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Controlling the Growth of Punitive Damages in Products Liability Cases

Richard Allen

CONTROLLING THE GROWTH OF PUNITIVE DAMAGES IN PRODUCTS LIABILITY CASES

RICHARD ALLEN*

SEVENTEEN YEARS HAVE PASSED since the California Court of Appeals held, in *Toole v. Richardson-Merrell, Inc.*,[1] that punitive damages were recoverable in a strict products liability action. Today the notion that the culpability of a manufacturer's conduct can be evaluated within the context of strict products liability is accepted in over 32 states.[2]

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* LL.B. Georgetown University, 1961; Attorney at Law, Lane, Powell, Moss & Miller, Seattle, Washington.

[1] 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967). *Toole* involved the distribution of MER/29, a drug developed to lower blood cholesterol levels. The drug also induced the development of cataracts in its users. *See also* J. Ghiardi & J. Kircher, PUNITIVE DAMAGES LAW AND PRACTICE § 6.05 (1985).

[2] Meyers & Barrus, *Punitive Damages in Products Liability Cases: A Survey*, 51 INS. COUNSEL J. 212 (1984). Punitive damages in products liability cases are authorized by common law in 29 states. Atkins v. American Motors Corp., 335 So. 2d 134 (Ala. 1976); Sturm, Ruger & Co. v. Day, 594 P.2d 38 (Alaska 1979), *modified*, 615 P.2d 621 (1980), *cert. denied*, 454 U.S. 894 (1981); Ferguson v. Cessna Aircraft Co.,.643 P.2d 1017 (Ariz. 1981); Forrest City Machine Works, Inc. v. Aderhold, 273 Ark. 33, 616 S.W.2d 720 (1981); Toole v. Richardson-Merrell, Inc., 251 Cal. App.2d 689, 60 Cal. Rptr. 398 (1967); Alley v. Gubser Development Co., 569 F. Supp. 36 (D. Colo. 1983); Cloroben Chemical Corp. v. Comegys, 464 A.2d 887 (Del. 1983); Piper Aircraft Corp. v. Coulter, 426 So. 2d 1108 (Fla. Dist. Ct. App. 1983); Kicklighter v. Nails By Janee, Inc., 616 F.2d 734 (5th Cir. 1980) (applying Georgia law); Beerman v. Toro Mfg. Corp. , 615 P.2d 749 (Hawaii Ct. App. 1980); Moore v. Remington Arms, Co., 100 Ill. App. 3d 1102, 427 N.E.2d 608 (1981); Gorman v. Saf-T-Mate, Inc., 513 F. Supp. 1028 (N.D. Ind. 1981); Sioux City Community School Dist. v. IT&T Corp., 461 F. Supp. 662 (N.D. Iowa 1978); Cantrell v. Amarillo Hardware Co., 226 Kan. 681, 602 P.2d 1326 (Kan. 1979); Racer v. Utterman, 629 S.W.2d 387 (Mo. Ct. App. 1981), *appeal dism'd*, 459 U.S. 803 (1982); Leslie v. Jones Chemical Co., 551 P.2d 234 (Nev. 1976); Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1967) (applying New York law); Robinson v. Parker-Hannifen Corp., 4 Ohio Misc. 2d 6, 447 N.E.2d 781 (1982);

The adolescent years of the punitive damages doctrine in the products liability field have been dangerous ones. The pages of daily newspapers and legal periodicals frequently are filled with stories about juries rendering seven, eight and even nine-figure punitive damage awards. The number of punitive damage awards against certain manufacturers is growing at almost exponential rates. One manufacturer, the Johns-Manville Corporation, has sought at least a temporary refuge in the bankruptcy courts from the financially devastating cumulative effects of high compensatory and punitive awards.[3] Manville's plight represents the fulfillment of Judge Friendly's worst fears about extending the availability of punitive damages to products liability cases,[4] namely that

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Thiry v. Armstrong World Indus., 661 P.2d 515 (Okla. 1983); Neal v. Carey Canadian Mines, LTd., 548 F.Supp. 357 (E.D. Pa. 1982); Campus Sweater & Sports-Wear Co. v. M.B. Kahn Const. Co., 515 F. Supp. 64 (D.S.C. 1979), *aff'd*, 644 F.2d 877 (4th Cir. 1981); Johnson v. Husky Indust., Inc., 536 F.2d 645 (6th Cir. 1976) (applying Tennessee law); Kritser v. Beech Aircraft Corp., 479 F.2d 1089 (5th Cir. 1972) (applying Texas law); Ford Motor Co. v. Bartholomew, 297 S.E.2d 675 (Va. 1982); Wangen v. Ford Motor Co., 294 N.W.2d 437 (Wis. 1980). Additionally three states authorize puntive damages in products liablity cases by statute. *See* CONN. GEN. STAT. ANN. § 52-240b (West Supp. 1983) (punitive damages limited to twice the amount of compensatory damages); MINN. STAT. ANN. § 549.20 (West Supp. 1983); OR. REV. STAT. § 30.925(1) (1980). Two states permit punitive damages only in product liability cases based upon negligence. American Laundry Mach. Indust. v. Horan, 45 Md. App. 97, 412 A.2d 407 (1980); Gold v. Johns-Manville Sales Corp., 553 F. Supp. 482 (D.N.J.1982). Four states do not allow the recovery of punitive damages in products liability cases. Philippe v. Browning Arms Co., 375 So. 2d 151 (La. App. 1979), *rev'd in part on other grounds*, 395 So. 2d 310 (La. 1982); Hawes Office Systems, Inc. v. Wang Laboratories, Inc., 537 F. Supp. 939 (E.D.N.Y. 1982) (applying Massachusetts law); Miller v. Kingsley, 230 N.W.2d 472 (Neb. 1975); Vratsenes v. N.H. Auto, Inc., 289 A.2d 66 (N.H. 1972).

