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From Punishment to Annihilation: Engle v. R.J. Reynolds Tobacco Co.—No More Butts—Punitive Damages Have Gone Too Far

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FROM PUNISHMENT TO ANNIHILATION: *ENGLE V. R.J. REYNOLDS TOBACCO CO.*—NO MORE BUTTS—PUNITIVE DAMAGES HAVE GONE TOO FAR

I. INTRODUCTION

Last fall, a Florida jury returned a $145 billion punitive damages verdict against the R.J. Reynolds Tobacco Company[1] and several other major tobacco companies. That jury rejected the argument by the tobacco industry that an award of such magnitude would bankrupt the industry.[2] Whether the defendants' financial argument was correct or not, a $145 billion award[3] is colossal and raises questions as to whether such awards are constitutional or justified as a matter of public policy.

Punitive damages are not typical tort law damages. Typical tort law damages are compensatory in nature and attempt to restore plaintiffs to the position they would have been in had their injuries never occurred.[4] Unlike compensatory damages, which attempt to

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1. *See* R.J. Reynolds Tobacco Co. v. Engle, No. 94-02797, 1999 Fla. App. LEXIS 13055, at *1 (Fla. Dist. Ct. App. Sept. 17, 1999), *vacating*, No. 94-02797, 1999 Fla. App. LEXIS 11937, at *1 (Fla. Dist. Ct. App. Sept. 3, 1999); *see also* Laura Parker & Deborah Sharp, *Sentiment on Tobacco Shifts Jurors in Florida Smokers' Case Show Disdain for the Industry*, USA TODAY, July 17, 2000, at 3A (reporting that this amount was the result of an aggregated punitive damages award determined by the jury in a class action lawsuit brought by individual smokers against several tobacco companies).

2. *See* Myron Levin & Henry Weinstein, *Florida Judge Affirms Massive Tobacco Award*, L.A. TIMES, Nov. 7, 2000, at C1.

3. *See id.* (stating the official amount of the punitive damages verdict was $144.8 billion, however, to simplify this figure, I will round up to $145 billion for the remainder of this Comment).

4. *See* Kimberly A. Pace, *The Tax Deductibility of Punitive Damage Payments: Who Should Ultimately Bear the Burden of Corporate Misconduct?*, 47 ALA. L. REV. 825, 836 (1996).

compensate the injured party for both economic and noneconomic loss, the purpose of punitive damages is somewhat more analogous to the principles behind criminal law—which are "to punish reprehensible conduct and to deter its future occurrence."[5] Punitive damages awards essentially serve the same purpose as fines and penalties, which are imposed "to punish or deter conduct that violates public policies of the state or federal government."[6] In addition to this specific deterrence factor, punitive damages are often used to send a social message of general deterrence. The imposition of punitive sanctions "signal[s] to the entire community that certain socially harmful behaviors will not be tolerated."[7]

For years, courts have pinpointed these ideals as the purposes behind awarding punitive damages,[8] yet it has never been suggested that these awards should be able to destroy or liquidate defendants completely. As a result of changes in punitive damages law and practice, there has been an increase in both the magnitude and frequency of punitive damages awards. For example, before 1976, there were only three reported appellate court decisions upholding punitive damages awards in product liability cases, and on average the punitive damages were minor in comparison to the compensatory damages awarded.[9] However, since the late 1970s, there has been an "unprecedented [increase in both the amounts and the] numbers of punitive awards in . . . mass tort situations."[10] As a result of this phenomenon, it seems the purpose of punitive damages awards is progressing from punishment to annihilation.[11]

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5. Victor E. Schwartz et al., *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 BROOK. L. REV. 1003, 1004 (1999) (quoting Banker's Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 87 (1988) (O'Connor, J., concurring in part and concurring in judgment)).

6. Pace, *supra* note 4, at 838.

7. Thomas Koenig & Michael Rustad, *"Crimtorts" as Corporate Just Deserts*, 31 U. MICH. J.L. REFORM 289, 315 (1998).

8. *See, e.g.*, Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851) (recognizing the propriety of awarding punitive damages).

9. *See* Schwartz et al., *supra* note 5, at 1009 & n.34.

10. *Id.* at 1009.

11. For a discussion of the opposing viewpoint see Jerry J. Phillips, *Multiple Punitive Damage Awards*, 39 VILL. L. REV. 433, 453 (1994). Phillips states that there is no punitive damages crisis in this country and that "[i]nsofar as a defendant feels oppressed by multiple punitive damages awards . . . it al-

This Comment explains how the Supreme Court has treated the issue of punitive damages in recent lawsuits. More particularly, it addresses whether it is appropriate for courts to impose massive aggregated damages awards. Since it is likely that the *Engle* matter will reach the United States Supreme Court, this Comment suggests how the Court should approach the question of how large a punitive award may be.

Part II of this Comment addresses the recent increase in punitive damages claims and the amounts of punitive damages judgments returned against corporate defendants. Part III discusses the *Engle v. R.J. Reynolds Tobacco Co.* case, the most recent damages class action lawsuit where the jury returned a record breaking punitive damages verdict. Part IV proposes, in light of Supreme Court precedent and policy rationales, that the *Engle* verdict should be overturned. Part V suggests possible reforms for punitive damages law, in an effort to prevent the ever-increasing amounts of punitive damages verdicts from threatening the denial of recovery to future deserving plaintiffs, as well as the threat of liquidation of corporate defendants.

II. INCREASE IN PUNITIVE DAMAGES AWARDS AGAINST CORPORATE DEFENDANTS

In the wake of a new millennium where our world thrives on job opportunities, consumer products and services, and the revenue of large corporations, it would be in our nation's best interest to protect corporate defendants, yet this has not occurred. Instead, along with the increase in punitive damages awards in general, has come a rise in the number of cases and punitive damages awards against sizeable corporate defendants. In one of the recent landmark punitive damages cases, *Pacific Mutual Life Insurance Co. v. Haslip*,[12] the Supreme Court upheld a punitive damages award against a corporate defendant that was four times the amount of the compensatory damages award.[13] Although the Court upheld the amount of the punitive award, it expressed some concern for the corporate defendant, noting that the award "may be close to [crossing] the line . . . of

ways has the option of bankruptcy." *Id.*

12. 499 U.S. 1 (1991).

