5-1-1986

Remedial Activism: Judicial Bargaining with Punitive Damage Awards

Rosemary A. Jackovic

Recommended Citation
Available at: http://digitalcommons.lmu.edu/lr/vol19/iss3/8
REMEDIAL ACTIVISM: JUDICIAL BARGAINING WITH PUNITIVE DAMAGE AWARDS

I. INTRODUCTION

In two recent decisions from the United States District Court for the District of Kansas, judges have conditioned the reduction of punitive damage awards on the defendants' willingness to undertake equitable remedial action. In *O'Gilvie v. International Playtex, Inc.*,¹ a toxic shock syndrome (TSS) case,² the jury assessed a tampon manufacturer $10,000,000 in punitive damages.³ Although the award was not found to be "excessive, nor did it shock the Court's conscience,"⁴ Judge Kelly offered the following proposition to the defendant. If International Playtex (Playtex) would agree to take remedial measures, including removing its polyacrylate tampon from the market, the court "would consider a substantial reduction, if not elimination, of the punitive damages award."⁵ Playtex complied,⁶ and the punitive award was reduced to $1,350,000.⁷

In *Miller v. Cudahy Co.*,⁸ farmland owners and lessees sought to recover damages⁹ and equitable relief¹⁰ arising from the American Salt Company's¹¹ pollution of a freshwater aquifer beneath their croplands.¹²

---

2. See *infra* note 20 for an explanation of toxic shock syndrome.
4. *Id.*
5. *Id.* at 818-19. The full remedial program implemented by Playtex included the removal of all polyacrylate fibers from tampons currently in production, the recall of polyacrylate tampons already on the shelves and the implementation of a public education program aimed at warning consumers of the dangers of TSS. *Id.*
6. *Id.* at 820.
8. *Id.* at 1005-06. The court awarded compensatory damages for injury to cropland from the salt brine pollution, consequential damages for injury to water wells and injury to a dairy business, damages for trespass and punitive damages. The court, however, concluded that the plaintiffs were not entitled to consequential damages for stress, aggravation and mental anguish. *Id.*
9. *Id.* at 1007. "The plaintiffs have invoked the equitable jurisdiction of this Court by praying for injunctive relief... The continuing trespass by the defendants' pipelines on Cecil Miller's property must come to an end. The Court will, therefore, enjoin the continuation of this trespass..." *Id.*
10. *Id.* at 1007. "The plaintiffs have invoked the equitable jurisdiction of this Court by praying for injunctive relief... The continuing trespass by the defendants' pipelines on Cecil Miller's property must come to an end. The Court will, therefore, enjoin the continuation of this trespass..." *Id.*
11. The court noted:
Judge Theis held that “the facts and circumstances of this case are such that the Court should exercise its discretion to find the defendants liable to the plaintiffs for punitive damages, in the amount of $10,000,000.” However, the court decided to hold final judgment on the punitive award temporarily in abeyance, “pending the defendants’ good-faith efforts to define and remedy the pollution they have caused.” The court is now overseeing the defendants’ cleanup efforts, reserving the right to award the punitive damages, in full or in part, should the cleanup effort not proceed in good faith “or at any time that it becomes apparent that any cleanup effort is impossible for either scientific or financial reasons.”

To date, O’Gilvie and Miller are the only known examples of judicial bargaining with punitive damage awards. However, should this practice become widespread, there may be significant ramifications. The threat of a large punitive damage award gives courts a strong bargaining position to encourage defendants to take the remedial alternative suggested. Moreover, judicial bargaining with punitive damages allows judges to act as regulators without the political checks that attend action by administrative agencies. Judicial bargaining with punitive damages demands that the courts become the creators and managers of complex forms of equitable relief. Depending on the remedial alternative offered by the judge, the action taken by the defendant may require ongoing judicial supervision of its administration and implementation and have widespread effects on persons who are not parties to the litigation.

This Comment first outlines the O’Gilvie and Miller cases. The dis-

---

At the time this lawsuit was filed, one of the operating divisions of Cudahy was the American Salt Company.

... After the lawsuit was filed, General Host [the parent company of Cudahy] divested itself of Cudahy, but retained American Salt as a wholly-owned subsidiary. Subsequently, General Host signed a letter of intent to sell American Salt to a third party.

Id. at 981.

12. Id. at 980-81.

13. Id. at 1007.

14. Id. at 1008.

15. Id.

16. The O’Gilvie court stated that the basis for the conditions set forth in the agreement was “probably without precedent.” 609 F. Supp. at 818. Moreover, “Judge Kelly said his own research indicated there was no authority determining that he could or could not bargain with the Playtex jury’s punitive award.” Schechet, Judges Bargain with Damages, Nat’l L.J., Aug. 12, 1985, at 1, 23, col. 1. In Miller, although the court claimed equitable jurisdiction to fashion a remedy which works substantial justice between the parties, it did not address the issue of the propriety of bargaining with a punitive damage award as a means of achieving this end. 592 F. Supp. at 1007.

cussion next examines the legal background and existing law regarding judicial review of punitive damages, comparing judicial control over remedies in analogous contexts and analyzing the role of remittitur in the punitive damages arena. Next, the Comment makes the case for remedial activism, evaluating judicial bargaining with punitive damages as a possible solution to regulatory and judicial failures. It then considers the constitutional, practical and economic objections to judicial bargaining with punitive damage awards, providing workable guidelines for the implementation of this innovative form of remedial activism.

II. THE LEGAL BACKGROUND


In O'Gilvie v. International Playtex, Inc., the plaintiffs were the surviving husband and children of Betty O'Gilvie. Ms. O'Gilvie died in April of 1983 at the age of twenty-one, an apparent victim of TSS. On February 25, 1985, the jury found that O'Gilvie's use of Playtex's super-deodorant tampon caused or contributed to her death from TSS. The jury also found that, compared to other tampons, the defendant's product posed an increased risk to users and that the instructions inside and outside the Playtex box did not adequately or fairly warn O'Gilvie of the risk of contracting TSS. On the basis of these findings, the jury awarded a total of $1,525,000 in compensatory damages. The jury was further asked to determine whether the failure of Playtex adequately to warn consumers of the risk of TSS was in reckless disregard of the consequences of its acts and whether the defendant knew or should have known of the increased risks of TSS created by its super-deodorant

18. 609 F. Supp. 817; see supra note 1.
19. Id. at 819.
20. See Schechet, supra note 16, at 23, col. 2. Toxic shock syndrome (TSS) is an illness caused when certain fibers (in this case, polyacrylate) found in some tampons “encourage the growth of Staphylococcus aureus, a bacterium sometimes present in the vagina. The bacteria, in turn, generate poisonous waste products, which are circulated by the blood.” A Verdict on Tampons, TIME, Mar. 29, 1982, at 73. “The initial signs include high fever, diarrhea, vomiting and dizziness, followed by a sunburn-like rash with peeling of the skin, especially on the hands and feet. There may also be a sharp drop in blood pressure and, in severe cases, fatal shock.” Toxic Tampons, TIME, Oct. 6, 1980, at 104. Hundreds of women have fallen victim to this sometimes fatal disease. Lawyers Flush Out Toxic Shock Data, SCIENCE, Apr. 13, 1984, at 132.
22. Id. “The Court discussed the present state of the warning on defendant's product which acknowledges an ‘association’ between the use of the tampon and toxic shock syndrome (TSS). The jury found that this warning was inadequate and the Court concurs.” Id. at 819.
23. Id. at 818. The award included $250,000 for the conscious pain and suffering of Betty O'Gilvie, $25,000 for nonpecuniary loss to Kelly O'Gilvie (Betty O'Gilvie's husband) and children, and $1,250,000 in pecuniary loss to Kelly O'Gilvie and children. Id.
tampons. The jury responded affirmatively to both inquiries and awarded the plaintiffs an additional $10,000,000 in punitive damages.\textsuperscript{24}

On motion by the defendant, the trial court considered whether the punitive damage award was so excessive as to shock the conscience of the court,\textsuperscript{25} but found for the plaintiffs on that issue.\textsuperscript{26} However, the court interpreted the high punitive award as the jury's way of saying, "[t]ake that damnable product off the market!"\textsuperscript{27} Therefore, the court offered the following bargain to the defendant: If Playtex would "acknowledge the jury's findings as factually established and announce the removal of the polyacrylate tampon from the marketplace, the Court in turn would consider a substantial reduction, if not elimination, of the punitive damages award."\textsuperscript{28} Playtex was advised "that it has never been the Court's intention to negotiate or otherwise dictate the course of [the] defendant's decisions . . . [and that] whatever decisions were made by the defendant company, were its alone to make."\textsuperscript{29} Although the court recognized that its actions were "probably without precedent,"\textsuperscript{30} it justified them on the basis that the remedy implemented "that which ought to be."\textsuperscript{31} Playtex complied with the terms of the court's offer and the punitive damages were accordingly reduced to $1,350,000.\textsuperscript{32} The court concluded:

