The Closing of Punitive Damages' Iron Cage

Michael L. Rustad
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I. INTRODUCTION

Punitive damages are portrayed as the unpredictable nine-hundred-pound gorilla of our civil justice system ever ready to wreak havoc on corporate America.¹ A recent insurance company report entitled “Tort Excess 2004” asserts: “The possibility of a corporation facing a costly, even bankrupting, lawsuit is greater than ever before in the history of U.S. justice.”² Another verbal grenade asserts “most states set no limit on punitive damages for civil acts, yet punishment for criminal acts is strictly limited.”³ The Solicitor General of the

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United States compared our system of punitive damages to a "giant underground fungus." Much of what is asserted about the nature of punitive damages is untrue, unknown, or stitched together from questionable sources. "Politicians exchange tales . . . and stories of the woman who won several million dollars from McDonald's after spilling a cup of coffee on herself." In the true-life McDonald's hot coffee case, the plaintiff suffered napalm-like burns from a superheated beverage.

Because policy makers and even some judges understand so little about the real world constraints on punitive damages, they accept calls for tort reform based upon hyped-up anecdotes and misleading statistics. True-sounding anecdotes do not make claims about punitive damages true. "Few arguments are as powerful as a populist-sounding cause backed by the corporate wallet."

There is a giant chasm between sound bites about demonized punitive damages gone amuck and the actual patterning of awards. Empirical studies unanimously conclude that high-end punitive

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6. Andrea Gerlin, A Matter of Degree: How a Jury Decided That One Coffee Spill Is Worth $ 2.9 Million, WALL ST. J. EUROPE, Sept. 2, 1994, at 1, 1994 WL-WSJE 2,037,634. A New Mexico jury awarded 81-year old Stella Liebeck $160,000 in compensatory damages and $2.7 million in punitive damages after she suffered serious burns from coffee purchased from a drive-through window at a McDonald's restaurant. Id. The trial judge later reduced the punitive damages to $480,000, and the parties settled the case before an appeal. Id. McDonald's not only served its coffee hotter than its competitors but had more than 700 prior similar claims and yet made a conscious decision not to warn customers of the possibility of serious burns. Id.

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damages are rarely awarded, are highly correlated with the plaintiff's injury, are reserved for truly egregious circumstances, and are often scaled back by trial and appellate judges. Juries are neither anti-corporate nor extravagant in awarding punitive damages as compared to judges. So effectively has tort reform rhetoric dominated the punitive damages debate that the question of judicial control hardly seems worth reexamining. This Article provides a new audit of the judicial and legislative tort reforms constraining the remedy of punitive damages.

Three major points will be discussed about tort reform. The first is that there is significant variation among the states in the availability of punitive damages. No common outlook is shared because the remedy is flexible enough to respond to local social problems. The second point is that punitive damages are


constrained by far-reaching procedural safeguards at each stage of the litigation process. The cards are increasingly stacked against high-end punitive damages because of the triumph of tort reform. Forty-five out of the fifty-one jurisdictions either do not recognize punitive damages or have enacted one or more restrictions on the remedy since 1979.11 These reforms include capping punitive damages, bifurcating the amount of punitive damages from the rest of the trial, raising the burden of proof, allocating a share of punitive damages to the state, and restricting use of evidence of corporate wealth. The handful of jurisdictions that have yet to enact tort reforms are mostly punitive damages cold spots rather than tort hellholes.12

most courts refer only to 'punishment' and 'deterrence' as rationales for [punitive] damages, this masks the variety of specific functions that punitive damages actually serve,” including such additional functions as education, compensation and law enforcement). 11. Of the jurisdictions that recognize punitive damages, only Delaware, New Mexico, New York, Rhode Island, West Virginia, and Wyoming have not enacted one or more of the following reforms: caps, proof, or split-recovery or state-sharing of the punitive damages awards. See infra appendix A. Delaware has enacted tort limitations on punitive damages in medical malpractice cases that are inapplicable to other substantive fields. See DEL. CODE ANN. tit. 18, § 6855 (1999) (mandating bifurcated proceedings and a statutorily prescribed standard of conduct for obtaining punitive damages against health care professionals).

12. Five of the six states that have yet to enact judicial or legislative tort reform of punitive damages are punitive damages cold-spots. Delaware, New Mexico, Rhode Island, Vermont, and Wyoming are jurisdictions with a low incidence of punitive damages. See Rustad, Unraveling Punitive Damages, supra note 8, at 34–36. In a review of extant studies of punitive damages, I found jurisdictional differences in the incidence of punitive damages. See id. Texas and California are ranked first or second in each study. Id. Alabama, Florida, Georgia, Illinois, and New York appeared in each of the top ten lists. Id. North Carolina, Pennsylvania, and Oklahoma were the only jurisdictions that ranked in the top ten in only one of the studies. Id. “The Department of Justice study of 1992 verdicts in the nation’s seventy-five most populous counties found punitive damages to vary significantly by jurisdiction. Texas ranked first in punitive damages with eighty-three, followed by California with seventy. Georgia was third with sixteen awards, followed by New York (9), Kentucky (8), Florida (7), Illinois (7), and Virginia (7).” Id. at 36. The clear pattern is that punitive damages reforms were enacted in every punitive damages hot spot save New York.
My third point is that when the state legislatures become convinced that they have a punitive damages problem, they enact substantive reforms or procedural restrictions on pleading, discovery, evidence, jury instructions, and judicial control on the remedy to prevent excessive awards. This Part examines the substantive limits on the size of punitive damages as well as specialized punitive damages defenses. A growing number of jurisdictions are capping the level of punitive damages generally based upon a ratio or an absolute dollar amount. In addition to state caps on damages, there is a de facto cap on punitive damages in every jurisdiction imposed by the U.S. Supreme Court’s federal excessiveness framework. The story of the punitive damages recoil is a familiar one about special legislation to help corporate America.

The state legislatures and courts have constructed a pro-defendant iron cage that constrains punitive damages but does not advance the performance of our civil justice system. The extensive tort reform constitutes the bureaucratization of punitive damages. Punitive damages are trending toward bureaucratic decision making, away from decision making by juries. Judicial controls on punitive damages undermine the institution of the jury and unduly constrain this valuable remedy. Punitive damages’ iron cage makes it more difficult for plaintiffs to prosecute and litigate punitive damages at every stage of the litigation process.

15. The metaphor of punitive damages' iron cage is inspired by German sociologist Max Weber who used the figure of speech of the iron cage of rationality to explain the seamy side of industrialized societies. See MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 176–83 (Talcott Parsons trans., 1958).
16. I am not arguing against the reform of punitive damages or any other tort remedy but against special interest legislation benefitting powerful stakeholders. See, e.g., John W. Wade, Strict Products Liability: A Look at its Evolution, THE BRIEF, Fall 1989, at 8, 56 (arguing that tort reform should be unconstitutional because of its classification as special interest legislation).
The net effect of tort reforms has been to cabin and contain punitive damages by marginalizing the role of the jury. The majority of states cap or prohibit punitive damages altogether, which hampers their deterrent function. Judge-assessed punitive damages in Kansas and Connecticut eliminate jury discretion by replacing them with judges.17 Pleading restrictions, evidentiary limitations, bifurcated proceedings, fortified jury instructions, and strengthened post-verdict review result in greater judicial control. The long-tail trend is for states to strengthen judicial control at the expense of the jury resulting in mechanical jurisprudence. The path of punitive damages is leading away from citizen-jurors and toward bureaucrats.18

The tort reformer’s iron cage for punitive damages does not genuinely reform the law, but confers special immunities and limitations on corporate liability and accountability. The restrictions on punitive damages are one-sided “reforms” benefiting corporate defendants. These reforms make it more difficult to recover punitive damages. Few of the reforms reported in Appendix A were a product of careful policy-based or empirical studies. Hundreds of tort limitations were placed on punitive damages despite clear and convincing empirical research that there is no punitive damages crisis warranting radical reforms.19 Similarly, there is no empirical evidence showing that juries are biased against corporate defendants.20 State legislatures enacted these punitive damages limitations as a backlash against a perceived litigation crisis, without

17. KAN. STAT. ANN. § 60-3702(a) (1994); CONN. GEN. STAT. ANN. § 52-240b (West 1999).
18. Kaimipono David Wenger & David A. Hoffman, Nullificatory Juries, 2003 WIS. L. REV. 1115, 1115–16 (2003) (“Legal academics have bolstered the theoretical and anecdotal case against punitive damages by enlisting empirical evidence in their attack on juries. Professor Cass Sunstein has led this effort, employing the methodology of behavioral economics to question juries’ abilities to award punitive damages rationally . . . Sunstein and others suggest that the problem is sufficiently severe that the power to award punitive damages should be transferred from citizen-jurors to bureaucrats.”); see also CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE (2002).
19. Rustad, Unraveling Punitive Damages, supra note 8, at 69.
20. In fact, Professor Valerie Hans concluded that jurors were predisposed to be suspicious of the motives of plaintiffs bringing lawsuits against corporations. See VALERIE HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY 216 (2000).
the benefit of careful empirical analysis. The downside of these hastily enacted legislative reforms is that they result in unanticipated negative consequences such as gender injustice.\(^{21}\)

Judge Richard Posner hypothesizes that state legislative enactments are likely to have negative effects; judge-made rules tend to increase efficiency whereas rules "made by legislatures tend to be efficiency reducing."\(^{22}\) Even so, in recent years, the vast majority of states have enacted procedural reforms to reduce juror bias against corporations in punitive damages litigation. The following comparison of judicial and legislative reform in the states confirms Posner's hypothesis and strongly suggests that the courts should be left to do the work of "reforming" the tort system.

II: STATES AS LABORATORIES OF REFORM FOR PUNITIVE DAMAGES

A. State Tort Reforms of Punitive Damages

Punitive damages are awarded to protect society from violations of the public safety or order. There is no consensus upon a common vocabulary for punitive damages or its social functions. Many jurisdictions use the term "punitive damages," but other states use the terms "exemplary damages," "vindictive damages," or "smart money" to refer to punishment and deterrence\(^{23}\) through the common law.\(^{24}\) The Oregon Supreme Court described punitive damages as a


\(^{22}\) RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 532 (2003).

\(^{23}\) Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19 (1991) ("Punitive damages are imposed for purposes of retribution and deterrence.").

\(^{24}\) See, e.g., Baltimore & P. R. Co. v. Golway, 6 App. D.C. 143, 151 (1895) (ruling that "smart money" could not be assessed in cases involving railway accident); Cowens v. Winter, 96 F. 929, 935 (6th Cir. 1999) ("[T]he doctrine is well settled that, in actions of tort, the jury . . . may award exemplary, punitive, or vindictive damages, sometimes called 'smart money' . . .") (quoting Lake Shore & Mich. S. Ry. Co. v. Prentice, 147 U.S. 101, 107 (1893)). Colorado too follows the English convention of using the term "exemplary damages" rather than punitive damages. COLO. REV. STAT. § 13-21-102 (2001). Alabama alternatively refers to punitive damages as vindictive damages. ALA. CODE § 6-5-186 (1993). Before New Hampshire abolished the remedy of punitive damages, it used the term "smart money."
"legal spanking" administered to bad actors who violate societal norms. The remedy of punitive damages has many built-in judicial controls to prevent abuses. The majority of states require plaintiffs to prove that the defendant was malicious or at least recklessly indifferent to the plaintiff. No jurisdiction permits punitive damages to be awarded for mere negligence.

The states have historically had the complete freedom to recognize the doctrine of punitive damages and determine the procedural or substantive contours of the remedy. This Part of the article examines the general availability of punitive damages in the states. This brief sketch confirms that punitive damages are prohibited in a minority of states and have a wide array of protected defendant categories in the states that recognize punitive damages. This Part confirms that punitive damages are a legal institution that reflects state judgments as to which parties should have access to this remedy.

B. Restrictions on the Availability of Punitive Damages

1. States that Prohibit Jury Awarded Punitive Damages

The vast majority of states recognize the common law doctrine of punitive damages. Five states prohibit common law punitive damages: Louisiana, Massachusetts, Nebraska, New Hampshire, and Washington. Louisiana is a civil code jurisdiction that refused to recognize punitive damages, except as statutorily authorized.


26. *Infra* appendix A (documenting the verbal standard or punitive damages predicate for all fifty-one U.S. jurisdictions).


Massachusetts does not recognize punitive damages except as may be recovered under specific statutory authorization such as the Commonwealth's wrongful death statute that is penal in form, but compensatory in effect. Nebraska, too, refused to adopt the remedy of punitive damages. Washington, like Massachusetts, permits punitive damages only if specifically authorized by statute. In 1986, New Hampshire became the first state to abolish punitive damages by legislative decree. In Washington, punitive damages are void as against public policy. As we shall see, a large number of other states prohibit punitive damages against specific categories of defendants.

2. Judge-Assessed Punitive Damages

Replacing the jury with judge-assessed punitive damages is a radical tort reform designed to prevent excessive awards. In Connecticut and Kansas, the jury determines whether punitive damages should be awarded, but the judge sets the amount of damages. Ohio had such a statute, but it was repealed. Judge-

36. For example, Illinois prohibits punitive damages in medical malpractice actions. 735 ILL. COMP. STAT. ANN. 5/2-1115 (West 2003). Oregon limits actions against product manufacturers, OR. REV. STAT. § 30.925 (2003), and prohibits punitive damages awards against medical providers, id. § 30.927.
37. CONN. GEN. STAT. ANN. § 52-240b (West 1999).
38. "In any civil action in which exemplary or punitive damages are recoverable, the trier of fact shall determine, concurrent with all other issues presented, whether such damages shall be allowed. If such damages are allowed, a separate proceeding shall be conducted by the court to determine the amount of such damages to be awarded." KAN. STAT. ANN. § 60-3702(a) (1994).
39. See also Malcolm Wheeler, The Constitutional Case for Reforming Punitive Damage Procedures 69 VA. L. REV. 269, 302 (1983) ("Several efforts have been made to place the responsibility for deciding the size of a punitive
assessed punitive damages resemble criminal trials in which a trial is bifurcated into the determination of guilt or innocence phase and the sentencing phase.  

41 Judges set sentences considering a wider range of aggravating and mitigating factors only after guilt or innocence has been determined.  

42 Academic commentators are deeply divided about whether juries should have the right to determine the amount of punitive damages.  

3. Immunity for Specific Defendant Categories

a. Public entities

Most states prohibit the awarding of punitive damages against public entities.  

44 The typical state tort claims act does not permit the recovery of punitive damages and places a statutory cap on the

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42 Id.

43 Professor Lisa Litwiller argues that the U.S. Supreme Court has not only changed the standard of review in excessiveness reviews for punitive damages, but also sounded the "death knell" on the jury's right to assess punitive damages. Id. at 411 (arguing that Cooper Industries Inc. v. Leatherman Tool Group, Inc. ruled that "the level of punitive damages is not really a 'fact' 'tried' by the jury"); see also Ryan Fowler, Why Punitive Damages Should Be a Jury's Decision in Kansas: A Historical Perspective, 52 KAN. L. REv. 631 (2004) (arguing that judge-assessed punitive damages "def[y] the historical purposes for both the civil jury and punitive damages, [are] an inappropriate means to the purported ends of curing the insurance crisis, and ha[ve] further eroded society's ability to control and keep in check potentially harmful and powerful entities").

44 See, e.g., IND. CODE ANN. § 34-13-3-4(b) (Michie Supp. 2004) (stating that there is no punitive damages against state officers or entities); MD. CODE ANN. art. 23A, § 1A (2001) (stating that municipal corporations and their officers are not liable for punitive damages).
amount of the award. Florida, for example, prohibits awards against the state government or its employees. Most courts refuse to impose punitive damages against municipalities for the wrongful acts of employees or agents. Municipalities are not liable for punitive damages in Maryland. Further, in most states, a municipality “may not indemnify a law enforcement officer for ... punitive damages if the law enforcement officer has been found guilty.” Punitive damages may not be assessed against any Alabama state agency.

Punitive damages in Illinois are not recoverable against municipalities and governmental employees acting in their official capacities. Similarly, the federal government has refused to surrender sovereign immunity for punitive damages, and in addition, this remedy is not available in lawsuits against the federal government. Illinois precludes the possibility of recovery for punitive damages against public entities and officials serving in their official capacities.

b. Wrongful death defendants

The purpose of wrongful death laws is to allow an injured person's action and claim for damages to survive. Alabama is the only state to permit punitive damages but not compensatory damages.

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45. See, e.g., South Carolina: S.C. CODE ANN. §§ 15-78-10 to 15-78-200 (Law Co-op Supp. 2003). See id. § 15-78-120 (stating limitation on liability; prohibition against recovery of punitive or exemplary damages or prejudgment interest; signature of attorney on pleadings, motions, or other papers); cf: Providence Wash. Ins. Co. of Alaska v. City of Valdez, 684 P.2d 861, 863 (Alaska 1984) (holding that punitive damages assessed against a municipal corporation were insurable).

46. FLA. STAT. ANN. § 768.28 (West Supp. 2004).

47. 1 LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES 194 (4th ed. 2000) (stating that “most courts ... refused to make punitive damages for wrongful acts of agents and employees against public entities” because the cost is imposed on citizens).


51. 1 SCHLUETER & REDDEN, supra note 47, at 194.

52. 745 ILL. COMP. STAT. ANN. 10/2-102.
in wrongful death cases.\textsuperscript{53} Massachusetts does permit wrongful death punitive damages, but does not recognize the common law remedy.\textsuperscript{54} The vast majority of states do not permit punitive damages to be awarded in wrongful death actions.\textsuperscript{55} Most states prohibiting punitive damages in wrongful death cases do so because their respective statutes are designed to be compensatory.\textsuperscript{56}

\textbf{C. Complicity rule for corporate punitive liability}

Many states do not recognize vicarious liability or the doctrine of \textit{respondeat superior} when it comes to punitive damages\textsuperscript{57} but rather use the complicity rule that requires greater proof of corporate involvement.\textsuperscript{58} Under the complicity rule, the principal is not liable

\begin{itemize}
  \item \textsuperscript{53} Killough v. Jahandarfard, 578 So. 2d 1041, 1044 (Ala. 1991).
  \item \textsuperscript{56} See, e.g., Vander Lind, 194 Cal. Rptr. at 367 (discussing legislative history of California wrongful death statute demonstrates statute designed to provide for compensatory damages only).
  \item \textsuperscript{57} 1 SCHLUETER & REDDEN, supra note 47, at 183–84.
  \item \textsuperscript{58} The “complicity rule” was coined in an article by Clarence Morris, \textit{Punitive Damages in Personal Injury Cases}, 21 OHIO ST. L.J. 216, 221 (1960). Professor Morris’ complicity rule requires that the plaintiff prove some deliberate corporate participation before corporate punitive liability may be imposed. \textit{Id.} Generally, a high-level officer of the corporation must have ordered, participated in, or ratified the egregious conduct of the employee for the firm to be assessed punitive damages. \textit{Id.; see Restatement (Second) of Agency § 217C (1958); Restatement (Second) of Torts § 909 (1979); see, e.g., Smith’s Food & Drug Ctrs., Inc. v. Bellegarde, 958 P.2d 1208, 1214 (Nev. 1998) (adopting Section 909 of the Restatement (Second) Of Torts).
for punitive damages for the agent’s act unless the conduct was authorized or ratified. Companies are only answerable for punitive damages if there is proof that “the conduct giving rise to the punitive damages claim is committed by a primary owner, officer, or an employee acting in the capacity of a “‘managing agent.’” The corporate complicity rule was approved by Illinois in *McCarthy v. Paine Webber, Inc.*, where the court stated explicitly: “Illinois law is clear that respondeat superior principles alone will not justify an award of punitive damages against an employer.”

In the Second Circuit case of *Roginsky v. Richardson-Merrell, Inc.*, Judge Friendly applied New York law to support the proposition that “superior officers” must order, participate in, or ratify outrageous misconduct in order to hold a corporate master liable for punitive damages. In that case, the court stated that punitive damages may not be imposed upon a corporation “unless, as charged [by the court] the officers or directors, that is, the management of the company or the relevant division ‘either authorized, participated in, consented to or, after discovery, ratified the conduct giving rise to such damages.’” Punitive damages against employers for their agents’ misconduct serve a deterrent function for the employees. The trend toward the complicity rule makes it more difficult for plaintiffs to prove punitive damages against corporations and other entities.

d. *No punitive damages in selected cases*

i. Breach of contract

Punitive damages are not recoverable for breach of contract. The Uniform Commercial Code does not expressly provide for punitive damages in any of its nine articles. Punitive damages are

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59. KAN. STAT. ANN. § 60-3702(d) (1994).
62. Id. at 942.
63. 378 F.2d 832, 842 (2d Cir. 1967) (applying New York Law).
64. Id.
not available in contract or commercial law cases absent proof of an independent tort. Some jurisdictions prohibit punitive damages for breach of contract even where there is proof of malice. The limited availability of punitive damages in contract or commercial cases has largely been a common law development rather than a legislative tort reform.

ii. Professional negligence cases

Several states have rejected punitive damages claims in professional negligence cases. For example, Illinois precludes punitive damages in legal and medical malpractice cases. This prohibition against punitive damages in malpractice actions was upheld against equal protection and due process challenges in Bernier v. Burris.

Similarly, in Lund v. Kokemoor, a Wisconsin appellate court held that punitive damages are not recoverable in medical malpractice actions. The court rejected the plaintiff’s claim that the statutory language, “other economic injuries and damages,” was sufficiently broad to encompass punitive damages. The same is true in Oregon. Punitive damages may not be recovered against medical practitioners. States that prohibit punitive damages against professionals have, in effect, created a pocket of immunity that reduces the scope of liability protection.

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67. 1 SCHLUETER & REDDEN, supra note 47, at 390 (“A majority of jurisdictions allow punitive damages for breach of contract that constitutes an independent tort.”).
70. 497 N.E.2d 763 (Ill. 1986).
71. 537 N.W.2d 21, 23 (Wis. Ct. App. 1995).
72. Id.
III. TORT REFORMS INCREASING JUDICIAL CONTROL

Since 1979, there has been a systematic tort reform backlash against punitive damages in all but a few states. In 2001, Florida, Mississippi, Nevada, Oklahoma, and West Virginia enacted additional tort limitations. Since 2003, Arkansas, Colorado, Idaho, Montana, Mississippi, and Texas have instituted new limitations on the remedy of punitive damages. Prior to 2003, North Carolina passed a cap on punitive damages. Its stated goal was to preserve the state’s economic development, “given the impact of punitive damages on a variety of industries; to assure public confidence in the judicial system; and to provide clear notice of possible penalty to defendants, whose property, as the result of a punitive damages award, will potentially be taken as a punishment.” North Carolina enacted these limitations despite empirical evidence of the jurisdiction being in the punitive damages arctic.

In 2004, Mississippi became the latest state to cap punitive damages. For any trial taking place on or after September 1, 2004, punitive damages are capped on a sliding scale calibrated to the net worth of the defendant. The maximum amount any defendant can pay is $20 million, regardless of assets.

Despite a record of twenty-five years of tort reform in

practically every state, no state has thoroughly studied the impact of these reforms on our civil justice system.\textsuperscript{82} Tort reformers use haphazard horror stories to induce state legislatures to take steps to rein in the "largely illusory problem of overly-generous punitive damages."\textsuperscript{83}

Appendix A presents a new methodical audit of a fifty-one jurisdiction appraisal of tort limitations on punitive damages enacted over the past quarter century. The irresistible conclusion anyone can draw is that there has been a dramatic legislative backlash against punitive damages in all but a few states.\textsuperscript{84} I use the term, "quiet revolution" to refer to the relative lack of publicity about the iron cage closing around punitive damages. Journalists do not report about tort limitations with the same gusto as they do fugitive juries.\textsuperscript{85} Little civic education is dedicated to tort reform. No state permits the jury to be educated about tort reform limitations. State legislatures and courts have a gag order that prevents them from enlightening the jury about whether a given jurisdiction caps or places other limitations on punitive damages. North Carolina, for example, prohibits references to tort reforms in the \textit{voir dire}, arguments, jury instructions, or otherwise.\textsuperscript{86} The jury is neither informed nor educated about tort limitations imposed by trial judges.

