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# Punitive Damages in Mass-Marketed Product Litigation

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# PUNITIVE DAMAGES IN MASS-MARKETED PRODUCT LITIGATION

## I. INTRODUCTION

The recent Ford Pinto cases[1] and the advent of asbestos litigation[2] have stirred up the controversy over multiple punitive damage awards against one defendant for injuries arising out of a single mass-marketed product. While it is commonly accepted that punitive damages may be awarded in one-on-one torts,[3] the merits of multiple awards have often been debated.[4] The specter of multiple claimants suing because of alleged wrongful conduct in the design or manufacture of a single product[5] conjures up obvious problems of management and fairness. An established authority on strict liability in tort has warned that the problem of punitive damages in mass-disaster litigation and in products liability cases with multiple plaintiffs, might well lead to a reexamination

1. *E.g.*, Robert v. Ford Motor Co., 417 N.Y.S.2d 595, 72 A.D.2d 1025, 100 Misc. 2d 646 (1980) (exploding fuel tank in rear-end collision); Grimshaw v. Ford Motor Co., No. 19-77-61 (Orange County Super. Ct., Santa Ana, Feb. 6, 1978) (same). *See also* 8 PRODUCT SAFETY & LIABILITY REP. 48 (1980) for a discussion of the criminal manslaughter trial against Ford Motor Company brought in Indiana in early 1980. The court accepted the argument that the jury should judge the safety of the Pinto's fuel system according to its own standards, as in a civil products liability case, rather than standards set out by the federal government sanctions. Documents suppressed at trial included a memorandum in which Ford compared the cost of changing the Pinto fuel tank design to the value of the lives which would be lost if the design were not remedied. Such a marketing decision would constitute evidence of conscious disregard for consumers' safety in a punitive damage claim. *See* text accompanying notes 20-25 *infra*.

2. *E.g.*, Campbell v. Johns-Manville Corp., No. 3-78185 (D. Tenn. Dec. 7, 1978); Barnett v. Johns-Manville Corp., No. 76-CP-23-1574 (D.S.C. Apr. 7, 1978); Bumgardner v. Johns-Manville Corp., No. 77-995 (D.S.C. Nov. 22, 1977); Starnes v. Johns-Manville Corp., No. 2-75-122 (D. Tenn. Feb. 17, 1977).

3. *See generally* Tozer, *Punitive Damages and Products Liability*, 39 INS. COUNSEL J. 300 (1972) [hereinafter cited as Tozer].

4. Hoenig, *Products Liability and Punitive Damages*, 47 INS. COUNSEL J. 198 (1980) (hereinafter cited as Hoenig); DuBois, *Punitive Damages in Personal Injury, Products Liability and Professional Malpractice Cases: Bonanza or Disaster?*, 43 INS. COUNSEL J. 344 (1976); Tozer, *supra* note 3; *Allowance of Punitive Damages in Products Liability Claims*, 6 GA. L. REV. 613 (1972).

5. Punitive damages have been sought in product cases based on theories of breach of implied or express warranty, *e.g.*, Barth v. B.F. Goodrich Co., 265 Cal. App. 2d 228, 71 Cal. Rptr. 306 (1968), strict liability in tort, *e.g.*, Pease v. Beech Aircraft Co., 38 Cal. App. 2d 450, 113 Cal. Rptr. 416 (1974), and fraudulent misrepresentation, *e.g.*, Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967).

of the whole basis and policy of awarding punitive damages.[6] Another jurist has remarked that there is "grave difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill."[7]

Apart from the possible hardship visited upon a defendant in mass-marketed product litigation, problems of trial court management and fairness to litigants may occur where punitive damages are requested. Presently, a plaintiff fortunate enough to litigate against a manufacturer in a sympathetic jurisdiction might receive a multimillion dollar punitive damage verdict, while another, litigating against the same manufacturer in a less liberal jurisdiction, might receive nothing or a nominal punitive damage award.[8] There is no law regulating punitive damage claims by successive plaintiffs, although all may be injured in the same way by the same product. Judge Friendly observed that "it [does not] seem either fair or practicable to limit punitive recoveries to an indeterminate number of first-comers, leaving it to some unascertained court to cry 'hold-enough' in the hope that others would follow."[9]

The question of fairness has prompted one commentator to suggest a complete abrogation of punitive damages in mass-marketed product litigation.[10] But that suggestion prompts the consumer-minded to fear that "absent the punitive damages remedy, many manufacturers may be tempted to maximize profits by marketing products known to be defective and to absorb resulting injury claims as a cost of doing business."[11]

This comment discusses punitive damages in products liability in the context of mass-marketed product suits. The arguments for and against the imposition of multiple punitive damage awards are used to illustrate the problems and pitfalls of such awards for both plaintiffs and defendants. Additionally, the difficulties a jury or judge en-

6. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2 (4th ed. 1971) [hereinafter cited as PROSSER].

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

8. This situation occurred in the MER/29 (anti-cholesterol drug) litigation. Although the plaintiff in Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, received no punitive damages, the plaintiff in *Toole*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967), received $250,000 after a reduction by the trial court from $500,000.

9. Roginsky v. Richardson-Merrell, Inc., 378 F.2d at 839-40.

10. Tozer, *supra* note 3, at 303. Under this view, "fairness forms the basis of the maxim that where the reason for the rule has ceased to exist," the rule should no longer exist and thus the several rationalizations for permitting punitive damages no longer exist. *Id.* at 303.

11. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258, 1291 (1976) (footnote omitted) [hereinafter cited as Owen].

counters in fashioning a second punitive damage award are explored. Finally, various solutions are offered which present a compromise between opposing views so that fairness to the defendant manufacturer is maintained while plaintiffs are allowed satisfaction for their injuries.

## II. AN OVERVIEW

### *A. Punitive Damages in Products Liability*

Punitive damages were permitted under the common law as a means of punishing the defendant for aggravated or outrageous conduct, and to deter him and others from similar action in the future.[12] The application of punitive damage theory to civil cases has been criticized as an unwarranted extension of the penal or retributive purpose of criminal law.[13] Nevertheless, the use of punitive damages in products cases has been deemed a logical extension of the historical need to deter wrongful conduct, especially where that conduct results in "foreseeably avoidable and all too often catastrophic injuries from defective products."[14]

From the plaintiffs' viewpoint, punitive damages traditionally operate as a form of individual revenge, deterrence, and punishment. One practitioner has noted that punitive damages take on a greater import in products litigation as a means to enforce both individual and community interests.[15] Such damages can serve as a societal curb on manufacturers' conduct by exposing and punishing misdeeds. The justification for imposing punitive damages thus becomes similar to the justification for criminal penalties—retribution and deterrence.[16] This dual goal is further advanced by the tangential effect of eliminating any unfair profit gained by misconduct in product design and manufacture.[17]

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12. The doctrine and theory of punitive damages were given their earliest application in a 1763 English case. A citizen sued the king's officers for assault, trespass, and false imprisonment for actions under an illegal warrant. While the plaintiff had been detained merely six hours, and suffered little physical damage, "exemplary damages" were legitimately awarded because the illegal warrant was a "most daring public attack made upon the liberty of the subject." Huckle v. Money, 2 K.B. 206, 207, 95 Eng. Rep. 768, 769 (1763).

13. Walker v. Sheldon, 10 N.Y.2d 401, 406-07, 179 N.E. 2d 497, 500-01 (1961) (Van Voorhis, J., dissenting) (fraud and deceit action against publisher).

14. Igoe, *Punitive Damages in Products Liability*, 34 J. Mo. B. 394, 405 (1978).

15. *Id.* at 395.

16. Tolle v. Interstate Sys. Truck Lines, Inc., 42 Ill. App. 3d 771, 772, 356 N.E. 2d 625, 626 (1976) (punitive damages sought against employer for reckless driving by employee).

17. The imposition of punitive damages on manufacturers has been based on the concept that because every business is a profit-maximizer, the most effective means to change manufacturing behavior is through the pocketbook. One author has suggested that it is

Punitive damages serve a further social function by increasing public safety through a coercive remedial effect on product design.[18] This purpose of punitive damages will be effective to the extent that the manufacturer's conscience is affected, or to the extent that the company seeks to avoid the stigma and severity of punishment.[19]

### *B. Imposing Punitive Damage Awards: Proof and Policy*

Punitive damages are awarded only when the defendant's behavior amounts to intentional or malicious wrongdoing or where the defendant manifests a reckless or conscious disregard for the safety of others, such that the defendant's conduct could almost be characterized as criminal.[20] In California, the defendant's act must be wrongful, not only in the sense of causing injury, but also in the sense that it was done purposely, or in conscious disregard of the rights of others.[21] California has codified these specific categories of misconduct; where the defendant is shown guilty of oppression, fraud, or malice, express or

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unrealistic to assume that the financial impact of lawsuits will affect manufacturing decisions. Christopher Stone, in an analysis of corporate social responsibility and behavior, found that "to the executive and business community peer group, having profits cut into by a lawsuit simply does not involve the same loss of face as losses attributable to other causes." C. STONE, WHERE THE LAW ENDS 40 (1975) [hereinafter cited as STONE]. Stone discovered that "businessmen questioned about product liability suits believe 'it could happen to anyone,' and that 'lawsuits against a pharmaceutical house were likened to being struck by lightning.'" Major lawsuit losses are "explained on corporate financial reports as 'non-recurring losses.'" *Id.*

18. *See, e.g.*, Moore v. Jewel Tea Co., 116 Ill. App. 2d 109, 132, 253 N.E.2d 636, 646 (1969) (evidence of different cap designs used after accident admissible). *See* text accompanying note 45 *infra* for facts of case. *See also* Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 589, 60 Cal. Rptr. 398 (1967).