[3] *See In re* Johns-Manville Corp., 26 Bankr. 420 (S.D.N.Y. 1983). On August 26, 1982, Manville and 20 of its subsidiaries filed petitions for reorganization under Chapter 11 of the Bankruptcy Code. Manville alleges that its financial difficulties have arisen from its position as a defendant in 11,000 asbestos-related personal injury and products liability damage suits brought by 15,500 plaintiffs in 46 states. Approximately 425 new suits are being filed each month. Manville anticipates 32,000 additional claims in the next 27 years. It has already been assesed punitive damages in several cases and Manville anticipates that its liabilities eventually will exceed over $2 billion. *Id.* at 422.

[4] *See* Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1967) (Friendly, J.):

> We have the gravest difficulty in perceiving how claims for punitive damages in such multiplicty of actions throughout the nations can

such actions could result in financial injury so severe that it becomes a form of corporate capital punishment. Every major aviation casualty elicits product liability claims and it has become commonplace that these claims incorporate product liability allegations. Moreover, aviation products manufacturers have suffered adverse punitive awards of substantial dimension.[5]

As punitive damages claims become increasingly prevalent in all products liability actions, the question arises whether the doctrine itself remains as standardless and widely unpredictable as its reputation suggests, or whether almost two decades of tenure in the products liability arena has lent the doctrine a more definable form and greater predictability. This article will examine how courts and juries have used punitive damages in strict products liability cases. It will review the standards of conduct applied by various jurisdictions in assessing punitive damages and analyze the specific factors that affect both the decision to award punitive damages and the size of the verdicts. Finally, the article will focus on ways in which courts are responding to legitimate concerns of defendants regarding the abuse of the punitive damage remedy by juries.

I. JUSTIFICATION FOR PUNITIVE DAMAGES IN STRICT LIABILITY CASES

Courts in every state that permit recovery of punitive damages in strict products liability cases have to resolve the apparent conflict between the concept of liability without fault necessary for the award of punitive damages.

> be so administered as to avoid overkill . . . on the other hand, the apparent impracticability of imposing an effective ceiling on punitive awards in hundreds of suits in different courts may result in an aggregate which, when piled on large compensatory damages, could reach catastrophic amounts.

Id. at 839, 841.

[5] For a discussion of punitive damages awards against aircraft manufacturers see Haskell, *The Aircraft Manufacturer's Liability for Design and Punitive Damages — The Insurance Policy and the Public Policy*, 40 J. AIR L. & COM. 595 (1974).

Courts have been accomplishing this task by differentiating between a manufacturer's *liability* as a matter of law for producing a defective product and introducing a defective or dangerous product into the stream of commerce, and the manufacturer's *culpability* for introducing the defective product and/or its failure to adequately warn the consumer of the product's dangerous propensities.[6]

The Wisconsin Supreme Court's decision in *Wangen v. Ford Motor Company*[7] is representative of the reasoning used to resolve this conflict. The plaintiffs in *Wangen* were seriously injured in a car fire when the fuel tank of their 1967 Ford Mustang ruptured after being struck by another car. Ford asserted that punitive damages were only recoverable in actions based on intentional torts and therefore were not available under the plaintiff's strict liability theory.[8] The court concluded that punitive damages awards rest on the kind of conduct displayed rather than the specific elements of the underlying tort theory relied upon by the plaintiffs.[9]

In *Piper Aircraft Corp. v. Coulter*,[10] the plaintiffs sued Piper Aircraft on claims based on strict liability and negligence for deaths resulting from the crash of a Piper aircraft.[11] Plaintiffs claimed that the aircraft contained a faulty door latch and that the crash occurred as a result of the pilot losing control of the plane when the door unexpectedly opened during flight.[12] The jury found Piper liable on the strict liability claim.[13] Piper appealed, claiming that punitive damages were improper in the absence of a finding of negligence.[14]

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[6] *See* Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 28 (1982).

[7] 97 Wis. 2d 260, 294 N.W.2d 437 (1980).

[8] 294 N.W. 2d at 440.

[9] *Id.* at 442.

[10] 426 So. 2d 1108 (Fla. Dist. Ct. App.), *petition for review denied*, 436 So. 2d 100 (Fla. 1983).

[11] *Id.* at 1109.

