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LITIGATING CLAIMS FOR PUNITIVE DAMAGES: THE VIEW FROM THE FRONT LINE

*Arvin Maskin**

I. OVERVIEW

Awards for punitive damages have long been the subject of considerable debate and controversy. Nearly every state has a statute or case law authorizing punitive damages.[1] Regardless of whether or not awards for such damages are empirically on the rise, there is no doubt that the possibility of an extraordinary punitive damages award influences the dynamics of personal injury litigation by increasing plaintiffs' opportunities and defendants' exposure. As one commentator recently observed in connection with the proposed tobacco settlement, "[E]veryone agrees that the potential for sky-high punitive damage awards in individual injury suits immensely strengthened [plaintiffs'] bargaining power."[2] The fact that the vast majority of cases settle before trial does not reduce the impact of punitive damages on the decision whether to settle.[3] Moreover, the fact that higher courts have reversed or reduced a great many punitive damages awards[4] is of little consolation to defendants. It does, however, show how often juries are getting it wrong, which is not necessarily

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1. *See* David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 8 (1982); Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 FORDHAM L. REV. 37, 44 (1983) (finding that all but four states authorize punitive damages awards).

2. Peter Passell, *Economic Scene: The Split Over Punitive Awards in Getting the Bad Guys*, N.Y. TIMES, July 10, 1997, at D2.

3. *See* Seltzer, *supra* note 1, at 91.

4. *See generally* Passell, *supra* note 2, at D2 (noting that the potential for large punitive damages awards functions as leverage for plaintiffs when negotiating a settlement).

their fault. Also, punitive damages appear to have expanded beyond their traditional intentional tort roots to become a common feature in virtually all significant products liability cases. The remark of a former president of the Association of Trial Lawyers of America illustrates the current trend: "We almost always include a count for punitive damages."[5] It should also be noted that insurance may not be available to cover punitive damages.[6]

One particular area in which there has been a lot of punitive damages activity is mass tort litigation.[7] This litigation usually involves alleged injuries from exposure to or ingestion of a toxic substance.[8] Such litigation has arisen in connection with mass-marketed products, such as asbestos,[9] tobacco,[10] pesticides,[11] food products,[12] cosmetics,[13] pharmaceuticals,[14] industrial solvents,[15] and building products.[16] It has also arisen from exposures resulting from the release of substances into the environment, such as with Exxon Valdez,[17] Times Beach,[18] Love Canal,[19] Woburn,[20] Agent Orange,[21]

5. Owen, *supra* note 1, at 54 n.258.

6. *See* St. Paul Surplus Lines Ins. Co. v. International Playtex, Inc., 777 P.2d 1259 (Kan. 1989). The court held that a tampon manufacturer that paid $10 million in punitive damages to a man whose wife died from toxic-shock syndrome was not entitled to reimbursement from its insurance company. *See id.* at 1261, 1270-71. The court found that Kansas public policy does not permit insurance coverage of punitive damages. *See id.* at 1270.

7. *See* Seltzer, *supra* note 1, at 37-41.

8. *See, e.g., id.* at 37-38.

9. *See, e.g., In re* Asbestos Litig., 90 F.3d 963 (5th Cir. 1996).

10. *See, e.g.,* Castano v. American Tobacco Co., 160 F.R.D. 544 (E.D. La. 1995).

11. *See, e.g.,* Sterling v. Velsicol Chem. Corp., 855 F.2d 1188 (6th Cir. 1988) (contamination from chlorinated hydrocarbon pesticides).

12. *See, e.g.,* Johnson v. Gerber Prods. Co., 949 F. Supp. 327 (E.D. Pa. 1996) (misleading baby food advertisements).

13. *See, e.g., In re* Silicone Gel Breast Implants Prods. Liab. Litig., 887 F. Supp. 1469 (N.D. Ala. 1995).

14. *See, e.g., In re* A.H. Robins Co., 880 F.2d 709 (4th Cir. 1989) (injuries stemming from defective Dalkon Shield device).

15. *See, e.g., Sterling*, 855 F.2d at 1192 (ultrahazardous dry and liquid chemical waste).

