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What you need to know about…

PUNITIVE DAMAGES

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INTRODUCTION

Punitive damages hold reckless companies and others accountable for their most egregious wrongdoing, and perhaps more importantly, they deter future misconduct.

George W. Bush thinks he knows about punitive damages. On March 21, 2001, he pledged to veto a bi-partisan "Patients' Bill of Rights" because the law would, among other things, allow punitive damages against HMOs whose decisions injure or kill patients (although capping such awards at $5 million). Bush said, "The caps [on punitive damages] are too high, and will drive up the costs of health care in America."[1] Bush's proposal would prohibit punitive damages altogether.

Solicitor General Ted Olson thinks he knows about punitive damages, too. In 1997, Olson told Congress that he believed punitive damages "combine the worst elements of a lottery and a plague by providing little rhyme or reason for who is rewarded and who is punished."[2] Senator Orrin Hatch (R-Ut.) also has spoken about "the incendiary outburst of punitive damage awards" which adds fuel to what he calls an out-of-control litigation "fire."[3]

No question, punitive damages are easy rhetorical targets by conservative policymakers in the debate over juries, verdicts and the civil justice system. But are they really as common, huge, arbitrary and costly to society as "tort reform" groups and their political allies say they are? Or do the facts tell a different story?

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protect the right
to trial by jury and
an independent judiciary
for all Americans."

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Actually, they tell a very different story.

Far from being "out of control," the typical award of punitive damages in this country is only $38,000 and, overall, punitive damages are imposed in only 3.3 percent of cases.[4] Moreover, the amount juries have awarded in punitive damages is declining – *down 34 percent* between 1992 and 1996.[5]

Although they are rare, punitive damages (sometimes called "exemplary damages") have critical social and financial importance lying not in their frequency, but in the "signals" they send to other potential wrongdoers. As the industry-backed Rand Institute for Civil Justice put it, "Punitive damages are designed to punish a defendant for grossly inappropriate actions and, in so doing, to deter future such actions by signaling that their consequences can be severe."[6] Indeed, history is replete with examples where the imposition or threat of punitive damages has resulted in dangerous products and services being taken off the market, and ensuring that similar products and services are never put on the market in the future.

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

So 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.

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 like General Motors, 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.

Of the 45 states that allow punitive damages in this country, one-third have now enacted some form of cap, or limit, on the ability of judges and juries to award punitive damages, directly undermining their deterrent potential. Texas has done this twice. Over 30 state legislatures have made it more difficult for injured consumers to prove punitive damages by raising the standard of proof required for awarding them.

Several states have created additional disincentives by penalizing those who seek punitive damages, ordering victims to pay a portion of punitive damages into state-designated funds. Fourteen states, including California, New Jersey and Texas, require or permit bifurcated trials where the injured person is forced to essentially try a case twice, first proving liability and second, arguing the size of the award. In Connecticut and Kansas, juries are prevented from deciding the amount of a punitive damages award — only the judge is permitted do that.[7] And even the U.S. Supreme Court recently took at swipe at juries that award punitive damages, giving appellate judges more authority than they have had in 150 years to overturn a jury's punitive damages award.[8]

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, namely that they are frequent, enormous and handed down by emotional, pro-plaintiff juries. By comparing rhetoric with empirical data, we refute the principal justifications used to limit or cap punitive damages. Part III discusses the media's role in helping perpetuate myths about punitive damages. In Part IV, we include a discussion of limits on punitive damages that have been enacted, as well as an overview of those currently under consideration in state legislatures and the U.S. Congress. And in Part V, we examine the hypocrisy of those who argue for restrictions on individuals' rights while pursing large punitive damages awards in their own lawsuits against corporations.

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.[9] The ancient Romans also enacted laws in 450 B.C. that mandated the imposition of multiple damages as a means of punishing egregious misconduct.[10] As Professors Michael Rustad and Thomas Koenig explain,

> The early Romans apparently employed multiple damages to mediate social relations between patricians and plebeians [*i.e.*, the wealthy elite and the common people] and to punish those who injured or killed slaves. Multiple damages were found in later Roman legal systems as well. Quadruple damages were a creditor's remedy against debtors who did not pay their debts after lapse of a year.[11]

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.[12] One of the earliest punitive damages lawsuits in the United States was the 1791 case of *Coryell v. Colbaugh*, where a jury awarded punitive damages against a man who broke his promise to marry. In its instructions, the court advised the jury “not to estimate the damages by any particular proof of suffering or actual loss; but to give damages for example’s sake, to prevent such offences in [the] future.”[13]

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.”[14]

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 at the expense of poor workers and innocent consumers.[15] 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.”[16] 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.”[17]

By the early 20th century, punitive damages were increasingly used as a consumer protection device against wrongdoers in commercial dealings.[18]

