

WHAT YOU NEED TO KNOW ABOUT... PUNITIVE DAMAGES

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*“Fighting to protect the right to jury tri
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Throughout U.S. history, a critical function of our civil justice system has been deterrence of unsafe practices through imposition of financial liability upon wrongdoers. Punitive damages have been an especially effective tool in this respect, ensuring that bad actors face the full costs of their dangerous behavior.

Punitive liability for gross misconduct has been embraced by conservative free-market economists — including some of the most respected conservative economic thinkers — as essential to a fair, safe and efficient society. As conservative economic theorist and Judge Richard Posner has written, the tort system’s economic function is deterrence of noncost-justified accidents, with tort law creating economic incentives for “allocation of resources to safety.”¹ According to Posner,

Knowing that he will have to pay compensation for harm inflicted, the potential injurer will be deterred from inflicting that harm unless the benefits to him are greater. If we do not want him to balance costs and benefits in this fashion, we can add a dollop of punitive damages to make the costs greater.²

It is well recognized that some companies do engage in these calculations or “cost/benefit” analyses, balancing safety against profits in determining whether a defective product should be redesigned or removed from the market, or an unsafe practice should be stopped. This flawed and dangerous process was most famously brought to public attention in the 1981 Ford Pinto “exploding gas tank” case, *Grimshaw v. Ford Motor*

*Company.*³ In that case, Ford knew its gas tank design exposed consumers to serious risk of injury or death but decided not to make necessary design changes, instead finding it cheaper to pay liability claims. There, the court observed that unlike “compensatory damages” which a manufacturer may find “more profitable to treat as a part of the cost of doing business rather than to remedy the defect,”⁴ punitive damages cannot be treated as such and so “remain as the *most effective remedy* for consumer protection against defectively designed mass-produced articles.”⁵ [emphasis added]

Similarly, in 1999, a California jury confronted an equally callous “cost/benefit” analysis when it assessed \$4.8 billion in punitive damages against General Motors for severe injuries sustained by Patricia Anderson, her four children and a family friend.⁶ They had been horribly burned when their defectively designed 1979 Chevy Malibu exploded in flames after being rear-ended by a drunk driver in 1993. The verdict was based, in part, on a 1973 memo by GM engineer Edward Ivey, a cost-benefit analysis evaluating the cost of GM “burned deaths,” which GM determined to be \$2.40 per vehicle.⁷ The memo indicated that the company decided it could be cheaper to pay liability claims to those injured or the families of those killed than to make certain design changes.

The economic argument for imposing punitive damages is eloquently summarized by University of Buffalo Law Professor Lucinda Finley who, when discussing the egregious harm imposed on women for decades by the manufacturer of defective intrauterine devices, said:

Until it faced punitive damages, A.H. Robins had determined that it could weather the Dalkon Shield litigation and could avoid ordering a recall of the product. It was not until corporate executives realized that juries reacted adversely to the company’s decision not to order removal of existing Shields, despite the overwhelming evidence of dangers to women of continuing to use them, that A.H. Robins finally wrote to physicians and advertised to women advising and offering to pay for removal. This step, which should have been taken ten years earlier, finally put an end to the carnage the Dalkon Shield caused to U.S. women.⁸

In this way, punitive damages are often more effective than criminal laws in protecting the public from dangerous products and practices. According to Northeastern University Law Professor Thomas Koenig,

Perhaps the most significant latent function of punitive damages is to supplement criminal law. Public authorities seldom prosecute corporations or their officers for deaths and serious injuries created by defective products or practices. The Chinese-import safety crisis, the complexity of bringing members of mercenary armies to justice, and the difficulty of prosecuting cybercriminals are just a few examples of the need for a civil supplement to punish and deter organizational misdeeds.⁹

Moreover, the amount of money society saves as a direct result of the deterrence function of punitive damages — injuries prevented, health care costs not expended, wages not lost, etc. — is incalculable but significant. Some have estimated this savings to be perhaps a trillion dollars a year.

Despite the fact that punitive damages are supported by some of our nation's most respected free-market economists (many of whom are politically conservative), have been around for centuries and are often a stronger deterrent than the criminal justice system, they remain under attack. In the last few decades and even this year, corporate lobbyists and court decisions have rendered punitive damages' deterrence power meaningless, often by disconnecting punitive remedies from a company's wealth.

Why are punitive damages such a target? One reason is that insurance companies and their corporate clients dislike a system in which they cannot precisely budget liability as a cost of doing business. Unlike "compensatory damages" — compensation for injuries — the amount of punitive damages a judge or jury could award may be difficult for companies to calculate. This amount depends on widely varying factors determined on a case-by-case basis — factors like the nature of the misconduct involved and the amount that the judge or jury determines is necessary to get a company's attention, which is precisely what makes punitives so effective.

For example, a \$40,000 award may be an appropriate punitive damages award in one case. But juries know that to a multi-billion-dollar company, whose deliberate failure to fix a design flaw may lead to numerous deaths and injuries, even a million-dollar punitive damages award is barely a slap on the wrist, creating no financial pressure on the company to create a safer design.

For all these reasons, limiting punitive damages to a predictable amount of money undermines their deterrent force in the civil justice system.¹⁰ As American University Washington College of Law Professor Andrew Popper recently wrote, limiting punitive damages to a predictable amount of money

allows for profit-maximizing behavior without the risk and critical disciplining effect of unplanned exposure to liability. The risk of unplanned exposure provides a market force of great consequence. It forces actors to consider the possibility of harm and injury associated with product or service failure. It pushes companies to optimize safety, within reasonable limits. This pressure is absent with a cap on liability.¹¹

No question, punitive damages are easy rhetorical targets in the debate over juries, verdicts and the civil justice system. But what are punitive damages? And are they really as common, huge, arbitrary and costly to society as "tort reform" groups and their political allies say they are?

This report examines the truth about punitive damages. Part I explores the most important function of punitive damages — deterring egregious misconduct. Part II dispels prevailing myths about punitive damages by analyzing the most up-to-date information available. Part III discusses how legislatures and the U.S. Supreme Court have recently eroded punitive damages remedies. In Part IV, we examine the hypocrisy of those who argue for restrictions on consumers' access to punitive remedies while pursuing punitive damages in their own lawsuits. And in conclusion, we argue that the imposition or threat

of punitive damages is so critical in the fight against reckless corporate behavior that any effort to restrict them undermines the safety of us all.

PART I: THE IMPORTANT ROLE OF PUNITIVE DAMAGES

To better understand the current battle over punitive damages, it is necessary to discuss what they are and why they're important.

A. The History of Punitive Damages

The remedy of awarding punitive damages in civil cases has ancient origins and deep roots in our legal system. The Babylonian Hammurabi Code in 2000 B.C., the Hindu Code of Manu in 200 B.C. and the Bible were among the earliest recorded legal systems that provided for multiple awards where a defendant had engaged in certain types of bad behavior.¹² The ancient Romans also enacted laws in 450 B.C. that mandated the imposition of multiple damages as a means of punishing egregious misconduct.¹³

The punitive damages doctrine that exists in America today originated from 18th century English cases which held that exemplary damages were an appropriate means of punishing and deterring outrageous acts.¹⁴ By the mid-19th century, a jury's discretion to award punitive damages had become a well-established part of the American legal system. In 1851, the U.S. Supreme Court wrote that "in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation."¹⁵

Although punitive damages were initially assessed only against individuals, often for physical abuse, by the late 1800s courts allowed such awards to be levied against corporations. This shift was due, in part, to the extent that railroads and other companies amassed enormous wealth with gross indifference to the wellbeing of their workers and innocent consumers.¹⁶ For this reason, juries were instructed that the amount of punitive damages was to be "individualized, tailor-made for the financial condition of the defendant."¹⁷ In addition, the "awarding of exemplary damages [became viewed as] one of the few effective social control devices used to patrol large powerful interests unimpeded by criminal law."¹⁸

B. The Contemporary Functions of Punitive Damages

By the early 20th century, punitive damages were increasingly used to protect consumers from egregious business practices.¹⁹ This rationale for awarding punitive damages remains just as vital today. Time and again, punitive damages hold reckless companies and others accountable for egregious wrongdoing, and, in doing so, deter future misconduct by signaling that such malfeasance will not be tolerated.

