sake, to prevent such offenses in [the] future." *Id*. at 77. Since then, punitive damages "have long been a part of traditional state tort law." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984).

By 1851, the U.S. Supreme Court declared the availability of punitive damages to be a "well established principle of the common law." *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851). The Court acknowledged that it was "aware that the propriety of this doctrine has been questioned by some writers, but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument." *Id.* The Court added that the jury's decision to assess punitive damages must be made on the basis of "the enormity of his offense, rather than the measure of compensation to the plaintiff."

In recent years, punitive damages, though still rarely awarded, have grown in size and frequency. In 1996, the U.S. Supreme Court held for the first time that a punitive damage award was so "grossly excessive" that it violated the defendant's due-process rights. *BMW of No. Amer., Inc. v. Gore*, 517 U.S. 559, 562 (1996). Five years later, the Court determined that

punitive damages had "evolved," were no longer considered within the ambit of the jury's authority under the Seventh Amendment[2] but instead an expression of the jury's moral condemnation, and that any award was subject to *de novo* review by an appellate court. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 n.11, 437, 432, 431 (2001).

C. The Purposes and Evolution of Punitive Damages

As traditionally conceived, punitive damages were both individualized and retributive. They punished a tortfeasor for intentional conduct directed toward an individual plaintiff. Torts giving rise to punitive damages were personal in nature - libel/slander, assault, malicious prosecution, false imprisonment, and intentional interference with property.[3]

Over time, the class of torts for which punitive damages could be awarded expanded, allowing punitive damages in cases of negligence, fraud, and products liability. Commentators have observed that awarding punitive damages in cases of reckless behavior and strict product liability (*i.e.*, cases where the defendant did not act intentionally or willfully) are directed, not at punishing intentional misconduct, but rather at reducing conduct that poses a risk to the larger society.[4] In this sense, punitive damages, when used to deter negligence, vindicate society's interests, rather than those of the individual plaintiff.

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[2] Nonetheless, a court still had to respect any factual findings of the jury. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 439 n.12 (2001).

[3] Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation Into "Punishment,"* 54 S.C. L. Rev. 47, 50 (2002).

[4] *E.g.*, Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 Yale L.J. 347, 357-58 & n.19 (2003).

With the increase in scope of claims for which punitive damages could be awarded, as well as larger verdicts, punitive damages awards have come under scrutiny. Scholars differ in their assessment as to whether punitive damages have become too frequent and excessive. Nevertheless, in response to a general perception that punitive damages should be constrained, state legislatures began imposing limits on punitive damages, some by imposing flat caps, some by limiting such damages to a multiple of compensatory damages, and others by requiring a higher evidentiary showing.[5]

Courts and scholars typically agree that punitive damages serve two distinct purposes: punishment and deterrence.[6]

1. Retribution and Punishment

Punishment is typically understood to mean the imposition of sanctions to satisfy a desire for retribution against the defendant. Punitive damages, when imposed to punish, are based on the reprehensibility of the defendant's conduct, *i.e.*, whether the conduct was intentional, malicious, or reckless. Nevertheless, while the conduct giving rise to punitive damages is the defendant's, the measure of those damages is based on the community's level of outrage, not the defendant's incentives to act. When used in this manner, punitive damages are similar to

[5] Kelly-Rose Garrity, *Whose Award is It Anyway?*, 45 Washburn L.J. 395, 399-400 (2006).

[6] "Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." *BMW of North Am., Inc. v. Gore*, 517 U.S. 559, 568 (1995). Although punishment and deterrence represent the consensus purposes of punitive damages, one scholar has indentified five underlying purposes served by punitive damages: (1) retribution; (2) education; (3) deterrence; (4) compensation; and (5) law enforcement. David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 Vill. L. Rev. 363, 406 (1994).

criminal fines, which are generally based on the severity of the infraction, rather than injury to a victim. In this very real sense, the punishment aspect of punitive damages -- even when directed toward individual harm[7] -- reflects social interests.

Current Supreme Court jurisprudence concerning the factors to be considering in assessing punitive damages emphasizes the punishment function of punitive damages.[8] The Court's use of "reprehensibility" analysis is really just another way of assessing blameworthiness.[9] Similarly, consideration of the wealth of a defendant as a factor in determining punitive damages makes sense only if the objective is to make the damages hurt.[10] Because the value of each additional dollar a person has goes down as more dollars are accumulated (i.e., money has diminishing marginal value once basic needs are met), the amount

[7] In *Phillip Morris USA v. Williams*, 549 U.S. 346 (2007), the Court rejected the notion that punitive damages can be assessed to punish a defendant for harming persons other than the plaintiff. Rather, harm to others may only be considered in deciding how reprehensible the defendant's conduct was when punishing it for injuring the particular plaintiff.

[8] *See, e.g., Phillip Morris*, 549 U.S. at 362 (Ginsberg, dissenting) ("The purpose of punitive damges, it can hardly be denied, is not to compensate, but to punish.").

[9] Reprehensibility is determined based on whether (1) the harm caused was physical as opposed to economic; (2) the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was the result of intentional malice, trickery, or deceit, or mere accident. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003).

[10] Wealth is a consideration because the "function of deterrence… will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort." *Watson v. Dixon*, 532 S.E.2d 175, 178 (2000)(citation omitted). Still, the U.S. Supreme Court has instructed that the "wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 427 (2003) (citation omitted).

necessary to punish a defendant with a high net worth is greater than the amount necessary to punish someone relatively poorer.[11]

Use of punitive damages to assign blame and extract punishment may be less justified in a system where punitive damages are awarded in cases of negligence or strict liability (*e.g.*, products liability). Similarly, where the defendant is a corporation or other business entity, punishment of the organization as a whole, rather than individuals within the organization, has been questioned by some scholars as unappealing and inefficient, because responsible individuals may evade punishment, or because the parties actually punished are innocent shareholders and customers to whom the cost of punitive damages awards are passed through.[12]

2. Deterrence

Courts have endorsed the use of punitive damages as a means of deterring undesirable conduct. Expanding on this objective, the field of law and economics has suggested that punitive damages are justified by a desire to achieve the proper balance between (1) harm caused; (2) precautionary measures by defendants; (3) self-protection by plaintiffs; and (4) litigation

[11] Varying punitive damages based upon wealth could meet deterrence goals as well. This may be the case if, for example, poor people are more risk averse then rich people. In that case, the potential damage award necessary to cause a poor person to cease bad behavior would be less than it would be for a rich person. A. Mitchell Polinsky & Steven Shavell, *Punitive Damages*, at 775-76 (available at http://lsr.nellco.org/harvard_olin/214/). Note, however, that varying damages based on wealth is probably not likely to achieve optimal levels of precautionary behavior, because the cost of safety measures is the same for both rich and poor.

[12] Polinsky & Shavell, *Punitive Damages*, at 773. *But see* Michael Wells, *Comments on Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 Ala. L. Rev. 1073, 1076 (1989) (""economic analysis does endorse a role for punitive damages. Insofar as corporate misconduct is concerned, their function is to see to it that the corporation does not undervalue negligently caused accidents for which the corporation does not pay the full costs in the form of compensatory damages."). Still, the approaches taken in individual states to this issue varies. For a survey of state approaches, *see* Christopher R. Green, *Punishing Corporations: The Food-Chain Schizophrenia in Punitive Damages and Criminal Law*, 87 Nebr. L. Rev. 197 (2008).

costs.[13] The central idea is that if a tortfeasor bears the full cost of his conduct, he will commit a tort only when it is efficient to do so -- that is, only when the cost of injury to the plaintiff is less than the cost to the defendant of not engaging in the conduct, both in terms of prevention (*e.g.*, safety measures) and opportunity cost (*e.g.*, lost convenience/utility). So, for example, if I can get to work 15 minutes faster by speeding, thus billing .25 more hours in the day at $400 an hour, I will continue to speed unless the cost of an accident times the probability of such an accident occurring in a given time period exceeds the value of my time during the same period.

Inherent in the deterrence goal of punitive damages is a belief that merely compensating a plaintiff for actual harm incurred is not -- at least in certain circumstances -- sufficient to cause a bad actor to refrain from the conduct or take safety measures to prevent his or her conduct from harming others where doing so leaves society as a whole better off. This can happen for one of a number of reasons, each of which provides an independent justification for punitive damages.

a. Underenforcement. In a world of perfect enforcement, if a tortfeasor must pay damages equal to the harm caused, he will only commit the act when it is efficient to do so.[14] Defendants will take safety measures only when the cost of safety is less than the harm caused in its absence. In addition, they will engage in activity only when the benefit of doing so exceeds the cost of harm caused.

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[13] Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 Yale L.J. 347, 357-58 & n.19 (2003).

[14] This is so for strict liability where the plaintiff is compensated whenever another causes him harm. Where damages are awarded only if the defendant acted negligently, on the other hand, damages equal to the harm to the plaintiff may result in overprecautions. Or it could lead to too much activity, because once precautions are taken, negligence is negated and liability reduces to zero regardless of harm caused. *See* Polinsy & Shavell, *Punitive Damages*, at 766-67. Other scholars have suggested that damages less than actual harm are optimal, at lease where tort supply is inelastic, meaning that the number of torts committed does not vary much with a change in damage award. *See* David Friedman, *An Economic Explanation of Punitive Damages*, www.daviddfriedman.com/Academic/Punitive/Punitive.html.

When not every tort is punished, however, the cost to the defendant of doing harm is less than the actual harm caused. Crime pays. This can lead to more activity than socially optimal, or fewer precautionary measures, or both. Underenforcement may result, for example, where the victim has difficulty identifying the responsible party or the costs of litigation make enforcement impractical. In this view, punitive damages account for the fact that tortfeasors discount the harm they cause by the probability of getting caught. Thus, to achieve proper deterrence, sanctions must be inflated. Punitive damages further address underenforcement by making litigation more attractive to injured parties who might otherwise be dissuaded from suing due to litigation cost.

2. Underestimation of Harm. Compensatory damages alone may be insufficient to deter bad conduct where they fail to capture the total social harm caused. This may occur where nonpecuniary losses are not recognized in the law or are difficult to prove,[15] or where the activity has externality effects on third parties who lack standing to sue.

3. Socially Illicit Acts. Some conduct, while enhancing the utility of the actor, may have no social benefit. For example, if I get $1000 worth of pleasure from smashing the headlights and slashing the leather seats of my cheating man's car, but it only causes $500 of damage, that would appear to be a socially optimal outcome. But pleasure derived solely from harm to others has no real social utility, notwithstanding country music lyrics to the contrary. Thus, my perception of this activity's benefit and society's view are not

[15] For example, damages for loss of animals is often limited to the market value of the animal. If you poisoned my family dog, recoverable damages are limited to the market value of a mutt. This would hardly compensate for me for the loss of my loyal companion and the sadness of my children.

aligned. To keep me from acting in a socially illicit manner, damages must be high enough to offset my pleasure -- it must cost me more than $1000. Moreover, because society is not concerned with achieving optimal levels of this activity, setting damages too high is not a problem from an efficiency point of view.[16]

At least one law and economics scholar has rejected the socially illicit conduct justification for punitive damages. Rather than viewing the defendant's conduct as generating "illicit" utility for the defendant, Friedman sees this as a transfer of utility from others to the defendant. The "gain" to the tortfeasor is netted out by a loss to third parties.[17] Because the harm to third parties is not recoverable by the plaintiff, damages do not equal total harm and punitive damages are justified.[18]

a. Encouraging Negotiated Arrangements

Although never endorsed by the courts, another justification for punitive damages is that they can encourage parties to negotiate rather than unilaterally do harm. The classic example is patent or copyright infringement. If damages for infringement (adjusted for probability of getting caught) are less than the benefit of taking intellectual property, the taking will occur. This is socially inefficient because parties will expend resources wastefully in an effort to protect intellectual property rather than develop it. Punitive damages, when set to make the cost of

[16] Although it could be inefficient if damages were so high that ex-lovers are motivated to bring specious lawsuits, which imposes litigation administration costs on society as a whole.

[17] This might be so if, for example, smashing up a cheating boyfriend's car has a chilling effect on the pursuit of relationships by others, thereby costing society at large $1000 worth of happiness.

[18] Friedman, www.daviddfriedman.com/Academic/Punitive/Punitive.html.

misappropriation higher than the cost of a license, induce parties to reach negotiated agreements.[19] This justification for punitive damages has at least two limitations. First, it would appear to apply only to intentional conduct, not negligence. And second, there are times when negotiation is not possible or is highly impractical.

Some commentators have treated the punishment goal of punitive damages as a vindication of private interests, and the deterrence goal as a vindication of public interests. But the line between punishment and deterrence is not so clear. Any mother of a four-year-old can tell you that punishment has a deterrent effect. Scholars have noted, however, that the ***magnitude*** of punitive damages necessary to achieve the punishment and deterrence objectives differ.[20] In practice, punitive damages awards strike a balance between these objectives by taking into account multiple factors directed at both goals, such as vulnerability of the plaintiff (punishment focus) and frequency of conduct (deterrence factor).

D. Problems Concerning Punitive Damages

1.) In recent years, through its Due Process jurisprudence, the Supreme Court has addressed several issues: the possibility of multiple punishments, "windfall" and variable distributions of punitive damage awards to individual plaintiffs, and states' punishment of conduct outside of their jurisdiction that may be lawful where it was undertaken. Issues concerning multiple punishment, unfair distribution, and federalism remain. In addition, through legislation, the States have actively addressed their own perceptions of issues with punitive damages.

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19 In theory, this could be true for other types of torts. If I enjoy smashing my car into yours, I may pay you to participate in a demolition derby, thereby securing your permission and avoiding suit.

20 If enforcement is low, high damages are necessary to deter. But since the nature of the conduct does not vary with enforcement, the damages necessary to punish are likely be less than is optimal for purposes of deterrence. Conversely, where enforcement is high, the magnitude of damages necessary to deter approaches actual harm caused, and retributive damages will exceed the level necessary for optimal deterrence.

Thus, for example, some states have limited awards through the imposition of caps, while others have emphasized policies of optimal deterrence.

a.) *Multiple Punishment*

Multiple punishment refers to the possibility that multiple punitive damages awards may be leveled against the same defendant for the same acts when a number of individuals or entities are injured by the defendant's common course of conduct. *See* Jim Gash, *Solving the Multiple Punishments Problem: A Call For A National Punitive Damages Registry*, 99 NW. U. L. REV. 1613, 1619-20 (2005).

i.) Unlike in criminal law where the Double Jeopardy Clause prevents multiple punishment, the federal Constitution has no similar explicit prohibition. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003). Still, the Court's emphasis on state-by-state adjudication, *id*. at 421-22, and awards tied to individualized harm, *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007), appears to guarantee multiple punishments when the misconduct affects many plaintiffs and crosses state lines.

ii.) The Court has, however, articulated Due Process limitations on "grossly excessive or arbitrary punishments." *State Farm*, 538 U.S. at 416.

aa.) Courts are to consider three factors in evaluating punitive damages awards: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized in comparable cases." *Id.* at 418; *see also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 424 (2001).

bb.) Reprehensibility is the most important factor, and although a jury may consider harm to nonparties in assessing reprehensibility, the jury "may not punish for the harm caused others," *Philip Morris USA v. Williams*, 549 U.S. 346, 355, 357 (2007); *Campbell*, 538 U.S. at 423 (explaining that such awards "creates the possibility of

multiple punitive damages awards for the same conduct"), 426.

The conceptual difficulty in allowing juries to consider damage to parties who are not before the court in assessing the overall reprehensibility of a defendant's behavior while concurrently not allowing such damage to be included in determining the amount of an award has been criticized. *See Williams*, 549 U.S. at 360 (Stevens, J., dissenting).

iii.) The two concepts could be reconciled by understanding damage to non-parties as a reprehensibility factor that could enhance an award, but not beyond an upper limit imposed by a relationship to the plaintiff's compensatory damages. *Cf.* Elizabeth J. Cabraser & Robert J. Nelson, *Class Action Treatment of Punitive Damages Issues After* Philip Morris v. Williams: *We Can Get There From Here*, 2 CHARLESTON L. REV. 407, 413-14 (2008).

iv.) However, constraining the upper limit in this way may limit the feasibility of punitive damages as an effective economic deterrent absent aggregation of plaintiffs in litigation. *See generally* Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L. J. 347 (2003).

b.) *Unfair Distribution*

The Court's Due Process limitations also address distributional issues that arise in the award of punitive damages.

i.) The Court appears to have rejected deterrence as a policy goal of punitive damages, *see Cooper Indus.*, 532 U.S. at 438, and instead to have focused exclusively on retribution for damage sustained by the individual plaintiff, *see Williams*, 549 U.S. at 353-55. Yet, the Court continues to acknowledge deterrence as a goal, if only at its most abstract level. *See, e.g.*, *Exxon Shipping Co. v. Baker,* 554 U.S. 471, 494 (2008). Still,

because "States possess discretion over the imposition of punitive damages," *State Farm*, 538 U.S. at 416, deterrence can receive greater emphasis than the Court has acknowledged. *See, e.g.*, Ore. Rev. Stat. § 30.925(3) (1991) (making "total deterrent effect" a factor in determining the size of an award).

ii.) By requiring a nexus between the plaintiff's compensatory damages and any punitive damages, and by explicitly calling for examination of similar cases, the Court has taken steps to work toward distributional uniformity among similarly situated plaintiffs and to limit windfall profits to a plaintiff for harm inflicted upon non-parties.

But even requiring a nexus to compensatory damages does not ensure a defendant will be able to pay all similarly situated plaintiffs' judgments.

iii.) Litigation arising out of a nation-wide course of conduct, such as products liability, may make a defendant insolvent. *See* Gash, *supra*, at 1625-27.

iv.) Plaintiffs who do not recover early may not recover at all.

v.) Moreover, conventional economic opinion has suggested that windfalls are an unavoidable and a necessary consequence of effective economic deterrence. *See* Sharkey, *supra*, at 370-72. Amounts necessary to deter wrongdoing may not be equal to the amount of a plaintiff's loss.

vi.) Finally, as commentators have noted, not all states allow for punitive awards to be distributed entirely to the plaintiffs. Some states distribute a portion of the award to a state fund. *See id*. at 372-389 (describing state statutory and court split-recovery rules); Cabraser & Nelson, *supra*, at 410.

c.) *Federalism*

The Court has also enunciated limitations on the territorial reach of state-court punitive damage awards explaining that state sovereignty and comity prevent a state from imposing economic sanctions for unlawful conduct in that state with the intent to change lawful conduct in other states. *Gore*, 517 U.S. at 572.

But courts and commentators have also criticized the Supreme Court's jurisprudence for unnecessarily limiting states rights. *See Gore*, 517 U.S. at 598 (Scalia, J., dissenting); *see also Campbell*, 538 U.S. at 429 (Scalia, J., dissenting); Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1421-27 (2006) (suggesting partial federalization caused by extraterritorial concerns creates instability).

2.) Going forward, methods for the aggregation of plaintiffs' claims, such as class and mass actions, may address these issues in some cases.

a.) Aggregation of claims addresses some of the fairness concerns related to compensating some plaintiffs, but not others, and to compensating similarly situated plaintiffs unequally, that may arise out of a defendant's limited resources. *See* Cabraser & Nelson, *supra*, at 421.

b.) Aggregation may also ameliorate the territorial limitations of the Court's punitive damages jurisprudence.

c.) Aggregation may also allow for larger awards that could serve as effective economic deterrents. *See id.* at 422.

d.) Have recent developments relating to federal class certification facilitated or hindered attempts to aggregate punitive damages claims?

i.) Following *Ortiz v. Fibreboard*, 527 U.S. 815, 864 (1999), use of Rule 23(b)(1)(B) mandatory limited fund class actions has been curtailed.

ii.) Rule 23(b)(3)'s predominance requirement similarly poses hurdles to class certification—especially in injury and mass tort cases where individual issues often predominate over issues common to the class. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628-29 (1997).

iii.) State class actions may provide another viable method of aggregation, s*ee* Cabraser & Nelson, *supra*, at 427-28, as may the rarely used "mass action" rules added to the Class Action Fairness Act in 2005, *see id.* at 430, but absent statutory revision, these methods of aggregation may remain of only limited applicability.

E. Differing Views on Punitive Damages

Controversy has surrounded punitive damages almost from the beginning,[21] and much of the criticism tracks age-old criticisms of the institution of trial by jury.[22] In the first half of the 19th century, an evidence scholar, Simon Greenleaf, lamented the growth of punitive damages as illegitimate, describing verdicts containing punitive damages as little more than a form of extra compensation for intangible or dignitary harms. *See* Simon Greenleaf, A TREATISE ON THE LAW

[21] *Smith v. Wade*, 461 U.S. 30, 58 (1983) (Rehnquist, J., dissenting) (awarding punitive damages "has been vigorously criticized throughout the Nation's history.").

