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MULTIPLE PUNITIVE DAMAGE AWARDS

JERRY J. PHILLIPS*

I. Introduction

The United States Supreme Court has upheld punitive damage awards against constitutional attacks based on the Excessive Fines Provision of the Eighth Amendment and on the Due Process Clause. In its most recent punitive damage case, TXO Production...

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1. See, e.g., TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711 (1993). In TXO, the Supreme Court upheld a punitive damage award far exceeding the actual award against a Due Process Clause attack. Id. at 2724. The award was upheld even though a majority of the Court found that punitive damage awards must satisfy due process, with a plurality emphasizing the constitutional requirements of fairness and reasonableness. Id. at 2718-28. For a further discussion of the facts and holding of TXO, see infra notes 2-5 and accompanying text.

Prior to the TXO decision, the two controlling cases on the constitutionality of punitive damage awards were Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1 (1991) and Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989). These two cases, however, failed to provide a workable framework and afforded little guidance with which to analyze punitive damage awards. See, e.g., Sheila L. Birnbaum & J. Russell Jackson, Since TXO, State Courts are Relying on Grounds Other Than Federal Due Process to Limit or Modify Punitive Damage Schemes, Nat'l L.J., Mar. 14, 1994, at B4, B6. In Haslip, the Court upheld, against a Due Process Clause attack, a punitive damage award of one million dollars that was four times the amount of compensatory damages. Haslip, 499 U.S. at 23-24. The Court determined that the jury's finding of intentional fraud and bad faith was reasonable and, thus, due process was not violated by the punitive damage award. Id. at 15-18. The Court emphasized the importance of basing punitive damage awards on objective criteria and ensuring that jury decisions undergo full procedural protection. Id. at 18-23. In Haslip, however, the members of the Court voiced a strong concern that the 4 to 1 ratio of punitive damages to compensatory damages may be "close to the line" of constitutional unacceptability. Id. at 9, 36-42, 61-63 (Scalia & Kennedy, JJ., concurring & O'Connor, J., dissenting). However, Justice Blackmun, writing for the majority, found that because there was no constitutional bright line for determining a reasonable punitive damage amount, reasonableness and adequate guidelines would be considered primary factors in determining constitutionality. Id. at 18.

In Browning-Ferris, the Supreme Court upheld a punitive damage award against attacks under the Eighth and Fourteenth Amendments. Browning-Ferris, 494 U.S. at 278. The majority found that the Excessive Fines provision of the Eighth Amendment was not applicable to punitive damages in a civil case where the claim of excessiveness under the Due Process Clause had not been raised. Id. at 276-77. However, all nine justices expressed their concern with the constitutionality of large punitive damage awards. Id.

Attacks on punitive damages as violative of the Excessive Fines provision of the Eighth Amendment have consistently been rejected by lower federal courts and various state courts. See, e.g., Daugherty v. Firestone Tire & Rubber Co., 85 F.R.D. 693 (N.D. Ga. 1980); Palmer v. A.H. Robins Co., 684 F.2d 187 (Colo. 1984) (en...
Corp. v. Alliance Resources Corp., the Court found that due process was not violated by the imposition of a punitive damage award of ten million dollars against an oil and gas company, even though the award was 526 times greater than the actual damages. Although the Court recognized that due process places substantive limits on


As early as 1852, the Supreme Court in Day v. Woodworth established that the imposition of punitive damages did not violate the United States Constitution. 54 U.S. (13 How.) 363 (1852). See generally Linda L. Schluter & Kenneth R. Redden, Punitive Damages § 3.0-13 (2d ed. 1990); Note, The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages, 41 N.Y.U. L. Rev. 1158, 1177 (1966). Furthermore, in Louis Pizitz Dry Goods Co. v. Yeldell the Supreme Court held that substantive due process was not violated by a punitive damage award. 274 U.S. 112, 115-16 (1927). The Court found that punitive damages were not fundamentally unfair, so as to impair the defendant’s substantive due process rights. Id. The Court relied heavily on the proffered purpose behind an award of punitive damages. Id. at 114-15. See also Mathews v. Eldridge, 424 U.S. 319, 335 (1975) (defining factors critical for ensuring that punitive damage awards are not violative of procedural due process). See generally Malcolm E. Wheeler, The Constitutional Case for Reforming Punitive Damages Procedures, 69 Va. L. Rev. 269, 273 (1983).

2. 113 S. Ct. 2711 (1993). In TXO, the dispute between TXO and Alliance centered on an unfair business competition claim over an oil and gas lease. Id. at 2715-16. TXO had attempted to acquire oil and gas rights in a West Virginia parcel of land from Tug Fork Land Company. Id. at 2716. In an attempt to influence the negotiations of the leases, TXO’s counsel falsely contrived a “cloud on title” to the tract. Id. TXO then sought a declaratory judgement to “clear title” and Alliance and Tug Fork counterclaimed with a “slender of title” claim. Id. Evidence was introduced that TXO had acted in bad faith in bringing a declaratory judgment action. Id. Also, evidence of TXO’s wealth and expected royalties were offered to prove that TXO had engaged in similar nefarious conduct prior to this. Id. at 2716-17. A jury awarded $19,000 in actual damages for Alliance’s cost of defense and $10 million in punitive damages based on evidence of TXO’s maliciousness and bad faith. Id. at 2717. The trial court dismissed TXO’s motion for remittitur and the Supreme Court of West Virginia upheld the award. Id. On appeal, TXO averred that the award of punitive damages violated the Due Process Clause as interpreted by the Supreme Court in Haship, and in the West Virginia Supreme Court of Appeals’ decision in Garnes v. Fleming Landfill, Inc., 413 S.E.2d 897 (1991). TXO, 113 S. Ct. at 2717. The West Virginia Supreme Court of Appeals, however, rejected TXO’s claims and found that the jury decision was based on TXO’s proven malicious conduct and was warranted to send a message of deterrence to mid-level corporate managers. Id. at 2717-18.

3. TXO, 113 S. Ct. at 2724. The decision was highly fragmented and controversial, with Justice Stevens writing for the majority, Justices Scalia, Kennedy, and Thomas concurring, and Justices White, O’Connor and Souter dissenting. Id. at 2713-14. Justice Stevens, joined by the Chief Justice and Justice Blackmun, held that punitive damage awards are not so “grossly excessive” as to violate due process, and the procedure for determining punitive damages was not so “unconstitutionally vague” as to violate the Due Process Clause. Id. The plurality recognized the parties’ desire to formulate a concrete “test;” however, it rejected both Alliance’s proposed rational basis standard and TXO’s proposed heightened scrutiny standard. Id. at 2718-20. The plurality also acknowledged that the punitive damage award was large, but it found that “in light of the millions of dollars potentially at stake, TXO’s bad faith, the fact that TXO’s scheme was part of a larger pattern of
the amount of punitive damages, it found that there was no mathematical bright-line with which to distinguish constitutionally acceptable awards from constitutionally unacceptable awards. Rather, the Court emphasized the reasonableness of the award and the existence of procedural safeguards as key factors in its constitutional calculus. The TXO decision, thus, seems to lay to rest federal constitutional concerns about punitive damage awards based

fraud, trickery and deceit, and TXO's wealth, the award [could] not be said to be beyond the power of the State to allow.” Id. at 2721-23.