[12] *Id.*

[13] *Id.*

[14] *Id.*

The court, following the *Wangen* approach, affirmed the punitive damage award.[15] The court reasoned that the doctrine of strict products liability merely renders proof of specific acts of negligence unnecessary.[16] Relief from this burden does not make consideration of the manufacturer's conduct either inappropriate or inconsistent.[17]

The Colorado Supreme Court more recently has drawn a sharper line between strict liability's goal of compensating for the harm caused by defective products and punitive damages' goal of punishing highly culpable conduct.[18] The court observed that:

> The principles of strict liability, however, are ill-equipped to deal with problems at the other end of the culpability scale, that is, when an injury results from the marketing of a product in flagrant disregard of consumer safety.[19]

The Colorado court's language reflects the view of many state courts that punitive damages are an effective tool for achieving the goals of punishment and deterrence. Some courts have defended the unpredictable nature of punitive damage awards for furthering the deterrence objective. The reasoning is that the harder it is for manufacturers to predict the way juries will react to specific instances of "outrageous conduct," the more difficult it will be to pass along the financial consequences of a punitive damages verdict as a cost of doing business.[20] This reasoning might be acceptable if the standard for determining the kind of conduct that is truly outrageous was fixed at an appropriate level and if all the relevent factors that influence the aggravation or mitigation of a punitive damage award were considered by juries. Unfortunately, at the present time, this is not the case.

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[15] *Id.* at 1110.

[16] *Id.* at 1109, n.1.

[17] *Id.*

[18] Palmer v. A.H. Robins Co., 684 P.2d 187 (Colo. 1984).

[19] *Id.* at 218.

[20] *See* Owen, *supra* note 6, at 27.

II. STANDARDS AND FACTORS GOVERNING PUNITIVE DAMAGES AWARDS

A. *The Threshold Test*

There are few meaningful differences among the states in the various formulations of the standard of conduct necessary to permit a punitive damage award. Most standards are phrased in terms of willful or wanton misconduct, malice, fraud, and conscious or reckless disregard for the rights or the safety of others.[21]

The problem with the employment of these traditional standards of punitive damage liability in product liability cases is that they were designed to be used in connection with intentional tort and negligence concepts, but not in conjunction with the doctrine of strict liability in tort.[22] The fundamental tenets of products liability law involve a weighing of the benefits of making mass-produced products available to a greater number of consumers against the risk of injury or harm from such products. An analysis of the probabilities and a reverence for consumer choice are important considerations in the marketing decision. Moreover, nearly every product that is manufactured is the result of hundreds, perhaps thousands, of decisions involving assessments of costs, benefits and risks. Yet, under most definitions of the standard of conduct under which punitive damage claims are evaluated, these considerations are largely ignored.

The State of California's punitive damages law permits recovery when the defendant has been guilty of "oppression, fraud or malice."[23] The problems of applying such imprecise terms in the context of a products liability action were particularly evident in *Grimshaw v. Ford Motor Company*,[24] the celebrated Pinto case. The trial court, in its instructions to the jury, defined malice as "motive and

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[21] *See* J. Ghiardi, *supra* note 1, at § 6.19; Meyers & Barrus, *supra* note 3, at 212-13.

[22] *Owen, supra* note 6, at 21.

[23] CAL. CIV. CODE § 3294(a) (West 1985).

[24] 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981).

willingness to vex, harass, annoy or injure another person."[25] The court went on to explain that malice could be inferred if the defendant's conduct was "wilful, intentional and done in conscious disregard of its possible results."[26] The jury returned a punitive damage award of $125 million against Ford. The amount was later reduced to $3.5 million.[27]

On appeal, the court rejected Ford's argument that the malice instructions should have borne some relationship to the manufacturing and marketing context in which the decisions were made. Ford urged that the malice instruction required the phrase "conscious disregard of the probability [or alternatively the high probability] of injury to others"[28] in order to preclude prejudicial error. However, the Court of Appeals found no reversible error in the trial court's formulation of the instruction.

The danger with punitive damage instructions of the kind approved in *Grimshaw* is that they open the door to punitive damages for any possible danger that could be remotely imagined by a manufacturer and not remedied, regardless of the likelihood that the contemplated danger would ever occur.[29] The shortcoming of the malice standard applied in *Grimshaw* was its failure to adequately bring into consideration the extent of the manufacturer's awareness of the danger flowing from the design, and the scope of the risk that the design presented to the public.[30] Nevertheless, the reviewing court concluded that the plaintiff's proof of the car's defective fuel tank design overcame any possible imprecision in the malice instruction.[31]

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[25] 174 Cal. Rptr. at 385.

[26] *Id.*

[27] *Id.* at 358.

[28] *Id.* at 386-87.

[29] Owen, *supra* note 6, at 22.

[30] Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1366 (1976).

[31] Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 816-17, 174 Cal. Rptr. 348, 386-87 (1981).

