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DEATH BY A THOUSAND CUTS: HOW TO STOP MULTIPLE IMPOSITION OF PUNITIVE DAMAGES

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National Legal Center
for the Public Interest

PREFACE

While the Supreme Court of the United States has placed some important constitutional limits on single punitive damage awards, there is no clear Supreme Court decision preventing a company from being punished a multiplicity of times for the same wrongdoing or course of conduct. Attorneys retained to defend a company that has already been subject to a punitive damage award face a dilemma. On the one hand, if they do not tell a jury that their client has already been "punished" by a jury, the new jury will assume that it is the sole arbiter of a company's alleged wrongdoing. On the other hand, if a defendant's attorney informs the jury that his or her client has already been punished, the jury will assume that the client is guilty and may overlook important defense evidence that may have been ignored in the first trial.

Both federal and state judges have spoken out against the fundamental unfairness of punishing a defendant more than once for the same wrongdoing. But these judges have stated that they are powerless to stop this phenomenon. Some individual state legislatures have enacted laws to stop multiple imposition of punitive damages in their own state, but have recognized that they cannot give extraterritorial effect to their laws.

This *Briefly* will discuss how the problem of multiple imposition of punitive damages arose in our legal system. It will show why such imposition of damages is unfair to both plaintiffs and defendants. It will provide legal arguments that defendants can use when they face exposure to multiple punishment. Finally, it will offer a fair and balanced model federal bill that will put an end to the unfair, multiple imposition of punitive damages for the same act or course of conduct.

Like all other publications of the National Legal Center, this monograph is presented to encourage a greater understanding of the law and its processes. The views expressed in this monograph are those of the authors and do not necessarily reflect the opinions of the advisers, officers, or directors of the Center.

Ernest B. Hueter
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INTRODUCTION

A major problem in our liability system is the multiple imposition of punitive damages. This process occurs when an individual or a company (which is really a group of individuals) is punished over and over again for the same act or course of conduct. Every parent knows that you do not punish a child more than once for the same wrongdoing. Common sense says as much, but our civil justice system has strayed from common sense and basic fairness. By way of contrast, our criminal justice system has safeguarded defendants against "double jeopardy."[1] People are not to be punished more than once for the same crime. But our civil justice system continues to allow people to be punished again and again for the same wrongdoing.

To remedy this situation, some federal legislators and their staffs have developed carefully thought out legislation that allows injured plaintiffs to obtain full compensation for their injuries while reining in unwarranted multiple punitive damages awards. In this monograph, we discuss the rise of multiple punitive damages, their impact on society, and a fair federal legislative remedy for resolving this problem.

I. THE HISTORY AND PURPOSE OF PUNITIVE DAMAGES

Punitive, or exemplary, damages are intended to punish a defendant's misconduct and deter that defendant as well as other persons from engaging in similar misconduct in the future. Punitive damages are not

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[1]U.S. CONST. amend. V ("No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb. . . .").

intended to "make the plaintiff whole." That is the role of compensatory damages, which reimburse a plaintiff for his or her economic losses (*i.e.*, out-of-pocket expenses such as lost wages or medical costs) and more amorphous noneconomic harms such as "pain and suffering."

Multiple imposition of punitive damages is a relatively new phenomenon. Multiple punishment for the same or similar conduct did not exist at the time the Constitution was drafted and certainly cannot be sustained on the grounds of "historical correctness." Rather, it is an unwelcome result of two significant changes in punitive damages in jurisprudence over the past thirty years.

Punitive damages originally developed in American courts as a civil law auxiliary, or "helper," to the criminal law system. They focused on bad acts purposefully inflicted by one person on another person, such as a punch in the face.[2] These cases were "the traditional intentional torts," such as battery, assault, libel and slander, malicious prosecution, false imprisonment, and intentional interferences with property such as trespass, conversion, malicious attachment or destruction of property, private nuisance, and other conduct amounting to reckless endangerment.[3] The typical allegation running through these cases was that defendant's tortious conduct had been motivated by a malicious or spiteful desire to injure a specific person.[4]

The first major change in punitive damages began in the 1960s, when a significant number of courts departed from the historical

[2]*See* Victor E. Schwartz, Mark A. Behrens & Joseph Mastrosimone, *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 BROOK. L. REV. 1003, 1006-07 (1999).

[3]*See, e.g.*, Corwin v. Watson, 18 Mo. 71 (1853); Louisville & Nashville R.R. Co. v. Ballard, 85 Ky. 307 (1887); Huling v. Henderson, 161 Pa. 553 (1894); Brown v. McBride, 52 N.Y.S. 620 (1898); Ellis v. Brockton Pub. Co., 84 N.E. 1018 (Mass. 1908); Schumacher v. Shawhan Distillery Co., 178 Mo. App. 361 (1914).