4. Id. at 2721-23. Justice Stevens, joined by the Chief Justice and Justices Blackmun and Kennedy, concluded that TXO was afforded procedural due process. Id. In doing so, they rejected TXO's arguments that: (1) the jury received improper jury instructions regarding punitive damage, (2) there had been inadequate trial and appellate review of punitive damages and (3) it had no advance notice of the possibility that the jury could award such substantial punitive damages. Id. at 2723-24.

Justice Kennedy, in his concurrence, disagreed with the plurality’s “reasonableness standard,” finding that the standard did not adequately compare the punishment with the actual conduct that gave rise to the punitive damage award. Id. at 2724 (Kennedy, J., concurring). As an alternative, Justice Kennedy proffered a standard that focused on the reasons for awarding such large punitive damage awards, rather than on the actual amount of the award. Id. at 2724-25 (Kennedy, J., concurring). Justice Kennedy reasoned that “[w]hen a punitive damages award reflects bias, passion, or prejudice on the part of the jury, rather than a rational concern for deterrence and retribution, the Constitution has been violated, no matter what the absolute or relative size of the award.” Id. at 2725 (Kennedy, J., concurring). Justice Kennedy agreed with the plurality’s judgment, because he found that the record as a whole reflected the fact that the jury had considered TXO’s intentional wrongful conduct and had shown concern for the general principles of retribution and deterrence. Id. at 2726 (Kennedy, J., concurring).

Justice Scalia, joined by Justice Thomas found that there was no federal substantive due process right to a reasonable punitive damage award, although procedural due process does require appellate review of awards for reasonableness. Id. at 2726-27 (Scalia, J., dissenting). Accordingly, they reasoned that TXO's due process challenge must fail, because the jury had been properly instructed on damages under West Virginia law, and the punitive damage award had received adequate trial and appellate review. Id. (Scalia, J., dissenting).

Conversely, the dissenters argued that the punitive damage award’s size and the procedures that produced it were so excessive and vague as to directly violate due process. Id. at 2728-42 (Scalia, J., dissenting). They posited that the award was oppressive and arbitrary and was not based on the principles of fair retribution and deterrence. Id. (Scalia, J., dissenting).

5. Id. at 2726. The majority stated that it did “not consider the dramatic disparity between the actual damages and the punitive award controlling . . . [be-cause] the jury may reasonably have determined that [TXO] set out on a malicious and fraudulent course to win back . . . the lucrative stream of royalties that it had ceded to Alliance.” Id. at 2722. Thus, the majority found that given TXO’s bad faith and malicious actions, the punitive damage award was not so “grossly excessive” as to violate the Due Process Clause. Id. Similarly, Justice Kennedy, in his concurring opinion, maintained that “it was rational for the jury to place great weight on the evidence of TXO's deliberate, wrongful conduct in determining that a substantial award was required in order to serve the goals of punishment and deterrence.” Id. at 2726 (Kennedy, J., concurring).
on insufficient guidelines and excessiveness.\(^6\)

The constitutionality of multiple punitive damage awards arising out of the same conduct, or same course of conduct, however, is a major issue that the Supreme Court has not yet considered. The issue has been considered by a number of lower courts, various

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6. See Dunn v. HOVIC, 1 F.3d 1371, 1388, 1404 (9d Cir.) (relying on TXO and Haslip decisions to determine whether punitive damage award was grossly excessive), modified in part, 13 F.3d 58 (9d Cir.), cert. denied sub nom. Owens-Corning Fiberglas Corp. v. Dunn, 114 S. Ct. 650 (1993). But see Colbert C. Stuart III, Note, Mean, Stupid Defendants Jarring Our Constitutional Sensibilities: Due Process Limits on Punitive Damages After TXO Production v. Alliance Resources, 30 CAL. W. L. REV. 313, 336-43 (1994) (discussing likely difficulty that lower courts will have applying TXO reasonableness standard). See generally Michael J. Pepek, Note, TXO v. Alliance: Due Process Limits and Introducing a Defendant's Wealth When Determining Punitive Damages Awards, 25 PAC. L.J. 1191 (1994) (concluding that after TXO, state courts will have to apply their own substantive and procedural tests when reviewing punitive damage awards).

In Dunn, the United States Court of Appeals for the Third Circuit held that a punitive damage award was supported by "clear and convincing evidence" and that the award was justified and not "grossly excessive." Dunn, 1 F.3d at 1382-91. Specifically, the Third Circuit recognized that proper judicial review included such factors as: (1) the reasonable relation between the award and the defendant's conduct; (2) the degree, duration, existence and frequency of the defendant's past fraudulent acts; (3) the wealth of the defendant; (4) the overall financial stability of the defendant; (5) the cost of current and pending litigation; and (6) the existence of multiple damage awards for the same conduct. Id. at 1404. The Third Circuit looked to the Supreme Court's emphasis in TXO upon the reasonableness of punitive damages for determining constitutionality. Id. at 1380. In addition to reasonableness considerations, the Third Circuit found that the existence and degree of multiple punitive damage awards against a defendant and the possible adverse effects of such punitive damage awards on pending claims were two critical factors in mass tort litigation. Id. at 1384-87; see also Transportation Ins. Co. v. Morel, 879 S.W.2d 10 (Tex. 1994) (comparing due process procedures approved by Supreme Court in Haslip, and reiterated in TXO, with Texas punitive damage scheme and finding Texas scheme lacking). In Transportation Insurance Co. v. Morel, the Texas Supreme Court pointed out that both the Haslip and TXO decisions placed great importance on three areas: (1) adequate jury instructions that limited discretion; (2) detailed post verdict review by the trial court, including explicit reasons for supporting the decision on the record; and (3) comprehensive appellate review of the award. 879 S.W.2d 10, 27-28 (Tex. 1994); see also Honda Motor Co. v. Oberg, 114 S. Ct. 2351 (1994) (striking Oregon constitutional amendment prohibiting judicial review of punitive damage awards on federal due process grounds). The Morel court then introduced new procedures that Texas courts are required to use to ensure fairness and predictability of awards. Morel, 879 S.W.2d at 29; cf. Georgia v. Mosely, 436 S.E.2d 632 (Ga. 1993) (upholding constitutionality of Georgia statutory provision that requires awarding 75% of punitive damages to state treasury and limiting punitive damage awards to only one plaintiff), cert. denied, 114 S. Ct. 2101 (1994). Unlike the Morel court, the Georgia Supreme Court in Georgia v. Mosely did not rely on approaches defined in Haslip and TXO. 486 S.E.2d 632 (Ga. 1993), cert. denied, 114 S. Ct. 2101 (1994). Instead, the Georgia Supreme Court began with the premise that there is no constitutional right to punitive damage awards. Id. at 640. See generally Birnbaum & Jackson, supra note 1, at B6 (addressing state and legislative approaches for ensuring fair punitive damage awards rather than relying on Supreme Court's seemingly amorphous due process jurisprudence).
state courts and the awards that have been upheld against constitutional attack.7 Multiple punitive damage awards are generally challenged as violating the Due Process Clause by punishing defendants repeatedly for essentially the same conduct.8 Defendants attack multiple punitive damage awards under a theory similar to double jeopardy analysis.9 Although multiple punitive damages awards have not been held unconstitutional, they may be invalidated or reduced on policy grounds.10

