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The American Law Institute’s Reporters’ Study on Enterprise Responsibility for Personal Injury: A Timely Call for Punitive Damages Reform

VICTOR E. SCHWARTZ*
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INTRODUCTION

In 1986, the American Law Institute (ALI) commissioned a study in response to the crisis confronting the United States tort litigation/liability insurance system. The project took more than five and one-half years and was authored by prominent professors from the nation’s leading law schools. Advisers from academia as well as members of both the judiciary and the practicing bar also made contributions. The resulting report, entitled *Enterprise Responsibility*

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for Personal Injury (Reporters' Study or Study), focused on a wide array of substantive and procedural issues in the law of torts. The Reporters' Study was not subjected to the formal American Law Institute approval process. Instead, the Study was made available by the ALI for the bench, bar, and state legislators to use as a resource to develop personal injury law.

The Reporters' recommendations on one topic, namely, punitive damages, are particularly appropriate and timely. In response to perceived abuses and unfairness in punitive damages awards, "more and more voices are calling for major overhauls of this area of the law." Even the United States Supreme Court has expressed concern in recent years that punitive damages awards have "run wild."

Part I of this article will briefly discuss the Study's analysis of the need for punitive damages reform. Part II will discuss the Study's recommendations concerning reform of the standard by which punitive damages should be awarded. Part III will discuss the Study's recommendations to set reasonable limits on the size of punitive damages awards. Part IV will discuss the Study's recommendation of a shield against tort damages, particularly punitive damages, for products that comply with federal regulatory standards. Part V will discuss the Reporters' proposal to deal with the special problem of multiple, or repetitive, punitive damages awards.


2. Id. at 232. There have been two major systemic reanalyses of punitive damages in the past several years. See ABA Special Committee on Punitve Damages, Punitive Damages: A Constructive Examination (1986) [hereinafter ABA Report]; American College of Trial Lawyers, Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice (Mar. 3, 1989) [hereinafter ACTL Report]. The Council on Competitiveness under President Bush also recently made punitive damages reform a primary goal on its agenda. See President's Council on Competitiveness, Agenda for Civil Justice Reform in America (1991) [hereinafter Justice Reform].

I. THE NEED FOR REFORM

After examining empirical evidence, the Reporters found that the present system for awarding punitive damages has become more like a state lottery than a system of justice.\(^4\) Little guidance is given to juries, courts, and litigation parties as to how to decide whether and when punitive damages should be awarded. Once a decision is made to award punitive damages, juries again are not given substantive guidance for deriving an appropriate amount to award.

Vagueness and uncertainty in punitive damages law undermines confidence in the civil justice system and has a substantial and detrimental impact on American industry. For instance, the specter of spiraling liability has sometimes discouraged manufacturers from developing and marketing new and useful products.\(^5\) Similar concerns have also led to the withdrawal of some products from the market.\(^6\) The climate of uncertainty puts American business at a sizable disadvantage in its attempt to compete with foreign enterprise.\(^7\) This is

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4. According to the Study:
The pattern depicted by the empirical research appears to be that enterprises are subject to an occasional risk of what may turn out to be a very large punitive award: an award that may be multiplied if a single business decision about, say, a product design or warning leads to numerous successful tort claims, each with its own punitive component.

ALI Study, supra note 1, at 235.


6. See Brown v. Superior Ct., 44 Cal. 3d 1049, 1064, 751 P.2d 470, 479 (1988) (discussing withdrawal of Bendectin from the market after the price increased by more than 300 percent and the withdrawal of all but two manufacturers of diphtheria-tetanus-pertussis vaccine when the price increased a hundredfold from eleven cents per dose to $11.40 per dose).

7. See S. REP. No. 215, 102d Cong., 1st Sess. 9 (1991) (“American manufacturers and product sellers generally pay product liability insurance rates that are 20 to 50 times higher than those of foreign competitors. This disparity is attributable in large part to the uncertainties and costs of the American tort litigation system.”); H.R. REP. No. 748, 100th Cong., 2d Sess., pt. 1, at 24 (1988) (“Without having to absorb the costs of product liability exposure for most of their sales, foreign corporations have an obvious price advantage. In Japan and Europe, product liability laws are more stable, litigation less frequent, and large damage awards uncommon.”).
particularly true in the area of innovation — where the United States has traditionally been a leader. Because foreign manufacturers can innovate and develop products in a more “friendly” environment, they receive a competitive advantage over their American counterparts.