[4]*See* Victor E. Schwartz & Liberty Magarian, *Challenging the Constitutionality of Punitive Damages: Putting Rules of Reason on an Unbounded Legal Remedy*, 28 AM. BUS. L.J. 485 (1990); David L. Walther & Thomas A. Plein, *Punitive Damages: A Critical Analysis*; Kink v. Combs, 49 MARQ. L. REV. 369, 371 (1965); Samuel Freifield, *The Rationale of Punitive Damages*, 1 OHIO ST. L.J. 5, 7 (1935).

intentional tort moorings of punitive damages. Courts began to award punitive damages to punish and deter conduct that was *not* intentional in nature, such as reckless conduct or even gross negligence.[5]

The second major change was evidentiary; it focused on how punitive damage cases were presented to a jury. Evidence shifted away from what the defendant did to injure a particular plaintiff, toward what the defendant did to hurt the general public.[6] The shift in

[5]*See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (a)(3) (Vernon 2001) (willful act or gross neglect in wrongful death cases); FLA. STAT. ANN. § 768.72(2) (West 2002) ("intentional misconduct or gross negligence"); Wisker v. Hart, 766 P.2d 168 (Kan. 1988) ("gross negligence"); Rubeck v. Huffman, 374 N.E.2d 411, 413 (Ohio 1978) ("caused by intentional, reckless, wanton, willful and gross acts or by malice inferred from conduct and surrounding circumstances"); Seals v. St. Regis Paper Co., 236 So. 2d 388, 392 (Miss. 1970) (gross negligence and "reckless indifference to the consequences"). *See also* J. Sales & K. Cole, *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VILL. L. REV. 1117, 1130-38 (1984) (discussing standards of conduct giving rise to punitive damages award).

[6]*See, e.g.*, Moore v. Jewel Tea Co., 253 N.E.2d 638, 648 (Ill. App. 1969), *aff'd*, 263 N.E.2d 103 (Ill. 1970) (plaintiffs were properly allowed to argue that defendant had been guilty of "gross disregard of the rights of the public"); Madison Chevrolet, Inc. v. Donald, 505 P.2d 1032, 1042 (Ariz. 1973) ("punitive damages . . . are applicable where there is a 'reckless indifference to the interest of others'"); Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727, 741 (Minn.) (manufacturer "acted in reckless disregard of the public" in marketing non-flame retardant children's pajamas), *cert. denied sub nom.* Riegel Textile Corp. v. Gryc, 449 U.S. 921 (1980); Wangen v. Ford Motor Co., 294 N.W.2d 437, 442 (Wis. 1980) ("Some commentators speak of the behavior justifying punitive damages as 'flagrant indifference to the public safety.'") (citing INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, 5 PRODUCT LIABILITY: FINAL REPORT OF THE LEGAL STUDY 137 (U.S. Dep't of Commerce 1977)); Sturm, Ruger & Co. v. Day, 594 P.2d 38, 47 (Alaska 1979) (punitive damages available where manufacturer has marketed known defective product in "reckless disregard of the public's safety"), *mod. on other grounds*, 615 P.2d 621 (Alaska 1980), *cert. denied*, 454 U.S. 894 (1981); Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 810 (Cal. App. 1981) (interpreting statutory term "malice" to encompass "callous and conscious disregard of public safety" by manufacturer of defective product);

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evidentiary strategy, as exemplified in the John Grisham novel *The Runaway Jury*, made jurors feel as if they were the only ones to right a wrong against society. The amount of the punitive damage awards had to be sufficient to punish for that newer, broader scope of wrongful conduct.

This new vista for recovering punitive damages found a strong anchor in a new trend toward mass tort litigation, particularly in product liability.[7] The advent of mass tort litigation meant that large and unprecedented punitive damages awards could be imposed repeatedly for an alleged risk created in a *single* product line on the basis of an alleged *single* wrongful decision.[8] This resulted in an explosion of punitive damage claims against manufacturers of such products as asbestos, formaldehyde, DES, Agent Orange, automobiles, tampons, and the Dalkon Shield IUD™.[9] As a result, the size and

(...continued)
RESTATEMENT (SECOND) OF TORTS § 908 cmt. b (1977) ("Reckless indifference to the rights of others and conscious action in deliberate disregard of them . . . may provide the necessary state of mind to justify punitive damages.").

[7]In *Toole v. Richardson-Merrell, Inc.*, the first case to find that punitive damages were recoverable in a strict product liability action, the California Court of Appeal ruled that the plaintiff was not required to prove that the defendant pharmaceutical company acted with deliberate intent to injure the plaintiff. *See* 251 Cal. App. 2d 689, 714 (1967). Rather, the malice in fact standard in California's punitive damages statute applied, and the plaintiff merely had to prove that the defendant acted recklessly and in wanton disregard to the possible harm to others when it marketed, promoted, and sold the anticholesterol drug at issue. *See id.* at 715.

[8]As one commentator wrote, "[A] single design error, inadequate warning or recurrent manufacturing mistake can permeate an entire product line, resulting in tens, hundreds or thousands of personal injury lawsuits with accompanying punitive damages claims. Individual awards that appear reasonable can aggregate to threaten the very survival of a business entity." John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 142 (1986).