Unlike compensatory damages, which are meant to make victims whole after suffering harm, punitive damages are intended to punish those who willfully or recklessly endanger health and safety. Punitives not only provide retribution to victims of outrageous conduct but in some cases incentivize them pursue claims in the public interest as “private attorneys general” when the state fails to act. As Judge Posner has explained,

Punitive damages relieve the pressures on the criminal justice system. They do this not so much by creating an additional sanction, which could be done by increasing the fines imposed in criminal cases, as by giving private individuals — the tort victims themselves — a monetary incentive to shoulder the costs of enforcement.²⁰

Moreover, in cases where criminal laws are violated, the potential for punitive damages can often be a more effective deterrent than criminal sanctions.²¹ In Professor Koenig’s words, punitive damages are a remedy that “mutates to fill the enforcement gaps that appear because of the inadequacies of the criminal law in every historical era.”²²

Punitive damages also give culpable wrongdoers the proper economic incentives to become safer and more responsible. History shows that the imposition or threat of punitive damages has caused corporations to take dangerous products and services off the market and operate more safely. Take the effect of punitives on G.D. Searle Co., manufacturer of the Copper 7-IUD, a birth control device that the company knew was extremely dangerous to women. As Professor Finley has written,

[A]n attorney for G.D. Searle Co., the manufacturer of the Copper-7 IUD, testified before the U.S. Senate that the first punitive damages verdict against this device, and the consequent withdrawal of coverage by the insurance carrier, led to the demise of this IUD. While it may well be true that this drastically changed the financial picture facing the Copper-7 and contributed to the decision to withdraw it, the punitive damages verdict was based on compelling evidence that the company had ignored and covered up evidence of risks, as well as irresponsibly promoted the device to a group of women for whom it was medically unadvised....

If G.D. Searle had been more responsive to this safety evidence than to cost considerations, then it may well have never had a liability and punitive damages problem.²³

Equally important, punitive damages communicate society’s moral condemnation for certain types of behavior. According to Judge Posner,

An award of punitive damages expresses the community’s abhorrence at the defendant’s act. We understand that otherwise upright, decent, law-abiding people are sometimes careless and that their carelessness can result in unintentional injury for which compensation should be required. We react far more strongly to the deliberate or reckless wrongdoer, and an award of punitive damages commutes our indignation into a kind of civil fine, civil punishment.²⁴

In this way, punitives perform a norm-setting or signaling function that deters potential wrongdoers from grossly irresponsible misconduct.

The following cases illustrate other cases where for decades, punitive damages have worked to make society safer:

Consumer Products

Bottle caps. In 1985, an 80-year-old was blinded in her left eye when a twist-off aluminum cap blew off a plastic 7-Up bottle and struck her in the eye. Documents revealed that the company knew of the problem of inadvertent exploding bottle caps and of numerous resulting eye injuries since the early 1970s and had added an ineffective warning label for the sole purpose of avoiding punitive damages. After the jury awarded \$10 million in punitive damages, the entire industry switched to plastic pre-formed caps and included a more specific warning on their soda bottles.²⁵

Drano. In November 1959, a woman was blinded in both eyes when a can of Drano exploded before she had a chance to open it. Trial evidence revealed that the manufacturer knew the can's caps were put on too loosely, had never tested the container to see if it was safe and was aware of at least three similar spontaneous explosions. After the punitive damages verdict, the company redesigned the can with a flip-top lid that would release before pressure built up in the can.²⁶

Pizza delivery. In January 1989, a woman suffered head and spinal injuries after a Domino's delivery driver ran a red light and broadsided her car. At trial, it was argued that Domino's 30-minute policy caused pizza-delivery personnel to drive recklessly in order to meet the company's service guarantee. Four days after the jury's \$78 million punitive damages verdict, the company dumped its 30-minute promise.²⁷

Tampons. In April 1983, a woman died from toxic shock syndrome (TSS) after using Playtex super-absorbent tampons. At trial, the jury learned that Playtex ignored studies and medical reports connecting high-absorbency tampon fibers with an increased risk of toxic shock, opting to keep its tampons on the market and advertise their effectiveness while other manufacturers modified or withdrew their high-absorbency products after learning of the high absorbency-toxic shock link. An internal memo also showed that Playtex knew the tampons were more absorbent than necessary for their intended use. After a jury awarded \$10 million in punitive damages, the company stopped producing the tampons, took them off the market, modified the TSS warning statement on its tampon packaging and agreed to inform the public about TSS.²⁸

Drugs and Medical Devices

Dalkon Shield IUD. The device, first put on the market in 1971, caused pelvic infections, septic abortions, infertility and death in thousands of women. Despite receiving reports of injuries in IUD users, the manufacturer continued to defend the device, only pulling the product from the U.S. market in June 1974 after FDA intervention. After 11 punitive damages awards over a number of years, totaling in

excess of \$24.8 million, the company finally agreed to urge doctors and women to remove the Dalkon Shield and offered to pay for the removal.²⁹

Ortho-Novum 1/80. A woman suffered acute renal failure after taking the oral contraceptive from the fall of 1972 until June 1976. She underwent dialysis, kidney removal and kidney transplant surgeries; one-third of her large intestine became gangrenous and had to be removed. She also suffered blind spots in her right eye and was precluded from bearing children. After finding that the manufacturer knew its product was potentially toxic, a jury awarded \$2.75 million in punitive damages, causing the company to lower the contraceptive's estrogen levels.³⁰

Parlodel. Hundreds of women suffered serious injuries, including strokes, heart attacks, seizures and death, after taking the drug to suppress lactation following childbirth. In 1989, the FDA requested that manufacturers voluntarily stop marketing Parlodel for post-childbirth lactation because of these health concerns. One company refused and continued to promote the drug to doctors despite proof that it caused life-threatening injuries. In July 1994, a jury awarded punitive damages against the manufacturer while other victims were seeking punitives in separate lawsuits. A few months after the punitive verdict, the company stopped selling the drug for lactation treatment. According to Professor Finley, "The growing threat of lawsuits seeking punitive damages was also instrumental in eventually prompting Sandoz to cease marketing Parlodel as a lactation suppressant five years after the FDA had first requested that it take this action."³¹

Ventilator. In May 1980, an Arkansas hospital patient suffered lung and brain damage when a ventilator impaired her breathing during surgery. Evidence showed that the company knew the apparatus was prone to be set up incorrectly before placing the ventilator on the market yet disregarded the information. A staff engineer who designed the machine testified that he was aware of the hazard, admitting that he had seen a 1977 article about an incident similar to the plaintiff's. Pre-market field tests also showed that the machine was both dangerous and potentially lethal. After the jury's \$3 million punitive damages award was upheld on appeal, the company issued an FDA-sponsored medical device alert, warning doctors and hospitals nationwide of the potential for product misuse.³²

Hate Crimes

Aryan Nation. In July 1998, Aryan Nation guards chased, shot at and assaulted a woman and her teenage son after their car backfired while driving past the group's Idaho compound. Trial testimony revealed that the organization not only failed to train and investigate security personnel but also tried to hide the absence of safety checks after the lawsuit was filed. After the jury awarded \$6 million in punitive damages, the group was barred from using the name "Aryan Nations" and agreed to transfer the compound to the victims.³³

Christian Knights of the Ku Klux Klan. In June 1995, members of the Christian Knights of the KKK burned down a black church in South Carolina. A \$37.5 million punitive damages verdict (later reduced to \$21.5 million) against four Klan members and

their “Grand Dragon,” as well as the Klan’s North and South Carolina organizations, marked the end of the Knights as a viable hate group.³⁴

Patient Care

Nursing home practices. In May 1989, a 79-year-old Texas nursing home patient suffering from Alzheimer’s disease drowned in a bathtub after being left unattended. Evidence produced at trial showed that the home had never reviewed the patient’s records from earlier nursing homes and had attempted to cover up the drowning by getting the autopsy report changed. Following the \$950,000 punitive damages verdict, the home installed safety strips in bathtubs and exercised closer supervision of its elderly patients.³⁵

Transportation

Ejection seat. In November 1979, while on a training mission in Arizona, an Air Force pilot was killed instantly after trying to eject when his jet’s flight controls jammed. The ejection seat had snapped his neck and severed his spinal cord when the parachute opened. At trial, it was shown that there were prior incidents of injuries and deaths caused by the seat’s parachute. “After the punitive damages award, the manufacturer made design changes to the controls in all its Air Force jets to eliminate the possibility of similar accidents.”³⁶

Jeep. In April 1976, two passengers suffered life-threatening injuries when their jeep’s roll bar collapsed after the vehicle pitched over down a steep hill in an off-road recreation area. Pre-trial discovery revealed that manufacturer had failed to test the safety of the roll bar device, with other evidence showing that the company had advertised the jeep as suitable for “off-road” use on rugged terrain and that the jeep’s roll bar was chosen for its aesthetic rather than protective value. After the jury returned a \$1.1 million punitive damages award, the jeep was redesigned to reduce its rollover propensity.³⁷

Workplace

Gas explosion. In October 1995, a 42-year-old Texas oil worker was scalped and also suffered brain damage, permanent vision and hearing loss, broken vertebrae in his neck and back, a crushed foot and ankle and a dislocated hip after a piece of equipment exploded from a gas well, throwing him 30 feet into a stand off pipe. When the victim offered to exchange the \$30 million punitive damages award for safety changes, the company agreed to work with a safety engineer to institute new rules at the company.³⁸

Punch press. A 27-year-old assembly-line worker’s hand was crushed by a forty-five ton punch press after the machine’s safety device was inadvertently overridden by a palm control button. Trial evidence revealed that the palm button was designed to specifically bypass a standard safety device and that the manufacturer had advertised the button for that purpose. After the punitive damages award in 1984, the company redesigned the palm button and stopped advertising it as an option for the presses.³⁹

PART II: DISPELLING PUNITIVE DAMAGES MYTHS

Statements about the destructive nature of punitive damages have served as an important tool in the rhetorical assault on the civil justice system.⁴⁰ Yet when pressed for real-world data to support such claims, the business community comes up empty. That's because there is no empirical evidence to support their wildly-exaggerated, negative characterizations of punitive damages.

