

## SOLVING THE MULTIPLE PUNISHMENTS PROBLEM: A CALL FOR A NATIONAL PUNITIVE DAMAGES REGISTRY

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### INTRODUCTION

Our tort system has a major and growing problem. State and federal courts, state and federal legislators, a wide array of commentators, and lawyers from both sides of the litigation table all agree that we have a problem. All also agree that there is currently no satisfactory solution to this problem. Briefly stated, this problem is how to handle a situation in which a defendant, who has injured multiple potential plaintiffs by a single act or course

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of conduct, faces multiple punitive damages awards for that conduct.<sup>1</sup> The so-called “multiple punishments problem”<sup>2</sup> (sometimes called “multiple punitive damages problem”)<sup>3</sup> has spawned (i) numerous majority and dissenting opinions in both state<sup>4</sup> and federal<sup>5</sup> courts, (ii) a variety of law review

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<sup>1</sup> Unlike in criminal law, civil defendants do *not* have the protection of the Double Jeopardy Clause preventing multiple punishments for the same conduct. See *United States v. Halper*, 490 U.S. 435, 451 (1989) (declaring that the “protections of the Double Jeopardy Clause are not triggered by litigation between private parties”). *But see* The Honorable William W. Schwarzer, *Punishment Ad Absurdum*, 11 CAL. LAW. 116 (1991) (“Surely allowing successive awards of punitive damages for the same conduct is offensive to the most basic notions of due process and to the spirit underlying the constitutional bar against double jeopardy.”).

<sup>2</sup> See, e.g., Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 594 (2003).

<sup>3</sup> See, e.g., Victor E. Schwartz et al., *Reining in Punitive Damages “Run Wild”: Proposals for Reform by Courts and Legislatures*, 65 BROOK. L. REV. 1003, 1032 n.123 (1999) [hereinafter V. Schwartz, *Reining in*].

<sup>4</sup> See, e.g., *Ex parte Holland*, 692 So. 2d 811, 816–19 (Ala. 1997) (pointing out the potential for the first plaintiff in a multiple-claimant tort case to impair the ability of the remaining members to protect their interests but refusing to use mandatory class actions to deal with the problem); *Ferguson v. Loeff, Cabraser, Heimann & Bernstein, LLP*, 69 P.3d 965, 969–73 (Cal. 2003) (recognizing the unfairness of multiple punishment and suggesting a “non-opt out” class action solution); *Loitz v. Remington Arms Co., Inc.*, 563 N.E.2d 397, 417 (Ill. 1990) (expressing concern for the imposition of multiple punitive damages and its effect on manufacturers and their economic contributions to society); *Spaur v. Owens-Corning Fiberglass Corp.*, 510 N.W.2d 854, 865–66 (Iowa 1994) (recognizing the seriousness of multiple punitive damages and calling for a national solution); *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 478, 480 (N.J. 1986) (stating there should be safeguards against multiple punitive damages including offering evidence of prior punitive damages award to the jury); *Owens-Corning Fiberglass Corp. v. Malone*, 972 S.W.2d 35, 48 (Tex. 1998) (holding that other impositions of punitive damages should be considered when assessing punitive damage awards but stopping short of declaring multiple punitive damages unconstitutional); *Jackson v. State Farm Mut. Auto. Ins. Co.*, 600 S.E.2d 346, 361 (W. Va. 2004) (discussing the potential problems with multiple impositions of punitive damages); *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 457–61 (Wis. 1980) (seeking effective judicial control over multiple punitive damages awards).

<sup>5</sup> See, e.g., *Dunn v. HOVIC*, 1 F.3d 1371, 1386 (3d Cir. 1993) (en banc) (Weis, J., dissenting) (noting that “both state and federal courts have recognized that no single court can fashion an effective response to the national problem flowing from mass exposure to asbestos products”), *modified in part*, 13 F.3d 58 (3d Cir. 1993); *Racich v. Celotex Corp.*, 887 F.2d 393, 396–99 (2d Cir. 1989) (declaring that a national rule on the issue of multiple punitive damages is necessary); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 841–42 (2d Cir. 1967) (explaining the problem of multiple punitive damages and recognizing courts’ limits in solving the problem); *McBride v. Gen. Motors Corp.*, 737 F. Supp. 1563, 1569–70 (M.D. Ga. 1990) (struggling with a resolution to the issue of multiple punitive damages against the same defendant); *Juzwin v. Amtorg Trading Corp.*, 718 F. Supp. 1233, 1234–35 (D.N.J. 1989) (holding that multiple punitive damages violate due process in certain circumstances); *Leonen v. Johns-Manville Corp.*, 717 F. Supp. 272, 284–85 (D.N.J. 1989) (recognizing that “awarding exemplary damages in successive asbestos litigations are thus nationwide problems and call for a uniform solution”); *Campbell v. ACandS, Inc.*, 704 F. Supp. 1020, 1022–23 (D. Mont. 1989) (declaring that the “continued imposition of punitive damages serves no purpose within the contemplation of the statutory or common law of Montana authorizing punitive damages”); *In re “Agent Orange” Prod. Liab. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983) (calling for a limit on the amount of times one defendant can be punished for a single act or course of conduct), *aff’d* 818 F.2d 145 (2d Cir. 1987); *In re N. Dist. of Cal. “Dalkon Shield” IUD Prod. Liab. Litig.*, 526 F. Supp. 887, 895, 899–900 (N.D. Cal. 1981) (pointing out the po-

articles from leading commentators,<sup>6</sup> (iii) several state statutes,<sup>7</sup> (iv) multiple failed attempts at federal legislation,<sup>8</sup> and (v) an ominous warning from the United States Supreme Court in its most recent punitive damages decision.<sup>9</sup>

The multiple punitive damages problem was first identified in the 1960s by Judge Friendly: “The legal difficulties engendered by claims for

tential abuse “implicit in repeated awards of punitive damages”), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982); *Maxey v. Freightliner Corp.*, 450 F. Supp. 955, 962 (N.D. Tex. 1978) (recognizing the problem with unlimited exemplary damages in the design defect context), *motion for reh'g modified, other motions denied*, 727 F.2d 350, 353 (5th Cir. 1984).

<sup>6</sup> See, e.g., WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 2 (4th ed. 1971) (warning that the multiple punitive damages problem “might well lead to a re-examination of the whole basis and policy of awarding punitive damages”); Colby, *supra* note 2, at 594 (“Numerous commentators have bemoaned this risk of unfair piling on, dubbing it the ‘multiple punishment’ problem.”); Howard A. Denmark, *Seeking Greater Fairness When Awarding Multiple Plaintiffs Punitive Damages for a Single Act by a Defendant*, 63 OHIO ST. L.J. 931, 932–34 (2002) (describing the multiple punitive damages problem and pointing out the inadequacy of any single court or state legislature to combat it); John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 142 (1986) (recognizing the threat multiple punitive damage awards pose on the viability of business entities); David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 44–47, 50 (1982) [hereinafter Owen, *Problems*] (explaining the problems of measurement and control of punitive damages especially in products liability litigation); 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) (discussing the emergence and existing problem of multiple punitive damages); Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 285 (1983) (bemoaning the lack of jury instruction and cogent standards for assessing punitive damages).

<sup>7</sup> See, e.g., FLA. STAT. ANN. § 768.73(2)(a)–(b) (West Supp. 2005) (disallowing punitive damages in situations where the defendant has previously been assessed punitive damages for the same act or single course of conduct); GA. CODE ANN. § 51-12-5.1(e)(1) (West 2003) (allowing only one award of punitive damages for any act or omission arising from product liability); MINN. STAT. ANN. § 549.20(3) (West Supp. 2005) (using other punitive and compensatory awards against a defendant as a factor in determining a punitive damage award); MO. ANN. STAT. § 510.263(4) (West Supp. 2005) (requiring that defendant be credited with a prior punitive damage award by the amount previously paid for the same conduct); OHIO REV. CODE ANN. § 2307.80(B)(7) (West 2004) (directing that when assessing punitive damage awards, courts consider the total effect of other punitive damages award against the same defendant for the same conduct giving rise to the claim); OR. REV. STAT. § 31.730(3) (2004) (directing that when reviewing punitive damage awards, courts consider previous judgments for punitive damages against the same defendant for the same conduct giving rise to the claim).

<sup>8</sup> An early attempt to introduce punitive damages reform occurred in 1983. See S. 44, 98th Cong. § 13 (1983). Members of the American Bar Association criticized this proposal declaring, “we have rejected much more radical suggestions that have been made, such as allowing only one punitive damages award [and] then deeming the company sufficiently punished. Such a provision was at one time part of proposed federal product legislation but eventually dropped as patently unfair since the first verdict might be a small one or one maneuvered by the defendant.” SPECIAL COMM. ON PUNITIVE DAMAGES, *Punitive Damages: A Constructive Examination*, 1986 A.B.A. SEC. LITIG. 73 [hereinafter ABA REPORT] (citing the 1983 proposal). Still later attempts were unsuccessfully made. See The Multiple Punitive Damages Fairness Act of 1997, S. 78, 105th Cong. (1997); The Multiple Punitive Damages Fairness Act of 1995, S. 671, 104th Cong. (1995).

<sup>9</sup> See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003) (implying strongly that due process imposes limits on multiple punitive damages awards).

punitive damages on the part of hundreds of plaintiffs are staggering.”<sup>10</sup> Nearly four decades later, the problem remains every bit as “staggering” in breadth. The question of whether due process (or anything else) imposes any restraints on multiple punitive damages awards has been aptly characterized by Professor David Owen, a leading commentator on punitive damages, as “the most momentous question as yet unresolved by the Court.”<sup>11</sup> Senator Orrin Hatch of Utah, a staunch supporter of tort reform, has declared the multiple punitive damages problem “one of the most egregious and unconscionable . . . abuses and excesses in our civil justice system.”<sup>12</sup> Even Professor Laurence Tribe, a long and fervent supporter of punitive damages,<sup>13</sup> concedes that due process *ought* to limit in some way the recovery of multiple punitive damages awards for the same conduct through “some double jeopardy like doctrine.”<sup>14</sup> Adding their voices to the chorus are the highly respected American Law Institute (“ALI”),<sup>15</sup> the American Bar Association (“ABA”),<sup>16</sup> and the American Association of Trial Lawyers.<sup>17</sup> Yet the solution to this ongoing problem has proven elusive.<sup>18</sup> All quarters involved in attempting to solve the problem agree, however, that a comprehensive solution can only be accomplished on a national, rather than state, level.<sup>19</sup> The aim of this Article is to provide such a solution—a solu-

<sup>10</sup> Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967).

<sup>11</sup> David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 406 (1994) [hereinafter Owen, *Punitive Damages*]; see also Colby, *supra* note 2, at 587 (characterizing the multiple punishments problem as “the single most discussed and debated issue in the law of punitive damages”); Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 432 (2003) (“The multiple punishments problem has confounded jurists and scholars for the better part of the past three decades.”); Victor E. Schwartz & Leah Lorber, *Death by a Thousand Cuts: How to Stop Multiple Punitive Damages*, BRIEFLY . . . : PERSP. ON LEGIS., REG., AND LITIG., July 2003, at 8–9 [hereinafter V. Schwartz & Lorber, *Death*] (“A major problem in our liability system is the multiple imposition of punitive damages.”).

<sup>12</sup> 143 CONG. REC. S454 (1997) (statement of Sen. Hatch).

<sup>13</sup> Professor Tribe has argued numerous cases in support of punitive damages awards. See, e.g., *State Farm*, 538 U.S. 408 (2003) (arguing for respondent that punitive damages were not excessive); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994) (arguing for respondents seeking to uphold the punitive damage award); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993) (same).

<sup>14</sup> See Transcript of Oral Argument at 46–47, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (No. 01-1289) (colloquy between Justice Stevens and Professor Tribe).

<sup>15</sup> 2 AMERICAN LAW INST., REPORTERS STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 260–65, 412–39 (1991) [hereinafter ALI REPORT].

<sup>16</sup> ABA REPORT, *supra* note 8, at 78–81.

<sup>17</sup> AM. COLL. OF TRIAL LAWYERS, REPORT ON PUNITIVE DAMAGES OF THE COMMITTEE ON SPECIAL PROBLEMS IN THE ADMINISTRATION OF JUSTICE 20–26 (1989) [hereinafter AM. COLL. OF TRIAL LAWYERS REPORT].

<sup>18</sup> Accord Owen, *Punitive Damages*, *supra* note 11, at 383 (lamenting that “this very serious problem of repetitive punitive damages awards remains to date a problem without a satisfactory judicial or legislative resolution”).

<sup>19</sup> See, e.g., 143 CONG. REC. S379-01, S454 (1997) (statement of Senator Hatch), available at 1997 WL 22690 (“The only effective means of addressing these problems is through a nationwide solution, which the legislation I introduce today would provide.”); *Dunn v. HOVIC*, 1 F.3d 1371, 1386 (3d Cir.

tion that is not only faithful to the theoretical objectives of punitive damages, readily understood by litigants, and easily applied by courts, but one that is also politically viable in this intensely partisan climate.

This Article's proposed solution to the multiple punishments problem (hereinafter "Proposal") involves passing federal legislation that, *inter alia*, creates a National Punitive Damages Registry (hereinafter "Registry"). Under the Proposal, a defendant who causes injury to multiple plaintiffs through a single act or course of conduct would be eligible to file a Prior Punitive Damages Statement (hereinafter "Statement") with the Registry after either (i) a punitive damages verdict is entered against the defendant, or (ii) a settlement that includes a punitive damages component is reached between the defendant and one or more of the plaintiffs. Following the verdict or settlement, the defendant would prepare the Statement, which would include a detailed description of the conduct for which the defendant was being punished and the amount of such punishment and then would move the trial court for an order certifying the Statement. The trial court would then certify the Statement after ensuring that it fairly and accurately described the conduct at issue and accurately reflected the amount of the punitive damages being paid. The defendant would then file the certified Statement with the Registry, which would then immediately post the Statement on a publicly-accessible website for all to see. Once the Statement was posted on the Registry, the defendant would be entitled to a dollar-for-dollar credit against any future punitive damages verdicts entered against that defendant based upon the conduct described in the Statement listed on the Registry. To receive this credit, the defendant would have to prove by clear and convincing evidence (i) that it had been punished for the same conduct at issue and (ii) the amount of such punishment. Participation in the Registry would be entirely voluntary at the option of the defendant. Failure to file a Statement with the Registry after a punitive damages verdict or settlement, however, would waive a defendant's entitlement to a

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1993) (en banc) (noting that "both state and federal courts have recognized that no single court can fashion an effective response to the national problem flowing from mass exposure to asbestos products"), *modified in part*, 13 F.3d 58 (3d Cir. 1993); *Racich v. Celotex Corp.*, 887 F.2d 393, 396-99 (2d Cir. 1989) (declaring that a national rule on the issue of multiple punitive damages is necessary); *Leonen v. Johns-Manville Corp.*, 717 F. Supp. 272, 284-85 (D.N.J. 1989) (recognizing that "awarding exemplary damages in successive asbestos litigations are thus nationwide problems and call for a uniform solution"); *In re N. Dist. of Cal. "Dalkon Shield" IUD Prod. Liab. Litig.*, 526 F. Supp. 887, 895, 899-900 (N.D. Cal. 1981) (discussing the potential for abuse implicit in a multiplicity of punitive damages awards and calling for nationwide solution to remedy this abuse), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982); *Spaur v. Owens-Corning Fiberglass Corp.*, 510 N.W.2d 854, 865-66 (Iowa 1994) (recognizing the seriousness of multiple punitive damages and calling for a national solution); ABA REPORT, *supra* note 8, at 78-81; AM. COLL. OF TRIAL LAWYERS REPORT, *supra* note 17, at 20-22 (calling for a national solution to the problem); Denmark, *supra* note 6, at 931-932 (same); Owen, *Punitive Damages*, *supra* note 11, at 406 n.152 (same); V. Schwartz & Lorber, *Death*, *supra* note 11, at 10, 17-18 (declaring that "a uniform remedy for the problems posed by multiple punitive damages awards can be effectively achieved only at the federal level"); Wheeler, *supra* note 6, at 276 (calling for a national solution).

credit against future punitive damages awards. A variety of procedural mechanisms detailed *infra* would ensure the effective and efficient application of this Proposal by both state and federal courts.

Not only would this Proposal fully resolve the multiple punishments problem because it would be national in scope, but it would also advance each of the public policies underlying punitive damages theory. This Proposal has the added benefit of removing the need for any action by a United States Supreme Court that has repeatedly (if not clumsily) attempted to alter the punitive damages landscape in recent years,<sup>20</sup> and has strongly implied that it considers multiple punitive damages awards to violate due process, at least in some (as yet undefined) circumstances.<sup>21</sup>

Part I of this Article traces the history of the multiple punishments problem, explaining why this problem is of relatively recent origin, and outlining the responses and various failed attempts to resolve this problem by courts,<sup>22</sup> legislatures,<sup>23</sup> and commentators.<sup>24</sup> Part II details the Proposal to solve this problem, which includes the creation of a National Punitive Damages Registry, and all of the procedural mechanisms necessary to make the Proposal a workable solution.<sup>25</sup> Part III demonstrates that this Proposal is consistent with and actually enhances the public policy rationales that animate punitive damages jurisprudence.<sup>26</sup> An Appendix with suggested language for federal legislation implementing the Proposal then follows.<sup>27</sup>

## I. THE MULTIPLE PUNISHMENTS PROBLEM

Punitive damages have a long and well-chronicled history.<sup>28</sup> Their origins trace all the way back to the Code of Hammurabi of 2000 B.C.<sup>29</sup> and

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<sup>20</sup> See Jim Gash, *Punitive Damages, Other Acts Evidence, and the Constitution*, 2004 UTAH L. REV. 1 (chronicling the Supreme Court's modifications of punitive damages jurisprudence over the past fifteen years).

<sup>21</sup> *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003); see also *infra* notes 125–151 and accompanying text.

<sup>22</sup> See *infra* Part I.C.

<sup>23</sup> See *infra* Part I.D.

<sup>24</sup> See *infra* Part I.E.

<sup>25</sup> See *infra* Part II.A–B.

<sup>26</sup> See *infra* Part III.A–E.

<sup>27</sup> See *infra* Appendix.

<sup>28</sup> See generally *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 448 (Wis. 1980) (tracing punitive damages back to eighteenth century England and pointing out that punitive damages have a century-old foundation in America); Denmark, *supra* note 6, at 932–35 (describing the long, worldwide history of punitive damages and the criticism of punitive damages in America over the last century); Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 2, 12 (1982) (describing punitive damages emerging as a “borderland that both bridges and separates criminal law and torts” and stating that “common law authority for courts to award punitive damages originated in eighteenth-century England”). For informative historical comment, see David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1262–1264 nn.17–23 (1976); and David G. Owen, *Civil Punishment and the Public Good*, 56 S. CAL. L. REV. 103 (1982) [hereinafter Owen,

have been part of our common law fabric for nearly two centuries.<sup>30</sup> Punitive damages are generally available to plaintiffs in all but five states.<sup>31</sup> While the particular standard varies slightly between states, it is generally sufficient to prove that the defendant's conduct was "reckless" or "willful and wanton."<sup>32</sup> For the sake of consistency and clarity, this Article will generally refer to the conduct necessary to warrant punitive damages as "reprehensible."<sup>33</sup> The United States Supreme Court has repeatedly ratified the constitutional validity of punitive damage awards, even while steadily imposing new restraints.<sup>34</sup> Yet the multiple punitive damages problem only emerged in the latter half of the twentieth century.<sup>35</sup> Why? This is true primarily because legal and technological changes combined to give birth to the modern mass tort claim during that time.

By definition, the multiple punitive damages problem can only arise when there exists the possibility of multiple punitive damages awards against a defendant for a single act or course of conduct. In the vast majority of cases filed in the United States, a single plaintiff sues a single defendant for injuries or damages arising out of the defendant's conduct, e.g., a car accident.<sup>36</sup> Even if the defendant's conduct rises to the level of repre-

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*Civil Punishment*] (pointing out that damages for antisocial behavior has been around for thousands of years and that punitive damages has been well established in this nation).

<sup>29</sup> See Owen, *Punitive Damages*, *supra* note 11, at 368 (tracing the history of punitive damages from the Code of Hammurabi and including the Hittite Laws, the Hebrew Covenant Code of Mosaic law, the Hindu Code of Manu, early Roman civil law, and English law); see also Owen, *Problems*, *supra* note 6, at 9–10.

<sup>30</sup> See *Day v. Woodworth*, 54 U.S. 363, 371 (1851) (reporting that, at that time, punitive damages had been accepted for "more than a century").

<sup>31</sup> See Owen, *Punitive Damages*, *supra* note 11, at 369 n.30 (listing Louisiana, Massachusetts, Nebraska, New Hampshire, and Washington as the five states generally prohibiting punitive damage awards).

<sup>32</sup> See generally RICHARD L. BLATT ET AL., *PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW & PRACTICE* § 8.2, at 235–36 (2004) (illustrating the conduct required for punitive damages in each state); Steven T. Voigt, *Changing Standard of Punitive Damages Indicates Need for Legislative Reform*, THE J. OF THE ALLEGHENY COUNTY B. ASS'N, Oct. 3, 2003, at 5 ("Today, courts state the standard for punitive damages as follows: 'Punitive damages must be based on conduct which is malicious, wanton, reckless, willful, or oppressive.'" (quoting *Feld v. Merriam*, 485 A.2d 742, 747–48 (Pa. 1984))).

<sup>33</sup> This terminology is commonly used by courts when generalizing about the conduct necessary to warrant an award of punitive damages. See generally *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419–20 (2003).

<sup>34</sup> See *State Farm*, 538 U.S. at 408; *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989).

<sup>35</sup> See *infra* notes 38–48 and accompanying text.

<sup>36</sup> See Seltzer, *supra* note 6, at 40 ("Typically, punitive damages claims arose from a single incident involving only two parties, making it possible for a jury to determine an appropriate award without considering the possibility of additional awards by other juries."); see also Owen, *Problems*, *supra* note 6, at 15 ("Punitive damages were developed largely as a punishment and deterrent for trespassers, oxen

hensibility required to trigger punitive damages, once that case is resolved there is no risk that the defendant will be punished (or even sued) again for that same conduct. It is only when the defendant's act or course of conduct injures *multiple* plaintiffs that the defendant is exposed to the risk of multiple lawsuits and multiple punitive damages awards. While it is certainly true that there were at least some cases involving multiple punitive damages awards prior to the latter half of the twentieth century,<sup>37</sup> those cases were few and far between and did not pose the wide scale threat that such awards now pose. The birth of products liability and other mass tort claims was primarily responsible for the dramatic rise in the number of cases implicating the problem.<sup>38</sup>

### A. *The Birth of Products Liability and Mass Torts*

Until forty years ago, products liability as it is now known did not exist.<sup>39</sup> Through the combined efforts of California Supreme Court Justice Roger Traynor and Berkeley Dean William Prosser, a new species of tort

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thieves and other such human malefactors. When the device is transferred to the complex bureaucracy of a modern manufacturing concern, the fit is awkward in many respects.”); *cf.* V. Schwartz & Lorber, *Death*, *supra* note 11, at 2 (“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.’”).

<sup>37</sup> See, e.g., *Reutkemeier v. Nolte*, 161 N.W. 290, 294 (Iowa 1917) (affirming punitive damages awards in favor of both a young woman seduced by the defendant and her father and declaring that “[t]he fact that a defendant has or may be held liable for exemplary damages in one case has never been held as a defense in his favor against liability for exemplary damages in another case to another plaintiff”); *Luther v. Shaw*, 147 N.W. 18, 20 (Wisc. 1914) (affirming punitive damages awards in favor of both a young woman seduced by the defendant and her father).

<sup>38</sup> A second development—the shift in focus from viewing punitive damages as redressing *private* wrongs, to now being viewed as redressing *public* wrongs—also played a contributing role. See *infra* notes 190–194 and accompanying text (discussing the shift in view and critiquing a recent proposal to shift the focus back). Victor Schwartz and Leah Lorber also suggest that there were two changes that explain the emergence of the multiple punitive damages problem. See V. Schwartz & Lorber, *Death*, *supra* note 11, at 2–3 (characterizing the “two significant changes in punitive damages” as the loosening of standards for awarding punitive damages and the shift in evidentiary focus from harm to the plaintiff to harm to the public). The difference in my characterization from that of Schwartz and Lorber is largely semantic. Whereas I focus on the emergence of a new type of torts (mass torts), Schwartz and Lorber focus instead on the lower standards *applied to those new torts* (recklessness as opposed to the traditional intent standard). *Cf.* Owen, *Problems*, *supra* note 6 at 20–28 (discussing the appropriate standard of conduct that should have to be found to award punitive damages in a products liability case). Likewise, although I emphasized the shift from viewing whether conduct constituted a private versus a public wrong, Schwartz and Lorber emphasize the evidentiary effect of such a change in analysis. See V. Schwartz & Lorber, *Death*, *supra* note 11, at 2–3; *cf.* Pamela S. Karlan, “Pricking the Lines”: *The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880, 903 (2004) (arguing that the Supreme Court got involved in punitive damages jurisprudence only after (i) courts started awarding them in products liability and other mass tort cases, and (ii) the amounts of such awards started to increase to striking levels).