[9]*See* Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency, and Control*, 52 FORDHAM L. REV. 37, 51-52 (1983); Jeffries, 72 VA. L. REV. at 142.

frequency of punitive awards "increased dramatically."[10] Plaintiffs' lawyers began to seek punitive damages in "unprecedented numbers of punitive awards in product liability and other mass tort situations [that] began to surface."[11] Multimillion dollar punitive damage verdicts became commonplace.[12]

At the beginning of this trend, almost four decades ago, the distinguished federal judge Henry Friendly had the foresight to appreciate the new opportunity for problems posed by the multiple imposition of punitive damages:

> The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering. . . . We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill.[13]

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

[11]Jeffries, 72 VA. L. Rev. at 142. *See also* PETER W. HUBER, LIABILITY: The Legal Revolution and its Consequences (1988); WALTER K. OLSON, THE LITIGATION EXPLOSION (1991); Stephen M. Turner et al., *Punitive Damages Explosion: Fact or Fiction?* (Washington Legal Foundation, Working Paper Series No. 50, Nov. 1992).

[12]This dramatic increase has led one commentator to suggest that "[p]unitive damages have replaced baseball as our national sport." Theodore B. Olson, *Rule of Law: The Dangerous National Sport of Punitive Damages*, WALL ST. J., Oct. 5, 1994, at A17. *See also* Malcom E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Products Liability Litigation*, 40 ALA. L. REV. 919, 919 (1989) ("Today, hardly a month goes by without a multi-million dollar punitive damages verdict in a product liability case.") (cited by O'Connor, J., dissenting, in *Pacific Mut. Ins. Co. v. Haslip*, 499 U.S. 1, 62 (1993)); Borowsky & Nicolaisen, *Punitive Damages in California: The Integrity of Jury Verdicts*, 17 U.S.F. L. REV. 147, 150 (1983) (noting trend of "juries . . . award[ing] substantial punitive damages with increasing frequency").

[13]Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967).

II. THE PROBLEMS CAUSED BY MULTIPLE PUNITIVE DAMAGES

Multiple punitive damages awards create problems for both plaintiffs and defendants. Repeated punitive awards for the same or similar conduct can curtail the ability of deserving future claimants to collect basic compensatory damages.[14] This is because multiple punitive damages awards can deplete the resources of even the largest corporate defendants. In cases where multiple punitive damage awards have caused a defendant to file for bankruptcy, such as the asbestos litigation, the adverse effects are even broader.[15] Jobs are lost, both at the defendant company and at other businesses that may depend on

[14]*See, e.g.*, Edwards v. Armstrong World Indus., Inc., 911 F.2d 1151, 1155 (5th Cir. 1990) ("If no change occurs in our tort or constitutional law, the time will arrive when [a defendant's] liability for punitive damages imperils its ability to pay compensatory claims. . . ."); Bishop v. General Motors Corp., 925 F. Supp. 294, 298 (D.N.J. 1996) ("Indeed, one of the many cogent criticisms of punitive damages is that multiple punitive [damage] liability can both bankrupt a defendant and preclude recovery for tardy plaintiffs."); *Punitive Damages Tort Reform: Hearing Before the Senate Judiciary Committee* (Apr. 4, 1995) (statement of George L. Priest, John M. Olin Professor of Law and Economics, Yale Law School) ("The tragic modern experience in the asbestos litigation demonstrates the problem. Here, because of multiple punitive awards to sets of plaintiffs reaching court first, many subsequent claimants have been unable to collect basic compensatory damages of any amount."), *available at* 1995 WL 149954, (Apr. 4, 1995).

[15]Numerous companies, particularly manufacturers of asbestos-containing products, have been driven into bankruptcy as a result of excessive punitive damages awards. Nearly seventy companies have sought Chapter 11 protection as a result of unrestrained punitive damages in asbestos litigation. *See* Mark A. Behrens & Rochelle M. Tedesco, *Two Forks in the Road of Asbestos Litigation, in* MEALEY'S LITIG. REP.: Asbestos, Vol. 18, No. 3, (Mar. 7, 2003), at 1; *see also* HON. GRIFFIN B. BELL, ASBESTOS LITIGATION AND JUDICIAL LEADERSHIP: THE COURTS' DUTY TO HELP SOLVE THE ASBESTOS LITIGATION CRISIS, BRIEFLY, Vol. 6, No. 6 (Nat'l Legal Center for the Pub. Interest monograph June 2002), *available at* <http:// www.nlcpi.org>.

the defendant or its employees for income.[16] Economic harm to one company also affects shareholders, such as pension funds and ordinary people, and other investors who face the loss of their savings.[17] As one court noted, the impact of multiple punitive damages is borne by both the employees and stockholders of the manufacturer, and the consumer:

> If the manufacturer is not in a strong financial position so as to be able to bear these added costs, he will be faced with the threat of being forced out of business or into bankruptcy, thus resulting in a loss of jobs (unemployment) and the curtailment of competition, to the detriment of the consumer. If bankruptcy or the loss of business and jobs is to be avoided, it is the consumer who will ultimately bear the burden of punitive damage awards through the payment of higher prices for the goods in the market place. . . . Moreover, imposition of multiple punitive damage awards could have an adverse impact not only on the [defendant] manufacturer . . . but also those commercial businesses that supply materials for use in construction of cars, such as the producers of automobile locks, tires, catalytic converters. . . .[18]