19. In Walker v. Sheldon, 10 N.Y.2d 401, 179 N.E.2d 497 (1961), the New York Court of Appeals held that a publisher who had defrauded the general public into contracts was liable for punitive damages. Judge Fuld, writing for the majority, noted that companies "are very much more likely to pause and consider the consequences if they have to pay more than the actual loss suffered by an individual plaintiff. An occasional award of compensatory damages against such parties would have little deterrent effect." *Id.* at 406, 179 N.E.2d at 499.

20. PROSSER, *supra* note 6, at 9-10 (defining the requisite conduct for punitive damages; the defendant's wrongdoing has the character of outrage frequently associated with crime).

21. Recent California law has affirmed this view. In permitting the recovery of punitive damages in drunk driving cases, the California Supreme Court quoted Prosser as saying, "[s]omething more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or 'malice' . . . *or such a conscious and deliberate disregard of the interests of others that [one's] conduct may be called wilful or wanton.*" Taylor v. Superior Court, 24 Cal. 3d 890, 894-95, 598 P.2d 856, 856, 157 Cal. Rptr. 693, 696 (1979) (emphasis in original) (quoting W. PROSSER, THE LAW OF TORTS § 2 (4th ed. 1971)).

implied, the plaintiff may recover punitive damages.[22] Maliciousness is generally understood as behavior with evil intentions. In a nonintentional tort case, a plaintiff may have a difficult battle proving not only that the defendant intended to injure, but also that he appreciated the likelihood of injury and therefore acted with evil motive.

In other jurisdictions, conduct proven willful, wanton, or reckless is sufficient for an award of punitive damages.[23] A wanton act is perceived as a wrongful act done on purpose or with malicious disregard for the rights of others. Recklessness has been defined as an indifference to the rights of others, whether or not wrong or injury occurs.[24]

In products liability litigation where punitive damages have been awarded, juries have determined that manufacturers resorted to such socially reprehensible conduct as fraud, gross negligence, and conscious disregard for the safety of consumers in the marketing of products.[25] To maintain the quasi-criminal effect of punitive damages, a punitive damage award should correspond to the degree that a manufacturer is aware of the safety risk inherent in the product. It has been suggested that the more certain a manufacturer is that his product poses a risk and the more dangerous that risk is, the more serious is his misconduct and therefore the more severe his punishment should be.[26]

### *C. Opposing Punitive Damage Awards: Theory and Policy*

Defendants have opposed the application of punitive damages in products liability litigation[27] on the theory that strict liability and puni-

22. CAL. CIV. CODE § 3294 (West Supp. 1981). Malice under California Civil Code § 3294, as interpreted by an appellate court, "implies an act conceived in a spirit of mischief, or with a criminal indifference towards the obligations owed to others." Ebaugh v. Rabkin, 22 Cal. App. 3d 891, 894, 99 Cal. Rptr. 706, 708 (1972). Oppression under the statute has been defined as "[a]n act of subjecting a person to cruel and unjust hardship in conscious disregard of that person's rights." Roth v. Shell Oil Co., 185 Cal. App. 2d 676, 681, 8 Cal. Rptr. 514, 517 (1960).

23. *See* 25 C.J.S. *Damages* § 123(1) (1966) and cases cited therein.

24. Evans v. Illinois Cent. R.R., 289 Mo. 493, 503, 233 S.W. 397, 400 (1921) (speeding railroad train; conduct not sufficiently reckless to justify imposition of punitive damages).

25. *E.g.*, G.D. Searle & Co. v. Superior Court, 49 Cal. App. 3d 22, 122 Cal. Rptr. 218 (1975) (conscious disregard of safety of others held sufficient to show malice); Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967) (malice and fraud found).

26. *See, e.g.*, Neal v. Farmers Ins. Exch., 21 Cal. 3d 910, 928, 582 P.2d 980, 984, 148 Cal. Rptr. 389, 398 (1978) (punitive damages awarded for insurance company's bad faith failure to pay uninsured motorist claim).

27. One jurisdiction, taking up the defendant's cause, advocated abolishing punitive damages in civil cases altogether. That court stated that "punitive damages are given, not to compensate the plaintiff for his injury, but to punish and deter the tortfeasor . . . . Wilful and intentional torts, of course, still exist, but should not be confused with negligence . . . .

tive damages are inherently incompatible.[28] A strict products liability case purportedly "looks to a defect in the product, rather than any culpable act by the manufacturer,"[29] while the punitive damage case focuses on the manufacturer's conduct.[30] A defendant sued on a strict liability theory for compensatory damages in a products case could argue that the plaintiff must at least make a further showing of aggravated conduct on the defendant's part to justify punitive damages.[31]

Further, defendants have historically made constitutional objections to the imposition of punitive damages on due process[32] and double jeopardy[33] grounds.

Punitive damages may arguably be unjust to defendants in products liability cases involving mass-produced goods. The cumulative amount of punitive damages awarded against a single manufacturer in such cases may overwhelm the defendant financially. Thus, "considerations of fundamental, ordinary fairness" should operate to limit awards[34] where a design defect affecting an entire product lot yields up multiple plaintiffs, each entitled to punish the manufacturer.

## III. Litigating Multiple Punitive Damage Awards

The proof and policy concepts outlined above may be utilized differently by a second or third plaintiff suing a single manufacturer for injuries, caused by a mass-marketed product, which are similar to those suffered by the first plaintiff. The successive plaintiffs will bear the same burden of proof as the first plaintiff in such cases, but may have to alter traditional policy arguments. The defense in such suits will have difficulty assessing the compensatory damage phase and predicting the

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The protection of the public from such conduct or from reckless, wanton or wilful conduct is best served by the criminal laws of the state." Bielski v. Schulze, 26 Wis. 2d 1, 18, 114 N.W. 2d 105, 113 (1962).

28. *Contra*, Toole v. Richardson-Merrell, 251 Cal. App. 2d at 719, 60 Cal. Rptr. at 419 (punitive damages allowed in drug (MER/29) case where defendant's misconduct justified the award); Owen, *supra* note 11, at 1269 (strict liability "has never purported to delimit the remedies that might be appropriate if a plaintiff's accident is attributable to some aggravated fault of the manufacturer").

29. Shaffer v. Honeywell, Inc., 91 S.D. 300, 310 n.7, 249 N.W. 2d 251, 257 n.7 (1976) (homeowner's product liability suit successful against manufacturer of furnace safety shut-off valve which malfunctioned and caused fire).

30. *See* note 25 *supra*.

31. Drake v. Wham-O Mfg. Co., 373 F. Supp. 608, 611 (E.D. Wis. 1974) (punitive damages permitted in recreational product case where the plaintiff made showing of manufacturer's aggravated conduct).

32. *See* notes 80-87 *infra* and accompanying text.

33. *See* notes 88-100 *infra* and accompanying text.

34. Tozer, *supra* note 3, at 301.

potential punitive damage verdict even if punitive damages were awarded in the previous suit.

### *A. The Plaintiff's Arguments*

Before a case for punitive damages in products liability may go forward, the plaintiff must show actual damages.[35] Moreover, even assuming that a second litigant has proven actual damages, he, like any claimant for punitive damages, bears the burden of proof as to why the defendant's conduct warrants special punishment.[36]

Differing standards of proof as to the requisite conduct warranting the imposition of punitive damages may preclude an award in some cases. Plaintiffs suing defendants with nationwide marketing concerns may be subject to the vagaries of state law on what constitutes sufficiently reprehensible manufacturing behavior.[37] Litigation on opposite coasts in the MER/29 cases produced opposite results on the issue of punitive damages. In New York, in *Roginsky v. Richardson-Merrell, Inc.*, the three-judge appellate panel determined that the "evidence was not sufficient to warrant submission of the punitive damage issue to the jury."[38] In California, the same evidence of falsified research and test data along with misrepresentations to the FDA was introduced. The California appellate court "respectfully differ[ed]" from the *Roginsky* holding, finding in its record "ample evidence of conduct on the part of [the manufacturer] from which the jury could infer intentional, wilful and reckless conduct on [the defendant's] part, done in

35. Esparza v. Specht, 55 Cal. App. 3d 1, 127 Cal. Rptr. 493 (1976) (sufficiently proven legally compensable damages justifies issue of punitive damages to be sent to jury, even when offset award eliminates actual damage recovery); James v. Public Fin. Corp., 47 Cal. App. 3d 995, 121 Cal. Rptr. 670 (1975) (compensatory verdict of $0 and punitive damage verdict of $1,750 remanded for entry of judgment in amount of $1,750 as actual and punitive); Bezaire v. Fidelity & Deposit Co. of Md., 12 Cal. App. 3d 888, 91 Cal. Rptr. 142 (1970) (no punitive damages allowed where no actual damage suffered).

36. Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d at 715-16, 60 Cal. Rptr. at 417. *See* text accompanying notes 20-25 *supra*.

37. In the suits arising from the 1979 DC-10 crash in Chicago, McDonnell-Douglas was subject to the laws of several states concerning punitive damages. About one-half of these states permitted punitive damages in wrongful death cases. The question became one of choice of law, subject to the rule of which state bore the greatest interest in the allegedly egregious conduct. On the issue of punitive damages, the choice was between the place of the conduct and the place of the defendant's domicile. One court found that the place of the accident was fortuitous, and held that the place of the defendant's domicile was the proper place to litigate the issue of punitive damages. That state was Missouri, in which McDonnell-Douglas could be held liable for punitive damages in wrongful death cases. N.Y.L.J., June 20, 1980, at 1, col. 1.