To confront these problems, the Reporters' Study recommends several specific reforms that judges and state legislators can incorporate into existing state procedures for the award of punitive damages.

II. STANDARDS FOR REFORM

The ALI Reporters, as discussed above, found serious flaws in the present system for awarding punitive damages. In response, the Study provides several recommendations to make clear the legal conditions in which punitive damages may be awarded. First, a standard is established by which the trier of fact can evaluate whether an enterprise defendant should be liable for punitive damages. Second, the Study recommends a burden of proof standard that a plaintiff must meet to show that a defendant’s conduct warrants the imposition of punitive damages.

A. Proscribed Conduct

The Reporters' Study recommends a standard of “reckless disregard for the safety of others” as the appropriate standard for liability for punitive damages in enterprise cases. “Reckless disregard,” the Study explains, “should involve both conscious advertence to the risks in question . . . and gross deviation from the appropriate standard of care.” The Study also cautions that juries must be “explicitly instructed” that manufacturers must engage in risk-utility balancing. Additionally, juries must be told that their belief that the defendant negligently struck the incorrect balance is insufficient to subject the defendant to punitive, as opposed to compensatory, damages.

10. ALI Study, supra note 1, at 248.
11. Id.
12. Id. In reviewing a case heard by the Alabama state courts, the United States
The "reckless disregard" standard recommended by the Reporters would not significantly increase the predictability of punitive damages liability. Courts and scholars have recognized that "recklessness" and "gross negligence" standards provide little guidance to jurors because they cover "too broad and too vague an area of behavior." 13 Individuals and companies, therefore, are unable to identify and avoid behavior that will trigger a punitive damages award. The result is that the deterrent effect of punitive damages is undermined.14 A similar, but more precise standard, would require a plaintiff to show that the defendant acted with "conscious, intentional indifference to safety" as a predicate to punitive damages liability.15 Practitioners who advocate punitive damages reform recommend precisely this standard.16 The United States Supreme Court supported this

Supreme Court stressed that the Alabama jury instructions at issue "enlightened the jury" on the "nature and purpose" of punitive damages. Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1044 (1991). These instructions could be easily drafted into statutory form enabling a legislature to provide clear and unequivocal guidelines for the jury to determine whether punitive damages should be awarded.


15. An example of purely "intentional" wrongdoing would be an individual purposefully firing a handgun at a specific person. In contrast, an example of "conscious" wrongdoing would be an individual purposefully firing a handgun into a crowd of people.

16. The American College of Trial Lawyers recommends that "[t]he appropriate minimum standard for culpability for punitive awards . . . requires a conscious indifference to the safety of others." ACTL REPORT, supra note 2, at 10. The American Bar Association recommends a standard of "conscious or deliberate disregard with respect to the plaintiff." ABA REPORT, supra note 2, at 18. See also W. Page Keeton et al., PROSSER AND KEETON ON THE LAW OF TORTS, § 2 at 9-10 (5th ed. 1984) (punitive damages require circumstances of outrage, such as a "conscious and deliberate disregard of the interests of others").
standard in *Pacific Mutual Life Ins. Co. v. Haslip*. The Court emphasized that "[t]he trial court specifically found the conduct in question 'evidenced intentional, malicious, gross, or oppressive fraud.'" Importantly, a "conscious, intentional" standard would establish the type of clear and strong trigger that juries and defendants need to promote deterrence and make punitive damages liability consistent.

Sound public policy also suggests that punitive damages be reserved for cases of conscious, intentional wrongdoing. One must remember that in their origins, and at the time the Framers ratified the Constitution, punitive damages were reserved solely for intentional torts, such as battery, assault, trespass, and false imprisonment. Punitive damages should not be awarded for less than this type of egregious conduct. The compensatory tort system with its ample awards, especially for pain and suffering, has developed mechanisms such as the collateral source rule to deter wrongful conduct that falls short of conscious wrongdoing.

**B. Burden of Proof**

The Reporters' Study recommends a "clear and convincing evidence" burden of proof standard to be applied in determining whether punitive damages are warranted in civil tort cases. According to the Reporters, this burden of proof standard is proposed

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20. The "collateral source rule" prohibits a defendant from reducing damages based on benefits received by a plaintiff from outside, or collateral, sources such as insurance companies. *See generally* John G. Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CAL. L. REV. 1478 (1966).