[22] Criticizing juries, based on anecdotal evidence, is a longstanding pastime. In a treatise on the jury first published in 1852, historian William Forsyth wrote: "It would not be difficult for an opponent of the system to cite ludicrous examples of foolish verdicts, but they would be a very unfair sample of the average quality; and nothing can be more unsafe than to make exceptional cases the basis of legislation." William Forsyth, HISTORY OF TRIAL BY JURY 376 (1971 reprint; 1878).

OF EVIDENCE 240-50 (16th ed. 1899). *See also Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 25-27 (1991) (Scalia, J., concurring) (describing Greenleaf's view).[23]

New Hampshire, one of five states that prohibit punitive damages,[24] subscribed to Greenleaf's critique, and rejected punitive damages, somewhat luridly, in declaring that the "idea of [punitive damages] is wrong. It is a monstrous heresy. It is an unsightly and unhealthy excrescence, deforming the symmetry of the body of the law." *Fay v. Parker*, 53 N.H. 342, 382, 1872 WL 4394, *41 (1872). That court went on to note that a "just and manly and honorable indignation" over a "malicious wrong" is susceptible to being "warped and perverted by violent hatred of evil and corrupt motives and deeds," resulting in the award of punitive damages, which is but "a branch of the law of compensatory damages" and results in "unfairly, as well as unconstitutionally and illegally, punishing an offender twice for the same crime." *Id*. at 3 N.H. at *40.

As Justice Scalia has stated, the Greenleaf sentiment, so fervently endorsed by the 19th century New Hampshire court, was and is a distinctly minority position. *Haslip*, 499 U.S. at 25 (Scalia, J., concurring) (Greenleaf's view "was not widely shared.").[25] At the time Greenleaf

[23] In *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), the Court adopted the view that "well into the 19th century, punitive damages frequently operated to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time," and found that this category of damages had "evolved" into something "more purely punitive." *Id*. at 437 n.11. One modern scholar has disputed the Court's reading of history. Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 Chi.-Kent L. Rev. 163 (2003).

[24] The five states are Louisiana, Massachusetts, Nebraska, New Hampshire, and Washington. Puerto Rico also prohibits punitive damages.

[25] Indeed, "[s]ince the time of the controversy between . . . Greenleaf and Sedgwick . . . , a large majority of the appellate courts in this country have followed . . . Sedgwick." *Hendrickson v. Kingsbury*, 21 Iowa 379, 1866 WL 321, *1, *3 (Iowa 1866); *Peshine v. Shepperson*, 58 Va. (17 Gratt.) 472, 1867 WL 2892, *10 (Va. 1867) (same); *Gaither v. Blowers*, 11 Md. 536, 1857 WL 3817, *9 (Md. 1857) (same). *See also* 11

wrote, Theodore Sedgwick, the leading scholar of the day on damages, took an opposing view and described punitive damages as favorably "blend[ing] together the interest of society and of the aggrieved individual, and giv[ing] damages not only to recompense the sufferer but to punish the offender." 1 Theodore Sedgwick, A Treatise on the Measure of Damages 53 (7th ed. 1880), quoted approvingly in *Mo. Pac. Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885). Sedgwick's description has largely prevailed.

By 1851, the Supreme Court of the United States had found more than a century's experience in the courts had settled the issue of the jury's authority to award punitive damages:

> It is a well established principle of the common law that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offense, rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers, but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument.

Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851).

The Greenleaf and Sedgwick debate on punitive damages continues to frame much of the modern debate. Today, competing and irreconcilable views of punitive damages are expressed both by the Supreme Court and by scholars and advocates. Thus, the Supreme Court has decried the fact that the "frequency and size of such awards have been skyrocketing,"[26] *yet also*

J.G. Sutherland, A Treatise on the Law of Damages, § 393, at 1284 n.62 (4th ed. 1916) ("a large majority of the appellate courts in this country have followed the doctrine advocated by Mr. Sedgwick.").

[26] *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 500 (1993). *See also* George L. Priest, "Introduction," in Cass R. Sunstein *et al.*, Punitive Damages: How Juries Decide 1 (2002).

recognized that the empirical evidence indicates that punitive damages remain rare and that the current environment has "not mass-produced runaway awards."[27]

Reflecting a common criticism, Justice O'Connor has noted that there is "no objective standard that limits the amount of punitive damages" and that, in many instances, juries are invested with "standardless discretion to impose punitive damages whenever and in whatever amount it wants."[28] Yet, despite that criticism, after examining available empirical data, the Court has concluded that "by most accounts the median ratio of punitive to compensatory awards has remained less than 1:1,"[29] thus suggesting that, in practice, most jurors exercise that discretion reasonably, a conclusion for which the empirical support is substantial.[30] Other scholars have criticized the focus on ratios as misleading and instead have suggested that the real issue is what they call "blockbuster punitive damage awards" of $100 million or more.[31]

A related criticism is that juries are too often swayed by passion when the evidence of intentional misconduct is overwhelming and thus become overly generous in awarding punitive damages, though a study of awards made by judges and juries found little differences between their evaluations of what amount of punitive damages was appropriate, with judges being slightly

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[27] *Exxon Shipping Co. v. Baker,* 128 S.Ct. 2605, 2624 (2008).

[28] *Haslip,* 499 S.Ct. at 54, 52 (O'Connor, J., dissenting) (citation omitted). *See also id*. at 18 ("One must concede that unlimited jury discretion-or unlimited judicial discretion for that matter-in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities.").

[29] *Baker,* 128 S.Ct. at 2624.

[30] *See* Theodore Eisenberg *et al., The Predictability of Punitive Damages,* 26 J. Legal Stud. 623, 635-37 (1997) (summarizing studies on the decision to award punitive damages).

[31] *See, e.g.,* Alison F. Del Rossi and W. Kip Viscusi, *The Changing Landscape of Blockbuster Punitive Damage Awards,* 12 Am. L. & Econ. Rev. 116 (2010); Joni Hersch and W. Kip Viscusi, *Punitive Damages by the Numbers: Exxon Shipping Co. v. Baker,* 18 Sup. Ct. Econ. Rev. 259 (2010); W. Kip Viscusi, *The Blockbuster Punitive Damages Awards,* 53 Emory L.J. 1405 (2004).

more generous than juries.[32] Another study, though, found that with respect to punitive damages assessed at $100 million or more, juries were more generous and unpredictable than judges.[33]

Yet another area where differing views are common is the issue of multiple punitive damage awards. Misconduct that warrants punitive damages often harms more than one person and, in instances of mass tort, cross state lines. Companies subject to punitive damages complain that they are being punished repeatedly for a single instance or single series of bad acts by different plaintiffs and sometimes in different states. Some states have attempted to address the multiple plaintiff issue through mechanisms that take into account previous in-state awards to assure that no defendant is over punished.[34] As for punishment in multiple states, it appears that this remains a byproduct of the U.S. Supreme Court's decisions, which prohibit any state from punishing a defendant for conduct outside that state, while also emphasizing each state's right to make its own decisions on what conduct merits punitive damages and in what amounts.[35]

Views also differ on what should be done with any award. Some have characterized the standard practice of letting a single plaintiff collect the entire punitive damages awarded as an

[32] Theodore Eisenberg *et al., Juries, Judges, and Punitive Damages: An Empirical Study,* 87 Cornell L. Rev. 743 (2002); Theodore Eisenberg *et al., The Decision to Award Punitive Damages: An Empirical Study*, 2 J. Legal Analysis 577, 578 (2010) (finding that "judges award[] punitive damages at a higher rate in personal injury cases and juries award[] them at a higher rate in nonpersonal injury cases," while speculating that this may be a function of the types of cases routed to each.).

[33] Joni Hersch and W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform*, 33 J Legal Stud 1, 1-36 (2004).

[34] In Oregon, for example, both juries (Ore. Rev. Stat. §§ 30.925(2)(g)) and reviewing courts (§ 31.730(2)) are separately required to take into account the "total deterrent effect" of other punishments imposed for the same misconduct to assure that awards remain fair and over deterrence does not take place.

[35] *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423-24 (2003) (limiting the extraterritorial or out-of-state reach of a state punitive damage award); *id.* at 422 (States "may make their own reasoned judgment" about the scope and measure of punitive damages); *BMW of No. Amer., Inc. v. Gore*, 517 U.S. 559, 572 (1996) (a constitutionally valid award is one "supported by the State's interest in protecting its own consumers and its own economy.").

unfair windfall, while others have praised that result as an appropriate incentive for what amounts to something of a private attorney general action for society's benefit. The issue may have been ameliorated by the U.S. Supreme Court's decision in *Philip Morris USA, Inc. v. Williams*, 549 U.S. 346 (2007), where the Court announced that a proper punitive damages award does not punish for harm that the misconduct may have caused others. Nonetheless, because punitive damages vindicate society's interest in punishment and deterrence, some states have enacted split-recovery statutes that assign some share of a punitive damages judgment, upwards of 75 percent, to the State or a specific state fund.

Finally, at least one scholar has questioned whether the various pieces of state legislation limiting punitive damages and the Due Process limitations imposed by the Supreme Court to prevent grossly excessive awards has undermined the deterrent effect of punitive damages.[36]

F. Summary of the Overall Effort

To be written at the end of the process.

[36] *See* Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 Iowa L. Rev. 957 (2007).

WG8 STANDARDS/ BURDEN OF PROOF

Standards of Conduct and Burdens of Proof for Punitive Damages

The states vary widely in their approaches to the standards for liability and burdens of proof for punitive damages, but for the most part reduce to two principal approaches to each issue. As to the conduct required to support an award of punitive damages, most impose a type of recklessness standard, requiring wanton conduct, reckless indifference, or conscious disregard of the rights of others. Three states restrict punitive liability to cases of "malice or "ill will," while one state extends punitive liability to acts of "gross negligence." Likewise, states vary in whether the analysis focuses on the outrageousness of the conduct, the defendant's mental state, or both. With respect to the burden of proof, the majority of states require proof by clear and convincing evidence, while a substantial minority apply the preponderance standard.

Level of Culpability

In attempting to precisely categorize the range of standards that courts use, two problems arise. First, most of the terms that courts use to define the standards for recovering punitive damages are tremendously malleable and ambiguous. Second, courts often use the same terms inconsistently. In spite of these challenges, some amount of differentiation is possible. But the categories outlined below are subject to the caveat that the boundaries separating them in practice are likely more fluid than rigid.

Intent or Ill Will

Three states—Maine, Maryland, and North Dakota—explicitly require proof that the defendant acted with malice, defined in these jurisdictions as ill will or evil motive. In Maine, malice may be express (motivated by ill will) or implied by outrageous conduct. [1] "[M]ere reckless disregard of the circumstances" does not establish implied malice.[2]

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[1] *Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985)..

[2] *See id.* (citation omitted).

Maryland and North Dakota use similar definitions. In Maryland, a plaintiff must prove "that the defendant acted with 'actual malice,'" which is "conduct of the defendant characterized by evil motive, intent to injure, ill will, or fraud."[3] Likewise, North Dakota's punitive damages statute requires that a defendant be guilty of "oppression, fraud, or actual malice" before a plaintiff can collect punitive damages.[4] North Dakota defines actual malice as "an intent with ill will or wrongful motive to harass, annoy, or injure another person."[5]

Conscious Disregard for the Rights of Others

Twelve states—Arizona, California, Idaho, Montana, Nevada, New York, Ohio, Rhode Island, South Dakota, Tennessee, Virginia, and Wisconsin—still require plaintiffs to show that the defendant acted with a high degree of mental culpability but do not require a showing of ill will. Five of these states require plaintiffs to prove malice, but define malice to include willful and conscious disregard for the rights or safety of others. [6] Montana's punitive damages statute establishes a slightly higher standard for malice because it requires that the defendant know of and disregard "a high probability of injury to the plaintiff."[7] Thus, these states require mental culpability that approaches intentionality.

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[3] *Darcars Motors of Silver Spring, Inc. v. Borzym*, 379 Md. 249, 264, 841 A.2d 828 (Md. 2004) (quotation and quotation marks omitted).
[4] N.D. CENT. CODE § 32-03.2-11(1).
[5] *McHugh v. Jacobs*, 450 F. Supp. 2d 1019, 1022 (D.N.D. 2006) (quoting North Dakota Pattern Jury Instructions C-72.16) (internal quotation marks omitted).
[6] CAL. CIV. CODE § 3294(c)(1); *see also* NEV. REV. STAT. § 42.001(3); *Home Ins. Co. v. Am. Home Prods. Corp.*, 75 N.Y.2d 196, 204, 550 N.E.2d 930, 934, 551 N.Y.S.2d 481, 485 (N.Y. 1990); *Cabe v. Lunich*, 70 Ohio St. 3d 598, 601, 640 N.E.2d 159 (Ohio 1994); *Biegler v. Am. Family Mut. Ins. Co.*, 621 N.W.2d 592, 605 (S.D. 2001).
[7] MONT. CODE § 27-1-221(2)(a)-(b).

In Arizona, instead of requiring "malice," the courts require an "evil mind."[8] Even though the term differs, the concept is essentially the same as the type of malice described above. As the Supreme Court of Arizona has held, "[t]he key is the wrongdoer's intent to injure the plaintiff or his deliberate indifference with the rights of others, consciously disregarding the unjustifiably substantial risk of significant harm to them."[9]

Wisconsin, without using malice or evil mind, sets out a similar standard. Under Wisconsin's punitive damages statute, punitive damages are available only when a defendant acts "maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff."[10] To fall within the statute, the Supreme Court of Wisconsin has held that "a defendant's conduct must be (1) deliberate, (2) in actual disregard of the rights of another, and (3) sufficiently aggravated to warrant punishment by punitive damages."[11]

In Virginia, punitive damages "are allowable only where there is misconduct or actual malice, or such recklessness or negligence as to evince a conscious disregard of the rights of others."[12] The court's use of the terms "recklessness" and "negligence" may suggest that the culpability requirement in Virginia is not as high as the other states in this category. This is probably not the case, however, because the Supreme Court of Virginia went on to hold that "[w]here the act or

[8] *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 331, 723 P.2d 675 (Ariz. 1986).
[9] *Id.* (citation omitted).
[10] WIS. STAT. § 895.043(3).
[11] *Groshek v. Trewin*, 325 Wis. 2d 250, 270-71, 784 N.W.2d 163 (Wis. 2010) (quotation and quotation marks omitted).
[12] *Xspedius Mgmt. Co. of Va., L.L.C. v. Stephan*, 269 Va. 421, 425, 611 S.E.2d 385 (Va. 2005).

omission complained of is free from fraud, malice, oppression, or other special motives of aggravation," punitive damages are not available.[13]

Similar to Virginia, Rhode Island's punitive damages conduct standard uses the term "recklessness" but does so in a way that still suggests it belongs in this category. According to the Supreme Court of Rhode Island, "[a] party seeking punitive damages must produce evidence of such willfulness, recklessness or wickedness, on the part of the party at fault, as amounts to criminality that should be punished."[14] It is this reference to "criminality" that seems to elevate Rhode Island's standard in stringency above those that will be discussed in the next section.

Tennessee allows for punitive damages only if a court finds that "a defendant has acted either (1) intentionally, (2) fraudulently, (3) maliciously, or (4) recklessly."[15] Tennessee's definition of "recklessly" suggests that Tennessee's standard fits best in this category: "A person acts recklessly when the person is aware of, but consciously disregards, a substantial and unjustifiable risk . . . ."[16]

Finally, despite its use of terms like "gross negligence" and "wantonness" in describing the required mental culpability, Idaho appears to belong in this category because it emphasizes that punitive damages are only justified when "the defendant acted with an extremely harmful state of mind."[17] Idaho's punitive damages statute also provides support for grouping Idaho in this category. The statute

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[13] *Id.* (quotation and quotation marks omitted). In addition, the court stated that punitive damages "should be awarded only in cases involving the most egregious conduct." *Id.* (quotation and quotation marks omitted).

[14] *Fenwick v. Oberman*, 847 A.2d 852, 854-55 (R.I. 2004) (quotation and quotation marks omitted).

[15] *Hodges v. S. C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992); *accord Sanford v. Waugh & Co.*, 328 S.W.3d 836, 848 (Tenn. 2010).

[16] *Id.* (citation omitted).

[17] *See Vendelin v. Costco Wholesale Corp.*, 140 Idaho 416, 430, 95 P.3d 34 (Idaho 2004) (quotation and quotation marks omitted).

requires that plaintiffs prove "oppressive, fraudulent, malicious or outrageous conduct by the party against whom the claim for punitive damages is asserted."[18]

Wantonness or Reckless Indifference

Twenty-eight states—Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Iowa, Illinois, Kansas, Kentucky, Minnesota, Mississippi, Missouri, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Utah, Vermont, West Virginia, and Wyoming—require plaintiffs to show willfulness, wantonness, or reckless indifference.[19] Although this requires a showing greater than that required for negligence, it appears to be a slightly lesser degree of culpability than malice. Instead of using terms such as "conscious disregard," these states use words such as reckless, wanton, and indifference. Thus, states in this category appear to allow the recovery of punitive damages when a defendant's behavior and mental state is socially deviant, even if it is not nearing intentionality.

For example, many of these states require that the defendant acted in "reckless" or "wanton" disregard of the rights of others,[20] engaged in purposeful conduct done

[18] IDAHO CODE § 6-1604(1).

[19] Plaintiffs in these states can still also recover punitive damages by proving malice or fraud.

[20] *See* ALA. CODE § 6-11-20(a), (b)(3); IOWA CODE § 668A.1(a); MISS. CODE § 11-1-65(1)(a); N.J. STAT. § 2A:15-5.12(a) (requiring acts "accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions); OKLA. STAT. tit. 23, § 9.1(B); *Shearer v. Morgan*, 240 Ark. 616, 401 S.W.2d 21, 24 (Ark. 1966) (citing *Texarkana Gas & Electric Light Co. v. Orr*, 59 Ark. 215, 27 S.W. 66 (1894)); *Slovinski v. Elliot*, 237 Ill. 2d 51, 58, 927 N.E.2d 1221 (Ill. 2010) (quotation omitted); *City of Middlesboro v. Brown*, 63 S.W.3d 179, 181 (Ky. 2001) (quotation omitted); *Taylor v. Medenica*, 324 S.C. 200, 221, 479 S.E.2d 35 (S.C. 1996); *Fly Fish Vt., Inc. v. Chapin Hill Estates, Inc.*, 187 Vt. 541, 549, 996 A.2d 1167 (Vt. 2010) (citations omitted); *Cramer v. Powder River Coal, LLC*, 204 P.3d 974, 979 (Wyo. 2009) (citation omitted).

"heedlessly and recklessly, without regard to consequences,"[21] or acted with "that entire want of care which would raise the presumption of conscious indifference to consequences."[22] Courts from other states in this group articulate the same idea in a slightly different way. They require "reckless indifference" to the rights or interests of others,[23] "reckless and outrageous indifference to a highly unreasonable risk of harm,"[24] or "conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others."[25] A few states in this category focus less on the level of indifference or disregard and look at whether the wrongful acts are wanton or reckless or done wantonly, recklessly, or mischievously.[26]

Some states come close to requiring the mental culpability described in Part III.D.2 above but still seem to fit better here. Minnesota's statute requires "evidence that the acts of the defendant show deliberate disregard for the rights or safety of others."[27] This partially echoes the "conscious disregard" language used by courts in the previous subsection. In interpreting the statute, however, the Supreme Court of Minnesota has stated that punitive damages "must be based upon conduct

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[21] *See* COLO. REV. STAT. § 13-21-102(1)(a)-(b).
[22] *See* GA. CODE § 51-12-5.1(b); *Kang v. Harrington*, 59 Haw. 652, 660-61, 587 P.2d 285, 291 (Haw. 1978) (quotation omitted).
[23] *Johnson & Higgins of Alaska Inc. v. Blomfield*, 907 P.2d 1371, 1376 (Alaska 1995) (quotations omitted); *Gargano v. Heyman*, 203 Conn. 616, 622, 525 A.2d 1343, 1347 (Conn. 1987) (quotation omitted); *Jardel Co., Inc. v. Hughes*, 523 A.2d 518, 529 (Del. 1987) (quoting RESTATEMENT (SECOND) OF TORTS § 908, comment b (1979));
[24] *See* OR. REV. STAT. § 31.730(1).
[25] *See* UTAH CODE § 78B-8-201(1)(a).
[26] *See* KAN. STAT. § 60-3701(c); *McClellan v. Highland Sales & Inv. Co.*, 484 S.W.2d 239, 242 (Mo. 1972); *Akins v. USW, Local 187*, 148 N.M. 442, 450 (N.M. 2010); *Hutchison v. Luddy*, 582 Pa. 114, 122, 870 A.2d 766 (Pa. 2005); *Peters v. Rivers Edge Mining, Inc.*, 224 W. Va. 160, 190, 680 S.E.2d 791 (W. Va. 2009) (quotation omitted).
[27] MINN. STAT. § 549.20(1)(a).

willfully indifferent to the rights or safety of others."[28] Because this language more closely mirrors the requirements used by courts belonging to this category, Minnesota should be likewise categorized.