The need to change the standard of conduct necessary for obtaining a punitive damage award has been recognized in several jurisdictions. At least two states have adopted the standard of "flagrant indifference to the public safety."[32] The advantage of this standard is its movement away from the subjective measurement of the manufacturer's "state of mind," commonly associated with the criminal law, and toward an objective determination of a manufacturer's conduct within the context of product design and production.[33]

The State of Connecticut has enacted a new statute that attempts to align the punitive damage standard more closely to the manufacturing environment.[34] Under the statute, manufacturers are liable for punitive damages when they act in "reckless disregard for the safety of product users, consumers or others who are injured by the product."[35] The statute also limits punitive damage recoveries to no more than twice the compensatory damage award.[36]

The majority of courts have predicated punitive damage awards in product liability cases on such traditional liability standards as "willful, wanton, malicious, conscious, or reckless disregard of the rights of others."[37] Professor Owen has criticized this approach arguing that since

> "malice" could be inferred from the defendant's conduct if the conduct was willful, intentional and done in conscious disregard of its possible result, [then] the totally un-

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[32] *Owen, supra* note 6 at 21. *See* Moore v. Remington Arms Co., 100 Ill. App. 3d 1102, 427 N.E.2d 608 (1982); Leichtamer v. American Motors Corp., 67 Ohio St. 2d 456, 424 N.E.2d 568 (1981).

[33] Owen, *supra* note 6, at 21.

[34] CONN. GEN. STAT. ANN. § 52-240(b) (West 1985).

[35] *Id.*

[36] *Id.*

[37] Owen, *supra* note 6, at 21. *See, e.g.*, Strum, Ruger & Co. v. Day, 594 P.2d 38 (Alaska 1979) (reckless indifference to rights of others); Ferguson v. Cessna Aircraft Co., 132 Ariz. 47, 643 P.2d 1017 (Ariz. Ct. App. 1981) (reckless or wanton disregard of the rights of others); Thiry v. Armstrong World Indust., 661 P.2d 515 (Okla. 1982) (reckless disregard for public safety); Heil Co. v. Grant, 534 S.W.2d 916 (Tex. Civ. App. — Tyler 1976, writ ref'd n.r.e.) (conscious indifference to plaintiff's rights).

> acceptable import of this standard is that every actor could be held strictly liable thereunder for punitive, in additon to compensatory damages for any consequence to any person that was contemplated in advance of any course of action.[38]

A second major issue involving the standards for punitive damage awards is the level of proof required for each element of the claim. Manufacturers have regularly argued that allowing plaintiffs to recover punitive damages on the basis of proof by a mere preponderance of the evidence or by a "more probable than not" standard amounts to a denial of due process.[39] If punitive damages are at least in theory a quasi-criminal remedy enforced by individuals who are indicating both their own and the public's outrage at the acts of the manufacturer, then notions of fundamental fairness suggest a high threshold of proof is necessary.[40]

The consistent refusal of courts to recognize the validity of the standard of proof arguments raised by defendants has motivated two states to establish higher standards by statute. Both Minnesota and Oregon have adopted the "clear and convincing evidence" test.[41] The State of Wisconsin adopted the same standard in the *Wangen* case.[42] The State of Colorado has gone a step further and now requires plaintiffs to prove their punitive damage claims beyond a reasonable doubt.[43]

The advantages of establishing a higher standard of proof go beyond remedying the surface-level impression of unfairness. A higher standard impresses upon juries the importance of their decision and reduces the risk of

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[38] Owen, *supra* note 6, at 21-2.

[39] *See, e.g.*, Palmer v. Robins Co. Inc., 684 P.2d 187, 214-15 (1984); Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 818, 174 Cal. Rptr. 348, 387 (1981).

[40] *See* Wheeler, *The Constitutional Case for Reforming Punitive Damages and Procedures*, 69 VA. L. REV. 269, 296 (1983).

[41] *See* MINN. STAT. ANN. § 549.20 (West. Supp. 1985); OR. REV. STAT. § 30.925(1) (1981).

[42] *See Wangen*, 97 Wis. 2d 290, 294 N.W.2d 434 (1980).

[43] *See* COLO. REV. STAT. § 13-25-127(2) (1973).

erroneous judgements that will require judicially imposed reversals or remittiturs. One commentator has suggested that a higher standard, such as the clear and convincing evidence test, compensates for the imbalance between the risk of an enormous punitive damage judgement adverse to the defendant and the risk of judgment adverse to the plaintiff.[44]

While further legislative actions to reform the burden of proof are possible, courts also may be propelled by the reasoning of the Wisconsin Supreme Court toward redefining the threshold standard by which juries approach punitive damages in a strict liability context.

B. *Factors Affecting the Determination and Calculation of Punitive Damage Awards*

These three factors have historically been linked to the determination and calculation of punitive damages: 1) "the character of the defendant's act; 2) the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause; and 3) the wealth of the defendant."[45] The first factor relates to the quasi-criminal function of punishment for outrageous conduct.[46] The second factor recognizes that the extent of harm caused may be a consideration in the size of an actual damage award, a prerequisite to recovery of punitive damages.[47] The third factor is intended to equate the degree of punishment or deterrence with the means of the defendant.

While these factors regularly find their way into jury instructions in products liability cases, a more useful way to understand what factors control modern punitive damage awards is to review the type of conduct by manufacturers that appears to influence jury verdicts. Most punitive

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[44] Wheeler, *supra* note 40, at 297.

[45] RESTATEMENT (SECOND) OF TORTS § 908 (1977).

[46] *Id.* comment b.