Punitive damages are rarely sought. In 2005, the most recent year studied by the U.S. Department of Justice (DOJ), punitive damages were sought in only 12 percent of all civil trials concluded in state courts.⁴¹ Punitive damages were sought in only 10 percent of tort trials; for contract cases it was 16 percent.⁴²

Punitive damages are also rarely sought in the areas often targeted for tort restrictions: products liability and medical malpractice. According to the DOJ, in 2005 punitive damages were sought in only 12 percent of product liability cases.⁴³ This includes asbestos and other product liability trials. Similarly, medical malpractice victims sought punitive damages in a mere 8 percent of cases.⁴⁴

Punitive damages are rarely awarded. In 2005, punitive damages were awarded in only 5 percent of civil cases where plaintiffs prevailed at trial. Punitive damages were awarded in only 3 percent of tort cases with plaintiff winners; for contract cases, it was 8 percent.

Punitive damages are also rare in products liability and medical malpractice cases. According to the DOJ, in 2005 punitive damages were awarded in only 1 percent of product liability cases with a successful plaintiff. This includes asbestos and other product liability trials. Similarly, punitive damages were awarded in a mere 1 percent of cases where medical malpractice victims established liability at trial.

The incidence of punitive damages is consistently low. Long-term DOJ data from state trials in the nation's 75 most populous counties show that:

- The percentage of plaintiff winners receiving punitive damages before civil juries was 4 percent in 1996, 6 percent in 2001 and 5 percent in 2005;
- The percentage of prevailing plaintiffs awarded punitive damages in all tort trials was 3.3 percent in 1996, 5.3 percent in 2001 and 3.6 percent in 2005;
- The percentage of successful medical malpractice plaintiffs receiving punitive damages was 1.1 percent in 1996, 4.9 percent in 2001 and 2.6 percent in 2005;
- The percentage of plaintiff winners awarded punitive damages in product liability trials was 7.7 percent in 1996, 4.2 percent in 2001 and 1.3 percent in 2005; and

- The percentage of winning plaintiffs receiving punitive damages in contract cases was no greater in 2005 than in 1996, with plaintiffs' success rate totaling 8 percent both years.

Punitive damages have decreased in frequency. Long-term DOJ data from state tort trials in the nation's 75 most populous counties show that:

- The percentage of successful plaintiffs awarded punitive damages in tort trials declined by 33.3 percent between 2001 and 2005;
- From 2001 to 2005, the percentage of prevailing plaintiffs awarded punitive damages in medical malpractice cases decreased by 46.1 percent; and
- The percentage of plaintiff winners receiving punitive damages in product liability trials dropped by 70.4 percent between 2001 and 2005.

Most punitive damage awards are modest. In 2005, the median overall punitive damage amount awarded to plaintiff winners in civil cases was \$64,000. The median punitive damage award for all tort cases was \$55,000. Moreover, in 76 percent of the 632 civil trials with both punitive and compensatory awards, the ratio of punitive to compensatory damages was 3 to 1 or less.

Juries and judges use similar reasoning when making punitive damage award decisions in tort cases. The DOJ found no detectible difference in the percentage of litigants awarded punitive damages when comparing tort bench and jury trials in 2005. Moreover, the median punitive damage awards in tort jury (\$100,000) and bench (\$54,000) trials were not statistically different.

PART III: UNDERMINING THE PURPOSE AND POWER OF PUNITIVE DAMAGES

No matter what the facts are, there are still those who insist that lawmakers and the U.S. Supreme Court should interfere with the longstanding authority of the courts and restrict the ability of judges and juries to hand down punitive damages. The results have been devastating to the rights of consumers in specific states and the welfare of society as a whole.

A. State Legislatures

Thirty-eight states have passed "tort reform" laws that impede consumers' ability to seek punitive remedies.⁴⁵ Legislative restrictions include: 1) outright bans on punitive damages; 2) damages caps; 3) mandatory apportionment of punitives to state funds; 4) heightened burdens of proof; and 5) bifurcated trials.

Outright ban. Both Louisiana and New Hampshire ban all punitive damages.⁴⁶ Several states bar punitive damages when patients are injured by FDA-approved drugs.⁴⁷

Caps. Nearly half the states restrict punitive awards to a specified dollar amount (“flat cap”) or some fixed multiple of compensatory damages (“multiplier”).⁴⁸ Such limits replace jury discretion with an arbitrary system that bears no relationship to the degree of the defendant’s size or misconduct.

“Flat caps” prevent punitive damages from working as a deterrent by giving wrongdoers notice of the maximum amount of money they will be forced to pay if they engage in reckless behavior. In other words, such caps allow companies to treat liability arising from malfeasance as a cost of doing business, weakening their deterrent impact. As the Colorado Supreme Court wrote more than 25 years ago, “If punitive damages are predictably certain, they become just another item in the cost of doing business, much like other production costs, and thereby induce a reluctance on the part of the manufacturer to sacrifice profit by removing a correctable defect.”⁴⁹

“Multipliers” also have an anti-consumer impact. By tying punitive awards to compensatory damages, which are largely dictated by the victim’s earning capacity, multipliers discriminate against low wage earners as well as children, seniors and women who do not work outside the home.

Apportionment. Some states, like Alaska, Indiana and Iowa, require that successful punitive damages plaintiffs pay a portion of their award into a state-designated fund.⁵⁰ This disincentivizes victims from taking on the expense and risk of litigation against egregious wrongdoers.

Heightened evidentiary standard. Over 20 states have attempted to block punitive remedies by raising the evidentiary threshold plaintiffs must meet to receive them.⁵¹ California, New Jersey and Texas are among the states that allow recovery of punitives only where there is “clear and convincing” evidence that a company acted reprehensibly.⁵² This is a much higher standard than the typical “preponderance of evidence” threshold normally used in civil cases. In Colorado, the threshold is even higher — injured consumers must show “beyond a reasonable doubt” that corporate behavior merits punitive damages.⁵³

Bifurcation. States such as Mississippi, Nevada and South Carolina require that the liability and punitive damages phases of a case be tried separately, preventing jurors from having access to the defendant’s financial information during the liability phase of the trial.⁵⁴

B. Recent Legislative Attacks

Congress. Lawmakers are considering H.R. 5, a bill that would severely limit the rights of medical malpractice and drug injury victims. Under the bill, punitive damages would only be awarded when a medical malpractice victim meets the heightened standard of “clear and convincing evidence.” And if punitives are assessed, they are limited to two times the amount of economic damages or \$250,000, whichever is greater. In addition, punitive damages would be eliminated against manufacturers of drugs and medical

devices approved by the FDA as well as those not FDA-approved yet “generally recognized as safe and effective.” Manufacturers and sellers of drugs would also be immunized from punitives for packaging or labeling defects.⁵⁵

South Carolina. In July 2011, Gov. Haley signed legislation into law that, among other things: 1) requires victims to prove by “clear and convincing evidence” that the alleged misconduct warrants punitive damages; 2) mandates a separate proceeding to determine punitive remedies; and 3) limits punitives to \$500,000 or three times compensatory damages, whichever is greater, in most cases.⁵⁶

Tennessee. In June 2011, Gov. Haslam signed legislation into law that in most cases caps punitive damages, which must be proved by “clear and convincing evidence,” to twice the amount of compensatory damages or \$500,000, whichever is greater. The new law also makes it virtually impossible for victims to win punitive damages in product liability actions.⁵⁷

Wisconsin. In January 2011, Gov. Walker signed legislation into law that limits punitive damages to \$200,000 or two times compensatory damages, whichever is greater. Drunk-driving cases are not subject to the cap.⁵⁸

C. Tax Loophole

Federal and state tax laws generally allow corporations to deduct punitive damages payments.⁵⁹ Allowing companies to deduct punitives as “ordinary and necessary business expenses” effectively rewards and subsidizes grossly irresponsible or intentional behavior, undermining the very purpose of punitive damages — to penalize and deter egregious misconduct. Such deductibility is also particularly outrageous given that most states, as well as the federal government, include punitive damages as part of the plaintiff’s taxable income.⁶⁰