Of paramount importance, the Court finds that [the defendant's] action is a significant postjudgment remedial and mitigatory response to the jury's findings. Indeed, the jury's

\textsuperscript{24} Id.
\textsuperscript{25} Id. For examples of cases where judges have reduced punitive awards on this basis, see Bankers Life & Casualty Co. v. Kirtley, 307 F.2d 418 (8th Cir. 1962) (award of $650,000 in punitive damages was so excessive as to shock the conscience of the court in view of compensatory award and defendant's poor financial status); Boyle v. Bond, 187 F.2d 362 (D.C. Cir. 1951) ("grossly excessive" verdict reduced because of great disparity between the proof and the jury's award); Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981) (remititur of $125 million punitive award to $3.5 million upheld).
\textsuperscript{26} O'Gilvie, 609 F. Supp. at 818. Although the court ruled that the jury's punitive damage award of $10 million was not excessive, it indicated that Playtex could take remedial action which would make the award unnecessary. Id. at 819.
\textsuperscript{27} Id. at 818.
\textsuperscript{28} Id.
\textsuperscript{29} Id. at 819.
\textsuperscript{30} Id. at 818; see supra note 16 and accompanying text.
\textsuperscript{31} O'Gilvie, 609 F. Supp. at 818. The court explained:
When wrongdoing is acknowledged, where change is agreed to, indeed, where change has occurred, the Court is usually impressed and persuaded principally as to what further punishment, if any, is then in order. In the Court's view, such remedial events are appropriate elements of mitigation which, in the Court's discretion, should be noted and considered.
\textsuperscript{32} Id. at 818-20.
intent has been substantially sufficed. In view of the defendant's actions, the Court finds that the punitive damages award is now, in part, excessive and unnecessary. . . . [Playtex] has faced its situation, it has acted most responsibly, and it has acted decently. It can be no further deterred; it has been punished enough.33

The second case of judicial bargaining with punitive damages, Miller v. Cudahy Co.,34 did not involve a jury. There, the court used its power to award punitive damages as a tool to convince the defendant that it would be cheaper to undertake remedial action than to pay a $10,000,000 punitive award.35 In Miller, the plaintiffs were landowners and lessees who sought both damages36 and equitable relief37 from the American Salt Company, whose plant produced salt brine pollution that was damaging their cropland.38 The court found that “[e]ven though American Salt’s management was fully cognizant of [the] properties of salt and the havoc that would be wreaked by massive salt pollution of the aquifer, they reached a conscious and reasoned business decision to maximize profits”39 and forego making the necessary repairs. Therefore, the court ordered that its punitive damage award be held in abeyance, pending a “conscientious, good-faith, and realistic effort to address and remedy, within a reasonable time, the pollution presently existing in the aquifer.”40 The court stated:

A district court sitting in equity has broad powers to devise and fashion a remedy between the parties before it that works a substantial justice between them, settles the matters in controversy, and prevents further litigation.

33. Id. at 819. In commenting on his actions, Judge Kelly said, “I’m convinced that what I did is workable and perhaps the vehicle to give rise to a solution to this problem of massive damages, and that is: Exchange them for remediation.” Schechet, supra note 16, at 23, col. 2.
34. 592 F. Supp. 976; see supra note 8.
35. Id. at 1007-08.
36. See supra note 9.
37. See supra note 10.
38. Miller, 592 F. Supp. at 993.
39. Id. at 994. The court explained:

It was perfectly foreseeable to American Salt’s management—and was, in fact, foreseen by them—that deterioration of the physical plant and equipment would occur, and would result in pollution of the environment if not corrected by aggressive routine maintenance. The physical plant and equipment were, nevertheless, allowed to deteriorate to the point where incidents of pollution were commonplace, everyday occurrences.

Id.; see also infra notes 93-96 and accompanying text.
40. Miller, 592 F. Supp. at 1007.
In the further exercise of its equitable jurisdiction, this Court concludes that substantial justice would best be worked between these parties if the defendants could accomplish, at their own expense, the removal of a substantial majority of the salt from the aquifer.\textsuperscript{41}

The court observed that the plaintiffs' interest in this litigation was not to "get-rich-quick," but to enjoy the benefits of their farmland without the pollution caused by the American Salt Company.\textsuperscript{42} Although a punitive award might serve to deter and punish American Salt, the court's concern was that such an award would do nothing to directly address the violated rights of the plaintiff farmers.\textsuperscript{43} Additionally, the rights of other downstream landowners, not involved in this law suit, could be affected. The court noted that "increasing numbers of the state's citizens will be injured"\textsuperscript{44} as the pollution spreads. The court concluded that if American Salt was truly the responsible corporate citizen that it proclaimed to be, the company would implement a full scale cleanup program.\textsuperscript{45} American Salt has since begun the cleanup effort. The court will oversee the program and evaluate its effectiveness before determining a final ruling on the punitive damage award.\textsuperscript{46}

\textbf{B. Doctrinal Roots of Judicial Bargaining with Punitive Damages}

The judges who decided \textit{O'Gilvie}\textsuperscript{47} and \textit{Miller}\textsuperscript{48} did not depart completely from accepted practice. Judicial bargaining with punitive damages has its roots in two well-known doctrines—remittitur of excessive punitive damages and judicial management of equitable remedies.

\begin{itemize}
  \item \textsuperscript{41} \textit{Id.} (citations omitted). In evaluating the potential success of the cleanup program, the court commented:
    
    There is a very high probability that remedial measures could prove effective in removing a substantial amount of the pollution from the aquifer at a reasonable cost well within the range of the defendants. \ldots{} The court \ldots{} finds that the various cleanup strategies have a substantial potential to benefit all of the parties to this case, as well as the state.
  
  \textit{Id.} at 999.
  \item \textsuperscript{42} "The plaintiffs \ldots{} made it abundantly clear that, if they had the power to select any remedy they wanted, they would choose to have the water under their properties restored and once again fit for irrigation and domestic uses." \textit{Id.} at 998.
  \item \textsuperscript{43} \textit{Id.}
  \item \textsuperscript{44} \textit{Id.} at 999.
  \item \textsuperscript{45} \textit{Id.}
  \item \textsuperscript{46} \textit{Id.} at 1008.
  \item \textsuperscript{47} 609 F. Supp. 817; see \textit{supra} note 1 \& notes 18-33 and accompanying text.
  \item \textsuperscript{48} 592 F. Supp. 976; see \textit{supra} note 8 \& notes 34-46 and accompanying text.
\end{itemize}
1. Punitive damages and remittitur

The successes, failures and goals of the punitive damage remedy are a subject of continuing academic, legislative and judicial debate. Presently, scholars, legislators and judges are faced with determining issues such as: under what circumstances should punitive damages be awarded, whether liability insurance should be allowed to cover the cost of punitive damage awards and whether there is an adequate solution to the apparent excessiveness of jury verdicts. Punitive damages are recognized in the federal courts and most states. Such damages can be awarded in addition to compensatory damages when it is proven


52. See generally James, Remedies for Excessiveness or Inadequacy of Verdicts: New Trial on Some or All Issues, Remittitur and Additur, 1 DUQ. L. REV. 143 (1963); Surrick, Punitive Damages and Asbestos Litigation in Pennsylvania: Punishment or Annihilation?, 87 DICK. L. REV. 265 (1983).

53. As one commentator explained:

Many federal statutes expressly provide or forbid punitive recoveries. Under others, however, the availability of punitive damages falls within the “penumbra of express statutory mandates.” Courts are therefore sometimes faced with the necessity of making quasi-legislative decisions about whether to allow punitive awards. Express reliance on such usually ambiguous factors as the common law availability of the remedy, legislative history, or statutory language has produced, in the words of the Second Circuit, a “conflicting gaggle of general rules” about when punitive recoveries should be allowed.