38. 378 F.2d at 835.

disregard of possible injury to persons."[39]

In a products case seeking punitive damages, the second plaintiff, like the first, should show not only deception, but also the defendant's knowledge that injuries were substantially certain to result from the use of the product.[40] In a case involving injuries arising from the same aircraft, plaintiffs introduced evidence that the aircraft manufacturer had long been aware of an alleged design defect in the fuel tank, but had failed to notify aircraft purchasers and continued to certify the aircraft as crash-worthy.[41] Proof of prior knowledge of a defect and a concomitant failure to rectify were sufficient to impose punitive damages in *Rinker v. Ford Motor Co.*[42] There, Ford had twenty-nine prior reports of a defective throttle in a carburetor, but issued no warnings to dealers or customers.[43] Elsewhere, punitive damages were permitted twice against the same drug manufacturer where it fraudulently and deceitfully misrepresented the safety of its products. Corporate executives knew of falsified data and injurious side effects, but continued to actively promote the sale of the product despite such knowledge.[44] The Drano manufacturer's knowledge of its product's potential dangerousness (that caustic soda compound was damaging to human tissue), along with prior notice of spontaneous explosions (the caustic soda compound generated gas in cans), was sufficient proof of gross disregard for consumers' safety. Punitive damages were imposed where evidence revealed that Drano failed to warn users of the product's dangers, while its own bottlers were instructed to wear cotton clothing and goggles.[45]

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39. Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d at 715 n.3, 60 Cal. Rptr. at 416 n.3. The New York standard for punitive damages holds that the recklessness that will give rise to punitive damages must be close to criminality. 14 N.Y. JURISPRUDENCE, *Damages* § 181 (1969). This is apparently stricter than California's malice, fraud, or oppression standard under CAL. CIV. CODE § 3294 (West Supp. 1981).

40. G.D. Searle & Co. v. Superior Court, 49 Cal. App. 3d at 32, 122 Cal. Rptr. at 225 (in products liability suit seeking punitive damages plaintiff should charge the defendant manufacturer with knowledge of the dangerous potential of its product).

41. Pease v. Beech Aircraft Corp., 38 Cal. App. 3d 450, 464-65, 113 Cal. Rptr. 416, 425-26 (1974) (punitive damages not recoverable in a wrongful death action arising out of aircraft crash).

42. 567 S.W.2d 655, 667-68 (Mo. Ct. App. 1978).

43. *Id.* at 667.

44. Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967); Ostopowitz v. Richardson-Merrell, N.Y.L.J., Jan. 11, 1967, at 20, col. 3 (Sup. Ct. Westchester County).

45. Moore v. Jewel Tea Co., 116 Ill. App. 2d at 136-37, 253 N.E.2d at 649.

### 1. Use of collateral estoppel

The doctrine of collateral estoppel may aid a second plaintiff's burden of proof on the issue of a manufacturer's reprehensible conduct. The principles of collateral estoppel, whereby a conclusive previous judgment is asserted in a subsequent action to bar relitigation of identical issues although theories of recovery may differ,[46] should logically pertain to successive punitive damage claims. The applicability of collateral estoppel appears compelling especially where the issue of the product's defectiveness overlaps the issue of fraud, malice, or conscious disregard for the safety of others,[47] assuming that similar standards for the imposition of punitive damages apply.

It should be noted that estoppel resulting from a judgment is equally available to either the plaintiff or the defendant in a subsequent action.[48] Traditionally, estoppel had to be mutual. That is, the judgment in the original action had to bind both litigants before one party could subsequently assert that the other was estopped by the prior judgment.[49] Thus, a plaintiff could not assert collateral estoppel in a subsequent action involving the same issue against the same defendant unless the plaintiff was also a party to the first suit. California has abolished the doctrine of mutuality of estoppel.[50] The current rule is

46. 46 AM. JUR. 2d *Judgments* § 521 (1969); Annot., 31 A.L.R.3d 1044 (1970).

47. *Cf.* Flatt v. Johns-Manville Sales Corp., 488 F. Supp. 836, 840-41 (E.D. Tex. 1980) (doctrine of collateral estoppel barred the manufacturers of asbestos from contesting the issue of whether products containing asbestos were unreasonably dangerous).

48. It has been argued by general counsel for Richardson-Merrell that the doctrine of collateral estoppel should operate as a defense in mass-marketed product litigation involving punitive damages. The same issues and evidence will be presented regarding punitive damages and each plaintiff is theoretically "seeking to deter the future acts of the defendant for the good of the public." Thus, "plaintiffs are in privy with one another so that a judgment rendered by [one] court . . . on the merits . . . on . . . punitive damages in one of such cases, will be a bar to such court in any other action in any other court so long as the prior judgment remains unreversed . . . ." Silliman, *Punitive Damages Related to Multiple Litigation Against a Corporation*, FED. OF INS. COUNSEL Q., Spring, 1966, 91, 95. This argument was summarily rejected, however, in *Roginsky*, where Judge Friendly stated, "We know of no principle whereby the first punitive award exhausts all claims for punitive damages and would thus preclude further judgments." 378 F.2d at 839 [footnote omitted]. However, such a determination does not necessarily prevent plaintiffs from invoking the doctrine.

49. RESTATEMENT OF JUDGMENTS § 93 (1942) provides that a "person who is not a party or privy to a party to an action in which a valid judgment other than a judgment in rem is rendered . . . is not bound by or entitled to claim the benefits of an adjudication upon any matter decided in the action."

50. Reasons for abolishing the rule of mutuality in favor of asserting collateral estoppel only against the party bound by a prior judgment have included the fact that the party against whom the plea is raised was a party to the prior action, that he had full opportunity to litigate the issue of his responsibility, and that there is no reason for permitting him to relitigate that issue. Blonder-Tongue Laboratories, Inc. v. Univ. of Illinois Foundation, 402

that one not a party to a judgment nor in privity with such party may assert collateral estoppel against one who is bound by the previous judgment. Thus, the second party, while not a litigant in the first suit, can prevent the relitigation of an issue determined in the prior action.[51]

To invoke collateral estoppel, the plaintiff in a successive suit against a single manufacturer must establish that the same issue that was necessary to the judgment in the prior action is decisive of the present action and that there was a full and fair opportunity for the party against whom collateral estoppel is asserted to have contested the decision now said to be controlling.[52] Evidence of prior similar product accidents could provide support for the use of collateral estoppel in the punitive damage phase of mass-marketed product suits. In *Moore v. Jewel Tea Co.*, evidence of previous similar explosions of an unopened drain cleaning product was admissible and competent, not for the purpose of showing independent acts of negligence, but to establish that the common cause of the accidents was a dangerous and unsafe product.[53] Thus, with respect to the punitive damage case, a plaintiff seeking to prevent relitigation of the defendant's conscious disregard of safety might argue that previous evidence which conclusively established the dangerousness of a product now estops the defendant from asserting that it had no knowledge of the product's dangerous propensities.

Collateral estoppel has often been used successfully by different plaintiffs in substantially similar actions against the same air carrier for

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U.S. 313 (1971) (a patent infringement case not within the present scope). Courts have been mixed as to whether collateral estoppel may be asserted offensively, that is, whether a plaintiff not a party to previous suits may collaterally estop litigating the issue of negligence if that issue has been decided adversely to the defendant in previous suits. Kelly v. Trans Globe Travel Bureau, Inc., 60 Cal. App. 3d 195, 202, 131 Cal. Rptr. 488, 492-93 (1976) (no collateral estoppel effect given in personal injury civil suits to "course and scope" of employment determined in previous workers' compensation proceeding); Cochran v. Union Lumber Co., 26 Cal. App. 3d 423, 427-28, 102 Cal. Rptr. 632, 635-36 (1972) (title deed language construction; collateral estoppel could not be asserted by stranger grantee to defeat defendant's claims); McDougall v. Palo Alto Unified School Dist., 212 Cal. App. 2d 422, 428-31, 28 Cal. Rptr. 37, 40-42 (1963) (quiet title action; collateral estoppel may only be asserted defensively). *But cf.* Louie Queriolo Trucking, Inc. v. Superior Court, 252 Cal. App. 2d 194, 200, 60 Cal. Rptr. 389, 392-93 (1967) (determination of negligence in previous suit could be asserted by plaintiff in subsequent suit).

51. Bruszewski v. United States, 181 F.2d 419 (3d Cir.), *cert. denied*, 340 U.S. 865 (1950); Bernhard v. Bank of America, 19 Cal. 2d 807, 122 P.2d 892 (1942).

52. Schwartz v. Public Adm., 24 N.Y.2d 65, 71, 246 N.E.2d 725, 728 (1969) (passenger's judgment against operators of colliding vehicles collaterally estopped operators from relitigating the issue of their negligence in subsequent action by one driver for his own injuries).

53. 116 Ill. App. 2d 109, 129, 253 N.E.2d 636, 645 (1969).

injuries arising out of a single accident.[54] Plaintiffs claiming collateral estoppel in defective mass-marketed product litigation may not be so fortunate. The defense in the recent California asbestos litigation[55] resisted the application of collateral estoppel on the grounds that inconsistent verdicts prevented the fair application of the doctrine.[56]

In *Williams v. Laurence-David, Inc.*,[57] collateral estoppel was not allowed by the Oregon Supreme Court in a second suit against a manufacturer of rubber gloves which allegedly caused contact dermititis. Although the previous party-plaintiff had worn rubber gloves bearing the same brand insignia as those worn by the present plaintiff, the court held collateral estoppel to be inapplicable as there was no evidence that the gloves worn by the previous litigant were identical with those worn by the present plaintiff, or that they came from the same carton or case lot.[58]

Successive plaintiffs in products cases seeking to invoke collateral estoppel only on the issue of punitive damages may be able to distinguish the above cases. First, in the recent asbestos suit and in *William*

54. Injured plaintiffs or estates of plaintiffs have affirmatively used collateral estoppel against defendant air carriers on the issue of negligence or other liability. United Air Lines, Inc. v. Wiener, 335 F.2d 379 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964); Gliedman v. Capital Airlines, Inc., 267 F. Supp. 298 (D.C. Md. 1967); United States v. United Air Lines, Inc., 216 F. Supp. 709 (D.C. Nev. 1962).