21. *See Note, Exemplary Damages in the Law of Torts*, 70 HARY. L. REV. 517 (1957): "If an act is particularly wrongful, society imposes criminal sanctions in order to deter the wrongdoer and others from repeating the offense. But while some faults, such as ordinary negligence, should be discouraged, they do not warrant the stigma and severity of criminal punishment. Such deterrence is effected in tort law by shifting the loss: the defendant is forced to repair the harm done to the plaintiff." Id. at 523 (emphasis added).

22. *ALI Study*, supra note 1, at 249.
because it will "signal clearly to juries that there is something special about a punitive award, and also give[s] judges somewhat greater leverage in controlling the parties' allegations about, and the jury's assessments of, such evidence before and during as well as after the trial."\(^2\)

The clear and convincing evidence standard is the accepted trend in the law of punitive damages. Each of the principal groups that have analyzed the product liability system since 1979 has recommended the clear and convincing evidence requirement.\(^4\) The American Bar Association recommended this standard in 1986 and the American College of Trial Lawyers, an association of plaintiff and defense attorneys who have substantial experience in litigation, followed with their recommendation in 1989. Further, the United States Supreme Court in Haslip noted: "There is much to be said in favor of a State's requiring, as many do, . . . a standard of 'clear and convincing evidence' or, even, 'beyond a reasonable doubt,' . . . as in the criminal context."\(^5\) Approximately half of the states have undertaken this initiative either by legislative action\(^6\) or judicial decision.\(^7\)

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23. Id. at 248.


Public policy makes clear that legislatures and courts should adopt this middle burden of proof standard. First, the clear and convincing standard signals to juries that they should be more certain of their decision when they invoke punishment, as contrasted with awarding compensatory damages. Second, trial courts are alerted that some cases may not be appropriate for hearing by a jury. Finally, the standard gives appellate courts power to carefully review decisions, making sure that punitive damages are properly awarded.

III. THE SIZE OF PUNITIVE AWARDS

The recommendations made by the Reporters’ Study, as described in the previous section, would rationalize and modestly tighten the standards for punitive damages liability in approximately one-half of the states. The Reporters were also concerned, however, about the size of punitive damages awards and believed that some guidelines should be adopted to control excessiveness in all of the states. In response, the Study recommends several reforms governing the size of punitive awards.

The Reporters’ recommendations can be packaged into three categories: (1) recommendations that seek to limit prejudicial evidence from and provide structure to trials involving punitive damages; (2) recommendations to change the method by which punitive damages awards are generally assessed; and (3) recommendations that seek to establish meaningful procedures for review of punitive damages awards.


28. See Haslip, 111 S. Ct. at 1064 (O’Connor, J., dissenting). Justice O’Connor argues that a clear and convincing evidence standard should be required of states because it would “signal to the jury that it should have a high level of confidence in its factual findings before imposing punitive damages.” Id.

29. Id. (a clear and convincing evidence standard would “permit closer scrutiny of the evidence by trial judges and reviewing courts”).

30. See id. (clear and convincing evidence standard would “constrain jury discretion”); See also Zenobia, 601 A.2d at 657; Masaki, 780 P.2d at 575. In Masaki, the Supreme Court of Hawaii held:

[P]unitive damages are a form of punishment and can stigmatize the defendant in much the same way as a criminal conviction. It is because of the penal character of punitive damages that a standard of proof more akin to that required in criminal trials is appropriate, rather than the preponderance of the evidence standard generally employed in trials of civil actions . . . . A more stringent standard of proof will assure that punitive damages are properly awarded.

780 P.2d at 575.

31. See ALI Study, supra note 1, at 252-53.

32. See id. at 253 (“we shall call for more searching reform of the criteria governing the size of punitive awards”).
A. Recommendations as to Admissible Evidence and Trial Structure

The Reporters were concerned about current trial practice in many states that allows evidence of a defendant's wealth to be paraded before a jury. This procedure prejudices defendants because it improperly allows the jury to focus on the defendant's wealth, rather than the allegedly wrongful conduct. The Reporters were also concerned about the structure of many punitive damages trials. Current trial practice in many states allows jurors to hear issues relevant only to the determination of punitive damages while assessing a defendant's liability for compensatory damages. To respond to these concerns, the Study makes a couple of recommendations.

1. The Defendant's Wealth

The Study recommends that, counter to popular practice, evidence of a defendant's total wealth should "no longer be admissible in assessing punitive damages." The Study would, however, allow reference to the profits earned by the defendant from the alleged tortious activity at issue.