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\item \textsuperscript{82} Robbennolt, \textit{supra} note 9, at 159 (concluding that little by way of empirical research has been conducted on the impact of tort reform).
\item \textsuperscript{83} Id.
\item \textsuperscript{84} The quiet revolution in punitive damages occurred during the same period in which plaintiffs were less successful in products litigation. \textit{See generally} Theodore Eisenberg & James A. Henderson, Jr., \textit{Inside the Quiet Revolution in Products Liability}, 39 UCLA L. REV. 731, 741 (1992) (reporting that the success rates of plaintiffs in products liability litigation as documented in published opinions "fell from 56% in 1979 to 39% in 1989, a drop of 29%").
\item \textsuperscript{85} Bill O’Reilly of Fox News, for example, purports to "look after the folks" but has not covered this topic. \textit{See} BillOReilly.com (containing numerous references to the need for tort reform, but no acknowledgment of limitations already in place). The same journalists that cover lawsuit abuse do not acknowledge that there are tort reforms.
\item \textsuperscript{86} N.C. GEN. STAT. § 1D-25(c) (2003); \textit{see also} ALA. CODE § 6-11-21(g) (Supp. 2003) ("The jury may neither be instructed nor informed as to the provisions of this section" [cap on punitive damages]); IDAHO CODE § 6-1604(3) (Michie 2004); IND. CODE ANN. § 34-51-3.3 (Michie 1998); FLA. STAT. ANN. § 768.73(8) (West 1997).
\end{itemize}
after the jury verdict is returned.

A. Restrictions on Punitive Damages Pleading

1. Pleading of Punitive Damages

In many jurisdictions, plaintiffs cannot claim punitive damages in the initial complaint. Illinois, for example, permits plaintiffs to amend a complaint after a pretrial motion and hearing before the court.\textsuperscript{87} Any motion to amend the complaint to contain punitive damages must be made within thirty days after the close of discovery.\textsuperscript{88} California requires court permission before a plaintiff may claim punitive damages against a religious corporation\textsuperscript{89} as well as in medical malpractice litigation.\textsuperscript{90} Florida has pleading restrictions in medical negligence cases.\textsuperscript{91} In medical malpractice cases, the attorney must make a reasonable investigation and verify the same before filing a complaint seeking punitive damages.\textsuperscript{92} If a court rules that a certificate of counsel was not made in good faith, the judge may award attorney's fees and costs against the claimant's counsel.\textsuperscript{93} No discovery of corporate financial worth may proceed until after the pleading for punitive damages is permitted in all substantive fields.\textsuperscript{94}

Pleading reforms, in general, bring common sense to the common law by screening out questionable punitive damages claims at an early stage of litigation. The restrictions on pleading are designed to protect corporate defendants from nuisance punitive damages claims and eliminate these claims at an early stage of the litigation. Pleading restrictions screen out marginal claims and

\textsuperscript{87} 735 ILL. COMP. STAT. ANN. 5/2-604.1 (West 2003) (struck down in \textit{Best v. Taylor Machine} as part of an unconstitutional scheme); see \textit{infra} note 518 on the continuing validity of this provision after \textit{Best}.
\textsuperscript{88} \textit{Id}.
\textsuperscript{89} \textsc{William F. Flahavan et al., California Practice Guide: Personal Injury} § 3:255.7 (2004 ed.).
\textsuperscript{90} \textsc{Cal. Civ. Proc. Code} § 425.13 (West 2004) (stating that punitive damages may not be pleaded in the initial complaint in medical malpractice cases and can only be added by leave of the court).
\textsuperscript{92} \textit{Id}.
\textsuperscript{93} \textit{Id}.
\textsuperscript{94} \textit{Id} § 768.72 (describing punitive damages pleading).
prevent extortionate claims.

2. Prohibition of *Ad Damnum* Clauses

Publicizing large amounts sought in lawsuits creates an impending problem of confusing the public about the size and frequency of awards. The preliminary announcement as to the amount of damages claimed is what is referred to as the *ad damnum* clause. The policy rationale for eliminating *ad damnum* clauses is to steer clear of the premature appraisal of a punitive damages claim by the jury and to prevent inflationary punitive damages awards.

*Ad damnum* clauses were first abolished in medical injury cases beginning in the early 1980s. Florida eliminated *ad damnum* clauses, so the plaintiff was no longer permitted to declare the amount of damages claimed, as did the state of New York in medical malpractice cases. In November of 2003, New York eliminated *ad damnum* clauses in all civil actions. No systematic empirical research has evaluated the impact of tort reforms restricting or eliminating *ad damnum* clauses. Intuitively, however, this tort reform has the positive impact of addressing the problem of undue pretrial publicity on multi-million dollar claims that prove meritless.

B. Prohibitions on Mentioning Punitive Damages

An increasing number of states restrict plaintiff’s counsel from

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95. *See, e.g.*, Illinois C.R. Co. v. Heath, 81 N.E. 1022, 1024 (Ill. 1907) (stating that an instruction as to the elements of damages and the size of a fair compensation, was referred to as the *ad damnum* declaration).


making rabble-rousing arguments about punitive damages. In fact, courts will generally not allow any mention of punitive damages until counsel has proven a *prima facie* case. A few courts curb the plaintiff's counsel’s arguments about punitive damages during opening and closing statements. The goal of these tort reforms is to reduce juror bias against defendants where there is an insufficient foundation for punitive damages. Even those states have not gone so far as to prohibit arguments about punitive damages per se, and give the trial judge wide discretion to limit arguments about punitive damages at each stage of the trial.

C. Restrictions on Evidence for Punitive Damages

Trial judges have historically enjoyed wide discretion in admissibility decisions on the issue of punitive damages. Evidence is broadly defined as “any matter of fact which is furnished to a legal tribunal, otherwise than by reasoning, [or a reference to what is noticed without proof], as the basis of inference in ascertaining some other matter of fact.” A number of states bar the admission of evidence material to punitive damages but irrelevant to the issue of compensatory damages. The trend has been for courts to adopt greater evidentiary limitations in punitive damages litigation.

1. Admissibility of Corporate Wealth

Wealth-sensitive punitive damages can teach even the most powerful corporation that anti-social conduct does not pay. For more than two hundred years, the wealth of the defendant was considered a relevant basis for setting the amount of punitive damages. The

102. *See*, e.g., Vanskike v. ACF Indus., Inc., 665 F.2d 188 (8th Cir. 1981) (applying Missouri law and reversing the district court’s decision overruling the motion for a mistrial based on the inflammatory closing argument concerning punitive damages).
105. *See*, e.g., ARK. CODE ANN. § 16-55-211(b) (Michie Supp. 2003).
purpose of introducing evidence of wealth is to calibrate the amount of punitive damages to achieve the most efficient level of deterrence. For these reasons, most states permit the admissibility of the financial condition or wealth of the defendant to set punishment.

A growing number of states have adopted tort reforms limiting
the use of a defendant’s wealth or financial condition in setting the amount of punitive damages. Iowa’s tort reform statute does not permit the discovery of the wealth of the defendant until the plaintiff proves there is “sufficient admissible evidence” for punitive damages. Some courts restrict access to the parent corporation’s wealth if a subsidiary is charged with punitive damages, as in Gearhart v. Uniden Corp. of America.

Some jurisdictions do not permit the admission of evidence of the defendant’s wealth until a supportable case for punitive damages is proven. Utah, for example, permits the admission of evidence of a party’s wealth or financial condition only after a finding of liability for punitive damages has been made. An Oregon statute provides that: “[d]uring the course of trial, evidence of the defendant’s ability to pay shall not be admitted unless and until the party entitled to recover establishes a prima facie right to recover.”

Arkansas, for example, does not permit proof of a defendant’s financial condition until after the plaintiff makes out a case for


110. IOWA CODE ANN. § 668A.1(3) (West 1998).

111. 781 F.2d 147, 153 (8th Cir. 1986).


punitive damages. Wisconsin does not permit counsel to introduce evidence of the defendant’s wealth until a prima facie case is established. Maryland does not admit evidence of the defendant’s financial means until there has been a finding of punitive damages “supportable under the facts.” The growing consensus is that the evidence of corporate wealth is not admissible until after the trial judge makes a determination that punitive damages are at issue. The law-making activity of judges and legislatures concerning corporate wealth makes it less likely that the jury will be awarding punitive damages based upon a “deep pocket” rather than evidence of corporate culpability. A few states even require the fact finder to consider wealth when setting the amount of punitive damages. California requires evidence of the defendant’s financial condition as critical to the punitive damages formulation, but such evidence is inadmissible in wrongful death actions. Ohio’s tort reform statute for punitive damages requires the factfinder to consider the wealth of the defendant in cases involving nursing home or residential facilities.

Despite this, the trend of tort reform has been to strike wealth from punitive damages and instead cap damages at a number that de-individualizes punishment, generally at the greater of a fixed sum or some multiple of the compensatory damages. For example, North Dakota’s 1995 tort reform prohibits the use of corporate wealth or personal financial worth in the punitive damages portion of a trial.

Such caps, however, “artificially and arbitrarily deflate punitive damages, no matter how egregious the defendant’s disregard of health and safety.” The arbitrary limitation of punitive damages to the harm suffered by the plaintiff “undermines deterrence because

120. 2004 Ohio Laws 144 (effective Apr. 7, 2005).
the sanction is then limited to a predictable amount of money.”

Tort reformers seek to decouple corporate wealth from the punitive damages equation. They seek a system of punitive sanctions that treats everyone equally: the punitive damages paid by a drunk driver should be the same as those paid by a Fortune 500 company. Yet wealth is taken into consideration for elderly recipients of Social Security who are taxed on their benefits if their income exceeds a certain amount. Upper middle class families whose income exceeds a given level may be denied or have restricted access to governmentally-funded student aid programs. A government regulation that takes into account how much money one earns does not mean that an entity or individual has been denied due process or been treated unequally before the law.

The U.S. Supreme Court has recently stepped into the mix, saying, in State Farm Mutual Automobile Insurance Co. v. Campbell, that wealth alone could not justify a high-ratio punitive damages award. The Court has repeatedly expressed concern about the open-ended use of wealth-based punishment.

129. Id. at 427 (“While States enjoy considerable discretion in deducing when punitive damages are warranted, each award must comport with the principles set forth in Gore. Here the argument that [the defendant] will be punished in only the rare case, coupled with reference to its assets (which, of course, are what other insured parties in Utah and other States must rely upon for payment of claims) had little to do with the actual harm sustained by the [plaintiffs]. The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.”).
130. See, e.g., BMW of N. Am. Inc. v. Gore, 517 U.S. at 585 (“The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States
Wealth-sensitive punitive damages serve a deterrent function because that level of award that would punish an impoverished person would not ‘sting’ a wealthy person or company.131

D. Delayed Discovery of Corporate Wealth or Financial Evidence

A larger number of states place restrictions on the admissibility of evidence of corporate wealth in punitive damages litigation. In general, all states permit the discovery of evidence that appears reasonably calculated to lead to the admissibility of evidence on the issue of punitive damages.132 In Rochen v. Huang,133 the court observed that a jury could “potentially [be] affected by the disparate financial positions of the parties [and was] concerned that the admission of financial information relevant only to establish the impose on the conduct of its business.”).

131. Wealth-based punitive damages are optimally used to punish and deter wrongdoers where the probability of detection is very low and the probability of harm is very high. Law and economics scholars contend that the price of wrongdoing must be proportional to potential gain in order to have a deterrent effect. See WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 160–63 (1987); see also Symposium Discussion: Punitive Damages, 56 S. CAL. L. REV. 155, 187–88 (1982) (comments of Edward Dauer). In Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. 257 (1989), a national waste disposal firm attempted to gain a competitive edge over a smaller rival by “‘squish[ing] him like a bug.” Id. at 260. The jury’s six million dollar punitive damages award was designed not only to punish the defendant, but also to deter the business community from employing such tactics. See id. at 275 (noting that “punitive damages advance the interests of punishment and deterrence”). A six million dollar punitive damages award will sting, but not bankrupt a national waste disposal company. The $10 million punitive damages award affirmed by the Supreme Court in TXO Products Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993), was based upon the actual and potential harm of the defendant’s course of conduct, the degree of bad faith displayed by the defendant, and whether the conduct was part of a “larger pattern of fraud, trickery and deceit.” Id. at 462. The ten million dollar punitive award sent a specific deterrent message to TXO, and a general message of deterrence to the entire oil and gas industry not to engage in predatory business practices. Id. at 453.


amount of punitive damages could well prejudice [the] defendant’s ability to receive fair consideration on the liability issues.’” 134 It is common for states to place restrictions on the discovery of corporate profits or the financial condition of the defendant by requiring an order of the court. 135

Some states give the trial judge the discretion to place restrictions on the discovery of evidence relevant to the wealth of a defendant. 136 The court in Varriale v. Saratoga Harness Racing, Inc. 137 stated that discovery of wealth of a defendant is not permitted until a factfinder determines first that the plaintiff is entitled to punitive damages. In Moran v. International Playtex, Inc., 138 a plaintiff moved for examination before trial of the defendant manufacturer’s financial records. The New York court found that discovery could only begin after the jury found the plaintiff was entitled to punitive damages. 139 Florida does not permit a plaintiff to discover a company’s net worth until the court has issued an order permitting an amended complaint for punitive damages. 140

**E. Bifurcating Punitive Damages**

Bifurcated or trifurcated 141 trials require a separate proceeding to “receive such evidence as is relevant to a decision regarding what amount of damages will be sufficient to deter, penalize, or punish the

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134. *Id.* at *4.
135. *See, e.g.,* CAL. CIV. CODE § 3295 (West 1997).
136. *See, e.g.,* Alabama: Hanners v. Balfour Guthrie, Inc., 589 So. 2d 684, 686 (Ala. 1991) (stating that the evidence of financial condition of defendant is inadmissible during liability phase of trial); Colorado: Leidholt v. Dist. Court, 619 P.2d 768, 771 (Colo. 1980) (requiring prima facie showing of punitive damages before wealth of the defendant may be discovered); FLA. STAT. ANN. § 768.72 (West Supp. 2004) (stating that there is no discovery of wealth until punitive damages are permitted by the trial judge).
139. *Id.* at 8.
141. Trifurcated proceedings divide a trial into three phases: (1) the determination of compensatory damages; (2) determining whether the evidence warrants punitive damages; and (3) determination of the amount of punitive damages. *See Cuzzort v. City of Gretna, No. 98-3096, 2000 U.S. Dist. LEXIS 621, at *3 (E.D. La. Jan. 20, 2000).
defendant in light of the circumstances of the case.\textsuperscript{142} Evidence of the defendant’s wealth and other aggravating circumstances are cabined off from the compensatory phase to protect the defendant. States differ with respect to what is bifurcated. There are two general types of punitive damages bifurcation: bifurcation of the entire punitive damages claim, and bifurcation only with respect to the amount of punitive damages. A few states permit a bifurcation of the entire punitive issue—punitive liability as well as the amount of damages—from the compensatory damages stage.\textsuperscript{143}

A larger number of states reconvene the second stage of the trial to permit the jury to receive evidence of the defendant’s wealth to set the amount of the award.\textsuperscript{144} During the punitive stage of the trial, the

\textsuperscript{142} GA. CODE ANN. § 51-12-5.1(d) (West 2003) provides that: “[i]n any case in which punitive damages are claimed, the trier of fact shall first resolve from the evidence produced at trial whether an award of punitive damages shall be made.” If it is found that punitive damages are to be awarded, “the trial shall immediately be recommenced in order to receive such evidence as is relevant to a decision regarding what amount of damages will be sufficient to deter, penalize, or punish the defendant in light of the circumstances of the case. It shall then be the duty of the trier of fact to set the amount to be awarded. . . .” Id. § 51-12-5.1(d)(1).


plaintiff's counsel will typically introduce evidence of corporate wealth and other aggravating circumstances affecting the amount of the punitive award. Bifurcation may be imposed by the state legislature or be adopted by the state's highest court as a form of judicial tort reform. Several jurisdictions provide for a mandatory review of the jury's award of punitive damages at the conclusion of the second phase of a bifurcated trial. In these states, the jury establishes liability while the trial judge sets the amount of punitive damages.

The procedure protection of bifurcation has sometimes been ordered by state supreme courts, as in *Hodges v. S.C. Toof & Co.* The bifurcation of punitive damages from the rest of the trial prevents the jury from hearing potentially inflammatory punitive damages evidence until punitive liability is established. Bifurcation has doctrinal symmetry with the remedy of punitive damages as being functionally equivalent to criminal sentencing. The empirical research on bifurcation reveals that it may not reduce punitive damages, but that it does increase the size of verdicts.

Bifurcation is a pro-defendant reform because it also gives the defendant an opportunity to present mitigatory circumstances that

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145. For example, Montana provides for a mandatory post-verdict review of the amount of the jury's punitive damages award. See *MONT. CODE ANN.* § 27-1-221(7) (2003) ("When the jury returns a verdict finding a defendant liable for punitive damages, the amount of punitive damages must then be determined by the jury in an immediate, separate proceeding and be submitted to the judge for review . . . .").

146. *CONN. GEN. STAT. ANN.* § 52-240b (West 1999) ("If the trier of fact determines that punitive damages should be awarded" in a products liability action, "the court shall determine the amount of such damages not to exceed an amount equal to twice the damages awarded to the plaintiff"); *KAN. STAT. ANN.* § 60-3702(a)–(b) (1994) ("In any civil action in which exemplary or punitive damages are recoverable, the trier of fact shall determine, concurrent with all other issues presented, whether such damages shall be allowed. If such damages are allowed, a separate proceeding shall be conducted by the court to determine the amount of such damages to be awarded. . . . At the conclusion of the proceeding, the court shall determine the amount of exemplary or punitive damages to be awarded.").

147. 833 S.W.2d at 901.


149. Id. at 182.
may lessen the amount of punitive damages or obviate them without compromising basic liability.\textsuperscript{150} The bifurcation of punitive damages from the rest of the trial prevents the jury from being unduly influenced by evidence that may create bias against large corporations. The purpose of bifurcation is to prevent evidence of aggravating circumstances or wealth of the defendant from creating jury bias in the compensatory damages stage.

\section*{F. Increasing Evidentiary Standard of Proof}

The vast majority of jurisdictions have raised the standard of proof in punitive damages litigation from that of a preponderance of the evidence to that of "clear and convincing evidence."\textsuperscript{151} Colorado is the only jurisdiction that requires plaintiffs to prove punitive damages "beyond a reasonable doubt."\textsuperscript{152} The adoption of a higher standard of proof than the usual "preponderance of evidence" standard is another example of a pro-defendant tort reform. The reform of "clear and convincing" evidence is doctrinally symmetrical

\begin{footnotesize}
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\item \textsuperscript{150} Santa Lucia, \textit{supra} note 60, at 41 (citing Meadowbrook Health Care Servs. of Fla. v. Acosta, 617 So.2d 1104 (Fla. Dist. Ct. App. 1993)).
\item \textsuperscript{152} \textit{COLO. REV. STAT.} § 13-25-127(2) (2001).
\end{itemize}
\end{footnotesize}
with the function of punitive damages as patrolling the conduct on the borderline between crime and tort.\textsuperscript{153} There is no empirical research, however, on whether increasing the standard of proof makes a difference in punitive damages litigation.\textsuperscript{154} Raising the standard of proof presumably "makes it more difficult for jurors to find punitive damages liability."\textsuperscript{155} The trend toward "clear and convincing" evidence is doctrinally consistent with the role of punitive damages as a remedy on the borderland between crime and tort.

\section*{G. Punitive Damages Liability Standard}

A large number of states have enacted statutes that specify the state of mind required for punitive damages.\textsuperscript{156} In general, the culpability leading to punitive damages varies from gross negligence in some states to actual malice in others.\textsuperscript{157} A recent survey

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    \item 153. Robbennolt, supra note 9, at 176.
    \item 154. Id.
    \item 155. Id. at 177.
    \item 156. BLATT ET AL., supra note 73, at 162–69.
    \item 157. See ARIZ. REV. STAT. ANN. § 12-653.02-.03 (West 2003) (requiring actual malice in action for libel or slander); CAL. CIV. CODE § 3294(a) (West 1997) (noting that punitive damages may be recovered upon proof of fraud, or malice in action for breach of non-contractual obligation); DEL. CODE ANN. tit. 18, § 6855 (1999) (requiring malice or willful or wanton misconduct in health care malpractice insurance action); IOWA CODE ANN. § 668A.1 (West 1998); MONT. CODE ANN. § 27-1-221 (2003) (requiring finding of actual malice or actual fraud); NEV. REV. STAT. ANN. 41.337 (Michie 2002) (requiring actual malice to support punitive damages award in libel or slander action); id. § 42.005(1) (Michie 2002) (requiring oppression, fraud, or malice, express or implied, in action for breach of non-contractual obligation); N.J. STAT. ANN. § 2A:15-5.12 (West 2000) (requiring in product liability actions that tortious conduct be actuated by actual malice or accompanied by wanton and willful disregard of safety of product users or others who foreseeably might be harmed by product); N.C. GEN. STAT. § 1D-35(2) (2003) (malice); N.D. CENT. CODE ANN. § 32-03.2-11 (Michie 1996 & Supp. 2003) (requiring oppression, fraud, or actual or presumed malice in actions for breach of non-contractual obligation); 2004 Ohio Laws 144 (effective Apr. 7, 2005) (requiring that acts or omissions of defendant demonstrate malice, aggravated or egregious fraud); R.I. GEN. LAWS § 28-5-29.1 (2003) (stating that conduct to be motivated by malice or ill-will and that such conduct involves reckless or callous indifference to statutorily protected right of others); S.D. CODIFIED LAWS § 21-1-4.1 (Michie 1987) (requiring willful, wanton, or malicious conduct on part of defendant); VA. CODE ANN. § 8.01-52(5) (Michie 2000) (allowing recovery of
\end{itemize}
concluded that twelve states now require proof that a defendant was acting maliciously in order to recover punitive damages. Another twenty-six states require the plaintiff to prove that the defendant’s culpability is greater than gross negligence. The predicate for Alabama punitive damages is “oppression,” “fraud,” “wantonness,” and “malice.” Thus, the trend in the law is toward increasing the standard of conduct required for punitive damages. The range of the defendant’s culpability varies from gross negligence to the predicate of actual malice; no jurisdiction permits the recovery of punitive damages for mere negligence. A majority of states follow the Restatement (Second) of Tort standard for punitive damages, which requires “conduct that is outrageous, because of the defendant’s evil motive or . . . reckless indifference to the rights of others.”

H. Jury Instructions for Punitive Damages

The U.S. Supreme Court observed that jury instructions about punitive damages that “typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant’s net worth [that] creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.” The reality is that state tort reforms have resulted in twenty-two states enacting statutes mandating detailed jury instructions. Alabama, California, 

punitive damages for willful or wanton conduct or recklessness evincing conscious disregard for safety of others).

158. BLATT ET AL., supra note 73, at 162–63 (stating that the conduct requirement of a showing of malice is required in Arizona, California, Delaware, Kentucky, Maine, Maryland, Montana, Nevada, North Dakota, Ohio, Rhode Island, and Virginia).