This Article is based on the premise that there is no inherent

7. Dunn, 1 F.3d at 1385; see, e.g., Solly v. Manville Corp. Asbestos Disease Fund, 996 F.2d 1454 (6th Cir.) (construing federal due process and Ohio law), cert. denied, 113 S. Ct. 411 (1992); Simpson v. Pittsburgh Corning Corp., 901 F.2d 277 (2d Cir.) (construing federal due process), cert. dismissed, 497 U.S. 1057 (1990); Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 402-07 (5th Cir.) (construing Mississippi law), cert. denied, 478 U.S. 1022 (1986); Hansen v. Johns-Manville Prods. Corp., 794 F.2d 1036, 1041-42 (5th Cir. 1984) (construing Texas law), cert. denied, 470 U.S. 1051 (1985) Palmer v. A.H. Robins Co., 684 F.2d 187, 215-16 (Colo. 1984) (declining to strike punitive damages award); W.R. Grace & Co. v. Waters, 638 So. 2d 502 (Fla. 1994) (upholding multiple punitive damage awards in mass tort asbestos litigation); Eagle-Fischer Indus. v. Balbos, 604 A.2d 445, 472 (Md. 1992) (same); Fischer v. Johns-Manville Corp., 512 A.2d 466, 475-80 (N.J. 1986) (same). See generally Richard A. Seltzer, Punitive Damage Awards in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control, 52 FORDHAM L. REV. 37 (1983). The Third Circuit in Dunn declined to strike a punitive damage award in an asbestos action on a claim of unconstitutionally repetitive punishment for the same conduct. Dunn, 1 F.3d at 1385-86. The court held that the multiple punitive damage awards would not be struck down because the defendant-asbestos manufacturer failed to demonstrate that the amount it was required to pay to the aggregate of prior awards had reached the maximum amount tolerable under the Due Process Clause of the United States Constitution. Id. at 1385-87. In addition, the Restatement (Second) of Torts does not preclude successive punitive damage claims stemming from the same conduct; rather, it states that the existence of multiple claims is only a factor in determining constitutional limits to damage amounts. RESTATEMENT (SECOND) OF TORTS § 908 cmt. e (1977).

8. See Dunn, 1 F.3d at 1385-90. In Dunn, the asbestos manufacturer, OCF, sought to have the court find the punitive damage award repetitive and, therefore, violative of due process. Id. at 1385. OCF argued that punitive damage awards had reached the point of overkill in asbestos litigation and, thus, did not meet the goals of deterrence and retribution. Id. The Third Circuit, however, rejected OCF’s claims and found no violation of the Due Process Clause. For federal and state cases that reject Due Process Clause challenges to multiple punitive damage awards, see supra note 7.

9. The “double jeopardy” theory is based on the principle that punitive damages serve the purpose of criminal sanctions. Because the first award of punitive damages against a defendant is based on the full extent of the defendant’s wrongful conduct, any subsequent awards for the same wrongful conduct is analogous to double jeopardy in a criminal case. See SCHLUETER & REDDEN, supra note 1, § 3.9. The United States Supreme Court, however, has been unwilling to find that the Fifth and Sixth Amendments are implicated by the imposition of multiple punitive damage awards. Id. (citing Rex Trailer Co. v. United States ex rel. Marcus v. Huss, 317 U.S. 537 (1943)).

10. For a discussion of the invalidation or reduction of punitive damages see infra notes 25-35 and accompanying text.
due process problem arising out of multiple punitive damage awards for the same course of conduct, because each of the claimants has been separately injured and, therefore, each may justly claim retribution from the defendant. 11 This Article further explains how existing judicial procedures control the problem of potential overkill to the extent that a punitive damage award represents deterrence for reprehensible conduct by the defendant, and other potential defendants, toward persons other than the claimant. 12 Finally, this Article concludes that there appears to be no alternative judicial or statutory solution to multiple punitive damage awards other than presently available bankruptcy procedures. 13

II. PUNITIVE DAMAGES CONSIDERED GENERICALLY

A. The Fallacy of Runaway Punitive Damage Awards

It is common practice to derogate punitive damage awards as

11. A punitive damages award is based on a fact-finder's determination of the amount appropriate for the totality of the defendant's misconduct against the injured plaintiff. See Dunn, 1 F.3d at 1389 (finding defendant failed to show that aggregate of prior awards punished entire wrongdoing); Simpson, 901 F.2d at 281 (requiring that defendant demonstrate punitive damage award was adequate punishment). Individual awards are based on a jury's assessment of the wrongfulness of a defendant's conduct at the time of the action and, therefore, serve as retribution for conduct against plaintiffs. See Dunn, 1 F.3d at 1386; see also Andrea G. Nadel, Annotation, Propriety of Awarding Punitive Damages to Separate Plaintiffs Bringing Successive Actions Arising Out of Common Incident or Circumstances Against Common Defendant or Defendants ("One Bite" or "First Comer" Doctrine), 11 A.L.R.4th 1261, 1262 (1982 & Supp. 1992) (noting that courts "have generally held that no principle exists which prohibits a plaintiff from recovering punitive damages against a defendant or defendants simply because punitive damages have previously been awarded . . . for the same conduct, or because other actions are pending . . . which could result in an award of punitive damages").

12. The "overkill" argument is based on a defendant's claim that the volume of pending claims against it is so great that the point of overkill has been reached with respect to punitive damage awards. See Dunn, 1 F.3d at 1385. In addition, the defendant argues that the magnitude of compensatory damage awards against it adequately furthers the goals of deterrence and punishment. Id. The Third Circuit did not find this "overkill" argument compelling in Dunn, because the defendant failed to prove that the prior damage awards reached a level that violated due process. Id. at 1385-90; see, e.g., Simpson, 901 F.2d at 281; see also Restatement (Second) of Torts § 908 cmt. e (1977). But see Alan Schulkin, Note, Mass Liability and Punitive Damages Overkill, 30 Hastings L.J. 1797 (1979).

13. See Dunn, 1 F.3d at 1386 (finding that no federal or state court can fashion effective response to multiple punitive damages); see also Michael Rustad, In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data, 78 Iowa L. Rev. 1 (1993) (arguing that tort reform of punitive damages is not necessarily more successful). In Dunn, the Third Circuit recognized the validity of empirical data indicating that legislative efforts to limit punitive damages are insufficient to resolve the problems associated with punitive damages. Dunn, 1 F.3d at 1386. But see Seltzer, supra note 7, at 67-68.
being a windfall to claimants, because such awards are generally not considered compensatory in nature.\textsuperscript{14} However, this is not an accurate description of such awards in a number of jurisdictions where a claimant’s litigation costs, including attorney’s fees, are treated as a legitimate component of such awards.\textsuperscript{15} Insofar as such costs are treated as a part of a punitive damage award, the award is compensatory in nature.\textsuperscript{16}

There may also be other compensatory elements to a punitive damage award.\textsuperscript{17} The award may specially compensate a claimant for an affront done to her dignity and for the inconvenience and hardship that are not normally redressed as a regular part of compensatory damages.\textsuperscript{18}

\textsuperscript{14} The Restatement (Second) of Torts defines punitive damages as “damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.” \textsc{Restatement (Second) of Torts} § 908(1) (1977).