The Reporters offer several reasons why evidence of a defendant's total assets is "irrelevant" in claims arising out of enterprise injuries. First, corporate wealth is typically spread among various corporate subsidiaries. Thus "it is often only an accident of the corporate structure that places this wealth in the hands of the particular defendant entity." Second, evidence of a defendant's wealth may unduly prejudice large corporate defendants, "which incur proportionately more instances of wrongdoing simply because of their greater volume of business." Third, imposing a burden of punitive damages on a corporation punishes persons who often are not guilty or wealthy, such as corporate employees, small shareholders, and people who buy the company's products and may have to pay more for them.

34. ALI STUDY, supra note 1, at 254-55.
35. See id. See also Dobbs, supra note 33, at 870-85.
36. ALI STUDY, supra note 1, at 254.
37. Id. at 254-55.
38. Id. at 255. See also PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION
The Reporters' recommendation to exclude evidence of a defendant's total wealth represents sound public policy. When a jury is allowed to focus on a defendant's wealth, the jury is free to disregard what is really at issue in the case: whether and to what extent the defendant's conduct was wrongful.39

2. Bifurcation of Punitive Damages Trials

Courts and legislatures that adopt the Reporters' Study's recommendation to allow reference to the profits earned by the defendant from the particular alleged tortious activity should also permit the defendant to bifurcate the trial.40 The use of a bifurcated trial procedure is recommended by the Reporters' Study.41 Bifurcation is equitable because it prevents the jury from hearing highly prejudicial evidence of profits when determining basic liability. Information regarding profits is relevant only to determining the amount of punitive damages to be awarded.42 Bifurcation also allows the jury to easily separate the burden of proof that is required for compensatory damages awards (i.e., proof by a preponderance of the evidence) from that which the Reporters recommend for the award of punitive damages (i.e., proof by clear and convincing evidence).43 The American Bar Association44 and the American College of Trial Lawyers have endorsed this reform.45

39. See Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1045 (1991) ("[T]he factfinder must be guided by more than the defendant's net worth. Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket."). Alabama allows the defendant's wealth to be considered on appellate review, but during trial the jury is precluded from considering the wealth of the defendant. The Haslip opinion suggests that the jury's focus in determining punitive damages should be on the defendant's active wrongdoing, not on his wealth. In finding that Alabama's procedure met due process standards, the Supreme Court in Haslip relied on the Alabama trial court's decision to not allow the jury to consider the defendant's wealth.

40. Bifurcation requires the same jury, usually at the defendant's request, to determine subsequent to deciding liability for compensatory damages whether liability for punitive damages exists and, if liability does exist, the amount of punitive damages.

41. See ALI STUDY, supra note 1, at 255 n.41.

42. See ALI STUDY, supra note 1, at 264. A jury that is informed about a firm's substantial profits from the product at issue in the case could be improperly influenced to issue a favorable plaintiff's verdict even though the case is weak for finding liability.

43. See ALI STUDY, supra note 1, at 255 n.41. See also Ellis, supra note 24, at 1003-07.

44. See ABA REPORT, supra note 2, at 19.

45. See ACTL REPORT, supra note 2, at 18-19. In the first common law decision on this point by a state supreme court, the Tennessee Supreme Court recently held that defendants may move for bifurcation in punitive damages cases. Hodges v. S.C. Toof & Co., 833 S.W.2d 896 (Tenn. 1992). The Tennessee holding follows changes made in

AND ITS CONSEQUENCES 118 (1988) ("When assessed against a corporation, for example, punitive damages are paid by stockholders, not by the responsible executives, and often not even by the stockholders who owned the company when the original mistakes were made.").
B. Recommendations About the Assessment of Punitive Damages Awards

Another concern among the Reporters was that in almost all states punitive damages are assessed by a jury verdict. According to the Study, juries are often without adequate guidance as to how large a punitive damages award is appropriate. In response to this problem, the Study recommends that courts assess punitive damages based on some ratio of the amount of compensatory damages previously awarded by the jury.