16. *See, e.g.,* Passell, *supra* note 2, at D2 (noting damages against lead paint manufacturers).

17. *See In re* Exxon Valdez, 767 F. Supp. 1509 (D. Alaska 1991).

18. *See* Bacon v. United States, 810 F.2d 827 (8th Cir. 1987).

19. *See In re* Love Canal Actions, 460 N.Y.S.2d 850 (1983).

20. *See* Anderson v. W.R. Grace & Co., 628 F. Supp. 1219 (D. Mass. 1986).

21. *See In re* "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762 (E.D.N.Y. 1980).

Stringfellow,[22] and Bhopal.[23] These types of plaintiffs seek huge awards, including, invariably, punitive damages. The outcome of such litigation is usually extremely difficult to predict. Worse still is the fact that courts permit the multiple imposition of punitive damages for the same course of conduct.[24]

Recently, awards of punitive damages have captured the attention of the bar, media, and the public.[25] The long-standing constitutional debate over punitive damages has also intensified. Beginning in 1991,[26] the Supreme Court heard a series of four cases in which it outlined boundaries beyond which an award of punitive damages would violate the Due Process Clause of the Fourteenth Amendment.[27] In its first three decisions, the Court repeatedly left open the question of substantive due process, focusing instead on procedural issues such as the adequacy of jury instructions and appellate review.[28] Although the Supreme Court acknowledged in these first three decisions that a punitive damages award could violate due process merely by being too high, the Court did not find any of these awards to be "grossly excessive."[29]

22. *See* United States v. J.B. Stringfellow, 661 F. Supp. 1053 (C.D. Cal. 1987).

23. *See In re* Union Carbide Corp. Gas Plant, 809 F.2d 195 (2d Cir. 1987).

24. *See, e.g.*, Seltzer, *supra* note 1, at 39.

25. *See* Passell, *supra* note 2, at D2.

26. The earliest challenges to punitive damages awards did not preserve the issue of due process for appeal; therefore, the issue could not be addressed by the Court. However, in dicta, various justices recognized that "the Due Process Clause forbids damages awards that are 'grossly excessive.'" Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 280 (1989) (Brennan & Marshall, JJ., concurring). *See also id.* at 283 ("[N]othing in the Court's opinion forecloses a due process challenge to awards of punitive damages or the method by which they are imposed . . . .") (O'Connor & Stevens, JJ., concurring in part and dissenting in part). In *Browning-Ferris*, the appellant challenged a $6 million punitive damages verdict on the ground that the award violated the Eighth Amendment's Excessive Fines Clause. The Court upheld the award, holding that the clause did not apply to civil cases between private parties. *See id.* at 259-60. *See also* Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 88 (1988) (O'Connor & Scalia, JJ., concurring in part and concurring in the judgment) (stating that the "wholly standardless discretion" of Mississippi juries over the "severity of punishment appears inconsistent with due process").

27. *See* BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589 (1996); Honda Motor Co. v. Oberg, 512 U.S. 415 (1994); TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991).

28. *See Honda Motor Co.*, 512 U.S. at 420-21; *TXO Prod. Corp.*, 509 U.S. at 471 (Scalia & Thomas, JJ., concurring); *Pacific Mutual Life Ins. Co.*, 499 U.S. at 18-19.

29. *See Honda Motor Co.*, 512 U.S. at 420-21; *TXO Prod. Corp.*, 509 U.S. at 462; *Pacific Mutual Life Ins. Co.*, 499 U.S. at 23-24.

On May 20, 1996, a five to four majority of the Supreme Court issued an opinion which finally attempted to provide some meaningful standards to use in judging the excessiveness of a punitive damages award. In *BMW of North America, Inc. v. Gore*,[30] the Court determined that the size of the punitive damages award violated the defendant's substantive due process rights. The Court evaluated the award's excessiveness by examining three "guideposts": the reprehensibility of the defendant's conduct, the ratio of the punitive award to the harm or potential harm caused by the conduct, and the difference between the verdict and civil or criminal penalties for comparable conduct.[31]

The Supreme Court's three guideposts are neither novel nor precise. Many states had incorporated one or more of these factors in their analysis of the appropriateness of punitive damages awards long before *BMW* was decided.[32] And the excessiveness inquiry that the guideposts contemplate is still highly subjective, fact-intensive, and case-specific. In spite of the apparent lack of substantive guidance, the Supreme Court's three guideposts have sent a message to state and federal courts that they have a duty to ensure that punitive damages awards do not violate a defendant's substantive due process rights. These decisions will influence the litigation strategies of plaintiffs and defendants.