\textsuperscript{15} However, this is not an accurate description of such awards in a number of jurisdictions where a claimant’s litigation costs, including attorney’s fees, are treated as a legitimate component of such awards.\textsuperscript{15} Insofar as such costs are treated as a part of a punitive damage award, the award is compensatory in nature.\textsuperscript{16}

\textsuperscript{16} Critics of punitive damages contend that it is unjust to benefit plaintiffs beyond compensatory damages. See \textsc{Schlueter \& Redden}, supra note 1, § 2.2(A)(2). This criticism, however, is undermined by the principle that a defendant’s malicious conduct often warrants the imposition of a punishment in excess of mere compensation of victims for their injuries.

\textsuperscript{17} See St. Luke Evangelical Lutheran Church, Inc. v. Smith, 568 A.2d 35 (Md. 1990) (finding that inclusion of reasonable attorney’s fees in calculation of punitive damage award is necessary to deter future wrongful conduct). An award of attorney’s fees is based on the punishment or “fee shifting” rationale in which an award is used as a legislative or judicial tool to punish oppressive, malicious and wrongful conduct. Id. at 39; see also Hall v. Cole, 98 S. Ct. 1043, 1946 (1973); Markey v. Santangelo, 485 A.2d 1305 (Conn. 1985) (finding that punitive damages serve to compensate for expenses of litigation); Umphrey v. Sprinkel, 682 P.2d 1227 (Idaho 1983) (determining that attorney’s fees are relevant in calculating punitive damages); Hofer v. Lavender, 679 S.W.2d 470 (Tex. 1984) (recognizing that punitive damages compensate for inconvenience and for attorney’s fees); Thomas D. Rowe, Jr., \textit{The Legal Theory of Attorney Fee Shifting: A Critical Overview}, 1982 DUKE L.J. 651, 660-61 (1982). \textit{But see} International Elecs. Co. v. N.S.T. Metal Prods. Co., 88 A.2d 40, 46 (Pa. 1952) (declining to consider attorney’s fees in calculation of punitive damages because attorney’s fees are seen as compensatory in nature and, thus, not proper in measuring of punitive damages).

pensatory damages. Such damages should be considered compensatory in nature, because they are designed to make the claimant whole. These damages, as well as damages for other litigation costs, are unique to the claimant and, as such, are not subject to attack as duplicate recoveries.

Much of the so-called "tort reform" attack on punitive damage awards has been directed against alleged runaway punitive damage awards. However, responsible empirical research indicates that there has never been a punitive damage award crisis in this country. The data shows, in contrast, that standard awards made in this area are neither excessive in number nor in amount. More-

18. See Dunn v. HOVIC, 1 F.3d 1371, 1378 (3d Cir.), modified in part, 13 F.3d 58 (3d Cir.), cert. denied sub nom. Owens-Corning Fiberglas Corp. v. Dunn, 114 S. Ct. 650 (1993). In Dunn, the Third Circuit relied on the premise that punitive damages need not be specifically related to the actual pecuniary or physical injuries suffered by the plaintiff. Id.; see also Hospital Auth. v. Jones, 409 S.E.2d 501, 503 (Ga. 1991) (finding punitive damages need not bear rational relationship to actual damages), cert. denied, 112 S. Ct. 1175 (1992); RESTATEMENT (SECOND) OF TORTS § 908 cmt. c (1977) (noting that while "the extent of the harm may be considered in determining their amount, it is not essential to the recovery of punitive damages that the plaintiff should have suffered any harm, either pecuniary or physical").

19. See Dunn, 1 F.3d at 1381-83; TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711, 2720 (1993) (plurality opinion) (observing that punitive damage "awards are the product of numerous, and sometimes intangible, factors; a jury imposing a punitive damages award must make a qualitative assessment based on a host of facts and circumstances unique to the particular case before it").


21. See generally Lisa K. Gregory, Annotation, Plaintiff's Rights to Punitive or Multiple Damages When Cause of Action Renders Both Available, 2 A.L.R.5th 449 (1992) (collecting cases in which plaintiff's single cause of action may result in both punitive and multiple punitive damage awards); Seltzer, supra note 7 at 55-61 (making various proposals to contain punitive damages awards and prevent "overkill").

22. See Rustad, supra note 13, at 24 (arguing that empirical data disprove skyrocketing of punitive damage awards); Michael J. Saks, Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?, 140 U. PA. L. REV. 1147 (1992) (analyzing existing punitive damages and current reforms and concluding that existing punitive damage system is best); Stephen Daniels & Joanne Martin, Myth and Reality in Punitive Damages, 75 MINN. L. REV. 1 (1990) (discussing current criticisms of punitive damages and arguing that criticisms are unfounded given reality of number and amount of actual punitive damage awards).

23. See Rustad, supra note 13, at 24; MARK A. PETERSON ET AL., PUNITIVE DAMAGES: EMPIRICAL FINDINGS 12 (1987) (finding that proportion of cases in which punitive damages were awarded was small and noting little increase in number of such cases between 1960 and 1984); Daniels & Martin, supra note 22, at 41 (concluding that "median punitive damage award is not at a level that is likely to 'boggle the mind' "). Michael Rustad, in his article, identifies the most common negative assumptions regarding punitive damages and disproves each using empirical data. Rustad, supra note 13, at 36-85. For example, Rustad disproves the as-
over, most awards are, generally speaking, richly deserved given the principles of retribution and deterrence that are furthered.\(^{24}\)

B. The Insufficiency of Legislative Response

Contrary to empirical evidence, the legislatures of several states have responded to a perceived crisis in the area of punitive damages by enacting statutory retrenchments on punitive damage awards.\(^{25}\) Two of the more popular restrictions, which are discussed below, place caps on the amount and the number of punitive damage awards that can be imposed upon one defendant from the same course of conduct.\(^{26}\) Both types of restrictions, however, are unwise.\(^{27}\)

1. Cap on Amount of Punitive Damage Awards

An arbitrary punitive damage award cap in a given case defeats the very purpose of punitive damages— to punish the defendant according to his just desserts.\(^{28}\) What is just, however, depends upon concepts such as: (1) the reprehensibility of the defendant’s conduct toward the plaintiff as well as toward others; (2) the degree of harm done; (3) the unjust enrichment to the defendant as a result of such conduct and (4) the wealth of the defendant.\(^{29}\) These consumption that punitive damage awards are often exorbitant by comparing the median size of both actual and punitive damages in 1983. \textit{Id.} at 46. His study reveals that median punitive damage awards have remained proportionate to compensatory awards. \textit{Id.} at 45. Further, by charting the number of products liability cases from 1965 to 1980, excluding asbestos cases, in which punitive damages were awarded, Rustad disproves the assumption that punitive damages are skyrocketing. \textit{Id.} at 38. His study reveals that with the exception of asbestos cases, punitive damage awards have actually decreased since the mid-1980s. \textit{Id.} at 37.