13. *See id.* at 23.

constitutional impropriety."[14] Punitive damages awards are often challenged on the basis that they potentially deprive defendants of their property without due process of law, thereby violating the Due Process Clause of the Fourteenth Amendment.[15]

A few years later, however, the Court handed down a huge strike against corporate defendants in *TXO Production Corp. v. Alliance Resources Corp.*[16] Here, the Court held a ten million dollar punitive damages award against a corporate defendant in a slander of title action was not so grossly excessive as to violate due process, even though it was 526 times larger than the compensatory damages award.[17] If the punitive damages award in *Haslip*, which was only four times the compensatory award, was "close to crossing the constitutional line," then certainly a ten million dollar punitive damages award—which is over five hundred times the actual damages award—should have categorically crossed the line. By upholding this award, the Court simply cast aside years of state court decisions recognizing that punitive damages should bear some proportion to the actual damages sustained, as a fundamental issue of fairness.[18] Although this was not the case here, and the Court refused to draw a "mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable,"[19] a plurality of justices agreed that a grossly excessive and unreasonable punitive damages award would violate the Due Process Clause of the Fourteenth Amendment.[20]

The Supreme Court in this case, however, seemed to express no mercy for the corporate defendant. This is clearly demonstrated by the Court's conclusion: "The punitive damages award in this case is certainly large, but in light of the amount of money at stake . . . and the [corporation's] wealth, we are not persuaded that the award was

14. *Id.* at 23-24.

15. *See* U.S. CONST. amend. XIV, § 1 (The text of the amendment states: "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.").

16. 509 U.S. 443 (1993).

17. *See id.* at 443, 459.

18. *See id.* at 459.

19. *Id.* at 458 (citation omitted).

20. *See id.*

so 'grossly excessive.'"[21] The majority's cursory treatment of the possible effect of the defendant corporation's wealth on the excessive amount of the punitive award appears to expose the Court's own potential bias against large corporate defendants. Similarly, when the defendant corporation pointed out that the jury's consideration of its wealth may have increased the risk of prejudice against large corporations, the Court simply stated, "the 'financial position' of the defendant [is] one factor that [can] be taken into account in assessing punitive damages."[22] However, the Court seemed to turn a blind eye to the fact that although a defendant's wealth may have been *one* factor utilized in determining a punitive damages award, it should not have been the *predominant factor*, as it may have been here.

Justice O'Connor's dissent criticizes the Court's failure to uphold its promise stated in *Haslip*—to police the potential arbitrariness, caprice, and prejudice that appears to have led to such a large award in *TXO Production Corp.*[23] O'Connor censures the dramatically irregular and shocking amount of the punitive damages verdict, stating it should at the least "raise a suspicious judicial eyebrow."[24] Her glaring dissent centers around the criticism that the monstrous size of the punitive damages award can only be explained by "the jury's raw, redistributionist impulses stemming from antipathy to a wealthy, out-of-state, corporate defendant."[25] Considering that the jury was instructed to consider TXO's massive wealth, this may have encouraged them to transfer some of the large corporation's impressive wealth to the smaller and more sympathetic plaintiffs.[26]

Justice O'Connor's dissent in *TXO Production Corp.* points to what may be one reason for the increase in the size and amounts of punitive damages against corporate defendants—jury bias.[27] Our system entrusts ordinary citizens to sit as jurors and to make profoundly important determinations. Juries may often use large punitive damages verdicts to express their personal biases against vastly

21. *Id.* at 462.
22. *Id.* at 464.
23. *See id.* at 473-74 (O'Connor, J., dissenting).
24. *Id.* at 481 (O'Connor, J., dissenting).
25. *Id.* at 468 (Kennedy, J., concurring).
26. *See id.* at 490 (O'Connor, J., dissenting).
27. *See id.* at 490-91 (O'Connor, J., dissenting).

wealthy "Goliath" corporations.[28] How can jurors instructed as to the deterrent purposes of punitive damages escape the prejudicial influence of information displaying a defendant corporation's net worth? These cases often appear to the common juror to be a battle between a feeble, injured plaintiff with limited funds and an abstract corporate defendant with very deep pockets. Juries may feel a sense of retribution as well as a need to correct social ills stemming from the inequality in wealth distribution between needy plaintiffs and large corporate defendants.[29] Since, "[a]rbitrariness, caprice, passion, bias and even malice can replace reasoned judgment and law as the basis for jury decisionmaking," modern judicial safeguards have been enacted to prevent this from occurring.[30] Although limiting jury instructions and judicial remittur exist to attempt to prevent such bias, it can nonetheless seep through the cracks as it may have in *TXO Production Corp.*

Another potential reason for the recent increase in both the size and the frequency of punitive damages awards may be due to the creation and emergence of modern mass tort litigation, particularly the use of the class action lawsuit. A class action lawsuit creates an efficient way to bring together many plaintiffs and defendants in a single litigation that binds all the parties involved.[31] The history of the class action lawsuit can be traced to the seventeenth century English "bill of peace."[32] This was a procedural device that allowed an action to be brought by or against representative parties when three requirements were met: (1) the number of people involved was too large to permit joinder, (2) all members of the group possessed a joint interest in the issue being adjudicated, and (3) the named parties adequately represented the interests of those present.[33] The bill of peace serves as the basis for the modern class action rule utilized in

28. *See* Schwartz et al., *supra* note 5, at 1021.

29. *See TXO Prod. Corp.*, 509 U.S. at 490-92 (O'Connor, J., dissenting).

30. *Id.* at 474.

31. *See* JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS AND OTHER MULTIPARTY DEVICES 26 (1995).

32. *See* JOHN J. COUND ET AL., CIVIL PROCEDURE: CASES AND MATERIALS 683 (7th ed. 1997).