[16]Companies sued in asbestos litigation cut approximately 60,000 jobs, failed to create 128,000 new jobs, and passed up approximately $10 billion in investment, according to studies by the RAND Corporation and Sebago Associates. *See* Stephen J. Carroll et al., *Asbestos Litigation Costs and Compensation: An Interim Report* 61, 73, 74 (Rand Inst. for Civ. Just. 2002). By the time the litigation is over, the total damage is estimated to reach $33 billion in foregone investment and 423,000 jobs not created. *See id.* at 73, 74; *see also* Center for Legal Policy, Manhattan Institute for Civil Justice, *Trial Lawyers, Inc.* 11 (2003) (discussing impact of bankruptcy-inducing awards in asbestos litigation).

[17]Workers' retirement funds have decreased 25% as a result of asbestos litigation, as many funds held significant amounts of company stock. *See* Joseph Stiglitz et al., Sebago Associates, *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms* 3 (Dec. 2002).

[18]Wischer v. Mitsubishi Heavy Industries America, Inc., 2003 WL 22231881 n.13 (Wis. Ct. App. Sept. 30, 2003) (Fine, J., concurring) (quoting Wangen v. Ford Motor Co., 294 N.W.2d 437, 470-71 (Wis. 1980) (Coffey, J., dissenting)).

Multiple punitive damages unreasonably inflate settlements. Judge Weis on the U.S. Court of Appeals for the Third Circuit observed:

> [T]he potential for punitive awards is a weighty factor in settlement negotiations and inevitably results in a large settlement agreement than would ordinarily be obtained. To the extent that this premium exceeds what would otherwise be a fair and reasonable settlement for compensatory damages, assets that could be available for satisfaction of future compensatory claims are dissipated.[19]

Multiple imposition of punitive damages creates a significant obstacle to global settlement negotiations in repetitive litigation, and frustrates the ability of claimants to recover quickly for their injuries or the loss of a family member. Respected Senior Federal District Judge William Schwarzer of California has written:

> Barring successive punitive damage awards against a defendant for the same conduct would remove the major obstacle to settlement of mass tort litigation and open the way for the prompt resolution of the damage claims of many thousands of injured plaintiffs.[20]

In sum, the imposition of multiple punitive damage awards for the same or similar conduct undermines the integrity of the justice system by transforming it into a lottery where a few people collect arbitrary, huge "wins" at the expense of everyone else—the company, its

[19]Dunn v. Hovic, 1 F.3d 1371, 1388 (3d Cir.) (Weis, J., dissenting), *modified in part*, 13 F.3d 58, *cert. denied sub nom.* Owens-Corning Fiberglas Corp. v. Dunn, 510 U.S. 1031 (1993); *see also* Richard A. Nagareda, *Punitive Damage Class Actions and the Baseline of Tort*, 36 WAKE FOREST L. REV. 943, 944 (2001) ("In any area in which individual tort suits are dispersed over time and across **multiple** jurisdictions, credible fear of **punitive** damages on defendants' part will form a significant impediment to resolution of the litigation.") (emphasis in original).

[20]William Schwarzer, *Punishment Ad Absurdum*, 11 CAL. LAW 116 (Oct. 1991).

employees, it shareholders and investors, other consumers, and future plaintiffs.

III. A FEDERAL SOLUTION IS THE ONLY PRACTICAL REMEDY

A. *While State Legislatures Can Provide Significant Help in Most Areas of Civil Justice Reform, They Cannot Effectively Address the Problem of Multiple Punitive Damages*

An individual state legislature cannot curtail multiple imposition of punitive damages outside its own borders. It simply lacks the power to legislate public policy outside of its own jurisdiction. Judicial scholars realize that individual states cannot resolve the problem of multiple imposition of punitive damages.[21] While some states have tried to address the problem (*e.g.*, Georgia, Missouri, and Florida),[22]

[21]*See, e.g.*, Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854, 865-66 (Iowa 1994) ("[T]he problem of successive punitive damages awards in mass tort cases arising from the same conduct is a serious one. [Nevertheless,] [w]e believe neither our action nor legislative action in Iowa will curb the problem of multiple punitive damages awards in mass tort litigation."); W.R. Grace & Co. v. Waters, 638 So. 2d 502, 505 (Fla. 1994) ("[L]ike the many other courts which have addressed the problem, we are unable to devise a fair and effective solution. Were we to adopt the position advocated by [defendant and limit multiple punitive awards], our holding would not be binding on other state courts or federal courts. This would place Floridians injured by asbestos on an unequal footing with the citizens of other states with regard to the right to recover damages from companies who engage in extreme misconduct."); *see also* Leonen v. Johns-Manville Corp., 717 F. Supp. 272, 284-85 & n.7 (D.N.J. 1989) ("The problems associated with awarding exemplary damages in successive . . . litigations are . . . nationwide problems and call for a uniform solution. . . . Concern with denying their citizenry the benefits available to litigants in other jurisdictions has been a driving force in the refusal of many states to even set a cap on or a proportional ratio to claims for punitive damages.").