North Carolina is also on the border. Under its statute, courts can award punitive damages when one of three aggravating factors are present: fraud, malice, or willful or wanton conduct.[29] According to the Supreme Court of North Carolina, "willful or wanton conduct" is "the conscious and intentional disregard of and indifference to the rights and safety of others."[30] Even though this comes close to the standards used by states in the previous category, North Carolina's standard fits better here because the rest of the definition of "willful or wanton conduct" reveals that a defendant need not necessarily know that his conduct "is reasonably likely to result in . . . harm" but simply should know.[31] This suggests that North Carolina does not require culpability that rises to the level of "conscious disregard."

Even though Texas allows for punitive damages when a defendant's conduct results from "gross negligence,"[32] part of the statutory definition of gross negligence requires "conscious indifference to the rights, safety, or welfare of others."[33] Thus, Texas should not be placed in the category to follow—gross negligence—but should be placed here.

Perhaps the state most difficult to categorize is Florida. Its Supreme Court used so many different terms in describing its standard that it is hard to pinpoint what the real standard is. It is clear that the defendant's behavior must transcend gross negligence,[34] but it is unclear how far beyond gross negligence it must go. The court used terms like "wanton intentionality, exaggerated recklessness, or such an

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[28] *McGuire v. C & L Rest. Inc.*, 346 N.W.2d 605, 615 (Minn. 1984).

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[30] *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 723 (N.C. 2009) (quotation omitted).

[31] *Id.* (quotation omitted).

[32] TEX. CIV. PRAC. & REM. CODE § 41.003(a).

[33] TEX. CIV. PRAC. & REM. CODE § 41.001(11).

[34] *Am. Cyanamid Co. v. Roy*, 498 So. 2d 859, 861 (Fla. 1986) (citations omitted).

extreme degree of negligence as to parallel an intentional and reprehensible act."[35] In the end, the court's use of vague and diverse terms, along with its suggestion that a "conscious indifference to consequences, . . . wantonness or recklessness" is enough to satisfy its conduct requirement,[36] suggest that this category is the best place for Florida's standard.

Gross Negligence

Indiana appears to have the most lenient standard for recovering punitive damages. Even though "[p]unitive damages are available if . . . evidence shows that the defendant acted with malice, fraud, . . . or oppressiveness ," they are also available if the evidence shows "gross negligence" that is "not the result of a mistake of fact or law, honest error of judgment, overzealousness, mere negligence, or other human failing."[37]

Punitive Damages Authorized Only by Specific Statutes

Two states—Louisiana and Massachusetts—allow punitive damages to be awarded only when explicitly authorized by statute.[38] Louisiana additionally requires the "strict construction" of any statute authorizes the imposition of punitive damages.[39]

Four states--Michigan, Nebraska, New Hampshire, and Washington--do not allow recovery of punitive damages. *Peisner v. Detroit Free Press, Inc*., 104 Mich. App. 59 (1981) (holding that in Michigan, exemplary damages are compensatory but not

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[35] *Id.* (citations omitted).
[36] *Id.* at 861-62 (quotation and quotation marks omitted).
[37] *Williams v. Tharp*, 914 N.E.2d 756, 769 n.6 (Ind. 2009) (quotation and quotation marks omitted).
[38] *See Ross v. Conoco, Inc.*, 828 So. 2d 546, 555 (La. 2002) ("[A] fundamental tenet of our law is that punitive or other penalty damages are not allowable unless expressly authorized by statute.") (citations omitted); *Gasior v. Mass. Gen. Hosp.*, 446 Mass. 645, 656 n.15, 846 N.E.2d 1133 (Mass. 2006) (Punitive damages "are not allowed in this Commonwealth unless expressly authorized by statute.") (quotation and quotation marks omitted).
[39] *See id.*

punitive damages); *Distinctive Printing and Packaging Co. v. Cox*, 232 Neb. 846, 857 (1989) ("punitive, vindictive, or exemplary damages contravene Neb. Const. art. VII, §5, and thus are not allowed in this jurisdiction."); N.H. Rev. Stat. Ann. § 507:16; *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 106 Wash. 2d 826, 726 P.2d 8 (1986) (holding that punitive damages are not available absent an express statutory provision).

Mental State vs. Conduct Alone

Courts account for the importance of a defendant's mental state in a variety of ways. Vermont recently instituted an innovative approach that requires an independent analysis of both the nature of the conduct giving rise to the plaintiff's cause of action and the defendant's mental state. As articulated by the Supreme Court of Vermont, "[p]unitive damages require a showing of essentially two elements."[40] "The first is wrongful conduct that is outrageously reprehensible."[41] "The second is malice, defined variously as bad motive, ill will, personal spite or hatred, reckless disregard, and the like."[42]

Most states, however, do not require two separate inquires. Some states instead use a defendant's conduct primarily to measure the culpability of the defendant's mental state. For example, the Supreme Court of Illinois has stated that "[p]unitive damages may be awarded when the defendant's tortious conduct evinces a high

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[40] *Fly Fish Vt., Inc. v. Chapin Hill Estates, Inc.*, 187 Vt. 541, 548, 996 A.2d 1167 (Vt. 2010).

[41] *Id.* (citations omitted).

[42] *Id.* at 549 (citations omitted). Arizona and Wisconsin appear to take a similar approach. The Supreme Court of Arizona has held that "before a jury may award punitive damages there must be evidence of an 'evil mind' and aggravated and outrageous conduct." *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 331, 723 P.2d 675, 680 (Ariz. 1986); *see also Groshek v. Trewin*, 325 Wis. 2d 250, 270-71, 784 N.W.2d 163 (Wis. 2010) (requiring "actual disregard of the rights of another" and "sufficiently aggravated" conduct) (quotation and quotation marks omitted).

degree of moral culpability.'"[43] The Court of Appeals of New York has similarly stated that "[t]he nature of the conduct which justifies an award of punitive damages has been variously described, but, essentially, it is conduct having a high degree of moral culpability which manifests a 'conscious disregard of the rights of others or conduct so reckless as to amount to such disregard.'"[44] Other states articulate the inquiry slightly differently, requiring that, in order to recover punitive damages, a defendant's actions "demonstrate malice or aggravated or egregious fraud,"[45] "show deliberate disregard for the rights or safety of others," [46] or "show[] willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences."[47]

In contrast to the examples above, a majority of states focus more directly on a defendant's mental culpability than on his conduct. For example, Delaware and Pennsylvania use a defendant's mental state to characterize conduct. Courts in those states allow punitive damages only when a defendant's conduct is outrageous

[43] *Slovinski v. Elliot*, 237 Ill. 2d 51, 58, 927 N.E.2d 1221 (Ill. 2010). Other states put the same inquiry slightly differently, requiring that there be "evidence of malice, willfulness or wantonness," *Growth Props. I v. Cannon*, 282 Ark. 472, 477, 669 S.W.2d 447, 449 (Ark. 1984), or that the "evidence must reveal a reckless indifference to the rights of others or an intentional or wanton violation of those rights," *Gargano v. Heyman*, 203 Conn. 616, 622, 525 A.2d 1343, 1347 (Conn. 1987)

[44] *Home Ins. Co. v. Am. Home Prods. Corp.*, 75 N.Y.2d 196, 203-04, 550 N.E.2d 930, 934, 551 N.Y.S.2d 481, 485 (N.Y. 1990) (citations omitted). The Supreme Court of Florida has also stated that the character of conduct "necessary to sustain an award of punitive damages must be of a gross and flagrant character, evincing reckless disregard of human life." *Am. Cyanamid Co. v. Roy*, 498 So. 2d 859, 861-62 (Fla. 1986) (quotation and quotation marks omitted).

[45] OHIO REV. CODE § 2315.21(c)(1).

[46] MINN. STAT. § 549.20(1)(a).

[47] *See* GA. CODE § 51-12-5.1(b).

because of "evil motive" or "reckless indifference to the rights of others."[48] Other states look at whether the conduct giving rise to a plaintiff's cause of action is "a result of,"[49] "motivated by,"[50] "attended by,"[51] "actuated by," or "accompanied by"[52] a culpable state of mind. Similarly, some states inquire as to whether a defendant "acted with" a culpable mental state.[53] In Virginia, courts cannot award punitive damages "[w]here the act or omission complained of is free from fraud, malice, oppression, or other special motives of aggravation."[54]

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[48] *See Jardel Co., Inc. v. Hughes*, 523 A.2d 518, 529 (Del. 1987) (quoting RESTATEMENT (SECOND) OF TORTS § 908, comment b (1979)); *Hutchison v. Luddy*, 582 Pa. 114, 121, 870 A.2d 766 (Pa. 2005) (quotation omitted). The Supreme Court of Alaska has used similar language, holding that "punitive damages may only be awarded 'where the wrondoer's conduct can be characterized as outrageous, such as acts done with malice or bad motives or a reckless indifference to the interests of others.'" *Johnson & Higgins of Alaska Inc. v. Blomfield*, 907 P.2d 1371, 1376 (Alaska 1995) (quotation omitted).

[49] *See* UTAH CODE § 78B-8-201(1)(a); *see also* TEX. CIV. PRAC. & REM. CODE § 41.003(a).

[50] *See Volz v. Coleman Co.*, 155 Ariz. 567, 570, 748 P.2d 1191 (Ariz. 1987) (quotation and quotation marks omitted).

[51] COLO. REV. STAT. § 13-21-102(1)(a).

[52] *See* N.J. STAT. § 2A:15-5.12(a); *City of Middlesboro v. Brown*, 63 S.W.3d 179, 181 (Ky. 2001).

[53] *See* KAN. STAT. § 60-3701(c); MISS. CODE § 11-1-65(1)(a); OR. REV. STAT. § 31.730(1); *Kuhn v. Coldwell Banker Landmark, Inc.*, 245 P.3d 992, 1006 (Idaho 2010) (quotation omitted); *Williams v. Tharp*, 914 N.E.2d 756, 769 n.6 (Ind. 2009); *Darcars Motors of Silver Spring, Inc. v. Borzym*, 379 Md. 249, 264, 841 A.2d 828 (Md. 2004) (quoting *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 460, 601 A.2d 633, 652 (Md. 1992)); *Peters v. Rivers Edge Mining, Inc.*, 224 W. Va. 160, 190, 680 S.E.2d 791 (W. Va. 2009) (quotation omitted); *Cramer v. Powder River Coal, LLC*, 204 P.3d 974, 979-80 (Wyo. 2009) (quotation omitted); *see also* WIS. STAT. § 895.043(3); *Kang v. Harrington*, 59 Haw. 652, 660-61, 587 P.2d 285, 291 (Haw. 1978) (quotation omitted).

[54] *Xspedius Mgmt. Co. of Va., L.L.C. v. Stephan*, 269 Va. 421, 425, 611 S.E.2d 385 (Va. 2005). Similarly, North Carolina requires that fraud, malice, or willful or

Finally, some states seem to mix the inquiry, blurring the line between conduct and mental state. In some of these states, punitive damages are only available where the defendant has been "guilty of" oppression, fraud, or malice.[55] In Iowa, the defendant's conduct must "constitute[] willful and wanton disregard for the rights or safety of another."[56] In New Mexico, punitive damages are available "as long as the wrongdoer's conduct is willful, wanton, malicious, reckless, fraudulent or in bad faith."[57] In Missouri, conduct "justifying imposition of punitive damages must be willful, wanton, malicious or so reckless as to be in utter disregard of consequences."[58] Finally, in Tennessee, courts "award punitive damages only if . . . a defendant has acted either (1) intentionally, (2) fraudulently, (3) maliciously, or (4) recklessly."[59]

Burden of Proof to Award Punitive Damages

Of the forty-six states that allow recovery of punitive damages, only one

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wanton conduct be present and describes these as "aggravating factors." N.C. GEN. STAT. § 1D-15(a)(1)-(3).

[55] *See* CAL. CIV. CODE § 3294(a); MONT. CODE § 27-1-221(1); N.D. CENT. CODE § 32-03.2-11(1); OKLA. STAT. tit. 23, § 9.1(B); S.D. CODIFIED LAWS § 21-3-2. Alabama uses a similar articulation, requiring that "the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff." ALA. CODE § 6-11-20(a).

[56] IOWA CODE § 668A.1(1)(a).

[57] *Akins v. USW, Local 187*, 148 N.M. 442, 450 (N.M. 2010). The requirement in South Carolina is similar: "there must be evidence the defendant's conduct was willful, wanton, or in reckless disregard of the plaintiff's rights." *Taylor v. Medenica*, 324 S.C. 200, 221, 479 S.E.2d 35 (S.C. 1996).

[58] *McClellan v. Highland Sales & Inv. Co.*, 484 S.W.2d 239, 242 (Mo. 1972) (citation omitted). The Supreme Court of Missouri did distinguish somewhat between conduct and mental state in holding that "[t]here must be some element of wantonness or bad motive" to justify punitive damages. *Id.* (citation omitted).

[59] *Hodges v. S. C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992); *accord Sanford v. Waugh & Co.*, 328 S.W.3d 836, 848 (Tenn. 2010).

state, Colorado requires that plaintiffs prove the conduct required for recovery of punitive damages beyond a reasonable doubt. The applicable Colorado statute provides that:

> exemplary damages against the party against whom the claim is asserted shall only be awarded in a civil action when the party asserting the claim proves beyond a reasonable doubt the commission of a wrong under the circumstances set forth in Section 13-21-102 [the general statute governing punitive damages in Colorado].

Colo. Rev. Stat. Ann. § 13-25-127(2).

Thirty-two states--Alabama, Alaska, Arizona, California, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nevada, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wisconsin—generally require proof of the conduct at issue by clear and convincing evidence. Ala. Code § 6-11-20; Alaska Stat. § 09.17.020; *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 723 P.2d 675 (1986); Cal. Civ. Code § 3294(a); *Grad v. Copeland*, 280 So. 2d 461 (Fla. Dist. Ct. App. 4th Dist. 1973) (libel and defamation); *Westinghouse Elec. Corp., Inc. v. Shuler Bros., Inc.*, 590 So. 2d 986 (Fla. Dist. Ct. App. 1st Dist. 1991) (civil theft); *Aspen Investments Corp. v. Holzworth*, 587 So. 2d 1374 (Fla. Dist. Ct. App. 4th Dist. 1991) (civil theft); *Urling v. Helms Exterminators, Inc.*, 468 So. 2d 451 (Fla. Dist. Ct. App. 1st Dist. 1985) (fraud); *Blaeser Development Corp. v. First Federal Sav. and Loan Ass'n of Martin County*, 375 So. 2d 1118 (Fla. Dist. Ct. App. 4th Dist. 1979) (fraud); Ga. Code Ann. § 51-12-5.1(b); *Masaki v. General Motors Corp.*, 71 Haw. 1, 780 P.2d 566, 574 (1989); Idaho Code § 6-1604; West's Ann.Ind.Code 34-51-3-2 (generally); West's Ann.Ind.Code 34-24-2-6 (the conduct required for recovery of punitive damages for damage caused by corrupt business influence must be proved only by a preponderance of the evidence); Iowa Code Ann. § 668A.1; Kan. Civ. Proc. Code Ann. 60-3702; *Phelps v. Louisville Water Co.*, 103 S.W.3d 46 (Ky. 2003); *Tuttle v. Raymond*, 494 A.2d 1353 (Me. 1985);

Owens-Illinois, Inc. v. Zenobia, 325 Md. 420 (1992); Minn. Stat. Ann. § 549.20.1; Miss. Code Ann. § 11-1-65; *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. 1996); Mont.Code Ann. 27-1-221(5); Nev. Rev. Stat. § 42.005; *Pavlova v. Mint Management Corp.*, 868 A.2d 322 (N.J. App. Div. 2005); N.D. Cent. Code § 32-03.2-11; Ohio Rev.Code § 2315.21; Okla. Stat. Ann. tit. 23, § 9.1; Or. Rev. Stat. § 31.730; *Martin v. Johns-Manville Corp*., 508 Pa. 154 (1985); *DiSalle v. P.G. Pub. Co.*, 375 Pa. Super. 510, 544 A.2d 1345 (1988); S.C. Code Ann. § 15-33-135; S.D. Codified Laws § 21-1-4.1; *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992); Tex. Civ. Prac. & Rem. Code Ann. § 41.008; Utah Code Ann. § 78-18-1(1); *Flippo v. CSC Associates III*, L.L.C., 547 S.E.2d 216 (Va. 2001); *Wangen v. Ford Motor Co*., 97 Wis. 2d 260 (1980). The Supreme Court of Arizona has stated the conventional rationales for requiring clear and convincing evidence:

> As this remedy is only to be awarded in the most egregious of cases, where there is reprehensible conduct combined with an evil mind over and above that required for commission of a tort, we believe it is appropriate to impose a more stringent standard of proof. When punitive damages are loosely assessed, they become onerous not only to defendants but the public as a whole. Additionally, its deterrent impact is lessened. Therefore, while a plaintiff may collect compensatory damages upon proof by a preponderance of the evidence of his injuries due to the tort of another, we conclude that recovery of punitive damages should be awardable only upon clear and convincing evidence of the defendant's evil mind.

Linthicum v. Nationwide Life Ins. Co., 723 P.2d 675, 681 (1986).

Thirteen states—Arkansas, Connecticut, Delaware, Illinois, Louisiana, Massachusetts, New Mexico, New York, North Carolina, Rhode Island, Vermont, West Virginia and Wyoming-- allow for recovery of punitive damages and require proof by only a preponderance of the evidence. *Orsini v. Larry Moyer Trucking*, Inc., 310 Ark. 179, 833 S.W.2d 366 (1992); *Freeman v. Alamo Management Co.*,

221 Conn. 674, 607 A.2d 370 (1992); *Cathleen C.Q. v. Norman J.Q.*, 452 A.2d 951, 954 (Del. 1982); *In re Arya*, 226 Ill. App. 3d 848 (4th Dist. 1992); *Rivera v. United Gas Pipeline Co.*, 697 So. 2d 327 (La. Ct. App. 1997); *LaLonde v. LaLonde*, 30 Mass. App. Ct. 117, 566 N.E.2d 620 (1991); *United Nuclear Corp. v. Allendale Mut. Ins. Co.*, 103 N.M. 480, 709 P.2d 649 (1985); *Kalra v. Kalra*, 539 N.Y.S.2d 761 (2d Dep't 1989); *Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 356 S.E.2d 578 (1987); *Taglianetti v. New England Tel. & Tel. Co.*, 81 R.I. 351, 103 A.2d 67 (1954); *Lyndonville Sav. Bank & Trust Co. v. Peerless Ins. Co.*, 126 Vt. 436, 234 A.2d 340 (1967); *Coleman v. Sopher*, 201 W.Va. 588, 499 S.E.2d 592 (1997); *Campen v. Stone*, 635 P.2d 1121 (Wyo. 1981). Courts in six of these thirteen states—Connecticut, Louisiana, New Mexico, New York, West Virginia, and Wyoming—have explicitly held that proof by a preponderance of the evidence is sufficient to sustain an award of punitive damages. Neither courts nor legislatures in Arkansas, Delaware, Illinois, Massachusetts, North Carolina, Rhode Island, and Vermont have specifically addressed the issue. Accordingly, the general burden of proof in civil cases applies in punitive damages cases in these seven states.

WG8 BIFURCATION/ PUNITIVE ELEMENTS IN COMPENSATORIES

SEDONA CONFERENCE WORKING GROUP 8 BACKGROUND SECTION

1. The Problem: Confusion Between Compensatory and Punitive Damages
2. Introduction to Bifurcation
   (a) Understanding Bifurcation
   (b) State and Federal Use
3. Bifurcation in the Punitive Damages Context
4. Examples: State Bifurcation Rules in Illinois, Wisconsin, and Indiana
   (a) Illinois
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5. Federal Uniformity As a Model for States

1. The Problem: Confusion Between Compensatory and Punitive Damages

Juries award damages based on their perception of the just measure of the defendant's liability and the plaintiff's injury. Problems arise when a jury's sense of justice is not necessarily what the law envisions. This problem is prevalent particularly at the juncture of compensatory and punitive damages. Compensatory damages "are intended to redress the concrete loss that the plaintiff has suffered."[54] Punitive damages, on the other hand, are "intended to punish the defendant and deter future wrongdoing."[55] Juries are entrusted to compartmentalize these two distinct purposes, and to determine compensatory and punitive damages accordingly. In reality, the legal construct that separates compensatory damages and punitive damages is often breached—what scholars have referred to as the "crossover" or "substitution" phenomenon.[56]

The crossover phenomenon occurs in two primary forms: (1) compensatory punitive damages; and (2) punitive compensatory damages. "Compensatory punitive damages" occur where juries award punitive damages as a means to compensate the plaintiff for losses that are "difficult to determine."[57] "Punitive compensatory damages" arise in the situation where compensatory damages, such as emotional distress damages, share characteristics with punitive damages. In that context, jury awards have an increased risk of overlap and double-counting.[58]

As Professor Sharkey has observed, "Our judicial system as a whole would seem to have a vested interest in retaining the punitive-compensatory dichotomy, in large part because of many policies and doctrines that are built upon its foundation."[59] Courts and legislatures have looked to several approaches in order to preserve that dichotomy and minimize the tendency of juries to go astray, including efforts to better instruct juries on the distinct purposes of compensatory and

[54] Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001).
[55] *Id.*
[56] Catherine M. Sharkey, *Crossing the Punitive-Compensatory Divide*, *in* CIVIL JURIES AND CIVIL JUSTICE: PSYCHOLOGICAL & LEGAL PERSPECTIVES 79, 80 (Brian H. Bornstein et al. eds., 2008).
[57] *See BMW v. Gore*, 517 U.S. 559, 582 (1996).
[58] *See State Farm v. Campbell*, 538 U.S. 408, 425 (2003).
[59] Sharkey, *supra* note 56, at 81.

punitive damages, restrictions on admissibility of evidence, and caps on punitive damages. One of the most utilized tools is bifurcating trials into compensatory and punitive stages.