<sup>39</sup> See generally W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 98 (5th ed. 1984); MARSHAL S. SHAPO, 1 THE LAW OF PRODUCTS LIABILITY ¶ 1.01[1] (3d ed. 1994).

was born in the early 1960s.<sup>40</sup> Traynor authored the first case to recognize strict products liability,<sup>41</sup> and Prosser incorporated the new tort into his contemporaneous draft of the *Restatement (Second) of Torts*.<sup>42</sup> Strict products liability ushered in a new era of mass torts, allowing a virtually unlimited number of lawsuits to be brought against a defendant for a single design or warning decision; *anyone* injured by a product with a design or warning defect could now sue.<sup>43</sup>

Within a few years, courts began allowing punitive damages in strict products liability cases. The first such case was *Toole v. Richardson-Merrell, Inc.*,<sup>44</sup> in which a California appellate court ruled that a plaintiff did not have to show deliberate intent to injure, but instead could prevail on a lesser showing of recklessness.<sup>45</sup> At approximately the same time, awareness of environmental contamination was increasing and the potential adverse health effects of such contamination were being discovered.<sup>46</sup> As with products liability claims, environmental injury claims hold the potential for numerous plaintiffs to allege individual injuries arising out of a single act or

<sup>40</sup> See generally Jim Gash, *Beyond Erin Brockovich and A Civil Action: Should Strict Products Liability Be the Next Frontier for Water Contamination Lawsuits?*, 80 WASH. U. L.Q. 51, 85–88 (2002) (tracing history of the birth and rise of strict products liability).

<sup>41</sup> *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1963).

<sup>42</sup> RESTATEMENT (SECOND) OF TORTS § 402A (1965); see also M. STUART MADDEN, DAVID G. OWEN & MARY J. DAVIS, MADDEN & OWEN ON PRODUCTS LIABILITY, § 5.1 (3d ed. 2000) (“Justice Traynor in 1963 constructed the new tort law doctrine in *Greenman v. Yuba Power Prods., Inc.*; Dean Prosser, Reporter for the Second Restatement, in 1964 incorporated the principle into *Restatement (Second) of Torts* § 402A, published by the American Law Institute the following year; and, thereafter, a flood of jurisdictions rapidly adopted the new strict tort doctrine.”).

<sup>43</sup> See V. Schwartz & Lorber, *Death*, *supra* note 11, at 4 (“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.”); Jeffries, *supra* note 6, at 142 (“In the mid-1970’s, unprecedented numbers of punitive awards in product liability and other mass tort situations began to surface. Many of these awards were also unprecedented in amount. And these trends continued and accelerated into the 1980’s.”).

<sup>44</sup> 60 Cal. Rptr. 398 (Cal. Ct. App. 1967).

<sup>45</sup> *Id.* at 415–16.

<sup>46</sup> See, e.g., Susan C. Gieser, *Federal and State Environmental Law: A Trap for the Unwary Lender*, 1988 BYU L. REV. 643, 643 (1988) (reporting that the threat of environmental pollution was thrust into the national spotlight when President Carter had to declare a state of emergency at Love Canal in New York in 1978 and that the acute awareness of health and safety risks posed by environmental contamination continued throughout the decade); Craig N. Johnston, *Current Landowner Liability Under CERCLA: Restoring the Need for Due Diligence*, 9 FORDHAM ENVTL. L.J. 401, 408, 429–30 (1998) (citing to the creation of CERCLA in 1980 and the 1986 amendment that incorporated Superfund in response to a call for clean up of environmental contaminants, and pointing out that the vast majority of discharged contaminants, such as PCBs, occurred during the 1950s and 1960s, leading to greater awareness in the next decade); Allan Kanner, *Toxic Tort Litigation in a Regulatory World*, 41 WASHBURN L.J. 535, 538–39 (2002) (citing environmental disasters that brought governmental attention and reform by the late 1960s); cf. ALI REPORT, *supra* note 15, at 384 (explaining that “the mass marketing of a variety of chemical and pharmaceutical products has exposed individuals to risks that could not have been anticipated a generation ago”).

course of conduct on behalf of a single defendant.<sup>47</sup> The convergence of products liability and environmental torts in the 1970s led to an explosion of litigation in these areas.<sup>48</sup> And because punitive damages were available in these cases, the number and size of punitive damages awards experienced a corresponding dramatic increase.<sup>49</sup> To the extent that a jury could find that the design or warning decision was sufficiently reprehensible to warrant the imposition of punitive damages, the risk of multiple punitive damages awards for a single act or course of conduct was squarely presented.

Among the products involved in this litigation explosion were automobiles, diethylstilbestrol (“DES”), Agent Orange, tampons, the Dalkon Shield Intrauterine Device (“IUD”), and asbestos.<sup>50</sup> Judge Friendly, of the Second Circuit Court of Appeals, first articulated the danger of multiple punitive damages awards presented by mass tort claims in a case called *Roginsky v. Richardson-Merrell, Inc.*<sup>51</sup> The plaintiff in *Roginsky* alleged that his ingestion of an anticholesterol drug called MER/29 caused, inter

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<sup>47</sup> See, e.g., Myron S. Greenberg & Megan A. Blazina, *What Mediators Need to Know About Class Actions: A Basic Primer*, 27 HAMLINE L. REV. 191, 209–10 (2004) (using environmental contamination cases as examples of mass tort scenarios with “hundreds or thousands of individual claims that may be spread across the nation, or even the world”); Kanner, *supra* note 46, at 540 & n.45 (describing the difficulties of case management in toxic tort litigation and the use of class action and mass tort to deal with the large numbers of plaintiffs and defendants); Dianne M. Nast, *Managing Mass Tort Cases*, 1 SEDONA CONF. J. 43, 43–44 (2000) (describing environmental torts as one of the “three generally recognized categories of mass torts” all of which involve “large numbers of plaintiffs seeking compensation from one or a handful of defendants for similar types of claims”); Robert L. Rabin, *Environmental Liability and the Tort System*, 24 HOUS. L. REV. 27, 30 (1987) (pointing out the problems created by toxic tort scenarios where “claims are potentially unbounded”). See generally Samuel D. Estep, *Radiation Injuries and Statistics: The Need for a New Approach to Injury Litigation*, 59 MICH. L. REV. 259, 281 (1960) (suggesting consideration of a “contingent injury fund” to cope with difficulties of mass claims based on nuclear accidents).

<sup>48</sup> See generally *In re N. Dist. of Cal. “Dalkon Shield” IUD Prod. Liab. Litig.*, 526 F. Supp. 887, 892, 899–900 (N.D. Cal. 1981) (“[T]he latter half of the twentieth century has witnessed a virtual explosion in the frequency and number of lawsuits filed to redress injuries caused by a single product manufactured for use on a national level.”), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982); Ellis, *supra* note 28, at 2–3; Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 961 n.2 (1993) (stating that “[i]n some parts of the country, mass tort claims threaten[ ] to overwhelm the civil justice system”); Sherrill P. Hondorf, *A Mandate for the Procedural Management of Mass Exposure Litigation*, 16 N. KY. L. REV. 541, 541–43 (1989) (describing the “big case phenomenon” born out of mass exposure to toxic agents that created “chaos in the judicial system” in recent times); Dennis Neil Jones et al., *Multiple Punitive Damages Awards for a Single Course of Wrongful Conduct: The Need for a National Policy to Protect Due Process*, 43 ALA. L. REV. 1, 1–2 (1991) (“Within the last twenty-five years, however, the advent of mass tort litigation has swept the nation, creating an unprecedented phenomenon of multiple punitive damages awards assessed against a defendant for a single course of conduct.”).

<sup>49</sup> See generally V. Schwartz & Lorber, *Death*, *supra* note 11, at 5.

<sup>50</sup> See generally Seltzer, *supra* note 6, at 38 n.6, 92 n.3.

<sup>51</sup> 378 F.2d 832 (2d Cir. 1967). While it is generally accepted that *Roginsky* was the first modern case to identify the multiple punishments problem, the American Law Institute argues that the danger of multiple claims was actually first mentioned in the landmark 1842 case of *Winterbottom v. Wright*, 152 Eng. Rep. 402 (Ex. 1842). ALI REPORT, *supra* note 15, at 383.

alia, cataracts in his eyes.<sup>52</sup> In the trial court, Roginsky was awarded both compensatory and punitive damages against Richardson-Merrell.<sup>53</sup> Roginsky's lawsuit, however, was not the only one alleging personal injuries caused by MER/29. While his was the first to be tried of seventy-five such cases then pending in the Southern District of New York, several hundred more claims were pending elsewhere, and three such cases had resulted in verdicts against the defendant in which punitive damages had been awarded.<sup>54</sup> Though the court ultimately vacated Roginsky's punitive damages award for insufficient evidence,<sup>55</sup> it did so only after expressing serious concerns about the potentially devastating consequences of allowing multiple punitive awards for the same conduct: "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."<sup>56</sup> Though Judge Friendly had no occasion to decide the matter, he openly questioned whether multiple punitive damages awards could eventually rise to the level of a due process violation.<sup>57</sup>

Since *Roginsky*, many other courts have criticized multiple punitive damages awards and have questioned their constitutional validity.<sup>58</sup> To date, however no court has yet overturned a punitive damages award on this basis.<sup>59</sup> In contrast, a number of dissenting judges and commentators have

<sup>52</sup> *Roginsky*, 378 F.2d at 834.

<sup>53</sup> *Id.* Roginsky was awarded \$17,500 in compensatory damages and \$100,000 in punitive damages.  
*Id.*

<sup>54</sup> *Id.* MER/29 was used by approximately 400,000 people before it was removed from the market, and more than 1500 lawsuits alleging personal injury were filed between 1961 and 1967. See Seltzer, *supra* note 6, at 51–52.

<sup>55</sup> *Roginsky*, 378 F.2d at 851.

<sup>56</sup> *Id.* at 839.

<sup>57</sup> *Id.* at 840.

<sup>58</sup> See, e.g., *Racich v. Celotex Corp.*, 887 F.2d 393, 396–99 (2d Cir. 1989) (cautioning that public policy counsels against the legitimacy of awarding multiple punitive damages in mass tort litigation and also that these awards may violate due process); *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1005 (3d Cir. 1986) (recognizing that many arguments have been made for the prevention of repeated awards of punitive damages); *McBride v. Gen. Motors Corp.*, 737 F. Supp. 1563, 1570 (M.D. Ga. 1990) (acknowledging that due process may limit multiple punishments of defendants); *Juzwin v. Amtorg Trading Corp.*, 718 F. Supp. 1233, 1235 (D.N.J. 1989) (declaring that multiple punitive damages are limited by due process and calling for federal legislation); *In re Dist. of Calif. "Dalkon Shield" IUD Prod. Liab. Litig.*, 526 F. Supp. at 895, 899–900 (N.D. Cal. 1981) (discussing the potential for abuse implicit in a multiplicity of punitive damages awards and calling for national solution to remedy this abuse), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982); *Owens-Corning Fiberglass Corp. v. Malone*, 972 S.W.2d 35, 50 (Tex. 1998) (recognizing that "repeatedly imposing punitive damages on the same defendant for the same course of wrongful conduct may implicate substantive due process constraints").

<sup>59</sup> See Andrea G. Nadel, Annotation, *Propriety of Awarding Punitive Damages to Separate Plaintiffs Bringing Successive Actions Arising out of Common Incident or Circumstances Against Common Defendant or Defendants ("One Bite" or "First Comer" Doctrine)*, 11 A.L.R. 4th 1261, 1262 (1982) (observing that courts "have generally held that no principle exists which prohibits a plaintiff from recovering punitive damages against a defendant or defendants simply because punitive damages have previously been awarded against the same defendant or defendants for the same conduct"); see also *in-*

argued strenuously that such awards do violate due process, at least in some situations.<sup>60</sup>

### B. *The Breadth of the Problem*

It is difficult to overestimate or overstate the potential breadth of the multiple punishments problem. The problem can arise in *any* scenario where multiple people are injured (physically or financially) by a single act or course of conduct that a rational jury concludes was sufficiently reprehensible to warrant the imposition of punitive damages. This, of course, means that any tangible item that is mass produced and marketed can potentially invoke the problem if the item proves to be defective. Likewise, any chemical or other toxin that is produced, distributed, sold, used, handled, or disposed of can potentially trigger the problem if such production, distribution, sale, use, handling, or disposal is done in such a way as to cause injury to multiple people. Additionally, any form of mass transportation (i.e., planes, trains, or automobiles) can trigger the problem because of the potential to injure multiple people through a single act. Furthermore, other forms of mass disaster, such as a fire or a structural collapse of part or all of a building, can present the same issue.

The potential scope of the multiple punishments problem is virtually limitless, and, to date, has arisen in cases involving Agent Orange,<sup>61</sup> DES,<sup>62</sup> chlorpyrifos,<sup>63</sup> automobiles,<sup>64</sup> tampons,<sup>65</sup> IUDs,<sup>66</sup> hotel fires,<sup>67</sup> walkway collapses,<sup>68</sup> and, of course, asbestos.<sup>69</sup> Defendants who are repeatedly punished

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*fra* notes 115–117 and accompanying text.

<sup>60</sup> See, e.g., *Dunn v. HOVIC*, 1 F.3d 1371, 1398 (3d Cir. 1993) (en banc) (Weis, J., dissenting) (arguing that limited funds should play into a court's review of jury verdicts), *modified in part*, 13 F.3d 58 (3d Cir. 1993); Colby, *supra* note 2, at 603 (“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.” (quoting Judge Weinstein in *In re “Agent Orange” Prod. Liab. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983))); see also The Multiple Punitive Damages Fairness Act of 1997, S. 78, 105th Cong. § 3 (1997).

<sup>61</sup> See, e.g., *In re “Agent Orange” Prod. Liab. Litig.*, 100 F.R.D. 718, at 728 (E.D.N.Y. 1983), *aff’d* 818 F.2d 145 (2d Cir. 1987).

<sup>62</sup> See, e.g., *Bichler v. Eli Lilly & Co.*, 436 N.E.2d 182 (N.Y. 1982); *Payton v. Abbott Labs.*, 83 F.R.D. 382 (D. Mass. 1979).

<sup>63</sup> See, e.g., *Louderback v. Orkin Exterminating Co., Inc.*, 26 F. Supp. 2d 1298, 1301 (D. Kan. 1998) (“[C]hlorpyrifos [is] the active ingredient in the termiticide used by Orkin.”).

<sup>64</sup> See, e.g., *Clarys v. Ford Motor Co.*, 592 N.W.2d 573 (N.D. 1999).

<sup>65</sup> See, e.g., *Graham v. Playtex Prods., Inc.*, 993 F. Supp. 127 (N.D.N.Y. 1998).

<sup>66</sup> See, e.g., *In re N. Dist. of Cal. “Dalkon Shield” IUD Prods. Liab. Litig.*, 526 F. Supp. 887 (N.D. Cal. 1981), *vacated*, 693 F. 2d 847 (9th Cir. 1982).

<sup>67</sup> See, e.g., *In re MGM Grand Hotel Fire Litig.*, 570 F. Supp. 913 (D. Nev. 1983).

<sup>68</sup> See, e.g., *In re Federal Skywalk Cases*, 93 F.R.D. 415 (W.D. Mo. 1982).

<sup>69</sup> See, e.g., *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314 (5th Cir. 1985), *aff’d on reh’g*, 781 F.2d 394 (5th Cir. 1986).

in the form of punitive damages face very real threats of bankruptcy,<sup>70</sup> the ripple effects of which are felt by numerous constituencies. For example, plaintiffs who have yet to be compensated for their injuries may be deprived of any recovery at all,<sup>71</sup> and employees of the defendant can and do lose their jobs.<sup>72</sup> Furthermore, employees of enterprises that are dependant on the defendant for supplies or income may also lose their jobs,<sup>73</sup> and stockholders of the defendant and other dependent companies lose their investments.<sup>74</sup> Additionally, consumers and the economy lose a once-

<sup>70</sup> See, e.g., *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 838–41 (2d Cir. 1967) (expressing concern for the potential for multiple punitive damages to end the business life of defendants); *Asbestos Litigation Crisis in Federal and State Courts: Hearings Before the Subcomm. on Intellectual Prop. and Judicial Admin. of the House Comm. on the Judiciary*, 102d Cong. 132–33 (1992) (statement of Hon. William W. Schwarzer) (“Punitive damages compete with compensatory damages for the increasingly scarce resources of asbestos defendants and their insurers. Until the claims of future claimants become liquidated, distribution of punitive damages to current claimants creates a risk of exhausting funds before potential claimants discover their injuries.”); DAN B. DOBBS, *LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION* § 3.11(8) (2d ed. 1993) (observing that multiple punitive damages can both bankrupt a defendant and preclude recovery by late-coming plaintiffs); Martin H. Redish & Andrew L. Matthews, *Why Punitive Damages Are Unconstitutional*, 53 EMORY L.J. 1, 2 (2004) (“If left unchecked, juries may employ the power to award punitive damages in order to impose what amounts to an economic death penalty on a defendant or to reward a plaintiff with an undeserved windfall.”); see also *infra* note 83.

<sup>71</sup> See, e.g., *Edwards v. Armstrong World Indus.*, 911 F.2d 1151, 1155 (5th Cir. 1990) (“If no change occurs in our tort law or constitutional law, the time will arrive when Celotex’s [asbestos] liability for punitive damages imperils its ability to pay compensatory claims and its corporate existence.”); *Ex parte Holland*, 692 So. 2d 811, 816–819 (Ala. 1997) (pointing out the potential for the first plaintiff in a multiple-claimant tort case to impair the ability of the remaining members to protect their interests); *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 478 (N.J. 1986) (cautioning that depletion of defendants’ funds by early plaintiffs often leaves no monetary compensation for later plaintiffs).

<sup>72</sup> See, e.g., *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053, 1055 (D.N.J. 1989) (stating that “if the successive fines serve to render companies insolvent, innocent employees and trade creditors are injured as well”), *vacated on other grounds*, 718 F. Supp. 1233 (D.N.J. 1989); *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 470–71 (Wis. 1980) (Coffey, J., dissenting) (“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.”); George N. Meros, Jr., *Toward a More Just and Predictable Civil Justice System*, 25 FLA. ST. U. L. REV. 141, 158 (1998) (also describing the effects of punitive damages outside the company); V. Schwartz, *Reining in*, *supra* note 3, at 1030 (describing the “ripple” effect excessive imposition of punitive damages awards has on businesses that extends to “losses suffered by the company’s employees, who may lose their jobs, as well as by those other businesses that rely on the company or its employees for income”); Alexander H. Slaughter, *Punitive Damages*, in *PRODUCTS LIABILITY: PHARMACEUTICAL DRUG CASES* 299 (Donald E. Vinson & Alexander H. Slaughter eds., 1998) (noting that multiple punitive damage awards may increase unemployment due to the threat of financial disaster from the increased litigation resulting from new and products).

<sup>73</sup> See, e.g., *Wangen*, 294 N.W. 2d at 470–71 (Coffey, J., dissenting) (“Moreover, imposition of multiple punitive damage awards could have an adverse impact not only on the manufacturer but also [on] those commercial businesses that supply materials for use in construction of [other products].”); Meros, *supra* note 72, at 158 (stating that “[s]mall businesses that rely on the company [that was forced out of business] for income lose their business and also their employees”).

<sup>74</sup> See Meros, *supra* note 72, at 158 (“Economic harm to the company also affects shareholders, pension funds, and investors, who face a loss of their savings.”); Kimberly A. Pace, *Recalibrating the*

valuable contributor to the country's economic health.<sup>75</sup> These effects were articulated effectively by a Wisconsin Court:

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 goods in the market place. . . . Moreover, imposition of multiple punitive damage awards could have an adverse impact not only on the manufacturer . . . but also [on] those commercial businesses that supply materials for use in construction of [other products].<sup>76</sup>

This country's experience with asbestos provides a compelling example of the multiple punitive damages award problem, and illustrates why this problem needs to be fixed immediately. Over the past forty years, asbestos litigation has inundated the country's civil courts and is predicted to be "one of the most costly litigated issues, if not the most, in the history of American jurisprudence."<sup>77</sup> While the first modern asbestos lawsuit was filed in 1966,<sup>78</sup> asbestos litigation exploded in the 1970s and 1980s; by 1982, 21,000 claims had been filed against 300 companies with "tens of thousands of new claims being filed each successive year."<sup>79</sup> In the midst of the asbestos crisis from 1979 to 1981, average total compensation per claim paid by all defendants and their insurers equaled \$60,000, while the average amount of punitive damages awarded per case from January 1982 to July 1982 was about \$600,000.<sup>80</sup> Projected to end up costing \$200 to \$265 bil-

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*Scales of Justice Through National Punitive Damage Reform*, 46 AM. U. L. REV. 1573, 1628 (1997) ("Proponents of limiting a defendant's liability for intentional misconduct also argue that large punitive damage awards actually harm consumers, employees, and shareholders of the corporation, because the corporation ultimately must pass these expenses on to them."); V. Schwartz, *Reining in*, *supra* note 3, at 1030 ("Economic harm to the company also affects shareholders, such as pension funds and ordinary citizens, and other investors who face the loss of their savings.")

<sup>75</sup> See, e.g., *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part) (cautioning that fear of large punitive damage awards may lead product manufacturers to curtail their research and development of new and beneficial products); see also Pace, *supra* note 74, at 1622 (warning that potentially unlimited liability might cause "the cautious manufacturers [to] be over-deterred and unwilling to invest in research and development for potentially valuable products," resulting in valuable products being taken off the market leaving consumers with depleted product options).

<sup>76</sup> *Wangen*, 294 N.W.2d at 470-71 (Coffey, J., dissenting).

<sup>77</sup> George Scott Christian & Dale Craymer, *Texas Asbestos Litigation Reform: A Model for the States*, 44 S. TEX. L. REV. 981, 998 (2003).

<sup>78</sup> Lisa A. Perillo, Note, *Scraping Beneath the Surface: Finally Holding Lead-Based Paint Manufacturers Liable by Applying Public Nuisance and Market-Share Liability Theories?*, 32 HOFSTRA L. REV. 1039, 1052 (2004).

<sup>79</sup> See Christian & Craymer, *supra* note 77, at 992-93.

<sup>80</sup> See Stacy Molton & Richard B. Hall, *Asbestos: Alternatives Where No Insurance Is Available*, in INSURANCE LITIGATION AND COVERAGE ISSUES 51, 55 (PLI Commercial Law & Practice Course,

lion,<sup>81</sup> this “asbestos-litigation crisis”<sup>82</sup> has forced nearly seventy companies to file for Chapter 11 protection.<sup>83</sup> By the fall of 2003, there had been 600,000 asbestos claims by workers against about 6000 different companies.<sup>84</sup> This litigation is predicted to continue through 2040, resulting in a predicted \$33 billion loss in capital investment alone.<sup>85</sup>

The multiple punitive damages problem is not limited to the ill effects of multiple jury verdicts imposing punitive damages against the defendant. The mere *threat* of multiple punitive damages awards causes defendants to factor such a possibility into the settlement process.<sup>86</sup> This, in turn, unnecessarily escalates the settlement amount, thereby triggering some or all of the parade of horrors discussed above.<sup>87</sup>

### C. Courts’ Responses to the Problem

While *Roginsky* was the first case to raise and discuss the multiple punishments problem, it was certainly not the last. Since *Roginsky*, numerous state and federal courts have faced the problem and have attempted to address it in a variety of ways. Some courts have ignored the problem or dismissed it as unproblematic. For example, in *Wangen v. Ford Motor Co.*,<sup>88</sup> a Wisconsin state court case involving a defectively designed fuel tank in Ford Mustangs,<sup>89</sup> the court acknowledged that there was a real risk that multiple punitive damages awards could be “catastrophic.”<sup>90</sup> Nevertheless, the court concluded that the problem could be managed effectively through the use of “judicial controls.”<sup>91</sup>

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Handbook Series No. 382, 1986).

<sup>81</sup> STEPHEN CARROLL ET AL., ASBESTOS LITIGATION COSTS AND COMPENSATION: AN INTERIM REPORT vii (RAND Inst. for Civil Justice 2002), available at <http://www.rand.org/publications/DB/DB397/DB397.pdf>.

<sup>82</sup> See, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997) (addressing the certification of a class of asbestos related claims that evolved “in response to an asbestos-litigation crisis”).

<sup>83</sup> See Mark A. Behrens & Rochelle M. Tedesco, *Two Forks in the Road of Asbestos Litigation*, in MEALEY’S LITIG. REP.: ASBESTOS, Mar. 7, 2003, at 35; see also CARROLL ET AL., *supra* note 81, at 75.

<sup>84</sup> See CARROLL ET AL., *supra* note 81, at 996–97.

<sup>85</sup> See *id.* at 73–74.

<sup>86</sup> See, e.g., *Dunn v. HOVIC*, 1 F.3d 1371, 1398 (3d Cir. 1993) (en banc) (Weis, J., dissenting) (“[T]he potential for punitive awards is a weighty factor in settlement negotiations and inevitably results in a larger 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.”), *modified in part*, 13 F.3d 58 (3d Cir. 1993).

<sup>87</sup> *Id.*

<sup>88</sup> 294 N.W.2d 437 (Wis. 1980).

<sup>89</sup> *Id.* at 440.

<sup>90</sup> *Id.* at 455.

<sup>91</sup> *Id.* at 458.

Other courts have questioned the *wisdom* of allowing multiple awards. For example, in *Maxey v. Freightliner Corp.*,<sup>92</sup> a diversity case involving a defectively-designed fuel system that caused diesel trucks to erupt in flames, the jury awarded the injured plaintiffs \$150,000 in compensatory damages and \$10 million in punitive damages.<sup>93</sup> After acknowledging that the potentially “devastating” effects of multiple punitive damage awards were “real and apparent,”<sup>94</sup> the court vacated the punitive damage award on other grounds.<sup>95</sup> The court went on to question the wisdom of multiple punitive damages awards, noting that after the first punitive damages award, the public interest has been vindicated.<sup>96</sup>

Still other courts, including the United States Supreme Court,<sup>97</sup> have openly questioned the constitutionality of allowing multiple awards.<sup>98</sup> In *Juzwin v. Amtorg Trading Corp.* (*Juzwin I*), one district court went so far as to declare multiple awards, at least as applied to the case before it, an unconstitutional denial of due process rights.<sup>99</sup> That court, however, ultimately reversed itself and upheld the constitutionality of the award (*Juzwin II*).<sup>100</sup>

In *Juzwin I*, the court rejected the defendants’ contentions that multiple punitive damage awards violated both the Double Jeopardy Clause of the Fifth Amendment<sup>101</sup> and the Excessive Fines Clause of the Eighth Amendment.<sup>102</sup> The court did find, however, that the Due Process Clause of the

<sup>92</sup> 450 F. Supp. 955 (N.D. Tex. 1978).