55. Memorandum of Points and Authorities for Defendant, Beauregard v. Johns-Manville, No. C137466 (L.A. Super. Ct. June 1980) [hereinafter cited as Memorandum]. It was thought that the plaintiff would move to collaterally estop the defendant from denying knowledge of dangers caused by inhalation of asbestos dust by asbestos insulation workers but the issue of collateral estoppel was not litigated.

56. *Id.* As authority for this position, the defendant relied on State Farm & Cas. Co. v. Century Home Components, Inc., 275 Or. 97, 550 P.2d 1185 (1976), a property damage case in which the Oregon Supreme Court determined that "[t]here seems to be something fundamentally offensive about depriving a party of the opportunity to litigate the issue again when he has shown beyond a doubt that on another day he prevailed." *Id.* at 110, 550 P.2d at 1191 (footnote omitted). The unfairness concept stems from a plaintiff's selective application of collateral estoppel from among inconsistent verdicts. The defense in Beauregard v. Johns-Manville relied on the United States Supreme Court determination in Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979), that "[a]llowing offensive collateral estoppel is itself inconsistent with one or more previous judgments in favor of the defendant." *Id.* at 330, quoted in Memorandum, *supra* note 55.

57. 271 Or. 712, 534 P.2d 173 (1975).

58. In the court's view:

> [W]e must recognize one individual might have an adverse reaction whereas another individual might not. This isn't like a situation where you have an automobile accident. There is one set of facts that creates the damage and the injury.
>
> Obviously these two people weren't wearing the same pair of gloves at the same time and maybe not under the same conditions. At least conceivably there may well be and probably are different factors involved which would give rise to different reactions . . . .

*Id.* at 724 n.1, 534 P.2d at 178 n.1 (quoting observations of trial court judge).

*v. Laurence-David, Inc.*, the operation of collateral estoppel was denied only in the compensatory damage phase of the case.[59] Second, the fact that different reactions may result from the use of a product, or that a product may be used under different conditions, should prove unpersuasive in light of other mass-marketed product litigation. In the MER/29 cases, the only successive plaintiff products cases completely litigated, punitive damages were awarded although evidence showed that some, but not all, product users developed either cataracts, balding, or skin irritation, and obviously not all users were on the same dosage regimen.[60] Further, differences in the severity of injuries suffered by plaintiffs might not prevent the operation of collateral estoppel on the issue of punitive damages.[61] In *Robert v. Ford Motor Co.*,[62] the plaintiff's parents died when the fuel tank of their Pinto ruptured in a rear-end collision. The court held that punitive damages could be allowed in wrongful death cases as well as those where victims survived. Thus, the fact that in some suits the consumers died, while in others they were merely injured, should not prevent collateral estoppel on the issue of manufacturing misconduct. Finally, the distinction drawn by the court in *Williams v. Laurence-David, Inc.*,[63] between injuries occurring from various lots of a product seems largely irrelevant in the punitive damage phase of a case. Presumably a manufacturer has engaged in the same conduct with respect to all lots of a product—at least until litigation brings such misconduct to a halt. Thus, the doctrine of collateral estoppel may prove a boon to plaintiffs seeking punitive damages in mass-marketed product suits. The doctrine can clearly ease the plaintiffs' burden of proof, especially when amassing evidence of the defendant's conscious disregard of safety proves costly and time-consuming.

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59. 271 Or. 712, 534 P.2d 173 (1975). The use of collateral estoppel in the liability phase of products litigation was also recently discussed in Weisiger, *Collateral Estoppel and the Mass-Produced Product: A Proposal*, 15 NEW ENGLAND L. REV. 1 (1980).

60. Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d at 699, 60 Cal. Rptr. at 406.

61. Collateral estoppel was not invoked by plaintiffs in the reported cases on MER/29, as they were decided within a few months of each other. *See* note 44 *supra*.

62. 100 Misc. at 646, 417 N.Y.S.2d at 595 (plaintiff-heir must prove "maliciousness, wantonness, wilfulness, and depraved indifference in defendant's manufacturing the car with knowledge of the fuel tank defect"). But California does not permit punitive damages to be awarded to heirs in wrongful death cases. Stencel Aero. Eng'r. Corp. v. Superior Court, 56 Cal. App. 3d 978, 128 Cal. Rptr. 691 (1976); Pease v. Beech Aircraft Corp., 38 Cal. App. 3d 450, 113 Cal. Rptr. 416 (1974).

63. 271 Or. 712, 534 P.2d 173 (1975).

2. Policy arguments of successive plaintiffs.

A plaintiff arguing for punitive damages usually urges that there is a need to punish and deter the defendant's misconduct. In the case of a first litigant suing a single manufacturer in a mass-marketed product suit, such traditional arguments will probably suffice. In the event a punitive damage verdict obtains in the first lawsuit, however, the conventional punish and deter arguments may be less persuasive in the second suit, even though the availability of punitive damages may entice successive plaintiffs to litigate.

A products liability claim can be expensive and a compensatory award may not cover the costs of suit.[64] A subsequent plaintiff asking that punitive damages be awarded against the defendant manufacturer might argue for an exemplary award in at least the amount of his litigation expenses. A plaintiff whose compensatory award cannot cover his attorney's fees must by necessity pay his attorney out of his punitive damage award. A small minority of jurisdictions allow punitive damages only in the amount of costs of suit; punitive damages are awarded not to punish the defendant for his misconduct, but as additional compensation to the plaintiff for his counsel's fees and disbursements.[65] Under this system, even the last claimant in mass-marketed product litigation would be encouraged to litigate his case.[66]

64. Generally, it is improper to include attorneys' fees as part of exemplary damages. Viner v. Untrecht, 26 Cal. 2d 261, 273, 158 P.2d 3, 9 (1945). However, in the absence of any agreement between the client and his attorney, the attorney is entitled to be repaid for costs of suit, such as filing fees, witness fees, and jury fees. Cooley v. Miller & Lux, 156 Cal. 510, 525, 105 P. 981, 987 (1909). In actions for damages in personal injury suits, contingent fee contracts are common, whereby the attorney agrees to take his compensation in the form of a stated proportion of the amount recovered, if there is any recovery. Compensation in a contingent fee arrangement is generally one third the net amount of distribution to the plaintiff, plus reimbursement for advances of court costs. Hendricks v. Sefton, 180 Cal. App. 2d 526, 532, 4 Cal. Rptr. 218, 221 (1960); Eaton v. Thieme, 15 Cal. App. 2d 458, 461-62 (1936). It is evident that the contingent fee compensation is calculated on the entire distribution to the plaintiff; thus, attorneys' fees are paid out of a punitive damage award as well as out of compensatory awards in contingent fee situations.

65. *E.g.*, Doroszka v. Lavine, 111 Conn. 575, 578, 150 A. 692, 693 (1930). California does not limit punitive damage awards to the amount of attorneys' fees expended. But California jurists have recognized that other jurisdictions limit punitive damages as compensatory only. Taylor v. Superior Court, 24 Cal. 3d 890, 906 n.4, 598 P.2d 854, 863 n.4, 157 Cal. Rptr. 693, 703 n.4 (1979).

66. Some commentators have suggested that a punitive damage award should compensate for the amount of effort exerted by a litigant to establish and prove the misconduct of a defendant manufacturer. This theory recognizes that the initial plaintiff may expend enormous effort to document his punitive damage case, while subsequent plaintiffs may often take advantage of such initiative and "ride to favorable verdicts and settlements on the coattails of the first comers." Owen, *supra* note 11, at 1325. However, the award-reduction system appears problematic in several respects. First, a subsequent plaintiff relying on col-

A punitive damage award also operates to punish the defendant for the misconduct that endangered society.[67] A plaintiff might argue the need to remind the manufacturer that the public continues to disapprove of a flagrant disregard of the consumers' safety. A second punitive verdict might also affirm the validity of any previous awards.

The need for personal satisfaction may remain the subsequent plaintiff's most persuasive argument to the trier of fact for imposing a second punitive award against a single manufacturer. Such an award clearly functions as the litigant's private revenge, as well as compensation for losses he is unable to prove, or for which the law does not ordinarily provide recovery.[68]

### *B. The Defendant's Arguments*

A defendant manufacturer may oppose successive claims for punitive damages under a variety of theories. These include arguments that the manufacturer's conduct does not warrant a second award, or that the plaintiff has been sufficiently compensated by his actual damage award. Defendant manufacturers may also claim constitutional protections under the due process, double jeopardy, and commerce clauses, and may assert that multiple awards constitute cruel and unusual punishment. Further, defendants may contend that such awards precipitate bankruptcy.

#### 1. The defendant's policy arguments

Defendant manufacturers often argue against the assessment of successive awards on the premise that where a single wrongful act results in injury to many persons, successive punitive damage awards are illogical. Thus, while defendants may concede that punitive damages might be imposed on the ground of deterring future misconduct, they might argue it is unreasonable to assume that successive punitive damage awards will effect any greater deterrence than the first such award.

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lateral estoppel to establish the manufacturer's misconduct in his own case would have his punitive damage award substantially reduced because he would not be required to document his punitive damage case as fully as did the first. Thus, by inhibiting the possible invocation of collateral estoppel, the award-reduction system precludes the use of an effective tool to speed up litigation. Second, the award-reduction system interjects a cost-benefit decision in the midst of the traditional evidentiary determination with regard to punitive damages. It is questionable whether the jury, which usually determines if the evidence presented warrants a punitive award, is qualified to judge the quality as well as the quantity of a particular plaintiff's evidence, as the award-reduction system seems to require.