2. Introduction to Bifurcation

(a) Understanding Bifurcation

The basic premise of bifurcation is that discrete, often dispositive issues are broken off and presented to the factfinder independently. The goal of bifurcation is that the early resolution of an isolated issue will resolve the case, catalyze settlement negotiations, or assist the jury in digesting the issues.[60] When used properly, the device allows for the presentation of issues in a manner that promotes efficiency and fairness to litigants on both sides. Bifurcation is used often to separate liability decisions from damages decisions,[61] as well as the compensatory stage from the punitive stage of a trial.

Bifurcation is best understood as the trial of separate *issues* within a single case.[62] This is sometimes confused with severance,[63] which is another device used to promote efficiency and limit confusion and prejudice.[64] Severance is outlined in Rule 21, F.R.C.P., and allows any *claim* to be severed and tried separately. The key difference is that severance takes one lawsuit and splits it into two or more lawsuits, while bifurcation separates out certain issues for separate trials within a single lawsuit.[65] Severed cases will result in multiple decisions, made (usually) by multiple factfinders.[66] Bifurcated cases will result in the entry of a single judgment, comprised of decisions from multiple trials, often called phases, heard (usually) by a single factfinder.[67]

(b) State and Federal Use

Bifurcation of issues is permissible in federal courts and in most state courts as well. In federal courts, Rule 42(b) governs the rules for separation. Rule 42(b) was adopted in 1937 and, short of a 2007 stylistic amendment, has not changed.[68] The Rule gives discretion to the judge, stating that the court *may* order separate trials for, *inter alia*, multiple-issue lawsuits.[69] The only limitations are that the court is advised to separate issues only for "convenience, to avoid

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[60] *See* 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2381, at 5 (3d ed. 2008); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.13, at 12 (2004).
[61] John P. Rowley III & Richard G. Moore, *Bifurcation of Civil Trials*, 45 U. RICH. L. REV. 1, 12 (2010).
[62] *See* BLACK'S LAW DICTIONARY 163 (6th ed. 1990) ("'Bifurcated trials' are trials in which only some of the issues of the case will be resolved at one trial, with the rest left for a further trial or other proceedings.").
[63] *See* Houseman v. U.S. Aviation Underwriters, 171 F.3d 1117, 1122 n.5 (7th Cir. 1999) ("Courts generally use the terms sever and separate interchangeably, they are analytically distinct . . . . Separate trials will usually result in one judgment, but severed claims become entirely independent actions to be tried, and judgment entered thereon, independently."); WRIGHT & MILLER, *supra* note 60, § 2387, at 87–89.
[64] *See, e.g.*, Stephan Landsman et al., *Be Careful What You Wish for: The Paradoxical Effects of Bifurcating Claims for Punitive Damages*, 1998 WIS. L. REV. 297, 298.
[65] *Id.*
[66] *Id.*
[67] *Id.* at 299; WRIGHT & MILLER, *supra* note 60, § 2387.
[68] FED. R. CIV. P. 42(b) (advisory committee notes); WRIGHT & MILLER, *supra* note 60, §2381, at 6–7.
[69] FED. R. CIV. P. 42(b).

prejudice, or to expedite and economize," and that the court must "preserve any federal right to a jury trial."[70]

States and state courts vary widely with their approaches to bifurcation. As of 2008, twenty-one states required bifurcation (or even trifurcation[71]) in certain situations.[72] Indeed, most states authorize bifurcation in at least some instances.[73] Most states have statutes or rules of court explaining the state's specific rules on separation, whereas in some instances the state's practices live only in the case law.[74]

3. Bifurcation in the Punitive Damages Context

Bifurcation in the punitive damages context concerns the separation of compensatory and punitive damages stages of trial. (Trifurcation separates compensatory liability/damages, punitive liability, and punitive damages.) Whereas the general consensus is that bifurcation is a vehicle for docket control, in the punitive damage context, separating issues can be a useful means of preventing juror prejudice.[75] The concern is that in a unitary trial where punitive damages are at issue, plaintiffs' attorneys may emphasize character-damning evidence that in no way pertains to compensatory damages. In that situation, juries are unable to block out those prejudicial facts when determining compensatory liability, which is reflected in the award of compensatory damages. Bifurcation provides the "acoustic separation" necessary to prevent a jury from hearing the evidence pertaining to punitive damages until the issue of general liability is resolved. Additionally, if the jury holds that the defendant is not liable for compensatory damages, then further proceedings on punitive liability are unnecessary.

While cases involving punitive damages are particularly conducive to bifurcation, the justifications for bifurcation vary. For example, a finding that the defendant has no compensatory liability is dispositive, rendering subsequent trial of punitive liability unnecessary, and the interests of efficiency are served. A court may also view bifurcation as a key to promoting settlement, knowing that a loss in the compensatory trial will nudge the defendant to negotiate. Ultimately there may be several reasons—or a combination of reasons—why bifurcation in the punitive damage context might be beneficial.

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[70] *Id.*

[71] "Trifurcation" is a type of polyfurcation—the splitting of a single issue into multiple trials—that refers to expanding the traditional bifurcation model (splitting issues of liability and damages) to include separate trials for liability and for different types of damages (i.e. compensatory and punitive). *See* WRIGHT & MILLER, *supra* note 60, § 2390 at 172–73 & nn.22–23; *see, e.g.*, In re Bendectin Litig., 857 F.2d 290, 309 (6th Cir. 1988) (affirming the district court order to trifurcate trials for issues of liability, causation, and damages). Some states require trifurcation in the punitive damage context, such that there are separate trials for (1) compensatory liability and damages, (2) punitive liability, and (3) punitive damages. *See* Catherine M. Sharkey, *Crossing the Punitive-Compensatory Divide*, *in* CIVIL JURIES AND CIVIL JUSTICE: PSYCHOLOGICAL & LEGAL PERSPECTIVES 79, 84 n.21 (Brian H. Bornstein et al. eds., 2008).

[72] Sharkey, *supra* note 56, at 84 & n.21.

[73] Rowley & Moore, *supra* note 61, at 8 n.33.

[74] Rowley & Moore, *supra* note 61, at 8 n.33.

[75] Avoiding prejudice is the main purpose behind employing bifurcation in the punitive damage context. *See* Rowley & Moore, *supra* note 61, at 12.

On the other hand, a sort of "reverse prejudice" may result from the separation of compensatory and punitive damage assessments. While preserving the determination of punitive damages until after the resolution of compensatory liability may effectively shield the defendant from prejudice at the first trial, if in fact the defendant is found liable for compensatory damages, the jury will be assessing the question of punitive damages for a defendant whom they have already labeled a law-breaker. In other words, the finding of liability in the first trial can act as a sort of scarlet letter on the defendant, and it may make the finding of punitive liability more likely. Indeed, one empirical study found that although defendants in bifurcated trials stood a better chance of winning on the issue of compensatory liability, if found liable, the odds that they would also be held liable for punitive damages increased significantly, as did their overall net loss.[76]

4. Examples: State Bifurcation Rules in Illinois, Wisconsin, and Indiana

(a) Illinois

The history of bifurcation in Illinois is complicated.[77] The right to bifurcate arose from the common law, where courts held they had the inherent authority to order a split trial.[78] Later, Illinois courts reversed course and determined that judges *could not* separate the issues of liability and damages, as there was no basis for this authority in law.[79] The Illinois legislature later contributed to the evolution of the practice, when the 1995 Illinois Tort Reform Act[80] created a specific right for defendants, upon request, to have separate trials for punitive damages claims.[81] However, the Act was later deemed unconstitutional in its entirety,[82] and no subsequent legislation has been passed concerning the matter.

Bifurcation rules in Illinois now live within its case law. The general principle is that bifurcation is available at the circuit court's discretion, especially when there is a threat of jury confusion or party prejudice.[83] However, the decision in *Mason v. Dunn* prohibiting a "split

[76] *See* Landsman, et al., *supra* note 64, at 329 (finding that defendants prevailed on the issue of compensatory liability 60 percent of the time in bifurcated trials, as opposed to only 43 percent in unitary trials).

[77] Compounding the lack of codified practices, Illinois courts also use the term "severance" as a general term that can refer either to Rule 21 severability or Rule 42(b) separation of issues. *See, e.g.*, Mason v. Dunn, 285 N.E.2d 191 (2d Dist. 1972); Ill. Law & Practice, § 15 (2011) ("The term 'sever' is used broadly, and when a trial court orders an issue or claim severed, more often than not the court is simply providing for separate trials and not that the claims thereafter should proceed as separate actions.").

[78] Opal v. Material Serv. Corp., 133 N.E.2d 733 (1st Dist. 1956); Lutgert v. Schaeflein, 47 N.E.2d 359, 364 (1st Dist. 1943) ("The court has ample power to order separate trials where the trial of all the issues presented by the various parties might tend to confuse the jury").

[79] Dunn, 285 N.E.2d at 193.

[80] Illinois Civil Justice Reform Amendments of 1995, Pub. Act No. 89-7 (1995); Kirk W. Dillard, *The Illinois Tort Reform Act: Illinois' Landmark Tort Reform*, 27 LOY. U. CHI. L.J. 805 (1996).

[81] 735 ILCS 5/2-1115.05(c) (1995).

[82] Best v. Taylor Machine Works, 689 N.E.2d 1057, 1106 (Ill. 1997) (holding that although many provisions, including 735 ILCS 5/2-1115.05, were not being challenged, the entire Act was deemed invalid on grounds of severability).

[83] Atwood v. Chi. Transit Authority, 624 N.E.2d 1180, 1186 (1st Dist. 1993).

issue trial" at the objection of either party still stands.[84] That is to say, it is not clear whether bifurcation of liability from damages is allowed in Illinois courts absent any authorizing legislation.[85]

(b) Wisconsin

Wisconsin is another state that has taken legislative action in addressing separation. The statute reads as follows:

> **Consolidation; separate trials. . . . (2)** Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition or economy, or pursuant to s. 803.04(2)(b), may order a separate trial of any claim, cross claim, counterclaim, or 3rd-party claim, or of any number of claims, always preserving inviolate the right of trial in the mode to which the parties are entitled.[86]

This statute was modeled after Rule 42(b), but, according to the legislative history, purposefully omitted the right to separate trials for separate *issues*.[87] While early drafts of the rule included a provision allowing bifurcation of issues, the Judicial Council Committee voted to exclude the provision, noting, "The rule has been intentionally written to provide that only claims can be bifurcated and that issues cannot be bifurcated. An exception to that is the bifurcation of an issue of insurance coverage under 803.04(2)(b)."[88] Although this received pushback from many concerned parties, including judges and representatives from local bar associations, the rule was adopted in 1976 without allowances for bifurcation of issues.[89] And so similar to the situation in Illinois, courts require legislation to authorize the separation of issues, and do not credit the general case-management discretion of judges as a vehicle for authorizing bifurcation.[90]

(c) Indiana

Indiana has codified bifurcation within its Rules of Court:

> **Rule 42. Consolidation--Separate trials:**

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[84] *See* Foerster v. Ill. Bell Telephone Co., 315 N.E.2d 63, 66–67 (1st Dist. 1974); *see also* HON. ROBERT S. HUNTER, TRIAL HANDBOOK FOR ILLINOIS LAWYERS § 13:10 (2010).

[85] Note that authorization could also come from the Illinois Supreme Court. *Id.*

[86] WIS. STAT. § 805.05 (2010).

[87] Waters v. Pertzborn, 627 N.W.2d 497, 503 (Wis. 2001).

[88] *Id.* (quoting Letter from Reuben W. Peterson, Chairman of the Judicial Council, to the Honorable Michael T. Sullivan, Circuit Court for the Milwaukee County (Apr. 16, 1974) (on file with the Wisconsin State Law Library).

[89] *Waters*, 627 N.W.2d at 505. Note that WIS. STAT. § 805.09(2) further supports the legislatures intention to preclude bifurcation of issues, at least to different juries, stating, "A verdict agreed to by five-sixths of the jurors shall be the verdict of the jury. If more than one question must be answered to arrive at a verdict on the same claim, the same five-sixths of the jurors must agree on all the questions."

[90] *Waters*, 627 N.W.2d at 906 (holding that WIS. STAT. § 906.11(1), granting authority to judges to control the general order of trials, was not sufficient to authorize bifurcation of issues).

> **(B) Separate trials.** The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, *or of any separate issue* or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury.
>
> **(C) Submission to Jury in Stages.** The Court upon its own motion or the motion of any party for good cause shown may allow the case to be tried and submitted to the jury in stages or segments including, but not limited to, *bifurcation of claims or issues of compensatory and punitive damages*.[91]

Despite this explicit authorization of separation of issues within the Rules (modeled after Federal Rule 42), and while judges have wide latitude in granting separate trials, Indiana courts are still reluctant to authorize bifurcation, preferring a unitary trial.[92] Indiana courts are tasked with balancing "the interests of convenience and economy against the likelihood of substantial prejudice to the defendant's case."[93] On appeal, Indiana courts require an actual showing of prejudice as a prerequisite to overturn a refusal to separate by the trial court,[94] lending substantial deference to trial judges who endorse unitary trials. Nonetheless, the Indiana Rules of Court specifically highlight punitive damages as ripe for bifurcation. Indeed, this accords with the thesis of Rowley & Moore's in-depth examination of bifurcation, concluding that the best way to promote the use of bifurcation is to "enact legislation recognizing discretionary judicial use of bifurcation in appropriate civil cases."[95]

(d) [Add Other State Examples]

5. Federal Uniformity As a Model for States

The previous Section, while covering only three states, illuminates a general disparity in bifurcation rules and practices at the state level. This Section revisits the federal standard in more detail.

The linchpin of the federal uniformity is that federal judges have absolute discretion to allow the separation of trials, and they have adopted this authority as a practical and effective means of managing cases. While either party can request bifurcated trials, the judge has the authority to

[91] Indiana Rules of Court, Trial Procedure Rule 42 (2009).
[92] Kerry M. Diggin, et al., INDIANA LAW ENCYCLOPEDIA § 3 (2011); Elkhart Cmty. Sch. v. Yoder, 696 N.E.2d 409, 414 (Ind. Ct. App. 1998).
[93] State Farm Mut. Auto. Ins. Co. v. Gutierrez, 866 N.E.2d 747, 749 (Ind. 2007) (quoting Jamrosz v. Res. Benefits Inc., 839 N.E.2d 746, 761 (Ind. Ct. App. 2005)) (internal quotation marks omitted).
[94] *Id.* at 750 (citing *Yoder*, 696 N.E.2d at 414).
[95] Rowley & Moore, *supra* note 61, at 2.

do so without the consent of the parties.[96] The key element to the federal practice is that the judge's decision be one of *informed discretion*, whereby the decision to bifurcate is one that, considering the totality of circumstances, will achieve the purposes of Rule 42(b).[97] And the Rule states very simply three grounds of consideration that can lead a judge to order separate trials: (1) in furtherance of convenience, (2) to avoid prejudice, or (3) for the purposes of efficiency and economy. Punitive damage cases fall primarily under the second prong, where "the possibility of prejudice, however remote, justifies a separate trial."[98] However, the judge also considers the general overlap between issues in deciding if the potential prejudice of a unitary trial outweighs its economy. Federal law is clear that this is a decision properly suited for the sound discretion of the federal judge.[99] While the ultimate decision can be complex, the Seventh Circuit has implemented a three-step process that illuminates and simplifies the judge's decision-making process: (1) whether separate trials would avoid prejudice or promote judicial economy, (2) whether bifurcation would unfairly prejudice the non-moving party, and (3) whether separate trials would violate the Seventh Amendment.[100]

Perhaps the most common use of bifurcation in federal courts is the separation of liability from damages, especially in the punitive damage context.[101] While the Manual for Complex Litigation instructs that "particular care" must be taken when considering bifurcation in certain areas of litigation (such as antitrust),[102] the general view is that bifurcation is a discretionary tool just like any other, allowing judge to effectively manage cases.[103]

While the Federal Rule does not explicitly mention the punitive damage context in its articulation of the rules of separation, federal judges have embraced the concepts behind the procedural rule, and have exercised it as vital tool in case management. While it seems that many states have adopted statutes that mirror the language of the Federal Rule, the examples in this brief survey have shown that with or without an explicit statutory basis for separation, the practical implementation among separate states is unpredictable.

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[96] WRIGHT & MILLER, *supra* note 60, § 2388.
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *See* Houseman v. U.S. Aviation Underwriters, 171 F.3d 1117, 1121 (7th Cir. 1999). Regarding the Seventh Amendment concern, this occurs when a second jury reexamines a fact that was tried by an earlier jury. *See* Rowley & Moore, *supra* note 61, at 3–4. While this has been a hot topic for scholarly debate (*see id.* at 4 n.11), the Supreme Court has addressed the subject by holding that the trial of separate issues in the same case to separate juries is permissible as long as the issues are so "distinct and separable" that the second jury will not make factual determinations already settled by the first jury. Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 500 (1931); *cf. In re* Rhone-Poulence Rorer, Inc., 51 F.3d 1293, 1303 (7th Cir. 1995) (holding that the proposed trial plan violated the Reexamination Clause, where one jury was to consider the common issue of negligence while subsequent juries considered comparative negligence and proximate cause).
[101] WRIGHT & MILLER, *supra* note 60, § 2390.
[102] MANUAL FOR COMPLEX LITIGATION (FOURTH) § 30.1, at 520 (2004).
[103] *Id.* § 10.13, at 12.

WG8 EXTRATERRITORIALITY/ MULTIPLE AWARDS

Summary of deliberations by the sub-group on multiplicity of punitive damage awards and extra-territoriality concerns:

A telephone meeting of the sub-group was held on May 13. Unfortunately, only representatives from the defense bar, Bill Gary, Sara Gourley and I, were able to participate. A subsequent call was cancelled for lack of attendance. Nevertheless, we have been able, as a result of our first meeting and subsequent emails (primarily substantial input from Elizabeth Cabraser), to put together tentative positions of the Sub-Group, summarized below.

Issue presented: **How to coordinate multi-state and federal/state legislation, so that early punitive damage awards do not eviscerate a defendant's funds.** The primary goals are to prevent the depletion of funds that would otherwise go to the payment of subsequent compensatory claims, and to ensure, as much as possible, that a defendant is not subjected to multiple punishment for the same conduct.

Approaches discussed:

- Statutes requiring courts to consider prior punitive damages in determining the availability and amount of punitive damages awards
- The use of Fed.R.Civ.P. 23b(1)(a) to bring all punitive damage claimants in one court
- Joinder and/or interpleader to bring all cases claiming punitive damages arising out of a single event, product, or common course of conduct before one court
- Expansion and change of MDL procedure to allow trial-purposes jurisdiction
- Fund-in-court

Plaintiff Tentative Proposal: Use of existing procedural tools to channel punitive damages process from initial trial through de novo appeals in single jurisdiction.

Open Issues relating to plaintiff tentative proposal:

- Which procedural tool to use?
    - 28 U.S.C. 1404, 1407?
    - Fed.R.Civ.P. 23b(1)?
    - Joinder/interpleader?
    - MDL?
- Choice of law/due process concerns
- Seventh Amendment concerns
- Forum-shopping concerns

- How do we coordinate state proceedings with a federal coordination vehicle?

Defense Tentative Proposal: Establishment of a fund-in-court, subject to ultimate allocation among stakeholders and distribution after some pre-determined date certain or other event related to the anticipated end of multi-jurisdictional litigation.

Open issues relating to defense tentative proposal:

- When is fund established?
    - Upon final appeal of punitive damages verdict?
    - Upon entry of initial judgment?
- Does fund contain only initial punitive damages award, or all subsequent awards?
- Does establishment of fund obviate need for bonds as to subsequent punitive awards?
- What is mechanism for ultimate allocation of award?
    - MDL?
    - 23b(1)?
- What event triggers allocation proceedings?
- Can total amount of all punitive awards be reviewed before ultimate allocation?
- How do we coordinate state proceedings with a federal allocation vehicle?