<sup>93</sup> *Id.* at 957.

<sup>94</sup> *Id.* at 962; *see also id.* (“Each jury has before it only one case[.] it is the aggregate effect of several juries’ faithful adherence to the law that poses risk of ultimate destruction.”).

<sup>95</sup> *Id.* at 963–64.

<sup>96</sup> *Id.* at 962.

<sup>97</sup> *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422–23 (2003); *see also Gash, supra* note 20, at 1263–65 (analyzing the Supreme Court’s allusion to the unconstitutionality of multiple punitive damages awards); *infra* notes 125–151 and accompanying text.

<sup>98</sup> *See, e.g., Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 280–84 (2d Cir. 1990) (implying that if defendant had presented a sufficient record, the court may have stricken later punitive damages award as unconstitutional); *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 Sch. Asbestos Litig.*, 789 F.2d 996, 1005 (3d Cir. 1986) (“declaring that ‘powerful arguments have been made that, as a matter of constitutional law or of substantive tort law, the courts shoulder some responsibility for preventing repeated awards of punitive damages for the same acts or series of acts’”); *In re Fed. Skywalk Cases*, 680 F.2d 1175, 1188 (8th Cir. 1982) (“Unlimited multiple punishment for the same act determined in a succession of individual lawsuits and bearing no relation to the defendants’ culpability or the actual injuries suffered by victims, would violate the sense of ‘fundamental fairness’ that is essential to constitutional due process.”).

<sup>99</sup> 705 F. Supp. 1053 (D.N.J. 1989), *judgment vacated on reh’g*, 718 F. Supp. 1233 (*Juzwin II*), *rev’d on other grounds sub nom. Juzwin v. Asbestos Corp.*, 900 F.2d 686 (3d Cir. 1990).

<sup>100</sup> *Juzwin II*, 718 F. Supp. at 1236.

<sup>101</sup> *Juzwin I*, 705 F. Supp. at 1057–59.

<sup>102</sup> *Id.* at 1059–60.

Fourteenth Amendment places constitutional limits on the imposition of multiple punitive damages awards.<sup>103</sup> Rejecting the notion that due process requires “simply the provision of a judicial proceeding”<sup>104</sup> and concluding that a class action was not a possible solution in the asbestos context,<sup>105</sup> the court pronounced that “subjecting defendants to the possibility of multiple awards of punitive damages for the single course of conduct alleged in this action would deprive defendants of the fundamental fairness required by the Due Process Clause.”<sup>106</sup>

Shortly thereafter, however, the court reconsidered and vacated its opinion and reinstated the punitive damages award.<sup>107</sup> The court declared that in order to prevail on a due process challenge to a multiple punitive damages award, several conditions first had to be met. First, there must have been a full and fair hearing to develop the total scope of the conduct of the defendant when the prior punitive damages verdict was entered.<sup>108</sup> Second, there must have been adequate representation at the prior trial.<sup>109</sup> Third, there must have been an instruction to the jury that its punitive damages verdict would be the one and only such verdict entered against the defendant.<sup>110</sup> And fourth, other conditions of the prior trial must have been fair.<sup>111</sup> Because these conditions had not been met in any prior trial, the court reinstated the punitive damages award entered by the jury.<sup>112</sup> The court in *Juzwin II* did adhere, however, to its prior declaration that “repetitive awards of punitive damages for the same conduct violate a defendant’s due process rights.”<sup>113</sup>

In *Dunn v. HOVIC*, another case that wrestled with the due process limitations on multiple punitive damages awards, the Third Circuit reviewed a punitive damages award in a Virgin Islands asbestos case to de-

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<sup>103</sup> *Id.* at 1060–64; accord *In re N. Dist. of Cal. “Dalkon Shield” IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 899 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982) (“A defendant has a due process right to be protected against unlimited multiple punishment for the same act. A defendant . . . 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.”). *But see* *Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565, 1571 (6th Cir. 1985) (denying due process challenge to multiple punitive damages awards on the grounds that allowing a defendant to litigate the punitive damages issue before a judicial tribunal provided “all of the procedural safeguards to which it is due”).

<sup>104</sup> *Juzwin I*, 705 F. Supp. at 1064.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Juzwin II*, 718 F. Supp. 1233, 1236 (D.N.J. 1989).

<sup>108</sup> *Id.* at 1235.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 1236.

<sup>113</sup> *Id.* at 1234.

termine whether due process limits multiple punitive damages awards.<sup>114</sup> Noting that it was aware of no federal<sup>115</sup> or state<sup>116</sup> court that had ever struck down a punitive damages award on the grounds that multiple punitive awards violate either common law tort principles or federal due process,<sup>117</sup> and recognizing that it was constrained by its role as the de facto Supreme Court of the Virgin Islands to follow common law principles as set forth in the Restatements,<sup>118</sup> the court declined to strike the punitive damages award as unconstitutional, even while acknowledging and sympathizing with those who have expressed concern about multiple punitive damages awards.<sup>119</sup> The court characterized the problem as “essentially a policy matter” that is “best left to the United States Congress or the legislature of the Virgin Islands.”<sup>120</sup> The court did not, however, rule out the possibility that a defendant in a different case (who had been subject to multiple punitive damages awards) could demonstrate that a particular punitive award violated due process, but concluded that the defendant in this case failed to make such a showing.<sup>121</sup> In light of its holding, the court instructed district courts in the

<sup>114</sup> *Dunn v. HOVIC*, 1 F.3d 1371, 1385 (3d Cir.) (en banc) (Weis, J., dissenting) (“The principal issue impelling us to take this otherwise routine product liability case in banc is the effect of successive punitive damages awards in mass tort cases arising from the same course of conduct.”), *modified in part*, 13 F.3d 58 (3d Cir. 1993).

<sup>115</sup> *Id.* at 1385–86 (citing *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 215–16 (Colo. 1984); *Froud v. Celotex Corp.*, 437 N.E.2d 910, 913 (Ill. App. Ct. 1982), *rev’d on other grounds*, 456 N.E.2d 131 (Ill. 1983); *Eagle-Picher Inds., Inc. v. Balbos* 604 A.2d 445, 472 (Md. 1991); *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 475–80 (N.J. 1986); *Fiberboard Corp. v. Pool*, 813 S.W.2d 658, 687 (Tex. Ct. App. 1991); *Davis v. Celotex Corp.*, 420 S.E.2d 557, 564–66 (W. Va. 1992); *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 466 (Wis. 1980)).

<sup>116</sup> *Id.* at 1385 (citing *Solly v. Manville Asbestos Disease Fund*, No. 91-3031, 1992 U.S. App. LEXIS 14030, at \*21–22 (6th Cir. June 8, 1992) (per curiam); *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 280–82 (2d Cir. 1990); *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 402–07 (5th Cir. 1986); *Hansen v. Johns-Manville Prods. Corp.*, 734 F.2d 1036, 1041–42 (5th Cir. 1984); *Man v. Raymark Inds.*, 728 F. Supp. 1461, 1465–68 (D. Haw. 1989); *Campbell v. ACandS, Inc.*, 704 F. Supp. 1020, 1021–23 (D. Mont. 1989); *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. 357, 376–77 (E.D. Pa. 1982), *aff’d sub nom.* *Van Buskirk v. Carey Canadian Mines, Ltd.*, 760 F.2d 481 (3d Cir. 1985)).

<sup>117</sup> *Id.* at 1386 (stating that “OCF [the defendant] has brought no majority opinion from any court to our attention (and our research has not disclosed such a case) which holds that multiple punitive damages claims must be struck on either basis” of due process or common law tort grounds); *accord* *Nadel*, *supra* note 59, at 1262 (“[Courts] have generally held that no principle exists which prohibits a plaintiff from recovering punitive damages against a defendant or defendants simply because punitive damages have previously been awarded against the same defendant or defendants for the same conduct, or because other actions are pending against the defendant or defendants which could result in an award of punitive damages.”).

<sup>118</sup> *Dunn*, 1 F.3d at 1387. These principles allow for consideration of the potential for multiple punitive damages awards as a factor in setting the amount of the award, but do not preclude multiple awards. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 908 cmt. e (1977)).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 1389; *see also id.* at 1390 (“[Defendant] simply has not made a ‘showing that the total [amount of punitive damages assessed so far] is even close to whatever limit due process might impose on the total punitive damages that may be assessed . . . for . . . misconduct with respect to asbestos warn-

Third Circuit to “determine whether a punitive award to a plaintiff in a particular case should be struck by carefully scrutinizing the ‘punitive damages overkill’ evidence submitted to them, both with respect to past awards actually paid by the defendant and the defendant’s ability to satisfy future punitive damages awards.”<sup>122</sup> The court then proceeded to consider the multiple punitive awards as a factor in affirming the panel’s remittitur of the punitive damages verdict from two million to one million dollars.<sup>123</sup>

Despite the variance in courts’ approaches to the multiple punishments problem, virtually all have agreed that the only way to fully and finally resolve the problem is through a nationwide solution.<sup>124</sup> Absent congressional action, the only other hope for a national solution is for the United States Supreme Court to intervene.

To the dismay and disappointment of many Court observers,<sup>125</sup> the United States Supreme Court has yet to squarely address the multiple punitive damages problem. This does not mean, however, that the Court is not aware of the problem or that it will continue its silence indefinitely. To the contrary, the Court has twice alluded to the problem and has even signaled how it might rule in the future.

The Court’s first reference to the multiple punitive damages problem came in Justice Ginsburg’s dissent in *BMW of North America, Inc. v. Gore*.<sup>126</sup> In *Gore*, the plaintiff sued BMW for repainting his car prior to his purchase in order to conceal damage caused by acid rain.<sup>127</sup> The jury awarded Gore \$4000 in compensatory damages and \$4 million in punitive damages.<sup>128</sup> In reducing the punitive award to \$2 million, the Alabama Supreme Court presumed that the jury had improperly reached its verdict by multiplying the number of times BMW had sold refinished cars as new nationwide (983)<sup>129</sup> by the reduced value to such cars as a consequence (\$4000).<sup>130</sup> Concluding that even the reduced punitive damages award operated to punish BMW excessively for its conduct,<sup>131</sup> the United States Su-

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ings.”) (quoting *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 281 (2d Cir. 1990)).

<sup>122</sup> *Id.* at 1391. As discussed *infra*, this Article’s Proposal not only equips trial judges with the tools they would need to carry out *Dunn*’s mandate to take into account prior punitive damages paid, but also renders irrelevant the highly speculative inquiry into the defendant’s ability to satisfy hypothetical future punitive damages awards. See *infra* notes 214–279 and accompanying text.

<sup>123</sup> *Dunn*, 1 F.3d at 1391.

<sup>124</sup> See, e.g., *id.* at 1386 (“[B]oth state and federal courts have recognized that no single court can fashion an effective response to the national problem flowing from mass exposure to asbestos products.”); see also *supra* note 19.

<sup>125</sup> See, e.g., Owen, *Punitive Damages*, *supra* note 11, at 406, 413 n.152 (arguing that the Court should have granted review on *Dunn* when presented with the opportunity).

<sup>126</sup> 517 U.S. 559 (1996).

<sup>127</sup> *Id.* at 563 n.1.

<sup>128</sup> *Id.* at 565.

<sup>129</sup> *BMW of N. Am. v. Gore*, 646 So. 2d 619, 621 (Ala. 1994).

<sup>130</sup> *Gore*, 517 U.S. at 567.

<sup>131</sup> Importantly, the conduct at issue was legal in most states. *Id.* at 569 n.13, 573.

preme Court struck down the award as a violation of due process.<sup>132</sup> In her dissent, Justice Ginsburg made clear that the Court was aware of the multiple punishments problem, but that this case was not the proper vehicle for addressing that issue: “Petitioner invites the Court to address the question of multiple punitive damages awards stemming from the same alleged misconduct. The Court does not take up the invitation, and rightly so, in my judgment, for this case does not present the issue.”<sup>133</sup>

The multiple punishments problem again arose in *State Farm Mutual Automobile Insurance Co. v. Campbell*,<sup>134</sup> the Court’s most recent punitive damages case. In *State Farm*, the jury awarded Campbell \$2 million in compensatory damages and \$145 million in punitive damages in an action alleging that State Farm had acted in bad faith in refusing to settle an earlier case against Campbell.<sup>135</sup> At trial, Campbell was permitted to introduce into evidence other acts by State Farm that Campbell argued demonstrated State Farm’s reprehensible motives and intent in its dealings with Campbell.<sup>136</sup> After the jury’s verdict, the trial court reduced the compensatory award to \$1 million and the punitive award to \$25 million, but the Utah Supreme Court reinstated the \$145 million punitive award.<sup>137</sup>

In an opinion by Justice Kennedy, the Court overturned the \$145 million award, concluding that because the evidence of other acts introduced by Campbell lacked a sufficient “nexus” to the conduct that harmed Campbell,<sup>138</sup> it could not be considered in measuring the level of State Farm’s reprehensibility.<sup>139</sup> And when evaluated with reference only to the conduct that harmed Campbell, the \$145 million award was grossly excessive, and thus in violation of State Farm’s due process rights.<sup>140</sup>

During the course of the oral argument in *State Farm*, Justice Stevens asked Campbell’s counsel, Professor Laurence Tribe, whether *another* plaintiff could introduce the same evidence as Campbell and then also re-

<sup>132</sup> *Id.* at 585–86.

<sup>133</sup> *Id.* at 612 n.4 (Ginsburg, J., dissenting). Justice Ginsburg went on to explain that the question in this case was “hypothetical” because (i) this was the first punitive damages award entered against BMW for this conduct, (ii) BMW failed to raise the multiple punitive damages issue below, and (iii) Alabama’s common law allows prior punitive awards to be considered as a factor in considering whether an award is excessive. *Id.* In his concurrence, Justice Breyer also obliquely alluded to multiple punitive damages in hypothesizing about which economic theory the Alabama Supreme Court may or may not have relied upon in reducing the jury’s punitive award: “Larger damages might also ‘double count’ by including in the punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover.” *Id.* at 593 (Breyer, J., concurring).

<sup>134</sup> 538 U.S. 408 (2003).

<sup>135</sup> *Id.* at 415. The compensatory award was reduced by the trial judge to one million dollars. *Id.*

<sup>136</sup> *Id.* at 414–15; *see also*, Gash, *supra* note 20 (extensively analyzing the *State Farm* opinion and its likely impact on future punitive damages cases).

<sup>137</sup> *Campbell*, 538 U.S. at 415.

<sup>138</sup> *Id.* at 422.

<sup>139</sup> *Id.* at 424.

<sup>140</sup> *Id.* at 429.

ceive a \$145 million punitive damages award.<sup>141</sup> Professor Tribe responded: “No. I think that it’s a penalty that is like—there ought to be some double-jeopardy-like doctrine that if they can show that they’ve already been punished for this course of conduct, they ought not to have to pay the penalty a second time.”<sup>142</sup> When pressed for his authority for his proposition, Professor Tribe retorted that he “just made it up.”<sup>143</sup> While the official transcript reports that laughter ensued,<sup>144</sup> Justice Kennedy was apparently not amused. Accordingly, in his majority opinion, Justice Kennedy included a passage that strongly suggests that he and at least five other members of the Court<sup>145</sup> agree with Professor Tribe that the Constitution limits the imposition of multiple punitive damages awards, albeit through *due process* rather than *double jeopardy*.<sup>146</sup>

After declaring that the evidence of other acts admitted against State Farm could not be considered in calculating the proper amount of punitive damages to be awarded,<sup>147</sup> Justice Kennedy noted that “[p]unishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains.”<sup>148</sup> While the most logical reading of this passage is that a majority of the United States Supreme Court considers the imposition of multiple punitive damages to be constitutionally suspect, the Court would have a very difficult time fashioning a principled approach to dealing with this problem. Yet unless Congress acts, the Court will be forced to confront the issue sooner or later. If the Court does choose to resolve the issue, there appear to be three available alternatives, each of which presents its own problems.

First, the Court could follow through on its veiled threat in *State Farm* and simply declare that multiple punitive damages are per se unconstitutional. The Court’s rationale would be that due process does not permit defendants, even in civil cases, to be punished multiple times for the same conduct. It could ground this reasoning in the notion that the due process clause itself contains a double-jeopardy-like restriction on multiple punishments.<sup>149</sup> Such an approach, however, would be overly simplistic and is

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<sup>141</sup> See Transcript of Oral Argument at 46-47, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (No. 01-1289) (colloquy between Justice Stevens and Professor Tribe).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 47.

<sup>144</sup> *Id.*

<sup>145</sup> Joining Justice Kennedy in his majority opinion in *State Farm* were Chief Justice Rehnquist and Associate Justices Stevens, O’Connor, Souter, and Breyer.

<sup>146</sup> *State Farm*, 538 U.S. at 422-23.

<sup>147</sup> *Id.* at 423.

<sup>148</sup> *Id.* For this proposition, Justice Kennedy cites only to Justice Breyer’s oblique allusion to multiple punitive damages in his concurrence in *Gore*. *Id.*; see also *supra* note 133.

<sup>149</sup> See Transcript of Oral Argument at 46-47, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) No. 01-1289 (colloquy between Justice Stevens and Professor Tribe); Gary T. Schwartz,

unlikely to occur because it is too susceptible to manipulation by defendants,<sup>150</sup> and because it fails to account for the possibility (or probability) that the first jury to impose punitive damages would be either (or both) (i) not aware that its award would be the only one or (ii) not presented with evidence of the full nature of the defendant's conduct.

Second, the Court could declare that at some point the *cumulative* effect of multiple punitive damages awards would exceed the limits of due process. Under this approach, a defendant would be left to argue each time it was assessed punitive damages that the combined total amount was (finally) too much. This approach would necessarily involve only vague guidelines from the Court instructing trial courts to consider the nature of the conduct, the wealth of the defendant, and the judge's own sense of proportionality. Alternatively, the Court could simply instruct courts to apply *Gore*'s three guideposts—reprehensibility of the defendant's conduct, ratio of punitive damages to compensatory damages, and other civil or criminal sanctions for comparable misconduct<sup>151</sup>—in determining whether or not the aggregate punishment was “grossly excessive.” While such a soft-sided, discretion-driven approach is probably the one the Court would take if called upon to do so, it is hopelessly vague and difficult to predict and consistently apply.

Third, the Court could opt to essentially legislate from the bench and create an intricate set of rules for lower courts to apply that provides, *inter alia*, credits for prior payments, notification guidelines, and special rules for settlements. While such an approach is precisely how this problem needs to be solved, this would represent another (and even larger) encroachment into the legislative arena in the punitive damages context for the Court. Accordingly, it is highly unlikely that the Court will go this route, and it would be highly questionable if the Court did so.

Because neither Congress nor the United States Supreme Court has yet fixed the problem, a number of state legislatures have attempted to provide their own solutions. As demonstrated below, however, while admirable, these state statutes are destined for failure because they have no extra-territorial effect.

#### *D. State Legislative Responses to the Problem*

Several state legislatures have taken a proactive role in attempting to reduce or eliminate multiple punitive damages awards. The legislative solutions vary from state to state, but they all have one thing in common—they are utterly ineffective in their goal of eliminating multiple awards be-

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*Mass Torts and Punitive Damages: A Comment*, 39 VILL. L. REV. 415, 422 (1994) [hereinafter G. Schwartz, *Mass Torts*] (explaining that fairness objections to multiple punishments for the same act or course of conduct are rooted in “our legal system’s norm against double jeopardy”).

<sup>150</sup> See *infra* note 155.

<sup>151</sup> *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1995).

cause the legislation has no effect outside the state's own borders. What follows is a sampling of six state statutes that attempt, directly or indirectly, to address the multiple punishments problem.

*I. Georgia.*—Georgia's statute, which was enacted in 1987, provides in relevant part:

In a tort case in which the cause of action arises from product liability, there shall be no limitation regarding the amount which may be awarded as punitive damages. Only one award of punitive damages may be recovered in a court in this state 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 which may arise from such act or omission.<sup>152</sup>

Accordingly, Georgia's statute limits the recovery of multiple punitive damages awards in the field of products liability (as opposed to all mass torts) to only one award. Such an approach is unsatisfactory for several reasons. First, the statute has no force and effect outside of Georgia and thus cannot limit multiple awards arising out of the same "act or omission" entered in other jurisdictions. Second, the statute fails to take into account any settlements that include a punitive damages component.<sup>153</sup> Third, products liability cases represent only a portion of the cases that present the multiple punishments problem, and there does not seem to be any compelling reason to distinguish such cases from the others. Fourth, the statute does not take into account the *size* of the first punitive award, leaving open the very real possibility that the punishment and deterrence from the award will be inadequate. For example, if the first of many potential plaintiffs to go to trial has suffered only minor harm, then the punitive award is likely to be relatively small because, *inter alia*, the punitive damages award must bear a reasonable relationship to the size of the compensatory award.<sup>154</sup> In contrast, if a more seriously injured plaintiff were to go to trial first, the punitive award would likely be much greater. This leaves open the very real possibility that a defendant can manipulate the trial process to ensure that the lesser injured party's case is tried first.<sup>155</sup> For the latter two and other reasons, the Georgia statute was struck down as unconstitutional.<sup>156</sup>

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<sup>152</sup> GA. CODE ANN. § 51-12-5.1(e)(1) (2003).

<sup>153</sup> For example, if a defendant settles a case for an amount that factors in the very real risk of punitive damages, that defendant can still be found liable for, and have to pay, a later large punitive damages verdict.

<sup>154</sup> See *Gore*, 517 U.S. at 580–83 (1996) (recognizing that punitive damages should bear a reasonable relationship to the harm inflicted); *Reid v. Lockheed Martin Aeronautics Co.*, 205 F.R.D. 655, 681 (N.D. Ga. 2001) (reiterating that "any punitive damages awarded to [p]laintiffs must bear a reasonable relationship to their compensatory damages" (citing *Gore*, 517 U.S. at 580–83)).

<sup>155</sup> *Accord* *Denemark*, *supra* note 6, at 962 (pointing out the possibility that defendants may manipulate the "first-comer" rule to minimize punitive damages).

<sup>156</sup> *McBride v. Gen. Motors Corp.*, 737 F. Supp. 1563, 1579–80 (M.D. Ga. 1990) (declaring GA. CODE ANN. § 51-12-5.1(e)(1) unconstitutional).

2. *Missouri*.—Missouri’s statute, enacted in 1992, provides perhaps the most comprehensive attempt at a solution to the problem of any state statute. It provides in pertinent part:

Within the time for filing a motion for a new trial, a defendant may file a post-trial motion requesting the amount awarded by the jury as punitive damages be credited by the court with amounts previously paid by the defendant for punitive damages arising out of the same conduct on which the imposition of punitive damages is based. . . . If the trial court sustains such a motion the trial court shall credit the jury award of punitive damages by the amount found by the trial court to have been previously paid by the defendant arising out of the same conduct and enter judgment accordingly.<sup>157</sup>

Thus, Missouri’s statute provides that once a punitive award has been entered against a defendant, that defendant may later move a court in which a subsequent punitive award has been entered for the same conduct for an order reducing the latter award by the amount paid as a result of the prior award.<sup>158</sup> While certainly a step in the right direction, this statute is only effective if the later trials take place in Missouri, and it fails to take into account prior settlements that include a punitive damages component.<sup>159</sup> It also fails to provide later trial courts with the necessary tools for comparing the conduct in the prior case(s) with the conduct presently before the court.

3. *Florida*.—Florida’s statute, originally enacted in 1986, provides in pertinent part:

Except as provided in paragraph (b), punitive damages may not be awarded against a defendant in a civil action if that defendant establishes, before trial, that punitive damages have previously been awarded against that defendant in any state or federal court in any action alleging harm from the same act or single course of conduct for which the claimant seeks compensatory damages. For purposes of a civil action, the term “the same act or single course of conduct” includes acts resulting in the same manufacturing defects, acts resulting from the same defects in design, or failure to warn of the same hazards, with respect to similar units of a product.<sup>160</sup>

The exception referenced in the above-quoted language removes the bar to multiple punitive awards “if the court determines by clear and convincing evidence that the amount of prior punitive damages awarded was

<sup>157</sup> MO. ANN. STAT. § 510.263(4) (West 2005).

<sup>158</sup> The statute also provides an escape clause, allowing the court to refuse to allow the credit if the trial court finds that (i) the defendant failed to prove the conduct out of which the prior award arose was the same, (ii) the defendant persisted in the wrongful conduct after learning of its dangerousness, or (iii) the punitive damages laws in the state from which the prior award came materially differ from Missouri’s laws. *Id.*

<sup>159</sup> See *infra* Part II.A.2 (discussing proposed approach to incorporating settlements into the setoff procedures).