54. Examples of states which do not recognize punitive damages include: Louisiana, see Ricard v. State, 390 So. 2d 882, 886 (La. 1980) (“[T]here is no need to introduce punitive damages into our state substantive law. Clearly an award of compensatory damages will serve the same deterrent purpose as an award of punitive damages.”), and Nebraska, see Prather v. Eisenmann, 200 Neb. 1, 11, 261 N.W.2d 766, 772 (1978) (the measure of recovery in all civil cases in Nebraska is compensatory damages).
that "the defendant acted out of malice, willfully, wantonly, recklessly, . . . with conscious disregard or indifference toward the interests of others" or where there are aggravating circumstances of gross negligence, fraud or oppression. These damages are being awarded in an increasing variety of cases, including "bad faith breach of contract claims, violations of civil rights, fraudulent violations of state securities laws, and products liability actions."

Traditionally, judges express their disapproval of excessive punitive damage awards by offering the plaintiff the option of remitting a portion of the award in exchange for a denial of the defendant's motion for a new trial. The court usually considers ordering a remittitur on motion by the losing party, but may also act on its own initiative. If the prevailing party refuses the remittitur offer, the court will order a new trial. However, the court's decision to grant the losing party's request for remittitur is not a power which can be arbitrarily applied. The following is an example of guidelines for a court's use of the remittitur doctrine:

The question is not whether the Court would have awarded a smaller sum than was awarded by the jury. The question is not whether the size of the verdict was merely too great. It is

55. Ellis, supra note 49, at 20 (footnotes omitted).
56. See id.; see also Note, Allowance of Punitive Damages in Products Liability Claims, supra note 50, at 614; see generally, D. DOBBS, REMEDIES 204-21 (1973).
57. Mallor & Roberts, supra note 49, at 640 (footnotes omitted).
58. See Dimick v. Schiedt, 293 U.S. 474, 480 (1935). "'When an excessive verdict is given, it is usual for the judge to suggest to counsel to agree on a sum, to prevent the necessity of a new trial.'" Id. (quoting J. Mayne, A TREATISE ON THE LAW OF DAMAGES 580 (9th ed. 1920)).
60. See Neal v. Matanuska Valley Lines, 165 F. Supp. 785 (D. Alaska 1958) (court has option of granting new trial if prevailing party does not agree to remittitur). The defendant may appeal the denial of a request for remittitur or of a new trial. See Dagnello v. Long Island R.R. Co., 289 F.2d 797 (2d Cir. 1961) (review of exercise of discretion by trial judge in refusing to set aside a verdict for excessiveness and resort to remittitur); Whiteman v. Pitré, 220 F.2d 914 (5th Cir. 1955) (review of whether there was abuse of discretion by the trial court in denying motion for new trial on ground that verdict was excessive); Butcher v. Krause, 200 F.2d 576 (7th Cir. 1952) (review of whether trial court abused discretion in amount of damages awarded); Sebring Trucking Co. v. White, 187 F.2d 486 (6th Cir. 1951) (review of whether there was abuse of discretion in overruling motion for new trial on ground that verdict was excessive). However, the plaintiff may not appeal from a remittitur that has been accepted. See Donovan v. Penn Shipping Co., 429 U.S. 648, 650 (1977) (court ruled that plaintiff could not accept remittitur "under protest," thereby reserving the right to appeal).
61. "Ordinarily, of course, the amount of damages is for the jury, and whether a verdict should be set aside as excessive is a matter resting in the discretion of the trial judge. This, however, is not an arbitrary but a sound discretion, to be exercised in the light of the record in the case and within the limits prescribed by reason and experience." Virginian Ry. Co. v. Armentrout, 166 F.2d 400, 407 (4th Cir. 1948).
whether the verdict was brought about by passion and prejudice; whether it is so exorbitant as to shock the conscience of the Court; and even whether it is so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate.\(^\text{62}\)

Remittitur, therefore, is not intended as a vehicle by which the court may substitute its own view for that of the jury; instead, it may be applied only under exceptional or unusual circumstances.\(^\text{63}\)

With judicial bargaining, the punitive award will be upheld unless the defendant implements the equitable alternative offered by the court. Once the defendant takes the remedial action, the punitive award may become, in part, unnecessary and excessive because the circumstances which originally warranted the punitive award have changed. Remittitur then becomes an appropriate option for the court. There are, however, key differences between judicial bargaining with punitive damages and remittitur. First, in neither \(\textit{O'Gilvie}\) nor \(\textit{Miller}\) did the court determine that the original punitive awards were excessive, a requirement for a remittitur order. In \(\textit{O'Gilvie}\), the court specifically ruled that the punitive award was not excessive,\(^\text{64}\) but determined that remedial action would lessen the necessity for imposing the punitive award.\(^\text{65}\) In \(\textit{Miller}\), because the punitive award was issued by the judge, it can be assumed that he believed his punitive award was reasonable.\(^\text{66}\)

Second, in remittitur it is the plaintiff who makes the decision whether to accept a lesser amount of damages in order to avoid a new trial. However, in both \(\textit{O'Gilvie}\) and \(\textit{Miller}\), the fate of the punitive award was in the hands of the defendants, based on a judge-initiated remedial alternative. If the defendant chose to accept the offer made by the judge, the punitive award would be reduced or eliminated. Therefore, under these two examples of judicial bargaining, the plaintiff was not a party to the decision to alter the remedy imposed. Nor was the plaintiff given the option of rejecting the proposed

\(^{62}\) \textit{Graling v. Reilly}, 214 F. Supp. 234, 235 (1963). The \textit{Graling} court considered the following factors in deciding that the jury had not been influenced by undue passion or prejudice:

\begin{quote}
The case was tried by able counsel on a very high level, without any attempt at undue eloquence or histrionics. All the witnesses, including the two plaintiffs, gave their testimony in a calm, deliberate fashion, without any manifest attempt at dramatization, exaggeration or painting the situation in lurid colors.
\end{quote}

\textit{Id.} at 237-38.

\(^{63}\) See \textit{id.; see also} \textit{Kennon v. Gilmer}, 131 U.S. 22, 29 (1889) (court not authorized to overturn jury award based on its own estimate of amount of damages plaintiff should have recovered).

\(^{64}\) \textit{O'Gilvie}, 609 F. Supp. at 818.

\(^{65}\) \textit{Id.}

\(^{66}\) \textit{Miller}, 592 F. Supp. at 1007.
remedial alternative in exchange for a new trial. These distinctions be-
tween judicial bargaining with punitive damages and remittitur may
serve as potential obstacles to acceptance of the practice.

2. Judicial management of equitable remedies

Although the use of bargaining with punitive damage awards as a
mechanism for implementing equitable remedial alternatives is an inno-
vative approach, judicial management of equitable remedies already ap-
pears in a variety of contexts. For example, in the areas of trusts and
bankruptcy, "[c]ourts have developed and administered, almost entirely
on their own, significant bodies of remedial law requiring them to engage
in continuing supervision of enterprises."  
Additionally, "[j]udges ac-
tively supervise the implementation of a wide range of remedies designed
to desegregate schools and to reform prisons and other institutions." 
This form of lawsuit has been labelled "public law litigation," and re-
fers primarily to civil rights actions. "The label was designed to empha-
size that in such cases, the federal courts [and state courts to a lesser
extent] are no longer called upon to resolve private disputes between pri-
vate individuals according to the principles of private law." Rather,
the trend in public law litigation is toward increased judicial activism.
The differences between traditional private litigation and public law liti-
gation are outlined as follows:

[1] Relief is not conceived as compensation for past wrong in a
form logically derived from the substantive liability and con-
fined in its impact to the immediate parties; instead, it is for-
ward looking, fashioned ad hoc on flexible and broadly
remedial lines, often having important consequences for many
persons including absentees. [2] The remedy is not imposed but
negotiated. [3] The decree does not terminate judicial involve-
ment in the affair: its administration requires the continuing
participation of the court. . . . [4] The subject matter of the
lawsuit is not a dispute between private individuals about private
rights, but a grievance about the operation of public policy.  