WG8 CHOICE OF LAW

Choice of Law Issues: Punitive Damages in the Mass Tort Context

I. Introduction

Choice of law rules can have outcome-determinative effect in many cases. Some (few) states do not allow punitive damages, or do not allow them in some contexts (e.g. statutory wrongful death claims). State courts will apply their own choice of law rules; federal courts will apply the substantive law of the state in which they sit, including its choice of law rules, which can result in the application of another states' law to the issue of punitive damages. In a mass tort context, the stakes are high for both sides to select (or secure after filing) a forum where the choice of law rules will lead to the application of law favorable to that party.

A. For a non-resident defendant, forum law may affect the ability of a plantiff to secure jurisdiction under International Shoe. Long –arm statutes, in general, seek to secure jurisdiction to the fullest (constitutionally permissible) extent. The forum choice of law rules, in turn, may result in outcome-determinative rulings as to i) the availability of punitive damages, ii) the burden of proof for an award of punitive damages (e.g preponderance or clear and convincing), iii) the degree of culpability required for an award of punitive damages (e.g. willful or gross negligence), and iv) the level of appellate scrutiny for an award of punitive damages. In addition, the insurability of punitive damages may be affected by the choice of law ruling.

B. In a mass tort context, a choice of law ruling can thus result in the application of law which has broad implications for a defendant. Choice of law rulings may result in different states' laws applying to the same conduct , depending on where the various suits are filed.

II. Choice of Law Rules: the current landscape

A. Lex Loci

B. Most significant relationship

C. Governmental interest

III. What can/should be done?

Because different states may apply different laws to punitive damages claims, questions about the legitimacy of such awards in the mass tort context inevitably arise. If a defendant's conduct may be judged by multiple standards, with different effects, the goal of deterrence is more difficult to meet. The problem may be intractable with respect to multiple state court actions (??), but a uniform choice of law rule in federal courts (e.g. center of the liability-creating conduct, or principal place of business) could provide certainty and serve the goals of punitive damages. If this can be accomplished, it would require a change in the view that punitive damages rules are substantive, rather than procedural.

WG8 DISTRIBUTION/ SPLIT-RECOVERY STATUTES/ STATE COURT ADMINISTRATION

Split Recovery Statutes

Split recovery statutes attempt to align more closely the impact of punitive damages awards with their purpose by maintaining the deterrence effect, but eliminating an arguably unseemly windfall aspect through redistribution of the award. Acceptance of split recovery schemes has been slow, based on concern that the statutes raise problems of over-deterrence, conflicts of interest and the potential inflation of punitive awards. Further, in practice, some states have found the statutes to be ineffective, either due to poor statutory construction or time limits on the legislation. Other states, however, have found split recovery statutes to be an effective means of punishing tortfeasors while distributing money to arguably deserving parties.

I. Operation of Split Recovery Laws

Split recovery statutes are not new, nor are they the acts of one or two rogue state legislatures. In response to a perceived rise in the volume and award amounts of litigation in the 1980s, many states engaged in a wave of tort reform to curb punitive damage awards. All told, one quarter of U.S. states have experimented with splitting punitive awards between plaintiffs and the state. Eight states currently require that a portion of any punitive damage judgment be shared with the state: Alaska, Georgia, Illinois, Indiana, Iowa, Oregon, Missouri and Utah. [1]

[1] A ninth state, Ohio, has no split recovery statute, however in the case of *Dardinger v. Anthem Blue Cross & Blue Shield*, 781 N.E.2d 121 (Ohio 2002), the court exercised its judicial discretion to split the recovery between the plaintiff and a cancer research fund. Although *Dardinger* is frequently cited for other punitive damages concepts, it has not been followed in splitting any other punitive awards.

Five other states formerly had split recovery statutes which are no longer in force: California, Colorado, Florida, Kansas and New York. (See attached chart.)[2]

There are a number of differences in the way the split-recovery statutes operate. First, there is a wide range in the percentage of the punitive award that is given to the state. Georgia, Indiana and Iowa allocate 75% to the state; New York's now inoperative statute gave the state only 20%.[3] Most other states fall somewhere in between, though Utah awards the first $50,000 in punitive damages to the plaintiff and then provides for a 50/50 split of the remainder.[4] The Illinois statute is discretionary, leaving both the decision whether to split and the amount to allocate to each party to the judgment of the court.[5]

Second, some states differentiate among the types of cases in which punitive damages may be awarded in deciding whether splitting applies. Georgia's statute singles out products liability cases for apportionment. In all other statutes currently in force, the split recovery scheme applies to all cases where punitive damages are allowable.

Third, the funds into which the state's portion of punitive damages is paid vary. Several of the states have attempted to direct monies received from punitive awards towards other

[2] Cal. Civil Code § 3294.5 (2004) (California); C.R.S. 13-21-102 (1994) (Colorado); Fla. Stat. § 768.73 (1991) (Florida); K.S.A. § 60-3402 (1991) (Kansas); NY CLS CPLR §8701 (1994) (New York).

[3] Ga. Code Ann. § 51-12-5.1(e)(2); Ind. Code Ann. § 34-51-3-6(c); Iowa Code Ann. § 668A.1; NY CLS CPLR § 8701 (1994).

[4] Alaska Stat. § 09.17.020(j) (50% of punitive damage award goes to general fund of the state); Mo. Ann. Stat. § 537.675 (50% of award paid into tort victim's compensation fund); Or. Rev. Stat. Ann. § 31.735(1) (40% goes to the prevailing party and 60% goes to crime victims fund); Utah Code Ann. § 78B-8-201(3)(a).

[5] 735 Ill. Comp. Stat. Ann. 5/2-1207.

injured persons whose only recourse may be state assistance, such as Missouri's Tort Victims' Compensation Fund or Iowa's Civil Reparations Trust Fund. The funds are not always a close fit to the harms giving rise to punitive awards -- Indiana's fund benefits victims of violent crime -- and some states simply deposit the money into their general fund.

Additionally, the statutes differ on whether attorneys' fees are segregated from the punitive award before dividing it among the recipients. In most states, the amount allocated to the state is calculated after payment of all applicable costs and fees, including the plaintiff attorney's full contingency fee, based upon the entire punitive award. In other states, however, the state's percentage is calculated before the attorneys' fees and costs are deducted, leaving the plaintiff to bear the full burden of the expenses of the litigation. And, in Illinois, the trial court has discretion to apportion the punitive award among the plaintiff, his attorney, and the State of Illinois Department of Human Services using whatever calculation it deems best.

II. Pros and Cons of Split Recovery Laws

There are a number of state policy and legal objectives that are advanced by split recovery statutes. Arguments in favor of apportioning include that split recovery awards:

- Prevent large windfalls to individual plaintiffs, thereby reducing frivolous litigation, forum shopping and inadequate precautionary measures;
- Recognize that punitive awards are often levied where there is widespread harm to individuals other than the plaintiff and allow the award to be allocated in a manner that

reaches more potentially injured people;

- Resolve the disconnect between the societal purposes for which punitive damages are awarded (punishment, deterrence) and the individualized receipt of such awards;
- Raise revenue for the states;
- Improve the business climate within states by welcoming innovation, which also increases state revenue;
- Lessen the number and size of awards, and in turn, slow increasing costs and decreasing availability of liability insurance;
- May address indirect costs incurred by the state in some cases (e.g. increased health care costs);
- Properly direct punitive damages, which are like criminal fines, to the state; and
- Produce similar deterrence at lower social cost by reducing strain on courts for frivolous suits.

Split recovery laws also raise a number of policy and incentive issues that some argue counsel against their use. These issues include:

- Allowing awards to go to individuals not before the court, thus denying parties a full opportunity to defend;
- Lack of fit between the state funds that receive the awards and the harm being punished means that other potential plaintiffs may not receive funds, while others -- who were

unharmed by the defendant -- will;

- When done in a discretionary manner by judges, it opens the possibility for judges to allocate to their favorite charities;
- Potentially violates Takings Clause of Federal Constitution;
- Potentially violates the Excessive Fines Clause of the Federal Constitution;
- Potentially violates the Due Process Clause where awards go to court-administered funds;
- Jurors may increase awards if they know the plaintiff will not receive all of it;
- Encourages jurors to think of people beyond the plaintiff who may have been harmed, which could lead to larger awards;
- Risks over-deterrence, since defendants may also be subject to criminal or civil fines that are designed to address the same societal harm as the punitive award;
- Disincentives plaintiffs and their attorneys from developing case facts supportive of punitive damages because they will not benefit sufficiently from any recovery;
- May reduce the availability of contingent fee arrangements for plaintiffs unable to pay in advance of judgment;
- Forces plaintiffs to settle meritorious claims because defendants need only offer the plaintiff's expected share of punitive damages, or offer to divide the amount that would go to the state;
- A few statutes allow the states to "ride in the attorney's pockets" by recovering an award without sharing the legal costs.

The aforementioned concerns do not, however, appear to be the main reason behind the demise of the split recovery statutes in the majority of the states where they are now inoperative. Four of the statutes were enacted with sunset provisions that automatically revoked them after a short period of time. These statutes were primarily revenue raising attempts by the states, with the California legislature expressly noting in the text that "extraordinary and dire budgetary needs have forced the enactment" of the split recovery provision. The sunset provisions may have defeated the very purpose for which these statutes were enacted, however, since plaintiffs could simply delay filing or drag out their case and hope to push the verdict out past the termination of the statute.

In California, an effort was made by the Attorney General to extend the sunset provision; however, it was opposed by the Chamber of Commerce out of concern that it incentivized higher punitive damages, despite a prohibition in the statute against instructing juries on the split recovery scheme. The Office of the Attorney General could not substantiate its claim that revenue from the bill would reach $450 million, and the statute, which was largely viewed as politically motivated, rather than a sincere attempt at tort reform, was not extended.

Only in Colorado has allocation to the state been repealed due to a direct challenge based on legal policy. Colorado's statute apportioned 1/3 of any punitive damage award to the state general fund, without first subtracting attorney's fees or costs.[6] The statute was ruled unconstitutional by the Colorado Supreme Court in *Kirk v. Denver Pub. Co.*, 818 P.2d 262 (1991) for violating the Takings Clause of the Colorado and United States Constitutions. The

[6] C.R.S. 13-21-102 (1994).

Colorado Supreme Court found the statute was a taking as a result of three factors: the state had no interest in the judgment prior to collection; the lack of a nexus between deterring undesirable conduct that is punishable by exemplary damages and the forced contribution by the injured party to the state; and if the payment was viewed as a fee, the fee was grossly disproportionate to the service provided and was under-inclusive as it did not apply to parties using court services who were not awarded exemplary damages.

Nevertheless, the decision in *Kirk* is by no means the final word on the constitutionality of split recovery statutes. To the contrary, constitutional challenges, including takings, have been raised repeatedly and been rejected by the supreme courts in several other states.[7] Moreover, the Colorado statute suffered from several drafting errors that are not present in most existing statutes and which could be avoided by future legislation. It did not vest the state with any interest in the punitive award until after it became due and had been collected by the plaintiff, making it plaintiff's property. By contrast, most split recovery statutes provide the state with an interest at the time of verdict or judgment. The state's share is paid directly to the court or state and never becomes plaintiff's property. Also, because Colorado's statute did not segregate attorney's fees and costs prior to division of the award, the state did not bear its share of the expense of the litigation and thus was not providing "just compensation" for the property it took. Additionally, because the state's share went to the general fund, rather than to a fund with a closer nexus to the judicial process the *Kirk* court did not consider the statute to be a proper

[7] *State v. Carpenter*, 171 P.3d 41 (Alaska 2007); *Cheatham v. Pohle*, 789 N.E.2d 467 (Indiana 2003); *DeMendoza v. Huffman*, 51 P.3d 1232 (Oregon 2002) (en banc); *Fust v. Missouri*, 947 S.W.2d 424, 431 (Mo 1997); *Mack Trucks, Inc., v. Conkle et al*., 436 S.E.2d 635, 639 (Georgia 1993); *Gordon v. State*, 608 So.2d 800, 801-02 (Florida 1992); *Shepherd Components, Inc., v. Brice Petrides-Donohue & Assoc.*, 473 N.W.2d 612, 619 (Iowa 1991).

revenue raising mechanism. By selecting a fund that hews more closely to grounds for the award, a split recovery statute could diffuse this issue.

III. Split Recovery Statutes - Can They Be Justified After *Phillip Morris*?

In his note, *Recent Developments: Reconceptualizing Split-Recovery Statutes: Phillip Morris USA v. Williams 127 S.Ct. 1057 (2007)*, Paul Rietema (hereinafter, "Rietema") suggested that the Supreme Court's decision in *Phillip Morris USA v. Williams*, 549 U.S. 346 1057 (2007), because it prohibits the award of punitive damages for harm to persons other than the plaintiff,[8] stripped away the primary justification for split-recovery statutes.[9] The argument is based on two premises:

1. That *Phillip Morris* outlawed use of punitive damages to foster society's goal of deterrence, "where the focus is on creating full internalization of harm in a world of partial enforcement";[10] and

2. That split recovery statutes are justified because punitive damages redress both harm to society and harm to the individual, giving the state an interest in the recovery.

Both premises are open to challenge.

Rietema's first premise assumes that assessing punitive damages to address the problem of partial enforcement is the same as awarding punitive damages for injury to third parties. This is not the case. When a tortfeasor believes the chance of getting caught is slim, she will discount actual harm to an individual plaintiff by the probability of enforcement. For example, assume the following:

- I can bill an additional $100 worth of time each work day by speeding on my way to work, yielding $25,000 more income each year,
- There is a 10% chance I will get into an accident
- The harm caused by the accident is likely to be $100,000

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[8] "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." 549 U.S. at 353.

[9] *E.g.*, Paul B. Rietema, *Recent Developments: Reconceptualizing Split-Recovery Statutes: Phillip Morris USA v. Williams 127 S.Ct. 1057 (2007)*, 31 HARV. J.L. & PUB. POL'Y 1159 (2008)

[10] Id. at 1166 ("states may no longer use pinitive damages to encourage socially optimal deterrence as traditionally conceived -- where the focus is on creating full internalization of harm in a world of partial enforcement").

Under this set of facts, I will continue to speed because the probable discounted cost of speeding is only $10,000. Underenforcement causes me to take risk because I underestimate the cost of my conduct on an individualized basis. I do not speed on my way to work on the belief that I can get into 10 accidents, each causing $100,000 worth of damage but only get sued for one. Chances of enforcement once I have had an accident are virtually 100%. So punitive damages are not needed for me to bear the cost of my conduct to third parties. Rather, punitive damages are necessary so that my perceived risk of experiencing even one enforcement event is enough to motivate me to slow down.

Let's look at the same scenario with punitive damages:

- I can bill an additional $100 worth of time each work day by speeding on my way to work, yielding $25,000 more income each year,
- There is a 10% chance I will get into an accident
- The harm caused by the accident is likely to be $100,000
- Plaintiff may recover punitive damages up to 5 times actual damages

Now, my total potential liability is $600,000, which means that even if I discount for risk, the cost of speeding ($60,000) exceeds the benefit ($25,000).

The notion that punitive damages redress harm to third parties is not really a problem of underenforcement at all -- it is a problem of underestimation of harm. Harm is underestimated when the type of injury is nonpecuniary and difficult or impossible to recover. Harm is also underestimated when conduct has far-reaching externality effects, causing injury to third parties who lack standing to sue. *Phillip Morris* does call into question the award of punitive damages in order to force defendants to internalize the cost of negative externalities, but this is a limited justification for awarding punitive damages and in no way negates the utility of punitive damages as a means of addressing underenforcement.

The second premise fails because the state's interest interest in a punitive damages award arises, not because such awards compensate for societal harm, but because such awards serve social goals and exist at the pleasure of the state legislatures.

Certainly, courts grappling with split-recovery statutes have noted that punitive damages serve societal ***aims*** such as deterrence.[11] But this is something very different than using punitive

[11] *E.g.*, *DeMendoza v. Huffman*, 51 P.3d 1232 (Or. 2002) (finding that because punitive damages served to punish and deter egregious behavior and not to remedy and injury, split-recovery statute did not violate state constitutional provision guaranteeing a remedy "to every man" only for an "injury done him in his person, property, or reputation"); Dardinger v. Anthem Blue Cross & Blue Shield, 98 Ohio St. 3d 77 - Ohio: Supreme Court (The award must be sufficient to persuade Anthem to pay more attention to patient care; to install a system in which

Footnote continued on next page

damages to redress third-party ***harms***. Even where there has been no harm to third parties, a defendant's conduct can justify a punitive damages award, simply because the conduct is outrageous.

Indeed, society has an interest in punishing bad behavior -- either because it deems such conduct blameworthy, or because the gains to the tortfeasor from such conduct are illicit. The goal of punishment is focused on the conduct ***of the defendant*** and is thus divorced from any actual measure of injury to society.[12]

Moreover, the state maintains an interest in punitive damages awards because they exist solely by virtue of the social construct of the law. Unless one believes that punitive damages are designed to compensate for nonpecuniary loss that is as of yet unrecoverable under the civil law, then by definition, such damages are noncompensatory and a plaintiff has no inherent right to such damages. Rather, they exist -- if at all -- because state legislatures want to punish and/or deter certain kinds of conduct by permitting larger jury awards. Measuring the size of such an award by reference to conduct directed toward a particular plaintiff does not change the essential nature of punitive damages as an award "on top of" being made whole, the right to which can be altered or even eliminated by the legislature. The windfall may be smaller post-*Phillip Morris*, but it is still a windfall.

This begs the question why have any portion of the recovery go to the plaintiff. If, as the law and economics scholars suggest, punitive damages provide an incentive for plaintiffs to bring lawsuits that would otherwise be infeasible due to litigation cost and/or size of potential damage claim, then plaintiffs must be awarded such damages to achieve optimal levels of enforcement. On the other hand, if large punitive damage awards are causing excessive spending on litigation (i.e., too many suits), then paying plaintiffs only portion of punitive damages allows society to maintain the same level of deterrence (by costing defendants the same amount) while reducing inefficient litigation.

IV. Looking Forward: Recommendations for Implementation of Split Recovery Statutes

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appeals are answered, and not purposely delayed; to achieve a system where appeals move forward on their own merit, and are not dropped because Anthem has outlasted the patient in the waiting game. The award must respect the fact that Anthem's bad acts were perpetrated on people who were in their most desperate state. And the award must reflect that, unlike in Wightman, the central event in this case was not accidental).

[12] State statutes capping punitive damages at a multiple of compensatory damages would suggest otherwise.

As with any attempt at tort reform, split recovery schemes come with a number of challenges with respect to shifting incentives and the practicalities of devising a workable procedure for enforcement. On the whole, though, they may offer a singular opportunity to mitigate some the excesses and inequities of the current punitive damages landscape without diluting the power of exemplary awards to promote ethical conduct through punishment and deterrence. Should other states consider adopting a split recovery statute, we offer the following recommendations.

A. Types of Cases

Following the majority of states that presently allocate punitive awards, statutes should be drawn to apply to all types of cases in which punitive damages are available. Since the main goal of splitting awards is to prevent large windfalls to single plaintiffs, there does not appear to be any strong reason to treat plaintiffs with differing injuries unequally. Application of a split recovery scheme should be mandatory in all cases where punitive damages are available, to avoid the due process challenges and potential for judicial favoritism that occur with discretionary statutes.

B. Amount Allocated to State

Although several states have awarded a much larger share to the state, we propose no more than a 50/50 split between the plaintiff and the state. A set percentage, as compared to discretionary allocation, has the advantage of allowing parties to predict recovery and plan for settlement, and also avoids the issues attendant to discretionary statutes, as discussed above. Regarding the amount given to each participant, tilting the numbers too far in favor of the state

can result in the anomalous situation wherein the plaintiff ultimately receives less money than either the state or his attorney. By keeping the plaintiff's share comparable to that of the state, a statute maintains the incentive for plaintiffs to pursue development of case facts for punitive damages, and recognizes that it is the plaintiff who has borne the time, effort and general aggravation of pursuing the case to judgment. At the same time, it leaves a sufficiently sized share to justify the work required of the state to pursue collection and redistribution of the award.

C. Type of Fund

The selection of a state fund to receive allocations of punitive awards should be carefully made to maximize fit between the underlying injury and the fund, while still remaining administratively feasible. Awards to the state general fund speak to revenue raising, not tort reform, and do little to achieve the goal of matching the award to others who were injured by the defendant's conduct. At the other extreme, creating a fund only for victims of the conduct described in a single lawsuit would require implementation of potentially extensive procedures to administer the fund, the cost of which would drain fund resources.[13] Many awards are not large enough to justify this level of administration. In other cases, uniquely tailored funds could be too small to compensate all victims, or, there could be money left remaining in the fund that then cannot be re-appropriated to other worthwhile uses because of the narrow drawing of the fund.