159. Id. at 164–66 (stating that the following states require proof of conduct beyond gross negligence but less than malice: Alabama, Alaska, Arkansas, Colorado, Connecticut, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Minnesota, Missouri, New Jersey, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Utah, Vermont, West Virginia, Wisconsin, Wyoming).


161. RESTATEMENT (SECOND) OF TORTS § 908(2) (1979). See, e.g., Inland Container Corp. v. March, 529 S.W.2d 43, 45 (Tenn. 1975); Beggs v. Universal C.I.T Corp., 409 S.W.2d 719,724 (Mo. 1966).


163. BLATT ET AL., supra note 73, §3.3 at 175 (noting that states providing
Colorado, Kentucky, Minnesota, Montana, and New Jersey have enacted statutes requiring juries to be instructed about the purpose of punitive damages.\(^{164}\) California, for example, requires that juries receive explanations of the meanings of "fraud," "malice," and "oppression."\(^{165}\) Colorado’s statute requires that the jury receive the definition of "willful and wanton conduct."\(^{166}\) Kentucky’s mandated jury instructions define "oppression," "fraud," and "malice."\(^{167}\) The widespread use of model jury instructions also provides juries with greater guidance in awarding punitive damages, which presumably provides defendants with another layer of protection. The empirical research supports initiatives to give jurors more guidance,\(^{168}\) but the Supreme Court’s critique of jury instructions does not accurately reflect the developments in the states.

\(^{164}\) See, e.g., ALA. CODE § 6-11-20(b)(1)--(3) (1993); COLO. REV. STAT. § 13-21-102(1)(b) (2001); KY. REV. STAT. ANN. § 411.184(1)(a)--(c) (Michie 1992); MINN. STAT. ANN. § 549.20(3) (West 2000); MONT. CODE ANN. § 27-1-221(2)--(4) (2003).

\(^{165}\) California spells out the definition of each predicate for punitive damages. For example, the jury may award punitive damages "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." CAL. CIV. CODE § 3294(a) (West 1997). "‘Malice’ means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.” Id. § 3294(c)(1). "‘Oppression’ means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person’s rights.” Id. § 3294(c)(2). "‘Fraud’ means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.” Id. § 3294(c)(3). See also ALA. CODE § 6-11-20(b)(1)--(3), (5) (1993) (defining fraud, malice and wantonness).


\(^{167}\) KY. REV. STAT. ANN. § 411.184(1)(a)--(c) (Michie 1992).

\(^{168}\) Robbennolt, supra note 9, at 144.
I. Verdict Restrictions

1. Form of Verdict

A number of states have passed tort reform statutes requiring that punitive damages be awarded by a special verdict. In those states, judges are required to address the issue of punitive damages in a special verdict. In court-tried cases, the judge is required to render a special verdict for punitive damages. Georgia requires that the trier of fact indicate the award of punitive damages "through an appropriate form of verdict, along with the other required findings." Iowa's punitive damages tort reform statute requires the court to instruct the jury to answer special interrogatories about punitive damages. Greater guidance in jury instructions and verdict forms are reforms designed to educate the jury and make it more likely that punitive damages awards are based upon a factual foundation.

2. Multiple Punitive Damages for the Same Conduct

A few jurisdictions restrict the number of punitive damages for the same mass product defect or course of conduct. The goal is to prevent overkill; punitive damages should sting, but not bankrupt the corporate defendant. The multiple punishment problem in punitive damages litigation has been "the most discussed and debated issue in the law of punitive damages." Georgia enacted a one-award provision for punitive damages in products liability. A federal court found this provision to be unconstitutional.

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170. See, e.g., id. (noting that the judge shall submit to the jury a special verdict as to punitive damages or, if the case is tried to the court, the judge shall issue a special verdict as to punitive damages).
174. Id.
Florida, the trial judge determines whether prior punitive damages awards are sufficient to punish a defendant’s behavior.\footnote{177}{FLA. STAT. ANN. § 768.73 (2)(b) (West Supp. 2004).}

Missouri enacted a complicated tort reform that permits the defendant to obtain credits for prior punitive damages.\footnote{178}{MO. ANN. STAT. § 510.263(4) (West Supp. 2004) (describing procedure for crediting past awards arising out of same conduct).} Assuming there are prior damages awards for the same conduct, the defendant can request a hearing on whether the amount awarded by the jury as punitive damages may be credited with amounts previously paid for punitive damages arising out of that same conduct. If the court finds that the previous award did arise out of the same conduct, the defendant must show that it did not “unreasonably continue the conduct after acquiring actual knowledge of the dangerous nature of such conduct.”\footnote{179}{Id.} Missouri also proscribes multiple punitive damages for the same conduct.\footnote{180}{Id.} The states that have placed arbitrary limits on the number of punitive damages awards are seeking to address the problem of multiple awards bankrupting the defendant. A more balanced approach would be to permit the defendant to introduce evidence of prior punitive damages in the second stage of a bifurcated proceeding rather than to arbitrarily cut off liability.

\section*{J. Post-Verdict Review for Excessiveness}

1. Passion or Prejudice Test

Punitive damages have a high “mortality rate” in the post-verdict period because trial and appellate courts have applied rigorous standards of review to such awards.\footnote{181}{See, e.g., MARK PETERSON ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, PUNITIVE DAMAGES: EMPIRICAL FINDINGS 27–30 (1987); see also Rustad & Koenig, supra note 8, at 1012.} The high rate of reversal or reduction of punitive damages is emblematic of extensive judicial control. In addition to post-trial reviews at the state level, the U.S. Supreme Court requires courts to conduct an excessiveness review to determine whether an award complies with due process.\footnote{182}{Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994) (finding}
states possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards. Every state prescribes its own method for reviewing the excessiveness of punitive damages. The states employ general standards such as the “passion or prejudice” or “shock the conscience” tests to determine whether punitive awards are excessive. The majority of U.S. Supreme Court justices believe that in addition to state judicial

Oregon’s state constitutional provision prohibiting post-verdict reviews of punitive damages for excessiveness as being violative of procedural due process; BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1995) (instructing reviewing punitive damages to consider three guideposts: “(1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases”).


184. See, e.g., Goucher v. Dinneen, 471 A.2d 688, 689 (Me. 1984) (“The award of punitive damages... is within the sound discretion of the fact finder after weighing all relevant aggravating and mitigating factors”); Hanover Ins. Co. v. Hayward, 464 A.2d 156, 158 (Me. 1983) (using an abuse of discretion standard for review of punitive damages decision).

185. Olmstead v. First Interstate Bank of Fargo, N.A., 449 N.W.2d 804, 809 (N.D. 1989) (citations omitted) (“We will not overturn an exemplary damages award as excessive absent passion or prejudice on the part of the jury. Passion means that the jury was motivated by feelings or emotions rather than by the evidence. Prejudice includes forming an opinion without due knowledge or examination.”).


187. Folks, 755 P.2d at 1335–36, states:

The award of punitive damages will not be set aside unless the trial judge finds that the award (1) was based on passion, prejudice or bias; (2) was based on mistake of law or fact; or (3) lacked evidentiary support. Where a verdict is so excessive and out of proportion to the damages sustained as to shock the conscience of the court and judgment has been entered, the trial judge may tentatively affirm the judgment, provided that the plaintiff will accept a reduced judgment, or may grant a new trial. If the appellate court determines the trial court did not abuse its discretion in affirming the award of punitive damages, but the award is so excessive and out of proportion as to shock the conscience of the appellate court, the appellate court may tentatively affirm the judgment and allow the plaintiff to either accept a reduced amount or be granted a new trial on the issue of punitive damages.
controls, there are due process limitations on the discretion of juries to award punitive damages. 188

Perhaps the most common test is some variant of the passion or prejudice test. 189 The test asks whether a punitive damages award is so large as to create an inference that it was the product of juror bias. For example, in Minnesota, reviewing courts have a standard of review that tests for juror bias:

The trial court, having heard the testimony and observed the parties and witnesses, is in a better position than this court to determine whether the damages were given under the influence of passion and prejudice, and in the absence of a clear abuse of that discretion its action will not be reversed. 190

As such, the Minnesota court’s reviewing role is “to determine whether the damages were given under the influence of passion and prejudice, and in the absence of a clear abuse of that discretion its action will not be reversed.” 191 The standard is substantially similar in Alaska: “A punitive damage award is excessive if it is manifestly unreasonable, resulting from passion or prejudice or disregard of the rules of law. Relevant factors include the compensatory damage amount, [the] magnitude of the offense, the importance of the policy violated, and the defendant’s wealth.” 192

188. Cass R. Sunstein et al., *Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)*, 107 YALE L. J. 2071, 2087 (1998) (“Hence a majority of recent Justices ... have argued that the Due Process Clause requires constraints on jury discretion that will provide fair notice to potential defendants and limit the role of arbitrary or irrelevant factors.”).

189. For example, Delaware punitive damages verdicts “will not be disturbed as excessive unless it is so clearly so as to indicate that it was the result of passion, prejudice, partiality, or corruption; or that it was manifestly the result of disregard of the evidence or applicable rules of law. A verdict should not be set aside unless it is so grossly excessive as to shock the Court’s conscience and sense of justice; and unless the injustice of allowing the verdict to stand is clear.” Cloroben Chem. Corp. v. Comegys, 464 A.2d 887, 892 (Del. 1983) (quoting Riegel v. Aastad, 272 A.2d 715, 717–18 (Del. 1970)).


191. Id.

In Connecticut, punitive damages are strictly limited to the cost of litigation.\textsuperscript{193} However, a \textit{remititur} will be granted even though a verdict "is so clearly excessive as to indicate that the jury \textit{was} unduly swayed by sympathy for the plaintiff."\textsuperscript{194} New Jersey’s "passion and prejudice" test refers not only to the possibility of passion or prejudice, but also to juror error in determining whether a punitive award is excessive.\textsuperscript{195}

2. Shock the Conscience Test

The "shock the conscience" test differs only in semantics from the "passion and prejudice" test.\textsuperscript{196} "A verdict should not be set aside unless it is so grossly excessive as to shock the Court's conscience and sense of justice; and unless the injustice of allowing the verdict to stand is clear."\textsuperscript{197} The Colorado Supreme Court combined the "shock the conscience" test with the "passion and prejudice" test:

\textit{[A]bsent an award so excessive . . . as to shock the judicial conscience and to raise an irresistible inference that passion,}

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  \item \textsuperscript{193} Alaimo v. Royer, 448 A.2d 207, 209–10 (Conn. 1982); see also Vandersluis v. Weil, 407 A.2d 982, 986 (Conn. 1978) (limiting punitive damages to costs of litigation).
  \item \textsuperscript{194} Seaman v. Dexter, 114 A. 75, 76 (Conn. 1921).
  \item \textsuperscript{195} Leimgruber v. Claridge Assocs., 375 A.2d 652, 657 (N.J. 1977) ("This Court has held that verdicts should be upset for being excessive only in clear cases, that damage awards will not be set aside unless so excessive as irresistibly to give rise to the inference of mistake, passion, prejudice or partiality, or are so disproportionate as to shock the conscience, or the sustaining of the award would result in a manifest denial of justice." (citations omitted)).
  \item \textsuperscript{196} The Arizona Supreme Court's variant of the test states: "The appropriate test of passion or prejudice is whether the verdict is 'so manifestly unfair, unreasonable and outrageous as to shock the conscience of the court.'" Hawkins v. Allstate Ins. Co., 733 P.2d 1073, 1084 (Ariz. 1987) (citing Lindsenmeyer v. Hancock, 533 P.2d 1181, 1185 (1985)); see also id. ("The test to be applied . . . is whether the 'verdict is so outrageously excessive as to suggest, at first blush, passion or prejudice.'").
  \item In 1994, the U.S. Supreme Court declined to review a federal appeals court decision upholding Arkansas' "shock the conscience" standard for punitive damages. See Todd P. Lewis, \textit{The Constitutionality of Punitive Damage Awards in Arkansas: Will the Conscience of the Court be Shocked?} Robertson Oil Co., Inc. v. Phillips Petroleum Co., 49 ARK. L. REV. 161, 167 (1996).
  \item \textsuperscript{197} Cloroben Chem. Corp. v. Comegys, 464 A.2d 887, 892 (Del. 1983) (quoting Riegel v. Aastad, 272 A.2d 715, 718 (Del. 1970)).
\end{itemize}
prejudice, corruption or other improper cause invaded the trial, the jury's determination of the fact is considered inviolate.  

Mississippi courts determine whether a punitive damages award is "so excessive that it should be altered or amended when it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience." The court explained that the shock the conscience test is not based upon an individual judge's reaction to a large punitive damages award, but to the abstract notion of the judicial conscience. Alabama's post-verdict standard requires the trial judge to conduct a de novo post-verdict hearing to evaluate whether a given award is excessive. Iowa does not permit courts to enter a remittitur in order

198. Hurd v. Am. Hoist & Derrick Co., 734 F.2d 495, 503 (10th Cir. 1984); Higgs v. Dist. Court, 713 P.2d 840, 860–62 (Colo. 1985). Colorado, like many other states, has enacted new punitive damages statutes fortifying the standard of review. Colorado’s punitive damages statute gives the court more discretion to remit or reverse punitive damages: "[T]he court may reduce or disallow the award of exemplary damages to the extent that: (a) The deterrent effect of the damages has been accomplished; or (b) The conduct which resulted in the award has ceased; or (c) The purpose of such damages has otherwise been served." COLO. REV. STAT. § 13-21-102(2) (2001).


200. Id.

201. In Alabama, the trial judge must determine whether the amount of punitive damages awarded by a jury is excessive. Hammond v. City of Gadsden, 493 So. 2d 1374, 1378–79 ( Ala. 1986). Punitive damages awarded "must not exceed an amount that will accomplish society's goals of punishment and deterrence." Green Oil v. Hornsby, 539 So. 2d 218, 222 ( Ala. 1989). The so-called "Hammond order" requires the judge to determine whether the amount of punitive damages is "not excessive." Hammond, 493 So. 2d at 1379. The statute provides that "[n]o presumption of correctness shall apply as to the amount of punitive damages awarded by the trier of fact." ALA. CODE § 6-11-23 (1993).

In Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, 22 (1991), the Court approved of Alabama’s process for awarding punitive damages and stated “[t]he Alabama Supreme Court’s postverdict review ensures that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages.” Further, the Court noted that Alabama’s post-trial review accomplishes the following: (1) it determines whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant’s conduct; (2) it examines the harm that actually has occurred from the defendant’s conduct; (3) it discerns the degree of reprehensibility of the
to cure excessive punitive damages awards. The standard of review requires excessive awards to be vacated or set aside entirely.

3. Fortified Tests for Excessiveness

The U.S. Supreme Court in *Honda Motor Co. v. Oberg* held that post-verdict excessiveness reviews were required to determine whether punitive damages awards comport with due process. After *Oberg*, Oregon adopted a post-verdict standard of review that asks the simple question whether a given punitive damages award is within the range of a rational jury. Similarly, Maryland's appellate courts revised its standard of review to comply with federal constitutional guidelines. A number of states provide detailed guidance in relation to excessiveness that goes far beyond merely asking whether damage awards comport with due process.

A number of other states have strengthened their post-verdict review procedures. Illinois, for example, gives the trial judge the discretion to "determine whether a jury award for punitive damages is excessive, and if so, enter a remittitur and a conditional new trial." Alabama grants no presumption of correctness of punitive damages when its appellate court conducts independent excessiveness reviews.

In 1991, South Carolina's Supreme Court implemented new guidelines for reviewing punitive damages awards. The net effect of defendant's conduct; (4) it measures the profitability to the defendant of the conduct; and (5) it looks at the "financial position" of the defendant. *Id.* at 21–22.

205. *Id.* at 434–35.
208. *See*, e.g., FLA. STAT. ANN. § 768.74(5) (West 1997).
209. 735 ILL. COMP. STAT. ANN. 5/2-1207 (West 2003).
developments in these and other states has been to fortify judicial control over jury awards, which has led to a high rate of reversals or reductions in punitive damages: "All of the [empirical] studies examining post-verdict adjustments confirm that punitive damages are strictly scrutinized by trial and appellate judges."212 In general, appellate courts seldom reverse or reduce compensatory damages, and they carefully and thoroughly scrutinize punitive damages.213

L. Joint and Several Punitive Liability

Punitive damages have been assessed jointly and severally since the English case of *Merryweather v. Nixan.*214 Courts permitted the jury to hear evidence of the joint tortfeasor's culpability and wealth if they were implicated in the wrongdoing.215 The policy underlying joint and several punitive damages can be traced to judicial unwillingness to entertain or adjust claims of aggravated wrongdoing.216 Joint and several punitive liability is not only fair, but it brings common sense to the common law—in a modern products liability action, there will frequently be several corporate defendants involved in an indivisible chain of manufacture, distribution, and sale, which may also involve foreign defendants.217

212. See Rustad, *Unraveling Punitive Damages,* supra note 9, at 40.
213. Id.
215. See, e.g., Lyons v. Williams, 567 So. 2d 1280, 1281 (Ala. 1990) (permitting joint and several unapportioned punitive damages against several relatives of the deceased in an action for conversion); Huckeby v. Spangler, 563 S.W.2d 555, 558, 560 (Tenn. 1978) (permitting apportionment of punitive damages); Odom v. Gray, 508 S.W.2d 526, 533–34 (Tenn. 1974) (allowing joint and several punitive damages); J.J.B. Enters. v. Boat Works, Inc., 472 N.W.2d 790, 796 (Wis. 1991) (imposing joint and several punitive damages in a case involving a distribution chain for the sale of a used boat).
217. In cases involving foreign parent corporations and American subsidiaries, it may be difficult to apportion wrongdoing. It is frequently the case where the joint corporate structures are inextricably linked and there may be an indivisible chain of wrongdoing from the importation and sale of a defective product to the failure of recall after a problem is detected. See, e.g., Stokes v. Geismar, 815 F.Supp. 904, 906–07 (E.D. Va. 1993). Forbidding joint and several liability where there is an interlocking parent and subsidiary may encourage the parent corporation to "isolate those [risky] activities in separate subsidiary corporations." Richard A. Westin & Sanford E. Gaines, *The Relationship of Federal Income Taxes to Toxic Wastes: A Selective Study,*
States vary in their willingness to extend the doctrine of joint and several liability to punitive damages. One of the unfair aspects of applying joint and several punitive liability is that it may force a codefendant to pay the entire punitive award where it has a lower level of culpability or fewer financial resources. If joint and several punitive damages are not permitted, however, the risk of an insolvent co-defendant is reallocated to the plaintiff. The requirement of apportioned punitive damages permits defendants to use complicated corporate structures as a shield. It is fair to both parties to assess punitive damages on combined net worth when the entities constitute an "interlocking... monolith." The risk that an interlocking company will isolate its wrongdoing in undercapitalized subsidiaries is a serious concern. The abolition of joint punitive damages is yet another example of judicial tort reform favoring corporate defendants.

218. For example, the Wisconsin Court of Appeals affirmed a joint and several liability punitive damages award against several joint tortfeasors in the distribution chain involved in the sale of a used boat in Radford v. J.J.B. Enterprises, 472 N.W.2d 790 (Wis. Ct. App. 1991). However, Wisconsin enacted a statute prohibiting joint and several punitive damages. See Wis. STAT. ANN. § 895.85(5) (West Supp. 2004) (noting that the rule of joint and several liability does not apply to punitive damages). The Tennessee Supreme Court permitted joint and several punitive damages in Odom v. Gray, 508 S.W.2d 526, 533–34 (Tenn. 1974), and in Huckeby v. Spangler, 563 S.W.2d 555, 558 (Tenn. 1978), the court found it unobjectionable to base a joint and several punitive damages award upon the net worth or assets of only one of several punitive damage defendants. The Alabama Supreme Court held that punitive damages in wrongful death actions may not be apportioned among joint tortfeasors. See Tatum v. Schering Corp., 523 So. 2d 1042, 1045 (Ala. 1988).
221. See Bell v. Morrison, 27 Miss. 68 (1854) (noting how a wealth defendant principally implicated in a wrong, might escape payment of just and reasonable damages by “having others, without character or property, associated in the unlawful act.”).
PUNITIVE DAMAGES’ IRON CAGE

M. Judicial Tort Reforms of Punitive Damages Procedures

In 1994, the United States Supreme Court began to formulate new judicial reforms for punitive damages procedures applicable to all jurisdictions. It struck down a succession of four large punitive awards against out-of-state corporations. Two reforms deserve special mention here.

1. Mandatory Post-Verdict Excessiveness Review

In the 1994 case of Honda Motor Co. v. Oberg, the Court ruled that a state constitutional prohibition against post-verdict reviews of punitive damages for excessiveness violated procedural due process. Oregon’s constitution did not permit either trial or appellate courts to review the amount of punitive damages for excessiveness. After the Oberg case, many states reviewed and even fortified post-verdict procedures for assessing the excessiveness of punitive awards.

2. De Novo Federal Standard of Review

The U.S. Supreme Court, in Leatherman Tool Co. v. Cooper Industries, held that federal appellate courts must apply a de novo standard when conducting excessiveness reviews of punitive

222. See Honda Motor Co. v. Oberg, 512 U.S. 415, 415 (1994) (vacating a multi-million dollar punitive damages award against a Japanese manufacturer on the grounds that Oregon did not provide for a mandated post-verdict review of the award for excessiveness); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 585–86 (1996) (reversing multi-million dollar award against U.S. subsidiary of German automobile company on grounds that the award was so excessive as to violate substantive due process); Cooper Indus., Inc. v. Leatherman Tool Group, 532 U.S. 424, 424 (2001) (vacating large punitive damages award in trade dress case because federal appellate court applied the wrong standard of review); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 408 (2003) (reversing an award of $145 million in punitive damages, where full compensatory damages were $1 million, as excessive and in violation of the Due Process Clause of the Fourteenth Amendment).

224. Id. at 434–35.
225. Id. at 418–19.
226. See supra note 222.
damages rather than the more deferential standard of abuse of discretion used in reviewing compensatory damages.\textsuperscript{228}

Prior to the Court's ruling, a number of federal appeals courts had applied the less deferential abuse of discretion standard in punitive damages cases.\textsuperscript{229} After Cooper, a defendant is entitled to greater due process at the appellate, as well as the trial, level.\textsuperscript{230} The defendant is constitutionally entitled to a "fresh" review of the amount of punitive damages without deference to the lower court's findings.\textsuperscript{231} Substantive and procedural due process, augmented by detailed jury instructions and state post-verdict procedures, contemplate a greater role for trial judges in controlling the size of punitive damages and provide another procedural guarantee that punitive damages fit the wrong.

VI. SUBSTANTIVE LIMITS ON PUNITIVE DAMAGES

A. Capping the Size or Ratio of Punitive Damages

Punitive damages have historically been awarded in view of the enormity of the wrongdoing, rather than being limited by some arbitrary mathematical formula.\textsuperscript{232} The legislative purpose of caps is to preclude even the possibility of excessive awards by placing an absolute limit upon awards, or by limiting punitive damages to a specified ratio of compensatory damages. Capping punitive damages or limiting them to a fixed amount or ratio is perhaps the most radical tort reform in terms of its impact on deterrence. Capping punitive damages undermines the unpredictability of punitive damages that makes the defendant think twice before engaging in wrongful conduct that may be profitable, but which violates community norms or disregards the public welfare.\textsuperscript{233} The ostensible

\textsuperscript{228} Id. at 436.
\textsuperscript{229} See, e.g., Zimmerman v. Direct Fed. Credit Union, 262 F.3d 70, 80–81 (1st Cir. 2001) (describing the standard of review prior to Cooper, and the effect of Cooper on its decision).
\textsuperscript{231} Cooper Indus., 532 U.S. at 436.
\textsuperscript{233} See Rustad, In Defense of Punitive Damages, supra note 8, at 85–88.
purpose of the cap is to address the excessiveness problem directly by eliminating jury discretion. The following table shows the punitive damages cap in each of the states.