B. The Contemporary Functions of Punitive Damages

Deterrence of unsafe practices through imposition of financial liability, particularly punitive damages, has always been considered a critical function of the modern U.S. civil justice system. Conservative theorist and judge, Richard Posner, has written that the tort system’s economic function is deterrence of noncost-justified accidents, and that tort law creates economic incentives for “allocation of resources to safety.”[19] As every first-year law student learns,

> The “prophylactic” factor of preventing future harm has been quite important in the field of torts. The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer. When the decisions of the courts become known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm.[20]

As the examples in the next section show, punitive damages give culpable manufacturers, hospitals and other wrongdoers the proper economic incentives to become safer and more responsible. They also show that often in cases where criminal laws are violated, the potential for punitive damages can be a more effective deterrent than criminal sanctions.[21]

Jury critics say that punitive damages should be limited, or “capped,” because otherwise they are too “unpredictable.” Yet it is the cost unpredictability of such verdicts that is the essence of the deterrence function of punitive damages. As explained by Professors Jane Mallor and Barry Roberts, "If a punitive damages award can be known with certainty in advance of the conduct, the very sort of callousness that is to be corrected by a punitive award would be facilitated; the defendant would be able to calculate his maximum exposure to liability and determine whether to disregard the interests of the plaintiff."[22]

It is well recognized that some companies, unfortunately, do engage in these kinds of calculations, or "cost/benefit" analyses, balancing safety against profits in determining whether to redesign a defective product, remove it from the market or recall it. That is what a California jury understood in 1999, when it assessed $4.9 billion against General Motors for injuries sustained by Patricia Anderson, her four children and a family friend. 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 was determined to be $2.40 per vehicle. 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 "cost/benefit" process was first brought to public attention in the famous 1981 Ford Pinto "exploding gas tank" case, *Grimshaw v. Ford Motor Company*. In that case, Ford decided not to make certain design changes to the gas tank, 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," punitive damages cannot be treated as such and so "remain as the most effective remedy for consumer protection against defectively designed mass-produced articles."[23] Similarly, in cases involving the defective Dalkon Shield IUD, which injured and killed thousands of women, the court noted that "[i]f 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."[24]

The following cases illustrate how punitive damages work to make society safer:

- On October 27, 1995, a 42-year-old Texas oil worker's scalp was torn off, causing hearing loss and brain damage, after a piece of equipment exploded from a gas well. 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.[25]

- In September 1982, a newborn suffered permanent brain damage after being left alone in an Arkansas hospital nursery for 35 minutes, 10 to 15 of which he stopped breathing. Evidence showed that the hospital's cost-cutting procedures left the nursery two nurses short on the nightshift. After a jury awarded $2 million in punitive damages, the parent corporation changed its policy on staffing pediatric units throughout its chain of hospitals.[26]

- 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.[27]

- 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.[28]

- The Dalkon Shield IUD, 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]

- A passenger lost both legs and the use of one arm after his plane's right engine quit at 1,000 feet, causing the plane to crash while en route to Lake Tahoe. Evidence showed that the engine manufacturer knew of at least 55 prior instances of engine failure caused by defective generators, but it was company policy to wait for one to two percent failures before taking corrective action. After the $10.5 million punitive damages verdict in June 1972, the company issued a detailed inspection procedure to mechanics to prevent future generator failures.[30]

- On May 31, 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.[31]

- On January 19, 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.[32]

- A 22-year-old civilian employee of the United States at Fort Sill, Oklahoma, was thrown from a lawn mower while cutting grass, causing an arm injury and finger amputation. Evidence showed that the manufacturer knew of prior injuries but refused to retrofit, repair or warn about the mower's dangerous design. After the punitive damages verdict, the company recalled and retrofitted the lawn mower.[33]

- In 1985, an 80-year-old was legally blinded in her left eye when a twist-off aluminum cap blew off a plastic 7-Up bottle and struck her in the eye as she began to remove the cap with a wrench.

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.[34]

- On April 2, 1983, a woman died from toxic shock syndrome (TSS) after using Playtex super-absorbent tampons. Although the package warning complied with the minimum FDA standard, experts testified that mere compliance was inadequate. After a jury awarded $10 million in punitive damages, the company stopped producing the dangerous tampons, took them off the market, modified the TSS warning statement on its tampon packaging and agreed to inform the public about TSS.[35]

- In June 1995, members of the Christian Knights of the Ku Klux Klan 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.[36]

- In November 1972, a family died from carbon monoxide poisoning after burning ten pounds of charcoal briquettes indoors to heat their house. Following the $212,500 punitive damages award, manufacturers began placing prominent warnings about the deadly hazards of using charcoal without ventilation on every charcoal bag.[37]

- On May 14, 1980, an Arkansas hospital patient suffered lung and brain damage when an Airco ventilator impaired her breathing during surgery. Testimony and pre-market tests showed that the company knew the apparatus was dangerous and potentially lethal before placing it on the market. After the jury's $3 million punitive damages award was upheld on appeal, Airco issued an FDA-sponsored medical device alert, warning doctors and hospitals nationwide of the potential for product misuse.[38]

- 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. After a $1.55 million jury verdict, the manufacturer made design changes to the controls in all its Air Force jets to eliminate the possibility of similar accidents.[39]

- 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.[40]

- On April 18, 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 American Motors 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.[41]

- A woman suffered acute renal failure after taking the oral contraceptive Ortho-Novum 1/80 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.[42]

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. Allan Zaremberg, President of the California Chamber of Commerce, recently said it this way: "Punitive damages have become one of the greatest threats to economic vitality."[43] Yet when pressed for real-world data to support such claims, "tort reformers" come up empty. As numerous scholars have pointed out, there is no empirical evidence to support these kinds of wildly-exaggerated negative characterizations of punitive damages.[44]

Below we dispel some common myths about punitive damages by examining the most up-to-date information available.