26. \textit{See}, \textit{e.g.}, ALA. CODE § 6-11-21 (Supp. 1992) (limiting amount of punitive damage awards); COLO. REV. STAT. § 13-21-102 (Supp. 1991) (same); KAN. CIV. PROC. CODE ANN. § 60-3701(e)-(f) (Vernon Supp. 1992) (limiting number of punitive damage awards for same course of conduct).

27. \textit{See} 22 AM. JUR. 2D DAMAGES § 733 (1988) (contending that restricting punitive damage awards diminishes intended effects of punishment of wrongdoer and deterring of others).

28. \textit{See id.;} SCHLUETER & REDDEN, supra note 1, § 2.2(A)(1) (stating that purpose of punitive damage awards is to punish defendants for wrongdoing).

29. \textit{See} RESTATEMENT (SECOND) OF TORTS § 908 cmt. e (1977) (setting forth
siderations vary according to the individual case; if they are not considered on a case by case basis, the whole purpose of a punitive damage award will be subverted. 30

2. **Cap on Number of Punitive Damage Awards**

A facially attractive approach to the punitive damages problem is to limit the number of times that punitive damage awards can be imposed for the same course of conduct. 31 For example, Georgia has limited such awards in products liability to only one award for a given course of conduct and has placed a cap on the amount of the punitive award in non-products liability cases. 32

The Georgia approach is, however, singularly inappropriate. As the United States District Court for the District of New Jersey in Juzwin v. Amorg Trading Corp. 33 recognized, such a limitation cannot run beyond a court's jurisdiction. 34 If additional punitive dam-

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31. See, e.g., Mo. Ann. Stat. § 510.263(4) (Vernon Supp. 1992) (limiting number of punitive damage awards for same course of conduct); Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967) (Friendly, J.) (questioning "how claims for punitive damages in such a multiplicity of actions throughout the nation can be administered [so as to avoid overkill]").

32. See Georgia v. Mosely, 436 S.E.2d 635 (Ga. 1993) (upholding as constitutional Georgia's legislative restriction of punitive awards to one case involving same course of conduct, with 75% of such awards payable to state), cert. denied, 114 S. Ct. 2101 (1994). But see McBride v. General Motors Corp., 737 F. Supp. 1563 (M.D. Ga. 1990) (reaching opposite result regarding constitutionality of Georgia statute).

Other cases dealing with the constitutionality of required payments of a part of a punitive damage award to the state include: Gordon v. State, 608 So. 2d 800 (Fla. 1999) (constitutional), cert. denied, 113 S. Ct. 1647 (1993) and Kirk v. Denver Publishing Co., 818 P.2d 262 (Colo. 1991) (unconstitutional); see also Sonja Larsen, Annotation, Validity, Construction and Application of Statutes Requiring That Percentage of Punitive Damages Awards Be Paid Directly to State or Court-Administered Fund, 16 A.L.R.5th 129 (1993). Where part of the award is paid to the state, however, an Eighth Amendment problem may be involved. See Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 270 (1989); McBride, 737 F. Supp. at 1565.

The cases divide on the constitutionality of a cap on the amount of punitive awards. See Hartsfield ex rel. Henderson v. Alabama Power Co., 627 So. 2d 878 (Ala. 1993) (unconstitutional); Garner v. Covington County, 624 So. 2d 1346 (Ala. 1993) (constitutional); see also Smith v. Printup, 866 P.2d 985 (Kan. 1993) (reviewing cases regarding constitutionality of statutes requiring payment of part of punitive award to state).


age awards can be imposed upon a defendant for the same course of conduct in other jurisdictions, they would defeat the one-award approach as well as unfairly disadvantage plaintiffs in the restrictive jurisdiction.35

III. CONTROLLING MULTIPLE PUNITIVE DAMAGE AWARDS

Although multiple punitive damage awards are not constitutionally objectionable,36 defendants and commentators alike have argued that multiple punitive damage awards result in excessive punishment to the defendant and diminished compensation to future plaintiffs.37 Specifically, these advocates of limitations on punitive damages assert that there is a point at which a defendant has been punished sufficiently and that further imposition of punitive damages only serves to cause the defendant’s financial destruction.38 Moreover, it is argued that the imposition of excessive and multiple punitive damage awards destroys a defendant’s financial ability to pay future compensatory and punitive damages to future deserving plaintiffs; thus, depriving compensation to deserving victims for their injuries.39

However, the imposition of multiple punitive damage awards in mass tort litigation is consistent with the purposes and policies supporting the imposition of punitive damages.40 Each claimant of punitive damages has been separately injured.41 Thus, no one claimant is more entitled to a punitive damage award than another claimant.42 Moreover, the full egregiousness of a defendant’s mis-

37. See HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 17.34 (3d ed. 1985).
38. Id.
39. Id. However, there are strong arguments in opposition to this claim. For a discussion of the arguments that favor the imposition of multiple punitive damage awards, see infra notes 40-93 and accompanying text.
40. Among the policies and purposes of punitive damages are deterrence of future like conduct by the defendant or others, and punishment for intentional or reckless behavior. NEWBERG, supra note 37, § 17.26.
42. Indeed, each claimant must prove his or her eligibility for punitive damages. NEWBERG, supra note 37, § 17.29. Generally, proving eligibility for punitive
conduct may not be revealed in the first trial and the defendant’s continued misconduct subsequent to the first trial might never be exposed. Thus, the imposition of an initial punitive damage award may fall far short of the amount needed to sufficiently deter or punish a defendant.

Given that mass tort litigation will continue to be a reality in our legal system, there are several alternative methods currently available to control and restrict the imposition of punitive damages without undercutting the purposes and policies of such awards. These alternatives include: (1) the class action; (2) bankruptcy; (3) post-trial hearings and (4) bifurcated trials. Each of these will be discussed in the following sections.

A. Class Actions

A particularly attractive device with which to handle multiple punitive damage awards is the class action lawsuit authorized by Federal Rule of Civil Procedure (F.R.C.P.) 23. If all punitive damages requires satisfaction of three threshold criteria: (1) punitive damages are permissible, as a matter of law, under the cause of action asserted by the plaintiff; (2) the plaintiff must demonstrate actual injury for which he or she is entitled to compensatory damages; and (3) the plaintiff must prove that the defendant’s conduct was intentional or reckless. Id. Moreover, even if a plaintiff satisfies these requirements, he or she is not entitled to punitive damages as a matter of law. Id. Rather, punitive damages may only be awarded at the discretion of the trier of fact. Id.

43. Seltzer, supra note 7, at 61-63. By establishing representative parties under F.R.C.P. 23, a class action lawsuit can effectively determine the rights of a pool of claimants in a single proceeding. Seltzer, supra note 7, at 63. In theory, "overkill" would be effectively avoided as all liability would be determined at this point. Id. Therefore, a more equitable system of distribution would be provided to all plaintiffs, rather than just the first few fortuitous plaintiffs. Id.