[13] Some commentators have proposed reforms that would allow for only one punitive award per a given set of facts leading to a judgment against a tortfeasor, with a fund created therefrom to compensate others harmed in a similar manner to the plaintiff. This proposal achieves the highest level of fit and does the most to prevent over-deterrence from repeat punishment for the same conduct. However, state sovereignty issues would likely preclude out-of-state victims from receiving money in a state fund, leading to a reduction, but not elimination of multiple awards. For this reason a law limiting plaintiffs to a single punitive award does not present an option superior to nationwide settlement agreements, which are already utilized in many torts involving large numbers of potential plaintiffs.

Accordingly, a state's split recovery portion could be placed in a fund designed to compensate persons with civil injuries, or, solely tort victims, who are unable to achieve redress for their injuries for various reasons, such as indigency or bankruptcy of the defendant. Examples of such funds include Iowa's Civil Reparations Trust Fund and Missouri's Tort Victims' Compensation Fund.[14] If the statutory scheme directs a fund administrator to place punitive awards in an interest bearing account for a minimum period of time prior to distribution, the interest can be used to defray the costs of administration.

Another possibility would be to name a default state fund, but include an option for the plaintiff to propose a charitable organization to be the recipient of the state's share. For example, in a case involving illegal dumping of toxic chemicals, the plaintiff might propose allocating the punitive award to an environmental group engaged in preservation and clean up efforts. The statute should prescribe certain qualifications for the organization to ensure it has the capacity to utilize the money in a circumspect manner and to prevent plaintiff from creating a sham organization to receive the award on his or her behalf. Such qualifications might include 501(c)(3) status, operation for a certain minimum number of years and a showing that neither plaintiff nor any close family member holds a controlling position in the organization or its board. Defendants could be given the right to stipulate or object if there were concerns about plaintiff fraud or fit between the organization and the injury.

D. Compensatory Awards, Attorney's Fees and Costs

Segregation of compensatory damages, attorney's fees and costs from the award prior to

[14] Consider also Florida's repealed statute, which allocated punitive awards from personal injury and wrongful death cases to a Medical Assistance Trust Fund.

apportioning shares is pivotal to the success and acceptance of split recovery statutes. This incentivizes attorneys to accept contingent fee cases, thereby expanding access to justice for lower income plaintiffs, and to develop fully case facts supportive of punitive damages. It also prevents the states from recovering an award without sharing the legal costs, thus reducing constitutional challenges. Some states utilize another fair-minded, though somewhat more mathematically complex method, and deduct attorney fees proportionally from the state's recovery. In a 50/50 split recovery this would result in a slightly higher payment by the plaintiff, since he or she would also be paying a percentage of the compensatory recovery.

Another key apportionment issue that should be addressed in prospective legislation is compensatory awards. Several states provide that punitive awards may not be paid to the state until the plaintiff receives full payment of any compensatory award. This restriction appropriately ensures that the actual harm at issue in the case is satisfied before ancillary aims of punishment, deterrence and compensation of other injured individuals is undertaken.

E. Jury Instructions

It has been theorized that if juries know the plaintiff will not receive the entire punitive award, they may feel greater comfort in awarding larger amounts as punitive damages than if there is no split recovery. A small number of states have included a jury instruction provision in their split recovery legislation that is worth consideration. To reduce the temptation to inflate the punitive award, instruction or argument on the split recovery scheme can be prohibited. This limitation, in combination with constitutionally required instructions permitting consideration only of plaintiff's injuries, should assist in keeping split recovery statutes from an inflationary result that is contrary to their intent.

F. Procedure

Split recovery schemes must be drafted with a clear process for vesting an interest in the state and collection of the award. Otherwise, they run the risk of creating an award that the state has no ability to collect or distribute. First, the statute should include a clear, mandatory directive to courts to award the designated amount to the state, e.g. the court "shall enter judgment providing" or the award "shall be paid to" the state.

Next, the statute should include an obligation for the plaintiff to notify the state Attorney General of the punitive damage claim. This could be mandated within a certain number of days from the verdict or, in states where plaintiffs must file a separate motion for punitive damages, upon filing of the motion.

Third, the statute should specify that the state is vested with all the rights of a creditor or judgment debtor upon announcement of the verdict. This ensures that the state is named in the judgment and thereafter has standing to pursue collection.

Statutes should also specify the order of payment of damages and priority of creditors. To protect the plaintiff, punitive damages should not be paid until after full payment of compensatory damages, costs and attorney fees. The enactment should require creditors to notify all other creditors when payments are received so that it is apparent when the state may begin pursuing collection. In the event that a punitive judgment is not paid in full, the statute should provide that the state receive its proportion of any amounts over and above compensatories, fees and costs that are recovered.

Several states have included provisions in their split recovery statues that prohibit the state from intervening in suits where they have no interest other than the recovery of punitive

awards. California's statute also prohibited the filing of amicus briefs by the state in this situation. The advantage of such a provision is that it prevents the state from pressing for a higher punitive award to further its own interests in revenue. On the other hand, eliminating intervention rights may prevent states from collecting awards entered in federal court pursuant to state punitive damage law since the federal court would not be bound to follow state procedure on identification of creditors and procedure for collection. We therefore suggest that where it is possible for state legislators to cooperate with the Attorney General on creating a standing policy of non-intervention prior to verdict, this may provide a more flexible method for limiting state intervention, while preserving the state's ability to collect.

G. Sunsets/Revenue Raising

Depending on the priority given to differing reform goals, split recovery statutes may be most effective if enacted in combination with other civil reforms. If a state's aim is to significantly cut back on litigation, then a combination with a punitive damages cap will have an even larger impact on number of cases filed in a state, but will diminish the state's return from punitive awards. If a state is interested in increasing deterrence and places a higher value on safety, then additional reforms might reduce deterrent incentives and thus combining with a split recovery statute would be disadvantageous. Whatever judicial goal is pursued, the one objective that is least desirable is fund raising. When split recovery statutes are enacted with overt revenue raising goals, instead of a sincere interest in tort reform, the results are often unpopular and poorly drafted to achieve the stated goal. Revenue raising measures are often associated with political figures or parties, whose enactments may be swiftly undone as soon as there is a change in office. Like sunset clauses, this can lead to statutes that are ended before there has been time

for the real effects to become clear. Litigants can circumvent the statute by delaying or prolonging suits, thus defeating the revenue-raising goal. Using split recovery statutes as quick-fix revenue measures also runs the risk of drafting deficiencies, which increases the potential for constitutional challenges that could derail the statute and eliminate the benefits it has for the interests of justice.

V. Conclusion

Split recovery statutes are not a magic bullet to fix all punitive award abuses and achieve perfect alignment with their intended purpose. They do, however, have the potential to produce modest reductions in the size and volume of punitive awards, without constraining cases where a large punitive judgment is appropriate. These statutory schemes also reduce the unease many feel over giving individual plaintiffs large windfalls, by directing money to others who may have been similarly harmed. Split recovery schemes achieve comparable levels of deterrence and punishment as schemes without such allocation, but at a reduced cost to society. With careful planning they may provide a useful tool for improvement of the judicial process.

States With Split Recovery Statutes

State	**Split amount state/plaintiff**	**Fund**	**Atty Fees Segregated prior to Split?**	**Procedure for collection by state**
Alaska	50/50	general	No	"the court shall require that 50% of the award be deposited in the general fund" "this subsection does not grant the state the right to file or join a civil action to recover punitive damages"
California (no longer in effect)	*75/25*	*Public Benefit Trust Fund*	*No, but state required to pay 25% of its share*	"shall be paid" 1. Def. pays Pl's costs if awarded 2. Def. pays Dep. Of Finance, which deposits in fund 3. Def. pays Pl.'s atty & notifies Pl's atty of amount paid to state 4. Fund pays Pl's atty 25% of its share on July 1 of the next fiscal year state shall not be a party in interest to action or intervene or file amicus briefs
Colorado (no longer in effect)	*1/3 / 2/3*	*general*	*No*	"shall be paid" no interest in claim until payment becomes due

Florida (no longer in effect)	*60/40* *35/65*	*Medical Assistance Trust Fund (personal injury & wrongful death cases)* *General (all other cases)*	*No (paid by plaintiff but calculated only on plaintiff's share)*	"shall be payable"
Georgia	75/25	general	Yes	"upon issuance of judgment in such a case, the state shall have all rights due a judgment creditor until such judgment is satisfied . . ." state is not a party in interest 1. payment sent to clerk 2. clerk to pay state w/in 60 days
Illinois	discretionary	Dept of Human Services	Yes	may apportion to the state
Indiana	75/25	Violent Crime Victims Compensation Fund	No	1. Def. to notify AG upon entry of verdict 2. punitive award paid to clerk of ct. 3. clerk "shall pay" to the treasurer of the state 4. treasurer to deposit in fund AG may negotiate & compromise Interest effective upon verdict
Iowa	75/25	Civil Reparations Trust Fund (administered by	Yes	"award to be ordered paid into…fund"

		court administrator & executive council)		
Kansas (no longer in effect)	*50/50*	*Health Care Stabilization Fund*	*No?*	"shall be paid"
New York (no longer in effect)	*20/80*	*general*	*Yes*	"shall be payable" 1. Judgment shall order payment to state 2. all rights of creditor vest following exhaustion of appeal 3. ct. clerk to send copy of judgment to Atty Gen. w/in 20 days 4. Atty Gen has duty to collect 5. Cannot collect until after costs, compensatories & atty fees have been paid
Oregon	60/40	Criminal Injuries Compensation Account of the Department of Justice Crime Victims' Assistance Section	No (taken from plaintiff's portion, up to 1/2)	"shall be paid" upon verdict, DOJ "shall become a judgment creditor as to the punitive damages portion of the award" 1. Pl. provide notice to DOJ after verdict w/in 5 days 2. Pl to provide notice upon entry of judgment w/in 5 days 3. Def to pay compensatories, costs and fees first

				4. then payment is applied to punitives 5. judgment creditors to notify all other creditors when payment is received
Missouri	50/50	Tort Victims' Compensation Fund	Yes	"state shall have a lien….which shall attach…after deducting attorney's fees and expenses" 1. Pl. to notify AG after final judgment 2.lien attaches 3. AG serves lien notice on Def 4. state petitions court & notifies all parties 5. court adjudicates parties' rights & enforces lien 6. Atty fees & expenses paid 7. lien satisfied state has no right to intervene at any stage except to enforce lien
Utah	1st 50k to Pl., remainder 50/50	General	No, but shared by state 50/50	"court shall enter judgment as follows:…shall be divided equally between the state and the injured party" "state shall have all rights due a judgment creditor" punitives not payable until after other award portions are paid

WG8 STATUTORY DAMAGES

CONSUMER FRAUD AND PUNITIVE DAMAGES

I. Background

Although consumer fraud statutes vary from state to state, there exists an element of commonality: in one way or another, they mirror the Federal Trade Commission Act by targeting fraudulent and deceptive acts and practices.[1] Unlike the FTC Act, many of these state statutes authorize private causes of action, including causes of action for fraud and breach of contract.[2] Most consumer protection statutes are based on the FTC Act, the Uniform Deceptive Trade Practices Act or the Uniform Consumer Sales Practices Act.

State consumer protection statutes are advantageous over the common law because common law fraud is difficult to prove- some state statutes relax or eliminate reliance while others do not require a showing of causation and injury[3]. State statutes are also preferred over the common law because they may provide for enhanced, punitive, or treble damages and attorneys fees.[4]

The most relaxed state statute is California's Unfair Competition law. California does not require standing nor privity; a plaintiff need not to have been affected by the

[1] Alan S. Brown & Larry E. Helpler, *Comparison of Consumer Fraud Statutes Across the Fifty States*, Federation of Defense and Corporate Counsel Quarterly, (Spring 2005), *available at* http://www.thefederation.org/documents/Vol55No3.pdf
[2] *Id*. at 263.
[3] *Id.* at 265.
[4] *Id.* at 266.

defendant's conduct. It is sufficient for the plaintiff to allege and prove the public was *likely* to be deceived.[5]

II. Punitive Damages: Purpose and Limitations

Punitive or exemplary damages are typically assessed when a tortfeasor's wrong is so egregious that compensatory damages are insufficient to redress the wrong.[6] The purpose of punitive damages is to reward the plaintiff in cases where compensatory damages may deemed insufficient, to punish the defendant for wrongdoing and to deter future similar activity by the defendant or others.

Although states retain discretion over what may warrant a punitive damages award, the power to award these damages is limited by procedural and substantive constitutional considerations.[7] In the past twenty years, the Supreme Court has enforced these limitations, holding that the Due Process Clause prohibits punitive damages awards from being based upon the fact-finder's desire to punish a defendant for harming persons who are not before the court,[8] finding that the Due Process Clause prohibits grossly excessive punitive damages award[9], and concluding that the standard of review for appellate courts reviewing such awards is *de novo*, a much less deferential standard than

[5] *Id*. at 265
[6] See *Kemezy v. Peters*, 79 F.3d 33 (7th Cir. 1996) (Posner, J.)
[7] *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003).
[8] *Phillip Morris USA v. Williams*, 549 U.S. 346, 353 (2007).
[9] *State Farm Mut. Auto Ins. Co. v. Campbell* at 425-426.

abuse of discretion, which was at one time recognized as the standard of review by the Ninth Circuit Court of Appeals.[10]

In *BMW of North America Inc v. Gore*, the Court identified the following substantive limits in making a determination whether a punitive damages award violates the Due Process Clause of the 4th Amendment: (1) the degree of the defendant's reprehensibility or culpability, (2) the relationship between the penalty and the harm to the victim caused by the defendants actions and (3) sanctions imposed in other cases for comparable misconduct.[11] Other considerations identified by the Supreme Court in this case were "whether the harm was physical rather than economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the conduct involved repeated actions or was an isolated incident; and the harm resulted from intentional malice, trickery, or deceit, or mere accident".[12] Further, the Court identified a presumption that compensatory damages made the plaintiff whole, so punitive damages should be awarded only if the defendant's culpability "is so reprehensible to warrant the imposition of further sanctions to achieve punishment or deterrence."[13].

III. State Consumer Fraud Statutes

A. Generally

Legislation or court decisions in several states have narrowed the scope of consumer protection laws, granted sweeping exemptions to entire industries, and placed

[10] Toward a New Standard of Review in Punitive Damage Awards in Arbitration, Brian F. McDonough (2001). *Cooper Industries Inc. v. The Leatherman Tool Group, Inc.*, 532 U.S. 424, 426 (2001)
[11] *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574-575 (1996).
[12] *Id*. at 576–577.
[13] *Id*. At 575.

substantial obstacles in the way of initiating suit or provide for low penalties.[14] For example, court decisions have rendered Michigan and Rhode Island's statute inapplicable to virtually any consumer transactions; Louisiana, New Hampshire and Virginia exempt most lenders from their statute; utility companies are immune from these laws in 16 states, as well as insurance companies in 24 states; Colorado, Indiana, Nevada, North Dakota and Wyoming impede the AG's ability to stop deceptive practices by requiring a finding that these practices were done knowingly and intentionally; Arizona, Delaware, Mississippi, South Dakota and Wyoming impose a financial burden on the consumers by denying them the ability to recover attorney's fees.[15] A significant deterrent exists for consumers in Florida and Oregon to bring suit- courts have required unsuccessful consumers to pay thousands of dollars to the business for its attorney fees, even though the suit was filed in good faith.[16]

B. Intent

States vary as to the level of intent required to find a violation of the statute. Many states require a knowing or intentional violation of the statute. Some states do not require an intent to deceive, including Alaska, Arizona, Colorado, Massachusetts, Maine, Missouri, Nebraska, New Jersey and Texas.[17] In California, scienter is presumed. In Tennessee, the intent to deceive need not be shown but the "concept of deception requires

[14] Carolyn L. Carter, *Consumer Protection in the States, a 50-State Report on Unfair and Deceptive Acts and Practices Statutes*, (February, 2009), *available at* http://www.scribd.com/doc/14473414/50-State-Report-on-Unfair-and-Deceptive-Acts-and-Practices.
[15] *Id*.
[16] *Id*.
[17] Alan S. Brown & Larry E. Helpler, *Comparison of Consumer Fraud Statutes Across the Fifty States*, Federation of Defense and Corporate Counsel Quarterly, (Spring 2005) at 275-276.

an element of intent."[18] In North Dakota, Illinois, New Jersey and Minnesota, the plaintiff must prove the defendant intended that others rely on the deceptive acts.[19]

C. Punitive Damages

California, Connecticut, Illinois, Maine, Missouri and Nevada are some of the states that permit punitive damages.[20] Nebraska, on the other hand, completely prohibits the recovery of punitive damages in statutory class actions.[21] Delaware allows punitive damages if the fraud committed was gross, oppressive, if there was a breach of trust and if the plaintiff received compensatory damages. In Maine, punitive damages are recoverable if the conduct was malicious and motivated by ill will, and in Nevada punitive damages are recoverable with clear and convincing proof of suppression, fraud or malice. Some states cap the amount that may be recovered such as California, Texas, and Arizona.[22]

D. Enhanced/Treble Damages

Twenty five states and D.C. allow double or treble damages for consumers.[23] Some consumer protection statutes, such as New Jersey and Ohio, carry an automatic recovery of treble damages if there is a violation of the statute.[24] In other states, treble damages are allowable if the plaintiff is disabled or elderly. In Massachusetts and South Carolina, treble damages are limited to intentional, willful, bad faith or knowing

[18] *Id*. at 276.
[19] *Id*.
[20] *Id*. at 279.
[21] *Id*.
[22] *Id.*
[23] *Id*.
[24] *Id*. at 280.

violations.[25] However, North Carolina does not require intent for an award of treble damages. New York caps the treble damages and only $1,000 may be rewarded by a court if there is a willful and knowing violation.[26]

IV. Conclusion

Although consumers and state agencies have benefitted from the existence of consumer fraud laws commencing in the 1970's and 1980's, the protection of these statutes seems to be eroding. Not only do the statutes discourage enforcement by making it difficult or unappealing for a consumer to bring suit, the penalties for violating these statutes are minimal and thus serve as a weak deterrent for repetitive offending conduct.