The increased receptivity of courts to punitive damages claims and the possibility of exorbitant jury awards provide the incentive for both plaintiff and defense counsel to develop effective strategies for handling punitive damages claims. For example, under what circumstances should plaintiffs' lawyers seek punitive damages? How should a defendant organize the defense to a punitive damages claim? How do punitive damages claims affect case management decisions, motion practice, discovery, presentation to the jury, and settlement negotiations? How does one develop a case of mitigating circumstances?

In the limited space of this Essay, it is impossible to discuss all the important considerations associated with litigating punitive damages. These considerations include, for example, using case management orders, conducting fact investigations, making motions for summary judgment and motions in limine, dealing with "bad"

30. 116 S. Ct. 1589 (1996).

31. *See id.* at 1598-99.

32. *See Browning-Ferris Indus. of Vt., Inc.*, 492 U.S. at 281.

documents or testimony, humanizing the company, making an appellate record and preserving constitutional challenges, instructing a jury, making post-trial motions, settling, coordinating cases in state and federal court, and bringing punitive damages class actions. Instead, this Essay will highlight a number of practical considerations in litigating punitive damages claims from the plaintiff and defense perspectives.

II. BASIC PRINCIPLES

Generally speaking, punitive damages are awarded in addition to compensatory damages in order to punish a defendant who commits an aggravated or outrageous act against the plaintiff(s) and to deter the defendant and others from similar misconduct in the future.[33] For an act to warrant punitive damages, it must be done with some element of wantonness or disregard for its probable harmful consequences.[34] Whether a plaintiff is able to prove that a defendant acted outrageously will depend on the definition given by a particular state for the terms comprising outrageous behavior, as well as the standard of proof for punitive damages. Yet an absence of clear standards has made it difficult to determine when punitive damages will be awarded. The initial step in assessing a punitive damages claim is to determine whether the state in which the case has been brought permits a plaintiff to recover punitive damages. Nearly all states appear to allow punitive damages; although a number of states have placed limits on the amount of such damages, and may vary in other significant respects as well.[35]

III. PUNITIVE DAMAGES IN PRACTICE

A. What Type of Conduct Are We Talking About?

Here is a partial list of the type of conduct found to warrant the imposition of punitive damages:

- Falsifying test results[36]
- Knowing violation of safety standards[37]

33. *See* Owen, *supra* note 1, at 7-8; Seltzer, *supra* note 1, at 42-43.
34. *See* Seltzer, *supra* note 1, at 45.
35. *See* Owen, *supra* note 1, at 8-9; *see also* Seltzer, *supra* note 1, at 44-45 (noting that all but four states provide for punitive damage awards).
36. *See* Tetuan v. A.H. Robins Co., 738 P.2d 1210, 1240 (Kan. 1987).
37. *See* Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1216 (6th Cir. 1988).

- Availability of a safer, more economical and technically feasible alternative course of conduct[38]
- Ignoring previous complaints or lawsuits[39]
- Management knowledge of the likelihood of injury[40]
- Violating the law[41]
- Refusing to take corrective measures[42]
- Failing to warn of known dangers which are not obvious[43]
- Evidence of cover-up[44]
- Lacking corporate policies and procedures in the face of obvious risks[45]
- Departing from standards in the industry[46]
- Ongoing pattern of misconduct[47]
- Where the magnitude of the *potential* harm flowing from the misconduct is great.[48]