Not surprisingly, this tax loophole has its share of critics. For example, Florida State University Law Professor Dan Markel argues that deductibility creates an “under-punishment problem.” As he explains in the 2011 law review article, “On the one hand, jurors assess punitive damages in an amount that they believe will best ‘punish’ the defendant. On the other hand, defendants are not always punished to the degree that the jury intends because punitive damages paid by business defendants are tax deductible under the Internal Revenue Code. As a result, these defendants often pay far less in real dollars than the jury believed they deserved to pay.”⁶¹

The *L.A. Times* has harsher words for punitive damages deductibility, calling the current system “counterproductive,” “an obvious wrong” and “ridiculous public policy” in a June 2nd editorial.⁶² “Punitive damages are appropriately rare — juries award them in only about 5% of cases” and “[t]he intent is to punish outrageous conduct and deter future misdeeds. Both of those goals are undermined by existing law,” the paper points out, adding that “[c]riminal fines, by contrast, are not deductible, underscoring the aberrance of this policy.”⁶³

This aberrance has been recognized by President Obama, whose budget request for 2012 would deny businesses a deduction on punitive damage payments.⁶⁴ It has also been recognized by U.S. Senator Patrick Leahy (D-Vt.), who recently introduced legislation to close the tax loophole. “When corporate wrongdoers can write off a significant portion of the financial impact of punitive damages, the incentives in our justice system that promote responsible business practices lose their force,” Leahy said in an April 12, 2011 press release.⁶⁵ “This is wrong. It undermines one of the primary deterrent functions of our civil justice system, and American taxpayers should not subsidize this misconduct.”⁶⁶

And on the state level, California Assemblyman Mike Feuer (D-Los Angeles) proposed legislation in February that would redefine punitive damages as nondeductible expenses that bad-acting companies should be forced to pay, or as the *LA Times* put it, keep punitive damages punitive.⁶⁷ As of June 23rd, the bill had been moved to an inactive file to be considered at a later date.⁶⁸

D. The U.S. Supreme Court

Since the 1990s, the U.S. Supreme Court has been placing arbitrary limits on punitive damages remedies, eroding their effectiveness as a check on reckless corporations. As Suffolk University Law Professor Michael Rustad argues, the Court’s “federal takeover of punitive damages”⁶⁹ has created a “backward-looking punitive damages jurisprudence,”⁷⁰ a “horse and buggy paradigm ill-suited for the Age of the Internet,”⁷¹ which “undermines the punitive damages’ societal function of punishing and deterring corporate wrongdoing” and “overlooks the notable role that the remedy has played in punishing and deterring aggravated misconduct in association with ‘group injuries.’”⁷²

Honda Motor Co. v. Oberg (1994). All courts must conduct a post-verdict review of punitive damages awards to determine whether the amount comports with due process.⁷³

BMW v. Gore (1996). Reviewing courts must apply three guideposts to determine whether a given punitive damages award is excessive: 1) “the degree of reprehensibility of the defendant’s conduct”; (2) the ratio between the punitive award and the plaintiff’s compensatory damages; and (3) the legislative (criminal or regulatory) sanctions authorized or imposed in similar cases.⁷⁴ The reprehensibility of the defendant’s conduct is the most important factor in determining the reasonableness of a punitive damages award.⁷⁵

State Farm v. Campbell (2003). The jury must be specifically instructed “that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.” Moreover, a single-digit ratio between compensatory and punitive damages satisfies due process.⁷⁶

Philip Morris v. Williams (2007). The jury can assess punitive damages only for the harm done to the plaintiff, not to other victims whose cases were not before it.⁷⁷

Exxon Shipping v. Baker (2008). The punitive/compensatory damages ratio is limited to 1:1 in federal maritime cases.⁷⁸

PART IV: PUNITIVE DAMAGES HYPOCRITES

Many who have pushed for restrictions on consumers' ability to seek punitive damages do not hesitate to demand them when they feel their own interests have been compromised.

For example, since 2005 U.S. Representative Phil Gingrey (R-Ga.) has sponsored the so-called HEALTH Act (H.R. 5), which, among other things, would make it virtually impossible for medical malpractice victims to obtain punitive damages from doctors, hospitals, nursing homes, pharmaceutical companies and medical device manufacturers.⁷⁹ Yet in 2004, Gingrey sought punitive damages after suffering injuries from a car crash. According to the complaint, Gingrey was "entitled to recover punitive damages from Defendant in amounts to be determined by the enlightened conscience of fair and impartial jurors."⁸⁰

Similarly, U.S. House Majority Leader John Boehner (R-Ohio) has gone out of his way to protect reckless pharmaceutical companies from punitive damages when their drugs kill or injure patients.⁸¹ Yet in a 1998 lawsuit, Boehner sought \$100,000 in punitive damages from fellow Congressman Jim McDermott (D-Wash.) who leaked to reporters the contents of a conference call between Boehner, then-House Speaker Newt Gingrich and other GOP leaders that had been illegally taped by a Florida couple.⁸² Boehner argued that McDermott's knowledge that the tape was illegally intercepted and his subsequent disclosure of it to members of the press "triggers liability for both statutory and punitive damages."⁸³ In 2008, Boehner received \$50,000 in court-ordered punitive damages from McDermott.⁸⁴

Corporations who have lent financial or other support to national and state groups that champion limits on punitive damages have engaged in the same hypocritical conduct. Take GlaxoSmithKline (Glaxo), member of the American Legislative Exchange Council (ALEC), a corporate-funded national organization where big business and conservative state legislators work together to attack the civil justice system, including punitive damages remedies.⁸⁵ Yet in July 2010, Glaxo filed a trademark infringement suit that sought punitive damages from Colgate for putting "Triple Action" and a "nurdle" (a wave-shaped toothpaste blob that sits on a toothbrush head) on its toothpaste packaging.⁸⁶ At the date of publication, the outcome of the case is unknown.

Fellow ALEC member, ExxonMobil,⁸⁷ is also pursuing punitive damages after one of its contractors contaminated company property, requiring ExxonMobil to "perform extensive environmental remediation at considerable cost."⁸⁸ And despite its memberships⁸⁹ in ALEC and the American Tort Reform Association (ATRA) — a corporate-funded group that routinely attacks punitive damages remedies⁹⁰ — Pfizer sought punitive damages in India for trademark infringement involving its cough syrup Corex. Pfizer was awarded over \$2,200 in punitives.⁹¹ In affirming the damage, Delhi's High Court wrote, "[S]ince the defendants have adopted a mark similar to the registered trademark of the plaintiff and they have been manufacturing and selling the cough syrup

under that mark and also with a view to deter the defendants from indulging in similar acts in future, it is necessary that some punitive damages are awarded to the plaintiffs.”⁹²

American Tort Reform Association member 3M is yet another punitive damages hypocrite, pursuing punitives in India after whole-sellers marketed and sold counterfeit Post-It® and 3M® products.⁹³ 3M prevailed, with the court awarding \$9,000 in punitive damages. When the defendants failed to pay, 3M appealed to Mumbai’s High Court, which then seized all defendants’ stationery products to satisfy 3M’s punitive judgment.⁹⁴

In addition, Motorola’s membership in the Illinois Civil Justice League⁹⁵ – a pro-business coalition that has consistently advocated for restrictions on punitive damages⁹⁶ – did not stop the company from seeking punitive damages for fraud against the owners of a Turkish wireless carrier.⁹⁷ A federal judge awarded Motorola over \$2 billion in punitives⁹⁸; that amount was later reduced to \$1 billion.⁹⁹

States also do not “practice what they preach” when it comes to punitive damages. Though Alabama limits punitive damages in cases brought by consumers¹⁰⁰, the state is seeking punitives from BP, Transocean, Halliburton and other companies associated with the massive oil spill in the Gulf.¹⁰¹ Attorney General Luther Strange — a “tort reform” advocate who holds punitive damages restrictions among his priorities — is pursuing the case.¹⁰² “We’re going to fight as vigorously as you possibly can to ensure that Alabama is compensated for the catastrophe by the responsible parties that’s for environmental impact, that’s for any damage done to our state by BP’s oil spill,” Strange told the *Associated Press*.¹⁰³ “I mean for the defendants to understand that Alabama is deliberate and determined as they see me personally argue on the state’s behalf in court, question BP executives about their reckless behavior and prove the defendants’ liability at trial. I will hold the responsible parties legally and financially accountable,” Alabama’s AG wrote in an April 24, 2011 opinion piece.¹⁰⁴

And despite Montana’s severe restrictions on punitive damages remedies for individuals¹⁰⁵, the state is pursuing punitive damages from BP, Amoco and other oil giants, alleging that the companies received millions from insurers to clean up petroleum contamination but hid that money so Montana’s Petroleum Tank Release Compensation Fund (PTRCF) had to pay the remediation costs.¹⁰⁶ “Defendants...knew they were improperly obtaining funds from the Montana PTRCF, obtaining a double recovery, causing other parties to improperly obtain funds from the Montana PTRCF and intentionally creating a high probability of injury to the resources of the state,” the suit alleged, adding the defendants should be made an example of to “promote truth and honesty.”¹⁰⁷ Like Alabama’s AG Strange, Montana seems to understand one of the most important functions of punitive damages – deterring egregious misconduct.