<sup>160</sup> FLA. STAT. § 768.73(2)(a)–(b) (West 2004).

insufficient to punish that defendant's behavior.<sup>161</sup> In such a case, the trial court must make specific findings of fact justifying this conclusion, and even if the trial court does so conclude, the defendant is entitled to a credit in the amount of any prior punitive award.<sup>162</sup> Once again, this statute represents a good first step, but it is necessarily inadequate because it only limits punitive awards in Florida and fails to account for prior settlements that include a punitive damages component. It also inexplicably requires trial courts to determine *before trial* whether the prior punitive damages award was based upon the same conduct as that involved *in a case that has yet to be tried*. Requiring a trial court to compare the evidence admitted in a trial over which it did not preside with evidence that has not yet been admitted in a case over which the court has not yet presided seems to be asking the impossible.<sup>163</sup>

4. *Connecticut*.—While Connecticut has not adopted a statute limiting multiple punitive damage awards per se, its statute does have the incidental effect of limiting the potential harm caused by such awards in products liability cases:

Punitive damages may be awarded if the claimant proves that the harm suffered was the result of the product seller's reckless disregard for the safety of product users, consumers or others who were injured by the product. If the trier of fact determines that punitive damages should be awarded, *the court shall determine the amount of such damages not to exceed an amount equal to twice the damages awarded to the plaintiff*.<sup>164</sup>

While this statute does not eliminate multiple punitive damage awards, it does do two things that minimize the harm potentially caused by such awards. First, it removes the power to set the amount of the award from the jury and gives it to the trial court, coinciding with proposals made by some commentators.<sup>165</sup> Second, it sets a cap on the amount of the punitive damages award of twice the compensatory award, again mirroring proposals by some commentators.<sup>166</sup> Once again, while this statute reduces some of the negative effects of multiple punitive damages awards, it does so only in Connecticut and it fails to provide any credit for prior punitive damages verdicts or prior settlements that include a punitive damages component.

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<sup>161</sup> *Id.* § 768.73(2)(b).

<sup>162</sup> *Id.*

<sup>163</sup> As discussed *infra*, this same task is assigned to trial courts in the federal legislation that has been proposed and rejected. See *infra* notes 207–208 and accompanying text.

<sup>164</sup> CONN. GEN. STAT. ANN. § 52-240(b) (West 2004) (emphasis added).

<sup>165</sup> See, e.g., Owen, *Punitive Damages*, *supra* note 11, at 411–12 (discussing reform proposals to strip juries of their right to determine punitive damages).

<sup>166</sup> *Id.* at 409–10 (describing the use of caps and multipliers of punitive damages to mitigate excessive punitive damage awards, but also recognizing the inflexibility of these proposals).

5. *Minnesota*.—Minnesota’s statute, enacted in 1992, uses the existence or prospect of multiple punitive damages awards as a factor to be considered when determining the appropriate amount of punitive damages to be awarded in any given case:

Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public arising from the defendant’s misconduct, the profitability of the conduct to the defendant, the duration of the misconduct and any concealment of it, the degree of the defendant’s awareness of the hazard and of its excessiveness, the attitude and conduct of the defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of the defendant, *and the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons*, and the severity of any criminal penalty to which the defendant may be subject.<sup>167</sup>

As with all other state statutes, this approach applies only inside Minnesota and does not account for prior settlements that include a punitive damages component. Additionally, this approach only carries with it the *potential* for minimizing or eliminating multiple punitive damages awards because prior awards are only a *factor* to be considered. In fact, allowing consideration of prior punitive damages as a factor could actually prove to be counterproductive because it involves notifying the jury that another jury has already found the defendant worthy of punishment.<sup>168</sup> Moreover, the statute requires trial courts to speculate on how many individuals might later file suit and on what future juries in other jurisdictions might or might not do.

6. *Oregon*.—Oregon’s statute, enacted in 1989, allows the trial court to reduce the punitive damages award after taking into account prior awards based upon the same conduct:

[U]pon the motion of a defendant the court may reduce the amount of any judgment requiring the payment of punitive damages entered against the de-

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<sup>167</sup> MINN. STAT. ANN. § 549.20, subd. 3 (West 2005) (emphasis added).

<sup>168</sup> See Jeffries, *supra* note 6, at 146–47 (stating that introducing prior punitive damage evidence to the jury could work against the defendant “if, as seems inevitable, the jury takes a history of prior awards as evidence of liability in the instant case”); Jones, *supra* note 48, at 29–30 (pointing out that evidence of prior punitive damages awards imposed for the same conduct could harm the defendant because “the jury may consider prior awards as evidence that the defendant’s conduct warrants a similar award”); Pace, *supra* note 74, at 1608 n.184 (arguing that introducing prior punitive damages evidence to the jury may not be in the defendant’s best interest due to jury prejudice); Seltzer, *supra* note 6, at 59–60 (warning that introducing prior punitive damage evidence can “backfire against the defendant”); John A. Albers, Note & Comment, *State of Confusion: Substantive and Procedural Due Process with Regard to Punitive Damages After TXO Prod. Corp. v. Alliance Res. Corp.*, 26 U. TOL. L. REV. 159, 201 (1994) (noting that although allowing prior punitive damages evidence does not violate due process, it has the potential of infuriating a “prejudice-bent jury even more,” resulting in an augmented verdict).

defendant if the defendant establishes that the defendant has taken remedial measures that are reasonable under the circumstances to prevent reoccurrence of the conduct that gave rise to the claim for punitive damages. In reducing the awards of punitive damages under the provisions of this subsection, the court shall consider the amount of any previous judgment for punitive damages entered against the same defendant for the same conduct giving rise to a claim for punitive damages.<sup>169</sup>

Accordingly, under this statute the trial judge *must* consider the existence of prior punitive damages awards in deciding whether or not to reduce the size of the jury verdict against the defendant. Once again, while this gives trial judges some discretion to minimize the effects of multiple punitive damages awards, it does not *require* them to do so. More importantly, this statute only applies to cases brought in Oregon and does not account for prior settlements that include a punitive damages component. It also fails to provide trial courts with the tools necessary to make these determinations.

While the attempts by these states to alleviate some of the unfairness caused by multiple punitive awards are laudable, they all suffer from the same shortcoming—they have no force and effect outside their own borders.<sup>170</sup> This self-evident truth is uniformly recognized.<sup>171</sup> Indeed, the powerful and influential American Law Institute concluded in a 1991 report that a piecemeal approach might actually be *counterproductive*:

This kind of 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.<sup>172</sup>

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<sup>169</sup> OR. REV. STAT. § 31.730(3) (2004).

<sup>170</sup> See, e.g., *Dunn v. HOVIC*, 1 F.3d 1371, 1386 (3d Cir. 1993) (en banc) (“[B]oth state and federal courts have recognized that no single court can fashion an effective response to the national problem flowing from mass exposure to asbestos products.”), *modified in part*, 13 F.3d 58 (3d Cir. 1993); *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 asbestos exposure and litigation arising from that exposure.”).

<sup>171</sup> See, e.g., *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.”); *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 [the defendant and limit multiple punitive awards], our holding would not be binding on other state courts or federal courts.”); cf. V. Schwartz & Lorber, *Death*, *supra* note 11, at 9 (“[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.” (alterations in original) (quoting *Spaur v. Owens-Corning Fiberglass Corp.*, 510 N.W.2d 854, 865–66 (Iowa 1994))).

<sup>172</sup> ALI REPORT, *supra* note 15, at 261. As discussed *infra*, the ALI released this report in support of a national class action solution to the multiple punitive damages problem. See *infra* note 174.

Accordingly, any solution to this problem must have nationwide effect. Over the past two decades, legal commentators have proposed several solutions to the multiple punishments problem. While none of these proposals has gained much traction, each is briefly discussed below.

### *E. Commentators' Responses to the Problem*

Over the years, numerous commentators have offered a variety of suggestions on how to solve the multiple punishments problem. For a variety of reasons, none has yet been adopted (at least nationally) and none is likely to be adopted in the foreseeable future. What follows is a brief description and critique of these suggested solutions.

*1. Class Actions.*—A number of prominent legal organizations and commentators have argued that the best solution to the multiple punitive damages problem is to utilize class action lawsuits.<sup>173</sup> For example, both the ALI and the ABA have advanced essentially the same proposed class action solution.<sup>174</sup> Both organizations agree that because existing class action rules are not sufficiently flexible to allow for effective use in mass tort cases, new federal legislation would be necessary.<sup>175</sup> The ALI and ABA solutions “encourage the use of court-ordered class actions for trial as well as pre-trial preparation of any common question of law or fact in mass tort cases.”<sup>176</sup>

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<sup>173</sup> See, e.g., AM. COLL. OF TRIAL LAWYERS REPORT, *supra* note 17, at 25–26 (proposing class actions as the remedy to multiple punitive damages awards); Elizabeth J. Cabraser & Thomas M. Sobol, *Equity for the Victims, Equity for the Transgressor: The Classwide Treatment of Punitive Damages Claims*, 74 TUL. L. REV. 2005, 2008–09 (2000) (discussing the use of Federal Rule of Civil Procedure 23(b)(1)(B) as a mandatory class action to handle mass tort lawsuits); Mary J. Davis, *Toward the Proper Role for Mass Tort Class Actions*, 77 OR. L. REV. 157, 158–68 (1998) (advocating class actions to promote fairness, justice, and efficiency); Denmark, *supra* note 6, at 967 (“The problem [of multiple awards] simply disappears if all plaintiffs are joined into one class action.”); Laura J. Hines, *Obstacles to Determining Punitive Damages in Class Actions*, 36 WAKE FOREST L. REV. 889, 890–91 (2001) (urging “courts to approach class claims for punitive damages with great care” to overcome the procedural and substantive obstacles presented by class action for mass tort); Jones, *supra* note 48, at 5 (citing to courts that tried to employ the class action device and using their efforts to help define when class actions can “work to avoid overkill to the defendants and yet provide a fair distribution to the plaintiffs”); Richard A. Nagareda, *Punitive Damage Class Actions and the Baseline of Tort*, 36 WAKE FOREST L. REV. 943, 944, 955–57 (2001) (proposing class actions as the best remedy to the multiple punitive damages problem); Joan Steinman, *Managing Punitive Damages: A Role for Mandatory “Limited Generosity” Classes and Anti-Suit Injunctions?*, 36 WAKE FOREST L. REV. 1043, 1044–49 (2001) (exploring procedural tools of mandatory class actions in mass tort claims); Semra Mesulam, Comment, *Collective Rewards and Limited Punishment: Solving the Punitive Damages Dilemma with Class*, 104 COLUM. L. REV. 1114, 1140–41 (2004) (claiming “punitive damages class is the only mechanism that can, within the constraints of constitutional process, protect the rights and interest of both plaintiffs and defendants”).

<sup>174</sup> See ABA COMMISSION ON MASS TORTS, REVISED FINAL REPORT AND RECOMMENDATIONS OF THE ABA COMMISSION ON MASS TORTS (1989); AMERICAN LAW INST., COMPLEX LITIGATION PROJECT (Tentative Draft No. 2, 1990); ALI REPORT, *supra* note 15, at ch. 13.

<sup>175</sup> See ABA REPORT, *supra* note 8, at 72–73; ALI REPORT, *supra* note 15, at 409–10.

<sup>176</sup> ALI REPORT, *supra* note 15, at 413.

This proposed solution would authorize *mandatory* class actions for all *state and federal* cases arising out of a mass tort claim.<sup>177</sup> There are numerous recognized problems with instituting such mandatory class actions for mass tort cases, including how to deal with conflicting state laws that would otherwise govern the members' claims,<sup>178</sup> how to deal with claims that have not yet accrued at the time of class certification,<sup>179</sup> federalism concerns about the propriety of federal court determination of state law,<sup>180</sup> lack of personal jurisdiction over one or more of the parties,<sup>181</sup> violation of the Anti-Injunction Statute,<sup>182</sup> and the deprivation of litigants' individualized choices and autonomy that otherwise accompany tort litigation. For these reasons and others, as both the ALI and the ABA concede, courts have been consistently hostile to using class action procedures in mass tort cases.<sup>183</sup> There is also little indication that Congress has any interest in modifying the class action rules to implement the proposed solutions.

2. *Judicial Reformation of Common Law.*—Professor Denmark has argued that the multiple punishments problem is one of common law origin and thus can be solved by *judicial* reformation of the common law.<sup>184</sup> Therefore, he argues, a national *legislative* solution is unnecessary to solve the multiple punitive damages problem. After outlining the problem in some detail, Professor Denmark urges courts to take matters into their own hands and *unilaterally* grant defendants a credit for punitive damages that

<sup>177</sup> *Id.* at 414.

<sup>178</sup> *Id.* at 418–19.

<sup>179</sup> See *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1006 (3d Cir. 1986) (explaining that underinclusiveness in a mandatory class action lawsuit would defeat its purpose); Hines, *supra* note 173, at 901 (“The opt-out class action . . . fails to ensure proportionate distribution of punitive damages among similarly situated plaintiffs.”); Meghan A. Crowley, Note, *From Punishment to Annihilation: Engle v. R.J. Reynolds Tobacco Co.—No More Butts—Punitive Damages Have Gone Too Far*, 34 LOY. L.A. L. REV. 1513, 1528–29 (2001) (pointing out that class actions would adversely affect the compensation of plaintiffs not included in the class).

<sup>180</sup> ALI REPORT, *supra* note 15, at 419.

<sup>181</sup> ABA REPORT, *supra* note 8, at 74–75.

<sup>182</sup> *Id.* at 75.

<sup>183</sup> *Id.* at 74; *Dunn v. HOVIC*, 1 F.3d 1371, 1399 (3d Cir. 1993) (en banc) (Weis, J., dissenting) (describing class actions as “an inadequate remedy”), *modified in part*, 13 F.3d 58 (3d Cir. 1993); *In re Temple*, 851 F.2d 1269, 1271–72 (11th Cir. 1988); *Raye v. Medtronic Corp.*, 696 F. Supp. 1273, 1275 (D. Minn. 1988); *Blake v. Chemlawn Servs. Corp.*, No. 86-3413, 1988 WL 6151 (E.D. Pa. Jan. 26, 1988); ALI REPORT, *supra* note 15, at 409 (citing *In re “Agent Orange” Prods. Liab. Litig.*, 818 F.2d 145, 164 (2d Cir. 1987), *aff’d*, 818 F.2d 145 (2d Cir. 1987)); AMERICAN LAW INST., COMPLEX LITIG. PROJECT 34–35 (Prelim. Draft No. 1, Apr. 14, 1988); accord *Irving R. M. Panzer & Thomas Earl Patton, Utilizing the Class Action Device in Mass Tort Litigation*, 21 TORT & INS. L.J. 560, 560–61 (1986) (stating that although numerous judges, lawyers, and scholars think class actions are the solution to mass torts, “in actual practice, the class action device has proved generally unavailing as the mechanism to deal with thousands of separate lawsuits arising out of a common tort”). *But see Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988) (approving class certification of water contamination case).

<sup>184</sup> Denmark, *supra* note 6, at 933.

had previously been paid.<sup>185</sup> While Professor Denmark's judicial solution does take into account both verdicts and settlements,<sup>186</sup> it does not provide trial judges the necessary tools to make the determinations suggested in the article.<sup>187</sup> More importantly, Professor Denmark's solution depends upon trial judges across the country *voluntarily* adopting the same approach to the problem,<sup>188</sup> an eventuality that most certainly will not happen because numerous courts have already disclaimed the authority to make such changes to the common law.<sup>189</sup>

3. *Limit Punitive Awards to Only Private Wrongs.*—A recent article made the argument that the historical practice of awarding punitive damages was limited to redressing *private* wrongs, and hence the defendant could only be punished for harm caused to the individual plaintiff before the court.<sup>190</sup> In this article, Colby maintains that “[h]istorically . . . punitive damages, even when regarded as punishment, were consciously limited to the amount necessary to punish the defendant for the wrong done, and the harm caused, to the individual plaintiff only.”<sup>191</sup> Accordingly, under this approach, the multiple punishments problem would not arise as long as the jury followed the court's admonition to consider only the harm to the plaintiff when determining the appropriate level of punishment. But even Colby acknowledges that it is now generally accepted that punitive damages are modernly awarded to vindicate the *public's* interest in punishing the defendant for the harm (or threatened harm) to the *public at large*.<sup>192</sup> For exam-

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<sup>185</sup> *Id.* at 971–78.

<sup>186</sup> *Id.* at 971–74.

<sup>187</sup> For example, while Professor Denmark declares that “[p]laintiffs’ lawyers would presumably be able to learn in discovery what awards have been paid and will thus be better able to advise clients than they can today,” *id.* at 976, he neither elaborates on how they would learn of these awards nor proposes a mechanism for discovering them. In contrast, the Proposal's creation of a National Punitive Damages Registry and its mandatory notification procedures ensure that the plaintiffs and their counsel will be notified of the prior punitive damages payments.

<sup>188</sup> *See id.* at 977 (“Judges in other jurisdictions that have not yet reached the question will not be bound to follow the setoff approach, but as more precedent accrues, a consensus *may* take shape that a setoff should be the law.”) (emphasis added).

<sup>189</sup> *See, e.g.,* Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 415 (5th Cir. 1986) (“Congress’ silence in the face of a desperate need for federal legislation in the field of asbestos litigation does not authorize the federal judiciary to assume for itself the responsibility for formulating what essentially are legislative solutions.”). *But see* Dunn v. HOVIC, 1 F.3d 1371, 1399 (3d Cir. 1993) (en banc) (Weis, J., dissenting) (“Courts should no longer wait for congressional or legislative action to correct common law errors made by the courts themselves. Mistakes created by courts can be corrected by courts without engaging in judicial activism.”), *modified in part*, 13 F.3d 58 (3d Cir. 1993); G. Schwartz, *Mass Torts*, *supra* note 149, at 423 (1994) (“The state’s own common law could plausibly be interpreted as failing to authorize cumulative punitive damages.”).

<sup>190</sup> *See generally* Colby, *supra* note 2, at 613–28.

<sup>191</sup> *Id.* at 628.

<sup>192</sup> *See id.* at 603–07 (citing, inter alia, *In re* “Agent Orange” Prod. Liab. Litig., 100 F.R.D. 718, 728 (E.D.N.Y. 1983); *see also* Elizabeth J. Cabraser, *Unfinished Business: Reaching the Due Process Limits of Punitive Damages in Tobacco Litigation Through Unitary Classwide Adjudication*, 36 WAKE FOREST

ple, the United States Supreme Court, in striking down the punitive damages award in *Gore*, evaluated whether the full scope of the defendant's conduct was sufficiently reprehensible to justify the punitive damages award, rather than considering only the harm to the individual plaintiff in that case.<sup>193</sup> Therefore, because the modern punitive damages award represents a jury's determination of the appropriate level of punishment warranted by the defendant's conduct as a whole, repeated punishment of the defendant for the same conduct raises serious questions of both public policy and due process.<sup>194</sup>

4. *Other Proposals.*—A handful of other solutions to the multiple punitive damages problem have been proffered over the years, including abolishing punitive damages completely,<sup>195</sup> limiting recovery to the first plaintiff to receive a punitive damages verdict,<sup>196</sup> placing an aggregate ceiling on punitive damages for a single act or course of conduct,<sup>197</sup> creating a products liability insurance pool out of which the defendant's rival's premiums would be paid,<sup>198</sup> simply allowing the defendants to introduce evidence

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L. REV. 979, 981 (2001) ("Punitive damages are not an entitlement of the victims, but of society: a punitive damages award is a civil punishment visited upon defendants to vindicate the public interest in deterrence, and to penalize conduct that violates the social contract and injures society."); Theodore B. Olson & Theodore J. Boutrous, Jr., *Constitutional Restraints on the Doctrine of Punitive Damages*, 17 PEPP. L. REV. 907, 918 (1990) ("[P]unitive damages are imposed for purposes of retribution and deterrence by a system which simultaneously compensates the victim for his injury, and punishes the defendant for the wrong done to society by his conduct."). *But see* Romo v. Ford Motor Co., 6 Cal. Rptr. 3d 793, 799 (Cal. Ct. App. 2003) ("There is a fundamental difference between parking fines and drug forfeitures, on the one hand, and punitive damages, on the other. In the former case, the exactions arise from 'public' wrongs—that is, wrongs against society. In the case of punitive damages, the exaction arises from a 'private' wrong: if there is no wrong resulting in compensable injury to *this* plaintiff, there can be no exaction of punitive damages.")

<sup>193</sup> See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574–80 (1996).

<sup>194</sup> See *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983) ("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*, 818 F.2d 145 (2d Cir. 1987).

<sup>195</sup> See, e.g., James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117 (1984). Given the level of acceptance punitive damages have received in the common law of the vast majority of states, and given the important policies that punitive damages serve, such a proposal is neither likely to expand beyond the few states that have abolished punitive damages, nor prudent in the abstract.

<sup>196</sup> This approach is essentially that utilized by the proposed federal legislation. See V. Schwartz & Lorber, *Death*, *supra* note 11, at 9–17. There are numerous problems with such an approach, including encouraging manipulation of the trial schedule by defendants. See ABA REPORT, *supra* note 8, at 73. For a discussion of the other specific problems with this proposed legislation, see *infra* notes 201–213 and accompanying text.

<sup>197</sup> See, e.g., Owen, *Problems*, *supra* note 6, at 48 (proposing an aggregate cap of the lesser of either five million dollars or five percent of the defendant's net worth). Given the variation in the net worth of the defendants and the level of reprehensibility of the defendant's conduct, this proposal has not gained much support. See, e.g., Seltzer, *supra* note 6, at 55–57 (criticizing and pointing out shortcomings of proposals to place aggregate caps on punitive damages).

<sup>198</sup> See, e.g., Robert H. Arnold, *Punitive Damages in Products Liability Litigation: Redirecting the*

of prior awards to juries in later cases,<sup>199</sup> and entirely eliminating the jury from the determination of punitive damages awards.<sup>200</sup>

Because none of the proposed solutions has gained sufficient support or approval from courts, Congress must act. Moreover, it is in the best interest of all concerned for Congress to pass legislation that not only solves the multiple punitive damages problem in a way that is fair to both plaintiffs and defendants, but that also equips trial courts to substantively and procedurally manage the solution when it is applied to a variety of factual scenarios. What follows is a discussion and critique of federal legislation sponsored by Senator Hatch, and then a Proposal that more effectively solves the multiple punishments problem.

#### F. Failed Federal Legislation

Recognizing the need for a federal legislative solution to this persistent problem, Senators Orrin Hatch and Joseph Lieberman, and former Senator John Danforth, have proposed "The Federal Multiple Punitive Damages Act" ("the Act").<sup>201</sup> A products liability bill was first proposed in 1995, but was not passed.<sup>202</sup> The Act was then reintroduced in 1997, but again failed to pass.<sup>203</sup> Another version of the Act will be again introduced soon with the backing of prominent scholar and lawyer Victor Schwartz and the National Legal Center for the Public Interest.<sup>204</sup>

While the Act would accomplish its goal of severely limiting the instances in which multiple punitive damage awards could be entered against a defendant based upon a single act or course of conduct, it still fails to deal with critical aspects of the problem and thus can be vastly improved both in its effectiveness and in its marketability. This Article's Proposal fills the gaps left by the Act, materially improves the ability of judges to eradicate the multiple punishments problem, minimizes the anticipated objections to eliminating the problem, and better fulfills the policy concerns animating

*Windfall*, 6 J. PRODS. LIAB. 367, 370 (1983).

<sup>199</sup> See, e.g., *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 480 (N.J. 1986); RESTATEMENT (SECOND) OF TORTS § 908 cmt. e (1977); Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173 (1931). Such an approach has been roundly (and appropriately) criticized. See, e.g., *W.R. Grace & Co. v. Waters* 638 So. 2d 502, 506 (Fla. 1994) ("The introduction of such evidence would be extremely prejudicial to a defendant trying to convince a jury that its conduct is worthy of no punishment at all."); Seltzer, *supra* note 6, at 59–60 ("A jury may be influenced unfairly by prior verdicts against the defendant . . ."); *supra* note 168 and accompanying text.

<sup>200</sup> See, e.g., Jane Mallor & Barry Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 663–66 (1980); *supra* note 165 and accompanying text.

<sup>201</sup> See The Multiple Punitive Damages Fairness Act, S. 671, 104th Cong. (1995); V. Schwartz & Lorber, *Death*, *supra* note 11, at 17; see also The Multiple Punitive Damages Fairness Act of 1997, S. 78, 105th Cong. (1997).

<sup>202</sup> S. 671. Different legislation that would have had a similar effect was unsuccessfully introduced in the 1980s. See *supra* note 8.

<sup>203</sup> S. 78.

<sup>204</sup> V. Schwartz & Lorber, *Death*, *supra* note 11, at 1, 17–20.

punitive damages jurisprudence. Before turning to the Proposal, however, the Act in its current form will be analyzed briefly and critiqued.

The current version of the Act contains the following Congressional findings, none of which is particularly controversial:

- (1) Multiple or repetitive imposition of punitive damages for harms arising out of a single act or course of conduct may deprive a defendant of all the assets or insurance coverage of the defendant, and may endanger the ability of claimants to receive compensation for basic out-of-pocket expenses and damages for pain and suffering.
- (2) The detrimental impact of multiple punitive damages exists even in cases that are settled, rather than tried, because the threat of punitive damages being awarded results in a settlement that provides for a higher award amount than would ordinarily be obtained. To the extent 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.
- (3) Fundamental unfairness results when anyone is punished repeatedly for what is essentially the same conduct.
- (4) Federal and State appellate and trial judges, and well-respected commentators, have expressed concern that multiple imposition of punitive damages may violate constitutionally protected rights.
- (5) Multiple imposition of punitive damages may be a significant obstacle to global settlement negotiations in repetitive litigation.
- (6) Limiting the imposition of multiple punitive damages awards would facilitate the resolution of mass tort claims involving thousands of injured claimants.
- (7) Federal and State trial courts have not provided adequate solutions to problems caused by the multiple imposition of punitive damages because of a concern that such courts lack the power or authority to prohibit subsequent awards in other courts.
- (8) Individual State legislatures can create only a partial remedy to address problems caused by the multiple imposition of punitive damages, because each State lacks the power to control the imposition of punitive damages in other States.<sup>205</sup>

In light of these findings, the Act provides the following general rule:

Except as provided in subsection (c), punitive damages shall be prohibited in any civil action in State or Federal court in which such damages are sought

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<sup>205</sup> S. 78, § 3.

against a defendant based on the same act or course of conduct for which punitive damages have already been awarded against such defendant.<sup>206</sup>

Therefore, the general rule expressly prohibits the imposition of multiple punitive damages awards based upon the same act or course of conduct. The Act does, however, contain an exception to this prohibition. This exception applies when the trial court determines “in a pretrial hearing that the claimant will offer new and substantial evidence of previously undiscovered, additional wrongful behavior on the part of the defendant.”<sup>207</sup> A newer (not yet introduced) version of the Multiple Punitive Damages Fairness Act adds an additional exception that would apply when the trial court “determines in a pre-trial hearing that the amount of punitive damages previously imposed [was] insufficient to either punish the defendant’s wrongful conduct or to deter the defendant and others from similar behavior in the future.”<sup>208</sup>

The Act further provides that if the trial court invokes either exception to the general rule, it must (i) make specific factual findings justifying the departure,<sup>209</sup> (ii) reduce the punitive award in the amount(s) the defendant previously paid in punitive damages based upon the same instance or course of conduct,<sup>210</sup> and (iii) prevent the jury from learning of the court’s pretrial determination.<sup>211</sup>

While a step in the right direction, the Act leaves numerous questions unanswered and fails to address important substantive and procedural areas that must be addressed if multiple punitive damages are to be effectively managed or eliminated. For example, why is the trial court making such determinations *before* the trial? More specifically, *how* is the trial court supposed to ascertain *before the evidence is presented* whether the plaintiff is offering or will offer “new and substantial evidence of previously undiscovered, additional wrongful behavior on the part of the defendant?”<sup>212</sup> Likewise, unless the trial court personally presided over the previous trial at which punitive damages were awarded (highly unlikely), how is the trial court supposed to determine whether the evidence offered by the plaintiff in the *current* trial is “new and substantial” or “previously undiscovered?”