In *Sterling v. Velsicol Chemical Corp.*,[49] for example, the defendant acquired rural land and used the site as a landfill for chlorinated hydrocarbon pesticide by-products from its chemical manufacturing facility.[50] Before purchasing the landfill site and depositing any chemicals, Velsicol failed to conduct hydrogeological studies to assess the site's soil composition, the water flow direction or the location of the local water aquifer.[51] Velsicol also failed to drill a monitoring well to discover any ongoing contamination.[52] Between October 1964 and June 1973, Velsicol deposited 300,000 fifty-five-gallon steel drums holding ultrahazardous liquid chemical waste.[53] During this

38. *See* O'Gilvie v. International Playtex, Inc., 821 F.2d 1438, 1446 (10th Cir. 1987).
39. *See Sterling*, 855 F.2d at 1216.
40. *See id.* at 1216-17.
41. *See id.*
42. *See Tetuan*, 738 P.2d at 1240.
43. *See id.*
44. *See id.*
45. *See* West v. Johnson & Johnson Prods., Inc., 174 Cal. App. 3d 831, 852, 220 Cal. Rptr. 437, 448 (1985).
46. *See O'Gilvie*, 821 F.2d at 1446.
47. *See Sterling*, 855 F.2d at 1216-17.
48. *See id.* at 1216.
49. 855 F.2d 1188 (6th Cir. 1988).
50. *See id.* at 1192.
51. *See id.*
52. *See id.*
53. *See id.*

time, Velsicol also deposited hundreds of fiberboard cartons containing ultrahazardous dry chemical waste in the landfill.[54]

Local residents, in addition to county, state, and federal authorities, became concerned about the environmental impact of Velsicol's activities shortly after the corporation began its disposal operations at the landfill site.[55] In 1967, in response to these concerns, the United States Geological Survey (USGS) prepared the first report on the potential contamination effects of the chemicals deposited into the landfill.[56] This report indicated that portions of the surface and subsurface environments next to the disposal site became contaminated when the chlorinated hydrocarbons seeped into the subsoil.[57] The USGS concluded that both the local and contiguous ground water faced danger of contamination even though the chemicals had not yet reached the local water aquifer.[58] After the publication of the 1967 USGS report, Velsicol doubled the size of the landfill disposal site from twenty to forty acres.[59] However, by state order, Velsicol ceased disposal of all toxic chemicals by August 21, 1972, and disposal of all other chemicals by June 1, 1973.[60]

In assessing its award of punitive damages, the district court found:

> [V]elsicol's actions in creating, maintaining and operating its chemical waste burial site, with superior knowledge of the highly toxic and harmful nature of the chemical contaminants it disposed of therein, and specifically its failure to immediately cease dumping said toxic chemicals after being warned by several state and federal agencies . . . constituted gross, wilful and wanton disregard for the health and well-being of the plaintiffs, and therefore is supportive of an award of punitive and exemplary damages.
>
> The Court further concludes that Velsicol's attempt to allege that plaintiffs were guilty of assuming the risk, or were guilty of contributory negligence is without factual basis and so outrageous as to subject the defendant to punitive damages.

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54. *See id.*
55. *See id.*
56. *See id.* at 1192-93.
57. *See id.* at 1193.
58. *See id.*
59. *See id.*
60. *See id.*

> In addition the Court further finds that Velsicol has also attempted to shift the liability and causation for the psychological disorders suffered by the plaintiffs to the local, state and federal authorities, claiming that the defendant cooperated with them in their attempts to monitor the situation and persuade Velsicol to limit its activities. They contend that news coverage of this case specifically caused the post-traumatic stress disorder. The Court concludes that these attempts by Velsicol are also so outrageous that punitive damages should be imposed.[61]

The Court of Appeals upheld the award of punitive damages based on the district court's finding "that Velsicol violated state law in establishing, utilizing and refusing to cease disposal operations at the landfill disposal site," and that it was "within the district court's discretion to consider defendant's disregard of state law in making its [punitive damages] award."[62] However, the court reversed and remanded the punitive damages award to the extent it was based on the positions taken by Velsicol at trial.[63]

In *Tetuan v. A.H. Robins Co.*,[64] the court upheld a jury award of $1.7 million in compensatory damages and $7.5 million in punitive damages to a plaintiff injured by the Dalkon Shield intrauterine contraceptive device.[65] The court did not find the punitive award to be excessive, and concluded that it did not shock the collective conscience of the court, where substantial evidence showed:

> - Defendant knew its product was not safe or effective.[66]
>
> - Defendant misled both doctors and consumers through misleading advertising and promotional campaigns, and never retracted its claims even though it privately acknowledged them as invalid.[67]
>
> - Defendant put money into "favorable" studies, tried to neutralize any critics and commissioned studies on the product which it dropped or concealed when the results were unfavorable.[68]

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61. *Id.* at 1216 (alterations in original) (quoting Sterling v. Velsicol Chem. Corp., 647 F. Supp. 303, 323-24 (W.D. Tenn. 1986)).
62. *Id.* at 1216-17.
63. *See id.*
64. 738 P.2d 1210 (Kan. 1987).
65. *See id.* at 1238, 1246.
66. *See id.* at 1240.
67. *See id.*
68. *See id.*

- After having punitive damages imposed against it in one case, the defendant "did not recall the product; it did not warn users of the Dalkon Shield's dangers; it did not warn physicians. It certainly did not warn [plaintiff] or the physicians who treated her. Instead, it reacted to the modest punitive damages award [granted in a previous case] by promptly attempting to destroy all evidence of its knowledge of the Dalkon Shield's dangers, consigning hundreds of documents to the draft furnace."[69]

In *O'Gilvie v. International Playtex, Inc.*,[70] a suit against a tampon manufacturer alleging that use of its tampons caused death from toxic shock syndrome, plaintiffs presented sufficient evidence to submit the question of punitive damages to the jury.[71] The court found that:

- Defendant deliberately disregarded medical reports and studies linking high-absorbency tampon fibers with toxic shock syndrome while other manufacturers withdrew or modified their high-absorbency products as a result of the information.[72]
- Defendant "deliberately sought to profit from [that] situation by advertising the effectiveness of its high-absorbency tampons when it knew other manufacturers were reducing the absorbency of their products."[73]
- Although defendant's tampon contained a warning that complied with FDA standards, this did not preclude punitive damages "when there is evidence sufficient to support a finding of reckless indifference to consumer safety."[74]

B. Practical Considerations: The Plaintiff's Perspective

The first question plaintiffs' counsel ask themselves is whether, based upon an investigation of the facts, there is sufficient evidence to justify an award of punitive damages under the substantive law of their particular jurisdiction.[75] Second, plaintiffs' counsel needs to consider the difficulty of amending the complaint. Some jurisdictions

69. *Id.* at 1246.
70. 821 F.2d 1438 (10th Cir. 1987).
71. *See id.* at 1445-46.
72. *See id.* at 1446.
73. *Id.*
74. *Id.*
75. *See* Seltzer, *supra* note 1, at 44-47.

allow amendment as a matter of right up until the filing of the pretrial order.[76] This influences whether the claim needs to be included at the outset or after facts are developed more extensively in discovery. Third, an allegation of punitive damages may have an influence on the discovery to be conducted. For example, depending on the jurisdiction, the financial circumstances of the parties may not be relevant. Consequently, they may not be discoverable absent allegations of punitive damages, where they may become relevant. A fourth factor from the standpoint of the plaintiff in deciding whether to include and pursue a punitive damages claim is its potential effect on settlement. In some cases, it may enhance the possibility of settlement, particularly when there have been awards of punitive damages in similar cases. Alternatively, there may be cases in which the allegations of punitive damages may deter the possibility of settlement by raising the stakes too high, particularly in the early stages of the litigation. Another consideration is the effect of insurance coverage on a punitive damages claim. Plaintiffs' counsel has to ask themselves, can I collect the judgment and, if so, should I be alleging conduct that might play into an exclusion under the applicable insurance policies? Most policies have an exclusion for intentional misconduct,[77] and if such conduct is alleged in order to justify an award of punitive damages, they may find coverage excluded.

Obviously, plaintiffs' counsel seeks to develop the kind of aggravating circumstances and facts described above to establish a basis for presenting the issue of punitive damages before a jury.