67. *See* text accompanying note 18 *supra*.

68. *See* note 64 *supra*.

Jurists have doubted the effectiveness of punitive damages in suits against business enterprises.[69] Judge Friendly in *Roginsky* recognized that it may prove impossible to impose a ceiling on punitive damage awards in hundreds of suits in different courts and that the result will be an aggregate of damages proving "catastrophic" to the defendant.[70]

Neither courts nor defendants have adopted Judge Friendly's criticism of multiple punitive damage awards. One court has stated that "it would require a substantial change in the law to hold that simply because there *might be* other suits filed against a defendant, punitive damages should not be allowed."[71] In *Grimshaw v. Ford*, Ford appealed the punitive damage verdict on the basis of excessiveness due to passion and prejudice on the part of the jury, rather than arguing the appropriateness of punitive damages.[72] In *Toole v. Richardson-Merrell Inc.*, the court stated that California Civil Code section 3294 establishes a right to punitive damages without discussing the difficulties created by multiple punitive awards.[73]

A defendant subject to many punitive damage verdicts arising out of a mass-marketed product may argue that compensatory awards in a significant number of suits are sufficient punishment.[74] Many large actual damage awards plus the costs of suit, including legal fees, along with the interruption in business, may drive the deterrence message home as effectively as any award labelled "punitive." The *Roginsky* court recognized this fact in the context of drug manufacturers, stating that "a manufacturer distributing a drug to many thousands of users under government regulation scarcely requires this additional measure [punitive damages] for manifesting social disapproval and assuring deterrence. Criminal penalties and heavy compensatory damages recov-

69. *See, e.g.*, Mattyatovszky v. West Towns Bus Co., 61 Ill. 2d 320, 326, 330 N.E.2d 509, 512 (1975) (punitive damages were not awarded against bus company for alleged willful and wanton conduct of its driver which caused death of passenger).

70. Rogninsky v. Richardson-Merrell, Inc., 378 F.2d at 841.

71. Vollert v. Summa Corp., 289 F. Supp. 1218, 1351 (D. Hawaii 1975) (products liability action by passenger injured in helicopter crash against designer and manufacturer of helicopter).

72. Grimshaw v. Ford, No. 19-77-61 (Orange County Super. Ct. Mar. 30, 1978).

73. 251 Cal. App. 2d at 713, 60 Cal. Rptr. at 413.

74. This argument has been made in punitive damage claims outside of products liability. Taylor v. Superior Court, 24 Cal. 3d at 902, 598 P.2d at 860, 157 Cal. Rptr. at 700 (1979) (Clark, J., dissenting) (drunk-driving case alleging punitive damages). *Contra*, Wangen v. Ford Motor Co., 294 N.W.2d 437, 451 (Wis. 1980) (intersection collision in which a 1967 Ford Mustang was rear-ended and fuel tank ruptured; court stated that multiple claims for compensatory damages are not a sufficient deterrent for the wrong-doer who might find it more economically advantageous to set aside funds for payment of claims than to cease misconduct).

erable under some circumstances even without proof of negligence should sufficiently meet these objectives. . . ."[75] Of course, the success of an argument that many compensatory verdicts, in and of themselves, sufficiently deter manufacturing misconduct depends upon whether evidence of these other verdicts would be admissible.[76]

A punitive damage award must be absorbed by the manufacturer as a cost of doing business, and paid out of profits or retained earnings.[77] When a manufacturer must pay numerous punitive damage verdicts, consumers at large may eventually bear the brunt of such awards in the form of higher prices. Thus, the claim that compensatory awards amply punish the manufacturer may appeal to a consumerist jury because compensatory awards need not be paid directly by the company.[78]

### 2. Constitutional protections

Due process and double jeopardy arguments have been rejected in products liability cases where punitive damages have been assessed.[79] Yet these constitutional protections, and others such as the cruel and unusual punishment doctrine and the commerce clause, appear applicable in the event of multiple punitive damage awards.

A single manufacturer faced with many punitive damage awards might argue that a statute such as California Civil Code section 3294 authorizing punitive damages[80] is unconstitutionally vague[81] for its

75. 378 F.2d at 840-41.

76. Wangen v. Ford Motor Co., 294 N.W.2d at 459-60 (jury permitted to consider compensatory and punitive damages in other cases involving injuries arising out of the same or similar product where evidence of defendant's wealth was admissible).

77. Insurance is not available for punitive damages as a matter of public policy. CAL. INS. CODE § 533 (Deering 1974); CAL. CIV. CODE § 1668 (Deering 1971); Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 415 P.2d 168, 54 Cal. Rptr. 104 (1966). *See generally Insurance Coverage of Punitive Damages*, 10 IDAHO L. REV. 263 (1974); Haskell, *The Aircraft Manufacturer's Liability for Design and Punitive Damages, The Insurance Policy and the Public Policy*, 40 J. AIR. L. & COM. 595 (1972). *Cf.* Wangen v. Ford Motor Co., 294 N.W.2d 437, 452 (Wis. 1980) (the court found unpersuasive the argument that a defendant might avoid the deterrent effect of punitive damages by passing along punitive losses to consumers in the form of increased prices).

78. Insurance for compensatory damages is commonly available. APPLEMAN, INSURANCE LAW AND PRACTICE § 4312 (1960).

79. *See* text accompanying note 92 *infra*.

80. CAL. CIV. CODE § 3294 (West Supp. 1981).

81. U.S. CONST. amend. V provides that "[n]o person shall be . . . deprived of life, liberty, or property without due process of law." U.S. CONST. amend. XIV provides that "no state shall . . . deprive any person of life, liberty, or property, without due process of law." The fundamental due process safeguard requires that legislation prohibiting or penalizing conduct must sufficiently describe that proscribed conduct. The void-for-vagueness

lack of standards by which the trier of fact can determine the appropriate size of the award.[82] As applied to punitive damages, the lack-of-guidelines problem strikes at the heart of the issue of whether punitive damages should be awarded at all.[83]

The United States Supreme Court has indicated that due process safeguards apply whenever the law deprives an individual of property or liberty for engaging in unascertainable prohibited conduct. In *Giacco v. Pennsylvania*,[84] the Supreme Court considered a state statute under which a defendant acquitted of a criminal charge could be assessed court costs if the jury found his behavior " 'reprehensible in some respects,' 'improper,' or outrageous to 'morality and justice,' " although not criminal beyond a reasonable doubt.[85] The Supreme Court struck down the statute for its failure to meet due process requirements

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standard has been applied to non-criminal as well as criminal statutes. *E.g.*, Arnett v. Kennedy, 416 U.S. 134, 158-59 (1974) (Lloyd-La-Follette Act, 5 U.S.C. § 7501, not overbroad or vague; employee dismissal from Civil Service under § 7501 upheld); Broadrick v. Oklahoma, 413 U.S. 601 (1973) (partisan political activities allegedly violated state's merit system act; Court rejected employees' argument that the act was unconstitutionally vague because "political activities" were not sufficiently described); Jordan v. De George, 341 U.S. 223, 229-32 (1951) (Court dismissed claim that immigration statute was unconstitutionally vague because of phrase requiring deportation for undefined "crimes of moral turpitude"). Although the vagueness doctrine ordinarily tests the description of proscribed conduct, courts have also applied the standard to the penalty prescribed in the statute. *E.g.*, United States v. Evans, 333 U.S. 483, 495 (1948) (penalty under immigration statute for harboring or concealing aliens held vague); United States v. Batchelder, 581 F.2d 626 (7th Cir. 1978), *rev'd*, 442 U.S. 114 (1979) (inconsistent sentence terms under statutes making interstate shipment of firearms a felony); Acunia v. United States, 404 F.2d 140, 143 (9th Cir. 1968) (statute lacking definition of incest and prescribed penalty unenforceable as to plaintiff); United States v. Hairston, 437 F. Supp. 33, 35-36 (N.D. Ill. 1977).

82. *E.g.*, Egan v. Mutual of Omaha Ins. Co., 24 Cal. 3d 809, 826, 598 P.2d 452, 461, 157 Cal. Rptr. 482, 491 (1979) (Clark, J., concurring and dissenting), *appeal dismissed*, 445 U.S. 912 (1980) (bad faith found in insurance company's failure to pay loss).

83. Justice Clark has claimed that there are no standards to determine when punitive damage awards are justified. Taylor v. Superior Court, 24 Cal. 3d at 902, 598 P.2d at 861, 157 Cal. Rptr. at 700 (Clark, J., dissenting). California's newly amended punitive damage statute addressed this problem by incorporating the following definitions:

> (1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or conduct which is carried on by the defendant with conscious disregard of the rights or safety of others.
>
> (2) "Oppression" means subjecting a person to cruel and unjust hardship in conscious disregard of that person's rights.
>
> (3) "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.

CAL. CIV. CODE § 3294(c) (West Supp. 1981).

84. 382 U.S. 399 (1965).

85. *Id.* at 404 (quoting Commonwealth v. Tilghman, 4 Serg. & Rawl. 127, 128 (Pa. 1818) and Baldwin v. Commonwealth, 26 Pa. 171, 172 (1856)).

because it was "so vague and standardless that it [left] the public uncertain as to the conduct it prohibits [and left] judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case."[86]

A single manufacturer faced with the imposition of multiple punitive damage verdicts should apply this reasoning to its own cases. By asserting that the jury lacks guidelines by which to assess the economic impact of a second or third punitive damage award, the defendant might convince the judge to withhold determination of the exemplary damage amount from the jury, if not to disallow punitive damages altogether.[87]

The contention that the double jeopardy[88] prohibition should prevent the imposition of multiple punitive damage awards has not succeeded in mass-marketed product litigation. Double jeopardy arguments have been posed when a defendant, punished for criminal conduct, became subject to punitive damages in a civil case arising out of the same misconduct.[89] But double jeopardy protections have been denied in such situations because "punitive damages in the plaintiff's tort judgment, . . . allowable for the private wrong to the individual rather than the accompanying wrong to the public, may effectively supplement the criminal law in punishing the defendant."[90] Punitive damages are considered separate and apart from punishment for criminal conduct. Thus, Richardson-Merrell's argument that, because it had been fined by the FDA for false reporting,[91] it would be subject to double jeopardy by the imposition of punitive damages, came to no avail in *Toole*. Relying on United States Supreme Court decisions, the

86. *Id.* at 402-03.