### Table 1: An Audit of Punitive Damages Caps

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Type of Cap</th>
<th>Specific Features</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Alabama</strong></td>
<td>Variable cap that varies with company's net worth &amp; type of injury. Inflation-adjusted.</td>
<td>Basic treble damages or $500,000 limit, whichever is greater, but adjusts the cap according to a company's size and net worth.</td>
</tr>
<tr>
<td><strong>Alaska</strong></td>
<td>Variable cap based upon the greater of a ratio, a fixed amount and the defendant's motivation for financial gain. No exceptions.</td>
<td>The greater of three times compensatory damages or $500,000.</td>
</tr>
</tbody>
</table>

234. Alabama Code Section 6-11-21(f) states:
As to all the fixed sums for punitive damage limitations set out herein in subsections (a), (b), and (d), those sums shall be adjusted as of January 1, 2003, and as of January 1 at three-year intervals thereafter, at an annual rate in accordance with the Consumer Price Index rate.

**Ala. Code § 6-11-21(f) (Supp. 2003).**

235. Alabama Code Section § 6-11-21(a)-(c) provides:
Except as provided in subsections (b), (d), and (j), in all civil actions where an entitlement to punitive damages shall have been established under applicable laws, no award of punitive damages shall exceed three times the compensatory damages of the party claiming punitive damages or five hundred thousand dollars ($500,000), whichever is greater. (b) Except as provided in subsection (d) and (j), in all civil actions where entitlement to punitive damages shall have been established under applicable law against a defendant who is a small business, no award of punitive damages shall exceed fifty thousand dollars ($50,000) or 10 percent of the business' net worth, whichever is greater.

*Id.* § 6-11-21(a)-(c).

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<tr>
<th><strong>JURISDICTION</strong></th>
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<th><strong>SPECIFIC FEATURES</strong></th>
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<tbody>
<tr>
<td><strong>ARKANSAS</strong></td>
<td>Fixed cap based upon the greater of a ratio and a fixed amount, exception for intentional harm.</td>
<td>The greater of three times compensatory damages or $250,000.237</td>
</tr>
<tr>
<td><strong>COLORADO</strong></td>
<td>Fixed ratio, but increases if the defendant is a recidivist or continues misconduct. No exceptions.</td>
<td>Exemplary damages may not be greater than compensatory damages.238</td>
</tr>
<tr>
<td><strong>CONNECTICUT</strong></td>
<td>Fixed ratio &amp; judge-assessed. No exceptions.</td>
<td>Punitive damages are limited to the “expenses of litigation less taxable costs.”239 In products liability litigation, punitive damages may not “exceed an amount equal to twice the damages awarded to the plaintiff.”240</td>
</tr>
<tr>
<td><strong>FLORIDA</strong></td>
<td>Fixed cap based upon a ratio and a fixed amount. No exceptions.</td>
<td>The greater of three times compensatory damages or $500,000. If the defendant was motivated by unreasonable financial gain, cap is increased to four times the</td>
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</table>

240. **CONN. GEN. STAT. ANN.** § 52-240b (West 1999) (stating that punitive damages may be awarded in products liability litigation).
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<tbody>
<tr>
<td></td>
<td>compensatory damages or $2 million, whichever is greater. No cap if there is proof of the defendant’s specific intent.</td>
<td></td>
</tr>
<tr>
<td>GEORGIA</td>
<td>Fixed amount; exception for products liability cases and acts committed with specific intent to harm and cases arising out of misuse of alcohol or drugs.</td>
<td>Capped at $250,000; Exceptions for intentional harm.</td>
</tr>
<tr>
<td>IDAHO</td>
<td>Fixed cap based upon a ratio and a fixed amount. No exceptions.</td>
<td>No greater than three times compensatory damages or $250,000.</td>
</tr>
<tr>
<td>INDIANA</td>
<td>Fixed Cap Based Upon Ratio &amp; Fixed Amount. No exceptions.</td>
<td>No greater than three times compensatory damages or $50,000.</td>
</tr>
<tr>
<td>KANSAS</td>
<td>Variable cap based upon the defendant’s profits or $5 million. Increased cap if there is proof of the defendant’s profits from misconduct. No exceptions.</td>
<td>The lesser of the defendant’s annual gross income or $5 million, unless the defendant profits from her misconduct beyond this amount, in which case the court may award “an amount equal to 1 1/2 times the amount of profit which the</td>
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<tbody>
<tr>
<td>LOUISIANA</td>
<td>No punitive damages, except as authorized by statute.</td>
<td>Louisiana has a de facto cap of zero.</td>
</tr>
<tr>
<td>MASSACHUSETTS</td>
<td>No punitive damages, except as authorized by statute.</td>
<td>Massachusetts has a de facto cap of zero for common law punitive damages.</td>
</tr>
<tr>
<td>MICHIGAN</td>
<td>Limited to compensation for injured feelings.</td>
<td>Michigan does not recognize the punishment and deterrence function of punitive damages.</td>
</tr>
<tr>
<td>MISSISSIPPI</td>
<td>Variable cap based upon the defendant’s net worth. No exceptions.</td>
<td>50 million: cap of 2% of the defendant’s net worth; net worth of $0 to $50 million to $100 million: cap of $2.5 million; net worth of $100 million to $500 million: cap of $3.75 million; net worth of $500 million–$750 million: cap of $5 million; net worth of $750 million–$1 billion: cap of $15 million; net worth of</td>
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<tbody>
<tr>
<td><strong>MONTANA</strong></td>
<td>Variable cap based upon an absolute amount and upon the defendant’s net worth.</td>
<td>An award for punitive damages may not exceed $10 million or 3% of a defendant’s net worth, whichever is less. Cap does not apply to class actions.</td>
</tr>
<tr>
<td><strong>NEBRASKA</strong></td>
<td>No punitive damages.</td>
<td>Nebraska does not recognize punitive damages, and therefore has a de facto cap of zero.</td>
</tr>
<tr>
<td><strong>NEVADA</strong></td>
<td>Fixed cap based upon fixed ratio and amount, with minor exceptions.</td>
<td>Limited to three times the compensatory damages if compensatory damages equal $100,000 or more, and to $300,000 if compensatory damages are less than $100,000.</td>
</tr>
<tr>
<td><strong>NEW HAMPSHIRE</strong></td>
<td>Prohibits punitive damages.</td>
<td>New Hampshire does not recognize punitive damages and therefore</td>
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</table>

252. Nev. Rev. Stat. Ann. § 42.005(1) (Michie 2002); id. § 42.005(2) (listing exceptions for defective product manufacture, bad faith insurance practices, violations of state discriminatory housing law, defamation, and toxic waste disposal violations).
253. Id. § 42.005(1).
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</tr>
</thead>
<tbody>
<tr>
<td>NEW JERSEY</td>
<td>Fixed cap based upon a fixed ratio and amount. No exceptions.</td>
<td>has a de facto cap of zero. 254</td>
</tr>
<tr>
<td></td>
<td></td>
<td>&quot;No defendant shall be liable for punitive damages in any action in an amount in excess of five times the liability of that defendant for compensatory damages or $350,000, whichever is greater.&quot; 255</td>
</tr>
<tr>
<td>NORTH CAROLINA</td>
<td>Fixed cap based upon a fixed ratio and amount. No exceptions.</td>
<td>Punitive damages are limited to three times compensatory damages or $250,000, whichever is greater. 256</td>
</tr>
<tr>
<td>NORTH DAKOTA</td>
<td>Fixed cap based upon a fixed ratio and amount. No exceptions.</td>
<td>Limits punitive damages to the greater of two times compensatory damages or $250,000. 257</td>
</tr>
<tr>
<td>OKLAHOMA</td>
<td>Variable cap based upon the motivation of the defendant. No exceptions.</td>
<td>Category I: limited to compensatory damages or $100,000 if the defendant is reckless. Category II: for</td>
</tr>
</tbody>
</table>

256. N.C. GEN. STAT. § 1D-25(b) (2003); North Carolina’s punitive damages cap was upheld in Rhyne v. K-Mart Corp., 562 S.E.2d 82, 95 (N.C. Ct. App. 2002); see also Rhyne v. K-Mart Corp., 594 S.E.2d 1, 9 (N.C. 2004) (Supreme Court affirming decision).
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</tr>
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<tbody>
<tr>
<td>Texas</td>
<td>Fixed cap based upon a fixed ratio and amount. Exception for felonious behavior.</td>
<td>Cap on punitive damages equal to the greater of two times economic damages plus non-economic damages up to $750,000, or $200,000. Exemptions for intentional acts such as criminal felonies.</td>
</tr>
<tr>
<td>Virginia</td>
<td>Fixed amount. No exceptions.</td>
<td>Cap of $350,000.</td>
</tr>
</tbody>
</table>


WASHINGTON

| Washington does not recognize punitive damages. 261 |
| No punitive damages. |

1. De Facto Caps on Punitive Damages Permitted

The jurisdictions not recognizing punitive damages (Louisiana, Nebraska, New Hampshire, Massachusetts, and Washington) have a de facto cap of zero punitive damages for every cause of action. New Hampshire has prohibited punitive damages since 1986. 262 States that treat punitive damages as mock compensatory damages also have a de facto cap. Connecticut limits punitive damages to litigation expenses, 263 whereas Michigan limits punitive damages for compensation to injured feelings. 264 The de facto cap on punitive damages in these cases is calibrated to a component of compensatory damages rather than to the usual punishment or deterrence function.

2. Fixed Amounts

Alabama, Georgia, and Virginia enacted tort reforms that capped punitive damages at a fixed dollar amount. Alabama sets punitive damages at $500,000 or three times the compensatory damages in non-wrongful death cases. 265 Virginia’s cap for total punitive damages is set at $350,000, 266 whereas Georgia caps punitive damages at $250,000 and the cap is inapplicable to products liability litigation and certain intentional torts. 267 These fixed amount jurisdictions cap punitive damages to an absolute dollar amount without adjustments for inflation or for the seriousness of the wrongdoing. Absolute dollar amount levels on punitive damages are

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265. See ALA. CODE § 6-11-21(a) (Supp. 2003).
266. See VA. CODE ANN. § 8.01-38.1 (Michie 2000).
267. GA. CODE ANN. § 51-12-5.1 (West 2003).
not wealth-sensitive fines and therefore have little or no possibility of achieving deterrence.\textsuperscript{268}

3. Fixed Ratios

States adopting the fixed ratio approach limit punitive damages to a predetermined maximum ratio to the amount of compensatory damages.\textsuperscript{269} A few states adopt fixed ratios but give the court the discretion to raise the ratio or level of punitive damages in egregious circumstances. In Colorado, for example, the court has the discretion to raise the punitive damages up to three times actual damage if the wrongful conduct continues during the pendency of the trial.\textsuperscript{270}

4. Hybrid of Amounts & Ratios

A few jurisdictions meld ratios with fixed amounts to limit excessive awards.\textsuperscript{271} Nevada limits punitive damages to $300,000 in cases in which compensatory damages are less than $100,000 and up to three times the compensatory damages in awards of $100,000 or more.\textsuperscript{272} This cap does not apply to products liability, however.\textsuperscript{273}

\textsuperscript{269} See, e.g., Colorado: COLO. REV. STAT. § 13-21-102(3) (2001) (limiting recovery to three times the amount of actual damages); Florida: FLA. STAT. ANN. § 768.73(1)(a) (West Supp. 2004) (stating punitive damages in Florida may not be greater than three times compensatory damages); Nevada: NEV. REV. STAT. ANN. 42.005 (Michie 2002); Oklahoma: OKLA. STAT. ANN. tit. 23, § 9.1(B) (West Supp. 2005); and Texas: TEX. CIV. PRAC. & REM. CODE ANN. § 41.008(b) (Vernon Supp. 2004–2005).
\textsuperscript{271} Kansas, for example, limits punitive damages to the lesser of five million dollars or the “defendant’s highest gross annual income earned for any one of the five years immediately before the act for which such damages are awarded.” KAN. STAT. ANN. § 60-3702(e) (1994). The prevailing plaintiff may bypass the Kansas cap by proving that a defendant expected to make profit exceeding the maximum damage award. See id. § 60-3702(f) (providing for exception if expected profits exceed limitation). If the plaintiff qualifies for the exception, damages may be set at one and one-half times the defendant’s expected profit because of the misconduct. See id. North Dakota limits punitive damages to no more than twice compensatory damages or $250,000, whichever is greater. See N.D. CENT. CODE ANN. § 32-03.2-11(4) (Michie 1996 & Supp. 2003).
\textsuperscript{272} See NEV. REV. STAT. ANN. 42.005 (Michie 2002) (capping punitive damages at three times actual damages).
\textsuperscript{273} Id.
Texas limits punitive damages to four times the amount of actual damages or $200,000, whichever is greater.\textsuperscript{274} Kansas has a hybrid model that limits punitive damages to the lesser of five million dollars or to the “defendant’s highest gross annual income earned for any one of the five years immediately before the act for which such damages are awarded.”\textsuperscript{275} The plaintiff can circumvent the Kansas cap by proving that a defendant expected to make a profit exceeding the maximum damage award.\textsuperscript{276} If the plaintiff qualifies for the exception, damages may be set at one and one-half times the defendant’s expected profit because of the misconduct.\textsuperscript{277}

Arkansas punitive awards may not exceed the greater of $250,000 or three times compensatory damages, not to exceed one million dollars.\textsuperscript{278} The cap may be removed, however, if the fact finder concludes that the defendant’s conduct was intentional and harmed the plaintiff.\textsuperscript{279} In intentional malfeasance cases, the punitive damages cap is not applicable.\textsuperscript{280} Arkansas is one of the few states to adjust the cap for inflation.\textsuperscript{281}

5. Caps that Vary with the Defendant’s Size or Misconduct

A growing number of jurisdictions have enacted caps that vary with the defendant’s conduct and provide for a safety valve that contemplates the lifting of the cap if there are sufficient aggravating circumstances. Alaska, for example, has capped punitive damages at (1) the greater of three times the compensatory damages awarded to the plaintiff; or (2) the sum of $ 500,000.\textsuperscript{282} If the jury determines, however, that the corporate misconduct was “motivated by financial gain and the adverse consequences of the conduct were actually known by the defendant or the person responsible for making policy

\textsuperscript{274} See \textsc{Tex. Civ. Prac. \\ & Rem. Code Ann.} § 41.007 (Vernon 1997).
\textsuperscript{276} See \textit{id.} § 60-3702(f).
\textsuperscript{277} \textit{Id.}
\textsuperscript{278} \textsc{Ark. Code Ann.} § 16-55-208(a) (Michie Supp. 2003).
\textsuperscript{279} \textit{Id.} § 16-55-208(b).
\textsuperscript{280} \textit{Id.}
\textsuperscript{281} \textit{Id.} § 16-55-208(c).
\textsuperscript{282} \textsc{Alaska Stat.} § 09.17.020(f) (Michie Supp. 2003).
decisions on behalf of the defendant,” the jury may award the greatest of four times compensatory damages, four times the defendant’s financial gain from the misconduct, or seven million dollars. Alaska imposes a cap based upon a fixed dollar amount for punitive damages in employment cases. In contrast, the Supreme Court of Alabama has stated that the essential purpose of punitive damages would be “thwarted if we required that they conform to any mathematical equation.”

There is little by way of empirical research on the impact of caps on deterrence. Commentators argue, however, that capping punitive damages will erode the deterrent power of this remedy, permitting firms to predict their liability in advance. The risk is that the firm will conduct risky cost-benefit analyses trading safety for profits. Thus, it is arguable that capping punitive damages cripples the

283. Id. § 09.17.020(g)(1)–(3).
284. Alaska Statute Section 09.17.020(h) states that the amount of punitive damages awarded by the court or jury may not exceed:

(1) $200,000 if the employer has less than 100 employees in this state;
(2) $300,000 if the employer has 100 or more but less than 200 employees in this state;
(3) $400,000 if the employer has 200 or more but less than 500 employees in this state; and
(4) $500,000 if the employer has 500 or more employees in this state.

Id. § 09.17.020(h).
286. Some legal commentators argue that capping punitive damages will lessen the deterrent value of the remedy by permitting firms to conduct cost-benefit analyses in order to determine the potential profitability of trading public safety for profits. See, e.g., Sylvia M. Demarest & David E. Jones, Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest?, 18 ST. MARY’S L.J. 797, 825 & n.156 (1987) (criticizing punitive damages caps as arbitrarily imposed, thereby creating disproportionate results); Clements, supra note 268, at 218–19 (asserting that punitive damages cap would cause malicious conduct to go undeterred and unpunished); Amelia J. Toy, Comment, Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective, 40 EMORY L.J. 303, 335 (1991) (stating that statutory punitive damages caps, by allowing potential tortfeasors to calculate maximum expected costs, sacrifice goals of punitive damages).
287. See, e.g., Clements, supra note 268, at 218; Toy, supra note 286, at 335; Demarest & Jones, supra note 286, at 825 n.156 (criticizing arbitrariness of caps).
deterrent function of punitive damages because the total punitive liability is predictable.

B. Compulsory State Sharing of Punitive Damage Awards

Recently, California’s governor, Arnold Schwarzenegger, signed a bill requiring plaintiffs to remit 75% of each punitive damages award to the state treasury.288 This makes California the ninth state to require plaintiffs to share a portion of their punitive damages awards with the state. The others are Alaska, Georgia, Iowa, Illinois, Indiana, Kansas, Missouri, Oregon, and Utah.289 The Ohio Supreme Court ruled that it could apportion a punitive damages award in an insurance bad faith case between the plaintiff and a state agency.290

In Alaska, the court requires that half of every punitive damages award be “deposited into the general fund of the state.”291 The Georgia state-sharing statute provided that “seventy-five percent of any amounts awarded [for punitive damages in products liability actions] shall be paid into the treasury of the state through the Fiscal Division of the Department of Administrative Services.”292 In


290. The court ruled that assigning a portion of a $49 million punitive damages award was an appropriate judicial action. Dardinger v. Anthem Blue Cross & Blue Shield, 781 N.E.2d 121, 146 (Ohio 2002) (apportioning $10 million to the plaintiff and the remaining portion to the James Cancer Hospital and Solove Research Institute at the Ohio State University).


292. GA. CODE ANN. § 51-12-5.1(e)(2) (West 2003). Georgia’s state-sharing statute which requires payment of 75% of punitive damages in products liability to the state was found to be unconstitutional by a federal judge in McBride v. General Motors Corp., 737 F. Supp. 1563, 1579 (M.D. Ga. 1990) (holding that Georgia’s split recovery statute violated due process, equal protection and the excessive fines clauses of the U.S. and Georgia’s state constitution). However, the Georgia Supreme Court upheld split-recovery in
Georgia, the state has standing as a judgment creditor until the judgment is satisfied. Georgia is typical in enacting compulsory apportionment without careful study. A federal judge observed that Georgia’s split recovery statute was enacted “with no studies or documentation” whatsoever supporting the assertion that apportionment was necessary to protect Georgia’s economy.

Punitive damages in Georgia products liability cases were rarely awarded and were modest in size. Illinois gives the trial judge the discretion to apportion punitive damages between the plaintiff and the State of Illinois Department of Human Services.

Indiana’s split-recovery statute has been found to be constitutional. In Iowa, if the defendant’s conduct is directed specifically at the claimant, the full amount of the punitive damage award is paid to the claimant. Otherwise, the plaintiff may receive a limit of a quarter of punitive damages with the rest remitted to the state. Indiana requires the defendant to remit all punitive damages to the court clerk, who allocates 75% to the state treasurer and 25% to the plaintiff. Missouri allocates 50% of punitive damages after attorney fees and legal expenses are allocated.

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Mack Trucks Inc. v. Conkle, 436 S.E.2d 635, 640 (Ga. 1993).
293. GA. CODE ANN. § 51-12-5.1(e)(2) (West 2003).
295. I uncovered a total of ten punitive damages awards in Georgia products liability cases in twenty-five year period (1965–1990). Georgia averaged only a single punitive damages award every two-and-a-half years. Yet, the legislature capped punitive damages and allocated 75% of each award to the state treasury based upon anecdotal evidence of a Georgia litigation crisis inimical to the interests of the business community. The only two awards greater than $500,000 were against Fortune 500 companies, Eli Lilly and Ford Motor. The Georgia data was part of the dataset reported in Michael Rustad, In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data, 78 IOWA L. REV. 1, 29 (1992).
296. 735 ILL. COMP. STAT. ANN. 5/2-1207 (West 2003).
297. Cheatham v. Pohle, 789 N.E.2d 467, 470 (Ind. 2003) (upholding constitutionality of Indiana’s allocation statute as it did not exact a taking of private property nor require attorneys to undertake such representation).
299. IND. CODE ANN. § 34-51-3-6(b) (Michie 1998).
300. MO. ANN. STAT. § 537.675 (West Supp. 2004).
apportionment statute in response to a litigation crisis that requires prevailing plaintiffs to remit half of every punitive damages award to the State. Utah requires the plaintiff to remit half of all punitive damages in excess of $20,000 to the state treasury.

Apportionment statutes have been enacted but repealed in Colorado, Kansas, New York, and Florida. Kansas repealed its split-recovery statute that allocated half of all punitive damages awarded in medical malpractice cases to the state.

301. In Oregon, attorneys' fees of the plaintiff are paid out of the punitive damages, with half of the remainder going to the plaintiff and the other half to the state. The empirical evidence reveals that Oregon was a punitive damages cold-spot. In the twenty-five year period between 1965 and 1990, Oregon juries handed down a total of two punitive damages awards in all products liability actions. The size of the average punitive damages award in a products case in Oregon is less than one-half the size than the national mean (only 46.12% of national mean). Although during the 25-year period covered an average of 1.16% of the nation's population lived in Oregon, juries in that state awarded less than one-quarter of that percentage in punitive damages during the 25 years surveyed, that is, only 0.27% of the total punitive damages awarded nationwide in products liability cases from 1965 through 1990 (less than one-quarter of the expected rate). Of the 45 states that allow punitive damages, awards, Oregon ranked in the bottom one-half in both total awards (ranking 29th) and per capita awards (ranking 24th). The amount of punitive damages awarded per capita in Oregon is less than one-quarter of the amount awarded nationwide ($1.47 per capita in Oregon for the 25-year period surveyed and only $0.06 per capita per year, compared to $6.36 per capita for the United States for the same 25-year period or $0.25 per capita per year nationwide). The data do not support the need for a split-recovery statute. These empirical findings are reported in an empirical study I completed for my amicus brief in Honda Motor Co. v. Oberg, 512 U.S. 415 (1994). See Brief of Amicus Curiae Trial Lawyers for Public Justice in Support of Respondent, Honda Motor Co., 512 U.S. 415 (1994) (No. 93-644).


303. UTAH CODE ANN. § 78-18-1 (Supp. 2004) ("In any case where punitive damages are awarded, the judgment shall provide that 50% of the amount of the punitive damages in excess of $20,000 shall, after an allowable deduction for the payment of attorneys fees and costs, be remitted by the judgment debtor to the state treasurer for deposit into the General Fund.").


305. KAN. STAT. ANN. § 60-3402(e) (1994) (allocating 50% of medical
recovery statute was repealed after a court found that it violated Colorado's state constitution and the U.S. Constitution. In 1991, the Colorado Supreme Court struck down the split-recovery statute ruling that it violated the federal and state constitutional provisions against the taking of private property without just compensation.