Plaintiffs' counsel also has to consider whether there is any advantage to bifurcating the issue of punitive damages. Generally, plaintiffs oppose bifurcation.[78] Some states actually require that the issue of punitive damages be tried in a separate phase.[79] In any event, plaintiffs' counsel are likely to face a defense motion calling for bifurcation. Their primary interest will be to get the benefit of

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76. *See, e.g.*, GA. CODE ANN. § 9-11-15(a) (Harrison 1994).

77. *See generally* CAL. INS. CODE § 533 (West 1993 & Supp. 1997) (stating that the law is based on two public policy objectives: (1) to prohibit indemnification for intentional misconduct and (2) to prevent encouragement of willful tortious acts).

78. *See* Jennifer M. Granholm & William J. Richards, *Bifurcated Justice: How Trial-Splitting Devices Defeat the Jury's Role*, 26 U. TOL. L. REV. 505, 516 (1995) (finding that "bifurcation may deprive plaintiffs of their legitimate right to place before the jury the circumstances and atmosphere of the entire cause of action") (quoting *In re* Beverly Hills Fire Litig., 695 F.2d 207, 217 (6th Cir. 1982).

79. See CAL. CIV. CODE § 3295(d) (West 1997); GA. CODE ANN. § 51-12-5.1(d)(1) (Harrison 1994); N.J. STAT. ANN. § 2A:58C-5(b) (West 1987).

presenting evidence of defendant's misconduct in their case-in-chief, with the hope of convincing a jury that such conduct warrants punitive damages. In a separate phase, plaintiffs' counsel then puts on additional evidence, as state law permits, such as the financial circumstances of the parties, which might not otherwise be admissible. Some plaintiffs prefer to first overcome the hurdle of whether to award punitive damages, and then separately have the jury simply decide the size of the award. The concern from the perspective of plaintiffs' counsel is the possibility of a jury compromise in the amount of punitive damages. As discussed below, however, if bifurcation or trifurcation avoids the subject of defendant's conduct in the first phase, such as limiting the case to the existence of a product defect or causation, then plaintiffs will, in all likelihood, vigorously oppose bifurcation. Thus, such tactical decisions, and the rulings of the court on the structure of the litigation, could have a tremendous impact on the outcome of the trial and on settlement dynamics.

C. Practical Considerations: The Defendant's Perspective

The defending attorney's first response to a complaint alleging a count for punitive damages is to make certain that the client understands the complaint must be taken seriously. This is not always easy, especially at the outset of the litigation. Conceptually, there are both internal and external responses to such a claim on the defendant's part. Internally, the defendant should not do anything that could be construed as a cover-up with respect to both documents and witnesses. Also, the defendant should not throw away documents or discharge people who have knowledge of pertinent events.

Externally, the lawyer must determine the applicable law. What standards will the court impose? The law of punitive damages varies from state to state in terms of burden of proof, the structure of the proceedings, jury instructions and appellate review. In some cases, particularly early in the proceedings, it may not be readily apparent which law applies. The lawyer will want to determine if motions to dismiss the punitive damages count can be made at an early stage in the proceedings. Should the underlying liabilities for compensatory damages be stipulated? Also, are there other jurisdictions in which similar claims are being pursued against the defendant or other defendants?

After making certain no documents or potential evidence is lost, and after ascertaining the applicable law, the next step is best described as litigation "triage." This begins with a thorough fact

investigation, which is an exercise in self-discovery involving document review, witness interviews, and perhaps expert consultation. During the litigation triage, one must examine many issues. Do any of the aggravating factors described above exist? Is there a danger of multiple litigation in different jurisdictions? Is any government investigative body likely to become involved? Are there possible criminal penalties? Are there allegations of a conspiracy with other co-defendants? What did the defendant do after the nature and extent of the problem at issue became known to them? Who was aware of the problem within the company, and at what level? Was the problem at issue generally known outside the company? What was the nature and *potential* magnitude of the harm arising from the alleged conduct? Was any internal risk/benefit comparison performed?

While evidence of a cover-up is bad, doing nothing may be equally bad. The defendant's attorney must look for and develop the facts that reflect the defendant's steps to remedy the problem at issue, such as making design changes, conducting additional testing, issuing more expansive warnings or notifying any government agency.