67. Eisenberg & Yeazell, The Ordinary and the Extraordinary in Institutional Litigation,
69. Chayes, Foreword: Public Law Litigation and the Burger Court, 96 HARV. L. REV. 4,
4 (1982).
70. Id. (material in brackets added to preserve context of original) (footnote omitted).
71. Chayes, supra note 17, at 1302.
The trend in public law litigation illustrates the contrast between the traditional role of the courts as neutral arbiters of private disputes and the practice of judicial management of equitable remedies. Under a system of judicial bargaining, it is the judge who initiates the remedial alternative, not a party to the action. In *O'Gilvie* for example, the court outlined a remedial alternative completely on its own initiative, without any input from the plaintiff. Moreover, the defendant is given a choice of remedies when offered a bargain by the court. The defendant may opt to pay the punitive damages or take the equitable action suggested, whereas standard equitable remedies (injunctions, for example) are mandates from the court to which the defendant must adhere. In both *O'Gilvie* and *Miller*, the court chose to give the defendants a choice of remedies, rather than limiting the alternatives to the relief requested by the plaintiffs. Therefore, although judicial management of equitable remedies is well established in other contexts, judicial bargaining with punitive damages is indeed outside the scope of traditional practice.

C. Doctrinal Justification for Remedial Activism

The underlying premise of *O'Gilvie* and *Miller* is that, under some circumstances, the court should have the power to determine on its own initiative when equitable remedies are superior to the remedies at law. However, judicial bargaining with punitive damages does not neatly fit into the existing doctrines of remittitur or judicial management of equitable remedies. Although there are similarities, there are important differences which make judicial bargaining unique. Whereas the remittitur doctrine is traditionally used merely to lower excessive damage awards, judicial bargaining allows judges to independently fashion creative equitable solutions in response to the broader needs posed by the

---

72. See Walker v. City of Birmingham, 388 U.S. 307, 314 (1967). There, the Court stated: "An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therin and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished."

*Id.* at 314 (quoting Howat v. Kansas, 258 U.S. 181, 189-90 (1922)).

73. 609 F. Supp. 817; see *supra* note 1 & notes 18-33 and accompanying text.

74. 592 F. Supp. 976; see *supra* note 8 & notes 34-46 and accompanying text.

75. Currently, courts may grant equitable relief only if the remedy at law is inadequate. See D. DOBBS *supra* note 56, at 57-62. Neither the *O'Gilvie* nor *Miller* courts addressed this issue.
litigation. And, although equitable remedies are imposed in many contexts, judicial bargaining with punitive damages as a means of implementing such remedies is a new practice. The existing doctrines, as expressed in the cases defining both remittitur and equitable remedies, neither authorize nor prohibit the new practice. Therefore, given the lack of controlling precedent, it is important to look to the underlying policy considerations which motivated the *O'Gilvie* and *Miller* decisions in order to determine whether there is a need and a justification for judicial bargaining with punitive damages.

III. POLICY ANALYSIS OF JUDICIAL BARGAINING WITH PUNITIVE DAMAGES

A. The Case For Remedial Activism

1. Failures of the present system

   a. tort system failure

   The message sent by the *O'Gilvie v. International Playtex, Inc.* 76 and *Miller v. Cudahy Co.* 77 courts is that the current remedial options are sometimes inadequate to meet the goals of the tort system. The frustrations experienced by courts when attempting to work within the constraints of the tort system are best illustrated by Federal District Court Judge Miles W. Lord's comments to officers of the A.H. Robins Company concerning the Dalkon Shield litigation:

   The courts of this country are burdened with more than 3,000 Dalkon Shield cases. The sheer number of claims and the dilatory tactics used by your company's attorneys clog court calendars and consume vast amounts of judicial and jury time. . . .

   . . .

   *If this court had the authority,* I would order your company to make an effort to locate each and every woman who still wears this device and recall your product. But this court does not. I must therefore resort to moral persuasion and a personal appeal to each of you. . . . You are the people with the power to recall. You are the corporate conscience.

   Please in the name of humanity, lift your eyes above the bottom line. You, the men in charge, must surely have hearts and souls and consciences.

   Please, gentlemen, give consideration to tracing down the

---

76. 609 F. Supp. 817; see supra note 1 & notes 18-33 and accompanying text.
77. 592 F. Supp. 976; see supra note 8 & notes 34-46 and accompanying text.
victims and sparing them the agony that will surely be theirs.78

This example graphically depicts the failure of the tort system to achieve a major aim of products liability legislation—protecting consumers from companies which market harmful products. The remedy at law is damages, which is meant to compensate individual victims of defective or unsafe products.79 The court’s added ability to award punitive damages is meant to punish past actions and deter future wrongdoing.80 However, these remedies do not always achieve the goal of protecting the public. The O’Gilvie court recognized this shortcoming. When O’Gilvie was decided, Playtex was still marketing its polyacrylate tampons,81 and there was no guarantee that a large punitive award in a single case would result in a change in Playtex’s product line. The court concluded that an equitable remedy, removal of the product from the market, would better meet the goal of protecting the public from harm.82 Thus, in offering the choice of an alternative remedy to the defendant, the O’Gilvie court considered both the overall goal of products liability law, that of protecting society at large, with the immediate goal of the litigation, that of compensating the particular victim. The result of the court’s action was that the victim’s family was compensated for its loss,83 and consumers were protected from future harm by removal of the product from the market.84 In this manner, the remedy formulated in O’Gilvie protected the rights of the litigants and insured the safety of the general public.

The O’Gilvie example, however, illustrates another shortcoming of the tort system. The removal of Playtex’s polyacrylate tampon could not have been achieved through traditionally available tort remedies. The plaintiffs in O’Gilvie did not possess standing to ask for injunctive relief in the form of the removal of the product from the market because such a remedy would do nothing to redress the injury claimed.85 Because the punitive damage remedy did not guarantee the removal of the product from the market, and no alternative solution was presented by the pres-

78. HARPER’S June 1985, at 13, 14 (reprint of a speech delivered in the judge’s Minneapolis courtroom on Feb. 29, 1985) (emphasis added).
79. See generally Owen, Punitive Damages in Products Liability Litigation, supra note 50.
80. See infra note 136 and accompanying text.
81. 609 F. Supp. at 818.
82. Id.
83. See supra note 23 and accompanying text.
84. See supra note 6 and accompanying text.
85. See generally City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (standing to invoke injunctive relief to bar use of “chokehold” by police denied because likelihood of repetition of injury was too speculative); Warth v. Seldin, 422 U.S. 490 (1975) (litigant must be able to prove a personal benefit from the court’s intervention).
ent or future litigation, the O'Gilvie court formulated its own remedy to protect unsuspecting consumers from harm.

A similar situation was posed in Miller, where the court found it necessary to balance the rights of individual litigants against the rights of future and downstream landowners. The court was faced with the dilemma that the available legal remedies, although compensating the litigants for their individual losses, did not adequately address the problem of the existing pollution and the long-term problems it posed. First, an injunction mandating that American Salt clean up past pollution was not an available remedy to the plaintiffs in the litigation. Second, a punitive award spread among several plaintiffs would do nothing to restore the soil because it is unlikely that the landowners would pool the award in order to initiate their own cleanup effort. The court recognized that the "plaintiffs would . . . be hard-pressed to directly address [their violated] rights were each plaintiff granted a fraction of a punitive award. The pollution presently existing in the aquifer is a problem that can only be effectively addressed in terms of the area as a whole, rather than as individual tracts." Therefore, the judge, acting as an arbiter, bargained with the punitive damage award in order to induce the American Salt Company to implement its own comprehensive cleanup effort under the supervision of the court.

In both O'Gilvie and Miller, the courts were concerned with the interests of persons who were not parties to the litigation. Their concern was to maximize the societal benefit of the litigation. Thus, the rationale for judicial bargaining in these two cases was to provide for a greater benefit to the public by bargaining with the defendant in order to induce remedial action.

b. regulatory failure

A common response to the failure of the tort system has been to

86. 592 F. Supp. at 998. The court implied that the plaintiffs did not have the power to elect a remedy which would facilitate implementation of a cleanup program. Id.; see also supra note 42 and accompanying text.
87. 592 F. Supp. at 998.
88. Id. at 1008.
89. For example, the Miller court stated:

The Court also finds that important societal interests mingle in this controversy. While the plaintiffs have suffered a direct injury, the state has also been injured by the damage done to a valuable natural resource. The problem is also not limited just to the plaintiffs in this lawsuit and the land they own or lease. Because the aquifer flows, the salt dissolved in it will continue to move downstream unless steps are taken to extract that salt. Thus, increasing numbers of the state's citizens will be injured as the pollution continues to spread.

create administrative agencies with the authority to promulgate regulations. These agencies have been criticized, however, on the ground that they have been captured by the very industries they are supposed to regulate. The failure of such agencies to achieve their goals was an important factor motivating judicial bargaining in O'Gilvie and Miller.