1. Assessment by the Court

The Study strongly recommends placing the responsibility for assessing the amount of punitive awards on judges rather than juries.46 This reform, the Study explains, "is, after all, the standard followed in all other explicitly penal (as opposed to remedial) legal regimes."47

The Council on Competitiveness48 under President Bush and the Council on California Competitiveness49 have recommended this reform. It is currently the law in some federal statutory causes of action,50 as well as the states of Connecticut,51 Kansas52 and Ohio.53
Some critics have challenged judicial assessment of punitive damages as a violation of a defendant's right to jury trial under the Seventh Amendment to the United States Constitution. This criticism is unlikely to hold up if asserted in court. In the past, defendants in criminal cases have challenged judges' activity in sentencing as a violation of their Sixth Amendment right to a jury trial. The Supreme Court, however, has held that no violation exists because sentencing is not a determination of guilt or innocence. Rather, sentencing involves consideration of many factors, including evidence that might be inadmissible under the formal rules of evidence. Moreover, a criminal defendant's Sixth Amendment right to trial by jury is given a broader scope than a civil defendant or plaintiff's right under the Seventh Amendment. Thus, we believe that the recommendation is constitutional under the Seventh Amendment. We also believe that the Reporters' recommendation that courts set the amount of punitive damages awards has a basis in sound public policy because judges are particularly suited to evaluate such material in a dispassionate manner.

2. Ratio of Punitive to Compensatory Damages

The Reporters' Study also recommends that punitive damages awards be limited to some ratio of compensatory damages. Furthermore, the Study suggests that an alternative monetary ceiling ("perhaps $25,000") should be permitted for cases "in which the plaintiff's harms were minimal, even though the defendant's behavior"


55. See cases cited supra note 54. Note especially the Court's reasoning in Spaziano: "The Sixth Amendment never has been thought to guarantee a right to a jury determination of [appropriate punishment to be imposed on an individual]. . . ." 468 U.S. at 459.


57. The Reporters Study does not recommend a specific ratio of punitive to compensatory damages that states should adopt. See ALI-SRUPY, supra note 1, at 259 ("Our concern in this Report is to endorse the substantive principle of the ratio of punitive to compensatory damages, not to commit ourselves to specific judgments about each of the issues in the operative formula.").
was egregious."

The Reporters’ Study’s recommendation on this issue comports with recent commentary from the courts. In Haslip, the United States Supreme Court found a four-to-one ratio of punitive to compensatory damages to be “close to the line” of being unconstitutional. The Supreme Court has made clear that this is an area where states can do the most good in providing a reasonable and rational safeguard against punitive damages awards that “run wild.”

Indeed, at least one state legislature and two state courts since Haslip, including one state supreme court and one mid-level state appellate court, have met the Supreme Court’s challenge and focused their actions on the important relationship between punitive and compensatory damages. In Garnes v. Fleming Landfill, Inc., the Supreme Court of West Virginia stated: “Punitive damages should bear a reasonable relationship to the potential of harm caused by the defendant’s action and that generally means that punitive damages must bear a reasonable relationship to actual damages. . . .” The Maryland Court of Special Appeals, in Alexander & Alexander, Inc. v. B. Dixon Evander & Associates, recently applied Haslip to invalidate a punitive damages award. According to the court, the award

58. Id.
61. See N.D. CENT. CODE § 32-03.2-11(1)-(5) (signed by governor Mar. 31, 1993).
62. 413 S.E.2d 897, 908 (W. Va. 1991). In Garnes, the Supreme Court of Appeals of West Virginia found an award of $105,000 punitive damages with nominal compensatory damages to be unconstitutional. Id. at 910.

275
was “all out of proportion to both the harm caused and the perniciousness of the conduct.” The court found that the punitive damages award “surely crossed the line” set forth in Haslip.

Similar to the Reporters’ recommendation, but more detailed, the American College of Trial Lawyers (ACTL) has recommended that punitive damages should be limited to twice the amount of compensatory damages awarded, or $250,000, whichever is greater. The ACTL’s recommendation is perhaps the best approach of the many proposals advanced to place reasonable limits on punitive damages awards. The ACTL’s flexible approach keeps the law from being an absolute prisoner of ratios and allows courts to do justice in the unusual case in which a defendant’s conduct was egregious, but resulted in little actual harm.

Note that when states act on the Reporters’ Study and the ACTL’s recommendations, the statute must provide: (1) that the jury should not be informed of the limit; and (2) if a jury’s award for punitive damages exceeds the limit, the award will be reduced by the judge. The reason for these two provisions is that informing the jury of the dollar limit may lead jurors to perceive that the ratio, or the specific figure, is a guideline for assessing punitive damages. In practical terms, the limit could become a floor for punitive damages, rather than a ceiling.