MYTH #1: "Huge, multimillion-dollar punitive damages awards are routine, thereby threatening our economic vitality."

FACT: Empirical studies demonstrate that awards of punitive damages in tort cases are both infrequent and modest in size. According to the most recent data from the Bureau of Justice Statistics of the U.S. Justice Department, which studied court statistics in the 75 largest U.S. counties, in 1996 punitive damages were awarded in just 3.3 percent of state tort trials where the injured person won his or her case.[45] The median punitive damages award was $38,000.[46]

Data also show that punitive damages are rare in the areas often targeted for tort restrictions: products liability and medical malpractice. The Bureau of Justice Statistics found that in 1996, in those cases where the injured victim prevailed, only 11 products liability (non-asbestos) cases resulted in punitive damages.[47] In addition, of the 359 trials involving defective products (including asbestos), only 5 plaintiff winners (1.4 percent) were awarded punitive damages.[48]

Punitive damages are also awarded in only a small fraction of medical malpractice cases, with a mere .25 percent (3 out of 1,195) of winning medical malpractice plaintiffs in the nation's 75 largest counties receiving punitive damages from *judges and juries* in 1996.[49] Lastly, *juries* are handing down punitive damages verdicts to fewer medical malpractice victims who prevailed at trial, declining from 3.2 percent in 1992[50] to .27 percent in

1996.[51] Other studies come to the same conclusion, namely that punitive damages are infrequent in medical malpractice and product liability cases.[52]

Studies also show that judges frequently reduce or reverse the occasional large punitive damages award. For example, according to a recent *National Law Journal* analysis of 29 jury-decided punitive damages verdicts of $1 million or more in 1994, 10 were reversed and 10 were severely reduced.[53] Similarly, in their study of punitive damages awards in products liability cases, Professors Michael Rustad and Thomas Koenig discovered that between 1965 and 1990 only one quarter of the punitive awards were affirmed by appellate courts, with nearly one-third ultimately being reversed or reduced on appeal. Thirty-seven percent of punitive damages winning plaintiffs received nothing. The data also showed that the median punitive award received was 77 percent lower than the original award at trial.[54] The largest punitive damages awards were most likely to be reduced or eliminated in the post-trial period.[55]

After looking at punitive damages in medical malpractice cases nationwide for the years 1963-1993, Koenig and Rustad found that judges changed 42 percent of punitive verdicts after trial. Nearly ten percent (26 out of 270) of cases involving punitive damages were reversed by appellate courts.[56] Moreover, the "vast majority of punitive dollars were uncollectible due to post-trial reversals, settlements, and defendant insolvency."[57]

MYTH #2: "Jurors are biased against deep-pocket corporate defendants in awarding punitive damages."

FACT: It is getting increasingly difficult for individuals to win punitive damages before juries. Justice Department statistics show that civil juries awarded punitive damages in only 2.5 percent of state tort trials in 1996; judges awarded punitives in relatively more cases —7.9 percent of cases.[58] Judges were also more generous than juries in 1996: the median tort punitive damages award by a judge equaled $75,000, $48,000 higher than the typical punitive jury award of $27,000.[59] Juries are also awarding smaller punitive damages amounts to winning tort plaintiffs: between 1992 and 1996, the median jury award declined by over 34 percent, from $41,000 in 1992[60] to $27,000 in 1996.[61]

Empirical research also shows that the "decision to award punitive damages is based upon egregious circumstances, rather than biases against corporations."[62] In their study of punitive damages in products liability cases from 1965 to 1990, Professors Rustad and Koenig concluded that "[p]unitive damages were generally awarded where there was some 'smoking gun' showing that a firm concealed, suppressed, or recklessly failed to take remedial action to correct a dangerous product defect."[63] After examining punitive damages in medical malpractice cases covering a thirty-year period, Koenig and Rustad found that punitive damages were only levied in instances of outrageous behavior.[64]

Professor Valerie Hans' extensive studies of decades of jury behavior also contradict the "deep pocket" theory. Rather than finding any evidence that juries arbitrarily use punitive damages as a "wealth redistribution" tool targeting insurance companies and wealthy corporations, Hans found that large awards were the result of jurors "follow[ing] the court's instruction that punitive damages should be large enough to hurt the defendant company."[65]