Florida enacted a state-sharing scheme that allocated 60% of punitive damage awards to the Public Medical Assistance Trust Fund where the wrongdoing arose out of personal injury or wrongful death. Florida's statute, which divided punitive damages 40% to the plaintiff and 60% to one of two state funds, was found to be rationally related to the objectives of state tort reform. The Supreme Court of Florida upheld a statute providing that 60% of punitive damages should be allocated to the state. Iowa upheld its state-sharing provision rejecting the plaintiff's argument that he had a "property right" in punitive damages.

A Utah trial district court recently declared that Utah's split-recovery statute is unconstitutional on the grounds that it constitutes an impermissible taking of property of the claimant.

There is no empirical research on the impact of split-recovery statutes. The evidence shows, however, that such split-recovery statutes may not help the states as much as had been assumed. For example, the state of New York received only $15,000 from punitive damages judgments in all substantive areas of law in the three years during which it had an apportionment statute.

malpractice punitive damages to the state); id. § 60-3402(g) (in force for all causes of action accruing after July 1, 1985, but before July 1, 1988).


308. Florida's state-sharing was upheld in Gordon v. State, 608 So. 2d 800, 802 (Fla. 1992).

309. FLA. STAT. ANN. § 768.73(2)(b) (West 1986) (expired 1990) ("60 percent of the [punitive] award shall be payable to the Public Medical Assistance Trust Fund" in personal injury or wrongful death cases).

310. Gordon, 608 So. 2d at 802.

311. Id. at 801.


314. The state legislature assumed that the 1992 split/share statute would result in sizable revenue. Gary Spencer, Punitive Damages Tax Yields Little
Split-recovery schemes reduce the incentive to underwrite cases where the harm to society is high, and where the probability of success may be indeterminate. State sharing could well result in a long-term financial drain because states will be forced to undertake expensive investigations currently performed by private attorneys general. Split recovery reduced the necessary incentives to conduct discovery and underwrite the considerable litigation expenses when filing actions against international corporations. To date, there is no empirical study of how split-recovery of punitive damages works in practice. New York and Florida enacted apportionment statutes with sunset provisions and have let these

So Far, N.Y. L.J., Nov. 5, 1992, at 1 (arguing that the low yield of New York’s split recovery statute suggests that there is a perverse incentive to structure post-verdict settlements to eliminate the punitive component). However, the state received only four orders or judgments awarding punitive damages in the first ten months of its effective date. Id. If the full amount of the awards survived appeal, New York would collect only $15,000 from its share of punitive damages in all substantive areas of the law. Id.

315. Thomas F. Lambert, Jr., The Case for Punitive Damages (Including Their Coverage by Liability Insurance), 35 ATLA L.J. 164, 171 (1974) (“The self-interest ‘windfall’ of punitive damages thus provides the motive power to induce plaintiffs to bring suits that would otherwise not be brought.”).

316. No empirical study has been conducted to study the impact of obligatory apportionment statutes that have been enacted to date. There is not a scintilla of evidence that split-recovery statutes protect the viability of the business community.

317. In the late 1980s, I interviewed plaintiff’s attorneys who were successful in obtaining punitive damages in products liability litigation. The range of expenditures was $10,000 to $1,500,000 and this did not include the lost opportunity costs as well as the attorneys’ time. See MICHAEL RUSTAD, DEMYSTIFYING PUNITIVE DAMAGES IN PRODUCTS LIABILITY CASES: A SURVEY OF A QUARTER CENTURY OF TRIAL VERDICTS 4–15 (Lee H. Romano 1991) (reporting data from interviews with trial lawyers). It is likely that the expenditures would be much greater today. Split-recovery makes it more unattractive to bring lawsuits, however worthy, against large corporations. When punitive damages are at issue, there is generally a wide array of constitutional, procedural, and evidentiary objections raised at every stage of the litigation process. It is hypothesized that state-sharing statutes alter the incentives resulting in a reduction of claims.

318. N.Y. C.P.L.R. 8701 (McKinney 1981), repealed by, 1992 N.Y. Laws c. 55, § 427(dd), eff. April 1, 1994, was enacted with a sunset provision that was not renewed.

319. FLA. STAT. ANN. § 768.73(2)(b) (West 1986) is a provision that is no longer operative under Florida’s punitive damages statute.
provisions expire. Alabama has a poison pill against sharing punitive damages with the state or a state agency: "No portion of a punitive damage award shall be allocated to the state or any agency or department of the state."320

C. Statutory Safe Harbors for Punitive Damages

A few jurisdictions immunize the manufacturers or sellers of drugs approved by the Food and Drug Administration (FDA). Arizona (1989),321 Colorado (1991),322 New Jersey (1987),323 Ohio (1987),324 Oregon (1987),325 North Dakota (1995),326 and Utah (1989)327 enacted tort reform statutes that held that drug manufacturers were not liable for punitive damages so long as they complied with the relevant FDA regulations during the approval process. These statutes provide for an exception if the manufacturer or seller has fraudulently withheld or misrepresented material information from the agency.328 The rationale for a government compliance defense is that compliance with an agency's approval process is inconsistent with the punitive damages standard of reckless indifference to the public. The problem, of course, is that the pharmaceutical company is the first to know of a profile of developing danger that occurs after approval. A company can also

321. ARIZ. REV. STAT. ANN. § 12-701 (West 2003) (precluding punitive damages for approved drug except if manufacturer or seller knowingly withholds or misrepresents information to the FDA).
323. New Jersey provides that compliance with FDA-approved warnings is presumptively adequate. Punitive damages are not available if pharmaceutical products are approved by the FDA. See N.J. STAT. ANN. § 2A:58C-5(c) (West 2000).
324. 2004 Ohio Laws 144 (effective Apr. 7, 2005) (stating that a government standard defense for FDA approved drugs with an exception for a seller or manufacturer's withholding of material information or fraudulent misrepresentations to the federal agency).
325. Under Oregon's statute, punitive damages may not be assessed against pharmaceutical manufacturers if the drug was manufactured or labeled in conformity with the Federal FDA regulations, or generally is recognized as safe and effective pursuant to FDA regulations. See OR. REV. STAT. § 30.927 (2003).
328. See, e.g., ARIZ. REV. STAT. ANN. § 12-701(B) (West 2003).
selectively submit and present studies to the FDA in a favorable light that misleads regulators, but does not amount to fraud.

The FDA defense is designed to insulate the pharmaceutical industry or manufacturers of medical products and devices from liability for punitive damages. The rationale for an FDA "safe harbor" is that immunity will reduce product liability exposure, thus lowering the cost of insurance and encouraging the development of new drugs and devices. The reformers also maintain that the FDA defense would "improve the climate for innovation in medical technology." Courts have sometimes interpreted the FDA defense to preclude compensatory as well as punitive damages.

The FDA defense to punitive damages has an unanticipated negative impact on women judging from mass tort litigation in recent years. Many of the drugs and medical products that have been the subject of mass tort actions are products or devices used only (or disproportionately) by women: intrauterine contraceptives, breast implants, pharmaceutical products, and medical devices.


332. Several courts have held that FDA approval should insulate a firm from actual damages as well as punitive damages. See, e.g., Stamps v. Collagen Corp., 984 F.2d 1416, 1424 (5th Cir. 1993) and King v. Collagen Corp., 983 F.2d 1130, 1132–37 (1st Cir. 1993) (holding that pre-market FDA approval of collagen preempts all tort remedies).


These mass torts affecting women feature injuries from defective products placed inside their bodies, whereas men are seldom injured in this fashion.

Another recent example of the gender injustice of the FDA Defense is the mass tort disaster caused by the marketing of the diet combination drug known as Fen-Phen. Three hundred thousand plaintiffs, mostly women, filed suits against Wyeth by the year 2000. The Fen-Phen tragedy illustrates the potential problem of immunizing manufacturers who have complied with FDA standards but knowingly endanger the consuming public. In the Fen-Phen cases, the companies complied with FDA regulations but failed to take prompt remedial actions in the face of a developing profile of danger.

D. Limits on Multiple Punishment for the Same Conduct

The multiple punishment problem occurs when a defendant is repeatedly assessed punitive damages for the same defective product or course of conduct. In toxic torts or mass torts cases, there may be millions of potential victims. The asbestos punitive damages awards were based upon an entire industry's cover-up of the then known dangers of unprotected exposure. In the Dalkon Shield products liability litigation, for example, A.H. Robins Co. executives had concealed evidence that its IUDs were defective. Thousands

337. See generally ALICIA MUNDY, DISPENSING WITH THE TRUTH: THE VICTIMS, THE DRUG COMPANIES, AND THE DRAMATIC STORY BEHIND THE BATTLE OVER FEN-PHEN (2001) (arguing that the pharmaceutical industry's undue influence on the FDA resulted in the diet drug being kept on the market long after a profile of developing danger was detected).
338. Id. at 386.
339. Id. at 24–27.
341. See, e.g., Owens-Corning Fiberglass Corp. v. Malone, 972 S.W.2d 35, 46 (Tex. 1998).
of women suffered preventable life-threatening or even fatal illnesses from the same course of conduct. The firm filed for bankruptcy facing thousands of potential punitive damages awards. A few jurisdictions place limits on the number of punitive damages for the same act or course of conduct. Florida, for example, precludes the awarding of punitive damages against a defendant if it can be established that there was a previous award "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 in the same defects in design, or failure to warn of the same hazards, with respect to similar units of a product.

343. See id.
344. Punitive damages in mass torts litigation present the greatest risk of strategic bankruptcy to avoid punitive damages liability. Asbestos cases were not the only mass torts that resulted in plaintiffs not collecting punitive damages due to bankruptcy. Several plaintiffs in the Dalkon Shield cases did not collect their punitive damage awards due to A.H. Robins' Chapter 11 reorganization. Georgene Vairo, Mass Tort Bankruptcies: The Who, the Why and the How, 78 AM. BANKR. L.J. 93, 117 (2004) (noting reorganization plan resulted in elimination of punitive damages). The reorganization plan funded a trust for the nearly 200,000 victims that provided compensation, which was a tiny fraction of actual damages which would be collected in full-scale trials. See id. at 114 (noting approximately 197,000 claims remained under reorganization plan). As with the asbestos manufacturers, A.H. Robins was not driven into bankruptcy by punitive damage awards. Only 11 plaintiffs were awarded punitive damages. See id. at 111–21. It was the thousands of compensatory awards and potential liability that motivated A.H. Robins to file for bankruptcy. See id.; In re A.H. Robins Co., 880 F.2d 709 (4th Cir. 1989).
345. Florida statute section 768.73(2)(a) provides:

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 in the same defects in design, or failure to warn of the same hazards, WITH RESPECT TO SIMILAR UNITS OF A PRODUCT.

FLA. STAT. ANN. § 768.73(2)(a) (West Supp. 2004).
A federal court struck down Georgia’s tort reform provision limiting punitive damages in products liability cases to one award irrespective of the number of plaintiffs or causes of action. Missouri and Montana give the trial judge the discretion to reduce punitive damages awards after considering evidence of prior awards.

Restricting punitive damages to the first plaintiff is arbitrary and may create the perverse incentive of encouraging frivolous lawsuits in the race to the courthouse. Discriminating among categories of plaintiffs is arbitrary and difficult to do. Limiting multiple punitive damages awards to the first comer creates a lottery-like atmosphere in which the first claimant wins punitive damages, precluding claims by other plaintiffs.

Punitive damages tort reform is perhaps the most successful legal reform movement in Anglo-American jurisprudence. Table Two depicts the tort reforms of punitive damages by the numbers. Bear in mind that most reforms have been enacted in the past decade. The aggregate effect of punitive damages reform is, in effect, the closing of punitive damages’ iron cage. The closing of the door on jury discretion threatens the continued vitality of punitive damages as a viable legal institution. The next section addresses the U.S. Supreme Court’s punitive damages jurisprudence, which applies to every state.

346. Id.
TABLE 2: CHECKS AND BALANCES ON PUNITIVE DAMAGES

<table>
<thead>
<tr>
<th>Description</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>The number of states that either prohibit punitive damages or that have enacted one or more tort limitations.</td>
<td>45</td>
</tr>
<tr>
<td>The number of states that have raised the standard of proof from a preponderance of the evidence to “clear and convincing” evidence.</td>
<td>34</td>
</tr>
<tr>
<td>The number of states that cap or limit the amount of punitive damages or prohibit recovery altogether.</td>
<td>25</td>
</tr>
<tr>
<td>The number of states that have fortified jury instructions on punitive damages.</td>
<td>22</td>
</tr>
<tr>
<td>The number of states that may require plaintiffs to share a portion of their recovery with the state or a state entity.</td>
<td>10</td>
</tr>
<tr>
<td>The number of punitive damages hot spots that have not enacted at least one punitive damage reform.</td>
<td>1</td>
</tr>
<tr>
<td>The number of states with compulsory post-verdict reviews of punitive damages awards for excessiveness.</td>
<td>51</td>
</tr>
</tbody>
</table>

E. THE COURT’S JUDICIAL TORT REFORM

In 1994, the Court began to strike down a succession of four large punitive awards against out-of-state corporations. Since

350. See infra appendix A.
351. See Honda Motor Co. v. Oberg, 512 U.S. 415 (1994) (vacating a multi-million dollar punitive damages award against a Japanese manufacturer on the grounds that Oregon did not provide for a mandated post-verdict review of the award for excessiveness); BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996) (reversing multi-million dollar award against U.S. subsidiary of German automobile company on grounds that the award was so excessive as to violate substantive due process); Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001) (vacating large punitive damages award in trade dress case because federal appellate court applied the wrong standard of review); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) (reversing an award of $145 million in punitive damages, where full compensatory damages
1989, the Court has issued seven opinions, reshaping the constitutional contours of punitive damages awarded against corporate defendants. The tort reform community single-handedly launched a judicial tort reform movement in the U.S. Supreme Court, urging the Court to step in to constrain runaway punitive damages in the states. Despite the unanimity of social science research findings that there is no nationwide punitive damages crisis, the majority of the Court agrees that concerted judicial action is required to contain excessive punitive damages awards.

In BMW of North America, Inc. v. Gore, a five to four majority of the Court found a $2 million dollar punitive damages award

were $1 million, as excessive and in violation of the Due Process Clause of the Fourteenth Amendment).


354. Despite the controversy over punitive damages, the empirical reality is that there is no nationwide crisis requiring radical judicial tort reform. Despite the diversity in research methods and samples, research studies of the law-in-action agree that there is no punitive damages crisis. Rustad, Unraveling Punitive Damages, supra note 8, at 19; see, e.g., Theodore Eisenberg, Damage Awards in Perspective: Behind The Headline-Grabbing Awards in Exxon Valdez and Engle, 36 WAKE FOREST L. REV. 1129, 1134–39 (2001) (summarizing study showing no increase in punitive damages awards between 1991 and 1996).

355. A number of U.S. Supreme Court Justices indicated their willingness to consider a due process challenge to punitive damages prior to 1991. See, e.g., Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 280 (1989) (Brennan, J., concurring) (“I join the Court’s opinion on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties.”); Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 87 (1988) (O’Connor, J., concurring) (“In my view, because of the punitive character of such awards, there is reason to think that this may violate the Due Process Clause.”).

356. 517 U.S. 559.
award to be excessive and violative of the Due Process Clause of the Fourteenth Amendment. 357 The Court announced three guideposts to determine whether exemplary damages are disproportionate to compensatory damages: (1) “the degree of reprehensibility of the nondisclosure;” (2) “the disparity between the harm or potential harm . . . and [the] punitive damages award;” and (3) the difference between the remedy and “the civil penalties authorized or imposed in comparable cases.” 358 In Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 359 the Court mandated the de novo standard of review for federal appellate courts applying an excessiveness review of punitive damages. 360

The latest U.S. Supreme Court opinion reshaping the path of punitive damages law was handed down in April of 2003 in State Farm Mutual Inc. v. Campbell. 361 The State Farm Court struck down a $145 million punitive damages award that was equal to fifty-six times the compensatory damages as disproportionate to the wrong committed by the insurer. 362 The Court continued its tort reform agenda, striking down a $145 million punitive damages award on the grounds that it was so excessive as to violate the insurer’s rights under the Due Process Clause of the Fourteenth Amendment. 363 A prominent insurer characterized this case as one that could “move the nation closer to guidelines for controlling punitive damages.” 364

1. The Court’s Presumptive Cap on Punitive Damages

The State Farm Court formulated a presumptive mathematical test for reviewing the reasonableness of high ratio punitive damages awards: “Single-digit multipliers are more likely to comport with due process, while still achieving the State’s goals of deterrence and retribution, than awards with ratios in range of 500 to 1, or in this

357. Id. at 585.
358. Id. at 575.
360. Id.
362. Id. at 429.
363. Id.
364. DIAL ET AL., supra note 2, at 1.
case, of 145 to 1."\textsuperscript{365} Justice Kennedy, writing for the majority, observed that "[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process."\textsuperscript{366} The Court acknowledged the different functions of compensatory and punitive damages\textsuperscript{367} but then asserted that compensatory damages also contain a punitive "element."\textsuperscript{368}

The punitive damages were ruled an arbitrary and unconstitutional deprivation because the insurer's conduct failed both the reprehensibility and the high ratio guideposts.\textsuperscript{369} The Court eschewed a mathematical ratio test, however, noting, "the precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff."\textsuperscript{370} The net effect of the Court's recent punitive damages jurisprudence is to place a \textit{de facto} cap on punitive damages. The Court's presumptive cap permits exceptions for particularly egregious conduct, but strictly scrutinizes high ratios of punitive damages to compensatory damages.

2. The Court's New Rules of Evidence

The \textit{State Farm} Court criticized the Utah trial court for engaging in extraterritorial punishment and permitting the plaintiff's attorney to introduce evidence that "rebuke[d] State Farm for its nationwide activities."\textsuperscript{371} The punitive damages issue was used "as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country."\textsuperscript{372} The Court observed that the trial court should not have admitted evidence of State Farm's national policies that did not have a nexus to the harm suffered by

\textsuperscript{365} \textit{State Farm}, 538 U.S. at 425.
\textsuperscript{366} \textit{Id}.
\textsuperscript{367} \textit{Id.} at 416.
\textsuperscript{368} \textit{Id.} at 426 (citing the \textbf{RESTATEMENT (SECOND) OF TORTS} § 908 cmt. c (1977)).
\textsuperscript{369} \textit{Id.} at 425 (observing that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process").
\textsuperscript{370} \textit{Id}.
\textsuperscript{371} \textit{Id.} at 420 ("From their opening statements onward the [plaintiffs] framed this case as a chance to rebuke State Farm for its nationwide activities.").
\textsuperscript{372} \textit{Id}.
the plaintiff. The Court's limitation on the admissibility of other bad acts conflicts with state law in which juries may be informed of other punitive damages awarded for the same course of conduct. The net effect is to place limitations on prosecuting corporations whose other bad acts and out-of-state lawsuits frequently have a nexus to their national policies.

The State Farm Court also limits the type of evidence and the manner in which states may determine what constitutes punishment sufficient to deter the defendant and others from repeating misconduct. There will be no shortage of future issues for the court to ponder when it comes to punitive damages. In the State Farm case, corporate amici urged the Court to eliminate the variable of the defendant's wealth from the punitive damages equation. The Court's skepticism about the value of a defendant's financial condition in setting punishment is inconsistent with more than two centuries of Anglo-American jurisprudence that calibrates punishment with wealth. The impact of the Court's new evidentiary doctrine will have a chilling effect on wealth-based punishment in all jurisdictions where that principle is well established.

The State Farm decision is the high-water mark in judicial tort reform and will likely have a chilling effect on punitive damages litigation. The net effect is to federalize punitive damages by placing nationwide limits on excessive awards. The Rehnquist Court is unhappy with the federal preemption of state law in nearly every substantive field of law save punitive damages. The Court's

373. Id. at 422 (stating that "a jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred") (citation omitted).
375. State Farm, 538 U.S. at 423.
376. Brief of the American Tort Reform Association as Amicus Curiae in Support of Petitioner at 1, State Farm, (No. 01-1289).
377. The use of wealth-based punishment sends a message of deterrence. As the Maine Supreme Court stated, "When it is thoroughly understood that it is not profitable to employ careless and indifferent agents, or reckless and insolent servants, better [employees] will take their places, and not before." Goddard v. Grand Trunk Ry. Co., 57 Me. 202, 224 (1869).
378. The Rehnquist Court has struck down numerous federal statutes on the grounds that they intruded upon the province of state law. See, e.g., United
punitive damages jurisprudence constitutes a radical departure from what Justice Brandeis described as "one of the happy incidents of the federal system that a single courageous State may . . . serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."\(^{379}\)

The U.S Supreme Court's federalization or centralization of punitive damages undermines the role of states as laboratories of punitive damages reform. In 2003, the business community ranked the Court's judicial tort reform opinion in *State Farm*\(^{380}\) as the single most important decision of the year for corporate America.\(^{381}\) The insurance industry and product manufacturers were the chief financial beneficiaries of the Court's nationalization of punitive damages.\(^{382}\) In the wake of the *State Farm* case, the Court vacated punitive damages awards awarded against a number of powerful corporate defendants: Philip Morris, Exxon, Chrysler, Ford Motor Company, and National Union Fire Insurance.\(^{383}\)

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379. New State Ice Co. v. Liebmann, 529 U.S. 598 (2000) (holding that Congress lacked the authority to enact the Violence Against Women Statute because it did not involve economic activity or interstate commerce); Bd. of Trs. of the Univ. of Alabama v. Garrett, 531 U.S. 356 (2001) (holding that Congress had not identified a history and pattern of unconstitutional employment discrimination by the state of Alabama sufficient to abrogate Alabama's Eleventh Amendment immunity); College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (ruling that the State of Florida was not subject to a trademark infringement case since it did not waive its sovereign immunity under the Eleventh Amendment).


383. State Farm and several of the corporate defendants who had their punitive damages verdicts vacated are financial supporters of the tort reform movement. See Trisha Howard, *Lawyers Strike Back at Interest Groups: They Say the Groups Who Have Criticized Donations to Judges Promote Corporate, but Not Public Interests*, ST. LOUIS POST-DISPATCH, Oct. 11, 2002, at C1 (noting that the "American Tort Reform Association counts as its primary supporters such companies as Caterpillar, Exxon, General Electric, Philip Morris and State Farm Insurance.").
The $5 billion in punitive damages awarded in the Exxon Valdez oil spill disaster was vacated,\(^{384}\) as was a $290 million award against Ford Motor Co.\(^{385}\) and a $3 million punitive damages award against Chrysler Corporation.\(^{386}\) When it vacated a $79.5 million punitive damages award against Phillip Morris in the wake of State Farm, the Court handed the tobacco mogul what was in effect, a multi-million dollar subsidy.\(^{387}\) Punitive damages have been slashed by state and federal courts in a number of cases on remand from the U.S. Supreme Court.\(^{388}\) Many of the corporate defendants whose

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385. Romo v. Ford Motor Co., 538 U.S. 1028 (2003) (vacating $290 million punitive damages awarded in products liability case involving Ford Bronco in which three family members were killed).


punitive damages were vacated are not only amicus parties in punitive damages jurisprudence, but also the most vocal activists for tort reform in Congress and state legislatures.