[47] *Id.* comment c. A Connecticut Superior Court Judge recently held that a punitive damage award is permitted in connection with a products liability claim involving only damage to property. American Airlines Inc. v. National Automatic Products Co., Conn. S. Ct., file no. 279359 (1984).

damage claims in products liability actions are based on a combination of five general varieties of conduct; 1) fraud; 2) knowing violation of established safety standards; 3) inadequate testing and/or manufacturing procedures; 4) failure to warn customers of known dangers of products when those dangers are first recognized; and 5) post-marketing failure to remedy dangers that are known or become known to the manufacturer.[48]

These categories of conduct reflect various expectations that have developed through mass marketing of products to several generations of consumers. Consumers have developed the expectation that all products will be designed to meet or exceed minimum government or industry standards, that important information regarding the use of the product will be communicated at the time of purchase or use, and that the manufacturer will communicate any subsequently acquired information about the product that may affect the consumer's health or safety. Finally, consumers expect that manufacturers will have tried to minimize potential injury at every step in the design, manufacturing and marketing process. Certain categories of conduct have been prominent in specific industries, as the following review of cases illustrates.

1. *Automobiles*

The actions of automobile manufacturers have involved all five categories of conduct more often than the manufacturers of other forms of transportation, although this likely is due to the larger volume of units produced. Both Ford and American Motors Corporation ("AMC") have faced multiple punitive damage verdicts in cases involving defectively designed fuel tanks. In *Wagen v. Ford Motor Company*,[49] facts were presented that defects in the design of the fuel system and the lack of a barrier between the gas tank and the passenger compartment in the 1967

[48] Owen, *supra* note 30, at 1326.
[49] 97 Wis.2d 260, 294 N.W.2d 437 (1980).

Mustang came to Ford's attention during design tests in 1964.[50] The plaintiffs also established that Ford knew these defects caused serious injuries after the car had entered the market, that it knew how to correct these defects, that it concealed this information from the public, and that it chose not to recall the vehicles.[51]

The Florida Court of Appeals was confronted with similar facts in *American Motors Corporation v. Ellis*.[52] Again, plaintiffs alleged that the severe injuries they sustained in a fiery highway collision resulted from a defectively designed fuel-fill system. They also alleged that AMC knew that the fuel tank was defective, but that it chose not to seek safer, alternative designs.[53] The Florida Court of Appeals used the case to establish the rule that punitive damages are recoverable in strict products liability cases.

Defectively designed fuel tanks have been the centerpiece of several other large punitive damage awards. In *Grimshaw v. Ford Motor Co.*[54] the manufacturer's knowledge that the Pinto's fuel tank and rear passenger compartment would expose passengers to serious injury or death in 20-30 mph collisions, and evidence of the company's conscious balancing of the dollar cost in human casualties against the expense of remedying the defect, led the jury to conclude that Ford's conduct was highly culpable.[55]

A substantially similar fact pattern also produced a large punitive damage verdict in *Toyota Motor Co. v. Moll*.[56] The case involved a defectively designed fuel tank in the 1973 Toyota Corona.[57] The plaintiffs introduced evidence that the manufacturer was aware of the safety problems associated with the design as early as 1966.[58]

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[50] *Id.* at 462.
[51] *Id.*
[52] 403 So.2d 459 (Fla. 1981).
[53] *Id.* at 468.
[54] 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981).
[55] *Id.* at 813, 174 Cal. Rptr. at 384.
[56] 438 So. 2d 192 (Fla. 1983).
[57] *Id.* at 195.
[58] *Id.*

Toyota changed the fuel tank configuration on all of its 1973 model cars except the Corona.[59] The Florida Court of Appeals affirmed the jury's determination that Toyota's decision to market the Corona, after knowing of the defect, was conduct in wanton disregard of public safety. The appellate court also affirmed the jury's $2 million compensatory and $3 million punitive damage verdict.[60]

Juries are cognizant of the good or bad faith displayed by manufacturers in addressing the problems of product defects identified in the post-marketing period. In *Hasson v. Ford Motor Co.*,[61] the California Court of Appeals affirmed a large verdict in favor of a plaintiff who suffered severe brain damage and physical disabilities in a collision caused by brake failure. Evidence of particular significance to the result was Ford's knowledge of the brake problem from complaints of both dealers and customers, and Ford's subsequent failure to remedy the defects.[62] The plaintiff was awarded $7.5 million in compensatory damages and $4 million in punitive damages.[63] The compensatory award was later reduced to make the total recovery $9.2 million.[64]

The automobile cases show that evidence of a consistent attitude of indifference to known dangers will result in high punitive damage awards. By contrast, experience in other transportation industries suggests that measures undertaken by manufacturers to mitigate potential dangers flowing from product defects can reduce, if not prevent, punitive damage verdicts.