44. The pertinent portion of F.R.C.P. 23 provides:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members for the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications

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Age awards can be determined in a single proceeding, the appropriate level of total punishment can be determined at this proceeding and the sum representing that total can then be apportioned among the various claimants.\(^45\) Such a procedure addresses two concerns: (1) that defendants are punished appropriately for their behavior and (2) that all deserving injured plaintiffs are permitted to recover punitive damages. Although the class action alternative has acquired new advocates recently,\(^46\) it has not proven to be a feasible means of controlling multiple punitive damage awards.

At the outset, it should be noted that F.R.C.P. 23 provides for three different types of class actions.\(^47\) The first, a 23(b)(1) "mandatory" class action, requires that the proponent demonstrate that: (1) failure to maintain a class action presents a risk of "inconsistent or varying adjudications" that would create "incompatible standards of conduct" for the defendant or (2) separate adjudications would either be dispositive of the interests of other members of the class or impair the other members' ability to protect their interests through adjudication.\(^48\) The second, a 23(b)(2) class action, requires that the form of relief requested be injunctive in nature.\(^49\) The third, a 23(b)(3) "voluntary" class action, requires that the proponent demonstrate that there are "questions of law or fact common to the members of the class" and that "a class action is

or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropri-

ate final injunctive relief or corresponding declaratory relief with

respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to

the members of the class predominate over any questions affecting

only individual members, and that a class action is superior to other

available methods for the fair and efficient adjudication of the

controversy.

FED. R. CIV. P. 23(a)-(b).


46. See In re A.H. Robins Co., 880 F.2d 709, 740 (4th Cir.) (concluding that historical reasons for rejecting class action suits in mass tort litigation are currently being rejected), cert. denied, 493 U.S. 959 (1989).

47. All class actions must meet the threshold requirements of F.R.C.P. 23(a); impracticality of joinder, common questions of law or fact, typicality and adequacy of representation: FED. R. CIV. P. 23(a). For a concise summary of these threshold requirements as they relate to mass tort litigation, see Irving R. M. Panzer & Thomas E. Patton, 21 TORT AND INS. L.J. 560, 563-64 (1986).

48. FED. R. CIV. P. 23(b)(1). For the text of F.R.C.P. 23(b)(1), see supra note 44.

49. FED. R. CIV. P. 23(b)(2). For the text of F.R.C.P. 23(b)(2), see supra note 44.
superior to other available methods for the fair and efficient adjudication of the controversy."\(^5\)\(^0\) Of these three alternatives, only the first, the mandatory class action, provides a vehicle with which to control multiple punitive damage awards.\(^5\)\(^1\)

1. **Obstacles to Maintaining a Mandatory Class Action**

The 23(b)(1) mandatory class action, as noted above, can be maintained only upon one of two alternative showings: (1) failure to maintain a class action would result in the risk of inconsistent adjudications\(^5\)\(^2\) or (2) failure to maintain a class action would substantially impair the ability of class members to protect their interests in subsequent adjudications against the same defendant.\(^5\)\(^3\) However, courts have been unwilling to certify mandatory classes under either alternative for punitive damage purposes.

a. No Risk of Inconsistent Adjudications.

Early on in the mass tort litigation debate, courts took the position that the mere fact that some plaintiffs may be successful in their suits against a defendant while others may be unsuccessful, did not rise to the level of "inconsistent adjudications" or "incompatible standards of conduct."\(^5\)\(^4\) Addressing this issue, the United States Court of Appeals for the Ninth Circuit concluded that "a judgment that defendants were liable to one plaintiff would not require action inconsistent with a judgment that they were not liable to another plaintiff. By paying the first judgment, defendants could act consistently with both judgments."\(^5\)\(^5\) The United States Court of Appeals for the Sixth Circuit echoed this interpretation of F.R.C.P. 23(b)(1) (A) in *In re Bendictin Products Liability Litigation.*\(^5\)\(^6\) Thus, as

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\(^5\)\(^0\) Fed. R. Civ. P. 23(b)(3). For the text of F.R.C.P. 23(b)(3), see *supra* note 44.

\(^5\)\(^1\) A 23(b)(2) class action is not available in most mass tort litigations, because the relief sought is not injunctive in nature. Fed. R. Civ. P. 23(b)(2). In addition, a voluntary class action, which permits plaintiffs to "opt out" and bring their own action against a defendant is considerably less efficient at achieving the desired effect of limiting the number of punitive damage awards. *See* Panzer & Patton, *supra* note 47, at 566. Although a voluntary class action may have the effect of reducing the number of punitive damage awards, it is a far less efficient method than the mandatory class action which, in theory, permits only one punitive damage award to be imposed on a defendant. *Id.*


\(^5\)\(^3\) Id. 23(b)(1)(B).


\(^5\)\(^5\) Id.

\(^5\)\(^6\) 749 F.2d 300, 304 (6th Cir. 1984).
a practical matter, F.R.C.P. 23(b)(1)(A) is not a viable option for class certification of mass tort litigation. There is, however, a growing sentiment among commentators that F.R.C.P. 23(b)(1)(A) should be available to certify class actions in mass tort litigation.57


Proponents of mandatory class actions for mass tort litigation assert that the F.R.C.P. 23(b)(1)(B) “substantial impairment” requirement is met by virtue of the fact that one defendant has a finite source of money from which to pay all punitive damage awards. Additionally, prior punitive damage awards may deplete this fund and, thus, deprive subsequent successful plaintiffs from recovering any punitive damages.58 This theory, known as the “limited fund” theory, has proven unsuccessful in actual cases, but it has not yet been definitively rejected.

In In re Northern District of California, Dalkon Shield IUD Products Liability Litigation,59 the Ninth Circuit vacated the district court’s certification of a mandatory class based on the limited fund theory.60 The Ninth Circuit concluded that mandatory class certification under F.R.C.P. 23(b)(1)(B) was only appropriate “when separate punitive damage claims necessarily [would] affect later claims.”61 Moreover, the Ninth Circuit concluded that even if there was a sufficient showing that separate punitive damage claims would necessarily affect later claims, there still must be a preliminary fact-finding inquiry as to the defendant’s “assets, insurance, settlement experience and continuing exposure” before there could be a determination that there is a limited fund.62 Similarly,

57. Irving R. M. Panzer and Thomas E. Patton argue: [W]hy should the defendant have the chance to relitigate over and over again the same issue as to which it has already been found liable? By the same token, why should plaintiffs be allowed to relitigate a finding of nonliability? Is it not an “incompatible standard” for a manufacturer... to be held responsible for its wrongdoing in one case, but in another to be held not culpable? Panzer & Patton, supra note 47, at 568-69; see also In re A.H. Robbins Co., 880 F.2d 709, 740 (4th. Cir.) (concluding that current trend is towards permitting class certification in mass tort litigation), cert. denied, 493 U.S. 959 (1989).