Similarly, Professor Marc Galanter has discovered overwhelming consensus among researchers about jurors' abilities to act within the boundaries of the law. According to Galanter, "[R]esearchers concur that jurors on the whole are conscientious, that they collectively understand and recall the evidence as well as judges, and that they decide factual issues on the basis of evidence presented."[66]

A March 2000 survey of federal judges by the *Dallas Morning News* and SMU School of Law also found overwhelming support of juries. Over 81 percent of respondents thought that most jurors come into a civil case favoring neither side, with nearly 77 percent believing that juries did very well in reaching a just and fair verdict.[67] In addition, 59 percent said they would prefer the dispute to be decided by a jury if they were a litigant in a civil case, with only 21 percent preferring a judge as the decisionmaker. [68]

MYTH #3: "Because jurors are overly sympathetic to injured individuals, punitive damages awards are larger and more common in cases where individuals sue companies than in other types of litigation."

FACT: Studies show that punitive damages are higher and more frequently awarded in cases involving intentional torts (*i.e.*, rape, assault) and business contracts (*i.e.*, usually one business suing another) than in cases by individuals against corporations. Professors Rustad and Koenig's on-going analysis of business tort cases – what they term "Goliath versus Goliath" cases – shows that the vast majority of hundred-million-dollar verdicts arise in business litigation. According to their findings:

> Intellectual property disputes, indemnification of pollution cases, real estate development, trade secrets litigation, and general corporate bad faith cases is where large punitive damages awards are more common. Rand's Institute of Civil Justice, the American Bar Foundation study, and [Rustad's] summary of all punitive damages research … confirms that if there is any problem in punitive damages as a remedy, it is likely to be in the field of business versus business.[69]

Regarding the frequency of punitive verdicts, the Rand Institute for Civil Justice reported that financial injury cases (*i.e.*, primarily business versus business cases) accounted for 49.6 percent of the nearly 1,300 cases in which punitives were awarded.[70] In contrast, medical malpractice and products liability cases accounted for only 2.1 percent and 3.5 percent, respectively, of all awards of punitive damage.[71] While 14.2 percent of financial injury cases resulted in punitive damages, only .5 percent of med mal cases and 2.1 percent of products cases involved punitives.[72]

Rand researchers also found that, compared with those injured by medical malpractice or defective products, financial injury plaintiffs (*i.e.*, mostly corporations) were awarded punitive damages at a substantially higher rate: 22.5 percent of prevailing financial injury plaintiffs received punitives, while only 1.7 percent of med mal and 5.3 percent of products plaintiffs received punitive damages.[73] Other studies have uncovered similar results.[74]

MYTH #4: "Awards of punitive damages are arbitrary; therefore, companies cannot anticipate the kinds of conduct from which to refrain to avoid future lawsuits."

FACT: Empirical data reflect considerable predictability about the level of corporate misconduct that gives rise to punitive damages. For example, in a recent study of 3,000 mock jurors, researchers concluded that individual "moral judgments about personal injury cases are very widely shared over diverse communities and demographic categories."[75] This finding was consistent with results from their earlier study, which also found widespread consensus in jurors' assessments of corporate accountability in personal injury cases.[76]

In products liability cases, the type of behavior that merits punitive damages is quite predictable.[77] After looking at 25-years' worth of cases, Professors Rustad and Koenig found that "[p]unitive awards in products liability are overwhelmingly the result of '(1) fraudulent-type of misconduct; (2) knowing violations of safety standards; (3) inadequate testing and manufacturing procedures; (4) failure to warn of known dangers before marketing; and (5) post-marketing failure to remedy known dangers.'"[78]

Moreover, the amount of punitive damages typically awarded is far less "unpredictable" than "tort reformers" say. In a 1996 study of three verdict data sources, researchers found that "[f]ar from picking numbers out of the air, jurors and judges across dozens of jurisdictions and many case categories determine punitive damages award levels with a startling consistency."[79]

After examining punitive damages in medical malpractice and products liability cases nationwide, Professors Rustad and Koenig concluded that the size of such awards was not random but patterned. Regarding medical malpractice cases between 1963 and 1993, punitive verdicts were largely proportional to compensatory awards, with the median ratio of punitive damages to compensatory damages awarded at trial 1.21 to 1.[80] In products cases from 1965 to 1990, the overall median punitive damages award was 1.67 times the median compensatory award.[81]

PART III: MISIMPRESSIONS AND THE MEDIA

The previous sections show that, far from creating an economic "crisis," punitive damages play a pivotal role in saving costs and making society safer. Yet many policymakers have the false and dangerous perception that the civil justice system, particularly punitive damages, are spinning out of control, or that a plaintiff received a windfall, a defendant was financially ruined or the system failed.[82]

Unfortunately, through selective coverage of headline-grabbing punitive damages awards rather than the mass of tort cases, the mainstream media have helped misinform the public about the nature and impact of punitive damages. Studies of media coverage bear this out.