2. *Aircraft*

Punitive damage claims against aircraft manufacturers have been based upon a combination of conduct different

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[59] *Id.*
[60] *Id.* at 193.
[61] 32 Cal. 3d 388, 650 P.2d 1171, 185 Cal. Rptr. 654 (1982).
[62] *Id.* at 402-03, 650 P.2d at 1180, 185 Cal. Rptr. at 663.
[63] *Id.* at 398, 650 P.2d at 1177, 185 Cal. Rptr. at 660.
[64] *Id.*

from their counterparts in the automobile industy. The costs and safety risks associated with crash testing production models of aircraft is perhaps the most obvious difference between the industries. Aircraft manufacturers, nevertheless, have been assessed punitive damages for failure to design their products in a manner that minimizes likely injuries from foreseeable accidents.[65]

Aircraft manufacturers have been successful in either holding down or preventing punitive damage awards by introducing evidence of actions undertaken to warn consumers once design defects are detected. In *Kritser v. Beech Aircraft Corp.*,[66] plaintiffs claimed that the crash of a twin-engined Beech Baron was the result of a defectively designed fuel tank. When certain maneuvers were performed with low levels of fuel in the tanks, air rather than fuel would flow into the engines, causing a loss of power.[67] Beech became aware of the situation prior to the crash of the decedent's plane and had consulted with the Federal Aviation Administration on the appropriate measures for addressing the problem.[68] Two months before the accident, the decedent received a flight manual supplement warning owners of the fuel tank problem and the kinds of maneuvers that should be avoided.[69]

Although a compensatory damage verdict of $310,000 was returned, the Fifth Circuit Court of Appeals affirmed the trial judge's refusal to submit the issue of punitive damages to the jury. The trial judge concluded that the steps Beech took to warn Kritser of the dangerous condition exhibited the requisite good faith necessary to prohibit a punitive damage instruction.[70]

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[65] *See* Owen, *supra* note 30, at 1341, 399-400; Smith v. Cessna Aircraft Co., No. 70-9255-6 (193d Judicial Dist. of Texas 1972) (unreported case) (failure to design a crash-worthy aircraft resulted in an award to plaintiffs of $200,000 in compensatory damages and $180,000 in punitive damages).

[66] 479 F.2d 1089 (5th Cir. 1973).

[67] *Id.* at 1091.

[68] *Id.* at 1094.

[69] *Id.*

[70] *Id.* at 1097.

A California court, hearing a case based upon the same fuel tank defect, permitted a punitive damage instruction. The jury returned a verdict that included $3.45 million in punitive damages.[71] The two cases, however, were distinguishable. The California case was based on fraud.[72] The evidence indicated that the pilot had not received the revised manual containing the warning from the manufacturer, although the warning had been issued before the accident took place.[73] The California Court of Appeals reversed the punitive damage verdict because it was precluded under California's wrongful death statute.[74]

Compliance with industry standards and government regulations is an important factor in proving good faith on the part of the manufacturer. In *Ferguson v. Cessna Aircraft Co.*,[75] the Arizona Court of Appeals affirmed a trial judge's refusal to submit the issue of punitive damages to a jury in a products liability action. The plaintiffs claimed that the crash of a Cessna Centurion after the left wing came off in flight was the result of defectively designed control surfaces on the wings.[76] Experts testified that the most probable cause of the accident was a loose aileron cable which resulted in a fluttering of the control surfaces.[77] The court relied on the fact that the FAA had certified the design of the aircraft to conclude that Cessna had not wantonly disregarded FAA regulations.[78]

Aircraft manufacturers have fared no better than automobile manufacturers who fail to disclose dangerous defects. In *Piper Aircraft Corp. v. Coulter*,[79] the Florida Court of appeals affirmed a punitive damage award in a strict liability and negligence action. The plaintiffs claimed the

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[71] *See* Pease v. Beach Aircraft Corp., 38 Cal. App. 3d 450, 114 Cal. Rptr. 416 (1974).

[72] *Id.* at 459, 113 Cal. Rptr. at 422.

[73] *Id.* at 461, 113 Cal. Rptr. at 423.

[74] *Id.* at 462, 113 Cal. Rptr. at 424.

[75] 132 Ariz. 47, 643 P.2d 1017 (1982).

[76] *Id.* at 1018.

[77] *Id.*

[78] *Id.* at 1021.

[79] 426 So.2d 1108 (Fla. 1983).

aircraft had a faulty door which suddenly opened during the flight, causing the pilot to lose control.[80] The jury found for the defendant on the negligence claim, but concluded in special interrogatories that the aircraft was defective when sold.[81]

The record in support of the punitive damage verdict included knowledge of the door openings by Piper's test pilot on the same model aircraft between 1954 and 1959, communication by the test pilot to his superiors of the need to modify the plane, actions by the company to conceal evidence of its knowledge of the defect to the extent that it ordered the test pilot to destory any records he had pertaining to problems with the aircraft and, finally, the manufacturer's failure to warn purchasers of the defect.[82] The court of appeals concluded that the punitive damage claim was predicated on Piper's post-design conduct rather than on its originally negligent design of the aircraft.[83] Piper's record of active concealment led the jury to conclude that the manufacturer acted in bad faith even before the aircraft entered the marketplace.[84]

3. *Other Products*

Conduct of the sort that led to the recent punitive damage verdict against Piper has also been a factor in a range of products liability actions involving asbestos materials and the cascade of litigation relating to the Dalkon shield. Jury verdicts with large punitive damage components have been assessed against Johns-Manville based upon its knowledge dating back to the mid-1930's of the health hazards posed to workers regularly exposed to asbestos particles. An appellate division of the Superior Court of New Jersey recently affirmed a lower court verdict that in-

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[80] *Id.* at 1109.