On a separate track, the lawyer should consider whether or not to move to bifurcate or trifurcate the case, so that the subject of punitive damages and related evidence is isolated and deferred. For example, in the context of a products liability case, it may be possible to structure the case so that the first issue is simply whether a particular product is defective or not, and whether the product caused the injury. This way, it may be possible to isolate the issue of defendant's conduct or the quantum of damages. In some instances, there may be things defense counsel wants the jury to know about the client, but not when they are deciding whether or not the product was defective. Also, depending upon the outcome of this first phase, you may never get into the subject of the defendant's conduct.

Another issue that may arise is whether to move for summary judgment on the issue of punitive damages. After discovery is complete and it appears that, even taking plaintiff's evidence as true and drawing all inferences in the plaintiff's favor, there is insufficient evidence of willful and wanton conduct, then a motion for summary judgment may be appropriate. The key is not to bring the motion too soon and to also know your judge.

Another important aspect to the defense of a punitive damages claim is to humanize the corporate defendant. This may involve bringing in the history of the corporation, detailing the number of

employees and introducing the jury to corporate employees who appear very likable and trustworthy. The demeanor of witnesses is extremely important in a jury's assessment of whether or not there was willful and wanton conduct. If a jury thinks a person is otherwise trustworthy, they may be willing to forgive a mistake. Careful preparation of the corporate witnesses in this regard is crucial. The idea is to bring out those facts that demonstrate to the jury that this is a responsible corporate entity, with thoughtful employees, and to get them to think of the corporation in terms of its employees rather than some non-human entity. In fact, if you have an in-state employee who has had anything to do with the facts at issue in the case and that employee appears decent and responsible, serious thought should be given to using the employee in the course of the trial.

In most mass tort cases, plaintiffs allege that defendants have withheld information concerning the alleged health risks associated with exposure to or the use of a particular product or substance.[80] More often than not, the defense to the underlying claims will lay the groundwork for the successful defense of the punitive damages claim. Where a defendant can demonstrate that all of the essential information—supposedly withheld from the public generally and from the plaintiff in particular—was contained in the public literature or otherwise disclosed to learned intermediaries, government agencies, or contained in warnings that complied with industry custom and standards, an award of punitive damages should be inappropriate. Plaintiffs will also try to make use of old internal corporate documents speculating about potential risks associated with particular materials. Where the issue of causation in such cases is still in dispute to this day, or where the current technology clearly points to a lack of causation, punitive damages should not be available. It is critical to make certain that the jury appreciates the evolution of scientific knowledge and techniques, and that the defendant's conduct must be judged in light of both the relevant time period and foreseeable circumstances. For example, plaintiffs invariably seek to exploit internal industrial hygiene files that address the use of various materials in the manufacturing process to show the company's knowledge of the

80. *See, e.g.*, Kehm v. Proctor & Gamble Mfg. Co., 724 F.2d 613 (8th Cir. 1983); Wolf v. Proctor & Gamble Co., 555 F. Supp. 613 (D.N.J. 1982); West v. Johnson & Johnson Prods., Inc., 174 Cal. App. 3d 831, 220 Cal. Rptr. 437 (1985); Nina G. Stillman & John R. Wheeler, *The Expansion of Occupational Safety and Health Law*, 62 NOTRE DAME L. REV. 969, 1005-06 (1987) (regarding asbestos and chemical substances).

risks to end users of a product. The point is, the very same facts plaintiffs use to establish the elements of their case-in-chief serve as the basis for attempting to impose punitive damages.

This is just the tip of the iceberg in terms of pertinent considerations for successfully handling punitive damages claims. Anyone practicing in this area must become a diligent student of prior punitive damages cases and those being litigated everyday throughout the country.

IV. CONCLUSION

This Essay intends only to serve as a sensitizer to the unique and formidable challenges of litigating punitive damages claims today. Given the substantive and tactical variables surrounding the prosecution or defense of punitive damages claims, especially in the mass tort context, the stakes could not be higher, and the need for thoughtful and aggressive planning could not be greater.