CONCLUSION

The availability of punitive damages protects us all by holding wrongdoers accountable for egregious misconduct and deterring its future occurrence. Laws that restrict punitive awards place the public at serious risk, and lawmakers should not be misled by falsehoods spread by corporate special interests about this most valuable and important

feature of our civil justice system. As U.S. Senator Sheldon Whitehouse (D-R.I.) explained on the Senate floor in June 2010,

Everybody knows corporations are all about their bottom line. That is not me saying that; that is the law of corporations. They actually have a duty, a legal duty to their shareholders to maximize their economic self-interest. It is what they do. It is why they were set up. It makes them a very important economic engine for society. But it does mean we have to control that motivation through the law. One of the ways we control that motivation through the law is with punitive damages — punitive damages assessed through the jury.¹⁰⁸

NOTES

- ¹ William M. Landes and Richard A. Posner, *The Economic Structure of Tort Law*. Cambridge, MA: Harvard University Press (1987), at 132.
- ² *Kemezy v. Peters*, 79 F.3d 33, 34 (7th Cir. 1996).
- ³ *Grimshaw v. Ford Motor Company*, 119 Cal. App. 3d 757 (1981). See also, Pubic Citizen, “Smoking Guns: Corporate Behavior and the Harmful Impact of Capping Punitive Damages in Product Liability Cases,” found at http://www.citizen.org/congress/article_redirect.cfm?ID=919.
- ⁴ *Grimshaw*, *supra* n. 3, at 810.
- ⁵ *Ibid*.
- ⁶ “G.M. Damages Cut By Over \$3 Billion In Gas Tank Case,” *New York Times*, August 27, 1999, found at <http://www.nytimes.com/1999/08/27/us/gm-damages-cut-by-over-3-billion-in-gas-tank-case.html>; Andrew Pollack, “\$4.9 Billion Jury Verdict In G.M. Fuel Tank Case,” *New York Times*, July 10, 1999, found at <http://www.nytimes.com/1999/07/10/us/4.9-billion-jury-verdict-in-gm-fuel-tank-case.html>.
- ⁷ Pollack, *supra* n. 6. See also, Pubic Citizen, *supra* n. 3.
- ⁸ Lucinda M. Finley, “Female Trouble: The Implications of Tort Reform for Women,” 64 *Tenn. L. Rev.* 847, 874 (1997). See later discussion of the Dalkon Shield.
- ⁹ Thomas H. Koenig, “Crimtorts: A Cure for Hardening of the Categories,” 17 *Widener L. Rev.* 733, 769 (2008), found at lawprofessors.typepad.com/tortspof/files/koenig_symposium_pp_733781_revised.pdf.
- ¹⁰ Andrew Popper, “Capping Incentives, Capping Innovation, Courting Disaster: The Gulf Oil Spill and Arbitrary Limits on Civil Liability,” 60 *DePaul L. Rev.* 975, 997 (2011), found at http://works.bepress.com/andrew_popper/8/.
- ¹¹ *Ibid*.
- ¹² Thomas H. Koenig and Michael L. Rustad, “The Historical Continuity Of Punitive Damages Awards: Reforming The Tort Reformers,” 42 *Am. U. L. Rev.* 1269, 1285-86, n. 78-81 (Summer 1993), citing Kenneth R. Redden and Linda L. Schlueter, *Punitive Damages* (2d ed. 1989), found at digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1580&context=aulr; Kenneth Cole and James Sales, “Punitive Damages: A Relic That Outlived Its Origins,” 37 *Vand. L. Rev.* 1117, 1119 (1984); *Exodus* 23:2 (“thou shalt not follow multitude to do evil”); *Exodus* 22:4 (requiring double restitution for crime of theft); *Deuteronomy* 22:8 (builder brings guilt of bloodshed on his house if someone falls from his roof); *Luke* 19:8 (restitution of four times damages caused as penalty for fraud or theft). See also, Jonathan Kagan, “Toward A Uniform Application Of Punishment: Using The Federal Sentencing Guidelines As A Model For Punitive Damage Reform,” 40 *U.C.L.A. L. Rev.* 753, 760 (February 1993); Allison Johnson, “Crookston v. Fire Insurance Exchange and the Utah Punitive Damage Act: Toward a Sounder Law of Punitive Damages,” 1993 *Utah L. Rev.* 513, 515.
- ¹³ Koenig and Rustad, *supra* n. 12, at 1285-86.
- ¹⁴ *Id.* at 1287-1291; Johnson, *supra* n. 12, at 515.
- ¹⁵ Jonathan Kagan, “Toward A Uniform Application Of Punishment: Using The Federal Sentencing Guidelines As A Model For Punitive Damage Reform,” 40 *U.C.L.A. L. Rev.* 753, 762 (February 1993), citing *Day v. Woodworth*, 54 U.S. (13 How.) 363 (1851).
- ¹⁶ Koenig and Rustad, *supra* n. 12, at 1293-96.
- ¹⁷ Michael L. Rustad, “How The Common Good Is Served By The Remedy Of Punitive Damages,” 64 *Tenn. L. Rev.* 793, 800-801 (1997).
- ¹⁸ Koenig and Rustad, *supra* n. 12, at 1296.
- ¹⁹ David C. Berry, “Untwisting New Jersey’s Cap on Punitive Damages,” 27 *Seton Hall L. Rev.* 167, 171 (1996); Koenig and Rustad, *supra* n. 7, at 1303-1304.
- ²⁰ *Kemezy*, *supra* n.2, at 37. See also, Koenig, *supra* n. 8.
- ²¹ Koenig and Rustad, *supra* n. 12, at 1324.
- ²² Koenig, *supra* n. 9, at 765.
- ²³ Finley, *supra* n. 8, at 875 (quoting Nicole Grant, *The Selling Of Contraception: The Dalkon Shield Case, Sexuality, and Women’s Autonomy*. Ohio State University (1992), at 147.
- ²⁴ *Kemezy*, *supra* n.2, at 37.