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<sup>206</sup> *Id.* § 3(b).

<sup>207</sup> *Id.* § 3(c).

<sup>208</sup> See V. Schwartz & Lorber, *Death*, *supra* note 11, at 23–24 (proposed as section 6(b)(2)).

<sup>209</sup> S. 78, § 3(d)(1).

<sup>210</sup> *Id.* § 3(d)(2).

<sup>211</sup> *Id.* § 3(d)(3).

<sup>212</sup> *Id.* § 3(c). Taken at face value, this seems to direct the trial court to conduct a lengthy pretrial hearing that could involve the introduction of much, if not most, of the plaintiff’s case-in-chief. It would also require the plaintiff to offer at least some (if not all) the evidence relating specifically to punitive damages—evidence that would never even be offered unless the jury first determined that punitive damages were appropriate at all. It would also give the defendant a “free look” at the plaintiff’s punitive damages evidence before the trial started, enabling the defendant to prepare a stronger defense.

Another related set of questions the Act raises is how the trial court is supposed to determine *before the evidence is presented* whether the prior punitive damages award was “insufficient to either punish the defendant’s wrongful conduct or deter the defendant and others from similar behavior in the future.”<sup>213</sup> It seems self-evident that the trial court could only make such a determination *after* evaluating the witnesses and other evidence offered by both the plaintiff and the defendant over the course of the trial.

Yet another critically important substantive question is not even raised by the Act—a question that *must* be answered if a federal legislative solution is to be workable. That question is how to handle settlements that include a punitive damages component. It is uncontroversial to say that one of the primary goals of the judicial system is to encourage parties to resolve their disputes outside of court. By allowing defendants to receive a credit for prior punitive damages paid as a result of the same act or course of conduct *only after going to trial*, the goal of encouraging settlements is severely undermined.

What follows is a Proposal that comprehensively resolves the multiple punishments problem. This Proposal attempts to address and answer all of the questions lingering in the Act and provides substantive fairness for both plaintiffs and defendants, making the Proposal a more politically viable solution than the Act.

## II. A PROPOSAL TO SOLVE THE MULTIPLE PUNISHMENTS PROBLEM

The Proposal this Article offers is not unique in all of its aspects. Rather, it utilizes some aspects of earlier proposals by legal scholars and incorporates a few of the ideas contained both in the Act and in state legislation. The centerpiece of this Proposal and many of its more important components are, however, unique, and if faithfully adopted can provide a readily understood, easily applied, and politically acceptable solution to the multiple punishments problem.

A mass tort hypothetical scenario will assist in the understanding and application of the Proposal. Assume that an established and wealthy drug company (DrugCo) designs, manufactures, and sells a new diet pill that is intended to block carbohydrates. Assume also that in its haste to speed the drug to market, DrugCo falsifies certain test results and elects not to perform other tests that it correctly suspects would reveal that the drug has numerous side effects ranging from temporary nausea all the way to brain tumors in a small percentage of those who ingest the pills. Further assume that after a few months on the market, the side effects become known and the drug is taken off the market. Finally, assume that some time later three plaintiffs separately file suit in three different states alleging that the product is defectively designed and contains inadequate warnings. Assume that

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<sup>213</sup> See V. Schwartz & Lorber, *Death*, *supra* note 11, at 23–24 (proposed as section 6(b)(2)).

Plaintiffs A and C have inoperable brain tumors, while Plaintiff B experiences temporary nausea and sleeplessness for three months.

In this hypothetical scenario, DrugCo has sold a defective product and has engaged in a single course of conduct that would likely rise to the requisite level of reprehensibility in most states to warrant imposition of punitive damages. As the law currently stands in the vast majority of states, three different juries could punish DrugCo through punitive damage awards without any regard for the other cases.<sup>214</sup> In other words, DrugCo could be punished three different times for the same course of conduct. Under the following Proposal, DrugCo would indeed be punished (perhaps even multiple times), but the aggregate punishment would generally not exceed the highest single punitive award entered by a jury.<sup>215</sup> Additionally, the trial courts in the second and third cases would be fully equipped with the necessary information and tools to adequately ascertain whether further punitive damages were appropriate, and would be able to make such a determination without engaging in a lengthy and inefficient pretrial hearing (as would be necessary under the Act). Additionally, under the Proposal, judicial economy would be promoted because DrugCo would have the option of settling one or more of the cases without forfeiting its entitlement to a credit in the amount of punitive damages paid in the settlement. Finally, for DrugCo to benefit from the Proposal, it would have to prepare a Statement detailing its actions and how much it was punished for them. The Statement would then be immediately accessible to the entire Internet-using world.

What follows is a detailed description of the various substantive and procedural components of the Proposal.<sup>216</sup> The Proposal will then be applied to the mass tort hypothetical described above to illustrate how the Proposal works. To further illustrate the flexibility and adaptability of the Proposal to any set of facts, the mass tort hypothetical will be evaluated using four different scenarios that alter the order and manner in which the three plaintiffs' cases against DrugCo are resolved.

#### A. *Post-Judgment Certification*

The first aspect of the Proposal addresses the mechanism for allowing a trial judge to determine whether a punitive damages award has previously been entered against a defendant for the same act or course of conduct as that currently before the court. Recall that under the Act, the trial court is tasked with holding a *pretrial hearing* to determine whether a punitive damages award has been entered against the defendant based upon the same

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<sup>214</sup> See *supra* Part I.D.

<sup>215</sup> As discussed *infra*, this is subject to the caveat that the defendant will generally have to pay fifty percent of the plaintiff's compensatory damages as punitive damages in subsequent cases where the punitive damage award is less than or equal to the aggregate amount already paid. See *infra* Part II.B.4.b.

<sup>216</sup> An Appendix with suggested legislative language is attached at the end of this Article.

conduct.<sup>217</sup> As discussed above, this is both inefficient and unfair.<sup>218</sup> If such were the case, the trial judge would have to examine the evidence admitted at the prior trial and compare it with the evidence not yet admitted in the trial to come. This would (logically) require the trial judge to read much (if not all) of the transcript from the previous trial and perhaps even hear testimony from witnesses in that trial. It would also require the trial judge to preview and prejudge much of the evidence that is yet to be introduced in the case pending before the court. The Proposal streamlines and simplifies this comparative process, rendering it unnecessary for the trial judge either to examine the evidence from the earlier trial or to hold a pretrial hearing at all.

Under the Proposal, a defendant who legitimately fears multiple punitive damages awards would simply have to move the court for a certification order *after* judgment was entered in the first case in which punitive damages were paid.<sup>219</sup> This motion would come on the heels of one of two possible events—a punitive damages verdict or a punitive damages settlement.

*1. Punitive Damages Verdict.*—In the usual case, after a verdict containing an award of punitive damages was entered against a defendant, that defendant would be entitled to file a motion to certify a statement detailing the basis for and amount of the punitive damages award. This would be called a Prior Punitive Damages Statement (hereinafter “Statement”). The Statement would need to contain a detailed description of the act or course of conduct upon which the punitive damages verdict was based. Because the defendant would later provide this certified Statement to subsequent trial judges who would, in turn, evaluate whether the defendant carried its burden of proving that the conduct in the later cases had been punished previously, the defendant would have a strong incentive to detail the conduct as meticulously as possible. The plaintiff in the first case would be entitled to be heard on the defendant’s motion, but only to the extent of offering clarification or supplementation of the defendant’s Statement; the plaintiff could not oppose the certification of the Statement. The trial court would ultimately determine the precise wording of the Statement after considering the defendant’s motion and, if submitted, the plaintiff’s comments. This Statement would be similar in form to trial courts’ findings of fact and conclusions of law routinely prepared by the parties and edited by the trial

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<sup>217</sup> See *supra* notes 206–208 and accompanying text.

<sup>218</sup> See *supra* notes 212–213 and accompanying text.

<sup>219</sup> Under the Proposal, it would ordinarily be in the defendant’s best interest to seek a certified order in conjunction with the first case in which punitive damages were paid. If, however, the defendant did not decide that the risks inherent in seeking a certified order outweighed the benefits of such an order until a second or third case in which punitive damages were awarded, the defendant would certainly be entitled to move for such an order at that point. In such a case, however, the defendant would *not* receive a credit for any punitive damages paid prior to that time.

court. Because the trial court would need to scrutinize the Statement to ensure that it accurately reflected the evidence introduced against the defendant in the trial, the defendant would be required to notify the trial judge before the trial began that, in the event a punitive damages award was entered against it, the defendant would be moving for an order certifying a Prior Punitive Damages Statement. Additionally, the defendant would have thirty days after final judgment was entered to prepare the Statement and move for an order certifying the Statement.

2. *Punitive Damages Settlement.*—The other possible event that could precede a defendant moving the court to certify a Statement is a settlement of the underlying case. If a defendant settles a case in an amount that takes into account a possible punitive damages verdict were the case to be tried, and if that defendant wants to have the portion of the settlement attributable to punitive damages taken into account in subsequent cases, the defendant would have to structure the settlement in such a way that expressly delineates the amount of the settlement apportioned to punitive damages.<sup>220</sup> The settling parties would then have to jointly move the trial court for an order certifying the settlement. This joint motion would need to include the same Statement describing in detail the conduct at issue as would be required in the case of a motion for a certification order following a punitive damages verdict. Such a joint motion by the settling parties would be similar to good faith settlement motions routinely filed in jurisdictions that retain joint and several liability.<sup>221</sup> In those motions, the settling parties jointly move the court for an order declaring that their settlement was made in good faith and, in some jurisdictions, that it represents an

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<sup>220</sup> *Accord* *Dunn v. HOVIC*, 1 F.3d 1371, 1390 (3d Cir. 1993) (en banc) (“[I]t is far from clear that sums paid in private settlements may validly be counted in determining when state-compelled punitive damages awards exceed the limits of the Fourteenth Amendment.” The failure to designate particular amounts of the settlements as representing punitive damages makes inclusion of these amounts problematic.” (quoting *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 282 (2d Cir. 1990), *modified in part*, 13 F.3d 58 (3d Cir. 1993))).

<sup>221</sup> *See generally* *Tech-Bilt, Inc. v. Woodward-Clyde & Assocs.*, 698 P.2d 159, 163 (Cal. 1985) (explaining that the purpose of requiring good faith settlement is to balance the objectives of contribution, i.e., “equitable sharing of costs among the parties at fault, and . . . encouragement of settlements”); JUSTICE EILEEN C. MOORE & MICHAEL PAUL THOMAS, CALIFORNIA CIVIL PRACTICE § 27.43 (2004) [hereinafter CALIFORNIA CIVIL PRACTICE] (explaining that when parties agree to settle and move the court to approve the settlement as made in good faith, the good faith settlement frees the settling defendant from further liability); JACOB A. STEIN, 3 STEIN ON PERSONAL INJURY DAMAGES § 14.36 (3d ed. 2004) [hereinafter STEIN ON PERSONAL INJURY DAMAGES] (describing the importance and mechanism of good faith settlements as they have the power to relieve defendant from obligations of contribution to nonsettling parties); Richard A. Michael, *Joint Liability: Should It Be Reformed or Abolished?—The Illinois Experience*, 27 LOY. U. CHI. L.J. 867, 876, 879–81 (1996) (describing the Illinois contribution and good faith settlement procedure and also discussing how “good faith” is defined); Daniel Waltz, Comment, *Total Equitable Indemnity Under Comparative Negligence: Anomaly or Necessity*, 74 CAL. L. REV. 1057, 1057–58 (1986) (explaining the purpose of good faith settlements and the case law in California defining good faith and the effect of these settlements as they relieve defendants from further liability).

amount that is within the “reasonable range” of what a jury verdict would likely be if the case were taken to trial.<sup>222</sup> In such cases, plaintiffs are willing participants in these motions because the settlement is almost always conditioned upon the court granting the motion, which has the effect of cutting off any contribution or indemnity rights against the settling defendant that nonsettling defendants might otherwise retain.<sup>223</sup> Likewise, the plaintiff in a punitive damages case would undoubtedly be a willing participant in the motion to certify the Statement because the defendant would ordinarily condition the settlement upon the court’s certification of the Statement.

As in good faith settlement proceedings, there would always be the prospect of collusion lurking in the background.<sup>224</sup> In the good faith settlement context, trial judges in many jurisdictions may not grant the good faith settlement motion (thus extinguishing the nonsettling parties’ contribution or indemnity rights) if the court finds that the settling parties are acting collusively.<sup>225</sup> In other jurisdictions, the trial judges may grant the motion only if the settlement amount falls within the “reasonable range” of what a jury verdict against the settling defendant would likely be if the case proceeded

<sup>222</sup> See, e.g., *Tech-Bilt, Inc.*, 698 P.2d at 167 (adopting the “reasonable range” test in determining the viability of an alleged good faith settlement); *Plumbers Specialty Supply Co. v. Enter. Prods. Co.*, 632 P.2d 752, 758 (N.M. Ct. App. 1981) (explaining that proving that a settlement was reasonable involves comparing the amount of the settlement to the “probable amount of a judgment if the [claimant] were to prevail at trial” (citation omitted) (alteration in original)); STEIN ON PERSONAL INJURY DAMAGES, *supra* note 221, § 14.36 (describing the “reasonable range” test); Waltz, *supra* note 221, at 1059 (“In *Tech-Bilt, Inc. v. Woodward-Clyde & Assocs.*, the court embraced a ‘reasonable range’ standard under which a settlement, to be declared in good faith, must approximate the amount of the settling defendant’s estimated liability. This test reduces the possibility that nonsettling defendants will remain exposed to liability inequitably disproportionate to their fault because the liability of these defendants is reduced by the amount of any previous equitable settlement.” (emphasis added)).

<sup>223</sup> See, e.g., CALIFORNIA CIVIL PRACTICE, *supra* note 221, § 27.43 (explaining that when parties agree to settle and move the court to approve the settlement as made in good faith, the good faith settlement frees the settling defendant from further liability); STEIN ON PERSONAL INJURY DAMAGES, *supra* note 221, § 14.36 (describing the importance and mechanism of good faith settlements as they have the power to relieve defendants from obligations of contribution to nonsettling parties).

<sup>224</sup> See, e.g., *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 213 n.16 (1994) (cautioning that the “judge in a good-faith hearing should . . . look for ‘collusion, fraud, dishonesty, and other wrongful conduct.’” (citing *Noyes v. Raymond*, 548 N.E.2d 196, 199 (Mass. App. Ct. 1990))); Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045, 1048 (1995) (discussing collusion in settlements of asbestos claims); Nicholas B. Clifford, Jr., Note, *Koticki v. Cyclops Welding Corp.: The Efficacy of a Limited Contribution Rule and Its Effect on Good Faith Settlements*, 68 CHI.-KENT L. REV. 479, 506 (1992) (explaining that in Illinois good faith settlements are challenged under six criteria including the existence of collusion); Douglas Lee, Note, *McDermott, Inc. v. AmClyde: Arkansas’s Wake-Up Call in Accounting for Settlements in Multi-Defendant Litigation?*, 48 ARK. L. REV. 1027, 1048 (1995) (explaining that when evaluating settlements “opportunities for collusion between the plaintiff and settling defendants” must be evaluated).

<sup>225</sup> See, e.g., *Tech-Bilt, Inc.*, 698 P.2d at 166–67 (stating that the existence of collusion in settlement is enough for a court to determine that the settlement was not made in good faith); *Blagg v. Ill. F.W.D. Truck and Equip. Co.*, 572 N.E.2d 920, 923–24 (Ill. 1991) (holding that a settlement was not in good faith when it was manipulated between a man’s claim and his spouse’s loss of consortium claim to deprive the nonsettling employer of his worker’s compensation lien).

to trial.<sup>226</sup> This is true because the nonsettling parties are entitled to a dollar-for-dollar credit against any verdict later obtained against them.<sup>227</sup>

In the multiple punitive damages context, the prospect of collusion would also be present. This is undoubtedly true because the defendant would be entitled to a dollar-for-dollar credit against future punitive damage awards in the amount of the settlement with the first plaintiff. This collusion would likely manifest itself in an unreasonably high percentage of the total settlement amount being allocated to the punitive damages portion of the settlement (as opposed to the amount allocated to compensatory damages). To offset this potential collusion, three safeguards would need to be inserted into the process. First, in no event would the settling parties be permitted to allocate more than one-half of the total settlement proceeds to punitive damages. This limitation derives from language in the recent Supreme Court pronouncement in *State Farm*.<sup>228</sup> While the defendant would understandably be advocating for as much of the settlement amount as possible to be allocated to punitive damages, the plaintiff would have the opposite incentive because, while punitive damages are taxable, compensatory damages are not.<sup>229</sup> The second safeguard would be the requirement that the trial court determine that the allocation percentages were not the product of collusion. This would involve the trial court facially evaluating the conduct described in the Statement to determine whether there was any evidence that allocating any of the settlement proceeds to punitive damages was unjustified. The third safeguard would be a requirement that the settling parties certify under penalty of perjury that the full amount of the award was

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<sup>226</sup> See *supra* note 222.

<sup>227</sup> See, e.g., ARIZ. REV. STAT. § 12-2504(1) (2003) (stating that a good faith settlement “does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant or in the amount of the consideration paid for it, whichever is the greater”); CAL. CIV. PROC. CODE § 877(a) (West Supp. 2005) (when good faith settlements are made and approved “[i]t shall not discharge any other such party from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it whichever is the greater”).

<sup>228</sup> *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). While the Court in *State Farm* set a presumptive outer limit of the ratio between punitive and compensatory awards at nine to one, the Court also indicated that a punitive damages award *equal* to the compensatory award may in some cases “reach the outermost limit of the due process guarantee.” *Id.* Accordingly, while permitting the settling parties to allocate up to ninety percent of the total settlement proceeds to the punitive damages component of the settlement would be a defensible upper limit, it would allow much more opportunity for collusive manipulation than would the upper limit of fifty percent contained in this Proposal.

<sup>229</sup> See 26 U.S.C. § 104(a) (2000) (“Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 . . . for any prior taxable year, gross income does not include . . . (2) the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness”); see also Denmark, *supra* note 6, at 973 (“[P]ersonal physical injury awards are non-taxable while punitive awards are taxed. Thus a physically injured plaintiff will wish to designate the entire amount of a settlement to compensation.”).

actually going to be paid in cash (or cash equivalents) within the next thirty days. This would prevent the defendant from diminishing the actual value of the payment by paying the settlement out over time or by paying the settlement amount through rebates or coupons or any other nominally valuable form of payment.

To summarize the first aspect of this Article's proposal, when a defendant facing the possibility of multiple punitive damages based upon a single act or course of conduct wants to receive a credit for a payment of punitive damages, it must obtain an order certifying a Prior Punitive Damages Statement from the trial court assigned to the case pursuant to which the punitive damages were paid. The defendant could seek this certification after either a punitive damages verdict or after a settlement that expressly delineates the amount being allocated to punitive damages. As part of the request for certification, the defendant would be required to provide a detailed description in the Statement of the act or course of conduct for which the defendant was being punished.

### *B. National Punitive Damages Registry*

The second aspect of the Proposal for solving the multiple punishments problem is the creation of a National Punitive Damages Registry (hereinafter "Registry").

*1. Creation and Funding of the Registry.*—The Registry would be created and initially funded by the federal legislation that incorporates this Article's Proposal.<sup>230</sup> After the first year, the Registry would be funded by the registration fees paid by those filing Statements with the Registry. The registration fee would be set at one percent of the award sought to be registered.<sup>231</sup> Accordingly, a defendant who wants to register a Statement that reflects a punitive damages payment of \$1 million would have to pay a filing fee of \$10,000.

*2. Purpose and Function of the Registry.*—The purpose and function of the Registry would be to serve as the central data center for the registration and posting of all Statements certified by trial courts and filed with the Registry. The Registry would have no decisionmaking authority or any other discretionary functions; its sole function would be administrative in nature. When a certified Statement arrived at the Registry, it would be cata-

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<sup>230</sup> Congress would undoubtedly be constitutionally authorized to pass this legislation pursuant to its Commerce Clause powers. See U.S. CONST. art. I, § 8, cl. 3 (giving Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"). Proposed language for such legislation is attached as an Appendix to this Article.

<sup>231</sup> This amount would be sufficient to pay the relatively minimal costs associated with administering the Registry. If not, or if a lesser amount would be sufficient, the registration amount could be increased (or decreased) or the Registry could be funded by Congress in some other manner.

logged and scanned onto the Registry's website, which would be designed to facilitate easily cross-referenced access by any Internet user.<sup>232</sup>

3. *Procedures for Registering Prior Punitive Damage Payment.*—To effectively register a punitive damage payment with the Registry, the defendant would need to file with the Registry a duly authorized certification order from a state or federal trial court. This certification order would contain the Statement that detailed the act or course of conduct that led to the punitive damages payment by the defendant. The Statement would also need to state the exact amount of punitive damages paid.<sup>233</sup> To be effective, the certification order would have to be filed with the Registry within sixty days of the entry of the certification order.<sup>234</sup>

4. *Effects of Registration of Prior Punitive Damages Statement.*—

a. *Immediate Internet publication.*—Once a defendant had properly registered a Statement with the Registry, it would be immediately accessible on the Internet. Any current or potential plaintiffs and their counsel would have access to the Statement to help them evaluate whether to proceed with their claims against the defendant. More importantly, the local and national media would have immediate access to the Statement and could further publicize the defendant's conduct to the general public. Additionally, the defendant's competitors could use the information contained in the Statement for whatever purposes they deemed appropriate.<sup>235</sup>

b. *Credit in amount recorded in statement.*—Registration of the duly certified Statement would also entitle the registering defendant to a credit against future punitive damages in the amount reflected in the Statement, but only for the same act or course of conduct detailed in the Statement. In order for a defendant to be entitled to such a credit, the defendant

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<sup>232</sup> In order to maximize effectiveness, the Registry would need to allow for searches at least by case name, party name, date, and subject matter. The Registry would operate under the auspices of the Department of Justice.

<sup>233</sup> Such a requirement would fill a gap left by current law in helping defendants prove prior punitive damages payments. See *Dunn v. HOVIC*, 1 F.3d 1371, 1389 (3d Cir. 1993) (en banc) (“[T]he factual record made by the defendant must, as a prerequisite to relief on due process grounds, include evidence demonstrating the amount of punitive damages it has actually paid in the past.”), *modified in part*, 13 F.3d 58 (3d Cir. 1993).

<sup>234</sup> This amount of time should be sufficient for the defendant to evaluate whether the monetary cost of registering the Statement (one percent of the award) plus the nonmonetary costs of such registration (e.g., negative publicity), see *infra* note 296, are more than offset by the credit against future punitive awards the defendant would receive as a result of registering the Statement.

<sup>235</sup> It bears repeating here that it is entirely up to the defendant who has paid punitive damages pursuant to either a verdict or a settlement to elect to file a Statement with the Registry, or to elect not to do so. This decision will have to be made on a case-by-case basis by a defendant after weighing the costs and benefits of its decision. To be entitled to a future credit, however, a defendant must file a Statement with the Registry and should not be heard to complain about the potential unfairness of multiple punitive damages awards if it foregoes the opportunity to register a Statement.

would have to do several things. First, the defendant would have to notify, within thirty days of registering the Statement, all plaintiffs who had sued the defendant arising out of what the defendant contends is the same act or course of conduct detailed in the Statement.<sup>236</sup> In the event a complaint was filed against the defendant after the Statement was registered, the defendant would have thirty days after filing its answer to that complaint to provide such notification. This notification would allow plaintiffs and their counsel to better evaluate the value of their cases, taking into account the likelihood that punitive damages would either be unavailable or limited. Second, the defendant would have to notify within thirty days of registering the Statement all courts before whom such claims are then pending of its intention to rely upon the Statement in the event punitive damages are awarded in those cases.<sup>237</sup> This notification would put the trial court on notice that, at the end of the case, the court might be called upon to decide whether or not the conduct detailed in the Statement was the same conduct at issue in the case pending before the court.

In the event that a plaintiff proceeded to trial in a case the defendant contended was covered by a Statement, the case would proceed without alteration of the normal trial process. As in the usual case, the jury would hear evidence of the defendant's conduct and decide whether or not an award of punitive damages was appropriate and, if so, in what amount. In making this determination, the jury would *not* be informed in any manner of the potential credit the defendant might receive for a prior award.<sup>238</sup> This, of course, would minimize the danger of the jury artificially inflating its punitive damages verdict in order to ensure that the defendant had to pay more money than it had already paid for its conduct.