[22]GA. CODE ANN. § 51-12-5.1(e)(1) (West 2003) (allowing only one award of punitive damages to be recovered from a defendant for any act or omission if the cause of action arises from product liability, regardless of the number of causes of action that may arise from such act or omission); MO.

(continued...)

they could only prevent multiple imposition of punitive damages within that specific state. Plaintiffs' lawyers have and will continue to shop for other forums that are still available, and hit a company again and again for the same wrongdoing.

Tort scholars at the prestigious American Law Institute recognized this fact. They stated in their *Reporters' Study on Enterprise Responsibility for Personal Injury* that:

> *single-state action . . . is an ineffectual response to the problem, because one state cannot control what happens in other jurisdictions.* In fact, the state that acts alone may simply provide some relief to out-of-state manufacturers at the expense of its own citizen-victims, a situation that hardly provides much law reform incentive for state legislators.[23]

Because a uniform remedy for the problems posed by multiple punitive damages awards can be effectively achieved only at the federal level, the *Reporters' Study* recommended congressional action.

We wish to be clear that we are not suggesting that other states should not follow the lead of Georgia, Missouri, and Florida and halt the multiple imposition of punitive damages within their own borders. We are saying that they can do no more than to resolve the problems that multiple punitive awards create within their state.

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ANN. STAT. § 510.263(4) (West 2003) (allowing defendants in most tort actions to file a posttrial motion requesting a credit of prior awards arising out of the same conduct). Florida does not permit punitive damages to be awarded more than once for the same act or course of conduct unless the court determines by clear and convincing evidence that the amount of punitive damages previously awarded was insufficient to punish the defendant. In that situation, the court may permit a jury to consider an award of subsequent punitive damages. Any subsequent awards must be reduced by the amount of any earlier punitive damages awards. *See* FLA. STAT. ANN. § 768.73(2) (West 2003).

[23]AMERICAN LAW INSTITUTE, 2 ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY—REPORTERS' STUDY 261 (1991) (emphasis added).

B. *State and Lower Federal Courts Cannot Effectively Address the Problem*

State and lower federal courts cannot resolve the problems caused by multiple punitive damages. They do not have the power or authority to prohibit subsequent awards outside their jurisdiction. Judges have voiced their frustration with this state of affairs. For example, Federal District Judge Lee Sarokin, a jurist known for his concern for plaintiffs' rights, issued an order striking punitive damages claims in an asbestos case on the ground that repeated awards of punitive damages for a single course of conduct violate the "fundamental fairness" requirement of the Due Process Clause.[24] While reaffirming his belief that multiple punitive damages violated due process, Judge Sarokin vacated his earlier order, in part because he believed he had no authority to limit other courts from imposing punitive damages awards against the same defendant:

> *[T]his court does not have the power or the authority to prohibit subsequent awards in other courts,* notwithstanding its opinion that such subsequent awards violate the due process rights of the defendants . . . . *Until there is uniformity*, either *through* Supreme Court decision or *national legislation, this court is powerless to fashion a remedy which will protect the due process rights of this defendant or other defendants similarly situated.*[25]

Other federal and state judges have concurred with Judge Sarokin's assessment of the limits on a single judge's power to curb the abuse of multiple punitive damages awards.[26]

[24]Juzwin v. Amtorg Trading Corp., 705 F. Supp. 1053, 1064 (D.N.J. 1989) [hereinafter "*Juzwin I*"].

[25]Juzwin v. Amtorg Trading Corp., 718 F. Supp. 1233, 1235 (D.N.J. 1989) (emphasis added).

[26]*See, e.g.*, Spaur, 510 N.W.2d at 865-66 ("[T]he problem of successive punitive damages awards in mass tort cases arising from the same conduct is a serious one. [Nevertheless,] [w]e believe neither our action nor legislative action in Iowa will curb the problem of multiple punitive damages awards in mass tort litigation."); Davis v. Celotex Corp., 420 S.E.2d 557, 566
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C. *The United States Supreme Court Has Not Resolved the Problem*

A number of courts and commentators[27] have voiced concerns that multiple punitive damages may violate federal constitutional due process protections.[28] Unfortunately, the United States Supreme Court

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(W. Va. 1992) (noting that, because punitive damages can be awarded "nationwide, it is doubtful that one state's ruling would necessarily bind other jurisdictions"); Fischer v. Johns-Manville Corp., 512 A.2d 466, 480 (N.J. 1986) ("At the state court level, we are powerless to implement solutions to the nationwide problems created by [multiple punitive damages awards]."). *See generally* Juzwin v. Amtorg Trading Corp., *Multiple Assessments of Punitive Damages in Toxic Tort Litigation*, 8 PACE ENVTL. L. REV. 647, 665 (1991) (concluding that the problem of multiple punitive damages awards "cr[ies] out for congressional action").