[81] *Id.*

[82] *Id.* at 1110.

[83] *Id.*

[84] *Id.*

cluded a $300,000 punitive damage award.[85] The court was influenced by the evidence of bad faith exhibited by Manville in its post-marketing conduct.[86]

Punitive damages are also frequent components of verdicts in the cases arising out of the use of the Dalkon shield. Fraud, concealment and failure to warn in the post-marketing period are aspects of the manufacturer's conduct influencing large verdicts. Prior to marketing the Dalkon Shield intra-uterine device (IUD), A. H. Robbins, the manufacturer, made several design modifications without subjecting the changes to clinical testing.[87] It then engaged in an intensive promotional campaign directed to both the medical community and the general public.[88] The advertising stated that the Dalkon shield had a pregnancy rate far lower than the scientific data in the hands of the manufacturer actually suggested.[89] Shortly after Robbins began marketing the IUD, it was informed that the nylon filaments of the shield's tail string could carry bacteria from the vagina into the uterus and cause infection. Despite this information, the manufacturer chose not to make any changes in the product.[90] Several years later, after additional scientific evidence was widely circulated about the health problems associated with the shield, Robbins sent a letter to physicians in which it outlined the information that it had acquired.[91]

The manufacturer's warning to physicians came too long after it had learned of the product's dangers for the

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[85] *See* Fischer v. Johns-Manville Sales Corp., 193 N.J. Super. 133, 472 A.2d 577 (Ct. App. Div. 1984).

[86] *Fischer*, 472 A.2d at 588.

> The jury here was justified in concluding that both defendants, fully appreciating the nature, extent and gravity of the risk, nevertheless [sic] made a conscious and coldblooded business decision, in utter and flagrant disregards of the rights of others, to take no protective or remedial action.

Id.

[87] *See* Palmer v. A.H. Robins Co., 684 P.2d 187, 195-96 (Colo. 1984).

[88] *Id.* at 195.

[89] *Id.*

[90] *Id.* at 196.

[91] *Id.* at 197.

letter to have any effect in mitigating punitive damages. Punitive damage verdicts ranging from $500,000[92] to $6.2 million[93] were affirmed against Robbins in 1984. Since over 1,500 suits have been filed, more large verdicts may follow. The Robbins experience again proves that the combination of fraudulent conduct and active concealment sow the seeds of large punitive damage verdicts.

III. STRATEGIES FOR CURBING PUNITIVE DAMAGE AWARDS

The frequency with which large punitive damage verdicts are being awarded has renewed interest in controlling this powerful, but seemingly unpredictable, remedy. The proffered solutions vary substantially in scope and feasibility. Some solutions are being employed by courts. Others have been tested and rejected. Still other proposed solutions will require major institutional changes before they can be tried and evaluated.

A. *Measures That Have Been Implemented*

Some courts have already reacted to the escalation of punitive damage awards by giving more exacting scrutiny to the quality of evidence of the defendant's conduct offered by plaintiffs. Many marginal claims can be weeded out if the trial courts insist on an adequate threshold of proof before giving punitive damage instructions.[94] Similarly, greater use of the remittitur device by both the trial and appellate courts can effectively reduce the potential of

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[92] Worsham v. A.H. Robins, Inc., 734 F.2d 676 (11th Cir. 1984).

[93] *Palmer*, 684 P.2d 187 (Colo. 1984).

[94] *Fischer*, 472 A.2d 577, 586.

> We concur, moreover, with the judicial consensus that the legitimate interests of products-liability defendants can be served by careful judicial scrutiny of the adequacy of plaintiffs' proofs regarding outrageous conduct, by monitoring excessive punitive damage awards, and by allowing the introduction into evidence of all pertinent financial circumstances of the defendant, including its contingent liabilities.

Id.

seemingly irrational or emotional verdicts.[95]

Some state legislatures and courts have responded to concerns about multiple punishment for the same conduct by permitting defendants to introduce evidence of prior punitive damage awards in the hope that such information will mitigate further punishment.[96] The downside risk for defendants employing this strategy is that it might increase the chance of juries finding against the defendant on the contested liability issues.[97] The Fifth Circuit Court of Appeals, in *Jackson v. Johns-Manville Sales Corp.*,[98] applying Mississippi law, reversed a punitive damage award because it considered informing juries of past punitive damage awards and the likelihood of additional verdicts in the future to be an unsatisfactory means of exercising judicial control.[99]

Another solution has been to withhold the introduction

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[95] *See* Maxey v. Freightliner, Inc., 450 F. Supp. 955 (N.D. Tex. 1978) (district court set aside jury's award of $10,000,000 punitive damages), *aff'd*, 633 F.2d 395 (5th Cir. 1982); Hanson v. Johns-Manville Products Corp., 734 F.2d 1036 (5th Cir. 1984) (trial court had awarded plaintiff $260,000 for loss of her husband's care and services, $800,000 for the decedent's pain and suffering and $1,000,000 in punitive damages. The fifth circuit reduced actual damages to $40,000 and $250,000 respectively. *Id.* at 1047. It then applied a Texas law requiring punitive damages found and reduced the punitive award to $300,000. *Id.*)

[96] *See, e.g.*, *Wangen*, 294 N.W.2d at 460.