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- ²⁵ E-mail correspondence from Colin King, July 21, 2000 (King is the attorney for plaintiff Mae Roberts); “Accidents; A Costly Pop In the Eye,” *Time*, December 21, 1987; *Roberts v. Aluminum Company of America et al.*, No. C86-0013 (Salt Lake County Ct., Utah, verdict December 5, 1987).
- ²⁶ Thomas H. Koenig and Michael L. Rustad, *In Defense of Tort Law*. New York: New York University Press (2001); *Moore v. Jewel Tea Co. et al.*, 253 N.E.2d 636 (Ill. 1969), *aff’d*, 263 N.E.2d 103 (Ill. 1970).
- ²⁷ E-mail correspondence from Cheryl A. Bachelder, Vice President Customer Satisfaction, July 24, 2000; Michael Janofsky, “Domino’s Ends Fast-Pizza Pledge After Big Award to Crash Victim,” *New York Times*, December 22, 1993; *Kinder v. Hively Corp.*, No. 902-1235 (St. Louis County Ct., Mo., verdict December 17, 1993).
- ²⁸ Finley, *supra* n. 8, at 874, 875; “Tampons Fine Cut By Judge,” *Chicago Tribune*, May 25, 1985; *O’Gilvie v. International Playtex, Inc.*, 609 F. Supp. 817 (D. Kan. 1985), *rev’d in part and remanded*, 821 F.2d 1438 (10th Cir. 1987), *cert. denied*, 108 S.Ct. 2014 (1988).
- ²⁹ Finley, *supra* n. 8, at 866 (Spring 1997); *Tetuan v. A.H. Robins Company*, 738 P.2d 1210 (Kan. 1987); Mary Williams Walsh, “A.H. Robins Begins Removal Campaign for Dalkon Wearers,” *Wall Street Journal*, Oct. 30, 1984; *Palmer v. A.H. Robins Co., Inc.*, 684 P.2d 187 (Colo. 1984).
- ³⁰ Thomas H. Koenig and Michael L. Rustad, “His And Her Tort Reform: Gender Injustice in Disguise,” 70 *Wash. L. Rev.* 1, 51 (January 1995); *Wooderson v. Ortho Pharmaceutical Corporation*, 235 Kan. 387 (1984).
- ³¹ Finley, *supra* n. 8, at 874, n. 118 (citing *Sandoz Pharm. Corp. v. Roberts*) (“Because the drug is still marketed for other medical uses, including to treat infertility and Parkinson’s disease, it is still possible for Parlodel to be prescribed to pregnant women. See Michael Unger, Moms Sue Maker of Antilactation Drug, N.Y. NEWSDAY, Feb. 8, 1995, at A37.”)
- ³² *Airco v. Simmons First National Bank*, 276 Ark. 486 (1982). See also, Koenig and Rustad, *supra* n. 26; Ralph Nader and Wesley J. Smith, *No Contest: Corporate Lawyers and the Perversion of Justice in America*. New York: Random House (1996), at 316.
- ³³ Nicholas K. Gerianos, “Butler reportedly has moved into a new home,” *Associated Press*, October 24, 2000; Kim Murphy, “Jury Verdict Could Bankrupt Aryans,” *Los Angeles Times*, September 8, 2000; “Jury finds Aryan leader negligent,” *Idaho Statesman*, September 8, 2000.
- ³⁴ Southern Poverty Law Center, “Macedonia v. Christian Knights of the Ku Klux Klan,” found at <http://www.splcenter.org/get-informed/case-docket/macedonia-v-christian-knights-of-the-ku-klux-klan>; “Exposing And Correcting Racial Violence,” Trial Lawyers Doing Public Justice 1999; “Reductions; Verdicts Reduced After Trial,” citing *Macedonia Baptist Church v. Christian Knights of the Ku Klux Klan-Invisible Empire, Inc.*, 96-CP-14-217 (Clarendon County Ct. Common Pleas, S.C., 1998).
- ³⁵ Koenig and Rustad, *supra* n. 26, citing questionnaire of Vanessa Gilmore, Mr. Beale’s attorney, dated May 10, 1994; *Beale v. Beechnut Manor Living*, No. 90-18826 (Harris County Dist. Ct., Tex., verdict May 21, 1992).
- ³⁶ Koenig and Rustad, *supra* n. 26, citing *Wahl v. McDonnell Douglas Corp. et al.*, No. A-80, CA-214 (W.D. Tex., December 1981); “\$3.5 Million Crash Death Award,” *Washington Post*, December 14, 1981.
- ³⁷ Koenig and Rustad, *supra* n. 26; *Leichtamer v. American Motors Corp. et al.*, 1980 Ohio App. Lexis 13923 (1980), *aff’d*, 424 N.E.2d 568 (Ohio 1981).
- ³⁸ Bob Van Voris, “Trial lawyers gird for political wars,” *National Law Journal*, August 2, 1999; “Lawyers, client given public service award,” *Corpus-Christi Caller-Times*, July 22, 1999; “Settlements; Reached After Trial,” *National Law Journal*, February 23, 1998, citing *Caballero v. Esenjay Petroleum Corp. et al.*, 95-6629-A (Nueces County Dist. Ct., Tex., verdict July 3, 1997). Although Esenjay failed to honor the agreement after the company was sold, the new owner ultimately reinstated the agreement after a second lawsuit. See, Bob Van Voris, “Trend Shows Lawyers Swapping Damages for Safety Changes,” *Legal Intelligencer*, September 17, 1999.
- ³⁹ E-mail correspondence from Michael Rustad, July 14, 2000, citing interview with plaintiff’s attorney Frank J. Bruzzese; Koenig and Rustad, *supra* n. 26, citing *Rush v. Minster Machine Co.*, No. 81-CV-191 (Mahoning County, Ohio C.P., 1984); Michael Rustad, “In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data,” 78 *Iowa L. Rev.* 1, 80 (October 1992).
- ⁴⁰ See, e.g., Tennessee Center for Policy Research, *Lawsuit Abuse Reform in the Volunteer State*, February 21, 2011 (discussing the need for a cap on punitives in the state), found at www.tennesseepolicy.org/wp-content/uploads/Lawsuit-Abuse-Reform-in-the-Volunteer-State.pdf (“While punitive damages are

frequently lowered on appeal, that process costs significant time and money for all parties involved, and drains resources from the court system. A punitive damages cap would more rapidly reduce the extent of these inefficiencies.”) (“In particular, punitive damages caps could provide targeted industries like nursing homes with the ability to redirect significant resources toward patient care that are currently lost as a result of excessive legal costs.”) The Center’s Board of Directors consists solely of business leaders. Tennessee Center for Policy Research, “About Us” (viewed August 11, 2011), found at <http://www.tennesseepolicy.org/about-2-2/>. American Tort Reform Association press release, “ATRA Lauds Wisconsin’s Governor, Legislators For ‘Reasonable,’ Economy-Boosting Tort Reforms,” January 27, 2011, (discussing newly-enacted limits in the state), found at <http://www.atra.org/newsroom/releases.php?id=8537> (“Lastly, the new limit on awards for punitive damage will help reduce trial lawyers’ incentive for bringing some of their less meritorious lawsuits, which of course cost just as much to defend against as do more meritorious lawsuits.”) This statement was made by Tiger Joyce, president of ATRA, a corporate front group that works to shield companies from legal accountability for dangerous behavior. Ted Frank, “The Era of Big Punitive Damage Awards Is Not Over,” *Wall Street Journal*, July 10, 2008 (discussing *Exxon Shipping v. Baker*, 554 U.S. 471 (2008)), found at <http://online.wsj.com/article/SB121564812517840987.html> (“the opinion highlights the need for legislative reform of arbitrary punitive damage awards”) (“more nine-digit punitive damages awards have been made in the past 10 years than in the rest of American history”) (“countless settlements induced by the threat of outlandish punitive damages”) (“Two in the majority... believe that the Supreme Court does not even have the constitutional power to review outlandish, state-court punitive damages awards.”) (“If one wants common-sense rules on punitive damages, state legislatures will need to step up.”) Frank is Founder and Director of the Center for Class Action Fairness, an Adjunct Fellow at the Manhattan Institute, Editor of the Institute’s blog, PointofLaw.com, and a frequent contributor to the Cato Institute’s blog, Overlawyered.com. “About,” found at <http://overlawyered.com/about/>; “Legal Experts,” found at http://www.pointoflaw.com/masthead/legal_experts.php. All three organizations seek to limit corporate accountability for injuring consumers. U.S. Chamber of Commerce press release, “Supreme Court Throws Out ‘Excessive’ Exxon Punitive Damages Award,” June 25, 2008 (discussing *Exxon Shipping v. Baker*, 554 U.S. 471 (2008)), found at <http://www.uschamber.com/press/releases/2008/june/supreme-court-throws-out-excessive-exxon-punitive-damages-award>. (““This is good news for companies concerned about reining in excessive punitive damages.... For years the Chamber has argued that punitive damages are too unpredictable and unfair, and today the Court agreed.””) (““The decision could have an effect far beyond federal maritime law.... Limiting punitive damages to no more than the amount of a compensatory award will go a long way in cabining unpredictable punitive damages.””) The Chamber is one of the largest “tort reform” lobby groups in the country.

⁴¹ U.S. Department of Justice, Bureau of Justice Statistics, *Punitive Damage Awards in State Courts, 2005*, NCJ 233094 (March 2011), at 1, 2 (Table 1).

⁴² *Ibid.*

⁴³ *Id.* at 2 (Table 1).

⁴⁴ *Id.* at 2 (Table 1).

⁴⁵ American Tort Reform Association, “Punitive Damages Reform” (viewed August 11, 2011), found at <http://www.atra.org/issues/index.php?issue=7343>. Wisconsin is included but hasn’t been updated. In January 2011, Gov. Walker signed legislation into law that limits punitive damages to \$200,000 or two times compensatory damages, whichever is greater. Drunk-driving cases are not subject to the cap. Adam Korbitz, “Governor signs controversial tort reform bill into law,” *State Bar of Wisconsin*, January 27, 2011, found at http://www.wisbar.org/am/template.cfm?section=Legislative_Advocacy&Template=/CM/ContentDisplay.cfm&Contentid=99842; Adam Korbitz, “Assembly sends omnibus tort reform bill to governor,” *State Bar of Wisconsin*, January 21, 2011, found at <http://www.wisbar.org/AM/Template.cfm?Section=News&Template=/CM/ContentDisplay.cfm&ContentID=99772>.

⁴⁶ American Tort Reform Association, *supra* n. 45. In Massachusetts, Nebraska and Washington, punitive damages are prohibited by common law. *Ibid.*

⁴⁷ Those states are Arizona, Colorado, New Jersey, Ohio, Oregon and Utah. American Tort Reform Association, *supra* n. 45.

⁴⁸ See, American Tort Reform Association, *supra* n. 45; Wilson Elser Moskowitz Edelman & Dicker LLP, *Punitive Damages Review* (2008), vi-viii, found at www.travelers.com/business-insurance/specialized-industries/excess-casualty/docs/punitedamages.pdf.

⁴⁹ *Palmer v. A.H. Robins Co.*, *supra* n. 29.