[27]*See Juzwin I*, 705 F. Supp. at 1064 ("[T]he court holds that due process places a limit on the number of times and the extent to which a defendant may be subjected to punishment for a single course of conduct. Regardless of whether a sanction is labeled 'civil' or 'criminal' in nature, it cannot be tolerated under the requirements of due process if it amounts to unrestricted punishment."); *In re* N. Dist. of Calif. "Dalkon Shield" IUD Prod. Liab. Litig., 526 F. Supp. 887, 889 (N.D. Cal. 1981) ("A defendant has a due process right to be protected against unlimited multiple punishment for the same act."), *vacated and remanded on other grounds*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983); Racich v. Celotex Corp., 887 F.2d 393, 398 (2d Cir. 1989) ("we agree that the multiple imposition of punitive damages for the same course of conduct may raise serious constitutional concerns, in the absence of any limiting principle"); *In re* Fed. Skywalk Cases, 680 F.2d 1175, 1188 (8th Cir.) (Heaney, J., dissenting) (unlimited punishment for one course of conduct "would violate the sense of 'fundamental fairness' that is essential to constitutional due process"), *cert. denied*, 459 U.S. 988 (1982); Morse v. Southern Union Co., 38 F. Supp. 2d 1120, 1126 n.12 (W.D. Mo. 1998) ("While the Missouri courts seem not to have considered whether the likelihood of multiple claims should limit punitive damages recovery, I believe such a factor may be required by Due Process."); Magallanes v. Superior Ct., 167 Cal. App. 3d 878, 888 (1985) ("it is also fair to ask whether a defendant who has been punished with punitive damages when the case is first tried should be punished again when the second, or the tenth, or the hundredth case is tried"); King v. Armstrong World Indus., Inc., 906 F.2d 1022, 1031 ("it must be said that a strong
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arguable basis exists for applying the due process clause . . . to a jury's award of punitive damages in a mass tort context"), *reh'g denied*, 914 F.2d 251 (5th Cir. 1990), *cert. denied*, 500 U.S. 942 (1991); McBride v. General Motors Corp., 737 F. Supp. 1563, 1570 (M.D. Ga. 1990) ("due process may place a limit on the number of times and the extent to which a defendant may be subjected to punishment for a single course of conduct"); *In re* Agent Orange Prod. Liab. Litig., 100 F.R.D. 718, 728 (E.D.N.Y. 1993) ("There must, therefore, be some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction."), *aff'd*, 821 F.2d 139 (2d Cir. 1987), *cert. denied sub nom.* Adams v. United States, 484 U.S. 1004 (1988); *see also* Jeffries, 72 VA. L. REV. at 151-53 (commenting on court decisions holding that the Due Process Clause limits multiple punitive damages recoveries for a single course of conduct); Seltzer, *Punitive Damages*, 52 FORDHAM L. REV. at 55 (recognizing that the Due Process Clause may limit multiple punitive damages awards for the same conduct and exploring several reform proposals).

[28]As one Federal District Judge in California explained:

> A defendant has a due process right to be protected against unlimited multiple punishment for the same act. A defendant in a civil action has a right to be protected against double recoveries not because they violate "double jeopardy" but simply because overlapping damage awards violate that sense of "fundamental fairness" which lies at the heart of constitutional due process. . . .

Dalkon Shield, 526 F. Supp. at 899-900. Other courts disagree. *See, e.g.*, Cathey v. Johns-Manville Sales Corp., 776 F.2d 1565, 1571 (6th Cir. 1985) (While finding the fundamental fairness argument to be "not without some appeal," ". . . [a]s a matter of federal constitutional law we believe that the presence of a judicial tribunal before which to litigate the propriety of a punitive damages award provides [defendant] with all of the procedural safeguards to which it is due."); *Wangen*, 294 N.W.2d at 466 ("We are not persuaded that the federal and state constitutions require us to limit punitive damages arising from a single product and a single incident to a single award for punitive damages, and we do not adopt such a rule. We believe that a wrongdoer is protected against oppressive multiple punitive damage awards by the judicial controls we have set forth herein.").

has not yet resolved the issue.[29]

The Supreme Court has provided welcome guidelines to curb excessive punitive damages awards under the Due Process Clause of the Fourteenth Amendment, most recently in the case of *State Farm Mutual Automobile Insurance Co. v. Campbell*.[30] The Due Process Clause places substantive limits on the amounts of punitive damages awards; they cannot be "greater than reasonably necessary to punish and deter." *Pacific Mut. Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1993). In light of the Court's clear pronouncement, both logic and common sense would suggest that multiple awards for a single claim cannot bankrupt a defendant and be constitutionally permissible under substantive due process.[31] While an award in one case may be reasonable, the amount of cumulative awards for the same course of conduct may not be. Multiple imposition of punitive damages for the same or similar conduct also poses procedural due process problems. The cumulative effect of repetitive punitive awards cannot be effectively reviewed. The Supreme Court has made clear that procedural due process does not permit punitive damages systems that give judges and juries unlimited discretion to impose arbitrary awards.[32]

The Supreme Court most recently had the opportunity to directly address multiple punitive awards in the 2003 session, in the case *Key*

[29]*See, e.g.*, BMW of N. Am. v. Gore, 517 U.S. 559, 613 n.4 (1996) (Ginsberg, J., dissenting) (noting that Court rejected opportunity to address multiple punitive damages issue); Owens-Corning Fiberglas Corp. v. Dunn, 510 U.S. 1031 (1993) (denying review of Dunn v. Hovic, 1 F.3d 1371 (3d Cir. 1993) (raising constitutional questions about multiple punitive awards)).