In fact, the O'Gilvie court was asked to resolve a dispute that stemmed from the failure of regulatory checks on consumer products. The Food and Drug Administration’s (F.D.A.) handling of the TSS cases graphically illustrates the inadequacies of regulatory solutions:

[The F.D.A.] file contained numerous reports of cases of T.S.S., some of which were fatal, but the agency did not alert the public until July 1980—after the [Center for Disease Control] had verified more than 105 cases of the illness and at least ten deaths. The F.D.A.’s response to the T.S.S. outbreak was typically restrained. In November 1980, it suggested a regulation that would require tampon manufacturers to notify the agency of any medical problems reported by users and to print a warning about toxic-shock syndrome on tampon packages. But the proposed regulation drew fire from the industry . . . . And since the number of reported T.S.S. cases seemed to be decreasing, the F.D.A. postponed taking any action. Under these circumstances, it is not surprising that the O'Gilvie court took the matter into its own hands. The court was individually able to accomplish what the F.D.A. could or would not—removal of a dangerous product from the market.

Regulatory failure was also evident in Miller. American Salt simply found that it was more profitable to allow the pollution to continue than to remedy the problem. The maximum fine that could be imposed by the Kansas Department of Health and Environment (KDHE) for violating the pollution laws was $10,000 per incident; the cost of complying with

92. There is a possible constitutional separation of powers objection to judicial bargaining with punitive damages which orders action that has been legislatively reserved to the domain of a regulatory agency. A full discussion of this issue is beyond the scope of this Comment.
93. The KDHE is the regulatory agency that was empowered to monitor emissions from the American Salt plant. At one point, the agency had threatened to shut down the plant if an emergency catch basin was not installed. Miller, 592 F. Supp. at 995. The KDHE also conducted a public hearing concerning a National Pollution Discharge Elimination System permit that was to be issued to American Salt. Id. at 996.
94. 592 F. Supp. at 995 (alluding to KAN. STAT. ANN. § 65-170d(a)(5) (1980)).
the law was $60,000, plus two days' lost production. The court concluded that American Salt "made a conscious and reasoned decision to pollute the environment and take the occasional $10,000 fine as a cost of doing business." Faced with the ineffectiveness of regulatory controls on the defendant, the Miller court devised its own remedy via judicial bargaining with punitive damages.

Unfortunately, the O'Gilvie and Miller cases are only two examples of the overall failure of regulatory solutions.

Federal administrative agencies have been subjected to an increasing barrage of criticism emanating from a variety of philosophical and political positions. Economists are concerned with inefficiency, waste and shortages they see caused by certain forms of regulation. Businessmen complain of unreasonable administrative burdens and lack of coordination among agencies. Consumer groups complain that regulation is ineffective. All this criticism centers around the charge that the agencies have failed effectively to discharge their mission of regulating given sectors of the economy to promote the public interest.

One important reason for the failure of regulatory agencies may be that their motivations differ significantly from those of an injured party seeking redress. Injured plaintiffs may be more zealous than regulatory agencies because the plaintiff has a stake in the outcome of the particular case. Agencies, on the other hand, may be more concerned with bureaucratic politics than zealous enforcement of the law. Therefore, if judicial bargaining with punitive damages is to provide an alternative to administrative solutions, care must be taken to ensure that the implementation of such a system does not compromise or diminish the forces motivating

95. Id. at 996.
96. Id.
potential plaintiffs.98

2. Judicial bargaining as a potentially efficient and effective form of remedial activism

Judicial bargaining with punitive damages offers a choice to the defendant: pay the punitive award or undertake remedial action. Thus, the defendant, the person who is in the best position to weigh the costs and the benefits of the proposed alternatives, is the decision maker. By contrast, in traditional equitable relief, it is the responsibility of the judge to weigh the costs and benefits by balancing the equities against the hardships.99 However, the judge may lack the same level of expertise and information as the defendant to engage in the balancing process. Thus, the judge's decision may be less likely to result in the most optimal solution. In contrast, in traditional cases where injunctive relief is ordered, there is no alternative. The defendant must adhere to the court order no matter how costly.100 Under judicial bargaining with punitive damages, however, the defendant can weigh the alternatives and make the most economically beneficial and efficient decision. Since it is the court which fashions the equitable alternative, the goals of the court are presumably met no matter which choice the defendant makes.

In formulating a bargain to offer to a defendant, the court has substantial flexibility to tailor a remedy best suited to the particular case. Thus, the O'Gilvie court recognized that, although the available remedies might serve to meet the needs of the individual plaintiffs, they did not go far enough in addressing the rights of consumers. Without judicial bar-

98. See infra notes 159-60 and accompanying text.
99. See D. Dobbs, supra note 56, at 52-54. Professor Dobbs explains:

The equities of a case are usually taken to refer to matters of fault, ethical position, and delay. Thus if one party has been guilty of some misleading conduct, this may be considered, even if it does not in itself amount to an estoppel. Hardships, changed position and various forms of prejudice or harm to the parties are also considered in this balancing.

Since all or almost all equitable remedies are discretionary, the balancing of equities and hardships is appropriate in almost any case as a guide to the chancellor's discretion. Examples of cases in which balancing occurs are cases in which injunctions are sought to compel removal of encroaching structures, or to force removal of structures erected in violation of building restrictions, or to force removal of nuisances.

Id. at 52-53 (footnotes omitted).
100. In theory, the defendant may be able to buy out of compliance with the injunction by settling with the plaintiffs. If there are a large number of plaintiffs, however, transaction costs and the possibility of holdouts may make it impossible to buy out of compliance with the injunction. With judicial bargaining, a single agent, the judge, is substituted for the plaintiffs, eliminating the possibility that transaction costs or holdouts will produce an inefficient result. See also supra note 72 and accompanying text.
gaining with punitive damages, the court would have been unable to or-
der Playtex's polyacrylate tampon off the market,\footnote{101}{See supra note 85 and accompanying text.} or order Playtex to educate the public about the dangers of TSS.\footnote{102}{In \textit{Miller}, because the court did not possess the option of ordering a cleanup program through traditional mechanisms,\footnote{103}{Judicial bargaining with punitive damages provided the only means by which the court could persuade the American Salt Company to implement a cleanup program. Judicial bargaining with punitive damages, therefore, offers courts the flexibility to formulate remedies which address important societal interests, as well as the needs of individual litigants.} judicial bargaining with punitive damages provided the only means by which the court could persuade the American Salt Company to implement a cleanup program. Judicial bargaining with punitive damages, therefore, offers courts the flexibility to formulate remedies which address important societal interests, as well as the needs of individual litigants.} In \textit{Miller}, because the court did not possess the option of ordering a cleanup program through traditional mechanisms,\footnote{103}{Judicial bargaining with punitive damages provided the only means by which the court could persuade the American Salt Company to implement a cleanup program. Judicial bargaining with punitive damages, therefore, offers courts the flexibility to formulate remedies which address important societal interests, as well as the needs of individual litigants.} judicial bargaining with punitive damages provided the only means by which the court could persuade the American Salt Company to implement a cleanup program. Judicial bargaining with punitive damages, therefore, offers courts the flexibility to formulate remedies which address important societal interests, as well as the needs of individual litigants.

\textbf{B. Objections to Judicial Bargaining with Punitive Damages}

\textit{1. Seventh amendment and integrity of jury verdicts}

There may be some resistance to approving judicial bargaining with punitive damages, a practice which is based, in part, on the remittitur doctrine. Although the remittitur doctrine is well established in the judicial system, its constitutionality has been questioned on seventh amendment grounds. However, this objection can be made only in limited circumstances. First, the provisions of the seventh amendment apply only to cases tried in the federal courts.\footnote{104}{Second, the amendment expressly applies only to jury cases. Therefore, the seventh amendment objection would not apply to cases such as \textit{Miller v. Cudahy Co.},\footnote{105}{The court concluded that "[a]s to the need for a public education program, the defendant's counsel have outlined a meaningful program which, given time and exposure, should serve to inform and alert the public and medical community about the toxic shock process." \textit{O'Gilvie}, 609 F. Supp. at 819.} that are tried by a judge.}

The text of the seventh amendment does not provide an explicit answer to the question of whether judicial bargaining is constitutional. The amendment reads:

\begin{quote}
In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and \textit{no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the}
\end{quote}