87. This position was argued in Memorandum, *supra* note 53, at 24. *See also* Maheu v. Hughes Tool Co., 569 F.2d 459, 480 (9th Cir. 1978) (punitive damages not violative of constitution in defamation suit).

88. U.S. Const. amend. V provides that "[n]o person shall be subject for the same offense to be twice put in jeopardy of life or limb . . . ."

89. In the early case of Brown v. Swineford, 44 Wis. 282, 28 Am. Rep. 582 (1898), the defendant claimed that allowing punitive damages in a civil suit alleging assault and battery placed him in double jeopardy by virtue of his prior criminal prosecution and fine. Indiana, for example, prohibits punitive damages if a defendant is open to criminal prosecution for the same act. This rule is rooted in Indiana common law beginning with Hudgson v. Taber, 5 Ind. 322 (1854). *See generally* Ford, *The Constitutionality of Punitive Damages*, DEFENSE RESEARCH INSTITUTE MONOGRAPH No. 15 (1969); Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1196 (1931).

90. Morris v. MacNab, 25 N.J. 271, 281, 135 A.2d 657, 663 (1957) (plaintiff fraudulently induced into bigamous marriage; $1,000 punitive damages awarded).

91. 18 U.S.C. § 1001 (1976) (authorizing a $10,000 fine for false, fictitious, or fraudulent statements or misrepresentations).

California appellate court ruled that the double jeopardy prohibition is not applicable in "purely civil actions . . . [and] the award of penal damages made under civil rules of procedure did not violate any constitutional right of appellant."[92]

A New York appellate court in one of the last Richardson-Merrell MER/29 cases has seemingly slammed the lid shut on the applicability of double jeopardy in mass-marketed product litigation. In *Ostopowitz v. Richardson-Merrell*,[93] the plaintiff was awarded $850,000 in punitive damages, subsequently reduced by the court to $100,000. Recognizing that the defendant had been subjected to previous punitive damage verdicts, the court addressed the double jeopardy issue. In the court's view, "it was at least highly questionable that fifth amendment and applicable state constitution provisions, insofar as they prohibit multiple jeopardy have any application to penalties imposed in civil actions."[94] Although the defendant was subject to repeated claims for punitive damages in hundreds of product liability actions, no violation of the constitutional prohibition against double jeopardy occurred, according to the court, because the identity of the plaintiff was different in each case. The court reasoned that "if a person by a single act commits a crime against two others he may be indicted and convicted for both crimes. By parity of reasoning, defendants may not escape punitive liability to one plaintiff because they have been held liable to another."[95]

Courts have refused to apply the double jeopardy prohibition in the context of mass-marketed product litigation, apparently overlooking the accepted quasi-criminal nature of punitive damage awards,[96] and the fact that such awards compensate the public at large. Punitive damages are said to fulfill society's need to expose and punish manufacturing misconduct which affects consumers.[97] Thus, the punitive damage concept contains the criminal law standard that a crime committed against a member of society is a crime committed against society as a whole.[98] One proponent of punitive damages has suggested that

92. 251 Cal. App. 2d at 717, 60 Cal. Rptr. at 148 (citing United States v. Regan, 232 U.S. 37 (1913), and United States v. Zucker, 101 U.S. 475 (1895)).

93. 157 N.Y.L.J., Jan. 11, 1967, at 21.

94. *Id.*

95. *Id.* (citation omitted).

96. The Supreme Court has stated that if the purpose of the law is punishment, the law is penal. Trop v. Dulles, 356 U.S. 86, 87 (1958).

97. *See* text accompanying notes 15 & 18 *supra*.

98. *See, e.g.*, 21 AM. JUR. 2d Criminal Law § 577 (1971); People v. Gardner, 56 Cal. App. 3d 91, 98, 128 Cal. Rptr. 101, 106 (1976), for discussions concerning the retributive aspect of punishment for a criminal's harmful acts against society.

the availability of punitive damages approximates criminal justice in the civil arena. A civil plaintiff plays "private prosecutor," and is rewarded by a "private fine" (in the form of punitive damages) for his public service in bringing the wrongdoers to justice.[99] Therefore, where the criminal aspect of punitive damages is recognized, a multiplicity of punitive damage verdicts against the same defendant can violate the double jeopardy principle that no man ought to be punished twice for one offense. Multiple punitive damage awards against a single manufacturer can "create a type of 'double jeopardy' whereby a defendant can be financially ruined by successive . . . punitive [damage] verdicts."[100]

Commerce clause[101] protections may be unique to punitive damages in mass-marketed product litigation. The defense in a recent asbestos suit[102] claimed that the California punitive damage statute[103] abridged the commerce clause in the event of many suits against a single manufacturer and constituted an impermissible regulation of interstate commerce, because it allowed repetitive and uncontrolled punishment for one course of conduct. The defense contended that multiple and undue burdens on interstate commerce were created which far outweighed ostensible local law benefits when a manufacturer could be subject to the punitive damage laws of other states. Various jurisdictions' punitive damage statutes would hinder a manufacturer's ability to compete effectively in the stream of commerce.[104] Thus, the threat to free-flowing interstate commerce occurs in the manufacturer's inability to formulate nationwide marketing decisions when it cannot ascertain how often it will be subject to punitive damage verdicts in products liability suits, or in what amounts. The asbestos manufacturer suggested that a state may still protect the welfare of its citizenry, but exert a lesser burden on a defendant manufacturer engaged in interstate commerce, by allowing the jury to consider past and potential punitive damage awards when determining a verdict.

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99. Owen, *supra* note 11, at 1287-88.

100. Dubois, *Punitive Damages in Personal Injury, Products Liability, and Professional Malpractice Cases: Bonanza or Disaster*, 43 INS. COUNSEL J. 344, 346 (1976).

101. U.S. CONST. art. 1, § 8, cl. 3, provides that "the Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." This grant has been interpreted as an exclusive Congressional power. Gibbons v. Ogden, 22 U.S. 1 (1824).

102. Memorandum, *supra* note 55.

103. CAL. CIV. CODE § 3294 (West Supp. 1981).

104. Memorandum, *supra* note 55.

The eighth amendment prohibition against cruel and unusual punishment[105] may also prevent the imposition of multiple punitive damage awards. In a civil fraud case, Justice Frankfurter stated that a "succession of separate trials for the enforcement of a great number of criminal sanctions . . . might be a form of cruelty or oppression . . . [and] the Constitution itself has guarded against such an attempt 'to wear out the accused by a multitude of cases with accumulated trials' . . . by prohibiting cruel and unusual punishments."[106]

### 3. Bankruptcy

The argument that many punitive damage awards might precipitate a company's bankruptcy has found its most sympathetic reception in *Roginsky v. Richardson-Merrell*.[107] There the court noted that the side effects from the drug MER/29 had yielded at least seventy-five cases filed in New York alone, with several hundred suits filed elsewhere, and the other MER/29 litigation had resulted in $850,000 and $500,000 in separate punitive verdicts.[108] Judge Friendly appreciated the impact that multiple punitive damage awards would have on the defendant, stating that a "sufficiently egregious error as to one product can end the business life of a concern that has wrought much good in the past and might otherwise have continued to do so in the future . . . ."[109]

Apart from raising the specter of a ruined defendant, the *Roginsky* opinion recognized the "punitive overkill" concept. This idea has its most anomalous effect where subsequent plaintiffs, each with valid actual damages, may be deprived of any recovery whatsoever from the defendant, for the simple reason that previous punitive awards left the defendant with no funds for paying other claims.

Some commentators have believed that the bankruptcy problem is largely theoretical because very few single-product multiple litigation cases result in punitive damage verdicts.[110] A recent case suggests otherwise. In *Grimshaw v. Ford Motor Co.*, the jury recently awarded 125 million dollars in punitive damages against Ford.[111] Although the

105. U.S. CONST. amend. VIII provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

106. 317 U.S. at 556 (Frankfurter, J., concurring) (suit against electrical contractors for collusive bidding).

107. 378 F.2d at 832.

108. *Id.* at 834 n.3.

109. *Id.* at 841.

110. *E.g.*, Owen, *supra* note 11, at 1324-35.

111. No. 19-77-61 (Orange County Super. Ct., Mar. 30, 1978).

court subsequently reduced the award to 3.5 million dollars, it is clear that several awards of this magnitude in addition to compensatory damages could bankrupt a company.[112] The ramifications for smaller business concerns are evident. A small company, whose conduct in marketing a single defective product is eventually found "malicious" or "in conscious disregard of the consumer's safety," could be financially ruined by even one large punitive award; several such verdicts would make bankruptcy certain. Multiple punitive awards can thus wreak havoc in the business community, driving out small competitors who cannot afford to pay such amounts.[113] One author has recognized that if the bankruptcy of a manufacturer would result from imposing a second or third verdict, punitive damages should not be available in addition to a compensatory award.[114] This suggestion, however, overlooks the argument that one deserving plaintiff is no more entitled to recover punitive damages than is another, and does not suggest whether the judge or jury would determine if the pending award could push the defendant over the edge.