64. Id. at 720, 596 A.2d at 711.
65. See ACTL REPORT, supra note 2, at 15. Some states have already adopted similar limitations. See, e.g., NEV. REV. STAT. § 42.005 (1991) (limiting punitive damages awards to $300,000 in cases where compensatory damages are less than $100,000 and to three times the amount of compensatory damages in cases of $100,000 or more); TEX. CIV. PRAC. & REM. CODE ANN. § 41.007 (West Supp. 1992) (confining punitive damages to four times actual damages, or $200,000, whichever is greater); N.D. CENT. CODE § 32-03.2-11(4) (signed by governor Mar. 31, 1993) (limiting punitive damages to twice compensatory damages, or $250,000, whichever is greater); Cf. CONN. GEN. STAT. § 52-240a (West Supp. 1990) (punitive award may not exceed twice the compensatory damages).
66. The American Bar Association has proposed a three-to-one ratio of punitive to compensatory damages. See ABA REPORT, supra note 2, at 62. Cf. FLA. STAT. ANN. § 768.73(1)(b) (West Supp. 1992) (punitive damages capped at three times compensatory damages unless “clear and convincing evidence” is presented by the plaintiff to show that a higher award is not excessive). In a model punitive damages statute, President Bush’s Council on Competitiveness limited punitive damages to the amount of compensatory awards. See PRESIDENT’S COUNCIL ON COMPETITIVENESS REPORT, MODEL PUNITIVE DAMAGES ACT (1991). See also COLO. REV. STAT. § 13-21-102(1)(a) (1987) (punitive award may not exceed compensatory damages). Cf. OKLA. STAT. tit. 23, § 9 (1987) (punitive damages capped at compensatory damages awarded unless plaintiff establishes case by clear and convincing evidence).
67. Sometimes this flexibility is needed. For example, if a person throws acid at another, but only damages his clothing which is worth $250, it seems inappropriate to limit punitive damages awards to $1,000. In such a case it may be appropriate to invoke damages up to $250,000.
68. ACTL REPORT, supra note 2, at 15.
A. Strict Post-Trial Review Procedures

The Reporters' Study additionally recommends establishing detailed post-trial standards for judicial review of punitive damages awards.\(^6\) According to the Reporters, "Such a list would give lawyers and juries somewhat clearer guidance at trial, and it would also strengthen the hand of judges in reviewing trial verdicts . . . ."\(^{70}\) This approach has already been endorsed by the American Bar Association.\(^{71}\)

States that establish guidelines for post-trial review should consider the approach adopted by Alabama and approved by the United States Supreme Court in *Haslip*. The Alabama Supreme Court had in place post-trial procedures for scrutinizing and, where necessary, overturning punitive awards.\(^{72}\) As an additional check, the Alabama Supreme Court provided a meaningful standard for appellate review by undertaking both a comparative and substantive analysis to "insure that the [punitive] award does not 'exceed the amount that will accomplish society's goals of punishment and deterrence.' "\(^{73}\) The United States Supreme Court noted that this approach "insures that punitive damage awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to

\(^{6}\) ALI Study, supra note 1, at 256.

\(^{70}\) Id.

\(^{71}\) See ABA Report, supra note 2, at 63-64 (listing seventeen possible factors that courts should consider in reviewing jury awarded damages).

\(^{72}\) The Alabama Supreme Court set forth specific factors for the trial court to consider and required trial courts to note in the record their reasons for sustaining a jury verdict or setting it aside. Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1044 (1991).

\(^{73}\) Id. at 1045. In a key footnote, the Court contrasted Alabama's detailed appellate guidelines with the punitive damages schemes of two other states about which "Justices expressed concern" in previous cases. See Haslip, 111 S. Ct. at 1045 n.10 ("In those respective schemes, an amount awarded would be set aside or modified only if it was 'manifestly and grossly excessive,' or would be considered excessive when 'it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience.' ") (citations omitted). The Court's footnote suggests that states with open-ended appellate review schemes may be vulnerable to constitutional attack on the ground that their review of punitive damage awards is vague and arbitrary, and therefore violates due process. Indeed, since *Haslip*, several courts have set aside state punitive damages review standards analogous to those questioned in *Haslip*. See Mattison v. Dallas Carrier Corp., 947 F.2d 95 (4th Cir. 1991) (setting aside South Carolina punitive damages scheme); Gamble v. Stevenson, 406 S.E.2d 350 (S.C. 1991) (same); Johnson v. Hugo's Skateaway, 949 F.2d 1338 (4th Cir. 1991) (setting aside Virginia punitive damages procedure); Garnes v. Fleming Landfill, Inc., 413 S.E.2d 897 (W. Va. 1991) (West Virginia law; same); Alexander & Alexander, Inc. v. B. Dixon Evander & Assoc., Inc., 596 A.2d 687 (Md. Ct. Spec. App. 1991), cert. denied, 605 A.2d 137 (Md. 1992) (Maryland law; same).
IV. Compliance with Regulatory Standards Defense