\footnote{101}{See supra note 85 and accompanying text.} \footnote{102}{The court concluded that "[a]s to the need for a public education program, the defendant's counsel have outlined a meaningful program which, given time and exposure, should serve to inform and alert the public and medical community about the toxic shock process." \textit{O'Gilvie}, 609 F. Supp. at 819.} \footnote{103}{See supra note 86 and accompanying text.} \footnote{104}{See \textit{Pearson v. Yewdall}, 95 U.S. 294, 296 (1877). Judicial bargaining with punitive damages is thus far a federal innovation. The objections which may be encountered with individual state constitutions concerning judicial alteration of jury verdicts must be dealt with on a state-by-state basis and are outside the scope of this Comment.} \footnote{105}{See infra note 109 and accompanying text.} \footnote{106}{592 F. Supp. 976; see supra note 8 & notes 34-46 and accompanying text.}
rules of the common law.\textsuperscript{107} The language of the seventh amendment was interpreted in \textit{Dimick v. Schiedt}\textsuperscript{108} to mean that any procedure which allows a judge to reexamine facts determined by a jury is unconstitutional, unless the procedure existed in English common law in 1791 when the Bill of Rights was incorporated into the Constitution.\textsuperscript{109}

In \textit{Dimick}, the United States Supreme Court noted in dictum that the remittitur doctrine arguably violates the seventh amendment by allowing a court to reexamine facts tried by the jury, \textit{a practice not fully supported by common law principles},\textsuperscript{110} and expressed the view that "if the question of remittitur were now before us for the first time, it would be decided otherwise."\textsuperscript{111} However, the Court reasoned that since "the [remittitur] doctrine has been accepted as the law for more than a hundred years and uniformly applied in the federal courts . . . we may assume that in a case involving a remittitur . . . the doctrine would not be reconsidered or disturbed at this late day."\textsuperscript{112} Today, the practice of remittitur has become so universal "and has had the apparent approval of so many Supreme Court cases, that it cannot be contended that its use is unconstitutional without a judicial uprooting of precedent akin to that effected by \textit{Erie-Tompkins}.”\textsuperscript{113}

The actions of the \textit{O'Gilvie v. International Playtex, Inc.}\textsuperscript{114} court can be constitutionally justified under the remittitur doctrine. When the court first ruled on the punitive damage award, it found the amount not to be excessive, given existing circumstances.\textsuperscript{115} Playtex was still marketing a dangerous product and had not initiated any educational programs to warn consumers about the association between TSS and its product. However, the court gave the defendants the option of taking action that

\begin{footnotes}
\textsuperscript{107} U.S. CONST. amend. VII (emphasis added).
\textsuperscript{108} 293 U.S. 474 (1935) (landmark case which held additur unconstitutional). Additur, the practice whereby a judge may \textit{increase} an insufficient jury verdict, will not be discussed within the text of this Comment. "It is well-settled . . . that the Seventh Amendment prohibits the utilization of additur, at least where the amount of damages is in dispute." Hawkes v. Ayers, 537 F.2d 836, 837 (5th Cir. 1976) (citations omitted) (verdict of $5000 for injuries sustained in automobile accident was reasonable and consistent with the evidence).
\textsuperscript{109} 293 U.S. at 476.
\textsuperscript{110} \textit{Id.} at 484.
\textsuperscript{111} \textit{Id.}
\textsuperscript{112} \textit{Id.} at 484-85.
\textsuperscript{113} 6A J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE, 59.08[7], at 190-91 (2d ed. 1985) (referring to \textit{Erie R.R. Co. v. Tompkins}, 304 U.S. 64 (1938) (holding that federal courts must apply state common law to substantive questions when jurisdiction is founded upon diversity of citizenship)) (footnotes omitted).
\textsuperscript{114} 609 F. Supp. 817; \textit{see supra} note 1 & notes 18-33 and accompanying text.
\textsuperscript{115} \textit{See supra} notes 25-26 and accompanying text.
\end{footnotes}
would change those circumstances, thus making remittitur appropriate in the eyes of the court. Once Playtex took its polyacrylate tampon off the market and implemented an educational program, the court reasoned that the punitive damage award was, in part, excessive and unnecessary. Had those conditions been in effect when the jury awarded the punitive damages, the judge could have ordered a remittitur. Therefore, proponents of judicial bargaining can argue that bargaining with punitive damages is a permissible extension of the remittitur doctrine.

2. Departing from the judicial role

The effectiveness and credibility of our judicial system depends on the neutrality and impartiality of its judges. If courts become responsible for fashioning creative remedies by bargaining with punitive damages, judicial impartiality may be compromised. In essence, when bargaining with punitive damages, the judge takes on the role of the plaintiff in a settlement negotiation. If the defendant agrees to undertake certain actions, as outlined by the judge, a compromise on other areas of liability can be reached. In effect, the judge becomes an active party in the dispute.

The judge also becomes the attorney for unrepresented parties to the litigation. The bargain offered to the defendant is designed to benefit those unrepresented interests. In O'Givie, the unrepresented interests

116. See supra notes 28-31 and accompanying text.
117. See supra notes 6 & 102 and accompanying text.
118. Conversely, it can be argued that the Supreme Court only approved the practice of remittitur because it was a well-established modern historical practice. Given that there is no precedent for judicial bargaining, the Court may not be willing to extend the remittitur doctrine to encompass such remedial activism. However, this would be a very mechanical interpretation of the Dimick opinion. The real question is whether judicial bargaining with punitive damages is materially different from the remittitur doctrine; that is, whether judicial bargaining results in a greater infringement on the decision of the jury than does remittitur. But there is no material difference between remittitur and judicial bargaining because the defendant's jury trial right is affected in exactly the same way by both practices.

There is another potential problem with the constitutionality of the remittitur doctrine. Dimick relied on the assumption that historical practice serves as a basis for constitutionality. Dimick's view of the role of historical practice in constitutional interpretation was, however, placed in question by two recent Supreme Court decisions. In Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919 (1983), the Court struck down the legislative veto as unconstitutional. The Chadha Court made it clear that the existence of a long-standing historical practice does not necessarily establish constitutionality. Moreover, the Court's decision in Marsh v. Chambers, 463 U.S. 783 (1983), has been interpreted to stand for the proposition that "even long-standing historical practice should receive little deference if it sheds no light on the intentions of the Framers." United States v. Woodley, 751 F.2d 1008, 1025-26 (9th Cir. 1985) (en banc) (Norris, J., dissenting). Therefore, the constitutional basis of the Dimick decision has been called into question. See generally id.

119. See Resnik, supra note 68, at 428; Chayes, supra note 17, at 1286.
were those of the consumer, whereas in Miller, the downstream landowners were the beneficiaries of the court's activism. By taking an activist role, the judge may lose objectivity and be unable fairly to decide whether the punitive award ultimately should be reduced. In bargaining with the punitive damage award, the judge effectively reformulates the pleadings to reflect the remedy deemed most desirable. In the absence of appropriate safeguards, such biases may prevent the judge from fairly and impartially creating and supervising the implementation of the proposed equitable alternative. Consequently, preserving the judge's role as a neutral arbiter must be considered in formulating guidelines for the implementation of judicial bargaining with punitive damages.\[120\]

3. Reduced incentive to litigate

Given the inadequacies of the regulatory approach,\[121\] "individual members of society must play a significant role in instituting actions to impose sanctions for serious misconduct."\[122\] The prospect of receiving punitive damages gives individual citizens the incentive to "play this role" of private attorney general. However, in an attempt to formulate the best remedy, judges who engage in judicial bargaining with punitive damages may shut the door on some private actions by reducing the incentive to litigate. The O'Gilvie court, after comforting the plaintiffs for their reduced recovery,\[123\] acknowledged the impact of their actions on the plaintiffs' attorneys:

[P]erhaps some solace is owing to plaintiffs' counsel. These lawyers, doubtless, have proceeded here with an attorney fee arrangement contingent upon the amount of recovery. This procedure is entirely acceptable and understood. They have surely advanced substantial expenses necessary for the successful trial of this case. To reduce the recovery reduces their expectancy. Fortunately, trial of this case involves the kinds of

\[120\] See infra note 155 and accompanying text.  
\[121\] See supra notes 90-98 and accompanying text.  
\[122\] Mallor & Roberts, supra note 49, at 649.  
\[123\] The court stated:  

Some comment is in order for the benefit of the plaintiff, Mr. Kelly O'Gilvie, for himself and on behalf of his children. Following the jury's verdict, they enjoyed the expectancy of a substantial recovery. Yet, they did not bring this action for personal enrichment. They sought punitive damages solely to punish and deter the defendant from future wrongdoing. In the face of defendant's announcements and representations, the plaintiffs have truly won!  