33. *See id.*

federal courts today—Rule 23 of the Federal Rules of Civil Procedure.[34]

Rule 23 establishes that before a class action can proceed, the class or group of plaintiffs bringing the suit must meet four main requirements to be certified—numerosity, commonality, typicality, and adequacy of representation.[35] Numerosity requires that the size of the class is so large that joinder of all members would be impracticable.[36] Similar to the English bill of peace, a commonality of questions of law or fact must exist amongst all members of the class.[37] The typicality requirement dictates that the questions of law or fact of the representative parties must also be typical of those of the class.[38] Finally, the party representing the class must fairly and adequately protect the interests of the class.[39]

Rule 23 creates three types of class actions known as 23(b)(1), 23(b)(2), and 23(b)(3) class actions. Rule 23(b)(1) allows necessary use of the class action device to avoid prejudice, either to the class party or the nonclass party, that might be caused by instituting individual actions.[40] Rule 23(b)(2) enables class action suits for injunctive or declaratory relief.[41] Rule 23(b)(3), the "damages" class action, that is the focus of this Comment, permits multiple claims for monetary damages.[42] This last provision is often used in adjudicating mass torts. In a 23(b)(3) class action, two additional prerequisites must be met.[43] "First, questions of law or fact common to the class members must 'predominate' over any questions affecting only individual class members. Second, the court must find that a 'class action is superior to other available methods for the fair and efficient adjudication of the controversy.'"[44]

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34. Rule 23 was initially codified in 1938, but it was substantially revised in 1966 to provide clearer guidelines for determining when the class action format is appropriate. *See* WEINSTEIN, *supra* note 31, at 134.

35. *See* COUND ET AL., *supra* note 32, at 688-93.

36. *See id.* at 690.

37. *See id.*

38. *See id.*

39. *See id.*

40. *See id.* at 691.

41. *See id.* at 692.

42. *See id.*

43. *See id.*

44. *Id.*

One of the main purposes of class action lawsuits is to promote judicial efficiency and to increase access to courts by allowing aggregation of a multitude of individual claims.[45] The class action device can potentially benefit both plaintiffs and defendants. It can enable plaintiffs who may not have sufficient claims, or the financial backing to bring cases individually, to have their day in court by pooling their resources with others enabling them to sue collectively.[46] Similarly, defendants can potentially save time and money by litigating multiple claims in one suit. Increased access to courts leads to more judgments against tortfeasors, which permits class actions to further promote judicial efficiency by deterring defendants from engaging in widespread harmful conduct.[47]

The advent of mass tort cases, many of which are litigated as class actions, has resulted in an increase in punitive damages claims against corporate defendants.[48] By allowing aggregation of plaintiffs who may not have had sufficient financial claims to make fighting a corporation worthwhile, the class action has helped to bridge the gap between wealthy defendant corporations and individual plaintiffs.[49] It has essentially given plaintiffs a leg up in the legal process by allowing them to have more bargaining power against their often larger and wealthier opponents. However, when considering that a class action allows the issuance of a single damages award that is to be shared amongst hundreds or thousands of plaintiffs, the size of this aggregated award may often have crippling effects on corporate defendants as a result of attempting to accommodate too many plaintiffs at one time. Though the mass tort class action is undeniably an efficient method for managing and redressing several plaintiffs' claims in one lawsuit, the benefits of the efficiency of issuing an aggregated damages award should not be achieved at the cost of potential corporate destruction.

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45. *See* Recent Cases, *Developments in the Law: The Paths of Civil Litigation*, 113 HARV. L. REV. 1755, 1809-10 (2000) [hereinafter *Developments in the Law*].

46. *See id.* at 1810.

47. *See id.* at 1809-10.

48. *See* Schwartz et al., *supra* note 5, at 1008.

49. *See Developments in the Law*, *supra* note 45, at 1809.

III. THE UNPRECEDENTED VERDICT OF *ENGLE V. R.J. REYNOLDS TOBACCO CO.*[50]

On October 31, 1994, the Circuit Court of Dade County Florida certified a landmark products liability class action lawsuit brought by individual smokers against several major tobacco companies.[51] The defendants in the action were R.J. Reynolds Tobacco Co., Philip Morris Inc., Lorrilard Tobacco Co., American Tobacco Co., Brown & Williamson Tobacco Corp., Liggett Group, Dosal Tobacco Corp., the Council for Tobacco Research U.S.A., and the Tobacco Institute.[52] The plaintiff class originally certified included "[a]ll United States citizens and residents, and their survivors, who have suffered, presently suffer or have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine. The class specifically exclude[d] officers, directors and agents of the [d]efendants."[53] On the defendants' interlocutory appeal, the Florida District Court of Appeals for the Third Circuit affirmed the class certification but restricted the class to Florida citizens and residents, rather than including all United States citizens and residents.[54] The court reasoned that "[a]lthough there is nothing inherently wrong about certifying a national class in a state court action . . . [since this] class contains so many members from so many different states . . . [it should be limited as] it threatens to overwhelm the resources of a state court . . . ."[55] The court ultimately affirmed the certification of the modified class and rejected the defendants' appeal challenging the commonality requirement necessary to certify a class stating that "the basic issues of liability common to all members of the class will clearly predominate over the individual issues."[56]

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50. Engle v. R.J. Reynolds Tobacco Co., No. 94-08273 (Fla. Cir. Ct. July 14, 2000).

51. *See* Ronni E. Fuchs, *State Rulings Show Florida Court Out of Step in Tobacco Class Actions*, TOBACCO INDUSTRY LITIG. REP., Sept. 8, 2000, at 9; *Judge Outlines Issues for Second Phase of Engle Trial*, TOBACCO INDUSTRY LITIG. REP., Aug. 27, 1999, at 3 [hereinafter *Judge Outlines Issues*].

52. *See* R.J. Reynolds Tobacco Co. v. Engle, 672 So. 2d 39, 39 (Fla. Dist. Ct. App. 1996).

53. *Id.* at 40.

54. *See id.* at 42.

55. *Id.*

56. *Id.* at 41.