For example, data collected from the *New York Times*, *Wall Street Journal*, *Washington Post*, *Los Angeles Times* and *Christian Science Monitor* from 1980 to 1999 reveal that 88 percent of reported punitive jury awards mentioned in news articles exceeded the typical punitive award in the country.[83]

Similarly, after examining newspaper reporting of product liability verdicts decided from 1985 to 1996 against auto manufacturers, Professor Steven Garber found coverage was more likely if punitive damages were part of the award.[84] Although punitive damages were awarded in only 4.6 percent of the verdicts, they appeared in 21.3 percent of all reports of verdicts.[85] According to Garber, "an award of roughly $ 2 million that includes a punitive component is as likely to receive newspaper coverage as a $ 25 million award that is entirely compensatory. Holding total damages constant … the probability of a newspaper article is 3.5 to 5.5 times higher if a component of the damages is punitive."[86] After looking at three different TV news databases, Garber also discovered that despite very little television coverage of tort verdicts, "virtually all of the television coverage we found was triggered by verdicts that included unusually large punitive damages awards."[87]

For more information on the media and jury verdicts, see *Reading Between The Headlines – The Media And Jury Verdicts* (January 2001), a Center for Justice & Democracy White Paper.

PART IV: LEGISLATION TO LIMIT PUNITIVE DAMAGES

A. Court Decisions Make Legislation Unnecessary

No matter what the statistics and facts say, there are some who still insist that legislatures should interfere with the longstanding authority of the courts and arbitrarily limit juries' powers to award punitive damages. This view is all the more absurd given recent Supreme Court decisions that give judges enormous power to limit a jury's determination of punitive damages.

Until 1996, the U.S. Supreme Court had generally upheld jury discretion to determine the appropriateness of a punitive damages award. For example, in 1991, the Court upheld an $800,000 punitive award against a life insurance agent who continued to collect premiums from insureds after their policies had been cancelled. The punitive award totaled four times the compensatory damages award.[88]

Two years later, the Court affirmed a jury award of $19,000 in compensatory damages and $10 million in punitive damages against a corporation that repeatedly tried to fraudulently transfer land titles hoping to earn millions. In *TXO Production Corp. v. Alliance Resources Corp.*,[89] the Court found the punitive award "not excessive" because it bore a reasonable relationship to the severity of the company's conduct, the profitability of the misbehavior and the harm done.[90]

However, in the 1996 case of *BMW of North America, Inc. v. Gore*,[91] the Court shifted its approach, providing a new definition for the term "grossly excessive punitive damages" as a violation of the Constitution's guarantee of due process of law. The case involved a car buyer who discovered that his $40,000 purchase, which he bought assuming it was new, had in fact been damaged and repainted prior to sale. An Alabama jury had awarded $4,000 for the reduced value of the car and $4 million in punitive damages, an amount based on the nearly 1,000 cars BMW refurbished and presented as new and undamaged to unsuspecting consumers nationwide.[92]

Notably, by the time the U.S. Supreme Court heard the case, the Alabama Supreme Court had already cut the punitive award in half. In a dissent, Justice Scalia argued that the majority opinion was basically creating law because no earlier cases "actually took the step of declaring a punitive award unconstitutional simply because it was 'too big.'"[93]

On May 14, 2001, the Supreme Court issued a ruling that further undermined the jury's role in deciding punitive damages. In *Leatherman Tool Group v. Cooper Industries, Inc.*,[94] the Court, in an 8-1 decision, ruled that the Court of Appeals should give awards of punitive damages full, or "de novo," review when judging court determinations of their constitutionality. However, it should be noted that many plaintiffs' lawyers believe that "the decision will have little impact, as the statistics show, courts have already been slashing and eliminating large punitive awards."[95]

B. Legislative Limits On Punitive Damages

The fact that 32 states have some type of statutory punitive damages limit is a measure of how successful "tort reformers" have been in spreading their anti-jury message when it comes to punitive damages.[96] Legislative restrictions now include: 1) outright bans on punitive damages; 2) damages caps; 3) mandatory assignment of a percentage of any punitive award to state funds; 4) heightened burdens of proof; and 5) bifurcated trials.

- **Outright ban.** Both Louisiana and New Hampshire have enacted statutes that ban punitive damages unless otherwise authorized by statute. This approach is similar to the common law in several states, like Massachusetts, Nebraska and Washington.[97]

- **Caps.** A punitive damages cap restricts awards to a specified dollar amount ("flat cap") or some fixed ratio tied to compensatory damages ("multiplier"), thereby replacing jury discretion with an arbitrary system that bears no relationship to the degree of the defendant's size or misconduct. Missouri and Florida went a step further by enacting laws that limit punitive awards against a company for a single incident regardless of whether the same act or course of conduct does harm to others.[98] (Florida's law was declared unconstitutional, and the decision is currently on appeal.)[99]

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. Caps allow companies to factor liability into the cost of doing business.