[25] *Id.*
[26] *Id.*

Comparison of Consumer Fraud Statutes

State	Statute	Private Cause of Action?	Class Action Allowed?	Harm to Consumer Required?	Scienter?	Reliance Required?	Enhanced Damages?	Attorneys' Fees?
AL*	Deceptive Trade Practices Act (Ala. Code § 8-19-5)	Yes (§ 8-19-10)	No (§ 8-19-10(f))	Yes (89 F. Supp. 2d 1248: 528 So. 2d 878)	Knowingly (§ 8-19-5)	No (§ 8-19-10(e))	Yes; greater of actual damages or $100 (§ 8-19-10(a)(1)) and treble damages (§8-19-10(a)(2))	Yes (§ 8-19-10(a)(3))
AK*	Unfair Trade Practices and Consumer Protection Act (Alaska Stat. § 45.50.471)	Yes (§ 45-50 -531(a))	Act neither sanctions nor precludes	Not for a private private (§ 45.50.535); some actions require plaintiff to have been misled, deceived or damaged (§ 45.50.471 (11) and (12))	Yes, for violations (§ 45.50.471); otherwise, no scienter required (609 P.2d 520))	No (19 P.3d 1229 and § 45.50.535(a))	Yes; greater of treble damages or $500 (§ 45.50.531(a))	Yes, for prevailing party (§ 45.50.537)
AZ**	Ariz. Rev. Stat. Ann. § 44-1522	Yes, implied (803 F. Supp. 237 and 890 P.2d 69)	Act neither sanctions nor precludes	Yes (591 P.2d 1005, 1008)	No intent to deceive necessary; just need intent to do the act (773 P.2d 490)	No (773 P.2d 490), but yes in some cases to show injury (591 P.2d 1005, 1008)	Yes (803 F. Supp. 237); for willful violation, civil penalty capped at $10,000 per violation (§ 44-1531)	Yes (§ 44-1534)

Comparison of Consumer Fraud Statutes

State	Statute	Private Cause of Action?	Class Action Allowed?	Harm to Consumer Required?	Scienter?	Reliance Required?	Enhanced Damages?	Attorneys' Fees?
AR*	Deceptive Trade Practices Act (Ark. Code Ann § 4-88-107)	Yes, if actual damage or injury (§ 4-88-113(f))	Act neither sanctions nor precludes	Yes, to bring private cause of action (§ 4-88-113(f))	Some violations require intent (§ 4-88-107(a)(1), (3), (5), (6) & (8) and § 4-88-108(2))	No, except for one specific violation (§ 4-88-108(2))	No, only actual damages for individual civil penalties not to exceed $10,000 (§ 4-88-113(a)(3)) (§ 4-88-113(f)), and only equitable relief for AG § 4-88-113(a)(b))	Yes, reasonable (§ 4-88-113(f))
CA*	Consumers Legal Remedies Act (Cal. Civ. Code § 1770)	Yes (§ 1780 (a))	Yes (§ 1781)	Yes, for private cause of action only (§ 1780)	No award of damages if violation not intentional (§ 1784)	No	Yes, punitive damages (§ 1780(a)(4)); yes, up to $5,000 if act is against senior citizen or disabled person and special findings are made (§ 1780(b))	Yes (§ 1780(d))
CA***	Unfair Competition Law (Cal. Bus. & Prof. Code § 17200)	Private litigant allowed injunctive relief, not damages (§ 17203 and 257 Cal. Rptr. 655))	Act neither sanctions nor precludes	Not for injunction (§ 17203; 259 Cal. Rptr. 191; 58 Cal. Rptr. 2d 89); to prove "fraudulent" act plaintiff must prove only that public is likely to be deceived (48 Cal. App. 4th 608)	No (§ 17200; 94 F. Supp. 2d 1052; 2000 U.S. Dist. LEXIS 1767)	No (259 Cal. Rptr. 191).	Yes, a civil penalty up to $2,500 if act is against senior citizen or disabled person (§ 17206.1); otherwise, no (973 P.2d 527)	Not under UCL. (973 P2d 527); but a plaintiff who prevails in an unfair competition law claim may seek attorney's fees as a private attorney general pursuant to Cal. Civ. Code § 1021.5

Comparison of Consumer Fraud Statutes

State	Statute	Private Cause of Action?	Class Action Allowed?	Harm to Consumer Required?	Scienter?	Reliance Required?	Enhanced Damages?	Attorneys' Fees?
CA	Unfair Practices Act (Cal. Bus. & Prof. Code § 17045)	Yes (§ 17070)	Act neither sanctions nor precludes	No for injunction; yes for damages (§ 17082)	No; presumed (§ 17071 and § 17071.5)	In some cases (146 F.3d 691)	Yes, treble (§ 17082)	Yes (§ 17082)
CO*	Consumer Protection Act (Colo. Rev. Stat. Ann. § 6-1-105)	Yes (§ 6-1-113(1))	Act neither sanctions nor precludes	Yes (§ 6-1-113(a) and (c)); no, if suing as a successor in interest (§ 6-1-113(b))	Knowingly or intentionally for many violations (§ 6-1-105); no intent to deceive necessary (§ 6-1-105(1))	Yes (205 B.R. 272, 276-77)	Yes: greater of treble damages or $500, except in class actions (§ 6-1-113)	Yes (§ 6-1-113(2)(b)); no in class actions (851 P2d 274)
CT***	Unfair Trade Practices Act (Conn. Gen. Stat. Ann. § 42-110b)	Yes (§ 42-110g)	Yes (§ 42-110g(b) and § 42-110h)	Yes (§ 42-110g); must allege injury or loss (147 F.3d 232)	No such requirement in the Act	No (636 A.2d 1383, 1388 and 734 F. Supp. 1025, 1029)	Yes; punitive damages in some circumstances (680 A.2d 1274, 1283 and § 42-110g(a))	Yes (§ 42-110g(d))
DE*	Deceptive Trade Practices Act (Del. Code Ann. tit. 6, § 2531 - § 2536)	Yes (558 A.2d 1066)	Act neither sanctions nor precludes	No (6 Del. C. § 2533)	No such requirement in the Act	No such requirement in the Act	Yes, treble damages (§ 2533)	In exceptional cases (§ 2533(b))

Comparison of Consumer Fraud Statutes

State	Statute	Private Cause of Action?	Class Action Allowed?	Harm to Consumer Required?	Scienter?	Reliance Required?	Enhanced Damages?	Attorneys' Fees?
DE**	Del. Code Ann. tit. 6, § 2511-§ 2527	Yes, if damaged (§ 2525 and 351 A.2d 857)	Act neither sanctions nor precludes	No (§ 2513(a)); yes for private cause of action (351 A.2d 857 and § 2525)	In the case of concealment, suppression or omission (§ 2513(a) and 306 A.2d 24)	No (§ 2513(a))	Yes; punitive damages available if fraud is gross, oppressive or aggravated or there is a breach of trust and plaintiff also receives compensatory damages (462 A.2d 1069)	No (462 A.2d 1069)
DC*	Consumer Protection Procedures Act (D.C. Code Ann. § 28-3904)	Yes (§ 28-3905 (k)(1))	Yes (§ 28-3905 (k)(1)(E))	No (§ 28-3904)	Only for one specific violation (§ 28-3904(h))	No (634 A.2d 433, 437-38 and § 28-3904))	Yes, greater of treble damages or $1,500 (§ 28-3905 (k)(1)(A)); punitive damages (§ 28-3905(k)(1)(E))	Yes (§ 28-3905 (k)(1)(B))
FL***	Deceptive and Unfair Trade Practices Act (Fla. Stat. Ann. § 501.204)	Yes if suffered a loss as a result of a violation (§ 501.211)	Yes (776 So.2d 971)	No (339 So.2d 253)	Willful violation (§ 501.207)); if violation due to bona fide error, recovery limited to unjust enrichment (§ 501.207)	No (776 So.2d 971)	No (454 So. 2d 580); for willful violations, civil penalty of not more than $10,000 will accrue to the state (§ 501.2075); no punitive damages (454 So. 2d 580)	Yes (§ 501.2105; § 501.2075; § 501.211(2)); but see exception (§ 501.211(2))

Comparison of Consumer Fraud Statutes

State	Statute	Private Cause of Action?	Class Action Allowed?	Harm to Consumer Required?	Scienter?	Reliance Required?	Enhanced Damages?	Attorneys' Fees?
GA*	Uniform Deceptive Trade Practices Act (Ga. Code Ann. § 10-1-370)	Yes; for injunctive relief only (§ 10-1-373(a))	Act neither sanctions nor precludes	No; only need likely to be damaged (§ 10-1-373)(a)	No (§ 10-1-373(a)), except for a few specific violations (§ 10-1-372 (a)(9) & (10))	No such requirement in the Act	No; only costs to the prevailing party unless court directs otherwise (§ 10-1-373(b))	Prevailing party (§ 10-1-373(b))
GA***	Fair Business Practices Act (Ga. Code Ann. § 10-1-391)	Yes, if injury or damage (§ 10-1-399(a))	No (§ 10-1-399(a) and 465 S.E.2d 670)	Actions must have potential to harm public (273 S.E.2d 910); yes for private action (473 S.E.2d 554)	No (473 S.E.2d 554, 556); if bona fide error, recovery limited to injury (§ 10-1-400)	Justifiable reliance is incorporated into the causation element (445 S.E.2d 774)	Yes; treble damages for intentional violations (556 S.E.2d 24 and §10-1-399(c)), and for willful violations (§ 10-1-397(1)(B))	Yes, for egregious or intentional misconduct(254 S.E.2d 416)
HI*	Uniform Deceptive Trade Practice Act (Haw. Rev. Stat. Ann. § 481A-3)	Yes; only for injunctive relief (§ 481A-3(a))	Act neither sanctions nor precludes	No; only likelihood of damage (§ 481A-4)	No (§ 481A-4); only for some specific violations (§ 481A-3(9) and (10))	No such requirement in the Act	Yes (§ 480-13(a)(1))	Yes for prevailing party (§ 481A-4(b))

Comparison of Consumer Fraud Statutes

State	Statute	Private Cause of Action?	Class Action Allowed?	Harm to Consumer Required?	Scienter?	Reliance Required?	Enhanced Damages?	Attorneys' Fees?
HI***	Haw. Rev. Stat. Ann. § 480-2	Yes (§ 480-2(e) and §480-13)	No, not for claims for unfair or deceptive acts (§ 480-13.3)	Yes (§ 480-13(a) and 607 P.2d 1304, 1311, *rev'd in part on other grounds)*	Only required for a violation of § 480-9 monopolization (491 F. Supp. 1199)	Injury must be induced by defendant's conduct (634 P.2d 111, 119)	Yes, greater of $1,000 or treble damages (§ 480-13), but $1,000 minimum is not available in class actions under § 480-13(c)(1); additional $10,000 penalty in certain circumstances (§ 480-13.5)	Yes (§ 480-2 and § 480-13(1))
ID*	Consumer Protection Act (Idaho Code § 48-601)	Yes (§ 48-619 and § 48-608)	Yes (§ 48-608)(1)	No (§ 48-606); Yes to bring private action under § 48-608	Knows or should know (§ 48-603)	No (615 P.2d 116)	Yes, with repeated or flagrant violations (§ 48-608(1)); plaintiff may choose the greater of actuals or $1,000 plus punitives (not treble) (§ 48-608(1))	Yes, for prevailing party (§ 48-608(4))
IL*	Uniform Deceptive Trade Practices Act (815 ILCS 510/2) (injunction only remedy)	Yes (206 Ill. App. 3d and § 815 ILCS 510/3)	Act neither sanctions nor precludes	No (815 ILCS 510/3); only need prove likely to be damaged (563 N.E.2d 1031 and 613 N.E.2d 1150)	No (815 ILCS 510/3)	No such requirement in the Act	No (8 F. Supp. 2d 1031; 537 N.E.2d 1332; 385 N.E.2d 714; 757 F. Supp. 1527)	Yes, if willful (815 ILCS 510/3)

Comparison of Consumer Fraud Statutes

State	Statute	Private Cause of Action?	Class Action Allowed?	Harm to Consumer Required?	Scienter?	Reliance Required?	Enhanced Damages?	Attorneys' Fees?
IL**	815 ILCS 505/2 (practices related to the "conduct of any trade or commerce")	Yes, if damaged (§ 815 ILCS 505/10(a) and 240 F.2d 584)	Act neither sanctions nor precludes	No (§ 815 ILC 505/2)	Intentionally (§ 815 ILCS 505/2) and intent that others rely on the deception (682 N.E.2d 118 and 607 N.E.2d 194)	Not under the Act, but must prove reliance in order to establish proximate causation (675 N.E.2d 994, *rev'd on other grounds*, 695 N.E.2d 853)	Punitive damages available if violation is malicious, done with evil motive, or indifference to the rights of others (§ 815 ILCS 505/10(a) and 658 N.E.2d 1325, 1336, *appeal denied*, 664 N.E.2d 648)	Yes (815 ILCS 505/ 10(c), 505/2W Radon, 505/2AA Immigration Services); yes, for appeals (597 N.E.2d 1242)
IN*	Deceptive Consumer Sales Act (Ind. Code Ann. § 24-5-0.5-4)	Yes (§ 24-5-0.5-4(a))	Yes by individual (§ 24-5-0.5-4(b)) and by AG (§ 24-5-0.5-4(c))	The requirement for injury is built into the definition of standing to sue (§ 24-5-0.5-4(a))	Knowingly intentionally (§ 24-5-0.5-3)	Yes (§ 24-5-0.5-4)	No, actual damages only (§ 24-5-0.5-4(a)) or a civil penalty to state (§ 24-5-0.5-4(g)); but treble damages if plaintiff is elderly (§ 24-5-0.5-4(h))	Yes, for prevailing party (§ 24-5-0.5-4(a))
IA**	Consumer Fraud Act (Iowa Code § 714.16)	No (578 N.W.2d 222)	Act neither sanctions nor precludes	No (§ 714.16(2)(a))	No, except for concealment, suppression, or omission of a material fact(§ 714.16(7))	No, except for concealment, suppression, or omission of material fact (§ 714.16(7))	Penalty of not more than $5,000 for each day of intentional violation of TRO or injunction (§ 714.16(7))	Yes (§ 714.16(11))

Comparison of Consumer Fraud Statutes

State	Statute	Private Cause of Action?	Class Action Allowed?	Harm to Consumer Required?	Scienter?	Reliance Required?	Enhanced Damages?	Attorneys' Fees?
KS*	Consumer Protection Act (Kan. Stat. Ann. § 50-623)	Yes (§ 50-634)	Not to recover damages or a civil penalty under (§ 50-636(a) § 50-634(b)); yes, for certain violations (§ 50-634(d))	No (§ 50-626(b))	Knowingly, willfully (§ 50-626(1) & (2)); proof of intent required (857 P.2d 676)	Only for one specific violation (§ 50-627(b)(6))	No (§ 50-634(c)); plaintiff may choose actual damages or $5,000 penalty, but no penalty in class actions (§ 50-634(b) and § 50-636(a))	Yes, for prevailing party (§ 50-634(e))
KY	K.R.S. §§ 367.110-367.370	Yes, if ascertainable loss (§ 367.220(1)	No (521 F.2d 775)	No (§ 367.170)	Only for violation by publisher – knowledge (§ 367.180)	No such requirement in the Act	Violation of Act does not itself lead to punitive damages; but Act does not limit right to punitive damages where one previously existed (§ 367.220(1); 575 S.W.2d 480)	Yes (§ 367.220(3))
LA***	Unfair Trade Practices and Consumer Protection Law (La. Rev. Stat. Ann. 51 § 1405)	Yes (§ 1409(A))	No (917 F. Supp. 432 and § 1409(A))	Yes, for private action	No such requirement in the Act	No such requirement in the Act	Treble damages for knowing violation after notice (§ 1409(A))	Yes (§ 1409(A))

Comparison of Consumer Fraud Statutes

State	Statute	Private Cause of Action?	Class Action Allowed?	Harm to Consumer Required?	Scienter?	Reliance Required?	Enhanced Damages?	Attorneys' Fees?
ME*	Uniform Deceptive Trade Practices Act (Me. Rev. Stat. Ann. Tit. 10, § 1213) (injunctive remedy only)	Yes, for injunctive relief (§ 1213); but may also seek common law remedies for same conduct (§ 1213)	Act neither sanctions nor precludes	No (§ 1212(2)); must prove likelihood of damage (§ 1213); need not prove actual confusion or misunderstanding (§ 1212(2))	No (§ 1213)	No such requirement in the Act	Punitive damages available if action based on tortious conduct that was malicious or motivated by ill will (658 A.2d 1065, 1069-70)	To prevailing party only in exceptional cases (§ 1213); against defendant only if willful violation (§ 1213)
ME***	Unfair Trade Practices Act (Me. Rev. Stat. Ann. Tit. 5, § 207)	Yes (§ 213)	Act neither sanctions nor precludes	Yes (§ 213)	Intentional violation (§ 209); no intent to deceive necessary (522 A.2d 362)	No such requirement in the Act	Punitive damages available if action based on tortious conduct that was malicious or motivated by ill will (658 A.2d 1065, 1069-70)	Yes (§ 213(2)) and for frivolous suit (§ 209)
MD*	Protection Act (Md. Code Ann. Com. Law II § 13-301)	Yes (§ 13-408(a), 335 Md. 661, 645 A.2d 1147)	Act neither sanctions nor precludes	No (§ 13-302)	For certain acts (§ 13-301(7) & (9))	No (§ 13-302)	No; private remedy is purely compensatory (517 A.2d 328, 333 and 594 A.2d 591)	Yes (645 A.2d 147 and § 13-408(b))

Comparison of Consumer Fraud Statutes

State	Statute	Private Cause of Action?	Class Action Allowed?	Harm to Consumer Required?	Scienter?	Reliance Required?	Enhanced Damages?	Attorneys' Fees?
MA***	Consumer Protection Act (Mass. Gen. Laws Ann. Ch 93A § 1)	Yes (93A § 9)	Yes (93A § 9(2))	Yes, for private action (93A § 9(1))	No (704 N.E.2d 1191); no intent to deceive necessary (764 F.2d 928)	No (443 N.E.2d 1308)	Up to three, but not less than two times actual damages for willing or knowing violation (93A § 11)	Yes (93A § 4 and 93A § 9)
MI*	Consumer Protection Act (Mich. Comp. Laws Ann. § 445.901)	Yes (MCLS § 445.911)	Yes, by AG (MCLS § 445.910) and by individual (MCLS § 445.910(3))	No (§ 445.911)	Only for specific violations (§ 445.903d(1) and c(1) and § 445.903(1)(g) and (h))	In class actions, sufficient to show that a reasonable person would have relied (415 N.W.2d 206, 209)	No, limited to actual damages; *but see* 135 F. Supp. 2d 840 ("not limited to pecuniary losses"). Plaintiff may choose the greater of actuals or $250; in class actions, actual damages (§ 445.911(2)).	Yes (186 Mich. App. 292, 463 N.W.2d 261)
MN**	M.S.A. § 325F.69	For elderly or handicapped (§ 325F.71)	Act neither sanctions nor precludes	No (§ 325F.69(1)	Intent that others rely (§ 325 F.69)	No (§ 325F.69(1))	Up to $10,000 (§ 325F.71(2))	Yes (§ 325F.71(4))
MS*	Consumer Protection Act (Miss. Code Ann. § 75-24-1)	Yes (§ 75-24-15(l)	No (Miss. Code. Ann. § 75-24-15(4))	No	Yes; knowingly and willfully for private action (§ 75-24-19).	No such requirement in the Act	If knowing and willful, AG may recover $10,000 per violation (§ 75-24-19(1)(a))	No (871 F. Supp. 279), except for frivolous claims (§ 75-24-15-(3))

Comparison of Consumer Fraud Statutes

State	Statute	Private Cause of Action?	Class Action Allowed?	Harm to Consumer Required?	Scienter?	Reliance Required?	Enhanced Damages?	Attorneys' Fees?
MO**	Merchandising Practices Act (Mo. Ann. Sta. § 407.020)	Yes for ascertainable loss (§ 407.025(1))	Yes (§ 407.025(2) and (3))	No (§ 407.020(1))	No (§ 407.020(1)); knowing and intentional violation is Class D felony (§ 407.436(1))	No such requirement in the Act	Punitive Damages (§ 407.025(1))	Yes (§ 407.025(1))
MT***	Unfair Practices and Consumer Protection Act (Mont. Code Ann. § 30-14-103)	Yes, for ascertainable loss (§ 30-14-133(1))	No (Mont. Code Ann. § 30-14-133)	No (§ 30-14-103)	No such requirement in the Act	No such requirement in the Act	Greater of actuals or $500 (§ 30-14-133(1)); may also award treble damages (§ 30-14-133(1))	Prevailing party (§ 30-14-133(3))
NE*	Uniform Deceptive Trade Practices Act (Neb. Rev. Stat. § 87-302) (injunctive remedy only)	Yes (§ 87-303.10-.11)	Act neither sanctions nor precludes	No (§ 87-303(a))	No (§ 87-303(a)); no intent to deceive necessary (§§ 87-302 and 303)	No such requirement by the Act	No (§ 87-303(a)) (2001 U.S. Dist. Lexis 14274); maximum civil penalty of $2,000 per violation (§ 87-303.11)	Prevailing party (§ 87-303)

Comparison of Consumer Fraud Statutes

State	Statute	Private Cause of Action?	Class Action Allowed?	Harm to Consumer Required?	Scienter?	Reliance Required?	Enhanced Damages?	Attorneys' Fees?
NE***	Consumer Protection Act (Neb. Rev. Stat. § 59-1601)	Yes (Neb. Rev. Stat. § 59-1609)	Act neither sanctions nor precludes	Injury is built into definition of standing to sue. (§ 59-1609)	Yes (268 N.W. 367)	No such requirement in the Act	No, only actual damages; but court may increase award by no more than $1,000 (Neb. Rev. Stat. § 59-1609)	Prevailing party (Neb. Rev. Stat. § 59-1608 and § 59-1609)
NV	Deceptive Trade Practices (N.R.S. § 598.0903)	Yes, by any victim (§ 41.600), by disabled and elderly (§ 598.0977), or by persons injured after determination that violation has occurred (§ 598.0993)	Act neither sanctions nor precludes	No (§ 598.0971)	Some violations, knowingly and fraudulently (§ 598.0915, § 598.0923, § 598.092); violation is evidence of intent to injure competitor (§ 598.0953)	No (§ 598.0963)	If directed toward elderly or disabled, civil penalty not more than $10,000 (§ 598.0973); punitives recoverable with clear and convincing proof of oppression, fraud, or malice (§ 42.005(1))	Yes (§ 41.600(3)); yes, if elderly or disabled (§ 598.0977)
NH*	Regulation of Business Practices for Consumer Protection Act (N.H. Stat. Ann. § 358-A:1)	Yes, if injured (§ 358-A:10)	Yes (§ 358-A:10-a)	No (§ 358-A:2)	No (§ 358-A:2)	No such requirement in the Act	Actual damages or $1,000 whichever is greater (§ 358-A:10(1)); if violation is knowing or willful, treble damages (§ 358-A:10(1))	Yes (§ 358-A:6 and § 358-A:10)