58. See In re Bendectin, 749 F.2d at 305 (noting that in ordering mandatory class certification, district court relied on limited funds available to pay all punitive damage awards); In re Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847, 851 (9th Cir. 1982) (same), cert. denied, 459 U.S. 1171 (1983).

59. 693 F.2d 847 (1982).

60. Id. at 857.

61. Id. at 852 (emphasis added).

62. Id.
in *In re Bendectin*, the Sixth Circuit vacated the district court’s order certifying a mandatory class based on the limited fund theory because the district court had failed to engage in the fact-finding required to support the existence of a limited fund. Therefore, while the limited fund theory appears to be theoretically available to proponents of a mandatory class action, it presents numerous practical obstacles, including the degree and quantum of proof that are necessary to support a finding of a limited fund.

B. *Bankruptcy*

Defendants in mass tort litigation may find bankruptcy a viable, indeed attractive, method of coping with actual and potential multiple punitive damage awards. Bankruptcy is an attractive mechanism for defendants subject to multiple punitive damage awards for two reasons. First, the bankruptcy court has the power to totally eliminate a defendant’s liability for punitive damage awards, whether the liability has been reduced to a judgment or is only a potential liability pending the outcome of a currently filed case. Second, federal bankruptcy law permits management to continue to operate a company, insulated from plaintiffs’ judgments, pending the approval of a successful reorganization plan.

1. The Procedural Benefits of Filing for Bankruptcy

Once a defendant in mass tort litigation files a Chapter 11 bankruptcy petition, two critical benefits result. First, Section 362(a) of the Federal Bankruptcy Code provides for an automatic stay of claims against the defendant. The effect of this stay is to halt the “commencement or continuation” of all proceedings against the defendant. Second, the Federal Bankruptcy Code provides a basis for certifying a mandatory class of mass tort plaintiffs pursuant to F.R.C.P. 23(b)(1)(B). The combined effect of the automatic stay provision and the mandatory class certification provides a defendant with an attractive forum within which to resolve

63. 749 F.2d 300, 306 (6th Cir. 1984).
64. See generally Newberg, *supra* note 37, § 20.01-31.
65. For a discussion of the bankruptcy court’s power to disallow punitive damage claims, see infra notes 71-75 and accompanying text.
66. For a discussion of the flexibility and autonomy afforded the management of a company in Chapter 11 bankruptcy, see infra notes 76-79 and accompanying text.
68. *Id.*
mass tort claims; in short, a much more manageable litigation situation.\textsuperscript{70}

2. \textit{The Disallowance of Punitive Damages}

In addition to the procedural benefits noted above, filing a Chapter 11 bankruptcy petition may ultimately result in the elimination of all punitive damage claims against a defendant. Indeed, this was the ultimate result in at least two Chapter 11 bankruptcy cases filed because of mass tort litigation.\textsuperscript{71}

In \textit{In re A.H. Robins Co.,}\textsuperscript{72} the bankruptcy court disallowed all punitive damage claims against a dalkon shield manufacturer stemming from product liability claims for injuries caused by the manufacturer's contraceptive device.\textsuperscript{73} The court concluded that Section 105(a) of the Federal Bankruptcy Code provided it with the equitable powers to disallow and, therefore, eliminate liability for claims for which the debtor-manufacturer would otherwise be liable.\textsuperscript{74} The court reasoned that A.H. Robins would be unable to successfully reorganize if it were subjected to potentially enormous and unpredictable liability for punitive damages.\textsuperscript{75} Thus, it appears that Chapter 11 bankruptcy provides a mass tort litigation defendant with a powerful tool to ward off punitive damage liability. Moreover, as discussed below, the bankruptcy alternative is no longer the financial death knell to corporate defendants.

\textsuperscript{70} Newberg, \textit{supra} note 37, \S\ 20.07.


\textsuperscript{72} 89 B.R. 555 (E.D. Va. 1988).

\textsuperscript{73} Id. at 563. The result of this disallowance was the elimination of liability for over seven million dollars of punitive damage claims pending on appeal in numerous cases filed against A.H. Robins across the country. \textit{Id.} at 558.

\textsuperscript{74} Id. at 561-62. Section 105(a) of the Bankruptcy Code provides:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.


\textsuperscript{75} A.H. Robins, 89 B.R. at 561-63. Judge Merhige stated that “[t]he presence of a ‘wild card’ in the form of punitive damages would constitute the death knell of any feasible reorganization plan.” \textit{Id.} at 562. \textit{But see} Richard B. Sobol, \textit{Bending the Law: The Story of the Dalkon Shield Bankruptcy} 330-31 (1991) (asserting that disallowance of all punitive damages was neither necessary nor equitable).
3. **Bankruptcy As a Financial Management Tool—Not a Financial Taboo**

Bankruptcy is no longer a financial taboo. This shift in perception is largely a result of the Bankruptcy Reform Act of 1978 that reformed the Federal Bankruptcy Code by creating the current Chapter 11 reorganization provision. Chapter 11 permits management to retain a significant amount of control over the day-to-day operations of a company, even though the company is in bankruptcy. As two commentators have observed:

[The] presumption favoring management's continued control, when combined with other provisions of Chapter 11 affording the corporate debtor considerable latitude regarding its treatment of creditors, effectively g[ives] managers powerful incentives to pursue bankruptcy reorganization. Managers are more likely to keep their jobs by reorganizing rather than liquidating their firm, and during reorganization they can operate without the constraints ordinarily imposed by creditors.

Thus, it appears that bankruptcy is a powerful, flexible and viable coping mechanism for corporate defendants in mass tort litigation.

**C. Post-Trial Hearings**

The availability of a post-trial hearing may be a constitutionally required mechanism to control the aggregate sum of punitive damages imposed upon a mass tort litigation defendant. During a post-trial hearing, the defendant can introduce evidence in support of the proposition that previously imposed punitive damage awards mitigate or eliminate the justification for additional punitive damage awards that may be imposed as a result of the current proceeding. Such post-trial procedures may be established statutorily or

76. See Michael Bradley & Michael Rosenzweig, The Untenable Case for Chapter 11, 101 YALE L.J. 1043, 1047 n.20 (1992) (concluding that bankruptcy filing is regarded as management tool rather than “last gasp of a dying company”).

77. Id.

78. Id.

79. Id. at 1045.

80. See Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 20 (1991) (noting importance of “meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages”). For a discussion of the constitutionally required safeguards necessary to ensure reasonable punitive damage awards, see supra notes 1-6 and accompanying text.