O'Gilvie, 609 F. Supp. at 819.  

But who have the plaintiffs won their victory for? It is clear that the plaintiffs' victory is for the parties who are not actively represented in the litigation—the consuming public.
lawyers with whom the Court can find comfort in open discussions.

The Court is first to note that it is only through these attorneys' considerable efforts, their commitment of much time in study and preparation, and their skills in the trial of this case, that plaintiffs have prevailed. Not every lawyer would share this experience. In the Court's view, however, they are also the kinds of lawyers who quietly share a certain professional satisfaction and sense of pride in seeing our adversary system work. Their efforts here have literally changed an industry! In the minds of good lawyers such as these, no amount of recompense quite touches that accomplishment. To them, the Court suggests that there will be other cases and other conquests. Indeed, attorneys such as these are always welcome here.124

Unfortunately, whether the welcome mat is out or not, the economics of the situation may mean that if there is widespread judicial bargaining with punitive damages, many cases will not be filed. "Absent the possibility of obtaining punitive damages, it would be economically unfeasible [in a case where actual damages are minimal] . . . for a plaintiff to bring a lawsuit and unlikely that the defendant would be deterred from similar action in the future."125

The loss of this valuable tool of private law enforcement may allow many wrong-doers to escape punishment. Although the O'Gilvie court believed that the attorneys should be satisfied with a noble outcome, the practicality may be that large punitive awards are the key to making their practice profitable or even possible.126 The Miller court addressed the issue by asserting that the plaintiffs were not looking for a "get-rich-quick" scheme.127 However, the motives of the plaintiffs in this particular litigation may not be the same as other potential plaintiffs and their attorneys. In setting guidelines for remedial activism, care must be taken to assure that the needs of all parties are met by the alternative proposed.128

124. Id. at 819-20.
126. For example, one winning case may finance a significant portion of a personal injury attorney's practice. Lawyers, like other businesspersons, need capital to finance their operations. A large judgment in a single case may make it financially possible for the lawyer to pursue other litigation.
127. See supra note 42 and accompanying text.
128. See infra notes 159-60 and accompanying text.
4. Diminished deterrence

An important consideration is whether judicial bargaining with punitive damages will deter future wrongdoing as effectively as punitive damages alone. In this context, two distinct types of deterrence can be identified: specific deterrence, aimed at discouraging the defendant in the litigation from repeating the offense, and general deterrence, aimed at deterring others in the community from committing the same or similar offense.

With regard to specific deterrence, in O'Gilvie and Miller there was some speculation that the remedial measures would have been taken regardless of the court's action. It was reported that American Salt "was committed to a program of installing some monitor and cleanup wells 'regardless of the punitive damage award.'" In addition, the circumstances surrounding the O'Gilvie case indicate that the polyacrylate tampon would have been removed from the market shortly. Thus, the respective defendants may have gotten a better bargain than either judge anticipated. On the other hand, by using judicial bargaining, both courts have ensured that the remedial action will be taken in accordance with specific mandates. In Miller, for example, the cleanup effort will be monitored by the court, eliminating the possibility that the program will be abandoned before it is completed. In O'Gilvie, in addition to requiring the removal of the product from the market, educational programs have been implemented to warn consumers of the dangers of TSS. Thus, the courts guaranteed the implementation of the proposed remedial action.

Whether general deterrence will be achieved by the actions of the O'Gilvie and Miller courts will depend upon the economic comparison of the cost of prevention to the cost of the remedial alternative. If it is less

130. See id. See infra notes 136-38 and accompanying text for a partial listing of the general goals of deterrence.
132. See id. at 24, col. 3.
The day before Judge Kelly's... offer... Playtex received a copy of a Harvard University medical study sponsored by Tambrands Inc. that linked... polyacrylate... to TSS. Tambrands subsequently took its Tampax tampon with polyacrylate off the market, and Playtex made a similar move with some of its tampons, including its Super Deodorant brand, which was at issue in the O'Gilvie case.

Id.
133. See supra notes 14-15 and accompanying text.
134. See supra note 102 and accompanying text.
costly for the defendant to comply with the provisions of the bargain than to pay the punitive damage award, general deterrence will be reduced. Unfortunately, there is a trade off between specific and general deterrence under a system of judicial bargaining with punitive damages. The bargain is only attractive to the defendant as long as it is less costly than the sum of the current punitive award plus any future punitive damages that might be imposed in suits brought by other plaintiffs. However, as the cost of the remedial alternative decreases, its effectiveness as a general deterrent also decreases. If the cost of the remedial alternative is too low in comparison to the punitive award, the goal of general deterrence may be thwarted. Therefore, the court must take care to balance the dual role that punitive damage awards play in deterring future unwanted conduct.\textsuperscript{135}

IV. PROPOSED GUIDELINES FOR JUDICIAL BARGAINING WITH PUNITIVE DAMAGES

A. The Goals of Punitive Damages and Remedial Law as the Basis for Formulating Guidelines

The effort to develop specific guidelines for the implementation of judicial bargaining with punitive damages need not proceed in a vacuum. Considerable thought has already been given to the goals which shape the imposition of punitive damage awards and equitable remedies. Initially, these goals are examined as a source for the development of specific guidelines for judicial bargaining.

The two primary goals of punitive damages may generally be described as punishment and deterrence.\textsuperscript{136} More specifically, punitive damages serve the following purposes: 1) punishing the defendant for his actions as a means for expressing community outrage and enforcing established norms of conduct;\textsuperscript{137} 2) deterring the defendant from repeating the offense so as to protect the community at large from a known harm;\textsuperscript{138} 3) deterring others in the community from committing the same or similar offense;\textsuperscript{139} 4) providing an incentive for plaintiffs who other-

\textsuperscript{135} See infra notes 146-47 and accompanying text.
\textsuperscript{136} O’Gilvie, 609 F. Supp. at 818; Ellis, supra note 49, at 11.
\textsuperscript{138} See Ellis, supra note 49, at 3. See supra note 129 and accompanying text for a description of specific deterrence.
\textsuperscript{139} See Cooter, supra note 137, at 90; Ellis, supra note 49, at 3. See supra note 130 and accompanying text for a description of general deterrence.
wise would not sue; and 5) fully compensating victims for uncompensable losses and attorney's fees. A major focus of these goals is a concern that the interests of all parties to the litigation and those affected by it are considered. Thus, in determining guidelines for judicial bargaining with punitive damages, it is important that the rights of one party are not inadvertently overshadowed by the benefits that judicial bargaining will confer on another. If there is an overriding policy interest in protecting the rights of one party to the detriment of another, that interest must be clearly stated.

The five basic goals of remedial law include: 1) congruence between the right violated and the remedy assessed; 2) administrative convenience; 3) the formulation of substantive goals in light of remedies available; 4) consistency in application; and 5) the avoidance of economic waste. These objectives require that the practice of judicial bargaining with punitive damages be administered in an equitable manner which provides notice to the parties and an opportunity to be heard. Moreover, the implementation of the alternative equitable remedies must not significantly burden the court or pose undue hardships on defendants. Thus, the goals of punitive damages and of remedial law provide the backdrop for the formulation of guidelines for judicial bargaining with punitive damages.

B. Guidelines for the Decision of Whether to Bargain

Judicial bargaining may not be appropriate in every case in which punitive damages are awarded. Therefore, before considering the proper procedure for the implementation of judicial bargaining, the court must decide whether to bargain at all. The court should make the following inquiries:

Consideration of alternative remedies—In determining whether judicial bargaining is appropriate, the court must look beyond the instant litigation. If a regulatory agency has assumed jurisdiction over the problem, it may be appropriate for the court to defer to the agency's greater expertise. The court should also determine if the remedial action desired could be imposed by another court in other pending litigation. In this

---

140. See Cooter, supra note 137, at 90; see also supra notes 121-28 and accompanying text.
141. See Cooter, supra note 137, at 90; Ellis, supra note 49, at 3; Comment, Punitive Damages Under Federal Statutes: A Functional Approach, supra note 53, at 203. In comparing punitive damages to criminal law enforcement, it has been argued that the additional goals of rehabilitation and neutralization of the offense should be incorporated into the aims of the current damages system. See Note, The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages, supra note 49, at 1162.
142. See D. Dobbs, supra note 56, at 3-8.
manner, the judge may avoid taking action that is outside the scope of the plaintiff's requested relief. Moreover, since the full ramifications of judicial bargaining are uncertain, deferring to a traditional forum may be a wise cautionary measure. For example, in *O'Gilvie v. International Playtex, Inc.*, the court may have been able to coordinate its efforts with those of the F.D.A., while in *Miller v. Cudahy Co.*, the court may have deferred to the Kansas Department of Health and Environment to take independent action.