The jury trial was separated into phases and was designated to focus on the plaintiffs' conduct and the defendants' conduct separately. Phase I of the trial, which began on July 6, 1998, and ended one year later, set out a series of findings—almost all of which were adverse to the defendants.[57]

On July 7, 1999, Phase I of the trial ended as the jury returned "the first verdict against tobacco companies in a class action brought on behalf of smokers."[58] In Phase II of the trial, the jury was to determine a lump sum punitive damages award for all class members whose individual claims were to be heard by different juries in Phase III of the trial.[59] In other words, the jury was allowed to determine the amount of the punitive damages award the plaintiffs would receive *before* it determined the issue of the defendants' liability to the entire plaintiff class. On July 14, 2000, nearly two years after the start of the trial, the six-member jury set a U.S. record by awarding the largest personal injury award in history[60]—a $145 billion punitive damages verdict against the defendants.[61] The defendants filed an appeal to reduce the amount of the punitive damages award, but their efforts were to no avail. In November 2000, the Florida courts dealt the corporate defendants another blow as Judge Kaye decided to uphold the $145 billion damages award even though he admitted "at first blush, a $14[5] billion punitive damage[s] award seems so far outside the comprehension of any reasonably thinking person . . . ."[62]

57. *See* Fuchs, *supra* note 51, at 9.

58. *Judge Outlines Issues*, *supra* note 51, at 4.

59. *See* Fuchs, *supra* note 51, at 9.

60. *See* Parker & Sharp, *supra* note 1; *see also* Myron Levin, *Jury Awards $145 Billion in Landmark Tobacco Case*, L.A. TIMES, July 15, 2000, at A1 (showing that the previous record for an unreduced punitive damages award in a U.S. court was a $5 billion award returned against Exxon for its 1989 oil spill in Alaska).

61. *See* Verdict Form for Phase II-B Punitive Damages at 1-2, Engle v. R.J. Reynolds Tobacco Co., No. 94-08273 (Fla. Cir. Ct. July 14, 2000).

62. Levin & Weinstein, *supra* note 2 at C1.

IV. WHY THE *ENGLE* VERDICT SHOULD BE OVERTURNED

A. Recent Supreme Court Cases Suggest Reasons to Overturn Excessively Large Punitive Damages Awards Against Corporate Defendants

1. Honda Motor Co. v. Oberg[63]

In *Honda Motor Co. v. Oberg*, Oberg filed a product liability suit against Honda for permanent injuries he incurred after an accident on one of Honda's three wheeled all-terrain vehicles.[64] Honda appealed the jury award in favor of Oberg for approximately $919,000 in compensatory damages and $5 million in punitive damages, claiming it violated the Due Process Clause of the Fourteenth Amendment because the award was excessive and Oregon courts lacked the power to review such verdicts.[65] Without addressing the issue of whether excessive punitive damages awards in general violate due process, the Court reversed the jury's punitive damages award and held that state prohibitions against judicial review of punitive damages awards violate procedural due process.[66]

In *Honda*, the Supreme Court took significant steps toward recognizing the necessity of monitoring and reviewing the amounts of punitive damages awards. Although this was a very narrow holding, the basic premise of the requisite need for review of punitive damages totals is clear.

2. BMW of North America, Inc. v. Gore[67]

In another recent decision, *BMW of North America, Inc. v. Gore*, the Supreme Court hit a milestone in the war against excessive punitive damages awards.[68] This 1996 decision marks the first time a majority of the Supreme Court found a punitive damages verdict to

63. 512 U.S. 415 (1994).
64. *See id.* at 418.
65. *See id.*
66. *See id.* at 430-32, 435.
67. 517 U.S. 559 (1996).
68. *See* Kimberly A. Pace, *Recalibrating the Scales of Justice Through National Punitive Damage Reform*, 46 AM. U. L. REV. 1573, 1606 (1997).

be too high.[69] In this case, the jury awarded the plaintiff $4,000 in compensatory damages and $4 million in punitive damages because BMW sold the plaintiff a "new" car that had been refinished without informing the plaintiff of this.[70]

The Court set out factors to help illuminate "'the character and standard that will identify unconstitutionally excessive awards' of punitive damages."[71] First, the Court examined the state's interest in imposing the punitive damages award to determine whether its interests entered the realm of arbitrariness that violates the Due Process Clause.[72] The Court declared that a state cannot impose economic sanctions on violators of its laws with the intent of changing the tortfeasor's conduct in other states and emphasized that a state's interest in imposing punitive damages must be based on protecting its *own* consumers and economy.[73] Also, the Court established that basic notions of due process dictate that defendants, in both civil and criminal cases, receive notice of the conduct that will yield punishment as well as the severity of the penalty a state may impose upon them.[74] To determine if a defendant has received adequate notice, the Court announced three guideposts to follow in the due process analysis: (1) the degree of the reprehensibility of the conduct; (2) the disparity between the harm suffered by the plaintiff, as determined by the judge or jury, and the punitive damages award; and (3) the difference between the remedy in the case at issue and civil penalties imposed in comparable cases.[75] Despite the fact that the appellate court reduced the punitive damages award to $2 million, after applying the above factors, the Supreme Court ultimately held that the punitive damages award was "grossly excessive" and "transcend[ed] the constitutional limit" set by the Due Process Clause of the Fourteenth Amendment.[76]

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69. *See* Bruce J. McKee, *The Implication of* BMW v. Gore *for Future Punitive Damage Litigation: Observations from a Participant*, 48 ALA. L. REV. 175, 175 (1996).

70. *See Gore*, 517 U.S. at 559.

71. *Id.* at 568 (citation omitted).

72. *See id.*

73. *See id.* at 572.

74. *See id.* at 574 & n.22.

75. *See id.* at 575-76.

76. *Id.* at 585-86.

3. *Engle* in light of *BMW of North America, Inc. v. Gore* and *Honda Motor Co. v. Oberg*

The holding in *Honda* clearly emphasized the need for "safeguards against excessive verdicts" and that "[p]unitive damages pose an acute danger of the arbitrary deprivation of property."[77] The Supreme Court should carry this reasoning one step further to establish that in certain cases where the amount of the punitive damages is unquestionably high, courts should require more than a judge's subjective viewpoint to ensure that defendants are not deprived of their "property" without due process of law.

One study attempted to test the popular viewpoint that judges, because of their legal training and experience, are less susceptible than juries to emotional appeals when determining damage amounts.[78] The results found that "a jury . . . on average [would] yield more reliable, that is, less variable, damage[s] awards than a single judge would in a bench trial."[79] Hence, this further supports the proposition that procedural safeguards should be used not only to review the damages verdicts returned by juries, but also to review judges' determinations regarding damages totals in order to guarantee that defendants are not unfairly deprived of their constitutional rights.