[30]123 S. Ct. 1513 (2003).

[31]*See* David Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258, 1325 (1976) ("[O]nce the bankruptcy of the defendant manufacturer appears to be a real and imminent possibility, punitive damages should no longer be available at all."); *Dalkon Shield*, 526 F. Supp. at 899 ("The purpose of punitive damages is to sting, not kill, a defendant.").

[32]The *Haslip* majority expressed particular concern 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." 499 U.S. at 18.

Pharmaceuticals Co. v. Edwards.[33] In this case, an injured patient and a prescribing doctor both relied on the same evidence of the manufacturer's nationwide conduct to support each plaintiff's separate punitive damages claim. An Oregon jury awarded two punitive damages awards, one to each claimant, based on virtually the same evidence of the defendant's marketing activities throughout the United States. The Oregon Court of Appeals upheld the awards and the manufacturer appealed to the United States Supreme Court. The Supreme Court granted certiorari, but, instead of addressing the multiples issue, the Court vacated the lower Oregon court's order and remanded the case for further consideration in light of its ruling in *Campbell*.[34]

One must read tea leaves rather than the *Key Pharmaceuticals* ruling in order to decide whether *Key Pharmaceuticals* absolutely signifies that due process prohibits the multiple imposition of punitive damages for the same conduct. But strong light is shed on the matter when one considers the Court's guidance on the multiples issue in *Campbell* along with comments made during oral argument in *Campbell*.

In *Campbell*, the Supreme Court considered whether to sustain a $145 million punitive award that was based on evidence of State Farm's dealings with people nationwide, as well as on its dealings with the plaintiffs themselves. Justice Kennedy, speaking for the Court, made clear in the opinion that constitutional restrictions existed on the use of evidence of out-of-state conduct as support for punitive awards. He stated that where out-of-state conduct is improperly considered, "[p]unishment on these bases creates the possibility of multiple punitive damage awards for the same conduct. . . ."[35]

This language is very direct and may have arisen when Professor Laurence Tribe, who represented the Campbells in the case, was questioned during oral argument about the multiple imposition of punitive damages. This is what occurred. Justice Stevens asked Professor Tribe if the evidence of State Farm's alleged wrongdoing in other states that gave rise to the Campbells' punitive award also would

[33]123 S. Ct. 1781 (2003).

[34]123 S. Ct. 1513 (2003).

[35]*Id.* at 1523.

be admissible in a second or third case brought against State Farm by other policyholders. Professor Tribe said it would not be permitted because of "some double jeopardy-like doctrine."[36] When Justice Stevens asked for the authority behind this statement, Professor Tribe joked, "I just made it up."[37] There was laughter in the audience, but Justice Kennedy did not laugh. There also was concern in the minds of those who believe that multiple punishment for the same conduct is both constitutionally and morally wrong.

Read in context with the dialogue between Professor Tribe and the Court, Justice Kennedy's language in the *Campbell* opinion strongly supports the view that the use of the same or similar conduct to prop up punitive damage awards is constitutionally suspect under the Fourteenth Amendment's Due Process Clause. But the bottom line is that the United States Supreme Court has not given final resolution to the multiples problem.

D. *Congress Is in the Best Position to Solve the Problem*

It is a unique situation where many state and federal judges called on Congress to support a substantive tort reform; to the best of the authors' knowledge, such a judicial outcry has never occurred before. For example, the much-respected Federal Circuit Judge Joseph Weis, Jr., has said, "[u]nquestionably, a national solution is needed" to the problem of multiple punitive damages awards.[38] Judges of the U.S. Court of Appeals for the Fifth Circuit have called for remedial legislation on this issue, specifically noting that only Congress can provide a policy or a theory that extends beyond any specific case at bar.[39] They wrote:

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[36]Transcript of Oral Argument, State Farm Mut. Auto. Ins. Co. v. Campbell, No. 01-1289, at *35 (U.S. Dec. 11, 2002) (colloquy between Justice Stevens and Laurence Tribe).

[37]*Id.*

[38]*Dunn*, 1 F.3d at 1399 (Weis, J., dissenting).

[39]*See* Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 415 (5th Cir.) (en banc) (Clark, J., joined by Garz, Gee, Politz, and Jolly, JJ., dissenting), *cert. denied*, 478 U.S. 1022 (1986). *See also* Man v. Raymark Indus., 728 (continued...)

> [T]he court is frustrated by the lack of congressional action. Clearly the powers of Congress to tax and regulate give that forum the interstate reach and flexibility needed to allocate the relatively scarce resources that must be available to present and future claimants to achieve the greatest good for society.[40]

IV. THE Federal MULTIPLE PUNITIVE DAMAGES FAIRNESS ACT CAN HELP

The Federal Multiple Punitive Damages Fairness Act was developed by the staffs of Republican Senator Orrin Hatch and former Senator John Danforth and Democratic Senator Joseph Lieberman. The Act would bar the imposition of multiple punitive damages for "the same act or course of conduct." The Act would allow two exceptions to this general rule. First, an additional punitive award might be permitted when there is new evidence of significant wrongful behavior by the defendant, other than the injury to a new claimant. For example, if an automobile company announced a recall after a punitive damages award, but then covertly sold a substantial number of the defectively designed vehicles in the secondary market, and a new plaintiff was injured in such a vehicle, an additional punitive damages award might be justified.