[97] Wheeler, *supra* note 40 at 295.

[98] 727 F.2d 506 (5th Cir. 1984).

[99] *Id.* at 527. *But see* Hansen v. Johns-Manville Products Corp., 734 F.2d 1036 (5th Cir. 1984). A different panel of the Fifth Circuit applying Texas law, rejected Manville's argument that the result in *Jackson* should apply in this wrongful death action. The court contrasted the *Jackson* panel's interpretation of Mississippi's punitive damages law that such damages are unavailable in products liability cases with a provision of the Texas constitution that makes punitive damages available in strict liability actions. *Id.* at 1041.

> "[T]he *Jackson* panel determined that the presence of a viable enterprise is essential to the maintenance of effective loss distribution in strict liability. . . . [A]t the point at which awards of punitive damages destroy the viability of the enterprise, the remedy of punitive damages becomes the antithetical to the policy of strict liability and thus . . . punitive damages must not be allowed. . . . [W]e find that we are unable to follow *Jackson* in this case. At least one Texas court has said that punitive damages may be recovered under Article 16, Section 26 of the Constitution of the State of Texas in a strict liability action . . ."

Id.

of evidence regarding a defendant's wealth until a plaintiff establishes a prima facie case for punitive damages. This approach has been adopted by statute in Oregon.[100] It is closely related to the general need for increasing the threshold of proof for punitive damages.[101]

B. *Other Alternatives*

1. *Class Actions*

A strategy designed to eliminate multiple punishment is the creation of a single punitive damage pool through the class action device. The reasoning behind the class action approach is attractive. Since many products-based mass torts such as the asbestos and Dalkon shield cases involve thousands of claims by similarly situated plaintiffs, consolidation of claims in one action would save time and resources.[102]

Several courts have spoken favorably of the class action alternative;[103] however, the two instances in which it was tested by federal district courts resulted in reversals.[104] A district court in Northern California certified a class of Dalkon shield claimants under Federal Rule 23(B)(1)(b). One of the reasons given for certification was the risk of nonpayment of future punitive damage claims because the amount of damages being sought by plaintiffs individually

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[100] *See* OR. REV. STAT. § 30.925(2) (1979).

[101] *See supra* note 94 and accompanying text.

[102] *See* Comment, *The Punitive Damage Class Action: A Solution to the Problem of Multiple Punishment*, 1984 U. ILL. L. REV. 163.

[103] *See, e.g.*, Jackson v. Johns-Manville Sales Corp., 727 F.2d 506, 527 (5th Cir. 1984). The court also recognized the drawbacks of the class action device.

> A single class action for recovery of one award of punitive damages might be an attractive alternative from a theoretical point of view, but does not appear feasible. Because the losses are widespread and disparate, the vital legal issues would not be common to all plaintiffs, nor would the applicable legal standards be identical in all jurisdictions in which the cases would arise.

Id.

[104] *In re* Northern Dist. of Cal. "Dalkon Shields" IUD Prods. Liab. Litg., 526 F. Supp. 887 (N.D.Cal. 1981), *vacated & remanded*, 693 F.2d 847 (9th Cir. 1982); *In re* Federal Skywalk Cases, 93 F.R.D. 415 (W.D. Mo.), *class decertified*, 680 F.2d 1175 (8th Cir. 1982).

exceeded the defendant's net worth.[105] The United States Court of Appeals for the Ninth Circuit stated that punitive damage claims would not necessarily affect later claims, and second, the punitive damage standard of conduct varied so substantially among different jurisdictions that some plaintiffs would be unfairly prejudiced by the federal court applying a less favorable standard than what would have been used in an individual action.[106]

While other problems involving the use of class actions remain to be resolved, the approach offers an opportunity to remedy many of the burdens faced by mass tort litigants, especially the onerous cost of multiple actions. Thus, it is a remedy that offers promise.

2. *Bifurcation*

Another way to control punitive damage awards is through bifurcation of the liability and punitive damage issues. It is suggested that through preventing juries from considering possibly inflammatory evidence of the defendant's wealth until the question of liability is determined, the likelihood of juries inflating the compensatory damage award will be reduced.[107] Bifurcation might reduce the need for courts to either remit or vacate punitive damage awards that are clearly influenced by passion and prejudice.

IV. CONCLUSION

While there are many reasons for alarm at the frequency and amount of punitive damage awards being granted by juries, it appears juror reaction is not entirely unpredictable. Evidence of a manufacturer's good faith action to mitigate the harm caused by possible product defects can preclude punitive awards. Furthermore, products liability defendants should be aware that courts

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[105] *See* Comment, *supra* note 102, at 163.
[106] Dalkon Shield, 693 F.2d at 851.
[107] *Wheeler*, *supra* note 40, at 301.

are increasingly receptive to consideration of procedural devices that will reduce the chance of multiple punishment and lead to more dispassionate results.