Assuming the jury did award the plaintiff punitive damages, in order for the defendant to be entitled to a credit in the amount contained in the Statement, the defendant would have to file a motion for a credit within thirty days of entry of the judgment. Pursuant to that motion, the defendant would bear the burden of proving that it notified both the plaintiff and the court of the Statement within thirty days of its registration of the Statement or within thirty days of filing its answer to plaintiff's complaint, whichever is later. More importantly, the defendant would also bear the burden of proving *by clear and convincing* evidence that this award is based upon the same act or course of conduct as that described in a duly registered Statement.<sup>239</sup> If the defendant failed to prove either proper notice or that the

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<sup>236</sup> Failure to notify a plaintiff (without good cause shown) would forfeit the defendant's right to seek a credit against any punitive damages award later entered in favor of the plaintiff to whom notice was not properly given.

<sup>237</sup> With respect to later-filed cases, the defendant would have thirty days after its answer to notify the trial court of its intent to seek a credit in that case based upon a registered Statement.

<sup>238</sup> This approach is the same as under the Act. See The Multiple Punitive Damages Fairness Act of 1997, S. 78, 105th Cong. § 3(d)(3) (1997).

<sup>239</sup> In determining whether the same act or course of conduct was at issue, the trial court could use

same conduct was at issue, the motion would fail and the judgment including the punitive damages would stand.<sup>240</sup>

If, however, the defendant proved that it provided proper notice and that the same conduct was at issue, then the defendant would be entitled to a dollar-for-dollar credit in the amount reflected in the Statement. If the punitive damages award in the instant case exceeded the amount reflected in the Statement, the defendant would be required to pay as punitive damages the *greater* of either (i) the difference between the actual punitive damages award and the amount reflected in the Statement,<sup>241</sup> or (ii) the *lesser* of the actual punitive damages awarded by the jury *or* an additional fifty percent of the compensatory damages awarded.<sup>242</sup> If, however, the punitive damages award was equal to or less than the amount reflected in the Statement, the plaintiff would receive as punitive damages the *lesser* of (i) the actual punitive damages award, or (ii) an additional fifty percent of the compensatory damages awarded by the jury to the plaintiff.

The Proposal's conditional inclusion of an award equal to fifty percent of the plaintiff's compensatory damages differs from the approach taken in the Act or in any state statute. The basis for this inclusion is a consideration of one of the justifications for punitive damages—offsetting the plaintiff's

the same or similar standard as it applies when deciding whether a counterclaim arises out of a common nucleus of operative facts and is therefore mandatory. *See* 28 U.S.C. § 1367 (2000) (guiding federal statute codifying supplemental jurisdiction stating that “the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution”). This statute's concept of “the same case or controversy” was interpreted by the Supreme Court in *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966). The Court held that pendent jurisdiction exists when the court has jurisdiction over the case (either under 28 U.S.C. § 1331 or 28 U.S.C. § 1332) and the state-law claim “derive[s] from a common nucleus of operative facts.” *Id.* at 725.

<sup>240</sup> If the motion failed because of inadequate notice, the defendant would be entitled to move the court to certify a Modified Prior Punitive Damages Statement that gave the defendant an additional credit in the amount of the award. *See infra* Part II.B.5. If, however, the motion failed because the defendant failed to prove the award was based upon the same conduct as that reflected in the Statement, the defendant would then file another Prior Punitive Damages Statement covering this new conduct.

<sup>241</sup> This is calculated by subtracting the amount reflected in the Prior Punitive Damages Statement from the punitive damages amount awarded by the jury in the instant case. Therefore, if the Prior Punitive Damages Statement reflected an earlier payment of \$10,000 and the current punitive award is in the amount of \$15,000, then the defendant will be required to pay \$5000 as punitive damages, having received a \$10,000 credit for the earlier payment.

<sup>242</sup> This is calculated by comparing the punitive damages award in the instant case with the compensatory damages award in the instant case. If the punitive damages award does not exceed one-half of the compensatory award, then the plaintiff receives an amount equal to the punitive damages award. If, however, the punitive damages award does exceed one-half of the compensatory damages award, then the plaintiff will receive one-half of the compensatory damages award. Therefore, if the punitive and compensatory damages awarded by the jury are \$10,000 and \$20,000 respectively, then the plaintiff will receive \$10,000. If, however, the punitive damage award is less than \$10,000, then the plaintiff will receive only the amount of such punitive award. If, on the other hand, the punitive award is greater than \$10,000, then the plaintiff will still only receive \$10,000, as that amount represents the lesser of either the punitive damages award or one-half of the compensatory damages award.

attorneys' fees.<sup>243</sup> While discussed more fully below, many courts and commentators argue that punitive damages are justified at least in part because they help pay the plaintiff's attorneys' fees incurred in bringing the case to trial and in bringing the defendant's reprehensible conduct to light.<sup>244</sup> Assuming this to be both true and sufficiently compelling, a persuasive case could be made for including within the Proposal a provision that expressly grants to plaintiffs who prevail on claims for punitive damages their reasonable attorneys' fees, at least when such fees are greater than the amount the plaintiffs would otherwise collect in attorneys' fees under the Proposal after accounting for the defendant's credit.<sup>245</sup> Such a provision was considered, but for several reasons, it was ultimately rejected in favor of using a figure of fifty percent of the compensatory damages as a benchmark.

First, if plaintiffs were allowed to recover their reasonable attorneys' fees in the event the punitive damages amount did not exceed the credit to which the defendant was entitled, there would exist too much incentive for attorneys to bring claims with only nominal compensatory damages in order to collect attorneys' fees. This scenario of allowing the tail to wag the dog is bad policy and would create even more litigation.<sup>246</sup>

Second, by setting the amount at fifty percent of the compensatory damages, the Proposal does a fairly good job of roughly approximating what the plaintiff expected to pay and what the plaintiff's counsel expected to earn in attorneys' fees from the outset. This is true because the standard contingency fee provides for the plaintiff's counsel to receive one-third of the amount recovered in the case. Awarding as punitive damages an amount equal to fifty percent of the plaintiff's compensatory damages, then, effectively awards plaintiffs an amount equal to their expected attorneys' fees with which to pay their attorneys, while allowing them to keep all of their compensatory damages.<sup>247</sup> For example, if a jury awarded a plaintiff \$50,000 in compensatory damages and \$100,000 in punitive damages, and

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<sup>243</sup> See *infra* note 302 and accompanying text.

<sup>244</sup> See *id.*

<sup>245</sup> Cf. Richard W. Murphy, *Superbifurcation: Making Room for State Prosecution in the Punitive Damages Process*, 76 N.C. L. REV. 463 (1998) (arguing that plaintiffs who prove liability for punitive damages should be allowed to recover reasonable attorney's fees, but nothing else).

<sup>246</sup> Such a skewed incentive system is causing California no small amount of trouble in the context of claims brought pursuant to section 17,200 of its Business and Professions Code. CAL. BUS. & PROF. CODE §§ 17,200–17,209 (West 1997 & Supp. 2005) (pertaining to unfair competition and prohibited activities involving fraudulent business activities and any other deceptive or misleading advertising, violation of which allows the plaintiff to recover attorneys' fees pursuant to section 17,500 of the Business and Professions Code). See Joshua D. Taylor, *Why the Increasing Role of Public Policy in California's Unfair Competition Law Is a Slippery Step in the Wrong Direction*, 52 HASTINGS L.J. 1131, 1131 (2001) (describing the ease of finding attorneys to represent claims pertaining to section 17,200 of California's Business and Professions Code and observing that due to "its grant of attorney's fees for successful suits . . . this statute has become one of the favorites of the plaintiff's bar").

<sup>247</sup> See *infra* note 308 and accompanying text.

if the defendant had a credit equal to or greater than \$100,000, then the plaintiff would receive an additional \$25,000 in punitive damages, which would represent fifty percent of the compensatory damages award. Under a standard contingency fee agreement, the plaintiff would pay her attorney one-third of the total recovery—\$25,000—which is the exact amount granted to the plaintiff as punitive damages by the Proposal. Accordingly, the plaintiff would be entitled to keep all of the compensatory damages awarded by the jury—\$50,000. This is, of course, qualified by the fact that the plaintiff would still have to pay the costs incurred in the litigation, but this would always be the case.<sup>248</sup>

The third justification for the Proposal's election of fifty percent of compensatory damages rather than reasonable attorney's fees is much more practical than theoretical. Plaintiff's counsel who typically work under contingency fee agreements are unaccustomed to keeping careful track of the time they spend on a case. They often also do not have standard hourly rates at which they bill clients. Accordingly, awarding reasonable attorneys' fees would inject more uncertainty and less precision into the calculation and would create needless additional work for trial courts who would otherwise be tasked with evaluating the request for, and inevitable opposition to, reasonable attorneys' fees and then determining the appropriate amount. The Proposal's approach is easy to calculate and even easier to administer and does not require any additional filings by the parties or hearings by the courts.

*c. Admissibility of prior punitive damages statement.*—The Statement would not be admissible in any court for any reason other than for the purpose of determining whether a defendant was entitled to a credit for a previous payment of punitive damages and the amount of such credit. Likewise, the jury would not be informed in any manner of the defendant's possible entitlement to a credit for previously paying punitive damages for the same act or course of conduct.<sup>249</sup>

*d. Exceptions to rule allowing credit in amount of statement.*—Unlike under the Act, there are *no* exceptions or qualifiers that are necessary in the Proposal. Under the Act, the first punitive damages award is the only one allowed unless the trial judge determines after a pretrial hearing in a later case that a further award is warranted by one of the Act's two exceptions to its general rule. Accordingly, further punitive damages are authorized if the trial judge determines that (i) the plaintiff will introduce new and substantial evidence of defendant's conduct, or (ii) the punitive damages award was insufficiently large to adequately punish and deter the defen-

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<sup>248</sup> Perhaps plaintiffs should also be entitled to collect litigation costs if they prove entitlement to punitive damages, though that is not part of this Article's Proposal.

<sup>249</sup> See *supra* note 168.

dant.<sup>250</sup> Once again, how a trial judge could make such a determination *before* trial and without the benefit of presiding over the prior trial at which punitive damages were assessed is a mystery.

The structure of the Proposal makes both exceptions unnecessary. If a plaintiff in a later trial introduced new and substantial evidence of the defendant's conduct, then the plaintiff might very well receive the benefit of this new evidence in the form of a punitive damages verdict that exceeded the first verdict, i.e., the amount reflected in the Statement. In such a case, the defendant would be entitled to a credit in the amount reflected in the Statement, but would have to pay the additional amount. Likewise, if the size of the first punitive damages award was insufficiently large to adequately punish the defendant's conduct, then a later jury would presumably render a larger verdict in a later plaintiff's favor. In such a case, the defendant would again receive a credit in the amount reflected in the Statement, but would have to pay an additional amount equal to the difference between the verdict and the amount reflected in the Statement. In either case, the defendant would ultimately have paid as punitive damages an amount equal to the highest level of punishment any single jury deemed warranted by the defendant's conduct, and highly discretionary and inefficient pretrial hearings will have been avoided.

5. *Registration Modifications.*—After a defendant who had previously registered a Statement was required to pay an additional amount following a later punitive damages verdict or settlement, that defendant would be entitled to move the trial court presiding over the subsequent case for an order certifying a Modified Prior Punitive Damages Statement (hereinafter “Modified Statement”). This motion would be subject to the same procedural requirements as if the defendant had not previously obtained a certified Statement, including the requirement that such a motion be filed within thirty days of a final judgment and that such motion describe in detail the conduct for which the defendant was being punished. The defendant's Modified Statement would, however, add any additional details not contained in the original Statement and would add to the amount contained in the original Statement the amount of the subsequent payment made in conjunction with the case before the court. The Modified Statement would have to include, of course, a description of *both* cases for which punitive damages were paid.<sup>251</sup> The trial court would then evaluate defendant's motion and, once approved, would enter an order certifying the Modified Statement. At that point, the defendant would be entitled to register the Modified Statement with the Registry within sixty days, which would then

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<sup>250</sup> See *supra* notes 207–208 and accompanying text.

<sup>251</sup> In the event the defendant duly filed multiple Modified Statements as the result of a series of punitive damages awards or settlements, each subsequent Modified Statement would need to describe all prior cases in which punitive damages had been paid for which defendant was seeking a credit.

supercede the original Statement.<sup>252</sup> The registration of the Modified Statement would then trigger the defendant's duty to notify within thirty days all plaintiffs with suits pending against the defendant relating to the conduct described in the Modified Statement, and all courts in which such claims are pending.<sup>253</sup> As a consequence, the defendant would, where appropriate, thereafter be entitled to a credit in the amount contained in the Modified Statement.

6. *Applying the Proposal to a Mass Tort Hypothetical Case.*—

Returning to the hypothetical mass tort case described above and analyzing how the Proposal works when applied to such a case will enhance the reader's understanding of the Proposal. Recall that DrugCo has sold a defective weight loss drug that has caused one plaintiff to experience temporary nausea, but has caused two other plaintiffs to have inoperable brain tumors.<sup>254</sup> Recall also that all three cases are pending in different state courts. Under the law as it currently stands in most jurisdictions, all three plaintiffs could recover against DrugCo both compensatory and punitive damages without regard for the other cases. Under the Act, however, after one of the three plaintiffs prevails in a trial, a later trial court will have to conduct a *pretrial* hearing to determine if the prior (out-of-state) case arose from the same act or course of conduct as the case the trial court has yet to hear, and, if so, whether (i) the evidence not yet offered substantially differs from the evidence presented in the prior case over which the judge did not preside, or (ii) the evidence not yet offered warrants a punitive damages award in excess of an award given in a case over which the judge did not preside.<sup>255</sup> In contrast, under the Proposal, no such pretrial hearings would be necessary.<sup>256</sup> Indeed, the hypothetical case can be analyzed under a variety of scenarios, demonstrating the ease of the Proposal's application and the consistency and fairness of the results.

a. *Scenario One.*—Assume that DrugCo decides to take its chances in a trial and that the first plaintiff to go to trial is Plaintiff A. Plaintiff A has an inoperable brain tumor and has thoroughly prepared his case for trial against DrugCo. This preparation includes assembling all documents unfavorable to DrugCo and successfully deposing all of DrugCo's employees who had knowledge of DrugCo's conduct. Recognizing that other similar claims are pending against it based upon the same

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<sup>252</sup> The registration fee for this Modified Statement would be one percent of the *additional* amount of punitive damages reflected in the Modified Statement, rather than one percent of the *full* amount reflected in the Modified Statement.

<sup>253</sup> As with the original Statement, a defendant would also be required to notify later-filing plaintiffs (and the courts where such complaints were filed) of the Modified Statement within thirty days of answering the complaint.

<sup>254</sup> See *supra* Part II.

<sup>255</sup> See The Multiple Punitive Damages Fairness Act of 1997, S. 78, 105th Cong. § 3(c) (1997).

<sup>256</sup> See *supra* Part II.B.4.d.

conduct, DrugCo notifies the trial court before trial that if a punitive damages award is entered against it, DrugCo will be moving the court after trial for an order certifying a Prior Punitive Damages Statement. Assume that after a trial on the merits, the jury returns a verdict in Plaintiff A's favor, awarding compensatory damages of \$1 million and punitive damages of \$5 million. Consequently, DrugCo prepares and files with the court within thirty days a Prior Punitive Damages Statement detailing the conduct for which it was punished. Plaintiff A then has an opportunity to comment on DrugCo's Statement. Thereafter, the trial court enters an order certifying the Statement, which includes a detailed description of the conduct and the amount of the punitive damages award entered. Within sixty days, DrugCo files the Statement with the Registry and within thirty days of filing with the Registry, DrugCo provides Plaintiffs B and C with a copy of the Statement filed with the Registry and notifies the plaintiffs and the trial courts presiding over the plaintiffs' cases of DrugCo's intent to move the court for a credit in the event punitive damages are awarded in those cases.

Assume that the second case to reach trial is brought by Plaintiff B, who experienced temporary nausea over the course of three months each time he took a pill. Assume also that Plaintiff B has prepared well for trial, gathering sufficient documents and testimony to prevail at trial on both compensatory and punitive damages. The jury awards him \$50,000 in compensatory damages and \$400,000 in punitive damages. DrugCo would then be able to file a motion with the trial court within thirty days of the final judgment seeking to gain the benefits of having filed a Statement with the Registry and of having notified both Plaintiff B and the trial court of DrugCo's intent to rely upon the Statement. DrugCo would have the burden of proving to the trial court by clear and convincing evidence that the punitive damages verdict in favor of Plaintiff B was based upon the same act or course of conduct described in the Statement filed with the Registry. Because the conduct at issue *is* the same, DrugCo would prevail on its motion. As a consequence, Plaintiff B would receive the \$50,000 in compensatory damages awarded by the jury and an additional \$25,000 as punitive damages (rather than the \$400,000 awarded by the jury). This reduction is a result of the credit DrugCo would receive in the amount of the \$5 million it paid as punitive damages to Plaintiff A, as was reflected in its Statement filed with the Registry. This \$5 million credit would more than offset the \$400,000 punitive damages verdict rendered in favor of Plaintiff B in the second trial. But rather than receiving no punitive damages, Plaintiff B would be entitled to a punitive damages award in the amount of fifty percent of its compensatory award—fifty percent of \$50,000 is \$25,000. This is true because under the Proposal, a plaintiff whose punitive damages verdict is *less* than the amount reflected in the Statement would be entitled to a punitive damages award in the amount of the lesser of either the actual punitive damages verdict or an additional fifty percent of the compensatory

damages award.<sup>257</sup> Since fifty percent of the compensatory award (\$25,000) is less than the jury's punitive damages verdict (\$400,000), Plaintiff B receives \$25,000 as punitive damages.

Following the trial court's reduction of Plaintiff B's punitive damages award, DrugCo would be entitled to file within sixty days a Modified Statement with the Registry. This Modified Statement would again detail the conduct at issue, but would increase the amount of the credit by the \$25,000 paid to Plaintiff B and would add a description of the second case. Consequently, DrugCo would thereafter be entitled to a \$5,025,000 credit in future cases based upon the same conduct. DrugCo would again have to furnish (within thirty days) a copy of the Modified Statement to any other plaintiffs and to the trial courts before which such cases were pending. It would also have to notify such plaintiffs and courts of its intent to rely upon the Modified Statement in the event further punitive damages were awarded against DrugCo for the conduct described in the Modified Statement.

Assume that Plaintiff C decided that even though DrugCo would likely be entitled to a \$5,025,000 credit, she still wanted to try her case against DrugCo. Assume also that after introducing generally the same evidence as Plaintiffs A and B, Plaintiff C was awarded \$3 million in compensatory damages and \$7 million in punitive damages. If the trial court found after a duly-filed, post-trial motion by DrugCo that DrugCo was entitled to a \$5,025,000 credit, Plaintiff C would be awarded \$3 million in compensatory damages and \$1,975,000 in punitive damages. The punitive damages amount represents the difference between the \$7 million award and the \$5,025,000 that DrugCo had proven that it had already paid as punitive damages for the same act or instance of conduct. This is true because a plaintiff who receives a punitive damages verdict *greater* than the amount of the defendant's credit is entitled to collect as punitive damages the greater of either (i) the difference between the verdict and the amount reflected in the Statement, or (ii) the lesser of either the punitive damages verdict or an additional fifty percent of the compensatory damages award. Since the difference between the verdict and the amount reflected in the Statement (\$1,975,000) is greater than the lesser of the verdict (\$7 million) or fifty percent of the compensatory award (\$1.5 million), Plaintiff C would receive \$1,975,000 as punitive damages.<sup>258</sup>

DrugCo would then, of course, be entitled to file another Modified Statement with the Registry. The Modified Statement would again describe the conduct at issue, identify all three cases in which it was assessed punitive damages, and state the new amount of credit to which it would be enti-

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<sup>257</sup> See *supra* Part II.B.4.b.

<sup>258</sup> Incidentally, if Plaintiff C's punitive award had been for \$6 million (rather than \$7 million), then C's punitive damage award would have been \$1.5 million rather than \$1,975,000. This is true because fifty percent of Plaintiff C's compensatory award (\$1.5 million) is greater than the difference between the amount reflected in the Statement and the punitive damages verdict (\$975,000).

tled in another case based upon the same act or course of conduct. The new amount would be \$7 million, which represents the cumulative amount paid in punitive damages for its conduct.<sup>259</sup> All notification requirements previously described would then apply to the new Modified Statement.

*b. Scenario Two.*—For Scenario Two, assume the same conduct by DrugCo and the same injuries to the three plaintiffs, but assume that Plaintiff B (rather than Plaintiff A) goes to trial first. Plaintiff B is awarded \$50,000 in compensatory damages for his nausea and headaches and \$400,000 in punitive damages. DrugCo would have to pay the full amounts of these awards, then move post-trial for an order certifying its Prior Punitive Damages Statement, file this Statement with the Registry, and notify the other plaintiffs and trial courts where the other cases are pending.

Assume that Plaintiff A next went to trial and was awarded the same \$1 million in compensatory and \$5 million in punitive damages as in Scenario One. Assuming that DrugCo proved its entitlement to a credit in the amount of the Statement, it would have to pay Plaintiff A the full \$1 million in compensatory damages, and would have to pay \$4.6 million in punitive damages.<sup>260</sup> Once again, this is true because when a plaintiff's punitive damages verdict exceeds the amount reflected in a defendant's Statement, the plaintiff is entitled to collect as punitive damages the *greater* of either (i) the difference between the verdict and the amount reflected in the Statement, or (ii) the lesser of either the punitive damages verdict or an additional fifty percent of the compensatory award. Since the difference between the punitive damages verdict and the amount reflected in the Statement (\$4.6 million) is greater than the lesser of the punitive damages verdict (\$5 million) or fifty percent of the compensatory award (\$500,000), then Plaintiff A is entitled to recover \$4.6 million as punitive damages. Consequently, the total amount of punitive damages paid to date, then, would be the amount that the jury in Plaintiff A's case determined DrugCo should be punished—\$5 million.<sup>261</sup>

Assume that DrugCo properly filed a Modified Statement and gave the proper notice to Plaintiff C and to the trial court where Plaintiff C's case was pending. Assume also that Plaintiff C is awarded the same \$3 million in compensatory damages and \$7 million in punitive damages as in Scenario One. If DrugCo proves it is entitled to a credit, then C will receive \$3 million in compensatory damages and \$2 million in punitive damages.<sup>262</sup>

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<sup>259</sup> Of course, if Plaintiff C's punitive award had been \$6 million (rather than \$7 million), then the new amount would be \$6,525,000, which represents the cumulative total of the punitive damage awards of \$5 million paid to Plaintiff A, \$25,000 paid to Plaintiff B, and \$1.5 million paid to Plaintiff C.

<sup>260</sup> This amount represents the difference between Plaintiff A's \$5 million award and the amount contained in the Statement that had been paid to Plaintiff B (\$400,000).

<sup>261</sup> This amount represents the \$400,000 paid to Plaintiff B plus the \$4.6 million paid to Plaintiff A.

<sup>262</sup> Once again, this is true because when a plaintiff's punitive damages verdict exceeds the amount reflected in a defendant's Statement, the plaintiff is entitled to collect as punitive damages the *greater* of

The total punitive damages paid by DrugCo would be \$7 million<sup>263</sup>—the precise amount of the largest single punitive damages verdict against DrugCo in any of the three trials.

*c. Scenario Three.*—For Scenario Three, assume that Plaintiff C goes to trial first and is awarded the same \$3 million in compensatory damages and \$7 million in punitive damages as in Scenarios One and Two. Assume also that DrugCo complies with the filing and notification requirements to be entitled to a credit. Finally, assume that Plaintiff A's case is tried next and that Plaintiff A is awarded the same \$1 million in compensatory damages and \$5 million in punitive damages. Because DrugCo has already paid \$7 million in punitive damages, Plaintiff A would be entitled to punitive damages in the amount of \$500,000—fifty percent of his compensatory damages.<sup>264</sup> DrugCo could then file a Modified Statement in the amount of \$7.5 million.

If Plaintiff B then later goes to trial and receives the same award described in Scenarios One and Two (\$50,000 in compensatory damages and \$400,000 in punitive damages), then DrugCo would have to pay an additional \$25,000 in punitive damages to Plaintiff B—fifty percent of his compensatory damages.<sup>265</sup>

Unlike in either of the prior two scenarios, DrugCo is ultimately having to pay in Scenario Three an amount higher than the largest single punitive damages verdict against DrugCo in any of the three trials. Instead, in Scenario Three, DrugCo would have to pay punitive damages in the amount \$7,525,000. While this slight discrepancy is not ideal, it is certainly to be preferred to the other alternatives. If current law were applied to any of the three scenarios, DrugCo would be paying \$12.4 million in punitive damages, the sum total of all three punitive damages awards. In contrast, under the Act, DrugCo would presumptively pay punitive damages in the amount of \$5 million under Scenario One, \$400,000 under Scenario Two, and \$7

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either (i) the difference between the verdict and the amount reflected on the Statement, or (ii) the lesser of either the punitive damages verdict or an additional fifty percent of the compensatory award. Since the difference between the punitive damages verdict and the amount reflected in the Statement (\$2 million) is greater than the lesser of the punitive damages verdict (\$7 million) or fifty percent of the compensatory award (\$1.5 million), Plaintiff C is entitled to recover \$2 million as punitive damages.

<sup>263</sup> This amount represents the \$400,000 paid to Plaintiff B, plus the \$4.6 million paid to Plaintiff A, plus the \$2 million paid to Plaintiff C.

<sup>264</sup> Once again, this is true because a plaintiff whose punitive damages verdict is less than the amount reflected in the Statement would be entitled to a punitive damages award in the amount of the *lesser* of either the actual punitive damages verdict or an additional fifty percent of the compensatory damages award. Since fifty percent of the compensatory verdict (\$500,000) is less than the punitive damages verdict (\$5 million), Plaintiff A receives \$500,000 as punitive damages.