The issue of judicial bias must specifically be addressed in looking to overturn the *Engle* verdict. Florida Judge Robert Kaye, who presided over the case, may not have been an impartial judge considering that he is a former smoker with angina and arteriosclerosis who could potentially benefit personally from the damages verdict.[80] Even though Judge Kaye probably would not have permitted himself to be a juror in this case because of the risk of bias,[81] when one of the defendant corporations asked Judge Kaye to disqualify himself from the *Engle* case based on this same reasoning, he

77. *Honda*, 512 U.S. at 421, 432.

78. *See* Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 850, 884 (1998).

79. *Id.* at 885.

80. *See Judge Outlines Issues*, *supra* note 51, at 4.

81. *See Chamber of Commerce Files Amicus Brief in Philip Morris's Effort to Recuse Judge*, TOBACCO INDUSTRY LITIG. REP., May 12, 2000, at 6.

refused.[82] *Honda*'s assertion of the need to police the arbitrariness of damages verdicts should undoubtedly be applied to the *Engle* case—for judges are not free from arbitrariness, bias, and caprice, simply because they wear a judicial robe.

The *Engle* verdict also seems to run afoul of many of the guidelines for determining punitive damages recently set forth by the Supreme Court in *BMW of North America, Inc. v. Gore.* In *Gore*, the Supreme Court articulated that a state's interest in imposing punitive economic sanctions on a defendant must be to protect its own citizens and economy.[83] Only then will a state's interest stand within the boundaries set by the Due Process Clause.[84] This means the Florida jury in the *Engle* case did not have the power to punish the defendant tobacco companies for their conduct, or its effect on those outside of the Florida class of plaintiffs. Even though the *Engle* class was confined to Florida residents, the jury's purpose in issuing such an enormous punitive damages verdict may have been to punish and deter the tobacco companies' conduct not only in Florida, but throughout the rest of the United States. In fact, the plaintiffs' attorney pressed the jury to consider the national effect of the tobacco companies' behavior in determining the damages verdict. This was demonstrated in his closing arguments as he stated, "This [tobacco] industry has left a half-century trail of deceit which has decimated millions of Americans. Never have so few caused so much harm to so many for so long, the day of reckoning has arrived."[85] Upon hearing this statement and presumably others like it throughout the course of the trial, it seems inevitable that the jury would have considered the economic interests of injured smokers outside of Florida when determining the amount of the damages verdict—which the *Gore* guidelines specifically forbid.[86] Considering that there are few other explanations as to why the jury would have returned such a monstrous punitive damages total, other than the fact that the award was intended to punish the defendants based on national interests,

82. *See id.*
83. *See Gore*, 517 U.S. at 572.
84. *See id.*
85. John Zarella & Susan Candiotti, *Big Tobacco Ordered to Pay $145 Billion in Punitive Damages* (July 14, 2000), *at* http://www.cnn.com/2000/LAW/07/14/floridasmokers.verdict.
86. *See supra* Part IV.A.2.

Gore dictates the award should be overturned as violating the defendants' due process rights. According to the reasoning announced in *Gore*, this global purpose, as opposed to a state specific interest, for issuing a punitive damages verdict undoubtedly "transcend[s] the constitutional limit."[87]

In *Gore*, the Supreme Court also declared that basic notions of due process dictate that defendants—even in civil cases—must have adequate notice of the severity of the penalty a state may impose upon them.[88] There was no way the defendants in the *Engle* trial could have received adequate notice of the severity of the punitive damages verdict they were facing since *Engle* was not only the "first verdict against tobacco companies in a class action [lawsuit] brought on behalf of smokers,"[89] but it was also the largest personal injury award in U.S. history.[90] Bearing in mind that the *Engle* verdict was entirely unprecedented, the defendants clearly did not have notice of the potential severity of the punishment at issue in this case and thus were denied their Fourteenth Amendment right to due process.

Additionally, the procedure adopted by the *Engle* court to determine punitive damages led to circumstances that made it impossible for the defendants to have adequate notice of their potential punishment. The judge allowed the jury to determine the lump sum punitive damages award total in Phase II of the trial *before* liability was determined as to even a single class member, which was to take place in Phase III.[91] The defendants could not possibly have had notice as to the potential magnitude of the punitive damages award considering that they did not know how many individual class members would pursue claims, what their injuries were, or what their damages were.[92]

When analyzing the *Engle* verdict in light of the necessity for scrutinizing the amounts of punitive damages awards suggested in *Honda*, as well as the strict guidelines set forth by the Supreme Court

87. *See Gore*, 517 U.S. at 586.
88. *See id.* at 574-75 & n.22.
89. *Judge Outlines Issues*, *supra* note 51, at 4.
90. *See* Parker & Sharp, *supra* note 1.
91. *See* Fuchs, *supra* note 51, at 9.
92. *See id.*

in *Gore*,[93] it seems inevitable that the monumental punitive damages verdict in *Engle* should at the least be reduced, if not overturned.

B. Policy Rationales for Overturning the Engle *Verdict*

Although the class action is a useful tool to assist in remedying sizeable social wrongs, courts should not allow class actions to be abused by using them to impose enormous aggregated punitive damages awards. Recent steps taken toward reducing the excessively high levels of punitive damages awards as demonstrated by the Supreme Court in *Honda*[94] and *Gore*[95] should translate to the class action arena. Proponents of mass tort litigation assert such "aggregated solutions present the best hope for . . . insuring fairness to claimants as a group . . . [and] minimizing transaction costs."[96] However, when considering that a class action allows the issuance of a *single* aggregated damages award, two significant problems arise. First, an aggregated punitive award is issued as a single award that is theoretically to be shared amongst all plaintiffs. In reality however, defendants have limited funds and are often not capable of providing the entire amount of the damages award. This leaves some plaintiffs completely uncompensated—unable to recover either their compensatory or punitive damages. The *Engle* verdict should be decreased to guarantee that current and future plaintiff classes, who may have been injured by these same tobacco companies, can recover. In view of the fact cigarette makers claim "the $144.8 billion punitive award—[which totals] more than twice their annual gross sales—would financially destroy them,"[97] allowing the *Engle* verdict to stand could realistically prevent any future recovery by other parties since the tobacco companies' resources would be drained. It is ironic that by using the class action in *Engle* to guarantee that the Florida

93. *But see* Neil B. Stekloff, Note, *Raising Five Eyebrows: Substantive Due Process Review of Punitive Damages Awards after* BMW v. Gore, 29 CONN. L. REV. 1797, 1798 (1997) (suggesting that *Gore* is unsound and unstable as a matter of constitutional law and that the guidelines set out by the majority in *Gore* simply raise more questions than they answer).