⁵⁰ See, Alaska Statute 09.17.020. “Punitive Damages,” found at <http://touchngo.com/lglcntr/akstats/Statutes/Title09/Chapter17/Section020.htm>; Indiana Code 34-51-3-6 “Payment and allocation of damages; notification; negotiation of award; state’s interest in award, found at <http://www.in.gov/legislative/ic/code/title34/ar51/ch3.html>; Iowa Code 668A.1 “Punitive or Exemplary Damages,” found at <http://coolice.legis.state.ia.us/coolice/default.asp?category=billinfo&service=iowacode&ga=83&input=668A>. See also, American Tort Reform Association, *supra* n. 45; Wilson Elser Moskowitz Edelman & Dicker LLP, *supra* n. 48, at v-vi.

⁵¹ American Tort Reform Association, *supra* n. 45; Wilson Elser Moskowitz Edelman & Dicker LLP, *supra* n. 48, at ii-iii. Arizona, Hawaii, Maine, Maryland, Missouri, Tennessee, Wisconsin and the District of Columbia have adopted the “clear and convincing” standard under the common law. American Tort Reform Association, “ATRA Issues: Punitive Damages Reform” (viewed August 2, 2011), found at <http://www.atra.org/show/7343>; American Tort Reform Association, *supra* n. 45; *Daka, Inc. v. Breiner*, 711 A.2d 86 (D.C. 1998); *Jonathan Woodner Co. v. Breeden*, 665 A.2d 929 (D.C. 1995).

⁵² Cal. Civ. Code §3294, found at <http://codes.lp.findlaw.com/cacode/CIV/5/d4/1/2/1/3/s3294>; New Jersey Statute §2A:15-5.10 “Definitions relative to punitive damages awards,” found at <http://law.onecle.com/new-jersey/2a-administration-of-civil-and-criminal-justice/15-5.10.html>; Texas Civil Practice and Remedies Code, Title 2, §41.001 “Definitions,” found at <http://www.statutes.legis.state.tx.us/Docs/CP/htm/CP.41.htm>.

⁵³ CRS §13-25-127 “Civil actions - degree of proof required,” found at http://www.michie.com/colorado/lpext.dll/cocode/1/216ee/23b64/23b66/23d3a#JD_13-25-127.

⁵⁴ American Tort Reform Association, “Mississippi Reforms,” found at <http://www.atra.org/states/index.php?state=MS&display=bydate>; American Tort Reform Association, “South Carolina Reforms,” found at <http://www.atra.org/states/index.php?state=SC&display=bydate>; NRS 42.005 “Exemplary and punitive damages,” found at <http://www.leg.state.nv.us/nrs/NRS-042.html#NRS042Sec005>. See also, American Tort Reform Association, *supra* n. 45.

⁵⁵ 112th Congress (2011-2012), “Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2011” (H.R. 5), bill summary and status found at <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:h.r.00005>.

⁵⁶ James T. Hammond, “Haley signs tort reform law, creating punitive damages cap,” *Charleston Regional Business Journal*, July 27, 2011, found at <http://www.charlestonbusiness.com/news/40474-haley-signs-tort-reform-law-creating-punitive-damages-cap>; “South Carolina’s week of legislative action,” *Associated Press*, June 17, 2011, found at <http://www.lakewyliepilot.com/2011/06/17/1162756/south-carolinas-week-of-legislative.html>; “Tort reform bill protects on both sides,” *Times and Democrat*, June 20, 2011, found at http://www.thetandd.com/news/opinion/article_d876a482-99ef-11e0-8692-001cc4c03286.html; American Tort Reform Association, “South Carolina Reforms,” found at <http://www.atra.org/states/index.php?state=SC&display=bydate>.

⁵⁷ Press release from the Office of Tennessee Governor Bill Haslam, “Haslam Signs Tennessee Civil Justice Act to Improve Business Climate,” June 16, 2011, found at <http://news.tennesseeanytoday.com/node/7345>; Michael Adams, “Tennessee Approves Caps on Lawsuit Damages,” *Insurance Journal*, May 25, 2011, found at <http://www.insurancejournal.com/news/southeast/2011/05/25/199910.htm>; Jeff Woods, “House approves tort reform; Haslam ready to sign bill,” *Nashville City Paper*, May 20, 2011, found at <http://nashvillecitypaper.com/content/city-news/house-approves-tort-reform-haslam-ready-sign-bill>.

⁵⁸ Korbitz, *supra* n. 45.

⁵⁹ Editorial, “Keeping punitive damages punitive,” *Los Angeles Times*, June 2, 2011, found at <http://www.latimes.com/news/opinion/opinionla/la-ed-damages-20110602,0,6653663.story>. See also, Franchise Tax Board, “Analysis of Amended Bill,” found at www.ftb.ca.gov/law/legis/11_12bills/AB1276_033111.pdf; AB 1276, found at <http://asmdc.org/members/a42/legislation?layout=item>.

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- ⁶⁰ Wilson Elser Moskowitz Edelman & Dicker LLP, *supra* n. 48, at v.
- ⁶¹ Dan Markel, “Overcoming Tradeoffs in the Taxation of Punitive Damages,” 88 *Wash. U. L. Rev.* 609, 611 (2011), found at <http://lawreview.wustl.edu/in-print/overcoming-tradeoffs-in-the-taxation-of-punitive-damages/>.
- ⁶² *L.A. Times* editorial, *supra* n. 59.
- ⁶³ *Ibid.*
- ⁶⁴ U.S. Treasury Department press release, “Fact Sheet: Administration’s Fiscal Year 2012 Budget Provides Incentives for Innovation, Infrastructure, and Education,” February 14, 2011, found at <http://www.treasury.gov/press-center/press-releases/Pages/tg1061.aspx>.
- ⁶⁵ Press release from the Office of U.S. Senator Patrick Leahy, “Leahy Proposes Bill To Stop Tax Breaks For Corporate Misconduct,” April 12, 2011, found at http://leahy.senate.gov/press/press_releases/release/?id=0a3b8313-3811-4dd0-98e6-0de8e1b7c0f0; 112th Congress (2011 - 2012), “Protecting Taxpayers from Misconduct Act” (S. 794), bill summary and status found at <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:s.00794>.
- ⁶⁶ Sen. Leahy press release, *supra* n. 65.
- ⁶⁷ *L.A. Times* editorial, *supra* n. 59; Franchise Tax Board, *supra* n. 50; AB 1276, found at <http://asmdc.org/members/a42/legislation?layout=item>.
- ⁶⁸ AB 1276, *supra* n. 67.
- ⁶⁹ Michael L. Rustad, “The Supreme Court and Me: Trapped in Time with Punitive Damages,” 17 *Widener L. Rev.* 783, 803 (2008), found at lawprofessors.typepad.com/tortspof/files/rustad_symposium_pp_783833.pdf.
- ⁷⁰ *Id.* at 811.
- ⁷¹ *Ibid.*
- ⁷² *Id.* at 815.
- ⁷³ *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994).
- ⁷⁴ *BMW of North America v. Gore*, 517 U.S. 559, 575-85 (1996).
- ⁷⁵ *Id.* at 575-79.
- ⁷⁶ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).
- ⁷⁷ *Philip Morris USA v. Williams*, 549 U.S. 346, 353-357. (2007).
- ⁷⁸ *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008). In the wake of the 2010 BP oil spill in the Gulf of Mexico, U.S. Senator Sheldon Whitehouse (D-R.I.) introduced legislation that seeks to remove the 1:1 cap on punitive damages. “Maritime Fairness Liability Act,” found at <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:s.00592>. See also, Office of U.S. Senator Sheldon Whitehouse, “Whitehouse Introduces Bills to Protect Oil Spill Victims Legislation Would Help Victims Collect Damages, Hold Responsible Companies Accountable,” March 16, 2011, found at <http://whitehouse.senate.gov/newsroom/press/release/?id=14ED2134-ED40-4821-919A-044D27ACB984>.
- ⁷⁹ See, *supra* n. 55; Bill Summary & Status 111th Congress (2009 - 2010), H.R.1086, found at <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:h.r.01086>; Bill Summary & Status 110th Congress (2007 – 2008), H.R.2580, found at <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:h.r.02580>; Bill Summary & Status 109th Congress (2005 - 2006), H.R.5, found at <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:h.r.00005>.
- ⁸⁰ Public Citizen, “2004 Lawsuit Shows Rep. Phil Gingrey’s Willingness to Use Courts While Trying to Block Other Americans From Using Them,” March 14, 2011, found at <http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=3293>; *Gingrey v. Davidson*, Civ. No. 04-1-5463-05 (complaint for damages, filed July 12, 2004), found at <http://www.citizen.org/documents/JG-Complaint-20110311.pdf>.
- ⁸¹ “Tort Reform Hypocrite John Boehner...Here We Go Again!” *The Pop Tort*, May 23, 2011, found at <http://www.thepoptort.com/2011/05/tort-reform-hypocrite-john-boehner-here-we-go-again.html>; Joanne Doroshow, “Boehner’s Big Gift to the Drug Industry,” *Huffington Post*, November 4, 2009, found at http://www.huffingtonpost.com/joanne-doroshow/boehners-big-gift-to-the_b_345815.html; “Amendment in the Nature of a Substitute to H.R. 3962 Offered by Mr. Boehner of Ohio,” found at docs.house.gov/rules/health/111_hr3962_boehner_sub.pdf.