<sup>265</sup> Once again, this is true because a plaintiff whose punitive damages verdict is less than the amount reflected in the Statement would be entitled to a punitive damages award in the amount of the *lesser* of either the actual punitive damages verdict or an additional fifty percent of the compensatory damages award. Since fifty percent of the compensatory verdict (\$25,000) is less than the punitive damages verdict (\$400,000), Plaintiff B receives \$25,000 as punitive damages.

million under Scenario Three. The “presumptively” caveat is subject to the trial court’s purely discretionary determination after a *pretrial* hearing that the prior punitive awards were inadequate to punish and deter the defendant. Such discretion on the part of trial courts would likely lead to more, rather than less, unpredictability in the eventual total punitive damages awarded against a defendant for a single act or instance of conduct. It would also leave itself open for manipulation by defendants who would try to ensure that the lesser injured plaintiff always got to trial first.

*d. Scenario Four.*—Because the vast majority of cases filed in American courts are settled before trial,<sup>266</sup> any workable solution to the multiple punitive damages problem would have to account for this eventuality and be able to illustrate how settlements would be handled under such a solution. For Scenario Four, assume that DrugCo and Plaintiff A decide to settle their case before trial. Assume also that parties are able to accurately predict what the jury’s verdict would have been if they had actually tried the case, i.e., \$1 million in compensatory damages and \$5 million in punitive damages. As discussed earlier, unlike the Act, the Proposal allows defendants to receive a credit in the amount of punitive damages paid in a pretrial settlement.<sup>267</sup> In a perfect world, defendants and plaintiffs would negotiate a settlement at arms length, honestly apportion the total settlement between compensatory and punitive damages, and then faithfully report to the court that allocation in a joint motion to certify the Prior Punitive Damages Statement. But because of the very real possibility of manipulation (if not collusion), the Proposal limits the proportion of the settlement proceeds that can be allocated to punitive damages to fifty percent of the total. Consequently, in the settlement between DrugCo and Plaintiff A, the parties would be entitled to allocate \$3 million to punitive damages, which represents half of the \$6 million total settlement amount. While this limitation operates to deprive DrugCo of an additional \$2 million in credit it could have otherwise received had it taken the case to trial, such a limitation is necessary in order to prevent manipulation in other cases and can be viewed as the price DrugCo has to pay for its choice to minimize the risk of an even higher award, which always inheres in taking a case to trial. It is also much more preferable to both current law and what has been proposed in the Act. In either situation, DrugCo would receive *absolutely no credit* for the amount it paid to settle the punitive damages aspect of Plaintiff A’s case.

Following the settlement, for DrugCo to be entitled to a credit in future cases, DrugCo would have to prepare a Prior Punitive Damages Statement and file a joint motion with Plaintiff A to get the Statement certified by the trial court. This joint motion would have to include declarations or affida-

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<sup>266</sup> See, e.g., ALI REPORT, *supra* note 15, at 403 (“Like the vast majority of sporadic tort claims, most mass tort claims are settled.” (citing P. S. Atiyah, *Tort Law and the Alternatives: Some Anglo-American Comparisons*, 1987 DUKE L.J. 1002, 1015)).

<sup>267</sup> See *supra* Part II.A.2.

vits by the settling parties that the settlement proceeds would be paid in cash or cash equivalents within thirty days of the Statement being certified.<sup>268</sup> To certify the Statement, the trial court would have to ensure that (i) the Statement contained a detailed description of the conduct for which the punitive damages were being paid, (ii) the amount of the total settlement allocated to punitive damages was no more than fifty percent, and (iii) there was no evidence of collusion between the parties.<sup>269</sup> The trial court's certification of the Statement would then trigger the same filing and notification requirements described above.

Assume that Plaintiffs B and C thereafter chose to take their cases to trial against DrugCo and that they received the same awards as in Scenarios One, Two, and Three. Assume also that DrugCo carried its burden of proving that it complied with the applicable notice requirements and also that it demonstrated to the respective trial courts that the cases all arose out of the same act or course of conduct. Plaintiff B would then receive \$50,000 in compensatory damages awarded by the jury and an additional \$25,000 (fifty percent of Plaintiff B's compensatory award) in punitive damages (even though the jury verdict was for \$400,000 in punitive damages) because DrugCo's credit of \$3,025,000 would more than offset the jury's punitive damages verdict.<sup>270</sup> DrugCo could then file a Modified Statement reflecting the new amount of \$3,025,000 that it had paid in punitive damages.<sup>271</sup> Plaintiff C would, in turn, receive the \$3 million in compensatory damages awarded by the jury and an additional \$3,975,000 in punitive damages (even though the jury verdict was for \$7 million in punitive damages) because DrugCo's credit of \$3 million would only partially offset the jury's punitive damages verdict.<sup>272</sup> This, of course, would bring the sum total of punitive damages paid by DrugCo as punishment for its conduct to the precise level that the jury in Plaintiff C's case determined represented the amount of money that would adequately punish and deter DrugCo for its reprehensible conduct—\$7 million.<sup>273</sup>

If, rather than trying the cases, DrugCo and Plaintiffs B and C also decided to settle their respective cases prior to trial, the Proposal would still operate to allow DrugCo an increased credit, albeit in a somewhat smaller amount. In light of the certified Statement DrugCo would have reflecting its settlement with Plaintiff A, the value of Plaintiff B's case would be dra-

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<sup>268</sup> *See id.*

<sup>269</sup> *See id.*

<sup>270</sup> *See supra* Part II.B.6 (Scenario One).

<sup>271</sup> This amount represents the \$3 million paid to Plaintiff A in the prior settlement and the \$25,000 paid to Plaintiff B after the trial in that case.

<sup>272</sup> This amount represents the difference between the \$7 million awarded by the jury in Plaintiff C's case and the \$3,025,000 amount DrugCo would be credited because it has already been punished in this amount through its settlement with Plaintiff A and its verdict in favor of Plaintiff B.

<sup>273</sup> This amount is calculated by simply totaling up the three punitive damages awards paid by DrugCo: \$3 million to Plaintiff A, \$25,000 to Plaintiff B, and \$3,975,000 to Plaintiff C.

matically lower. This is undoubtedly true because the likelihood that Plaintiff B would receive a punitive damages award greater than \$3 million is incredibly remote.<sup>274</sup> Consequently, again assuming perfect knowledge, DrugCo could settle B's case for the same \$75,000 that it would end up paying Plaintiff B if the case proceeded to trial.<sup>275</sup> But instead of being entitled to file a Modified Statement increasing the amount previously paid in punitive damages by \$25,000, DrugCo could increase that amount by \$37,500 because it would be entitled to allocate half of the \$75,000 settlement proceeds to punitive damages.<sup>276</sup> This slightly higher amount of credit is more than justified because it comes as a result of conduct (settling cases) that should be strongly encouraged.

The value of Plaintiff C's case would likewise be affected by the prior settlements because DrugCo would be entitled to a \$3,037,500 credit towards punitive damages as a result of those settlements. This would render the expected value of Plaintiff C's case \$6,962,500.<sup>277</sup> Assuming DrugCo and Plaintiff C decided to settle the case for \$7 million, DrugCo and Plaintiff C could allocate half of the settlement amount (\$3.5 million) to punitive damages and the other half to compensatory damages. If the trial court approved the joint motion for certification of the Modified Statement filed by DrugCo and Plaintiff C, the total credit to which DrugCo would thereafter be entitled would be \$6,537,500.<sup>278</sup> This amount, of course, roughly approximates the amount that DrugCo would be entitled to apply toward future punitive damages cases based upon the same conduct if DrugCo had taken all three cases to trial. Accordingly, this Proposal is far more effective at encouraging settlements than either the status quo or the Act, which do nothing to promote settlements (at best), and actually discourage settle-

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<sup>274</sup> This is undoubtedly true because the United States Supreme Court has declared that a plaintiff's punitive damages award must bear a reasonable relationship to the compensatory damages, and that only in extremely rare cases will a ratio of punitive to compensatory damages greater than nine to one be constitutionally permissible. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). In Plaintiff B's case, a nine to one ratio would set the presumptive ceiling for punitive damages at \$450,000, far short of the \$3 million credit to which DrugCo would be entitled.

<sup>275</sup> This \$75,000 represents the \$50,000 in compensatory damages that would be awarded by the jury plus the additional \$25,000 Plaintiff B would ultimately receive in punitive damages (fifty percent of his compensatory award). The jury's punitive award of \$400,000 would be completely offset by the \$3 million credit DrugCo would receive by virtue of its earlier settlement with Plaintiff A and its certified Statement filed thereafter.

<sup>276</sup> This, of course, assumes that this allocation could be done in good faith. Given the inherent unpredictability of trials, this slight modification would be well within the parties' rights.

<sup>277</sup> This amount represents the \$3 million in compensatory damages Plaintiff C could expect plus the \$3,962,500 in punitive damages that Plaintiff C could expect. This \$3,962,500 represents the difference between the \$7 million punitive damages verdict and the \$3,037,500 credit that DrugCo would receive for the prior settlements with Plaintiffs A and B.

<sup>278</sup> This amount represents the \$3 million paid to Plaintiff A, plus the \$37,500 paid to Plaintiff B, plus the \$3.5 million paid to Plaintiff C.

ments (at worst) because settling defendants receive *no* future credit for such settlements.

### III. EVALUATING THE PROPOSAL AGAINST THE OBJECTIVES OF PUNITIVE DAMAGES

As demonstrated above, the Proposal greatly diminishes the risk of punitive damages overkill caused by multiple punitive damages awards. Moreover, it does so in a way that is easily understood by litigants, easily applied by courts, and substantively fair to both plaintiffs and defendants. It is, therefore, demonstrably sound in practice. As this section demonstrates, the Proposal is also sound in theory because it advances the objectives of punitive damages better than either the status quo or any other proposed solution to the multiple punishments problem.

While it is uncontroversial to declare that the purpose of punitive damages is to punish the defendant for the conduct at issue and to deter the defendant and others from engaging in this conduct in the future,<sup>279</sup> punitive damages also serve a variety of other objectives in our legal system. Professor David Owen has identified and analyzed in some detail what he describes as the five objectives of punitive damages.<sup>280</sup> These five objectives are (1) retribution, (2) education, (3) deterrence, (4) compensation, and (5) law enforcement.<sup>281</sup> Each of these objectives will be briefly described and

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<sup>279</sup> See generally *State Farm*, 538 U.S. at 416 (explaining that “punitive damages serve a broader function; they are aimed at deterrence and retribution”); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991) (stating that the standard for determining if a punitive damages award is reasonable is if it is sufficient to “punish and deter”); *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 480 (N.J. 1986) (admonishing courts to “keep[] in mind that punitive damages are meant to punish and deter defendants for the benefit of society, not to compensate individual plaintiffs”); *In re “Agent Orange” Prod. Liab. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983) (“It is axiomatic that the purpose of punitive damages is not to compensate plaintiffs for their injury, but to punish defendants for their wrongdoing.”), *aff’d*, 818 F.2d 145 (2d Cir. 1987); 1 JOHN J. KIRCHER & CHRISTINE M. WISEMAN, *PUNITIVE DAMAGES LAW AND PRACTICE* § 4.13 (2d ed. 2000) (discussing the functions of punishment and deterrence as the overall rationale for punitive damages in the vast majority of jurisdictions); Richard C. Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 KY. L.J. 1 (1986); Bailey Kuklin, *Punishment: The Civil Perspective of Punitive Damages*, 37 CLEV. ST. L. REV. 1 (1989).

<sup>280</sup> See DAVID G. OWEN, *PRODUCTS LIAB. LAW* § 18.2 (2005) [hereinafter OWEN, *TREATISE*] (citing Owen, *Punitive Damages*, *supra* note 11).

<sup>281</sup> *Id.*; see also Andrea A. Curcio, *Painful Publicity—An Alternative Punitive Damage Sanction*, 45 DEPAUL L. REV. 341, 372 (1996) (laying out the objectives of punitive damages including deterrence, retribution, rehabilitation, and incapacitation); Ellis, *supra* note 28, at 3 (describing seven purposes for punitive damages: “(1) punishing the defendant; (2) deterring the defendant from repeating the offense; (3) deterring others from committing an offense; (4) preserving the peace; (5) inducing private law enforcement; (6) compensating victims for otherwise uncompensable losses; and (7) paying the plaintiff’s attorneys’ fees”); Ryan Fowler, Comment, *Why Punitive Damages Should Be a Jury’s Decision in Kansas: A Historical Perspective*, 52 U. KAN. L. REV. 631, 633 (2004) (“Punitive damages are generally designed to serve at least one of four functions: revenge, public justice, compensation, and punishment and deterrence.”).

then applied to the Proposal to demonstrate that the Proposal advances these objectives.

#### A. Retribution

The retribution function is what is commonly referred to as punishment<sup>282</sup> and is a core function of punitive damages.<sup>283</sup> When individuals or entities cause injury to others while engaging in conduct society deems reprehensible, the need for individual retribution, societal retribution, or both is substantial.<sup>284</sup> Punitive damages awards against such individuals serve to satisfy or diminish the victim's feeling of helplessness or desire for revenge.<sup>285</sup> Punitive damages also serve to express the community's sense of outrage, and force the defendant to disgorge much or all of the advantage gained from such conduct.<sup>286</sup>

The awarding of multiple punitive damages for a single act or course of conduct certainly accomplishes the retribution function of punitive damages. A defendant who engages in conduct worthy of punitive damages will feel the sting of punishment over and over again as jury after jury expresses the community's outrage at the defendant's conduct. Seeing a defendant repeatedly punished should help to satisfy the victim's revenge instincts. But while the multiple awards force the defendant to disgorge the profits gained or competitive advantage realized from the conduct, they

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<sup>282</sup> OWEN, TREATISE, *supra* note 280, § 18.2, at 1133 (“When courts refer to the ‘punishment’ function of punitive damages, they generally mean retribution, perhaps the most fundamental basis for punishment in any form.”).

<sup>283</sup> *See generally* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19 (1991) (“It is true, of course, that under Alabama law, as under the law of most States, punitive damages are imposed for purposes of retribution and deterrence.”); Gerald W. Boston, *Punitive Damages and the Eighth Amendment: Application of the Excessive Fines Clause*, 5 COOLEY L. REV. 667, 676–77 (1989) (“While courts have identified other objectives that justify imposition of punitive damages, the twin objectives of retribution and deterrence are generally recognized as the core rationale behind the punitive damages system.”); Note, *An Economic Analysis of the Plaintiff's Windfall from Punitive Damage Litigation*, 105 HARV. L. REV. 1900, 1900–01 (1992) (“Many courts and commentators have identified retribution as a primary rationale for punitive damages.”). *But see* Edward L. Rubin, *Punitive Damages: Reconceptualizing the Crucible Remedies of Common Law*, 1998 WIS. L. REV. 131, 138–41 (disputing whether retribution is still an appropriate objective).

<sup>284</sup> *See* OWEN, TREATISE, *supra* note 280, § 18.2; Ellis, *supra* note 28, at 9 (explaining that one of the functions of punitive damages is to “preserve the peace” because of the satisfaction gained from the public declaration of a wrong, vengeance on the defendant, and the transfer of wealth). Owen develops this point by characterizing the defendant's conduct as a theft of freedom and autonomy from both the individual and from the rest of society that needs to be rectified through retribution. *See* David G. Owen, *The Moral Foundations of Punitive Damages*, 40 ALA. L. REV. 705, 708–13 (1989).

<sup>285</sup> OWEN, TREATISE, *supra* note 280, § 18.2.

<sup>286</sup> *Id.*; *see also* Robert D. Cooter, *Economic Theories of Legal Liability*, 5 J. ECON. PERSP. 11, 12–13 (1991) (arguing that if a defendant fully internalizes the harm caused this will lead to an economically and socially efficient result); Ellis, *supra* note 28, at 5 (recognizing punitive damages rationale of “requiring a person to internalize the cost of an activity”); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 873–74 (1998).

have the potential for being even more deadly—to over-punish the defendant.<sup>287</sup> The goal of the retribution objective of punitive damages should be, then, not to achieve the *maximum* level of punishment, but rather the *optimal* level of punishment—“The purpose of punitive damages is to sting, not kill, a defendant.”<sup>288</sup>

Under the Proposal, a defendant who has injured multiple individuals through a single act or course of conduct will still be stung by a punitive damages award and quite possibly by multiple punitive damages awards. Under the Proposal, however, a defendant will at least have the opportunity to avoid being killed by these repeated stings. But, in order to stop the stings, the defendant must be willing to be publicly spanked as well. The Proposal provides defendants with two options. First, a defendant may continue to endure the stings and try to stop them from coming by continuing to litigate subsequent cases. Should the defendant choose this option, the status quo holds and the defendant risks further punishments, perhaps going well beyond the optimal level to the maximum level, whereupon the defendant may be killed.<sup>289</sup> The retribution objective of punitive damages is achieved, but to a level beyond that which is either necessary or appropriate.

The second option the Proposal provides is that once the defendant has been stung by punitive damages either through a jury verdict or through a settlement that takes into account punitive damages, the defendant can minimize both the number and severity of future stings. Once again, the Proposal does not prevent the defendant from being stung again—a defendant can still have to pay multiple punitive damages awards—but the level of ultimate punishment will generally be set at the highest level that a single jury determines is the appropriate level of punishment for the defendant’s conduct.<sup>290</sup> This approach seems to achieve a much more desirable level of punishment than does the status quo, which allows punitive damages to be imposed until the defendant is put into bankruptcy. Importantly, however, a

<sup>287</sup> For example, multiple punitive damages in the asbestos context were at least partially responsible for driving numerous companies, including insurance carriers, into bankruptcy. See *supra* note 83.

<sup>288</sup> *In re N. Dist. of Cal. “Dalkon Shield” IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 899 (N.D. Cal. 1981), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982); see also *Wynn Oil Co. v. Purolator Chem. Corp.*, 403 F. Supp. 226, 232 (M.D. Fla. 1974) (explaining that “the award of punitive damages should only hurt but not bankrupt a defendant”); Seltzer, *supra* note 6, at 55 (“At some point, justifiable punishment ends and overkill begins.”).

<sup>289</sup> Accord Dan B. Dobbs, *Ending Punishment in “Punitive” Damages: Deterrence-Measured Remedies*, 40 ALA. L. REV. 831, 854 (1989) (“[T]o punish the guilty beyond their guilt is not different from punishment of the innocent, and it cannot be done in a manner consistent with ordinary notions of justice.”).

<sup>290</sup> As illustrated in Scenario Three, plaintiffs who are awarded punitive damages in an amount less than that reflected on a properly-filed Statement are still entitled to punitive damages in an amount equal to fifty percent of their compensatory damages, and thus the cumulative amount of punitive damages paid can exceed the highest level a single jury determines is the appropriate level of punishment for the defendant’s conduct. See *supra* Part II.B.6.c (Scenario Three).

defendant is not entitled to stop the stings unless it is willing to be spanked in full view of the public. Under the Proposal, multiple punitive damages awards are minimized only after the defendant files with the National Punitive Damages Registry a Prior Punitive Damages Statement detailing the conduct for which it paid punitive damages.<sup>291</sup> This public acknowledgment by the defendant of the amount of money it has paid and the conduct for which such money has been paid is itself an exceedingly strong form of punishment. But this form of punishment is not likely to put the defendant out of business. It is, however, likely to enhance the individual and societal interests in seeing tangible evidence that retribution has been achieved, and is likely to further satisfy or diminish the victim's feeling of helplessness or desire for revenge more than, for example, a confidential settlement or an unpublicized jury verdict would. Moreover, public disclosure will also likely serve to more fully express and widely disseminate the community's sense of outrage at the defendant's conduct.

Accordingly, the Proposal advances the retribution objective at least as effectively as the status quo and actually better than the status quo if the defendant opts to file a Statement with the Registry. This is true because the punishment is precisely the same as the status quo, unless the defendant chooses to file a publicly-available Statement detailing the conduct that led to the punitive damages payment. In such a case, the defendant would still be punished through punitive damages payments, but at a much more optimal level. Additionally, the defendant would suffer further punishment by having its conduct aired for all to see.

### *B. Education*

A second objective of punitive damages is to educate the public on the legally-protected rights and interests citizens enjoy and the corresponding responsibilities citizens have to respect those rights and interests.<sup>292</sup> By punishing defendants through punitive damages for shirking their responsibilities in ways that deprive others of their rights, society educates the public about these rights and responsibilities.<sup>293</sup> Moreover, the amount of the award given conveys the relative value placed on the particular rights and responsibilities at issue.<sup>294</sup> Professor Owen argues persuasively that punitive damages "sensationalize the consequences of improper behavior in a manner that informs and reminds defendants and society at large that a par-

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<sup>291</sup> See *supra* Part II.B.4.b.

<sup>292</sup> OWEN, TREATISE, *supra* note 280, § 18.2.

<sup>293</sup> *Id.*

<sup>294</sup> *Id.* at 1135 (explaining that "punitive damages proclaim the special importance the law attaches to the plaintiff's particular invaded right, and the corresponding condemnation that society attaches to its flagrant invasion by the kind of conduct engaged in by the defendant").

ticular right-duty legal value not only exists, but that it is given staunch protection by the law.<sup>295</sup>

Under the Proposal, the education objective of punitive damages is better served than under the status quo. To the extent that the defendant opts to file a Statement with the Registry, the public will be given more information about the conduct of the defendant and the amount of the punishment. What better way to “sensationalize” the consequences of improper conduct than by putting this conduct on the Internet in a manner that can be examined without the filter of media spin and in a form that has been approved by the trial judge assigned to the case in which the punitive damages were paid?<sup>296</sup> This is true not only for jury verdicts, which can and occasionally do receive at least some publicity, but also for settlements that include a punitive damages component—most of which are completely confidential. In order to receive the benefit of such a settlement—minimization of future punitive damages awards—a defendant would have to publicize not only the settlement, but also the conduct that gave rise to the settlement.

### C. Deterrence

The deterrence objective of punitive damages is to discourage or prevent future conduct similar to that presently being punished.<sup>297</sup> It is generally agreed that awarding punitive damages serves to deter future conduct, at least in many situations.<sup>298</sup> This deterrence is achieved in the defendant by having to pay punitive damages and having the conduct that gave rise to the punitive damages publicized. The deterrence to others, however, comes only as a result of the punitive damages payment becoming known to others and to the public at large. Consequently, the more publicity given to punitive damages awards or settlements, the more likely it is that the deterrence objective will be maximized. While this might militate in favor of manda-

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<sup>295</sup> *Id.*; *see also id.* at 1136. (“This form of judicial punishment serves to publicize the community’s condemnation of flagrant breaches of the rules of proper behavior which reaffirms society’s commitment to its moral and legal standards.”).

<sup>296</sup> *Cf.* Curcio, *supra* note 281, at 343 (advocating mandatory publication of punitive damages verdicts as an additional sanction to monetary awards); Steven Garber, *Product Liability, Punitive Damages, Business Decisions and Economic Outcomes*, 1998 WIS. L. REV. 237, 245–46 n.13 (discussing the effects of publicity of punitive damages on defendants).

<sup>297</sup> *See, e.g.*, *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 487 (1993) (“The object of [punitive damages] is to deter TXO Prod. Corp. and others from committing like offenses in the future.”); Ellis, *supra* note 28, at 8–9 (explaining the deterrence objective of punitive damages in deterring the defendant and deterring others from the wrongful conduct at hand).

<sup>298</sup> *See, e.g.*, Michael Wells, *Comments on Why Punitive Damages Don’t Deter Corporate Misconduct Effectively*, 40 ALA. L. REV. 1073, 1076 (1989) (“Economic analysis suggests that punitive damages do influence decisionmaking. Rational actors attempt to minimize their costs, and hence will avoid conduct that generates punitive damages. Punitive damages may deter too much, rather than too little.”). *But see* W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 GEO. L.J. 285, 336 (1998) (arguing that “[p]unitive damages generate no statistically significant deterrent effects”).

tory disclosure of all punitive damages payments as urged by one commentator,<sup>299</sup> the costs associated with mandatory disclosure are simply too high.<sup>300</sup>

Under the Proposal, the instances of public disclosure of punitive damages payments and the conduct that gave rise to them will increase, thus increasing the overall deterrent effect. But each individual defendant would be given the opportunity to weigh the benefits and detriments associated with publicly disclosing the punitive damages payment and determine whether it was in that defendant's best interest to file a Statement with the Registry. If yes, deterrence is better served. If no, deterrence remains at the same level as the status quo.

#### D. Compensation

While most courts and commentators do not view compensation as a legitimate objective of punitive damages,<sup>301</sup> it is beyond dispute that punitive damages can and do, ultimately, serve a compensatory function.<sup>302</sup> In the vast majority of personal injury cases, the plaintiff has to pay at least one-third of her total recovery to her attorney as attorney's fees.<sup>303</sup> As a consequence, even after the plaintiff has been made "whole" through com-

<sup>299</sup> See Curcio, *supra* note 281, at 366–68.

<sup>300</sup> See Garber, *supra* note 296, at 245–46 n.14 (arguing that the potential detrimental effects on the defendants outweigh the benefits of mandatory disclosure).