V. CONCLUSION

Tort reformers proudly stir the pot of ignorance about the administration of punitive damages in the states in order to encourage state legislators to further limit this remedy. This article has contrasted the tort reform rhetoric about punitive damages availability with the reality that states have slammed the door on punitive damages' iron cage. After two decades of tort reform, jurors have far less discretion at every stage of the litigation process. Punitive damage awards in the states have become overly bureaucratic, hamstringing this remedy at every stage of the litigation process. Part II of this article reviewed the general availability of punitive damages and the various restrictions that limit their availability. In the United States, the states are properly a laboratory for experimentation with different views about whether punitive damages should be recoverable, against which party, and under which conditions. Punitive damages have been awarded for more than two centuries to punish and deter reckless or outrageous conduct that threatens the public safety or interest. States tailor "checks and balances," such as restrictions on claimants and defendants, to local conditions.

Part III examined the procedural tort reform rules relevant to the punitive damages aspect of a trial. A preponderance of jurisdictions has imposed new judicial controls on the recovery of punitive damages in recent years. New pleading and discovery rules preclude the possibility of frivolous punitive damages. Punitive damages may not be required unless there is clear and convincing evidence that the defendant recklessly or maliciously violated the rights of the plaintiff. New evidentiary doctrines place restrictions on the use of corporate wealth to set damages. Tort reforms have mandated fortified jury instructions, standards of review, and excessiveness ratio); Boerner v. Brown & Williamson Tobacco Co., 394 F.3d 594, 603 (8th Cir. 2005) (holding that a $15 million punitive damages award was excessive and reducing award to $4 million).
reviews for punitive damages. This remedy has been cabined, cornered, and subjected to judicial control at every stage.

Part IV surveyed the substantive limits on punitive damages enacted to prevent excessive awards. Capping the level of punitive damages is the fastest growing tort reform. Caps not only reduce deterrence, but they also leave little room for autonomous jury decisions. This audit of tort reforms demonstrates that the legal environment for punitive damages is not overly favorable to plaintiffs, and arguably is not even fair to them. The U.S. Supreme Court in the recent State Farm case expressed concern "over the imprecise manner in which punitive damages systems are administered." Vice President Dick Cheney recently stated that "he and President Bush have a plan to fix [our medical liability litigation system] by, among other things, capping punitive damages in malpractice cases at $250,000." Before the Court or Congress further restricts plaintiffs’ rights to an important remedy, it is incumbent upon legislators to review the judicial control over punitive damages already in place.

The backlash against punitive damages is one of the most extensive "law reform" movements in Anglo-American history. Appendix A documents that punitive damages reforms constitute special interest legislation in disguise. Tort reform in the states is a victory of the "haves" over the "have-nots" achieved through a disinformation campaign whose watchword is tort reform. Legal historians will surely agree that the past two decades of punitive damages jurisprudence have belonged to the corporate defense. It is no exaggeration to say that there has been a quiet revolution, which has revamped punitive damages in all but a few states. Although

391. The tort reform of punitive damages is part of a "skillfully organized and well-financed movement to sharply limit key tort rights and remedies such as punitive damages, modified duty, non-economic damages, multiple causation, joint and several liability, products liability and strict liability. Neo-conservative legal consciousness is bringing us "back to the future" by resurrecting the defenses, privileges, immunities and liability-limiting doctrines of an earlier era.” Rustad & Koenig, supra note 8, at 4.
392. See Koenig & Rustad, supra note 8 app., at 88–90 (listing punitive damages reforms by state). Since 1993, the pace of punitive damages
there is little legislative history for state tort reforms, the states have often enacted punitive damages reforms in hopes of stimulating the local economy. The last few decades have witnessed a closing of punitive damages' iron cage. The danger of an overly bureaucratic iron cage is that this remedy will no longer be flexible enough to accommodate the dangers of the twenty-first century.

See infra appendix A (documenting the enactment of numerous tort reforms limiting punitive damages).
APPENDIX A: A FIFTY-ONE JURISDICTION SURVEY OF PUNITIVE DAMAGES

ALABAMA

A. Standard of Liability and Functions of Punitive Damages

"Punitive damages may not be awarded in any civil action, except civil actions for wrongful death . . . other than in a tort action where it is proven by clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff."393 Punitive damages are awarded to punish the defendant394 and for both specific and general deterrence.395 Punitive damages rest upon "a theory of punishment for wrongful conduct and [serve] as a warning to others. . . ."396 Punitive damages should exceed the defendant’s profit or gain from its wrongful activity.397

B. Limits on Punitive Damages

1. Clear and Convincing Evidence

In Alabama punitive damages require clear and convincing evidence, defined as "[e]vidence that, when weighed against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion."398 This restriction does not apply to civil actions for wrongful death.399

394. See, e.g., Marigold Coal, Inc. v. Thames, 149 So. 2d 276, 280 (Ala. 1962).
396. Southern Bldg. & Loan Ass’n v. Dinsmore, 144 So. 21, 23 (Ala. 1932).
399. Id. § 6-5-410.
2. Capped Punitive Damages

Alabama caps punitive damages in non-physical injury cases to the greater of three times compensatory damages or $500,000. For small businesses with a net worth less than $2 million, the punitive damages are capped at $50,000 or 10% of net worth up to $2 million. In physical injury cases, punitive damages are limited to the greater of three times compensatory damages or $1.5 million.\textsuperscript{400} Alabama code section 6-11-21 provides:

(a) Except as provided in subsections (b), (d), and (j), in all civil actions where an entitlement to punitive damages shall have been established under applicable laws, no award of punitive damages shall exceed three times the compensatory damages of the party claiming punitive damages or five hundred thousand dollars ($500,000), whichever is greater.

(b) Except as provided in subsection (d) and (j), in all civil actions where entitlement to punitive damages shall have been established under applicable law against a defendant who is a small business, no award of punitive damages shall exceed fifty thousand dollars ($50,000) or 10 percent of the business’ net worth, whichever is greater.

(c) ”Small business” for purposes of this section means a business having a net worth of two million dollars ($2,000,000) or less at the time of the occurrence made the basis of the suit.

(d) Except as provided in subsection (j), in all civil actions for physical injury wherein entitlement to punitive damages shall have been established under applicable laws, no award of punitive damages shall exceed three times the compensatory damages of the party claiming punitive damages or one million five hundred thousand dollars ($1,500,000), whichever is greater.

(e) Except as provided in Section 6-11-27, no defendant shall be liable for any punitive damages unless that defendant has been expressly found by the trier of fact to have engaged in conduct, as defined in Section 6-11-20, warranting punitive damages, and such defendant shall be liable only for punitive damages commensurate with that defendant’s own conduct.

(f) As to all the fixed sums for punitive damage limitations set out herein in subsections (a), (b), and (d), those sums shall be adjusted as of January 1, 2003, and as of January 1 at three-year intervals thereafter, at an annual rate in accordance with the Consumer Price Index rate.
excludes wrongful death actions from the impact of tort reform statutes.  

ALASKA

A. Standard of Liability & Functions of Punitive Damages

Alaska plaintiffs may recover punitive damages when the defendant’s conduct is “outrageous” or “evidenced reckless indifference to the interest of another person.” Alaska imposes punitive damages for the purposes of punishment, specific deterrence, and general deterrence. Alaskan punitive damages are recoverable where the wrongdoer’s conduct “could fairly be categorized as ‘outrageous, such as acts done with malice or bad motives or reckless indifference to the interests of another.’” Malice is defined by Alaskan courts as “a callous disregard for the rights of others.”

B. Limits on Punitive Damages

1. Clear and Convincing Evidence

Punitive damages require “clear and convincing evidence” that the conduct of the defendant’s conduct “was outrageous, including acts done with malice or bad motives; or evidenced reckless indifference to the interest of another person.”

2. Bifurcation

Alaska requires a separate proceeding to determine the amount of punitive damages that must be determined by statutorily

Id. § 6-11-21 (Supp. 2004).


402. ALASKA STAT. § 09.17.020(b) (Michie Supp. 2003).


404. Weiford, 831 P.2d at 1266.


determined standards. At the conclusion of the separate proceeding, the fact finder must determine the amount of punitive damages to award.

3. Limitations on the Discovery of Evidence Relevant to Punitive Damages

"Discovery of evidence... relevant to... punitive damages may not be conducted until after the fact finder has determined that an award of punitive damages is allowed..."409

4. Capped Punitive Damages

In general, punitive damages may not exceed the greater of three times the compensatory damages or $500,000. If the fact finder determines, however, that the defendant was motivated by financial gain and that the defendant or a responsible policy maker knew the consequences of the defendant’s misconduct, the cap is increased to the greatest of: (1) four times compensatory damages; (2) four times the aggregate amount of financial gain; or (3) seven million dollars. In employment cases, the cap ranges from $200,000 to $500,000 depending upon the number of employees.

5. Split Recovery or State Sharing

"If a person receives an award of punitive damages, the court shall require that 50 percent of the award be deposited into the general fund of the state. This subsection does not grant the state the right to file or join a civil action to recover punitive damages."

6. Corporate Punitive Liability

Alaska does not permit punitive damages to be imposed vicariously, subject to narrow exceptions.

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407. Id. § 09.17.020(c)(1)-(7) (mandating factors the fact finder may consider in setting the amount of punitive damages).
408. See id.
409. Id. § 09.17.020(e).
410. Id. § 09.17.020(f).
411. Id. § 09.17.020(h).
412. Id. § 09.17.020(j).
413. See id. § 09.17.020(k).
ARIZONA

A. Standard of Liability and Functions of Punitive Damages

Punitive damages are recoverable in Arizona if the plaintiff can prove that the defendant manufacturer acted with an "evil mind" or consciously pursued a course of conduct knowing that it created a substantial risk of significant harm. Punitive damages are also recoverable for "outrageous conduct... done with bad motive or with a reckless indifference to the interest of others." Arizona punitive damages are awarded to punish wrongdoers, and for general and specific deterrence.

B. Limits on Punitive Damages

1. FDA Defense to Punitive Damages

Arizona immunizes drug manufacturers from punitive liability so long as they comply with Food and Drug Administration (FDA) standards. In addition, a manufacturer or seller is not liable for punitive damages if the product is generally regarded as "safe and effective." The FDA Defense is inapplicable if the plaintiff proves by clear and convincing evidence that the defendant knowingly withheld or misrepresented information to the FDA.

2. Limitations on the Admissibility of Evidence to Prove Punitive Damages

Arizona prevents plaintiffs in products liability litigation from using a product safety audit or review or reasonable remedial measures to prove punitive damages.

418. Id. § 12-701(A)(2).
419. Id. § 12-701(B).
420. Id. § 12-687.
ARKANSAS

A. Standard of Liability and Functions of Punitive Damages

The standard for Arkansas punitive liability is "malice, willfulness or wanton disregard for the rights and safety of others." The purpose of Arkansas punitive damages is to "impose a monetary penalty on the defendant and to discourage others from similar behavior." Punitive damages are intended to punish the defendant, not to compensate the plaintiff.

B. Limits on Punitive Damages

1. Clear and Convincing Evidence

In Arkansas, a plaintiff must satisfy the burden of proof for punitive damages by clear and convincing evidence.

2. Capped Punitive Damages

Arkansas caps punitive damages at the greater of the following:

(a) (1) Two hundred fifty thousand dollars ($250,000); or
(2) Three times the amount of compensatory damages awarded in the action, not to exceed one million dollars.

(b) Subsection (a) does not apply when the fact finder:
(1) Determines by clear and convincing evidence that, at the time of the injury, the defendant intentionally pursued a course of conduct for the purpose of causing injury or damage; and
(2) Determines that the defendant's conduct did, in fact, harm the plaintiff.

(c) With respect to the punitive damages limitations in subsection (a) the fixed sums of $250,000 and $1,000,000

424. ARK. CODE ANN. § 16-55-206(1)(a) (Michie Supp. 2003); id. § 16-55-207.
will be adjusted as of January 1, 2006, and every three years afterwards, in accordance with the Consumer Price Index rate for the previous year.\textsuperscript{425}

3. Bifurcation
In Arkansas, either party may request bifurcation.\textsuperscript{426}

CALIFORNIA

A. Standard of Liability and Functions of Punitive Damages
In California, punitive damages are intended to punish the offender and to deter others from committing similar wrongs of oppression, fraud, or malice.\textsuperscript{427} The punitive damages statute states that California punitive damages are “for the sake of example and by way of punishing the defendant.”\textsuperscript{428} Punitive damages are proven by clear and convincing evidence that the defendant is guilty of fraud, malice, or oppression.\textsuperscript{429}

B. Limits on Punitive Damages

1. Clear and Convincing Evidence
Punitive damages must be supported by “clear and convincing” evidence of fraud, malice, or oppression.\textsuperscript{430}

2. Bifurcation
Defendants may request bifurcation of the punitive damages stage from the compensatory damages phase of the trial. During the second phase of the trial, evidence of the defendant’s wealth is presented.\textsuperscript{431} Evidence of the defendant’s wealth may not be introduced until after a verdict for actual damages and a finding that the

\textsuperscript{425} Id. § 16-55-208 (limitations on the amount of punitive damages).
\textsuperscript{426} Id. § 16-55-211(a)(1).
\textsuperscript{427} See Wetlands Water Dist. v. Amoco Chems. Co., 953 F.2d 1109, 1116 (9th Cir. 1992).
\textsuperscript{428} CAL. CIV. CODE § 3294(a) (West 1997).
\textsuperscript{429} Id.
\textsuperscript{430} Id.
\textsuperscript{431} See id. § 3295(d).
defendant is guilty of "malice, oppression or fraud."\textsuperscript{432}

3. State Sharing

California enacted SB 1102, which provides that 75\% of all punitive damages be remitted to the state treasury. This bill applies to cases filed after the bill becomes law and the "Governor's Office files it with the secretary of state and [it is] settled or adjudicated by the sunset date of June 30, 2006."\textsuperscript{433}

\textbf{COLORADO}

\textit{A. The Standard of Liability and Functions of Punitive Damages}

Exemplary damages in Colorado are awarded in "circumstances of fraud, malice, or willful and wanton conduct."\textsuperscript{434} "Wanton and reckless conduct" is a sufficient predicate for exemplary damages.\textsuperscript{435} Exemplary or punitive damages are not compensatory in nature but are for the purpose of the punishment of wrongdoer as an example to others.\textsuperscript{436}

\textit{B. Limits on Punitive Damages}

1. Exemplary Damages Must Be Proven Beyond a Reasonable Doubt

In 1986, as part of tort-reform legislation, the Colorado General Assembly modified the preexisting statutory scheme for exemplary damages.\textsuperscript{437} Colorado now permits exemplary damages to be awarded provided they are supported by an evidentiary foundation proved "beyond a reasonable doubt."\textsuperscript{438}

432. \textit{Id.}
433. \textit{Governor Signs Bill, supra} note 288.
434. \textit{COLO. REV. STAT. \S\ 13-21-102 (2001).}
436. Exemplary damages are calculated to punish wrongful conduct and to deter a repetition of that conduct. An award of punitive damages "is such as to adequately impress upon defendant and others the seriousness and harmful consequences of a particular form of misconduct." \textit{Palmer v. A.H. Robins Co., Inc.,} 684 P.2d 187, 220 (Colo. 1984).
438. \textit{COLO. REV. STAT. \S\S\ 13-21-102, 13-21-127 (2001).}
2. Standard Defined by Statute

In all civil actions in which damages are assessed by a jury for a wrong done to the person or to personal or real property, and the injury complained of is attended by circumstances of fraud, malice, or willful and wanton conduct, the jury, in addition to the actual damages sustained by this person, may award the person reasonable exemplary damages.\(^439\)

The standards for awarding exemplary damages and the amount of exemplary damages are also specified by statute.\(^440\)

3. Tort Reform for Standard of Review

Colorado permits a trial judge to reduce or eliminate exemplary damages if "(a) The deterrent effect of the damages has been accomplished; or (b) The conduct, which resulted in the award, has ceased; or (c) The purpose of such damages has otherwise been served."\(^441\)

4. Capped Exemplary Damages

The amount of reasonable exemplary damages "shall not exceed an amount which is equal to the amount of the actual damages awarded to the injured party."\(^442\)

5. FDA Defense

No exemplary damages are imposed that were the result of the use of any drug or product approved for use by any state or federal regulatory agency that was used within the approved standards of that agency, or used in accordance with the standards of prudent health care professionals.\(^443\)

\(^{439}\) Id. § 13-21-102(1)(a)–(b).
\(^{440}\) Id. §§ 13-21-102, 13-25-127(2).
\(^{441}\) Id. § 13-21-102(2)(a)–(c).
\(^{442}\) Id. § 13-21-102(a).
\(^{443}\) Id. § 13-64-302.5(5)(a).
A. Standard of Liability and Functions of Punitive Damages

The purpose of punitive damages in Connecticut is not to punish or deter, but to provide a form of extra compensation. The sole purpose of punitive damages is to compensate the plaintiff for litigation expenses. Punitive damages are available only when the defendant has shown reckless indifference to the rights of others, or has behaved intentionally and in wanton violation of those rights.

B. Limits on Punitive Damages

1. Caps on Punitive Damages

Punitive damages “are restricted to [the] cost of litigation less taxable costs of the action being tried and not that of any former trial.” In products liability actions, punitive damages are capped at two times compensatory damages. In motor vehicle cases, punitive damages are limited to two to three times the compensatory damages.

2. Judge-Assessed Punitive Damages

In Connecticut, the trier of fact determines whether punitive damages should be awarded, and the trial judge determines the amount of the award, subject to the caps noted above. These limitations apply to products liability cases, and in other substantive

447. Alaimo v. Royer, 448 A.2d 207, 209–10 (Conn. 1982) (quoting Vandersluis v. Weil, 407 A.2d 982, 986 (Conn. 1978) (citations omitted)). This cap was judicially recognized very early on in Connecticut’s history. See, e.g., Doroska v. Lavine, 150 A. 692, 693 (1934); Hassett v. Carroll, 81 A. 1013, 1020 (1911).
448. CONN. GEN. STAT. 552-240(b) (2004).
449. Id. § 14-295 (West 1999 & Supp. 2004).
450. Id. § 52-240b (West 1991).
fields the trial judge awards punitive damages based upon proof of litigation expenses.\textsuperscript{451}

3. Bifurcation

In Connecticut punitive damages cases, the trier of fact determines whether punitive damages are awarded in the first stage of the trial, and the judge sets the amount of punitive damages in the second.\textsuperscript{452} After the trier of fact determines that punitive damages should be awarded, the court “determine[s] the amount of such damages not to exceed an amount equal to twice the damages awarded to the plaintiff.”\textsuperscript{453}

**DELAWARE**

A. **Standard of Liability and Functions of Punitive Damages**

Punitive damages are awarded if there is proof of the defendant’s evil motive or conscious indifference to the rights of others.\textsuperscript{454} The standard for punitive damages in medical malpractice actions is malicious intent, or willful or wanton misconduct.\textsuperscript{455} In Delaware, punitive damages are awarded to punish and deter.\textsuperscript{456} The Supreme Court of Delaware has reiterated that punitive damages are not to be awarded to correct private wrongs, but only to advance broad societal purposes.\textsuperscript{457} Punitive damages are administered under strict judicial controls to assure that they will be awarded only in instances of the most egregious misconduct.\textsuperscript{458}

\textsuperscript{451} See Berry v. Loiseau, 614 A.2d 414, 435, 437 (Conn. 1992); DeSantis v. Piccadilly Land Corp., 487 A.2d 1110, 1113 (1985) (stating that the purpose of punitive damages is for compensation).

\textsuperscript{452} CONN. GEN. STAT. ANN. § 52-240b (West 1999).

\textsuperscript{453} Id.

\textsuperscript{454} See Jardel Co. v. Hughes, 523 A.2d 518, 529 (Del. 1987).

\textsuperscript{455} DEL. CODE ANN. tit. 18, § 6855 (1999).

\textsuperscript{456} Jardel Co., 523 A.2d at 529.

\textsuperscript{457} Id.

\textsuperscript{458} Id.
B. Limits on Punitive Damages

1. Bifurcation

A Delaware statute requires that the punitive damages determination in medical malpractice cases be bifurcated.\textsuperscript{459} Courts have permitted bifurcation in other substantive areas where punitive damages are at issue.\textsuperscript{460}

DISTRICT OF COLUMBIA

A. Standard of Liability and Functions of Punitive Damage

"[M]aliciousness, wantonness, gross fraud, recklessness and willful disregard of another's rights" are the predicates for punitive damages in the District of Columbia.\textsuperscript{461} Punitive damages are awarded in the district to punish and deter "outrageous conduct."\textsuperscript{462}

B. Limits on Punitive Damages

In 1995, a D.C. court ruled that punitive damages must be proven by "clear and convincing evidence."\textsuperscript{463}

\textsuperscript{459} DEL. CODE ANN. tit. 18, § 6855 (1999).
\textsuperscript{463} Jonathan Woodner Co. v. Breeden, 665 A.2d 929, 938 (D.C. 1995) (ruling that, in D.C., plaintiffs must prove by clear and convincing evidence that the defendant's tort was aggravated by egregious conduct and that the defendant's state of mind warranted punitive damages); see generally Scott L. Winkelman, \textit{Resetting the Punitive Hurdle}, LEGAL TIMES, Dec. 4, 1995, at 43 (reporting that the District of Columbia now mandates the "clear and convincing" standard for punitive damages award). For cases applying the clear and convincing evidence standard, see Railan v. Katyal, 766 A.2d 998 (D.C. 2001); Dist. Cablevision Ltd. P'ship v. Bassin, 828 A.2d 714 (D.C. 2003); Chatman v. Lawlor, 831 A.2d 395 (D.C. 2003).
A. Standard of Liability and Functions of Punitive Damages

The Florida standard for punitive liability is negligence of a gross and flagrant character amounting to criminal manslaughter. The standard for Florida punitive damages is "willful, wanton, or gross misconduct." Punitive damages are available even when compensatory damages are not awarded. Florida punitive damages are imposed for purposes of punishment, specific deterrence, and general deterrence.

B. Limits on Punitive Damages

1. Pleading and Discovery Limitations

No claim for punitive damages can be made unless there is a "reasonable showing" of evidence supporting the claim. For this reason, Florida does not permit a plaintiff to initially assert a punitive damages claim. The plaintiff "may move to amend his or her complaint to assert a claim for punitive damages" once she has met the evidentiary burden, however.

2. Clear and Convincing Evidence

In civil actions, "the plaintiff must establish at trial, by clear and convincing evidence, its entitlement to an award of punitive damages. The 'greater weight of the evidence' burden of proof applies to a determination of the amount of damages."