### *C. Judge or Jury-Fashioned Awards*

The lack of control and management in awarding punitive damages exacerbates the problem of multiple exemplary verdicts. Traditionally, a punitive damage award lies in the discretion of the jury once the plaintiff has shown that his injury resulted from fraud or reckless disregard of safety on the defendant manufacturer's part. California Civil Code section 3294 provides no guidelines as to the proper amount of punishment.[115] The jury may set damages at any amount it deems sufficient to punish and deter the defendant. The Model Uniform Product Liability Act, set up by the United States Department of Commerce for use by the states, also retains the jury's customary function, providing that the trier of fact may impose a punitive damage verdict if the claimant proves by clear and convincing evidence that the harm suffered resulted from the product seller's reckless disregard for the

112. *See* text accompanying note 138 *infra* for a discussion of the comparability of punitive damage verdicts with a company's budget.

113. One writer arguing for the abolition of punitive damages in products liability cases also recognized the problem of large punitive damages precipitating bankruptcy. In his view, "elimination of small and moderate businesses imposes enormous costs upon society via tax losses, increased welfare payments and dislocation of employees. The resultant anti-competitive conditions caused by liquidating businesses will mean that only the big and strong can survive." Hoenig, *supra* note 4, at 204.

114. Owen, *supra* note 11, at 1325.

115. CAL. CIV. CODE § 3294 (West Supp. 1981).

safety of product users and others harmed by the product.[116]

The only available rein on jury-determined multiple punitive damage awards is the exercise of control by the trial court.[117] Punitive damage awards may be reduced if the amount appears to have been based on prejudice or partiality, or if the amount is so unreasonable as to shock the conscience of the court.[118] At the trial level, the judge may be restricted to admonishing the jury, as was the trial judge in *Roginsky*, to consider the " 'potentially wide effect of the actions of the corporation, and, on the other hand, . . . the potential number of actions similar to this one to which that wide effect may render the defendant subject.' "[119]

A jury instruction concerning the effect of proliferating punitive damage awards might restrict the jury's propensity to impose excessive amounts.[120] However, such instructions would probably do little to alleviate a jury's psychological reaction in cases where a punitive damage claim is legitimate. Moreover, as Judge Friendly reasoned in *Roginsky*, "it is hard to see what even the most intelligent jury would do with [an instruction explaining the possibility of other awards], [the jury] being inherently unable to know what punitive damages, if any, other juries in other states may award other plaintiffs in actions yet untried."[121]

The lack of guidelines by which the jury can determine the eco-

116. 44 Fed. Reg. 62714, 62748 (1979).

117. *E.g.*, Wangen v. Ford Motor Co., 97 Wis. 2d 260, 294 N.W.2d 437, 457 (1980) (court held that the potential for economically disastrous multiple punitive damage awards in mass-disaster litigation can be avoided through judicial controls to ensure that the penalty inflicted is not disproportionate to the harm done or contrary to the public interest).

118. Reynolds v. Pegler, 123 F. Supp. 36 (S.D.N.Y. 1954), *aff'd*, 223 F.2d 429 (2d Cir.), *cert. denied*, 350 U.S. 846 (1955); 22 AM. JUR. 2d *Damages* § 266 (1965).

119. Roginsky v. Richardson-Merrell, 378 F.2d at 839. Judge Friendly noted that, in the *Ostopowitz* case, the judge refused an instruction on the potential number of punitive claims. Given the tenor of the *Roginsky* opinion, Friendly appears vaguely critical of the *Ostopowitz* judge for eliminating the court's vestige of control over irrational jury actions. Judge Friendly may have correctly perceived the sentiment of the jury, for the *Ostopowitz* court was forced to reduce the $850,000 punitive award to $100,000, recognizing that if

> every other jury in a case against this same manufacturer believed that it was to be the final arbiters of the punishment, defendants could be destroyed by having other assets parcelled out, in grotesquely disproportionate amounts among a number of individuals who have already been fully compensated for their injuries. Perhaps this would not be unconstitutional. It would be worse than that. It would be unwise.

157 N.Y.L.J., Jan. 11, 1967, at 21, col. 3.

120. The traditional instruction to a jury with respect to punitive damages is that the amount to be awarded lies within the sound discretion of the trier of fact, as long as it is exercised without passion or prejudice. CALIFORNIA JURY INSTRUCTIONS BOOK OF APPROVED JURY INSTRUCTIONS (BAJI) No. 14.71 (1977 Revision).

121. 378 F.2d at 839.

nomic impact of multiple punitive awards argues for only a threshhold determination by the jury as to whether the evidence warrants a punitive damage award. The United States Interagency Task Force on Products Liability has recommended that the trial judge decide the amount of punitive damages, while the jury merely determine whether the defendant manufacturer engaged in sufficiently reckless or intentional misconduct.[122] The Model Uniform Product Liability Act also incorporates this concept, and outlines a number of factors for the trial judge to consider.[123]

Allowing the trial judge to determine the punitive damage amount comports with the quasi-criminal nature of punitives. In criminal cases, the jury never imposes a sentence upon the defendant whom it convicts.[124] Thus, in a products case where punitive damages are to be awarded against a defendant manufacturer, the judge, because of his experience in sentencing, should impose the amount. Although he has heard the same evidence as the jury, the judge may be less swayed psychologically. He can balance the evidence with the awareness that the defendant may have already paid punitive damages in other actions involving the same product. Such a scenario would eliminate evidence regarding the defendant's financial status from the actual damage phase of the suit, evidence which might otherwise predispose a jury to

122. U.S. DEP'T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCTS LIABILITY VII-78-9 (1977).

123. The Model Uniform Product Liability Act, 44 Fed. Reg. 62714, 62748 (1979), provides as follows:

> [B] If the trier of fact determines that punitives should be awarded, the court shall determine the amount of those damages, in making this determination, the court shall consider:
> 1. The likelihood that at the relevant time, serious harm would arise from the product seller's misconduct;
> 2. The degree of the product seller's awareness of that likelihood;
> 3. The profitability of the misconduct to the seller;
> 4. The duration of the misconduct and any concealment of it by the product seller;
> 5. The attitude and conduct of the product seller upon discovery of the misconduct and whether the conduct has been terminated;
> 6. The financial condition of the product seller;
> 7. The total effect of other punishment imposed or likely to be imposed on the product seller as a result of the misconduct including punitive damage awards to persons similarly situated to claimant and the severity of criminal penalties to which the product seller has been or may be subjected;
> 8. Whether the harm suffered by the claimant was also the result of the claimant's own disregard for personal safety.

*Id.* at 62748.

124. CAL. PENAL CODE § 12 (West 1970) provides in pertinent part that there is a "duty upon the court authorized to pass sentence, to determine and impose the punishment prescribed." See also People v. Navarro, 7 Cal. 3d 248, 497 P.2d 481, 102 Cal. Rptr. 137 (1972), for a discussion of a judge's discretion in sentencing.

make a higher compensatory damage award.[125] Where the judge determines the punitive damage award, a separate trial on the issue of punitive damages becomes unnecessary. At present, in many cases, a second jury considers the amount of punitive damages to be awarded.[126] Moreover, the trial judge's decision, like the jury's, may always be subject to appellate review if either party is dissatisfied.[127]

## IV. PROPOSED SOLUTIONS

Even if the judge, rather than the jury, determines the amount of a punitive damage award to be imposed against a defendant manufacturer, the problem remains that in mass-marketed product litigation individual plaintiffs each recover awards far in excess of their actual damages. The fact that the manufacturer's reckless misconduct also damages the consuming public cannot be reconciled with the fact that punitive damage awards represent a windfall to individual plaintiffs.[128]

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125. In California, financial information is discoverable and admissible in punitive damages cases. Coy v. Superior Court, 58 Cal. 2d 210, 222-23, 373 P.2d 457, 463-64, 23 Cal. Rptr. 393, 399 (1962); Cobb v. Superior Court, 99 Cal. App. 3d 543, 547-48, 160 Cal. Rptr. 561, 564 (1979).

126. CAL. CIV. PROC. CODE § 1048(b) (Deering 1973) provides that "[t]he court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any cause of action . . . or of any separate issue . . . ." Defendants may move to sever the punitive damage issues from the compensatory damage phase of a products liability case in order to eliminate evidence coming in of the manufacturer's "malicious" conduct and the manufacturer's net worth, which is admissible on the issue of punitive damages. *See* note 125 *supra*. Such evidence might predispose the jury to impose a higher compensatory award. California courts have approved this practice. In Stencel Aero Eng'r v. Superior Court, 56 Cal. App. 3d 978, 128 Cal. Rptr. 691 (1976), involving an aircraft accident, the court recognized the possibility of undue prejudice to the defendant aircraft manufacturer where the claim for $10,000,000 in punitive damages was connected to a $200 compensatory claim for property damage, and suggested severing the punitive damages issues to protect against such prejudice. *Id.* at 988, 128 Cal. Rptr. at 696. Punitives were not awarded in a separate trial on the issue of punitive damages in the recent asbestos case of Beauregard v. Johns-Manville, No. C137466 (L.A. Super. Ct., June 6, 1980).

127. *E.g.*, Finney v. Lockhart, 35 Cal. 2d 161, 164, 217 P.2d 19, 21 (1950). Amounts awarded for punitive damages are not generally disturbed on appeal unless the sum appears to be excessive or to have resulted from passion or prejudice. Brenner v. Haley, 185 Cal. App. 2d 183, 188, 8 Cal. Rptr. 224, 227-28 (1960). A reviewing court considers the entire record including the evidence to determine whether a punitive award is excessive as a matter of law, when the award is greatly disproportionate to the defendant's net worth, Ferraro v. Pacific Fin. Co., 8 Cal. App. 3d 339, 351, 87 Cal. Rptr. 226, 233 (1970), or when the award does not approximate the actual harm suffered. Walker v. Signal Co., 84 Cal. App. 3d 982, 997, 149 Cal. Rptr. 119, 126 (1978). These standards are applied when juries have determined an award, but presumably could be extended to cases where a trial judge imposes a disproportionately high award.