<sup>301</sup> See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) ("It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence."); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 6 n.1 (1991) ("This amount of money is awarded to the plaintiff but it is not to compensate the plaintiff for any injury. It is to punish the defendant." (quoting from district court jury instructions)); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) ("[Punitive damages] are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."); *Ellis*, *supra* note 28, at 65 ("[P]unitive damages are not intended to perform direct compensatory functions."); *Wheeler*, *supra* note 6, at 292 ("As courts have uniformly held, no plaintiff has a right to punitive damages: the purpose of punitive damages is to vindicate the public interest, not that of a particular plaintiff."). *But see* *Kewin v. Mass. Mut. Life Ins. Co.*, 295 N.W.2d 50, 55 (Mich. 1980) ("In Michigan, exemplary damages are recoverable as compensation to the plaintiff, not as punishment of the defendant."); *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 454 (Wis. 1980) ("The 'windfall criterion' overlooks that the payment of punitive damages to the injured party is justifiable as a practical matter, because such damages do serve to compensate the injured party for uncompensated expenses, e.g., attorneys' fees and litigation expenses."); *Owen*, *Civil Punishment*, *supra* note 28, at 109 ("[P]unitive damages serve three principal objectives: punishment, deterrence, and compensation. . . . Included within the third category, 'compensation' are all the costs of restoring the plaintiff to his pre-injury position in financial terms, including payment of his attorneys' fees."); *Owen*, *Punitive Damages*, *supra* note 11, at 381 ("[P]unitive damage recovery serves as a compensatory incentive for the victim (and his attorney) to pursue the matter against the flagrant offender.").

<sup>302</sup> OWEN, *TREATISE*, *supra* note 280, § 18.2.

<sup>303</sup> The plaintiff also has to pay additional costs such as court filing fees, expert fees, and deposition transcript costs.

pensatory damages, the plaintiff is then rendered only two-thirds whole after paying her attorney. In cases in which punitive damages are awarded, plaintiffs stand a much better chance of actually ending up with an amount that truly compensates them for their injuries. Because punitive damages are awarded only in cases in which the plaintiff has demonstrated that the defendant has engaged in reprehensible conduct, it can hardly be disputed that it is unfair and illogical that the economic burden of bringing this conduct to light (and to justice) should be borne by the victim, rather than the wrongdoer.<sup>304</sup>

The problem with the status quo, however, is that punitive damages verdicts usually bear no relation whatsoever to the plaintiff's costs of bringing the suit. Accordingly, there is a real risk that the plaintiff will be grossly *overcompensated* if the punitive damages award is greater than fifty percent larger than the compensatory damages award. One logical response to this lack of precision would be to always award the plaintiff her reasonable attorneys' fees in punitive damages cases.<sup>305</sup> While there are many situations in which prevailing plaintiffs are entitled to collect reasonable attorneys' fees,<sup>306</sup> there is a substantial risk of creating a wave of nuisance litigation if such attorneys' fees were measured by the hours spent by attorneys' multiplied by a reasonable hourly rate. In such situations, attorneys would have an incentive to bring numerous cases on behalf of only marginally injured plaintiffs in an attempt to collect the attorneys' fees.

Accordingly, keeping in mind that a defendant who injures a plaintiff while engaging in reprehensible conduct should not be heard to complain about making a plaintiff truly whole, and keeping in mind the risk of creating a new class of nuisance suits if reasonable attorneys' fees are automatically awarded in punitive damages cases, under the Proposal, the plaintiff is entitled to recover as punitive damages an amount equal to the *greater* of (i) the amount of punitive damages awarded by the jury less any credit to which the defendant is entitled as a result of having filed a Statement with the Registry, or (ii) the lesser of either the amount of the punitive damages award or fifty percent of the plaintiff's compensatory damages.<sup>307</sup> There-

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<sup>304</sup> Accord OWEN, TREATISE, *supra* note 280, § 18.2 ("It seems self-evident that a defendant who has intentionally or wantonly injured another should fairly be required, as much as a money judgment is capable of doing, to make the plaintiff truly whole again.").

<sup>305</sup> Murphy, *supra* note 245, at 466, 472 (arguing that the plaintiff should not receive punitive damages if they prove such liability but should be given reasonable attorneys' fees).

<sup>306</sup> See, e.g., 29 U.S.C. § 216(b) (2000) (awarding reasonable attorneys' fees to the prevailing plaintiff or plaintiffs who bring action against an employer under the Fair Labor Standards Act); 42 U.S.C. § 7604(d) (2000) (awarding costs "including reasonable attorney and expert witness fees" to prevailing citizens who bring suits for the public health and welfare in the prevention and control of air pollution); *id.* § 1988(b) (allowing attorneys' fees in federal civil rights cases); Murphy *supra* note 245, at 505 ("In other contexts, courts and legislatures have used the private-attorney-general doctrine to justify awarding reasonable attorneys' fees to plaintiffs.").

<sup>307</sup> See *supra* Part II.B.4.b.

fore, the amount the plaintiff will receive as punitive damages could be as high as the jury's award (if the plaintiff is the first to recover punitive damages), but will be less than fifty percent of the compensatory damages *only* if the jury decides that proper punishment of the defendant is less than that amount. In other words, unless the jury's punitive damages award is less than half of its compensatory award, the plaintiff will ultimately be made whole. This is true because a punitive award of fifty percent of the compensatory award will allow the plaintiff to pay her attorney one-third of the total recovery and still retain one hundred percent of the compensatory damages awarded to her by the jury.<sup>308</sup> In the event that the jury awarded the plaintiff punitive damages in an amount less than fifty percent of her compensatory damages, then that amount would be the limit of the plaintiff's punitive damages recovery. This lower amount would be justified because it would represent the amount of punishment that the jury, after hearing the evidence of defendant's wrongdoing, felt was appropriate in the case. In that case, the compensatory function of punitive damages would not be enough to overcome (and increase) the jury's verdict.

To summarize, while compensation is not universally considered to be a legitimate *objective* of punitive damages, it is a well-recognized and accepted *benefit* because it serves to help make a plaintiff injured by the reprehensible conduct of a defendant whole. Punitive damages awards, however, are exceedingly imprecise in accomplishing this. Under the Proposal, the risk of grossly overcompensating plaintiffs is all but eliminated,<sup>309</sup> and most plaintiffs who prove entitlement to punitive damages will ultimately be made truly whole because they will get to keep all of the compensatory damages awarded to them by the jury.<sup>310</sup>

#### E. Law Enforcement

The fifth and final objective of punitive damages is to provide an incentive to plaintiffs and their counsel to uncover and bring to light reprehensible conduct. This law enforcement function serves "as a kind of bounty, inducing injured victims to serve as 'private attorneys general,' increasing the number of wrongdoers who are pursued, prosecuted, and even-

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<sup>308</sup> For example, if the jury awarded the plaintiff \$100,000 in compensatory damages, then a punitive damages award of fifty percent of the compensatory damages would be \$50,000, bringing the total to \$150,000. After paying her attorney one-third of the total (\$50,000), the plaintiff would still be able to keep the full \$100,000 awarded as compensatory damages. This does not, however, take into consideration that the plaintiff will still be responsible for her own litigation costs.

<sup>309</sup> The notable exception to this is the first plaintiff to receive a punitive damages award. This overcompensation of the first plaintiff, however, is justified under the law enforcement function of punitive damages. *See infra* Part III.E.

<sup>310</sup> Once again, this is because the punitive damages they will collect will be equal to the amount of attorneys' fees they would otherwise have to pay out of their compensatory damages award. The sole exception to this is when the jury's punitive damages verdict is less than half of the compensatory damages verdict, in which case the plaintiff would recover the amount of the punitive damages verdict.

tually ‘brought to justice.’”<sup>311</sup> The underlying assumption is that the criminal system is under-staffed and ill-equipped to prosecute all who violate the laws and thereby cause injury. Consequently, incentivizing the plaintiffs’ bar through the prospect of recovering punitive damages increases the likelihood that wrongdoers will be both identified and adequately punished.<sup>312</sup> It is beyond dispute that punitive damages have been and continue to be a powerful law enforcement tool.<sup>313</sup> If adopted, the Proposal would not undermine this objective, but would serve to further this objective.

It is axiomatic that the law enforcement objective is achieved when the wrongdoer is brought to justice. Accordingly, once the defendant’s conduct is exposed and the defendant is punished through punitive damages, the incremental law enforcement benefit gained from another plaintiff bringing the same conduct to light has very little, if any, value. Under the status quo, once the first plaintiff proves the defendant has engaged in reprehensible conduct and receives a punitive damages award, the law enforcement function has been accomplished, and deterrence then takes over. The plaintiff and her counsel share in the punitive damages bounty awarded to them for taking on the risk and responsibility of bringing the conduct to light. Allowing the next plaintiff to also receive a bounty does not advance the law enforcement function. Surely it would make no sense to give rewards to the second, third, and fourth people who provide information to the authorities that would have allowed for the capture of a wanted criminal had the criminal not already been captured based upon the information provided by the first informant—once the law enforcement objective has been achieved, paying others to bring the same claim is inefficient and illogical.

One could argue credibly that often times it takes numerous informants coming forward in order to fully expose the misdeeds of the criminal. Even so, the later informants should not be entitled to be rewarded for information provided by the earlier informants. Likewise, the full level of reprehensibility of a defendant’s conduct may not be uncovered and exposed by the first plaintiff to receive a punitive damages award against a given defendant. It may take several other cases involving the same course of conduct for certain aspects of the defendant’s conduct to come to light. Even so, the law enforcement objective is enhanced only to the extent of the mar-

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<sup>311</sup> OWEN, TREATISE, *supra* note 280, § 18.2.

<sup>312</sup> *Id.* (“By helping to finance the detection, proof and punishment of flagrant violations of the rules, punitive damages increase the likelihood that wrongdoers will be identified in the first instance and adequately punished in the second.”).

<sup>313</sup> *See, e.g.*, TVT Records v. Island Def Jam Music Group, 279 F. Supp. 2d 413, 425–26 (S.D.N.Y. 2003) (observing that among the functions of punitive damages, the remedy offers a law enforcement “bounty,” serving to create an incentive for plaintiffs injured by extreme misconduct to undertake the risks and burdens of litigation to redress the wrongs); Ogelsby v. W. Stone & Metal Corp., 230 F. Supp. 2d 1184, 1193 (D. Or. 2001) (stating that punitive damages advance the goal of law enforcement); Owen, *Punitive Damages*, *supra* note 11, at 380–81 (deeming “law enforcement” as one of the five major functions of punitive damages).

ginal exposure of the misdeeds by the later plaintiffs. Accordingly, it makes sense to reward the later plaintiffs with a bounty only to the extent of the increased level of exposure—it is both inefficient and illogical to reward later plaintiffs with the same bounty as the earlier plaintiff *plus* an additional bounty for the additional exposure. Yet that is precisely how the status quo works.

In contrast, under the Proposal, the same law enforcement incentives exist for plaintiffs and their counsel to uncover and expose reprehensible conduct by defendants. By so doing, they will be entitled to reap the benefits of their efforts because they will be entitled to recover the full amount of punitive damages awarded by the jury. Once the defendant's misdeeds are brought to light and punished, however, later plaintiffs will be limited in the size of the punitive awards they can receive. If later plaintiffs are able to convince a jury that the defendant's conduct warrants a larger punishment than awarded by a previous jury, then the plaintiff would be entitled to keep the difference between the prior award and the current award. This could be accomplished in one of two ways. First, the later plaintiff could put forth additional evidence of the defendant's wrongdoing and thus further the law enforcement objective by showing the defendant's conduct to be more reprehensible than previously thought. Second, the later plaintiff could convince the jury that the defendant's conduct when judged against societal standards justified a greater punishment than previously inflicted. In either case, legitimate law enforcement objectives would be advanced by the later plaintiff. As a consequence, the later plaintiff would have earned the additional bounty represented by the difference between the punitive damages amount already paid and the punitive damages amount awarded. This is precisely how punitive damages would work under the Proposal.

In summary, the objectives served by punitive damages are much better served by the Proposal than by the current system of allowing multiple punitive damages to be awarded for a single act or instance of conduct. Under the Proposal, a more optimal level of punishment is achieved, society is better educated about the rights and responsibilities of citizens because of the public disclosure of the defendant's conduct, deterrence is better accomplished because the fact and amount of punishment is more widely disseminated, plaintiffs are more adequately compensated for the costs of bringing the defendant's conduct to light, and law enforcement objectives are more efficiently achieved.

#### CONCLUSION

Despite considerable scholarly debate and frequently expressed judicial concern, the multiple punishments problem continues to plague our tort system. While several state legislatures have attempted to mitigate the effects of this problem, such attempts are doomed to fail because they have no extraterritorial effect. Accordingly, this problem cries out for a national solu-

tion. While the United States Supreme Court has recently taken an increasing interest in curbing punitive damages, it has not entered (and should not enter) the fray on this issue because a carefully crafted statutory scheme presents the best solution to this ongoing problem. To date, Congress has failed to rise to the occasion and pass meaningful legislation on this issue. Moreover, the Act it has considered adopting (and will soon consider again) does not adequately address all of the issues presented by the problem and would not provide courts with the appropriate tools for dealing with the problem even if it were passed.

In contrast, the Proposal set forth in this Article fully addresses the multiple punishments problem in a manner that is easily understood and applied by courts. Moreover, the Proposal resolves the problem in a way that materially advances the objectives of punitive damages better than either the Act or the status quo does. Specifically, under the Proposal, a defendant against whom punitive damages have been awarded is entitled to file a Prior Punitive Damages Statement with the trial court who presided over the case. The Statement must detail the conduct that gave rise to the punitive damages award and report the amount of punitive damages paid. This Statement can then be filed with the National Punitive Damages Registry, where it will be published on the Internet for all to see. After giving notice to other plaintiffs and to the courts presiding over the cases brought by these other plaintiffs, a defendant who filed a Statement with the Registry is entitled to a dollar-for-dollar credit against future punitive damages the defendant proves by clear and convincing evidence arose out of the same act or course of conduct as that detailed in the Statement. If the plaintiff's punitive damages award exceeds the amount reflected in the Statement, the plaintiff is entitled to collect as punitive damages the *greater* of either (i) the difference between the actual punitive damages award and the amount reflected in the Statement, or (ii) the *lesser* of the actual punitive damages awarded by the jury *or* an additional fifty percent of the compensatory damages awarded. If, however, the punitive damages award is equal to or less than the amount reflected in the Statement, the plaintiff would receive as punitive damages the *lesser* of (i) the actual punitive damages award or (ii) an additional fifty percent of the compensatory damages awarded by the jury to the plaintiff.

A faithful application of this Proposal would minimize (if not eliminate) the risk that defendants would be repeatedly (and excessively) punished for a single act or course of conduct through the imposition of multiple punitive damages awards. Instead, a defendant who engages in reprehensible conduct would indeed be punished, but in an amount that was closely tied to the highest level of punishment any single jury determined was appropriate, rather than the cumulative amount of all punitive damages awards.

APPENDIX

I. SHORT TITLE

Multiple Punitive Damages Resolution Proposal

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Section 1. Short Title

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III. CONGRESSIONAL FINDINGS

A. Multiple or repetitive imposition of punitive damages for harms arising out of a single act or course of conduct may deprive a defendant of all of its assets or insurance coverage, and may endanger the ability of claimants to receive compensation for basic out-of-pocket expenses and damages for pain and suffering.

- B. The detrimental impact of multiple punitive damages exists even in cases that are settled, rather than tried, because the threat of punitive damages being awarded results in a settlement that provides for a higher award amount than would ordinarily be obtained. To the extent 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.
- C. Fundamental unfairness can result when one is punished repeatedly for what is essentially the same conduct.
- D. Federal and state appellate and trial judges, and well-respected commentators, have expressed concern that multiple imposition of punitive damages may violate constitutionally protected rights.
- E. Multiple imposition of punitive damages may be a significant obstacle to global settlement negotiations in repetitive litigation.
- F. Limiting the imposition of multiple punitive damages awards would facilitate the resolution of mass tort claims involving thousands of injured claimants.
- G. Federal and state trial courts cannot resolve the problems caused by the imposition of multiple punitive damages because they lack the power or authority to prohibit subsequent awards in other courts.
- H. Individual state legislatures can create only a partial remedy to address problems caused by the multiple imposition of punitive damages, because each state lacks the power to control the imposition of punitive damages in other states.

#### IV. PURPOSE

The purpose of the Proposal is to provide a fair and balanced resolution to the problem of multiple imposition of punitive damages in interstate commerce.

## V. DEFINITIONS

As used in this Proposal:

- A. "Punitive Damages" includes exemplary damages and means damages, other than compensatory and nominal damages, awarded against a person or entity to punish such person or entity and/or to discourage such person or entity, or others, from engaging in similar conduct in the future.
- B. "Claimant" refers to a person or entity seeking "Punitive Damages" from a "Defendant."
- C. "Defendant" refers to a person or entity against whom a "Claimant" seeks "Punitive Damages."
- D. "Punitive Damages Verdict" refers to a decision rendered after a trial by the trier of fact in a "Trial Court" that awards "Punitive Damages" to a "Claimant."
- E. "Compensatory Damages Verdict" refers to a decision rendered after a trial by the trier of fact in a "Trial Court" that awards monetary damages other than "Punitive Damages" to a "Claimant." Compensatory damages include, but are not limited to, past and future lost wages, past and future medical expenses, and past and future pain and suffering.
- F. "Trial Court" refers to a state or federal court with general jurisdiction over lawsuits filed with that court and which is responsible for the trial of such lawsuits.
- G. "Punitive Damages Settlement" refers to an agreement between one or more "Claimants" and one or more "Defendants" to resolve a disputed claim in which a "Claimant" seeks to collect, inter alia, "Punitive Damages" from a "Defendant."
- H. "Punitive Damages Payment" means a transfer of "Cash or Cash Equivalents" from a "Defendant" to a "Claimant" to resolve a claim for "Punitive Damages."
- I. "Cash or Cash Equivalents" means United States currency or other assets that are readily valued in or convertible to United

States currency on the open market, such as bonds, stocks, or other marketable securities. It does not include rebates, coupons, or services that are not readily valued in or convertible to United States currency.

- J. “Prior Punitive Damages Statement” refers to a document a “Defendant” may file with a state or federal trial court following either a “Punitive Damages Verdict” or a “Punitive Damages Settlement” describing in detail the act or course of conduct that provided the basis for a recent or pending “Punitive Damages Payment” from a “Defendant” to a “Claimant.”
- K. “Modified Prior Punitive Damages Statement” refers to a document a “Defendant” may file with a state or federal trial court following either a “Punitive Damages Verdict” or a “Punitive Damages Settlement” pursuant to which a “Defendant” has made an additional “Punitive Damages Payment” a “Trial Court” determines arose out of the same act or course of conduct detailed in a properly filed “Prior Punitive Damages Statement.”
- L. “National Punitive Damages Registry” refers to an entity created by Congress to receive, catalog, and publish “Prior Punitive Damages Statements.”

## VI. GENERAL RULES

- A. Following a “Punitive Damages Verdict” or “Punitive Damages Settlement,” a “Defendant” may file a motion with the “Trial Court” that seeks a certification from the “Trial Court” of a “Prior Punitive Damages Statement.” After reviewing and revising (if appropriate) the “Prior Punitive Damages Statement” to ensure that it (i) accurately describes the conduct that gave rise to the “Punitive Damages Verdict” or “Punitive Damages Settlement,” and (ii) accurately reflects the amount of a “Punitive Damages Payment,” the “Trial Court” shall issue an order certifying the “Prior Punitive Damages Statement.”
- B. After a “Trial Court” certifies a “Prior Punitive Damages Statement,” a “Defendant” may file the “Prior Punitive Damages Statement” with the “National Punitive Damages Registry.”

- C. After filing a “Prior Punitive Damages Statement” with the “National Punitive Damages Registry,” a “Defendant” may provide a copy of the “Prior Punitive Damages Statement” to “Claimants” who are seeking “Punitive Damages” based upon the same act or course of conduct described in the “Prior Punitive Damages Statement” and to “Trial Courts” where the “Claimants” claims are pending.
- D. A “Defendant” against whom a “Punitive Damages Verdict” is rendered shall be entitled a credit toward the amount of the “Punitive Damages Verdict” in the amount reflected in a “Prior Punitive Damages Statement,” if and only if:
  - 1. The “Defendant” carries its burden of proving by clear and convincing evidence to the “Trial Court” that the “Punitive Damages Verdict” is based upon the same act or course of conduct reflected in a “Prior Punitive Damages Statement”;
  - 2. The “Defendant” complied with all of the timing provisions provided herein relating to moving (i) the “Trial Court” for an order certifying a “Prior Punitive Damages Statement” and (ii) registering the “Prior Punitive Damages Statement” with the “National Punitive Damages Registry”; and
  - 3. The “Defendant” provided the “Claimant” and the “Trial Court” with proper notice of its intention to rely upon the “Prior Punitive Damages Statement” as defined herein.

## VII. PROCEDURAL RULES

- A. To be entitled to a credit against a “Punitive Damages Verdict” as provided herein, a “Defendant” must, absent good cause shown, comply with the following timing requirements:
  - 1. Before a trial in which a “Claimant” seeks “Punitive Damages,” a “Defendant” must notify the “Trial Court” of its intention to file a post-trial motion to certify a “Prior Punitive Damages Statement” in the event a “Punitive Damages Verdict” is entered against the “Defendant.”

2. A “Defendant” must file a motion to certify a “Prior Punitive Damages Statement” with the “Trial Court” that presided over the case in which a “Punitive Damages Verdict” has been entered within thirty days of entry of final judgment in a case.
  3. A “Defendant” must jointly file with the “Claimant” a motion to certify a “Prior Punitive Damages Statement” with a “Trial Court” either before, or within thirty days after, making a “Punitive Damages Payment” in a case in which a “Punitive Damages Settlement” is reached.
  4. A “Defendant” must register a “Prior Punitive Damages Statement” with the “National Punitive Damages Registry” within sixty days of the “Trial Court’s” order certifying the “Prior Punitive Damages Statement.”
  5. A “Defendant” must provide a copy of a “Prior Punitive Damages Statement” to a “Claimant” in whose case the “Defendant” will seek a credit based upon a “Prior Punitive Damages Statement” within thirty days of either (i) registering a “Prior Punitive Damages Statement” with the “National Punitive Damages Registry,” or (ii) being properly served with a “Claimant’s” complaint, whichever is later.
  6. A “Defendant” must provide a copy of a “Prior Punitive Damages Statement” to a “Trial Court” in whose court the “Defendant” will seek a credit based upon a “Prior Punitive Damages Statement” within either thirty days of either (i) registering a “Prior Punitive Damages Statement” with the “National Punitive Damages Registry,” or (ii) being properly served with a “Claimant’s” complaint pending before that “Trial Court,” whichever is later.
- B. “Prior Punitive Damages Statements” are not admissible in court for any purposes other than those defined herein.

#### VIII. CALCULATING PUNITIVE DAMAGES

The amount of any subsequent awards of “Punitive Damages” a “Defendant” who has properly filed a “Prior Punitive Damages

Statement” with the “National Punitive Damages Registry” and who otherwise complies with the rules set forth herein must pay shall be calculated as follows:

- A. If the amount of the “Punitive Damages Verdict” exceeds the amount reflected in the “Prior Punitive Damages Statement,” the “Defendant” shall pay “Punitive Damages” to the “Claimant” in an amount equal to the greater of either (i) the difference between the “Punitive Damages Verdict” and the amount reflected in the “Prior Punitive Damages Statement,” or (ii) the lesser of either the “Punitive Damages Verdict” or fifty percent of the “Compensatory Damages Verdict” rendered in favor of the “Claimant.”
- B. If the amount of the “Punitive Damages Verdict” is equal to or less than the amount reflected in the “Prior Punitive Damages Statement,” the “Defendant” shall pay “Punitive Damages” to the “Claimant” in an amount equal to the lesser of either (i) fifty percent of the “Compensatory Damages Verdict” rendered in favor of the “Claimant,” or (ii) the amount of the “Punitive Damages Verdict.”

#### IX. MODIFIED STATEMENTS

- A. After a “Defendant” who, pursuant to Section VIII, makes a “Punitive Damages Payment,” the “Defendant” may file a “Modified Prior Punitive Damages Statement.”
- B. The “Modified Prior Punitive Damages Statement” must (i) accurately describe the conduct that gave rise to the “Punitive Damages Verdict” or “Punitive Damages Settlement,” (ii) accurately describe all “Punitive Damages Verdicts” and/or “Punitive Damages Settlements” pursuant to which the “Defendant” seeks a credit for making a “Punitive Damages Payment,” and (iii) accurately reflect the total amount of “Punitive Damages Payments” made in the cases described in subsection (ii).
- C. All of the Procedural Rules set forth in Section VII apply to “Modified Prior Punitive Damages Statements.”
- D. When calculating “Punitive Damages” pursuant to Section VIII, the amount of credit to which the “Defendant” is enti-

ted is the amount reflected in the “Modified Prior Punitive Damages Statement.”

X. REGISTRATION FEE

A “Defendant” wishing to register a “Prior Punitive Damages Statement” with the “National Punitive Damages Registry” must pay a registration fee equal to one percent of the “Prior Punitive Damages Payment” the “Defendant” seeks to register. A “Defendant” wishing to register a “Modified Punitive Damages Statement” must pay a registration fee equal to one percent of the “Prior Punitive Damages Payments” the “Defendant” seeks to register, less the fee the “Defendant” has previously paid to register the “Prior Punitive Damages Statement” relating to the same act or course of conduct reflected in the “Modified Prior Punitive Damages Statement.”

XI. APPLICABILITY; PREEMPTION; JURISDICTION OF FEDERAL COURTS

A. Applicability to Punitive Damages Actions

1. In General—Except as provided in paragraph 2 below, this Proposal shall apply to any civil action brought on any theory where punitive damages are sought based on the same act or course of conduct for which punitive damages have already been awarded against the defendant.
2. Statutory Exception—This Proposal shall not apply to any civil action involving damages awarded under any federal or state statute that prescribes the amount of punitive damages to be awarded.

B. Preemption—Except as provided in subsection XI.A.2. above, this Act shall supersede any federal or state law regarding recovery of punitive damages.

C. Jurisdiction of Federal Courts—The district courts of the United States shall not have jurisdiction over any civil action pursuant to this Proposal based on § 1331 or 1337 of title 28, United States Code.