Caps can also have a discriminatory effect on low-income citizens. By tying punitive awards to compensatory damages, multipliers discriminate against the economically disadvantaged in that the award is largely dictated by the earning capacity of the injured plaintiff.

- **Apportionment.** Alaska, Illinois, Iowa, Missouri, Oregon and Utah create disincentives to pursue punitive damages and penalize victims by requiring an injured individual who wins a case to pay a portion of any award of punitive damages into a state-designated fund.[100]

- **Heightened evidentiary standard.** Over 30 states have attempted to limit punitive damages by raising the evidentiary threshold plaintiffs must meet to receive them. To date, 23 states, including California, New Jersey, Texas and South Carolina, have enacted laws that allow recovery of punitive damages only where there is "clear and convincing" evidence that a company acted reprehensibly, a much higher standard than the typical "preponderance of evidence" standard normally used in civil cases. Eight states and the District of Columbia have adopted the "clear and convincing" standard under the common law. In Colorado, an injured consumer must show "beyond a reasonable doubt" that a company's behavior merits punitive damages.[101]

- **Bifurcation.** States such as Georgia, Mississippi and Texas require that the liability and punitive damages phases of a case be tried separately, preventing jurors from having access to a defendant's financial information during the liability phase of the trial, as if juries are incompetent to handle such data.[102]

Insurance. Though not considered a traditional punitive damages "tort reform," the ability to insure against punitive damages also subverts their primary functions of punishing and deterring dangerous behavior. Laws relating to the insurability of punitive damages vary between states and jurisdictions. Over 35 states allow companies to insure against punitive damages in at least some situations. In certain states, like Illinois and New York, directly assessed punitive damages (*i.e.*, damages based directly on the wrongdoers own acts) are not insurable as a matter of public policy. In others, such as Hawaii and Montana, the language of the insurance contract controls, meaning that punitive damages are insurable only if they are expressly included in the policy. Still another approach, which exists in over 30 states, is that punitive awards vicariously assessed against an insured are insurable.[103] In states where punitive damages are insurable and there is also a punitive damages cap, like Georgia, Texas and Virginia, wrongdoers are doubly protected from punishment.[104]

C. Current Developments

STATE LEGISLATION

- **California.** As of the date of this publication, the California state assembly is considering a bill that would cap punitive damages against small businesses at three times the amount of compensatory damages.[105]

- **Florida.** In 2001, the legislature passed a measure that would limit punitive damages against nursing homes to the greater of $1 million or three times the level of compensatory damages, or in some cases, to the greater of $4 million or four times compensatory damages, provided there is no intentional misconduct.[106]

- **Tennessee.** The House is considering several bills allowing patients to sue HMOs. While two versions permit suing for punitive damages, one does not.[107]

- **Texas.** A bill has been introduced in the Senate that would cap punitive damages in cases involving injuries to children, the elderly or the disabled to the greater of: 1) two times the amount of economic damages plus the lesser of an amount equal to noneconomic damages or $750,000: or 2) $200,000. Under the Senate proposal, a nursing home resident could only seek punitive damages against a nursing home if the institution has already been convicted in criminal court for the same conduct. [108]

  The Texas House is considering a punitive damages bill with similar damages caps that only apply to the elderly and the disabled. According to the current draft, where a defendant injures an elderly or disabled individual in violation of the criminal law, punitive damages are capped at the greater of: 1) four times the amount of economic damages plus the lesser of an amount equal to noneconomic damages or $1.5 million; or 2) $400,000.[109]

FEDERAL LEGISLATION

- **Patients' Bill of Rights.** Senators Edward Kennedy (D–Mass.), John Edwards (D-N.C.) and John McCain (R-Ariz.) have proposed a $5 million cap on punitive damages in federal lawsuits against HMOs over decisions denying coverage, also raising the evidentiary standard.[110] An alternate bill, advocated by George W. Bush and sponsored by Senators Bill Frist (R-Tenn.), James Jeffords (I-Vt.) and John Breaux (D-La.), bans punitive damages against HMOs altogether.[111]

- **Small Business immunity bill.** This bill, introduced in both the House and Senate, among other things caps punitive damages against businesses with fewer than 25 employees to the lesser of $250,000 or three times the amount of economic damages, unless a court finds that there is "clear and convincing evidence" that the company acted "with specific intent" to cause the harm at issue. In addition, to recover punitive damages, injured plaintiffs would have to establish "by clear and convincing evidence" that the defendant acted "with a conscious, flagrant indifference to the rights or safety of others."[112]

- **Teacher immunity bill (for corporal punishment).** Under the punitive damages section of this bill (which as of the date of this publication is on the Senate calendar), punitive damages can only be awarded in lawsuits against teachers, principals, administrators or other school officials, as well as local school boards and educational agencies, where there is "clear and convincing evidence" that the injury was caused by "willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed."[113]

THE COURTS

- **Florida.** The state's broad punitive damages cap, enacted in 1999, is currently under review by a Florida appeals court after a lower court held the law unconstitutional.[114] Under the challenged law, punitives were capped at the greater of three times compensatory damages or $500,000. The cap was the greater of four times compensatory damages or $2 million if the defendant's wrongful conduct was motivated by unreasonable financial gain or the likelihood of injury was known.