94. *See* Honda Motor Co. v. Oberg, 512 U.S. 415 (1994).

95. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996).

96. Georgene M. Vairo, *Georgine, The Dalkon Shield Claimants Trust, and the Rhetoric of Mass Tort Claims Resolution*, 31 LOY. L.A. L. REV. 79, 83-84 (1997).

97. Levin & Weinstein, *supra* note 2, at C1.

by using the class action in *Engle* to guarantee that the Florida plaintiffs' harms are vindicated, the class action thwarts and actually prevents future class actions from achieving the exact same goal. This situation exemplifies how "the class action . . . has not proven to be a feasible means of controlling multiple punitive damages awards."[98] Although the class action is meant to enable individual plaintiffs to aggregate claims to increase their likelihood of recovery, the aggregation of the damages award in *Engle* actually threatens to *decrease* the chances future plaintiffs have of recovering damages for similar injuries.

The second significant problem with allowing aggregated punitive damages awards is exemplified by the astronomical size of the *Engle* verdict itself. Using the class action to permit a single damages award to be determined for hundreds and possibly thousands of plaintiffs at one time undoubtedly encourages and promotes verdicts of preposterous sizes. When one considers the startling increase in the size of damages awards, together with the likelihood of jury/judge bias against large corporations,[99] the threat of incurring an aggregated damage award in a class action is metaphorically like holding a gun to the head of the defendants. Even if the class actions against corporate defendants do not proceed to judgement, allowing plaintiffs to aggregate their claims in such cases can and often does lead to "judicial blackmailing" of corporate defendants.[100] In other words, the mere thought of facing an aggregated punitive damages award in a class action, coupled with the threat of anticorporate bias, can be so intimidating that it often "blackmails" defendants into settling claims as early and cheaply as possible.[101] This immense pressure to settle often frustrates the defendants' ability to obtain a judgment on the merits of the plaintiffs' claim, even with respect to frivolous filings which are a constant concern in the context of class

98. Phillips, *supra* note 11, at 445.

99. *See, e.g.*, Vidmar, *supra* note 78, at 870-80 (discussing various studies showing the recent overall inflation of damages award totals as well as evidence that juries tend to hold corporate defendants "more liable" and to a higher standard than the law demands, partially because of the deep pocket effect).

100. *See Developments in the Law*, *supra* note 45, at 1812.

101. *See id.*

actions.[102] Although allowing an aggregated damage award in class actions is a valuable tool to ensure injured plaintiffs do not go uncompensated, when one looks at the ever-increasing amounts of damage awards, it appears this "tool" can unfairly back corporate defendants into a corner and force them to pay regardless of their liability.

Additionally, in determining whether massive punitive damages awards are appropriate in cases against large corporate defendants, courts should consider the stigmatizing effect of such awards as well as their monetary impact. Cases against large corporate defendants are often widely and adversely publicized.[103] Adverse publicity following the imposition of a massive punitive damages award will undoubtedly compound the punitive effect of the damages. The severe damage that can result from the unfavorable publicity of a large punitive damages verdict is clearly demonstrated in *Grimshaw v. Ford Motor Co.*[104] In this case, a jury imposed a $3.5 million punitive damages verdict on Ford for marketing its Pinto automobiles with fuel systems it knew were dangerously defective.[105] As a result of the negative publicity following this punitive damages verdict, Ford's Pinto, which had been America's best selling car in the early 1970s, had to be withdrawn from the market.[106] Evidently, not only will defendants suffer the fiscal impact imposed by the punitive award, but they will also suffer the stigma which accompanies it.[107]

Another problem with the *Engle* verdict is the method of distribution of the monetary damages to the plaintiffs. In Phase II of the trial, the judge set an order requiring the jury to determine the amount of punitive damages by applying a lump sum approach.[108] This meant the jury would set the punitive damages at a total dollar

102. *See id.*

103. *See* Koenig & Rustad, *supra* note 7, at 316 n.121 ("Defense attorneys and corporate officials viewed adverse publicity as the ultimate sanction posed by punitive damages. . . . It is not the payment of punitive damages that is so greatly feared; it is the publicity and the stigma.").

104. 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981).

105. *See id.* at 772, 174 Cal. Rptr. at 358.

106. *See* Koenig & Rustad, *supra* note 7, at 316-17.

107. *See* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 54 (1991) (O'Connor, J., dissenting).

108. *See Judge Outlines Issues*, *supra* note 51.

amount, which all class members would then share equally.[109] This method of determining damages is the antithesis of the standard practice of measuring punitive damages, which uses the amount of compensatory damages as a yardstick for determining punitive damages.[110] Using this method means that every single plaintiff will receive the same amount of punitive damages, regardless of the differing amounts of compensatory damages they receive. Thus, a slightly injured plaintiff, who is granted a small amount of compensatory damages, and a seriously injured plaintiff, who is granted millions of dollars of compensatory damages, will both receive the exact same amount of the lump sum punitive damages verdict.[111] In other words, the defendant is equally "punished" with regard to all plaintiffs when in fact the defendant may not actually deserve such a harsh punishment.