81. See, e.g., MO. ANN. STAT. § 510.263(4) (Vernon 1952 & Supp. 1994). The Missouri statute provides:
jusldically.\textsuperscript{82}

The scope and nature of the evidence that a defendant can introduce at a post-trial hearing in support of mitigation of a current punitive damage award have not been definitively decided. Evidence of prior punitive damage awards actually paid by a defendant for the same course of conduct is certainly relevant.\textsuperscript{83} The defendant's ability to pay future punitive damage awards based on the same course of conduct is also important.\textsuperscript{84} With regard to a defendant's ability to pay future punitive damage awards, courts and commentators are in disagreement as to the quantum.\textsuperscript{85} and

\begin{quote}
Within the time for filing a motion for new trial, a defendant may file a post-trial motion requesting the amount awarded by the jury as punitive damages be credited by the court with amounts previously paid by the defendant for punitive damages arising out of the same conduct on which the imposition of punitive damages is based. At any hearing, the burden on all issues relating to such a credit shall be on the defendant and either party may introduce relevant evidence on such motion. Such a motion shall be determined by the trial court within the time and according to procedures applicable to motions for a new trial. If the trial court sustains such a motion the trial court shall credit the jury award of punitive damages by the amount found by the trial court to have been previously paid by the defendant arising out of the same conduct and enter judgment accordingly. If the defendant fails to establish entitlement to a credit under the provisions of this section, or the trial court finds from the evidence that the defendant's conduct out of which the prior punitive damages award arose was not the same conduct on which the imposition of punitive damages is based in the pending action, or the trial court finds the defendant unreasonably continued the conduct after acquiring actual knowledge of the dangerous nature of such conduct, the trial court shall disallow such credit, or, if the trial court finds that the laws regarding punitive damages in the state in which the prior award of punitive damages was entered substantially and materially deviate from the law of the state of Missouri and that the nature of such deviation provides good cause for disallowance of the credit based on the public policy of Missouri, then the trial court may disallow all or any part of the credit provided by this section.
\end{quote}


\textsuperscript{82} See Dunn, 1 F.3d at 1384-89 (determining appropriateness of multiple punitive damage awards).

\textsuperscript{83} Id. at 1391; Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854, 868 (Iowa 1994).

\textsuperscript{84} Spaur, 510 N.W.2d at 868.

\textsuperscript{85} Cf. Dunn, 1 F.3d at 1384 (concluding that evidence of negative net worth alone does not constitute evidence sufficient to justify remittitur); Spaur, 510 N.W.2d at 867-68 (concluding that evidence of prior payments of three million dollars in punitive damages and unspecified settlement amounts, coupled with defendant's failure to demonstrate that currently imposed punitive damage award would "threaten its corporate existence," failed to meet required level of proof to support mitigation or remittitur).
nature\textsuperscript{86} of evidence necessary to support mitigation of a punitive damage award. Regardless of the quantum or nature of evidence required to support remittitur of punitive damage awards, however, the defendant will bear the burden of proof.\textsuperscript{87}

Even though there is no right to punitive damages, judges presumably cannot reduce such awards without conditioning a reduction on the right of a new trial at the option of a dissatisfied plaintiff.\textsuperscript{88} This option preserves the plaintiff’s right to a jury trial.

D. Bifurcated Trial

A number of jurisdictions provide for bifurcated trials. In a bifurcated trial, if the jury finds liability for compensatory damages in the first proceeding, it must then determine whether punitive damages should be awarded in a second proceeding.\textsuperscript{89} Such a bifurcated procedure permits a defendant to introduce evidence of its wealth and of prior punitive damage awards imposed against it during the second stage of the bifurcated proceeding. By permitting such evidence in the second stage, the evidence will not have a prejudicial effect on the finding of liability.\textsuperscript{90}

A bifurcated proceeding, however, may not be available to

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\textsuperscript{86} Courts are divided on the relevance of insurance coverage in assessing punitive damages. Cf. Lewis v. Terrebonne, 894 F.2d 142, 146 (5th Cir. 1990); Michael v. Cole, 595 F.2d 995, 997 (Ariz. 1979). Courts and commentators are also divided on the issue of whether the defendant’s wealth is relevant as to punitive damage awards. See Herman v. Sunshine Chem. Specialties, Inc., 627 A.2d 1081, 1086-87 (N.J. 1993) (compiling arguments on both sides).

\textsuperscript{87} Dunn, 1 F.3d at 190.

\textsuperscript{88} SCHLUETER & REDDEN, supra note 1, §§ 3.4(A)-3.6(D) (1980). But see Smith v. Printup, 866 F.2d 985 (Kan. 1993) (upholding constitutionality under state and federal constitutions of statute that requires judge to determine amount of awardable punitive damages after jury determines liability for such damages).

\textsuperscript{89} See MO. ANN. STAT. § 510.263(1)-(3) (Vernon 1952 & Supp. 1994) (providing for bifurcation at request of any party of all actions involving punitive damages tried before jury); Hodges v. S. C. Toof & Co., 833 S.W.2d 896 (Tenn. 1992); see also CAL. CIV. CODE § 3295 (West Supp. 1994) (requiring bifurcation of trials); GA. CODE ANN. § 105-2002.1(d) (Supp. 1993) (same); MINN. STAT. ANN. § 549.20(4) (West Supp. 1994) (same); MONT. CODE ANN. § 27-1-221(7) (1993) (same); NEV. REV. STAT. § 42.005(3) (1993) (same); N.J. STAT. ANN. § 2A:58C-5(b) (West 1987) (same); UTAH CODE ANN. § 78-18-1(2) (1993) (same). In diversity cases brought in federal court, F.R.C.P. 42(b) provides the trial court with discretion to bifurcate the proceeding. FED. R. CIV. P. 42(b). It does not appear that bifurcation raises an issue under the \textit{Erie} doctrine. See Simpson v. Pittsburgh Corning Corp., 901 F.2d 277, 283 (2d Cir.) (asserting that bifurcation under F.R.C.P. 42(b) does not violate \textit{Erie} doctrine), cert. dismissed, 497 U.S. 1057 (1990).

\textsuperscript{90} See Simpson, 901 F.2d at 283 (“A defendant wishing to minimize the amount of [punitive] damages by revealing the punitive damages assessed in prior cases is understandably reluctant to put such evidence before the jury at the point where it is deciding whether the defendant should be found liable at all.”).
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every mass tort litigation defendant because the decision to bifurcate proceedings is generally left to the trial court’s discretion.91 Moreover, some mass tort litigation defendants may prefer not to introduce evidence of wealth or prior punitive damage awards to a jury at any stage of a proceeding because of the risk of undue prejudice. As a general proposition, therefore, a post-trial proceeding before a judge may be the better alternative.

IV. CONCLUSION

There appears to be no punitive damages crisis in this country and no constitutional problem with such damages. Moreover, punitive damage awards can serve an important function in the individualized corrective justice for claimants. Insofar as a defendant feels oppressed by multiple punitive damage awards arising out of the same course of conduct, it always has the option of bankruptcy, which is far from unattractive in the case of corporate defendants.92 Short of bankruptcy, possible duplicative awards can be handled in a post-trial proceeding before a judge by seeking a reduction in the amount of the award.93

91. See id. (holding that denial of bifurcation under F.R.C.P. 42(b) is within trial court’s discretion); Johnson v. Celotex Corp., 899 F.2d 1281 (2d Cir.) (same), cert. denied, 498 U.S. 920 (1990). But see Mo. Ann. Stat. § 510.263(1) (requiring bifurcation if any party requests it).

92. For a discussion of punitive damages and the advantages of Chapter 11 of the Bankruptcy Code, see supra notes 64-79 and accompanying text.

93. For a discussion of punitive damages and the advantages of a post-trial hearing, see supra notes 80-88 and accompanying text.