- **Mississippi.** In May 2001, the state supreme court placed a $100 million cap on the amount a defendant has to post to appeal a punitive damages award.[115]

- **North Carolina.** An appeal has been filed challenging the constitutionality of the state's $250,000 punitive cap.[116]

PART V: THE HYPOCRITES OF PUNITIVE DAMAGES

(See also, *Not In My Backyard – Hypocrites Of "Tort Reform"* (January 2001), a Center for Justice & Democracy White Paper).

Many of those 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, in 1995, the corporate front-group Citizens Against Lawsuit Abuse (CALA), an organization dedicated to weakening the civil justice system, helped lobby for and enact legislation in Texas that capped punitive damages. Yet at the time this legislation passed, Sterling Cornelius, a trustee of the Texas CALA, was seeking over $75.3 million in punitive damages against DuPont for damage to his companies' crop and nursery. Because his lawsuit was filed before enactment of the 1995 legislation, his suit was not affected by the punitive damages cap that passed.[117]

Similarly, in January 1994, then-West Virginia Supreme Court Justice Richard Neely testified before the New Jersey Senate Commerce Committee as it considered a bill designed to restrict punitive damages claims. Appearing as a paid spokesman for the corporate front-group, New Jersey Citizens Against Lawsuit Abuse, Neely suggested that legislators abolish punitive damages, characterizing them as simply a tool to get defense lawyers to settle.[118] Yet in 1986, Neely had sued TWA for $38,000 in punitive damages after his bags arrived 70 minutes late. The case ultimately settled for $12,500.[119]

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. For example, Caterpillar Inc.'s membership in the Illinois Civil Justice League[120] – a pro-business coalition that has consistently advocated for restrictions on punitive damages[121] – did not stop the manufacturer from seeking punitive damages for fraud and breach of contract in a 1995 case against companies that once made and marketed Caterpillar-brand boots. The jury awarded Caterpillar $2 million in punitives.[122]

Despite its financial support of Citizens for Sound Economy (CSE),[123] a corporate-funded "think tank" whose members favor limits on punitive damage,[124] AlliedSignal Inc. pursued punitive damages in a 1996 patent infringement suit against Cooper Automotive concerning Cooper's manufacture of platinum-tipped spark plugs.[125] DaimlerChrysler, another CSE supporter, is currently seeking punitive damages against a plaintiffs' law firm and an individual attorney who filed a class action suit against the automaker over unsafe car seats.[126]

States also do not "practice what they preach" when it comes to punitive damages. In 1999, while capping punitives in suits by consumers against wrongdoers, the state of Alabama sought $3 billion in punitives against Exxon for underpaying royalties from natural gas wells in the state's coastal waters. The state's case against Exxon was filed before the new law passed.[127] In response to the jury's $3.42 billion punitive verdict, Alabama governor Don Siegelman said, "I would suspect they won't make the mistake of trying to take advantage of this state again."[128]

Texas, a state with a severe punitive damages cap in cases brought by consumers, is also seeking punitives from ExxonMobil for taking oil and gas from the state without permission for the past 25 years. The suit was filed by Attorney General John Cornyn, a staunch "tort reform" advocate, who as a Texas Supreme Court Justice wrote the majority opinion that allowed defendants to request that trials involving punitive damages be split into two phases. In defending the suit against ExxonMobil, Cornyn explained the company had defrauded the state: "It's illegal. It's stealing from the taxpayers, and it's wrong."[129] Cornyn seemed to understand one of the most important functions of punitive damages – punishing egregious misconduct.

CONCLUSION

For years, insurance companies and their corporate allies have relied on myths to convince lawmakers to enact legislation that makes it nearly impossible for many seriously injured consumers to hold their offenders financially responsible through punitive damages. This movement has had terrible consequences for society. The availability of punitive damages protects all Americans by holding companies 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 the civil justice system.

NOTES

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[4] "Tort Trials and Verdicts in Large Counties, 1996," U.S. Department of Justice, Bureau of Justice Statistics, NCJ1 79769 (August 2000), p. 7.

[5] *Id.*; "Civil Trial Cases and Verdicts in Large Counties, 1996," U.S. Department of Justice, Bureau of Justice Statistics, NCJ 173426 (September 1999), p. 16.

[6] Erik Moller et al., "Punitive Damages in Financial Injury Verdicts," found at http://www.rand.org/publications/MR/MR889/MR889.text.html.

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[8] *Cooper Industries, Inc. v. Leatherman Tool Group Inc.*, 121 S. Ct. 1678 (2001).

[9] Thomas Koenig & Michael Rustad, "The Historical Continuity Of Punitive Damages Awards: Reforming The Tort Reformers," 42 *Am. U. L. Rev.* 1269, 1285-86, notes 78-81 (Summer 1993), citing Linda L. Schlueter & Kenneth R. Redden, *Punitive Damages* (2d ed. 1989); James Sales & Kenneth Cole, "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.