128. The court in Wangen v. Ford Motor Co. acknowledged a "certain equitable ring" in

It has been recognized that a punitive damage award from the defendant constitutes unjust enrichment of the plaintiff and, unlike fines paid to a public treasury for public use, similar "fines paid to private persons will not be similarly used."[129] Continuing the punitive damage system in mass-marketed product cases requires a solution which balances each plaintiff's right to recover punitive damages with the right of defendant manufacturers to be protected from financial ruin,[130] while preserving the traditional deterrence/punishment elements of punitive damages.

The lack of guidelines for judges and juries to follow when assessing the economic impact of many punitive damage verdicts might require removing the determination of punitive damage awards from the judicial forum. The formation of a regulatory agency to impose fines when a defendant manufacturer recklessly disregards the consumer's safety is a possible solution. A federal or state agency could be charged with the responsibility of protecting consumers; millions of dollars are already appropriated for similar purposes.[131] Fines exacted which reasonably relate to the amount of damage caused by a manufacturer's defective product would maintain the traditional punitive damage standard, while a fine sufficiently publicized could mark the manufacturer with the necessary public disapproval of his acts.

To date, government regulatory agencies policing manufacturers' misconduct have proved ineffective. Problems in defining the requisite improper conduct and in developing an agency's fact-finding procedure to ferret out such misconduct often lead an agency to adopt the product standards already worked out in an industry.[132] Moreover, limited disciplinary authority renders such agencies impotent. For example, while the Federal Trade Commission was established to advocate the public interest concerning commercial practices,[133] it cannot punish wrongdoers or afford a remedy to injured private citizens.[134] It may merely issue "cease and desist" orders which the corporation may ap-

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Ford's argument that punitive damages should not be a windfall to those plaintiffs who win the race to the courthouse. 294 N.W. 2d at 454.

129. Taylor v. Superior Court, 24 Cal. 3d at 902, 598 P.2d at 860, 157 Cal. Rptr. at 700 (Clark, J., dissenting).

130. *Id.* at 902-06, 598 P.2d at 860-63, 157 Cal. Rptr. at 700-03.

131. The Environmental Protection Agency, 42 U.S.C. §§ 4321-4361 (1977), was established pursuant to appropriations authorization, 42 U.S.C. § 4327 (1977).

132. STONE, *supra* note 17, at 96.

133. Davies v. Arthur Murray, Inc., 224 Ill. App. 2d 141, 260 N.E. 2d 240 (1970) (dance student sued under Federal Trade Commission Acts to recover money paid on contracts for unused hours of dancing instruction).

134. Bartner v. Carter, 405 A.2d 194, 201 (Me. 1979) (footnotes omitted) (fraud action

peal to the appellate courts within sixty days after the order has been imposed.[135]

Forming government agencies to police product misconduct, however, might cause legislative intervention in the traditional judicial domain.[136] To maintain the courts' role in exacting punishment, it has been suggested that in mass-marketed product cases all compensatory claims should be litigated first. The measurement and assessment of punitive damages would follow, with a single award against the defendant manufacturer to be equitably distributed among the plaintiffs.[137] Under this sytem, a punitive damage award could be tailor-made to fit the manufacturer's budget, so that the defendant would still feel the "sting" but would not be threatened by bankruptcy.[138] Judge Friendly advocated such a course, wishfully speculating that "[i]f there were any way in which all cases could be assembled before a single court . . . it might be possible for a jury to make one award to be held for appropriate distribution among all successful plaintiffs, although even as to this the difficulties are apparent."[139]

Judge Friendly's approach eliminates the unjust enrichment of individual plaintiffs, yet overlooks the need to punish on behalf of society. The most attractive solution combines a single punitive damage assessment with a reallocation of punitive damage payments away from individual litigants. The United States Interagency Task Force on Products Liability has suggested that punitive damage awards should be paid to a source other than plaintiffs, such as a state fund which could be employed for product liability victims who cannot ob-

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brought against real estate brokers under state unfair practice acts comparable to Federal Trade Commission provisions).

135. 15 U.S.C. § 45(b) (1970).

136. *See, e.g.*, Chamber of Commerce of Minneapolis v. F.T.C., 13 F.2d 673, 683 (8th Cir. 1926) (Chamber of Commerce conducting grain market allegedly instigated misleading publications and statements).

137. Hoffman v. Sterling Drug, Inc., 374 F. Supp. 850, 856-57 (D.C. Pa. 1974) (dictum).

138. STONE, *supra* note 17, at 102.

139. 378 F.2d at 839-40 n.11. Judge Friendly's speculation has recently become reality in the case of In re N. Dist. of Cal. "Dalkon Shield" IUD Products Liability Litigation, No. C802213SW (N.D. Cal. 1980), where a nationwide class of plaintiffs will be certified to determine whether punitive damages will be awarded against the manufacturer of the device. The jury will determine for all parties whether to award punitive damages and, if so, in what amount. Following separate litigation of the compensatory damage phase, the single punitive damage award will be apportioned among all plaintiffs who have successfully established that the IUD injured them. The court determined that the creation of the class was necessary to preserve the manufacturer's ability to pay claims. *See* text accompanying notes 104-14 *supra*. In a conversation with this author, an attorney for some of the plaintiffs indicated that the class certification order will be appealed on constitutional and jurisdictional grounds.

tain recovery.[140] This solution would eliminate the faults and preserve the best aspects of the punitive damage system as applied to mass-marketed product litigation. The manufacturer would still pay for his misconduct, and society would still be compensated, but no single plaintiff could recover a windfall at the expense of subsequent litigants, or at the cost of financially destroying the manufacturing concern.

## V. CONCLUSION

Where products defective in their manufacture or design result from a manufacturer's conscious or reckless disregard of the consumers' safety, punitive damages are often sought in products liability cases. In mass-marketed product litigation, plaintiffs must convince the trial court that multiple punitive awards against a single manufacturer are warranted. Prior knowledge of a defect accompanied by a failure to rectify it, or fraudulent misrepresentations of a product's safety, may prove sufficient manufacturing misconduct to justify imposing multiple punitive damage awards. Collateral estoppel may ease subsequent plaintiffs' burden of proof, in the event a manufacturer has engaged in such reprehensible conduct with respect to all lots of the product. Multiple verdicts may be justified to compensate plaintiffs for litigation expenses, or to remind the manufacturer that the public continues to disapprove of his misconduct.

Defendants have traditionally opposed the imposition of punitive damages in products liability suits, insisting that such cases should focus on the product, rather than on the manufacturer. The punishment and deterrent effects fade with the imposition of many punitive damage awards, whereas several large actual damage verdicts along with accompanying costs of suit may prove to be a sufficient deterrent.

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140. U.S. DEP'T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCTS LIABILITY VII-78-9 (1977). This fund could be used to compensate victims when recovery would be precluded by the defendant's insolvency or when claims would be barred by statutes of limitations. But the trial court in In re Paris Air Crash, 427 F. Supp. 701 (C.D. Cal. 1977), *overruled on other grounds*, 622 F.2d 1315 (9th Cir. 1980), said:

> California has . . . spoken . . . in unequivocal language in CC § 3294 permitting punitive damages, without limitation in tort cases for the purpose of punishing and deterring tortious conduct . . . .
>
> Punitive damages are addressed . . . to the *nature and gravity of the invasion of plaintiff's right*. They are meant to guarantee that such conduct on the part of a tortfeasor will not be repeated against this plaintiff.

*Id.* at 705, 706 (emphasis in original). The case of Wangen v. Ford Motor Co., 294 N.W.2d at 454, followed similar reasoning. The *Wangen* court noted that proposals which advocated the turning of punitive damage awards over to the public treasury ignore the fact that such awards represent an incentive for claimants to spend the additional time and effort to uncover wrongful conduct.

Defendants' constitutional objections involving due process and double jeopardy have failed in mass-marketed product litigation. The California punitive damage statute has withstood "void-for-vagueness" challenges and the double jeopardy prohibition extends only to criminal prosecutions. Whether multiple punitive damage verdicts amount to cruel and unusual punishment or transgress the commerce clause remains to be tested in future cases. The manufacturer's imminent bankruptcy may prove the most compelling reason for declining to impose multiple punitive awards.

Judges and juries may find the management and control of punitive damages in mass-marketed product litigation increasingly difficult in light of recent product liability developments. For example, California has adopted the "industry-wide" liability theory, under which a plaintiff may sue all manufacturers producing a generic product.[141] In the event punitive damages are appropriate, assessment procedures in the first such suit, much less in subsequent suits, appear incapable of accurate determination. Further, the recent discovery of toxic shock syndrome in tampon users promises many suits brought by victims who are certain to seek punitive damages against the manufacturers.[142]

When the burdens of proving the validity or invalidity of multiple punitive damage claims become too great, perhaps litigants and courts alike will look to the legislatures for a solution that will allow public sanctions against the manufacturing industry while at the same time allowing for protection of the production process.

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141. Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 612, 607 P.2d 924, 163 Cal. Rptr. 132 (1980). The California Supreme Court held that, in the absence of proof that the manufacturer was not making the product at the time the plaintiff was injured by it, each manufacturer's liability will be apportioned according to its market share of the product. *Id.* at 612, 607 P.2d at 942, 163 Cal. Rptr. at 150.

142. Plaintiff Linda Imboden has sued Proctor and Gamble, Inc., for $5 million in punitive damages, alleging that the manufacturer knew its tampon product was hazardous. NEWSWEEK, Sept. 15, 1980, at 84.