466. Ault v. Lohr, 538 So. 2d 454, 456 (Fla. 1989).
3. Caps on Punitive Damages

For causes of action arising after October 1, 1999, an award of punitive damages generally may not exceed the greater of three times the amount of compensatory damages awarded to each claimant, or $500,000.\textsuperscript{472} The statutory limitation is subject to exceptions, such as when the defendant has specific intent to injure the plaintiff.\textsuperscript{473}

4. Bifurcation

Defense counsel may request bifurcation of the punitive damages and compensatory damages phases.\textsuperscript{474}

5. Multiple Damages

In subsequent civil actions involving the same act or single course of conduct for which punitive damages have already been awarded, if the court determines by clear and convincing evidence that the amount of prior punitive damages awarded was insufficient to punish the defendant’s behavior, the court may permit a jury to consider a second award of punitive damages.\textsuperscript{475}

6. Restrictions on Evidence of Wealth

The defendant’s wealth is a relevant concern in punitive damages litigation.\textsuperscript{476} Net worth is admissible in determining the amount of Florida punitive damages.\textsuperscript{477} A plaintiff may not, however, discover the defendant’s financial worth or wealth until the trial court has granted the plaintiff’s motion to amend.\textsuperscript{478}

\textsuperscript{472} Id. § 768.73(1)(a).
\textsuperscript{473} Id. § 768.73(1)(c).
\textsuperscript{474} W.R. Grace & Co. v. Waters, 638 So. 2d 502, 506 (Fla. 1994) (creating a new procedure in Florida to supplement the statutory punitive damage limitations by requiring courts to “bifurcate the determination of . . . punitive damages” upon timely motion). See also Santa Lucia, supra note 60, at 41 (“Bifurcation will effectively preclude plaintiffs from presenting financial worth evidence in the first stage of the trial in which the jury would determine only liability for compensatory and punitive damages, and the amount of the compensatory damages. . . . Bifurcation assists defendants by allowing the argument of mitigation to be presented in the second portion of the trial.”).
\textsuperscript{475} FLA. STAT. ANN. § 768.73(2)(a)–(b) (West Supp. 2004).
\textsuperscript{476} St. Regis Paper Co. v. Watson, 428 So. 2d 243, 246 (Fla. 1983).
\textsuperscript{477} Bankers Multiple Line Ins. Co. v Farish, 464 So. 2d 530, 533 (Fla. 1985).
\textsuperscript{478} Meadowbrook Health Care Servs. of Fla., Inc. v. Acosta, 617 So. 2d 1104
7. Repealed Split Recovery Statute

Florida had a statute that allocated 35% of every punitive damages award to either the State’s General Revenue Fund or its Public Medical Assistance Trust Fund. The Florida Supreme Court upheld the state-sharing scheme in *Gordon v. State.* In 1992, however, Florida repealed the statute.

GEORGIA

A. Standard of Liability and Functions of Punitive Damages

In Georgia, punitive damages may not be awarded for the purpose of compensation. The term “punitive damages” is synonymous with the terms “vindictive damages,” “exemplary damages” and other damages awarded for “aggravating circumstances to penalize, punish or deter.” Punitive damages are imposed for actions that demonstrate “willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to the consequences.” In Georgia, the remedy of punitive damages is not awarded as compensation, “but solely to punish, penalize, or deter a defendant.”

B. Limits on Punitive Damages

1. Bifurcation

In all cases in which punitive damages are claimed, liability for punitive damages is determined first, and then the amount of punitive damages. If punitive damages are to be awarded, the trial is recommenced to “receive such evidence as is relevant to a decision

479. FLA. STAT. ANN. § 768.73(2)(b),(4) (West 1997), *repealed by,* 1992 Fla. Laws c. 92-85, § 3.
480. 608 So. 2d 800, 802 (Fla. 1992).
481. FLA. STAT. ANN. § 768.73(2)(b),(4) (West 1997), *repealed by,* 1992 Fla. Laws c. 92-85, § 3.
482. GA. CODE ANN. § 51-12-5.1(c) (West 2003).
483. *Id.* § 51-12-5.1(a).
484. *Id.* § 51-12-5.1(b).
485. *Id.* § 51-12-5.1(c).
486. *Id.* § 51-12-5.1(d).
regarding what amount of damages will be sufficient to deter, penalize, or punish the defendant in light of the circumstances of the case.\textsuperscript{487} In the first phase of a bifurcated trial, the factfinder determines compensatory damages and whether to award punitive damages.\textsuperscript{488} In the second phase, the amount of punitive damages is determined.\textsuperscript{489} Evidence of the defendant’s wealth and other aggravating circumstances are admissible in the second phase of the trial.\textsuperscript{490}

2. Multiple Punishments

Georgia prohibits multiple awards stemming from the same predicate conduct in products liability actions.\textsuperscript{491}

3. Caps on Punitive Damages

There is a $250,000 cap on punitive damages in all tort actions not arising out of intentional torts or products liability actions.\textsuperscript{492} In a tort action predicated upon the defendant’s “specific intent to cause harm,” or action taken “under the influence of alcohol, drugs other than lawfully prescribed drugs,” there is no limit on punitive damages.\textsuperscript{493}

4. Clear and Convincing Evidence

The standard of proof for Georgia punitive damages is clear and convincing evidence.\textsuperscript{494}

\textsuperscript{487} Id. § 51-12-5.1(d)(1)-(2) ("In any case in which punitive damages are claimed, the trier of fact shall first resolve from the evidence produced at trial whether an award of punitive damages shall be made . . . . If it is found that punitive damages are to be awarded, the trial shall immediately be recommenced in order to receive such evidence as is relevant to a decision regarding what amount of damages will be sufficient to deter, penalize, or punish the defendant in light of the circumstances of the case. It shall then be the duty of the trier of fact to set the amount to be awarded . . . .")

\textsuperscript{488} Id.

\textsuperscript{489} Id.

\textsuperscript{490} See id. § 51-12-5.1(d)(2).

\textsuperscript{491} Id. § 51-12-5.1(e)(1).

\textsuperscript{492} Id. § 51-12-5.1(g) ($250,000 limitation on punitive damages in all tort actions not involving products liability or intentional torts).

\textsuperscript{493} Id. § 51-12-5.1 (f).

\textsuperscript{494} Id. § 51-12-5.1(b).
5. Special Verdict

A special verdict must set out a required finding of punitive damages.495

6. State Sharing of Punitive Damages

Seventy-five percent of a punitive damages award in a products liability action goes to the state.496 State extraction does not take place until costs and attorney’s fees are paid.497 After these costs have been extracted, the plaintiff must remit seventy-five percent of her award to the Georgia Office of Treasury and Fiscal Services.498 Georgia’s punitive damages extraction statute was held constitutional in Mack Trucks, Inc. v. Conkle.499

7. Prejudgment Interest Reform

Georgia’s tort reform includes a provision for not including punitive or exemplary damages in the computation of interest prior to judgment.500

HAWAII

A. Standard of Liability and Functions of Punitive Damages

“Under Hawaiian law, punitive damages are recoverable where the defendant has acted with such an entire want of care as would raise a presumption of conscious indifference to consequences.”501 Punitive damages are not awarded for mere inadvertence, mistake or errors of judgment. A plaintiff must prove entitlement to punitive damages by clear and convincing evidence.502 Punitive damages predicates are wanton or oppressive conduct as implies a spirit of mischief or criminal indifference to civil obligations; or misconduct that raises presumption

495. Id. § 51-12-5.1(d)(1).
496. Id. § 51-12-5.1(e)(2).
497. Id.
498. Id.
499. 436 S.E.2d 635 (Ga. 1993).
PUNITIVE DAMAGES' IRON CAGE

of conscious indifference to consequences.\textsuperscript{503} The purpose of punitive
damage awards are to penalize, punish or deter a defendant. Punitive
damages may not be used to compensate the plaintiff.\textsuperscript{504}

B. Limits on Punitive Damages

1. "Clear and Convincing Evidence"

In 1989, the Hawaii Supreme Court raised the standard of proof
in punitive damages cases from a "preponderance of the evidence" to
"clear and convincing evidence."\textsuperscript{505} "Punitive damages are a form of
punishment and can stigmatize the defendant in much the same way
as a criminal conviction. It is because of the penal character of
punitive damages that a standard of proof more akin to that required
in criminal trials is appropriate."\textsuperscript{506}

IDAHO

A. Standard of Liability and Functions of Punitive Damages

The standard for recovering punitive damages in Idaho is evidence
that a defendant evinces conduct that is an extreme deviation from
reasonable standards of conduct.\textsuperscript{507} The predicates for punitive
damages are oppressive, fraudulent, malicious, or outrageous conduct
by the party against whom the claim for punitive damages is
asserted.\textsuperscript{508} The deterrence of other similarly situated defendants in the
future may be taken into account in determining the size of punitive
damage awards.\textsuperscript{509}

\textsuperscript{503} Id. at 573.
\textsuperscript{504} Id.
\textsuperscript{505} Id. at 574.
\textsuperscript{506} Id. at 575.
\textsuperscript{508} IDAHO CODE § 6-1604(1) (Michie 2004).
\textsuperscript{509} Hatrock v. Edward D. Jones & Co., 750 F.2d 767 (9th Cir. 1984)
(applying Idaho law).
B. Limits on Punitive Damages

1. Clear and Convincing Evidence

"In any action seeking recovery of punitive damages, the claimant must prove, by clear and convincing evidence, oppressive, fraudulent, malicious, or outrageous conduct by the party against whom the claim for punitive damages is asserted."\(^{510}\)

2. Pleading Restrictions

Punitive damages may not be pleaded in an initial complaint but may be included in an amended pleading after a hearing before the court.\(^{511}\)

3. Compliance with Industry Standard as a Defense

Idaho permits defendants to interpose a products liability defense that they complied with industry or feasible performance standards.\(^{512}\)

4. Capped Punitive Damages

Punitive damages in Idaho are limited to the greater of $250,000 or three times compensatory damages.\(^{513}\)

ILLINOIS\(^{514}\)

A. Standard of Liability and Functions of Punitive Damages

Punitive damages are disfavored in Illinois law,\(^{515}\) although this remedy has a long lineage. To recover punitive damages in Illinois,

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511. Id. § 6-1604(2).
512. Id. § 6-1306.
513. Id. § 6-1604(3).
514. As of the time of the writing of this article, the status of the Illinois provisions on punitive damages is uncertain, due to the Illinois Supreme Court's decision in *Best v. Taylor Machine Works*, 689 N.E.2d 1057 (Ill. 1997). The court, in *Best*, declared unconstitutional the entirety of the tort reform enacted by Public Act 89-7 (1995), including the provisions governing punitive damages. *Id.* at 1104. The Illinois courts have generally reverted to law as it existed prior to the 1995 revision. *See, e.g.*, McCann v. Presswood, 721 N.E.2d 811, 815 (Ill. App. Ct. 1999).
"a plaintiff must show by clear and convincing evidence that the defendant's conduct was with evil motive or with a reckless and outrageous indifference to a highly unreasonable risk of harm and with a conscious indifference to the rights and safety of others."⁵¹⁶ Punitive damages are recoverable in Illinois to punish and deter, but not to compensate the plaintiff.⁵¹⁷

B. Limits on Punitive Damages

1. Pleading Restrictions

No complaint based upon bodily injury may contain a claim for punitive damages. The procedure is for the plaintiff to move for a pretrial hearing seeking leave to amend the complaint to include a punitive damages claim.⁵¹⁸ Punitive damages may not be added to a complaint after 30 days from the close of discovery.⁵¹⁹

2. Clear and Convincing Evidence

To recover punitive damages, the Illinois plaintiff "must show by clear and convincing evidence that the defendant's conduct was with evil motive or with a reckless and outrageous indifference to a highly unreasonable risk of harm and with a conscious indifference to the rights and safety of others."⁵²⁰

⁵¹⁶. 735 ILL. COMP. STAT. ANN. 5/2-1115.05(b) (West 2003) (struck down, by Best, as part of an unconstitutional scheme). Because this statute largely codified pre-existing law, see, e.g., Loitz, 563 N.E.2d at 402, the substance of this provision likely remains in effect.


⁵¹⁸. 735 ILL. COMP. STAT. ANN. 5/2-604.1 (West 2003) (struck down by Best) (defining method of pleading of punitive damages). Given that the wording of the repealed statutory provision is almost identical to its predecessor, this provision is not substantially affected by Best. McCann, 721 N.E.2d at 815.

⁵¹⁹. 735 ILL. COMP. STAT. ANN. 5/2-604.1 (West 2003).

⁵²⁰. Id. 5/2-1115.05(b) (struck down by Best) (defining clear and convincing evidence requirement as well as standard for punitive liability).
3. Restrictions on Punitive Damages in Products Liability Cases

In a product liability action, punitive damages are not awarded against a defendant manufacturer, or product seller, or reseller if the defendant’s conduct that allegedly caused the harm was approved by, or was in compliance with, standards set forth in applicable federal or State statute or regulations.

4. No Punitive Damages in Medical Malpractice

Punitive damages are not recoverable in medical malpractice and legal malpractice cases.\(^{521}\)

5. Bifurcation of Punitive Damages Proceeding

At the defendant’s request, punitive damages are bifurcated from the compensatory damages phase of a trial. In the punitive damages phase, evidence relevant to punishment and deterrence is introduced. “If the trier of fact makes an award of actual damages, the same trier of fact shall immediately hear any additional evidence relevant to, and render a verdict upon, the defendant’s liability for punitive damages and the amount thereof.”\(^{522}\)

6. State Sharing of Punitive Damages at the Discretion of the Court

Illinois permits a trial court to “apportion the punitive damage award among the plaintiff, the plaintiff’s attorney and the State of Illinois Department of Human Services. The amount of the award paid from the punitive damages to the plaintiff’s attorney shall be reasonable and without regard to the contingency fee contract.”\(^{523}\)

INDIANA

A. Standard of Liability and Functions of Punitive Damages

Punitive damages are imposed if the defendants “subjected other persons to probable injury, with an awareness of such impending

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\(^{521}\) 735 ILL. COMP. STAT. ANN. 5/2-1115.

\(^{522}\) Id. 5/2-1115.05 (struck down by Best) (describing method of bifurcation).

\(^{523}\) Id. 5/2-1207.
danger and with heedless indifference of the consequences." 524
Punitive damages are awarded to punish and deter. 525

B. Limits on Punitive Damages

1. Clear and Convincing Evidence
The plaintiff must demonstrate all facts necessary for a punitive damages award by "clear and convincing evidence." 526

2. Capping of Punitive Damages
In 1995, Indiana passed extensive limitations on punitive damages. As of July 1, 1995, plaintiffs may recover $50,000 or three times compensatory damages, whichever is greater. 527

3. State Sharing of Punitive Damages
Indiana passed a state-sharing scheme in which 75% of each punitive damages award is allocated to a state fund for victims of violent crime. 528 The payment of punitive damages is made to the clerk of the court, who pays the plaintiff 25% of each award. 529 The Indiana Supreme Court upheld Indiana's split-recovery statute. 530

IOWA

A. Standard of Liability and Functions of Punitive Damages
The standard for awarding punitive damages is a "preponderance of clear, convincing, and satisfactory evidence [that] the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another." 531 Iowa follows the majority rule in imposing punitive damages to punish

527. Id. § 34-51-3-4 (describing cap on punitive damages).
528. Id. § 34-51-3-6 (allocating seventy-five percent of every punitive damages award to state fund benefiting the victims of violent crime).
529. Id. § 34-51-3-6(b)(1)-(2).
and deter.\textsuperscript{532}

**B. Limits on Punitive Damages**

1. Clear and Convincing Evidence

Iowa requires plaintiffs to prove punitive damages by “clear and convincing” evidence.\textsuperscript{533}

2. State Sharing

Only 25\% of the punitive damages award is paid to the plaintiff. The other 75\% is placed in a civil reparations trust fund.\textsuperscript{534}

3. Limitations on Pleading and Discovery

The mere pleading of a claim for punitive damages is no basis for discovering the wealth of the defendant. A plaintiff must demonstrate a prima facie claim for punitive damages before he or she can begin discovery of the defendant’s ability to pay.

**Kansas**

**A. Standard of Liability and Functions of Punitive Damages**

The standard for Kansas punitive damages is “willful conduct, wanton conduct, fraud or malice.”\textsuperscript{535} Punitive damages in Kansas are awarded to punish and deter the defendant and others from committing similar acts.\textsuperscript{536}

**B. Limitations on Punitive Damages**

1. Clear and Convincing Evidence

The jury determines liability for punitive damages by clear and convincing evidence.\textsuperscript{537} The judge then determines the amount of

\textsuperscript{532} Webner v. Titan Distribution, Inc., 267 F.3d 828, 837 (8th Cir. 2001) (applying Iowa law).

\textsuperscript{533} IOWA CODE ANN. § 668A.1(1)(a) (West 1998).

\textsuperscript{534} Id. § 668A.1(2)(b).

\textsuperscript{535} KAN. STAT. ANN. § 60-3702(c) (1994).

\textsuperscript{536} Watkins v. Layton, 324 P.2d 130, 134 (Kan. 1958).

\textsuperscript{537} KAN. STAT. ANN. § 60-3702(a), (c) (1994).
punitive damages.\(^538\)

2. Judge-Assessed Punitive Damages

In non-medical liability cases, punitive damages are determined by the court in a bifurcated proceeding. The statute lists a number of factors that the court should consider, including, the likelihood of harm, the defendant’s awareness, the duration of the misconduct, the attitude of the defendant upon discovery, and the defendant’s financial condition.\(^539\) In addition, the court considers the total deterrent effect of other punitive damages or other punishment imposed upon the defendant.\(^540\)

3. Capped Damages

The Kansas cap is the lesser of the defendant’s annual gross income or $5 million.\(^541\) In the alternative, if the court believes that the profitability of the defendant’s misconduct will exceed this amount, the limitation is “1-1/2 times the amount of profit which the defendant gained or is expected to gain as a result of the defendant’s misconduct.”\(^542\)

4. Bifurcation

Kansas requires the bifurcation of the amount of punitive damages and the other aspects of a case.\(^543\) Punitive damages must be proven by clear and convincing evidence.\(^544\) The judge, rather than the jury, determines the amount of punitive damages.\(^545\)

5. Multiple Punishments

Kansas’ judge-assessed punitive damages procedure requires consideration of the total deterrent effect of other punitive awards when awarding damages.\(^546\)

\(^{538}\) Id. § 60-3702(c).
\(^{539}\) Id. § 60-3702(b).
\(^{540}\) Id. § 60-3702(b)(7).
\(^{541}\) Id. § 60-3702(e)(1)–(2).
\(^{542}\) Id. § 60-3702(f).
\(^{543}\) Id. § 60-3702(a).
\(^{544}\) Id. § 60-3702(c).
\(^{545}\) Id. § 60-3702(a)–(b).
\(^{546}\) Id. § 60-3702(b)(7).
KENTUCKY

A. Standard of Liability and Functions of Punitive Damages

Kentucky awards punitive damages "in enhancement of compensatory damages on account of the wanton, malicious or reckless character of the acts complained of."

A plaintiff shall recover punitive damages only upon proving, by clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud or malice.

Punitive damages are awarded to punish and deter the defendant and others.

B. Limits on Punitive Damages

1. Clear and Convincing Evidence

Plaintiffs may recover punitive damages if there is proof "by clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud or malice."

2. Statutorily Set Standard for Punitive Liability

Kentucky sets the standard for punitive liability statutorily.

3. Judge-Assessed Punitive Damages in Products Liability Cases

Kentucky imposes judge-assessed punitive damages in products liability litigation. The court determines the size of the punitive damages award in a product liability action after the trier of fact determines fault.

547. Great Atl. Tea Co. v. Smith, 136 S.W.2d 759, 768 (Ky. 1939).
549. Ashland Dry Goods Co. v. Wages, 195 S.W.2d 312, 315 (Ky. 1946).
550. KY. REV. STAT. ANN. § 411.184(2) (Michie 1992); see also id. § 411.184(1)(a)–(c) (defining "oppression," "fraud" and "malice").
551. Id. § 411.184.
552. Id. § 411.182.
LOUISIANA

A. Standard of Liability and Functions of Punitive Damages

Absent express statutory authorization, punitive damages are not recognized in Louisiana.\textsuperscript{553}

B. Limits on Punitive Damages

Not applicable.

MAINE

A. Standard of Liability and Functions of Punitive Damages

Punitive damages are awarded to deter the defendant and others from repeating the wrongful act. The remedy is permitted in tort where there is express or implied malice on the part of the defendant.\textsuperscript{554}

B. Limits on Punitive Damages

1. Clear and Convincing Evidence

Maine permits punitive damages to be awarded if supported by "clear and convincing" evidence.\textsuperscript{555}

MARYLAND

A. Standard of Liability and Functions of Punitive Damages

Maryland requires a showing of actual malice for the jury to consider awarding punitive damages in tort cases. The plaintiff's burden is to establish that the defendant's conduct was characterized by "... evil motive, intent to injure, ill will or fraud, i.e., actual malice."\textsuperscript{556}

\textsuperscript{554} Tuttle v. Raymond, 494 A.2d 1353, 1363–64 (Me. 1985).
\textsuperscript{555} Id.
Punitive damages, as in the majority of states, are intended to punish and deter.

B. Limits on Punitive Damages

1. Clear and Convincing Evidence

Maryland’s highest court imposed a clear and convincing standard of proof to ensure that punitive damages are properly awarded. The court reasoned that:

[the] potential consequences of a punitive damages claim warrant a requirement that the plaintiff present proof greater than a mere preponderance of the evidence. Therefore, we hold that a plaintiff may recover exemplary damages based upon tortious conduct only if he can prove by clear and convincing evidence that the defendant acted with malice.\(^{557}\)

2. Limitations on Pleading

Evidence of the defendant’s financial means is not admissible until there has been a finding of liability and that punitive damages are supportable under the facts.\(^{558}\)

Massachusetts

A. Standard of Liability and Functions of Punitive Damages

Punitive damages are not recoverable in Massachusetts in the absence of specific statutory provisions.\(^{559}\)

B. Limits on Punitive Damages

Not applicable.

\(^{557}\) Id. at 657.
\(^{558}\) MD. CODE ANN., CTS. & JUD. PROC. § 10-913(a) (2002).
A. Standard of Liability and Functions of Punitive Damages

The standard for punitive damages is malicious conduct or conduct so willful and wanton as to demonstrate reckless disregard for the rights of others. The Michigan court also noted Michigan’s long-standing judicial doctrine that exemplary damages play a strictly compensatory function and may not awarded to punish or deter. The court reaffirmed the principle that exemplary or punitive damages are intended only to compensate. “The conduct must be malicious or so willful and wanton as to demonstrate a reckless disregard of plaintiff’s rights.” Michigan awards punitive damages to compensate the plaintiff for humiliation, outrage, and indignity stemming from the commission of torts. Punitive damages in Michigan compensate the plaintiff for injured feelings. Compensation is for the humiliation of being victimized by defendant.

B. Limits on Punitive Damages

In Michigan, punitive damages are limited to compensation for injury to feelings. There is no provision for punitive damages to punish and deter and any award based upon those functions must be vacated.

MINNESOTA

A. Standard of Liability and Functions of Punitive Damages

“Punitive damages [are] allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others.”

561. Id. at 168.
566. MINN. STAT. ANN. § 549.20(1)(a) (West 2000).
B. Limitations on Punitive Damages

1. Pleading Restrictions

Minnesota plaintiffs may not plead punitive damages in their original complaints. Minnesota requires the plaintiff to present affidavits showing that the defendant's conduct warrants punitive damages. If the trial judge finds sufficient prima facie evidence, punitive damages are pleaded by an amended complaint.

2. Clear and Convincing Evidence

Punitive damages in Minnesota must be proved with "clear and convincing evidence."

3. Bifurcation

Minnesota gives a defendant in a punitive damages case the right to a bifurcated proceeding in which punitive damages are determined in the second stage of the trial. Minnesota requires the entire punitive damages claim, liability and the amount of the award to be determined in the second phase with post-verdict review by the trial judge.

4. Restrictions Regarding the Wealth of the Defendant

Evidence of the defendant's wealth is inadmissible until there is a separate proceeding to determine the amount of punitive damages.

5. Statutorily Mandated Factors

Minnesota mandates the factors that must be considered for punitive damages. Minnesota requires that the award be calibrated to the purpose of punitive damages, including "the seriousness of hazard to the public arising from the defendant's misconduct," the "profitability of the misconduct to the defendant," the "duration of the...