**Consideration of deterrent effect**—The court should bargain with the defendant only if the cost of complying with an alternative equitable remedy is high enough to maintain the specific and general deterrent impacts of the potential punitive damage award. The court should investigate whether the remedial alternative offered to the defendant is action that might be taken anyway. Deterring the specific defendant from repeating the offense, and deterring potential defendants from committing the same or similar offense, are considerations which address the ultimate societal value of the litigation. Therefore, the court must weigh the alternatives: reducing the punitive award sufficiently to induce the specific remedial action, but not so significantly as to destroy the general deterrent effect. Both the *O'Gilvie* and *Miller* courts appear to have taken these considerations into account. In *O'Gilvie*, the court reduced, but did not eliminate, the punitive award. In *Miller*, the court has reserved the option of awarding the punitive damages in full or in part if the cleanup effort is unsatisfactory.

**C. Guidelines for Implementing the Bargain**

Once the decision has been made to bargain with the punitive damage award, the court should consider the following guidelines in effecting its implementation.

**Procedural safeguards**—Prompt notice should be given to the plaintiff and the defendant that the court is considering bargaining with the punitive damage award. Procedural due process, at a minimum, requires an adversary hearing where the parties have the opportunity to contest the use of bargaining itself and object to the content of the specific equitable alternative proposed. The judge should present the remedial alternative to both parties, giving them an opportunity to contest the judge's

---

143. 609 F. Supp. 817; see supra note 1 & notes 18-33 and accompanying text.
144. 592 F. Supp. 976; see supra note 8 & notes 34-46 and accompanying text.
145. See supra note 93 and accompanying text.
146. See supra note 7 and accompanying text.
147. See supra note 14 and accompanying text.
action and to suggest alternatives.\textsuperscript{148}

The right to appeal the bargain at the time it is offered is another essential procedural safeguard. Because the appellate court does not participate in shaping the bargain, appellate review is especially important in guarding against the possibility that the trial court may have lost its neutrality in the process of bargaining with the punitive damage award.\textsuperscript{149} In cases in which compliance with the bargain requires time consuming action, such as the cleanup in \textit{Miller}, postponement of the appeal could deprive the plaintiff of the punitive damages for months or years. Moreover, when the cleanup is completed, and a reduced punitive damage award is finally entered, the parties' positions may be unalterably prejudiced. If the appellate court overturns the bargain after the defendant has already performed the equitable remedy, the defendant may be stuck with the equivalent of double punitive damages. If the appellate court allows the bargain to stand in order to avoid this inequity, the plaintiffs may be deprived of a punitive damage award which they should have received. In either case, appellate review after the bargain has been fully performed and a final judgment entered is not a satisfactory safeguard. Consequently, the decision of the appellate court in \textit{Miller} to dismiss the appeal on the ground that the judgment was not final is distressing.\textsuperscript{150}

For these reasons, the final judgment rule—the rule that allows appeal "only after all the issues involved in a particular lawsuit have been finally determined by the trial court"\textsuperscript{151} should be modified to allow immediate appeal from the entry of an order establishing a punitive damages bargain. Such an exception would be grounded in two existing doctrines. First, appeal is already allowed from orders that are not final but create "some immediate harm that might occur to the appellant if review is postponed."\textsuperscript{152} The exception is limited by the requirement that the harm be "irremediable should later review suggest that it was improperly ordered."\textsuperscript{153} Because compliance with a punitive damages bargain unalterably changes the equities of the case for appellate review, the

\textsuperscript{148} Another alternative would be for the judge to alert the parties that bargaining was being considered and call for arguments and proposals from both sides. This alternative would have the advantage of protecting the judge's neutral role as an adjudicator, and now arbitrator, of disputes. However, the interests of the parties to the litigation may be different from those of the absent class of persons the bargain is meant to benefit. Therefore, a judicially initiated remedial alternative may better serve the needs of all parties.

\textsuperscript{149} See \textit{supra} notes 119-20 and accompanying text.

\textsuperscript{150} See \textit{supra} note 8.

\textsuperscript{151} J. Friedenthal, M. Kane & A. Miller, \textit{Civil Procedure} 579 (1985).

\textsuperscript{152} \textit{Id.} at 589-90.

\textsuperscript{153} \textit{Id.} at 590.
rationale underlying the immediate harm exception to the final judgment rule also supports an exception for such bargains. Second, appeals from orders entering injunctions are specifically allowed by statute.\textsuperscript{154} Not only are judicial bargains with punitive damages structurally similar to injunctions, but the rationale underlying this exception—that an order entering an injunction cannot be effectively appealed once the injunction has been complied with—applies with equal force in the context of an order establishing a punitive damages bargain. The decision to dismiss the appeal in \textit{Miller} was in error; great mischief may result if this approach is followed by other courts.

\textit{Maintaining judicial impartiality}—The bargain should be structured so that the judge does not have to enter into negotiations with the defendant. The judge should not be put in the position of engaging in intensive adversarial bargaining in trying to get the “best deal.” A proposal which required such negotiations could lock the judge into a partisan role preventing fair and even-handed supervision of compliance with the terms of the bargain.\textsuperscript{155} The court may also consider appointing a special master to act as negotiator-arbiter. The special master could, for example, work out the details of a bargain with the parties, leaving the approval and oversight functions to the district judge.

\textit{Ease of administration}—In the interest of ease in administration, the terms of the bargain should be structured so that there are objective criteria for compliance.\textsuperscript{156} In \textit{O'Gilvie}, for example, the court had no difficulty determining whether the product had been removed from the market or if the educational program had been implemented.\textsuperscript{157} Conversely, the \textit{Miller} court has undertaken the responsibility of evaluating the effectiveness of a technical and complicated cleanup program.\textsuperscript{158}

\textit{Preservation of the role of punitive damages in rewarding private attorney general actions}—The court must consider how large a role punitive damages played in providing an incentive for the litigation.\textsuperscript{159} If the

\textsuperscript{155} See supra notes 119-20 and accompanying text.
\textsuperscript{156} Professors Thompson and Sebert explain:

It is a waste of judicial resources and of the time and money of the parties and witnesses if the litigation culminates in a decree for specific relief that cannot be enforced. The court which issues the decree exposes its limitations in a manner which erodes its stature. Even where the decree can be enforced the expenditure of resources necessary for enforcement may be all out of proportion to the gain to the successful party from enforcement.


\textsuperscript{157} See supra note 6 and accompanying text.
\textsuperscript{158} See supra note 41 and accompanying text.
\textsuperscript{159} See supra notes 121-28 and accompanying text.
litigation was a high risk proposition, requiring the establishment of a new legal theory or requiring difficult fact-finding efforts, the court may want to preserve the punitive damage award as an incentive for potential plaintiffs to take such risks. The court should also consider the relative size of the compensatory and punitive awards. If it is the kind of case where the punitive award represents a high percentage of the judgment, bargaining may not be appropriate. In providing incentives to lawyers, the judge should consider awarding fees based on the benefits that their efforts have created. For example, in O'Gilvie, the fee award could reflect the value to future consumers of the removal of the product from the market, whereas in Miller, the fee award could reflect the value to the landowners of the cleanup program.160

V. CONCLUSION

It is difficult to predict whether judicial bargaining with punitive damages will gain widespread approval. However, the O'Gilvie v. International Playtex, Inc. 161 and Miller v. Cudahy Co. 162 cases have brought the failures and shortcomings of current practices to the attention of the legal community and offered a potential solution. This Comment recognizes that while there are cases where judicial bargaining would be the best alternative, there are cases where judicial bargaining would be an unwise practice. 163 Ultimately, the lesson is that the judicial system should maintain the flexibility to implement alternative remedies when it would best serve the interests of justice.

Rosemary A. Jackovic

---

160. There will undoubtedly be problems in estimating the value of the remedial alternative and translating it into adequate compensation for the attorneys. The major emphasis of this guideline, however, is to ensure that the needs of all parties are adequately addressed.
161. 609 F. Supp. 817; see supra note 1 & notes 18-33 and accompanying text.
162. 592 F. Supp. 976; see supra note 8 & notes 34-46 and accompanying text.
163. See supra notes 143-47 and accompanying text.