V. SUGGESTED REFORM OF PUNITIVE DAMAGES AWARDS IN CLASS ACTION LAWSUITS AGAINST CORPORATE DEFENDANTS

A. Suggested Reform in Punitive Damages Law

Although the Supreme Court has set some substantive and procedural limits on the constitutionally acceptable size of punitive damages awards,[112] the *Engle* verdict[113] exhibits how courts can easily skirt these boundaries. Punitive damages play an integral role in our legal system to deter potential defendants from engaging in similar harmful conduct in the future. However, with the increasing trend of escalating punitive damages totals, these awards threaten not only to punish defendants but to potentially destroy them. Below are some suggested reforms that could be used to restore balance, fairness, and predictability to punitive damages law.[114]

109. *See id.*
110. *See id.* at 5.
111. *See id.*
112. *See* Schwartz et al., *supra* note 5, at 1003.
113. *See* Verdict Form for Phase II-B Punitive Damages at 1-2, Engle v. R.J. Reynolds Tobacco Co., No. 94-08273 (Fla. Cir. Ct. July 14, 2000).
114. *See* Schwartz et al., *supra* note 5, at 1004.

1. Quasi-criminal damages should be awarded by using quasi-criminal standards

Punitive damages are quasi-criminal in nature, as their purpose is to punish reprehensible conduct and deter its future occurrence;[115] therefore, they should be awarded by applying quasi-criminal standards. Since most forms of criminal punishment require a requisite level of intent, so should quasi-criminal civil types of punishment. Thus before punitive damages can be awarded, plaintiffs should have to prove "actual malice" on the part of the defendants.[116] Also, because punitive damages are not entirely civil or criminal, they should not be determined by the civil preponderance of the evidence standard, or by the criminal beyond a reasonable doubt standard. Rather plaintiffs should be required to prove liability for punitive damages by an intermediate evidentiary standard—clear and convincing evidence.[117] The clear and convincing evidence standard seems more appropriate since it is less strict than the burden of proof required for criminal punishment yet more strict than the lenient standard for imposing civil liability. "The clear and convincing evidence burden of proof should be adopted as a safeguard for the defendant's rights in recognition of the criminal component of the penalty and to offset potential bias in favor of the plaintiff and against the corporate manufacturer."[118] Finally, to further correspond with the quasi-criminal nature of punitive damages awards, boundaries should be established in each case to ensure that the punishment is proportional to the offense.[119] Applying these quasi-criminal standards would undoubtedly help to limit the excessiveness and unpredictability of punitive damages awards in many cases, as well as help to guarantee that punishment is fairly and adequately determined.

2. Excluding evidence of a defendant's net worth

Excluding evidence of a defendant's net worth would also be a beneficial reform as it would increase fairness and reduce bias in the

115. *See id.*
116. *See id.* at 1013.
117. *See id.*
118. Pace, *supra* note 68, at 1618.
119. *See id.*

awarding of punitive damages against corporate defendants.[120] Studies have shown that juries are often biased against large, wealthy corporate defendants and often believe that wealthy corporations should be held to a higher standard of responsibility than the average individual.[121] In addition, as discussed in Part IV of this Comment, judges are not immune to bias against corporate defendants either. Opponents of limiting punitive damages awards may argue that it is not necessary to exclude all information of a defendant's net worth in order to prevent jury bias, since juries can be given limiting instructions defining how they should utilize such information in determining a punitive damages award. However, this argument fails as numerous studies have shown that juries have difficulty comprehending legal instructions.[122]

Supporters of introducing information of a defendant's net worth claim that evidence of a defendant's overall financial standing is crucial to the determination of punitive damages awards. This claim is based on the rationale that the jury must have access to information regarding wealth in order to impose a higher financial penalty on wealthier defendants to effectively deter them.[123] However, this argument can be countered as well:

> As two noted scholars on punitive damages awards have explained, "[d]eterrence theory is based on the . . . assumption that actors weigh the expected costs and benefits of their future actions. Specifically, a potentially liable defendant will compare the benefits it will derive from an action that risks tort liability against the discounted present expected value of the liability that will be imposed if the risk occurs. Whether a defendant is wealthy or poor, this cost-benefit calculation is the same. If, as is likely, a wealthy defendant derives no greater benefit from a given action than a poor defendant, then both will be equally deterred (or equally undeterred) by the threat of tort liability. A defendant's existing assets do not increase the expected value of a given future action. Therefore they do not require any

120. *See* Schwartz et al., *supra* note 5, at 1019-23.
121. *See* Vidmar, *supra* note 78, at 870-71.
122. *See id.* at 866.
123. *See* Schwartz et al., *supra* note 5, at 1022.

> adjustment in the level of sanction needed to offset that expected value. The defendant's wealth or lack of it is irrelevant to the deterrence of socially undesirable conduct."[124]

Accordingly, to prevent information about a defendant's net worth from leading to potentially irreversible judge or jury bias and unjustly large punitive damages awards against corporate defendants, courts should require such information to be excluded from trials.

3. Placing a "cap" on punitive damages awards

One popular suggested reform for preventing limitless punitive damages liability for corporate defendants in a society where punitive damages awards are increasingly inflating, is the so-called "punitive damages cap." Although how this cap should be determined is one of the most controversial issues of tort reform, the basic premise is that this cap would limit the total amount of punitive damages that could be awarded in any case.[125]

Placing a cap on the total amount of punitive damages that could be awarded in any case would not only help to reduce the effect of jury bias against corporate defendants, it could also remedy the denial of due process that unusually large punitive damages awards potentially impose. As the Supreme Court noted in *BMW of North America, Inc. v. Gore*, "[e]lementary notions of fairness . . . dictate that a person receive notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a [s]tate may impose."[126] Determining a cap, or maximum amount of punitive damages that can be awarded, would assist in ameliorating the due process violation by putting defendants on notice of the maximum amount of punitive damages they may be subjected to in any given case.[127]

Those against placing a cap on punitive damages awards argue that capping damages would greatly decrease their deterrent value. The main thrust of this argument is that if corporate defendants are

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124. *Id.* at 1022-23 (quoting Kenneth S. Abraham & John Calvin Jeffries, Jr., *Punitive Damages and the Rule of Law: The Role of Defendant's Wealth*, 18 J. LEGAL STUD. 415, 417 (1989)).

125. *See* Pace, *supra* note 68, at 1620-21.

126. 517 U.S. 559, 574 (1996).