-
- ⁸² *Boehner v. McDermott*, Civ. No. 98-0594 (memorandum opinion, dated March 31, 2008), n.5, found at news.findlaw.com/hdocs/docs/cngrss/boehnermcd33108opn.pdf; Lizette Alvarez, "Congressman Sues a Colleague Over Disclosing G.O.P. Talks." *New York Times*, March 10, 1998, found at <http://www.nytimes.com/1998/03/10/us/congressman-sues-a-colleague-over-disclosing-gop-talks.html>.
- ⁸³ *Boehner v. McDermott*, 332 F. Supp. 2d 149, 153 (D.C. Dist. Ct., 2004)(citing Plaintiff's motion at 5), found at http://scholar.google.com/scholar_case?case=5231033006153585774&hl=en&as_sdt=2,33&as_vis=1.
- ⁸⁴ Matthew Daly, "McDermott pays damages to Boehner in 1996 phone-tape case," *Associated Press*, January 31, 2008, found at <http://www.seattlepi.com/local/article/McDermott-pays-damages-to-Boehner-in-1996-1263262.php>.
- ⁸⁵ Edwin Bender, *Beyond Dinner and a Movie: ALEC Actively Courts State Lawmakers*, National Institute on Money in State Politics, July 20, 2011, found at <http://www.followthemoney.org/press/PrintReportView.phtml?r=454>; Brendan Fischer, "ALEC and 'Tort Reform,'" *Center for Media and Democracy*, July 13, 2011, found at <http://www.prwatch.org/news/2011/07/10886/alec-and-tort-reform>; American Legislative Exchange Council, Center for Media and Democracy, "Punitive Damages Standards Act," found at http://www.alecexposed.org/w/images/5/57/0G6-Punitive_Damages_Standards_Act_Exposed.pdf.
- ⁸⁶ Jonathan Stempel, "Colgate, Glaxo sue over toothpaste 'nurdle,'" *Reuters*, July 29, 2011, found at <http://uk.reuters.com/article/2010/07/29/colgate-glaxo-nurdle-idUKN2926730620100729>.
- ⁸⁷ Bender, *supra* n. 85.
- ⁸⁸ *Exxon Mobil Corporation v. Bolton Fencing & Construction*, Case No. 201114639 (original petition and request for disclosure, filed March 8, 2011)(on file with CJ&D).
- ⁸⁹ American Tort Reform Association, "Sample List of ATRA Members " (viewed August 2, 2011), found at <http://www.atra.org/about/members.php>; Bender, *supra* n. 85.
- ⁹⁰ See, e.g., American Tort Reform Association, *supra* n. 45, 51; American Tort Reform Association, "ATRA Paper Makes Clear Case for Constitutionality of Federal Medical Malpractice Reform," May 10, 2011, found at <http://www.atra.org/show/8591>; American Tort Reform Association, "ATRA Lauds Wisconsin's Governor, Legislators for 'Reasonable,' Economy-Boosting Tort Reforms," January 27, 2011, found at <http://www.atra.org/show/8537>.
- ⁹¹ *Pfizer v. Tyagi* (decision May 31, 2011), found at lobis.nic.in/dhc/VKJ/judgement/01-06-2011/VKJ31052011S22972007.pdf. See also, "Curb deceptive marketing gigs: Delhi High Court," *Economic Times*, June 20, 2011, found at http://articles.economicstimes.indiatimes.com/2011-06-20/news/29679866_1_cough-syrup-corex-trade-mark.
- ⁹² *Pfizer v. Tyagi*, *supra* n. 91.
- ⁹³ Press release, "3M wins case against counterfeit stationary items bearing the Trademarks 3M, Post-it and Post-it logo in Mumbai," *India PRwire*, July 30, 2010, found at <http://news.pluggd.in/3m-wins-case-against-counterfeit-stationary-items-bearing-the-trademarks-3m-post-it-and-post-it-logo-in-mumbai-bombay-high-court-seizes-all-stationary-products-from-defendants-premises-221/>.
- ⁹⁴ *Ibid.*
- ⁹⁵ Illinois Civil Justice League, "Membership," found at <http://www.icjl.org/about/membership/>.
- ⁹⁶ See, e.g., Illinois Civil Justice League, "April 2011: ICJL Legislation Gains Hearing, But No Votes, in Illinois House," June 1, 2011, citing H.B 1367 - Product Liability Reform, found at <http://www.icjl.org/newsupdate/LegislativeUpdate.htm>. For text of bill, go to <http://www.ilga.gov/legislation/97/HB/PDF/09700HB1367lv.pdf>. See also, Letter from Edward D. Murnane, "Sending the Right Message," *Chicago Tribune*, July 31, 2000, found at http://articles.chicagotribune.com/2000-07-31/news/0007310121_1_punitive-personal-injury-lawyers; Comments of Ed Murnane, President of the Illinois Civil Justice League, "Litigation after the \$4.9 Billion GM Verdict: Lawsuit Lottery or Civil Justice?" September 23, 1999, found at <http://fedsoc.server326.com/Publications/Transcripts/gmchicago.htm>.
- ⁹⁷ "Court Upholds \$1 Billion Award to Motorola," *Bloomberg News*, November 22, 2007, found at <http://www.nytimes.com/2007/11/22/business/22motorola.html>; *Motorola Credit Corp. v. Uzan* (original complaint, filed January 28, 2002), found at <http://www.techlawjournal.com/courts2002/motorola/20020128.asp>.

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- ⁹⁸ *Motorola Credit Corp. v. Uzan*, 274 F. Supp. 2d 481, 581 (S.D.N.Y. 2003), found at http://scholar.google.com/scholar_case?case=4726814881014713378&hl=en&as_sdt=2&as_vis=1&oi=scholar.
- ⁹⁹ *Motorola Credit Corp. v. Uzan*, 561 F. 3d 123 (2nd Cir.)(2009), found at http://scholar.google.com/scholar_case?case=12877408917051166305&hl=en&as_sdt=2&as_vis=1&oi=scholar; *Bloomberg News*, *supra* n. 97.
- ¹⁰⁰ American Tort Reform Association, *supra* n. 45.
- ¹⁰¹ Thomas H. Koenig and Michael L. Rustad, "Parens patriae litigation to redress societal damages from the BP oil spill: the latest stage in the evolution of crim torts," *UCLA J. Envtl. L. & Pol'y* (Summer 2011), found at http://findarticles.com/p/articles/mi_hb3571/is_1_29/ai_n57659668/; Jessica M. Karmasek, "New Ala. AG fires private firms handling BP case," *Legal Newsline*, January 27, 2011, found at <http://www.legalnewsline.com/news/230784-new-ala.-ag-fires-private-firms-handling-bp-case>; Bob Johnson, "New Ala AG: pursuing oil spill claims top priority," *Associated Press*, January 8, 2011; Hubert Tate, "AG Troy King files suit against BP," *FOX10 TV*, August 13, 2010, found at http://www.fox10tv.com/dpp/news/local_news/baldwin_county/ag-troy-king-files-suit-against-bp; Philip Rawls, "Alabama AG Sues BP, Others Over Gulf Oil Spill," *Associated Press*, August 12, 2010, found at <http://www.aolnews.com/2010/08/12/alabama-ag-sues-bp-others-over-gulf-oil-spill/>.
- ¹⁰² Office of Alabama Attorney General Luther Strange, "Issues," found at <http://lutherstrange.com/issues/>.
- ¹⁰³ Johnson, *supra* n. 101.
- ¹⁰⁴ Luther Strange, "Alabama in forefront of BP claims litigation," *Gadsen Times*, April 24, 2011, found at <http://www.gadsentimes.com/article/20110424/news/110429918>.
- ¹⁰⁵ American Tort Reform Association, *supra* n. 45.
- ¹⁰⁶ Eve Byron, "State sues BP, other oil and gas companies," *Independent Record*, February 23, 2011, found at http://helenair.com/news/state-and-regional/article_5fdd3370-3fad-11e0-b2ec-001cc4c03286.html.
- ¹⁰⁷ *Ibid.*
- ¹⁰⁸ U.S. Senator Sheldon Whitehouse, "Whitehouse Highlights How Supreme Court Decisions Affect Nation," June 22, 2010, found at <http://whitehouse.senate.gov/newsroom/speeches/speech/?id=f2a0834f-10c0-4b1f-b6f0-400b9935eb49>.