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[11] *Id.*

[12] *Id.*; 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.

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[15] Thomas Koenig & Michael Rustad, "The Historical Continuity Of Punitive Damages Awards: Reforming The Tort Reformers," 42 *Am. U. L. Rev.* 1269, 1293-96 (Summer 1993).

[16] Michael Rustad, "How The Common Good Is Served By The Remedy Of Punitive Damages," 64 *Tenn. L. Rev.* 793, 800-801 (1997).

[17] Thomas Koenig & Michael Rustad, "The Historical Continuity Of Punitive Damages Awards: Reforming The Tort Reformers," 42 *Am. U. L. Rev.* 1269, 1296 (Summer 1993).

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[58] "Tort Trials and Verdicts in Large Counties, 1996," U.S. Department of Justice, Bureau of Justice Statistics, NCJ 179769 (August 2000), p. 7. The frequency of punitive awards by judges has also been examined by Professors Theodore Eisenberg & Martin Wells, "Punitive Awards After *BMW*, a New Capping System, and the Reported Opinion Bias," 1998 *Wis. L. Rev.* 387, 416 ("Of the 110 opinions satisfying our WESTLAW search, seven contained punitive damage awards imposed by judges, not juries. …Since bench trials comprise only a small percentage of tort trials, this seven percent figure strikes us as surprisingly high").

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[98] "2000 Tort Reform Record," found at http://www.atra.org/record. Florida's single incident restriction was part of a 1999 "tort reform" package that was recently struck down by a Florida state court judge. *See*, *Florida Consumer Action Network et al. v. Bush*, No. 99-6689 (Leon County Cir. Ct., Fla., decided February 9, 2001).

[99] *Id.*

[100] "2000 Tort Reform Record," found at http://www.atra.org/record. In 1996, the Alabama Supreme Court ruled that 50 percent of punitive damage awards in all cases (excluding wrongful death cases) had to be paid into the state general fund. *Life Insurance Company of Georgia v. Johnson*, 684 So. 2d 685, 698-99 (1996). Over a year later, the same court overruled that decision, concluding that existing procedural safeguards made it "[un]necessary to share punitive awards with the state treasury in order to prevent windfalls to those who pursue claims against tortfeasors." *Life Insurance Company of Georgia v. Johnson*, 701 So. 2d 524, 531-32 (1997).

[101] "2000 Tort Reform Record," found at http://www.atra.org/record.

[102] *Id.* For a general discussion of punitive damage reforms, *see*, "Developments In The Law – The Paths Of Civil Litigation III. Problems and Proposals in Punitive Damages Reform," 113 *Harv. L. Rev.* 1783 (May 2000); Jane Mallor & Barry Roberts, "Punitive Damages: On the Path to A Principled Approach?" 50 *Hastings L. J.* 1001 (April 1999); Michael Rustad, "Nationalizing Tort Law: The Republican Attack on Women, Blue Collar Workers and Consumers," 48 *Rutgers L. Rev.* 673 (Spring 1996).

[103] "CNA Re, A Focus On: Punitive Damages," *Dialogue* (July 1998) found at http://www.cnare.com/Assets/pdf/Dialogue.pdf; "The Insurability of Punitive Damages," found at http://www.mcandl.com/puni_states.html.

[104] Alabama, Alaska, Mississippi, North Carolina and North Dakota are also among the states where there is a punitive damages cap and direct punitive damages are insurable.

[105] "Exemplary Damages," A.B. 840 (introduced February 22, 2001).

[106] "Relating to Long-term-care Facilities," S.B. 1202 (signed into law May 15, 2001; Chapter No. 2001-45).

[107] Bonna de la Cruz, "3rd Patients' Rights Bill Called More Industry-Friendly," *Tennessean*, March 30, 2001.

[108] S.B. 1555 (introduced May 3, 2001).

[109] H.B. 2225 (introduced April 4, 2001).

[110] "Bipartisan Patient Protection Act," S. 872 (introduced May 14, 2001).

[111] "Bipartisan Patients' Bill of Rights Act of 2001," S. 889 (introduced May 15, 2001).

[112] "Small Business Liability Reform Act of 2001," S. 865, §103 and H.R. 1805, §103 (introduced May 10, 2001).

[113] " No Child Left Behind Act of 2001," §2301 et seq. (On the Senate's calendar as of the date of this publication.)

[114] *Florida Consumer Action Network et al. v. Bush*, No. 99-6689 (Leon County Cir. Ct., Fla., decided February 9, 2001). *See also*, "State appeals ruling that tort reform law is unconstitutional," *Associated Press*, February 28, 2001; Pat Dunnigan, "A surmountable setback? Business lobbyists, trial lawyers plot opposing strategies after judge overturns law limiting liability suits," *Miami Daily Business Review*, February 21, 2001.

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