127. *See* Pace, *supra* note 68, at 1622.

aware of the specific amount of punitive damages they may have to face, they will use a cost-benefit analysis to weigh the amount of damages they may incur in court against the cost to fix or alter their dangerous product.[128] If the punitive damages cap is lower than the cost of repair, opponents of punitive damages caps assert that corporations will not be scared into making repairs since the amount of damages is no longer a threat.[129] This analysis is based on an unfair stereotype that paints corporations as overly wealthy abstract entities that are willing to make a profit at any cost. Corporations consist of people—logically, it would not be in their best interest to continue to knowingly market a dangerous product since it may inevitably affect someone they personally know and love.

Opponents' arguments may also be countered by creating a damages cap that is not simply an arbitrary fixed amount. Perhaps if the amount of punitive damages is capped at a certain percentage of the defendant's net worth, the damages award will still retain its deterrent effect, yet not at the cost of driving the defendant into bankruptcy. Similarly, creating a punitive damages award cap that is not immutable may not only maintain the deterrence factor, but could potentially increase it. For example, if punitive damages were capped at a certain amount for the first offense and then that cap was increased for each recidivist offense the corporation undertook, surely even the wealthiest corporations would be deterred by this. Although the specifics of determining a cap on punitive damages may be complex, it could be one of the most effective ways to fairly and justly impose civil punishment on defendants.

B. Alternative Methods of Compensating Injured Plaintiffs

Perhaps instead of looking to traditional methods of tort law to compensate injuries inflicted by corporate defendants on large groups of plaintiffs, alternative methods of compensation that do not threaten the potential annihilation of corporate defendants should be used. Injury compensation systems created by legislatures, such as workers' compensation, provide an excellent model of an alternative approach to "compensating for injuries outside of the traditional tort

128. *See id.* at 1624 & n.271.
129. *See id.* at 1622.

arena."[130] Many of the goals of injury compensations systems—to compensate for loss, to enhance safety, and to achieve administrative efficiency—are similar to the goals of tort law.[131] Yet these alternative systems compensate plaintiffs for their injuries by means that do not attempt to manipulate the procedures and goals of tort law to achieve desired results.

Injury compensation systems seek to anticipate and mitigate the impact of prospective harms, as opposed to merely compensating victims after the harm has occurred. In other words, "injury compensation system[s] enable[] society and its legal system[s] to get ahead of the curve instead of continually playing catch-up in addressing injury problem[s]."[132] As a result of this difference, injury compensation systems ensure that states are poised and prepared to deal with harms to large groups of plaintiffs. Consequently, they may allow such injuries to be dealt with in a faster and more efficient manner than class actions or mass tort lawsuits which take months, if not years, to clamor their way through the court dockets. Unlike tort systems, compensation systems allow the process to be streamlined; they allow decision making, without such an immense amount of fact-finding, by building presumptions of entitlement into the system itself.[133]

Another positive effect of injury compensation systems is that they may be more effective than traditional tort liability in promoting safety. Proponents of traditional tort liability, such as punitive damages awards in mass tort product liability and class action lawsuits, claim that without unlimited potential tort liability for defendants, many large corporate defendants would recklessly manufacture unsafe products.[134] However, this argument fails to recognize that the "threat" of unlimited tort liability will fall short of deterring those

130. Paul A. LeBel, *Beginning the Endgame: The Search For an Injury Compensation System Alternative to Tort Liability for Tobacco-Related Harms*, 24 N. KY. L. REV. 457, 464 (1997).

131. *See id.* at 466.

132. *Id.* at 467.

133. *See id.* at 479.

134. *See* Cynthia Mabry, *Warning! The Manufacturer of This Product May Have Engaged in Cover-Ups, Lies, and Concealment: Making the Case for Limitless Punitive Awards in Product Liability Lawsuits*, 73 IND. L.J. 187, 216 (1997).

corporate defendants that do not face a realistic risk of exposure to tort liability. Injury compensation systems implemented by legislatures may not only have a greater deterrent effect than tort liability, they may also increase safety more effectively. This is based on the fact that these systems force corporate defendants to consider the accident costs for which they could be held liable; hence they would be more likely, when facing this inevitable threat, to take steps to increase safety measures to prevent injuries before they occur.[135]

One very attractive feature of many injury compensation systems is their "tendency to restrict compensation to pecuniary losses."[136] These programs tend to limit the types of damages defendants can be held responsible for, thereby preventing the destructive potential of tort law's limitless liability. For example, workers' compensation typically limits benefits to medical and rehabilitation expenses incurred as a result of injury, partial replacement of wage loss due to the injury, and death benefits to those dependent on the injured party.[137] Here, the defendants pay for the damage they cause within limited boundaries of liability, preventing, or at least reducing, the risk of destruction of corporate defendants.

Although injury compensation programs often develop out of policies and ideals of tort law, they seem to more effectively strike a balance between the plaintiffs' and the defendants' interests. Overall, injury compensation programs work toward ensuring that defendants fully compensate injured parties for their loss while deterring future conduct and promoting safety, without the threat of liquidating corporate defendants.

VI. CONCLUSION

Punitive damages are an essential element of our civil remedial scheme. They punish defendants and deter others from engaging in similar harmful conduct in the future.[138] Punitive damages are necessary to teach defendants they cannot freely engage in intentional or careless conduct that causes harm to others. Similarly, class action lawsuits act as an important legal device to enable several plaintiffs

135. *See* LeBel, *supra* note 130, at 471.
136. *Id.* at 468.
137. *See id.*
138. *See* Stekloff, *supra* note 93, at 1798.

to aggregate small individual claims into one large claim to increase their chances of attaining adequate recovery. Although class action lawsuits and punitive damages awards together are fundamental tools which exist to protect plaintiffs from new social threats as they emerge, it is necessary to place limits on these tools to prevent them from potentially destroying corporate defendants. It seems the primary purpose of the *BMW of North America, Inc. v. Gore* decision was to send a message to lower courts to "tighten the reigns on punitive [damages] awards."[139] The verdict in *Engle* clearly illustrates that this message has been ignored.[140] It is time the Supreme Court sends a stronger message: No more excuses, punitive damages have gone too far.

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139. McKee, *supra* note 69, at 225.

140. For examples of other cases that have ignored or circumvented the *BMW v. Gore* guideposts, see Daniel Guglielmo, *Supreme Court Should Provide More Guidance on Punitive Damages*, TOBACCO INDUSTRY LITIG. REP., Mar. 24, 2000, at 14.

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