Second, an additional award may be allowed if a court determines in a pretrial hearing that prior punitive damages were insufficient to punish the defendant or deter him or others from engaging in similar

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(...continued)
F. Supp. 1461, 1466 (D. Haw. 1989) ("Only a legislature is in the position to weigh whether the deterrent effect of punitive damages is effective in mass tort litigation, and . . . implement a solution . . . ."); *Waters*, 638 So. 2d at 505 ("Any realistic solution to the problems caused by [multiple punitive damage awards] in the United States ... can only be effected by federal legislation."); Keene Corp. v. Kirk, 870 S.W.2d 573, 582 (Tex. App.–Dallas 1993, no writ) ("We too conclude that the higher courts and the appropriate legislative bodies should resolve such policy considerations.") (citing Glasscock v. Armstrong Cork Co., 946 F.2d 1085, 1096 (5th Cir.1991)).

[40]*Jackson*, 781 F.2d at 415 (Clark, J., joined by Garz, Gee, Politz and Jolly, JJ., dissenting).

activity. For example, if the defendant engaged in a highly egregious course of conduct, but was able to expedite a trial in a state with a very modest cap on punitive damages, a court might determine that an additional award would be justified.

If the court allows an additional award, the factual findings supporting the award must be put on the record, to aid in appellate review. Under either exception to the general rule, a court must reduce the amount of the punitive award by the total amount of punitive damages previously paid by the defendant in prior lawsuits with respect to any evidence based on the same act or course of conduct. Also, the court must not disclose its determination or action to the jury.

The Federal Multiple Punitive Damages Fairness Act does not affect damages that compensate plaintiffs for their harm. Both economic and noneconomic harm are addressed through compensatory damage awards. The legislation does not adversely impact the rights of plaintiffs to be fully and fairly compensated for any and all harms. To the contrary, the Act protects the right of future plaintiffs to collect compensatory damages by preventing the defendant's assets from being needlessly squandered.

It has been argued that the Act is unsound public policy because it would allow punitive damage awards to only one or two people and unjustly enrich them at the expense of others. This argument misapprehends the nature and purpose of punitive damages. They are not an entitlement to all plaintiffs who might have been hurt by an act of a defendant. To the contrary, they exist to punish the defendant and deter him and others from committing similar acts. The public policy issue is whether the punishment is adequate to accomplish these purposes. The Federal Act is designed to achieve this goal.

An analogous situation occurs in the law when the government offers an award for the apprehension of a criminal. The first person to spot the alleged criminal and notify the authorities gets the award. The award is not regarded as an unjust enrichment, or one that unfortunately deprives others who may "call in later" for the same reward. The Federal Multiple Punitive Damages Fairness Act creates a similar incentive to the first plaintiff to prove that a defendant committed an egregious act that has endangered the lives of others. As a matter of public policy, there is nothing wrong with creating such an incentive. To the contrary, it is sound public policy.

CONCLUSION

The Federal Multiple Punitive Damages Fairness Act is a just solution to the problem of multiple punishment for the same or similar conduct. It is designed to bring a measure of fairness to the awarding of punitive damages while minimizing the problems caused by multiple awards. If one punishment is inadequate for a particularly heinous act, it can be augmented. If an initial trial does not consider significant wrongdoing that occurs after the first award, additional damages may be awarded for the later misconduct. Fair and balanced federal legislation must accommodate these concerns, while at the same time creating a system that prevents people from being punished multiple times for the same basic wrong.

Punitive damages can be a valuable deterrent and punishment for serious misconduct. But like any sanction, they must be applied in a fair and just manner. The purpose of punitive damages is thwarted by repeatedly imposing them against the same defendant for the same or similar conduct. Repetitive punitive awards can simultaneously unfairly bankrupt a defendant and crush the rights of future plaintiffs who have not recovered basic compensation for their injuries.

Except for a handful of lawyers who may reap a windfall of hundreds of millions of dollars from repeated punitive damages, few would argue that repeatedly punishing the same defendant for the same or similar conduct makes sense or benefits society. To the contrary—out of control punitive awards have had a debilitating effect on many important industries. Also, awarding punitive damages over and over without limits for cases arising out of a single act or course of conduct is arbitrary and fundamentally unfair. The Supreme Court has now made clear that such multiple punishment threatens constitutional due process guarantees.

Federal legislative action is needed. Neither state legislatures nor state judges can provide a fully effective remedy. Neither state legislators nor judges can control what happens in other jurisdictions.

A federal legislative solution is the only effective remedy to the unfairness of multiple punitive damages awards. The Multiple Punitive Damages Fairness Act will uniformly and effectively protect claimants from the risk that corporate defendants are unfairly stripped of their ability to pay damages. At the same time, this legislation will