Comparison of Consumer Fraud Statutes

State	Statute	Private Cause of Action?	Class Action Allowed?	Harm to Consumer Required?	Scienter?	Reliance Required?	Enhanced Damages?	Attorneys' Fees?
NJ**	N.J. Stat. Ann. § 56:8-2	Yes (§ 56:8-2.12 and § 56:8-19)	No (696 A.2d 793)	No (§ 56:8-2), but must have suffered loss to bring private action (§ 56:8-19)	Intent that others rely (§ 56:8-2 and 264 N.J. Super. 172); only need intent to deceive for acts of omission (602 A.2d 302)	No (§ 56-8:2)	Yes, treble damages (N.J. Stat. Ann. § 56:8-19) mandatory (647 A.2d 454)	Yes (§ 56:8-19); mandatory (647 A.2d 454)
NM	Unfair Trade Practices Act (N.M. Stat. Ann. § 57-12-10)	Yes (§ 57-12-10(B))	Yes (§ 57-12-10(E))	No (§ 57-12 -10(A))	No, if seeking equitable relief (§ 57-12-10 (A)); No (753 P.2d 346, *overruled on other grounds*)	No, if seeking equitable relief (§ 57-12-10 (A)); *but see* (880 P.2d 857)	Yes, greater of actuals or $100; greater of treble damages or $300 for willful act (§ 57-12-10(B))	Yes (§ 57-12-10(B))
NY***	Consumer Protection Act (N.Y. Gen. Bus. L. § 349)	Yes (113 Misc. 2d 848)	Yes (517 N.Y.S.2d 764)	Injury is built into the definition of standing to sue (§ 350-e)	No (647 N.E.2d 741)	Yes (122 App. Div. 2d 559); it is sufficient to show materially misled (439 N.Y.S.2d 1005)	Yes; discretionary treble damages up to $1,000 if willful and knowing (§ 349(h) and (§ 350-(e)), if elderly, additional penalties (§ 349(c)	Yes (§ 349(h))

Comparison of Consumer Fraud Statutes

State	Statute	Private Cause of Action?	Class Action Allowed?	Harm to Consumer Required?	Scienter?	Reliance Required?	Enhanced Damages?	Attorneys' Fees?
NC***	Unfair and Deceptive Trade Practices Act (N.C. Gen. Stat. § 75-1.1)	Yes (§ 75-16)	Yes (354 S.E.2d 459)	Yes (§ 75-16)	Only for specific violations (§ 75-1 and 485 F. Supp. 1041); no need to show knowledge (394 S.E.2d 643)	No such requirement in the Act	Yes, but must elect punitive or treble (388 S.E.2d 127); if violation knowing, civil penalty of $5,000 (§ 75-15.2); treble damages (§ 75-16); because Act awards automatic treble damages, punitive damages are duplicative (338 S.E.2d 918)	Yes, if willing violation and refusal to settle (§ 75-16.1)
ND**	N.D. Stat. § 51-15-02	Yes (§ 51-15-09)	Act neither sanctions nor precludes	No (§ 51-15-02)	Intent that others rely (§ 51-15-02)	No (§ 51-15-02)	Yes (§ 51-15-09)	Yes (§ 51-15-10)
OH***	Consumer Sales Practices Act (Ohio Rev. Code Ann. § 1345.02)	Yes (§ 1345.09)	Yes, but not for treble damages (Ohio Rev. Code Ann. § 1345.09(B))	No (§ 1345.09)	Knowingly (§ 1345.03) or uncon-scionable (§ 1345.03 (A))	Yes (463 N.E.2d 625)	If deceptive or unconscionable, treble damages (§ 1345.09(B))	Yes (§ 1345.09(F))
OH	Ohio Rev. Code Ann. (§ 4165.01 to § 4165.04)	Yes (§ 4165.03)	Act neither sanctions nor precludes	No for injunction (§ 4165.03(A)(1)); yes for damages §4165.03(A)(2)	No (§ 4165.02)	No such requirement in the Act	No (§ 4165.03(A)(2))	Prevailing party (§ 4165.03(B))

Comparison of Consumer Fraud Statutes

State	Statute	Private Cause of Action?	Class Action Allowed?	Harm to Consumer Required?	Scienter?	Reliance Required?	Enhanced Damages?	Attorneys' Fees?
OK*	Consumer Protection Act (Okla. Stat. Ann. tit. 15 § 753)	Yes (§ 761.1)	Act neither sanctions nor precludes	No (§ 753)	Knowingly (§ 753)	No such requirement in the Act	$2,000 for unconscionable conduct (§ 761.1(B))	Yes (§ 761.1)
OK*	Deceptive Trade Practices Act (Okla. Stat. Ann. tit. 78 § 53)	Yes (§ 54(A))	Act neither sanctions nor precludes	Damage or likely to damage for private actions (§ 54(A))	In some cases (§ 53)	No such requirement in the Act	Yes, if available at common law (§ 54(D))	Only for willful violation or if plaintiff acted in bad faith in bringing suit (§ 54(C))
OR*	Unlawful Trade Practices Act (Or. Rev. Stat. § 646.608)	Yes (§ 646.638)	Act neither sanctions nor precludes	Yes (§ 646.638)	Must prove willful to bring private action (§ 646.638(1))	No (607 P.2d 1375), but some violations require reliance as an element of causation (561 P.2d 1003)	Yes; allows greater of actual or $200 plus punitive (§ 646.638(1))	Prevailing party (§ 646.638 (3) & (4))
PA*	Unfair Trade Practices and Consumer Protection Law (Pa. Stat. Ann. Tit. 73 § 201-1)	Yes (§ 201-9.2(a))	Yes for certain violations (1991 Phila. Cty. Rptr. Lexis 22) and class certified in 2002 U.S. Dist. Lexis 12718	Only for private action (§ 201-9.2(a))	Only for specific violations (73 P.S. § 201-2(4))	No (1991 Phila. Cty. Rptr. Lexis 22); for some claims only (729 A.2d 574, 584)	Yes, up to treble (§ 201-9.2(a)); $2,000 civil penalty for willful violations (§ 201-8)	Yes (§ 201-9.2(a))

Comparison of Consumer Fraud Statutes

State	Statute	Private Cause of Action?	Class Action Allowed?	Harm to Consumer Required?	Scienter?	Reliance Required?	Enhanced Damages?	Attorneys' Fees?
RI***	Consumer Protection Act (R.I. Gen. Laws § 6-13.1)	Yes (§ 6-13.1-5.2(a))	Yes (§ 6-13.1-5.2(b))	No (§ 6-13.1-5.1)	Only for specific violations (§ 6-13.1-1(5)(ix) and (x))	No such requirement in the Act	Yes (§ 6-13.1-5.2(a) § 6-13.1-5.2(b))	Yes (§ 6-13.1-5.2(d))
SC***	Unfair Trade Practices Act (S.C. Code Ann. § 39-5-20)	Yes (§ 39-5-140(a))	No (§ 39-5-140(a))	Must adversely affect public interest (451 S.E.2d 21)	No (880 F. Supp. 416)	No such requirement in the Act	Yes, civil penalty not greater than $5,000 for willful violation (§ 39-5-110); if willful or knowing, treble damages (§ 39-5-140(a))	Yes (§ 39-5-140(a))
SD**	S.D. Codified Laws § 37-24-6	Yes (§ 37-24-31)	Act neither sanctions nor precludes	No (§ 37-24-6(1)) and 290 N.W.2d 467)	Yes, knowing and intentional (§ 37-24-6; § 37-24-8 and § 37-24-27)	No such requirement in the Act	No punitive damages (584 N.W.2d 103, 107); only for internet provider services violations (§ 37-24-40)	No, only for internet provider services violations (§ 37-24-40)
TN*	Consumer Protection Act (Tenn. Code Ann. § 47-18-101)	Yes (154 F. Supp. 2d 1330 and § 47-18-109)		Yes (608 S.W.2d 585, 590-91)	No (843 S.W.2d 9)	No (608 S.W.2d 585)	No, punitive damages (756 S.W.2d 697); treble damages if willful or knowing (§ 47-18-109(a))	Yes (§ 47-18-109(e))

Comparison of Consumer Fraud Statutes

State	Statute	Private Cause of Action?	Class Action Allowed?	Harm to Consumer Required?	Scienter?	Reliance Required?	Enhanced Damages?	Attorneys' Fees?
TX*	Deceptive Trade Practices - Consumer Protection Act (Tex. Bus. & Com. § 17.46)	Yes (§ 17.50(a)	Act neither sanctions nor precludes	Yes (§ 17.50)	No intent to deceive necessary (58 F.3d 198 and 727 S.W.2d 812)	Proof of reliance not essential, but relevant to required proof of causation (890 S.W.2d 118, 130)	Yes, punitives(§ 17.50(b)); if knowing, can award up to treble damages (§ 17.50(b))	Yes, prevailing party (§ 17.50(d))
UT*	Consumer Sales Practices Act (Utah Code Ann. § 13-11-1)	Yes (§ 13-11-19)	Yes for actual damages (§ 13-11-19 and § 13-11-20)	No (§ 13-11-17)	Yes, knowing or intentional (§ 13-11-4(2))	No such requirement in the Act	No, but administrative fine of up to $2,500 for each violation (§ 13-11-17(4)(a))	Yes (§ 13-11-17.5 and § 13-11-19(5))
VT***	Consumer Fraud Statute (Vt. Stat. Ann. Tit. 9, § 2451)	Yes (§ 2461(b) and § 2464(c))	Act neither sanctions nor precludes	No (513 A.2d 1163)	No (§ 2453)	Yes, for private action (§ 2461(B))	Yes (580 A.2d 51); for malice, ill will or wanton conduct, treble damages (§ 2461(b) and 580 A.2d 51)	Yes, but not to prevailing defendant (§ 2461(b) and 438 A.2d 394)
VA*	Consumer Protection Act (Va. Code Ann. § 59.1-200)	Yes (§ 59.1-204(A))	Act neither sanctions nor precludes	Injury built into definition of standing to sue (§ 59.1-204)	No (§ 59.1-200)	No such requirement in the Act	Yes, greater of actual damages or $500 (§ 59.1-204(A)); if willful, greater of treble damages or $1,000 (§ 59.1-204(A))	Yes (§ 59.1-204(B))

Comparison of Consumer Fraud Statutes

State	Statute	Private Cause of Action?	Class Action Allowed?	Harm to Consumer Required?	Scienter?	Reliance Required?	Enhanced Damages?	Attorneys' Fees?
VA+	Va. Code Ann. (§ 18.2 - 216)	No (§ 18.2-245(b))	Act neither sanctions nor precludes	No (§ 18.2 - 245(b))	Yes. knowing (§ 18.2-216.1) or intentional (§ 18.2-214)	No such requirement in the Act	Statute does not sanction	Only for pyramid scheme prosecutions by state (§ 18.2-240)
VA+	Va. Code Ann. §§ 59.1-68.3	Yes (§ 59.1-68.3)	Act neither sanctions nor precludes	Only for individual action (§ 59-1-68.3)	No (§ 59.1-68.3)	No such requirement in the Act	Yes, greater of actual damages or $100 (§ 59.1-68.3)	Yes (§ 59.1-68.3)
WA	Consumer Protection Act (Wash. Rev. Code § 19.86.920)	Yes (858 P.2d 1054, 1061; § 19.86.090)	Act neither sanctions nor precludes	Yes (858 P.2d 1054, 1061 and 930 P.2d 288)	No (858 P.2d 1054, 1061)	No reliance, but must prove conduct has the capacity or tendency to deceive (553 P.2d 423; 693 P.2d 92)	Yes, discretionary treble damages up to $10,000 (Wash. Rev. Code § 19.86.090)	Yes (§ 19.86.080 and § 19.86.090)
WI	Consumer Act (Wis. Stat. §§ 421 to 427)	Yes (§ 426.110)	Yes, for certain violations (§ 426.110)(1); however, not for others § 426.110(3)	No (§ 426.110)	No, but if violation unintentional and result of bona fide error, specific penalties unrecoverable (§ 425.301(3))	No such requirement in the Act	Act specifically states that it does not preclude punitive damages (§ 425.301); fine up to $2.000 for willful violation (§ 425.401)	Yes (§ 426.110)

Comparison of Consumer Fraud Statutes

State	Statute	Private Cause of Action?	Class Action Allowed?	Harm to Consumer Required?	Scienter?	Reliance Required?	Enhanced Damages?	Attorneys' Fees?
WV*	Consumer Credit and Protection Act (W. Va. Code Ann. § 46A-6-101 to § 46A-6-110)	Yes (§ 46-6-106)	Act neither sanctions nor precludes	Yes to sue for damages (§ 46A-6-106)	No (§ 46A-6-102)	Yes (§ 46A-6-102)	Greater of actual damages or $200 (§ 46A-6-106(1))	No
WY*	Consumer Protection Act (Wyo. Stat. Ann. § 40-12-101)	Yes (§ 40-12-108(a))	Yes (§ 40-12-108(b))	Yes (§ 40-12-102(a)(ix)(A))	Knowing (§ 40-12-105(a))	Yes (§ 40-12-108(a))	No (§ 40-12-108)	Yes. in class action (§ 40-12-108(b))

* Statutes similar to Uniform Deceptive Trade or Consumer Sales Practices Acts
** Statutes with Consumer Fraud Acts
*** Statutes similar to the Federal Trade Commission Act
\+ Other

WG8 ARBITRATION

ARBITRATION & PUNITIVE DAMAGE AWARDS

Arbitration is strongly favored by the courts as it serves the important public policy of reducing the burden on the judiciary. As the practice has evolved, so has the type of damages available in an arbitration award. It is now an established principle that in arbitration, unless the parties have expressly precluded an award for punitive damages in their arbitration clause, punitive damages can be awarded.

A. Preliminary Matters

A claimant cannot merely seek punitive damages. Punitive damages are awarded based on some wrong for which compensatory damages are first awarded.[109] Once compensatory damages are awarded and punitive damages are contemplated, it should be noted that the punitive damages are a matter of substantive law as opposed to procedural law. Thus, if a conflict of laws should arise, the substantive law of the Respondent's home state should be applied.

B. Sources of Authority

The harmed party must show that there is some authority for awarding punitive damages. The arbiter may not act *sua sponte*. There must be some cognizable authority permitting the action. Possible sources of authority include a rule, a statute, an arbitration provision, or some egregious conduct committed by the Respondent which substantiates a claim for punitive damages.

The American Arbitration Association Rules, R-43(a) states: The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract. Thus, where an arbitration clause is silent with regard to punitive damages and where there is no state law prohibiting an award of punitive damages in arbitration proceedings, Rule-43(a) is commonly read broadly to justify a punitive damages award. The U.S. Supreme Court has also concluded that such open ended language, in agreed-upon arbitration rules supports a conclusion that the parties authorized their arbitrator to award punitive damages. *See, Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 60-63 (1995).

Additionally, the arbiter must look to the jurisdiction for support. As the Illinois Court of Appeals explained, courts in various jurisdictions have generally adopted one of three approaches in making a determination of whether arbitrators may award punitive damages:

(1) arbitrators may award them unless the arbitration agreement provides otherwise; (2) private arbitrators may never award them because only the state may do so; or (3) arbitrators may award them if the arbitration agreement expressly so provides. *See*, *Edward Electric Co. v. Automation, Inc.*, 593 N.E.2d 833 (Ill. App. 1992).

C. How Punitive Damages Are Determined

In arbitration, punitive damages are determined just as they are in actual litigation. The awards are granted based on an examination of the Respondents conduct. Conduct that is

[109] But see, *MedValUSA Health Programs Inc. v. MemberWorks, Inc.*, 273 Conn. 634, 872 A.2d 423 (May 17, 2005), the Connecticut Supreme Court ruled that $300,000 punitive damages award should be permitted to stand even without a minimal compensatory damages award. *Hadelman v. Deluca*, 274 Conn. 442, 2005 WL 1576485, (July 12, 2005).

malicious or accompanied by ill will warrants a punitive damages award. The award is to be in an amount sufficient to punish the bad actor and at the same time not be overly excessive.[110]

In 1996, the U.S. Supreme Court decided ***BMW v. Gore***, 517 U.S. 559 (S.Ct. 1996). There, the Supreme Court determined that the amount of a punitive award could be so grossly excessive that it would violate the Due Process Clause of the Fourteenth Amendment[111]. Accordingly, when punitive damages are at issue, the arbiter must strike the proper balance between the State's interest in limiting the burden on the judiciary and violating the due process rights of its citizens. Probably the most common factor cited in ***BMW v. Gore*** is the ratio between the actual harm inflicted on the plaintiff and the amount of punitive damages awarded. Referred to as the "reasonable relationship" test, the Supreme Court ostensibly endorsed the notion that compensatory damages should have some reasonable relationship to punitive damages.

Also in 1996, the National Conference of Commissioners on Uniform State laws adopted a Model Punitive Damages Act (1996) and recommended the Model act for enactment in all states. However, the Model act does not define the types of cases for which punitive damages may be granted. Some of the provisions include:

- Allowing the trier of fact to award punitive damages only if there is *clear and convincing* evidence that the defendant maliciously intended to cause the injury or exhibited a conscious and flagrant disregard of others in causing the injury;
- Identifying nine factors to be considered in determining a punitive award, such as the defendant's financial condition and any adverse effect of the award on innocent persons;
- Determining whether the punitive damage award is disproportional to the punishable conduct and therefore excessive.

[110] But see, *MedValUSA Health Programs Inc. v. MemberWorks, Inc*., 273 Conn. 634, 872 A.2d 423 (May 17, 2005), The court found that The *Gore* due process analysis is not implicated in the absence of state action because an arbitration award does not constitute state action and is not converted into state action by the trial court's confirmation of that award, "regardless of how excessive the award may be."

[111] U.S. Const. amend XIV, §1 states "[n]o State shall make or enforce any law which shall…deprive any person of life, liberty, or property without due process of the law."

By 2001, the clear and convincing evidence standard had been adopted by 31 jurisdictions including:

> Alabama; Alaska; Arizona; California; District of Columbia; Florida; Georgia; Hawaii; Indiana; Iowa; Kansas; Kentucky; Maine; Maryland; Minnesota; Mississippi; Missouri; Montana; Nevada; New Jersey; North Carolina; North Dakota; Ohio; Oklahoma; Oregon; South Carolina; South Dakota; Tennessee; Texas; Utah; and Wisconsin.

By way of example, in New Jersey, NJSA 2A:15-5.12., the Punitive Damages Act governs the award of punitive damages. The Act indicates that punitive damages may be awarded to the plaintiff only if the plaintiff proves, by clear and convincing evidence, that the harm suffered was the result of the defendant's acts or omissions Further, under New Jersey law such acts or omissions must be made with "actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions." The New Jersey statute is clear that an award of punitive damages requires far more than negligence. The Act states "[t]his burden of proof may not be satisfied by proof of any degree of negligence including gross negligence."

The New Jersey Statute also provides guidance with regard to the type of evidence the arbiter should consider when making a determination of whether punitive damages are to be awarded. The Act indicates, the trier of fact shall consider all relevant evidence, including but not limited to, the following:

> (1) The likelihood, at the relevant time, that serious harm would arise from the defendant's conduct;
>
> (2) The defendant's awareness of reckless disregard of the likelihood that the serious harm at issue would arise from the defendant's conduct;
>
> (3) The conduct of the defendant upon learning that its initial conduct would likely cause harm; and
>
> (4) The duration of the conduct or any concealment of it by the defendant.

Once the trier of fact operating under New Jersey law has determined that punitive damages should be awarded, the trier of fact must then determine the amount of those damages. In making that determination, the trier of fact shall consider all relevant evidence, including, but not limited to, the following:

(1) All relevant evidence relating to the factors set forth in subsection b. of this section;

(2) The profitability of the misconduct to the defendant;

(3) When the misconduct was terminated; and

(4) The financial condition of the defendant.

Considering these factors, the claimant seeking a determination of punitive damages should:

1. Include a claim in the Demand for punitive damages.
2. Cite the authority permitting an award for punitive damages.
3. Show there is sufficient evidence which entitles the Claimant to an award of punitive damages.
4. Offer clear and convincing evidence of the reprehensibility of Respondent's misconduct or show evidence that Respondent profited from his misconduct.
5. Offer evidence regarding the Respondent's financial worth.
6. Show the arbiter there exists a reasonable relationship between the compensatory damages sought and the punitive damages being sought.

Recent and Notable Punitive Awards

Shahinian v. Cedars Sinai Medical Center, 2011 WL 1566971,

In Shahinian, the arbitrator awarded plaintiff $508,124 in economic damages, $1,603,650 in emotional distress damages and $2,580,000 in punitive damages.

The court rejected the argument that judicial confirmation and enforcement of the arbitrator's

punitive damage award is a form of state action that triggers the protections of the Due Process Clause. But the court did not rule out the possibility that, in some cases, a private arbitration award may be so excessive and contrary to public policy that judicial review is appropriate. The court concluded, however, that the punitive damages award in this case, which was only 1.2 times the amount of the compensatory damages award, did not represent an exceptional circumstance in which judicial review is required.