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567. Punitive damages may not be pleaded initially; punitive damages must be pleaded by an amended complaint. Id. §§ 549.191–549.20.
568. Id. § 549.191 (requiring pre-trial hearing to determine if there is sufficient prima facie evidence for punitive damages to warrant amending plaintiff's complaint to include a punitive claim).
569. Id. § 549.20(1)(a).
570. Id. § 549.20(4)–(5).
571. Id. § 549.20(4).
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 other awards].”\footnote{572}

MISSISSIPPI

A. Standard of Liability and Functions of Punitive Damages

The Mississippi standard for punitive damages and functions requires proof that the defendant acted with “actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud.”\footnote{573} Before punitive damages can be recovered from the defendant, the plaintiff must prove by a preponderance of the evidence that the defendant acted with (1) malice or (2) gross negligence or reckless disregard for the rights of others.\footnote{574}

B. Limits on Punitive Damages

1. Clear and Convincing Evidence

Mississippi has a “clear and convincing” evidence standard for awarding punitive damages where the defendant acted with “actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud.”\footnote{575}

2. Bifurcation

Mississippi requires bifurcated proceedings in which the amount of punitive damages is determined in a separate proceeding at the

\footnote{572}{Id. § 549.20(3).} \footnote{573}{MISS. CODE ANN. § 11-1-65(1)(a) (Supp. 2004).} \footnote{574}{Hurst v. S.W. Miss. Legal Servs. Corp., 708 So.2d 1347, 1350 (Miss. 1998).} \footnote{575}{MISS. CODE ANN. § 11-1-65(1)(a) (2002 & Supp. 2004).}
request of either party.576

3. Statutorily Mandated Factors for Determining the Amount of Punitive Damages

In all cases of punitive damages, the factfinder must consider factors such as the defendant’s net worth, the nature and reprehensibility of the wrongdoing, the impact of the conduct on the plaintiff, the defendant’s motivation, the duration of the conduct, the defendant’s attempt to conceal, and other aggravating circumstances.577

4. Capping of Punitive Damages

<table>
<thead>
<tr>
<th>Defendant’s Net Worth</th>
<th>Limitation on Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>$0–$50 million</td>
<td>2% of defendant’s net worth ($1 million maximum)</td>
</tr>
<tr>
<td>$50 million–$100 million</td>
<td>$2.5 million maximum</td>
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<tr>
<td>$100 million–$500 million</td>
<td>$3.75 million maximum</td>
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<tr>
<td>$750 million–$1 billion</td>
<td>$15 million maximum</td>
</tr>
<tr>
<td>More than $1 billion</td>
<td>$20 million maximum578</td>
</tr>
</tbody>
</table>

MISSOURI

A. Standard of Liability and Functions of Punitive Damages

In Missouri, punitive damages are imposed to punish and deter conduct that is willful, wanton, malicious, or demonstrates reckless disregard for the acts or consequences.579

576. Id. § 11-1-65(b)-(d).
577. Id. § 11-1-65(1)(e).
578. Id. § 11-1-65(3)(a) (Supp. 2004).
579. Burnett v. Griffith, 769 S.W.2d 780 (Mo. 1989).
B. Limits on Punitive Damages

1. Bifurcation

Missouri requires bifurcated proceedings in which the amount of punitive damages is determined in a separate proceeding at the request of either party.\(^{580}\) It is the jury’s role to determine whether a defendant should be liable in the first phase of the trial, and to determine the amount of punitive damages in the second phase.\(^{581}\)

If during the first stage of a bifurcated trial the jury determines that a defendant is liable for punitive damages, that jury shall determine, in a second stage of trial, the amount of punitive damages to be awarded against such defendant. Evidence of such defendant’s net worth shall be admissible during the second stage of such trial.\(^{582}\)

2. Multiple Punitive Damages

Multiple punitive damages are prohibited in products liability litigation. In addition, the trial judge may reduce punitive damages if prior awards have been awarded for the same misconduct.\(^{583}\)

3. Split-Recovery Statute

In Missouri, a party receiving a final judgment including punitive damages is required to remit 50% to Missouri’s victims’ compensation fund.\(^{584}\)

4. Multiple Punitive Damages

Missouri has a provision for crediting amounts paid previously for punitive damages arising out of the same conduct to limit or preclude punitive damages.\(^{585}\)

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\(^{581}\) Id. § 510.263(2).

\(^{582}\) Id. § 510.263(3).

\(^{583}\) Id. § 510.263(4).

\(^{584}\) Id. § 537.675(2) (West 2000).

\(^{585}\) Missouri statute section 510.263(4) states:

Within the time for filing a motion for new trial, a defendant may file a post-trial motion requesting the amount awarded by the jury as
Montana

A. Standard of Liability and Functions of Punitive Damages

In Montana, punitive damages are predicated upon actual fraud or malice.\textsuperscript{586} "A judge or jury may award, in addition to compensatory damages, punitive damages for the sake of example and for the purpose of punishing a defendant."\textsuperscript{587}

B. Limits on Punitive Damages

1. Clear and Convincing Evidence

Punitive damages must be premised on clear and convincing evidence of actual fraud or actual malice.\textsuperscript{588}

\begin{itemize}
\item 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. At any hearing, the burden on all issues relating to such a credit shall be on the defendant and either party may introduce relevant evidence on such motion. Such a motion shall be determined by the trial court within the time and according to procedures applicable to motions for new trial. 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. If the defendant fails to establish entitlement to a credit under the provisions of this section, or the trial court finds from the evidence that the defendant's conduct out of which the prior punitive damages award arose was not the same conduct on which the imposition of punitive damages is based in the pending action, or the trial court finds the defendant unreasonably continued the conduct after acquiring actual knowledge of the dangerous nature of such conduct, the trial court shall disallow such credit, or, if the trial court finds that the laws regarding punitive damages in the state in which the prior award of punitive damages was entered substantially and materially deviate from the law of the state of Missouri and that the nature of such deviation provides good cause for disallowance of the credit based on the public policy of Missouri, then the trial court may disallow all or any part of the credit provided by this section.
\end{itemize}

\textit{Id.} § 510.263(4) (West Supp. 2004).


587. \textit{Id.} § 27-1-220(1).

588. \textit{Id.} § 27-1-221.
2. Bifurcation

Punitive damages are determined in a bifurcated proceeding and a judge or jury must decide the issue of punitive liability as well as the amount.\textsuperscript{589}

3. Capping of Punitive Damages

An award for punitive damages in Montana "may not exceed $10 million or 3% of a defendant's net worth, whichever is less" and the cap does not limit punitive damages that may be awarded in class action lawsuits.\textsuperscript{590}

NEBRASKA

A. Standard of Liability and Functions of Punitive Damages

Punitive damages are not allowed in Nebraska.\textsuperscript{591}

B. Limits on Punitive Damages

Not applicable.

NEVADA

A. Standard of Liability and Functions of Punitive Damages

Nevada permits punitive damages for punishment and deterrence where there is evidence of "oppression, fraud, or malice."\textsuperscript{592}

B. Limits on Punitive Damages

1. Clear and Convincing Evidence

Nevada permits punitive damages to punish and deter where there is clear and convincing evidence of "oppression, fraud, or

\textsuperscript{589} Id. § 27-1-221(6). The prior provision requiring a \textit{unanimous} jury was declared unconstitutional in \textit{Finstad v. W.R. Grace}, 9 P.3d 778 (Mont. 220).

\textsuperscript{590} Mont. Code Ann. § 27-1-220(3).


malice."

2. Bifurcation

After a jury determines that punitive damages will be awarded, the jury then determines the amount in a separate proceeding. In Stage I, compensatory damages and punitive damages liability are decided. In Stage II, a proceeding "must be conducted before the same trier of fact to determine the amount of such damages to be assessed."

3. Capping of Punitive Damages

Punitive damages are capped at three times the compensatory damages or $300,000, whichever is greater. Nevada's cap does not apply to products liability, insurer acts of bad faith, toxic torts, or defamation cases.

NEW HAMPSHIRE

A. Standard of Liability and Functions of Punitive Damages

In 1986, New Hampshire enacted a statute that abolished punitive damages.

B. Limits on Punitive Damages

Not applicable.

NEW JERSEY

A. Standard of Liability and Functions of Punitive Damages

In New Jersey, punitive damages are recoverable if the defendant's conduct is found to constitute actual malice or wanton disregard of others' safety.

593. Id.
594. Id. 42.005(3).
595. Id.
596. Id.
597. Id.
42.005(2).
B. Limits on Punitive Damages

1. Clear and Convincing Evidence

New Jersey requires the plaintiff to prove the predicate for punitive damages by clear and convincing evidence.600

2. Bifurcation

New Jersey requires bifurcation of compensatory and punitive damages upon the motion of the defendant.601

3. Food and Drug Administration Defense

New Jersey provides that compliance with FDA-approved warnings is presumptively adequate. Punitive damages are not available if the FDA approves pharmaceutical products.602

4. Capping of Punitive Damages

New Jersey caps punitive damages at the greater of five times the award of compensatory damages or $350,000.603 The cap is lifted in cases involving hate crimes, discrimination, AIDS testing disclosure, sexual abuse, or injuries caused by drunk drivers.

NEW MEXICO

A. Standard of Liability and Functions of Punitive Damages

Punitive damages are recoverable upon proof of the defendant's gross negligence, malice, or other circumstances of aggravation.604

B. Limits on Punitive Damages

None enacted.

600. Id.
601. Id. § 2A:15-5.13(a)–(d).
602. Id. § 2A:58C-5(c).
603. Id. § 2A:15-5.14.
NEW YORK

A. Standard of Liability and Functions of Punitive Damages

New York punitive damages are for punishment and deterrence and recoverable if the plaintiff can prove that the defendant acted with evil or wrongful motive or reckless indifference equivalent thereof.\textsuperscript{605}

B. Limits on Punitive Damages

Not applicable.

NORTH CAROLINA

A. Standard of Liability and Functions of Punitive Damages

In North Carolina, a defendant is liable for punitive damages if he or she is engaged in “fraud,” “malice,” or “willful or wanton conduct.”\textsuperscript{606} Punitive damages are never awarded as compensation; they are awarded beyond actual damages, as a punishment for the defendant’s intentional wrong.\textsuperscript{607}

“The statutory scheme tracks the common-law standards for awarding punitive damages by mandating that a plaintiff must prove certain aggravating factors to be entitled to an award of punitive damages, those factors being fraud, malice, or willful or wanton conduct.”\textsuperscript{608}

B. Limitations on Punitive Damages

1. Clear and Convincing Evidence

North Carolina requires the plaintiff to prove the predicate for punitive damages by clear and convincing evidence.\textsuperscript{609}


\textsuperscript{606} N.C. GEN. STAT. § 1D-5(a) (2003). Malice is “a sense of personal ill will toward the claimant that activated or incited the defendant to perform the act or undertake the conduct that resulted in harm to the claimant.” Id. § 1D-5(5).

\textsuperscript{607} See id. § 1D-15(a).

\textsuperscript{608} Id.; Rhyne v. K-Mart Corp., 594 S.E.2d 1, 7 (N.C. 2004).

\textsuperscript{609} N.C. GEN. STAT. § 1D-15(b) (2003).
2. Bifurcation

The defendant has the right to a bifurcated proceeding and initiates this procedural protection by a motion.610

3. Capping of Punitive Damages

Punitive damages are limited to the greater of three times compensatory damages or $250,000.611

NORTH DAKOTA

A. Standard of Liability and Functions of Punitive Damages

A plaintiff in North Dakota must prove that "the defendant has been guilty by clear and convincing evidence of oppression, fraud, or actual malice."612 Punitive damages in North Dakota are intended to punish and deter "bad" conduct.613 A finding of actual or presumed malice is sufficient to support an award of punitive damages in North Dakota.614 Punitive damages require a finding of "oppression, fraud, or malice, actual or presumed."615 The Eighth Circuit also stated that punitive damages instruction should include "the lesser standard of reckless disregard."616

B. Limits on Punitive Damages

1. Clear and Convincing Evidence

Clear and convincing evidence is required to prove punitive damages in North Dakota.617

610. Id. § 1D-30.
611. Id. § 1D-25(b).
613. Id. (oppression, fraud, or actual malice).
617. Id.
2. Bifurcation
Either party may request bifurcated proceedings.\(^{618}\)

3. Capping of Punitive Damages
North Dakota caps punitive damages at the greater of $350,000 or two times compensatory damages.\(^{619}\)

4. Evidence of the Defendant’s Wealth is Inadmissible
Evidence of the defendant’s wealth is never admissible in North Dakota.\(^{620}\)

Ohio

A. Standard of Liability and Functions of Punitive Damages
Punitive damages are recoverable where it is proven the defendant acted with “malice or aggravated or egregious fraud or that the defendant as principal or master knowingly authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate.”\(^{621}\)

B. Limits on Punitive Damages

1. Clear and Convincing Evidence
Ohio requires that punitive damages be proven by clear and convincing evidence.\(^{622}\)

2. FDA Defense
In 1987, Ohio developed an FDA defense to punitive damages in regulated drugs and medical products cases.\(^{623}\)

3. Judicially Dictated State Sharing of Punitive Damages
Ohio is the only state to have ordered a split recovery of punitive

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619. Id. § 32-03.2-11(4).
620. Id. § 32-03.2-11(3).
621. 2004 Ohio Laws 144 (effective Apr. 7, 2005).
622. Id. § 2315.21(C)(2).
623. Id. § 2307.80(C).
PUNITIVE DAMAGES' IRON CAGE

damages between the plaintiff and a public entity. In Dardinger v. Anthem Blue Cross & Blue Shield,\textsuperscript{624} the Ohio Supreme Court allocated two-thirds of a $30 million punitive damages award to state agencies including Ohio State University.\textsuperscript{625}

4. Judge-Assessed Punitive Damages

Ohio repealed its provision for exclusively judge-assessed punitive damages.\textsuperscript{626} The current statute allows the trier of fact, whether judge or jury, to determine the amount of punitive damages.\textsuperscript{627}

OKLAHOMA

A. Standard of Liability and Functions of Punitive Damages

Punitive damages in Oklahoma are awarded to “punish the wrongdoer for wrongs committed upon society.”\textsuperscript{628} The amount of punitive damages does not have to be in particular ratio to the amount of actual damages; instead, the focus is on harm caused to society by the defendant’s wrongful acts.\textsuperscript{629} Punitive awards are imposed “for the sake of example and by way of punishing the defendant. . .”\textsuperscript{630}

B. Limits on Punitive Damages

1. Clear and Convincing Evidence

In Oklahoma, punitive damages must be supported by clear and convincing evidence.\textsuperscript{631}

\textsuperscript{624} 781 N.E.2d 121 (Ohio 2002).
\textsuperscript{625} Id. at 146.
\textsuperscript{626} The history accompanying the most recent edition of OHIO REV. CODE ANN. § 2315.21 (Anderson 2001), states: “Section 2315.21 of the Revised Code is revived, supersedes the version of the same section that is repealed by Section 2.02 of [Ohio Senate Bill 108], and includes amendments to respond to [this provision] being declared unconstitutional by the Supreme Court of Ohio.” The case in which this provision was declared unconstitutional is Zoppo v. Homestead Ins. Co., 644 N.E.2d 397 (Ohio 1994).
\textsuperscript{627} 2004 Ohio Laws 144 (effective Apr. 7, 2005).
\textsuperscript{629} Id.
\textsuperscript{630} OKLA. STAT. ANN. tit. 23, § 9.1 (West Supp. 2005).
\textsuperscript{631} Id. § 9.1(B) (Supp. 2005).
2. Bifurcation

Oklahoma requires a bifurcated proceeding to determine the amount of punitive damages.632

3. Capped Punitive Damages

Punitive damages are capped in three separate categories of cases based upon the defendant’s state of mind. In cases where the defendant is proven reckless, punitive damages are limited to $100,000 or the level of compensatory damages, whichever is greater. For the second category, where the jury finds clear and convincing evidence that the defendant has acted intentionally and with malice, or an insurer has intentionally or maliciously breached its duty of good faith and fair dealing, punitive damages can be no larger than two times compensatory damages or $500,000. In the third category, if the jury finds by clear and convincing evidence that the defendant has acted intentionally and with malice toward others, there is no cap.633

OREGON

A. Standard of Liability and Functions of Punitive Damages

Punitive damages in Oregon are recoverable where the defendant “acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others.”634

B. Limits on Punitive Damages

1. Clear and Convincing Evidence

Oregon punitive damages are proven by the clear and convincing evidence standard.635

632. Id. § 9.1(B)(2), (C)(2), (D)(2).
633. Id. § 9.1(B)–(D).
635. Id.
2. FDA Defense

Punitive damages may not be assessed against pharmaceutical manufacturers if the drug was manufactured or labeled in conformity with the Federal Food and Drug Administration regulations, or is generally recognized as safe and effective pursuant to FDA regulation.636

Pennsylvania

Pennsylvania punitive damages may be "awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others."637

Rhode Island

A. Standard of Liability and Functions of Punitive Damages

In Rhode Island, punitive damages are awarded for the purposes of punishment, specific deterrence, and general deterrence, and the predicate is that the defendant's conduct was willful, reckless, or wicked.638

B. Limits on Punitive Damages

None enacted.

South Carolina

A. Standard of Liability and Functions of Punitive Damages

South Carolina permits a jury to award punitive damages to punish, deter, and vindicate the rights of a plaintiff whenever conduct of the defendant is willful, wanton, or reckless.639

636. Id. § 30.927(1)(a)–(b).
B. Limits on Punitive Damages

1. Clear and Convincing Evidence

South Carolina's tort reform statute requires "clear and convincing" evidence for punitive damages to be awarded.\textsuperscript{640} Case law further defined this standard as "consciousness of the wrongdoing" at the time of the conduct.\textsuperscript{641}

**SOUTH DAKOTA**

A. Standard of Liability and Functions of Punitive Damages

South Dakota punitive damages are awarded to punish and deter "willful, wanton or malicious" conduct.\textsuperscript{642} Punitive damages may be predicated upon oppression, fraud, or malice, actual or presumed, or in any case of wrongful injury to animals, being subjects of property, committed intentionally or by willful and wanton misconduct, in disregard of humanity."\textsuperscript{643}

B. Limits on Punitive Damages

1. Clear and Convincing Evidence

A 1986 tort reform raised the standard of proof from a preponderance of the evidence to "clear and convincing evidence."\textsuperscript{644}

2. Restrictions on Pleading and Discovery

"In any claim alleging punitive or exemplary damages, before any discovery relating thereto may be commenced and before any such claim may be submitted to the finder of fact, the court shall find, after a hearing and based on clear and convincing evidence, that there is a reasonable basis to believe that there has been willful, wanton or malicious conduct on the part of the party claimed against."\textsuperscript{645}

\textsuperscript{641} Mattison, 947 F.3d at 110.
\textsuperscript{642} Flockhart v. Wyant, 467 N.W.2d 473, 477 (S.D. 1991).
\textsuperscript{643} S.D. CODIFIED LAWS § 21-3-2 (Michie 1987).
\textsuperscript{644} Id. § 21-1-4.1 (Michie 1987).
\textsuperscript{645} Id.
TENNESSEE

A. Standard of Liability and Functions of Punitive Damages
In Tennessee punitive damages may be recovered where the defendant intentionally, fraudulently, maliciously or recklessly harmed the plaintiff.\(^{646}\)

B. Limits on Punitive Damages
Punitive damages require clear and convincing evidence.\(^{647}\)

TEXAS

A. Standard of Liability and Functions of Punitive Damages
The standards for recovery of exemplary damages in Texas are (1) fraud, (2) malice, or (3) gross negligence.\(^{648}\)

B. Limits on Punitive Damages

1. Clear and Convincing Evidence
Plaintiffs must prove punitive damages by clear and convincing evidence.\(^{649}\)

2. Bifurcation
Bifurcation is required in Texas after *Transportation Insurance Co. v. Moriel*.\(^{650}\) Texas bifurcates to isolate evidence that is relevant only to the amount of punitive damages, such as the net worth of the defendant.

3. Capping of Punitive Damages
Punitive damages are capped at the greater of (a) two times compensatory damages plus an amount equal to non-economic

\(^{647}\) *Id.*
\(^{649}\) *Id.* § 41.003.
\(^{650}\) 879 S.W.2d 10 (Tex. 1994).
damages not to exceed $750,000, or (b) $200,000.651

UTAH

A. Standard of Liability and Functions of Punitive Damages

Punitive damages are designed to punish and deter defendants for "knowing and reckless" conduct. The standard of liability is based on "clear and convincing" evidence.652

B. Limits on Punitive Damages

1. Clear and Convincing Evidence

Punitive damages must be proven by clear and convincing evidence.653

2. Bifurcation

Evidence of the defendant's wealth can only be introduced after a finding of liability for punitive damages.654

3. FDA Defense

There is a government standards defense to punitive damages for FDA approved drugs.655

4. State Sharing of Punitive Damages

Utah apportions punitive damages in excess of $20,000 equally between the plaintiff and Utah's General Fund.656 Recently, a Utah district court judge declared that Utah's split recovery statute was an unconstitutional taking.657

653. Id.
654. Id.
655. Id. § 78-18-2.
656. Id. § 78-18-1 (apportioning half of any amount in excess of $20,000 punitive damages to half).
657. Thomson, supra note 313.
VERMONT

A. Standard of Liability and Functions of Punitive Damages

Vermont plaintiffs must prove that the plaintiff acted with "actual malice" in the form of "reckless or wanton disregard" of another's rights.\textsuperscript{658} Punitive damages are for punishment and deterrence of conduct that was emblematic of a "bad spirit and wrong intention."\textsuperscript{659}

B. Limits on Punitive Damages

None enacted.

VIRGINIA

A. Standard of Liability and Functions of Punitive Damages

In Virginia punitive damages are awarded to punish and deter where there is actual malice, misconduct, or such recklessness or negligence as to evince a conscious disregard of the rights of others.\textsuperscript{660}

B. Limits on Punitive Damages

1. Capping of Punitive Damages

Punitive damages are capped at $350,000, with no exceptions.\textsuperscript{661}

WASHINGTON

Washington common law does not allow punitive damages.\textsuperscript{662}

WEST VIRGINIA

A. Standard of Liability and Functions of Punitive Damages

Punitive damages are awarded to punish and deter gross fraud, malice, oppression, or wanton, willful or reckless conduct, or criminal

\textsuperscript{659} Parker v. Hoefer, 100 A.2d 434, 446 (Vt. 1953).
\textsuperscript{660} Oxenham v. Johnson, 402 S.E.2d 1, 5 (Va. 1991); Booth v. Robertson, 374 S.E.2d 1, 2 (Va. 1988).
\textsuperscript{661} VA. CODE ANN. § 8.01-38.1 (Michie 2000) (caps punitive damages at $350,000).
\textsuperscript{662} Spokane Truck & Dray Co. v. Hoefer, 25 P. 1072, 1075 (Wash. 1891).
indifference to civil obligations affecting the rights of others. 663

B. Limits on Punitive Damages

None enacted.

WISCONSIN

A. Standard of Liability and Functions of Punitive Damages

The 1995 tort reform fortifies the standard for punitive damages. The new standard is proof "that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff." 664

B. Limits on Punitive Damages

1. Clear and Convincing Evidence

In 1980, the Wisconsin Supreme Court articulated the earlier standard for punitive liability in Wangen v. Ford Motor Co. 665 The Wangen court required that the plaintiff establish that a defendant was malicious or reckless by "clear and convincing evidence." 666

2. Statutorily Defined Punitive Damages

Punitive damages are now defined by statute as appropriate where the defendants acted "maliciously or in intentional disregard of the rights of the plaintiff.

WYOMING

A. Standard of Liability and Functions of Punitive Damages

In Wyoming, the purpose of punitive damages is to punish or deter the defendant for willful or wanton conduct. 667

664. Id.
665. 294 N.W.2d 437, 457 (Wis. 1980).
666. Id. at 458.
B. Limits on Punitive Damages

None enacted.

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* Denotes judicial tort reform or restriction imposed by state court.