As described in Part I of this article, punitive damages have caused a stifling effect on the development and marketing of some new and useful products. Products have been taken off the market, for example, because of the fear of punitive damages liability. The Reporters' Study responds to these concerns by recommending that states create a shield against tort damages, particularly punitive damages. The shield would be appropriate in cases where the harm-causing aspect of a product complied with the requirements of a federal administrative regulation.

The Reporters endorsed this concept in no uncertain terms:

We believe that the risk of overdeterrence of socially valuable activities through the imposition of tort liability on regulated products and activities merits more widespread recognition of a regulatory compliance defense . . . . The strongest case for a regulatory compliance defense arises when punitive damages are sought. If a defendant has fully complied with a regulatory requirement and fully disclosed all material information relating to risk and its control, it is hard to justify the jury's freedom to award punitive damages.

In this regard, the Study sets out four guidelines for courts and legislatures to follow to develop a compliance with regulatory standards defense.

The public policy reason for this type of rule is clear: society wants to encourage companies to invest and develop new and useful products, especially in the area of medicine. The Study's recommendation would provide a strong incentive for the innovation of

74. Haslip, 111 S. Ct. at 1045.
75. ALI STUDY, supra note 1, at 95.
76. Id. at 101.
77. The Study recommends the following four guidelines:
1. The regulation must have been promulgated by a specialized administrative agency with the statutory responsibility to monitor risk-creating activities in that domain and to establish and revise regularly specific standards governing enterprise behavior;
2. The agency must have addressed the specific risk at issue in the case at hand, and must have made an explicit judgment about what type of legal conditions are appropriate;
3. The enterprise in question must have complied with all the relevant standards prescribed by the agency; and
4. The defendant must have disclosed to the regulatory agency any material in its possession (or of which it had good reason to be aware) concerning either the hazards posed by the defendant's activities or the available means of controlling the related risks.

Id. at 110.
78. A recent study by the prestigious Brookings Institution points out the strong need for the adoption of a compliance with regulatory standards defense, particularly with regard to the pharmaceutical industry. See Peter Huber & Robert Litan, The Liability Maze: The Impact of Liability Law on Safety and Innovation (1991).
pharmaceuticals and medical devices. At the same time, the recommendation calls for punishing manufacturers who withhold material information from a federal government agency, such as the Federal Food and Drug Administration. This approach would separate good manufacturing practices from the bad — the dolphin from the tuna. Indeed, at least five states have enacted a defense against punitive damages liability for drugs and medical devices approved by the FDA.

V. MULTIPLE PUNITIVE AWARDS

The last major issue studied by the Reporters was multiple, or repetitive, punitive damages awards. Mass torts pose a special problem in the law of punitive damages. Substantial punitive awards in cases brought in mass enterprise injuries may strip a corporate defendant of its insurance coverage and assets. Such awards endanger the ability of later claimants to receive compensation for their injuries. In response, the Reporters' Study recommends federal action to “authorize mandatory class actions for multiple punitive damages awarded in the same cause of action.”

See also Peter Huber, Liability: The Legal Revolution and Its Consequences (1988).


83. See ALI Study, supra note 1, at 261 n.50. See also Roginsky v. Richardson-Merrell, Inc., 378 F.2d 382 (2d Cir. 1967) (criticizing application of punitive damages in mass marketed product litigation); Jackson v. Johns-Manville Sales Corp., 727 F.2d 506 (5th Cir. 1984) (same).
damages arising out of large-scale mass torts." The Study offers two approaches. First, in mass disaster types of cases, such as airplane crashes, all claims could be consolidated in a federal court. That court would have power to compel joinder by issuing injunctions against any related suits in any state or federal court. The federal court would also have the power to decide which state's substantive law to apply and would produce a single punitive damage award against the defendant for all members of the class. Second, in cases involving mass exposure that occurs over years or decades, such as in asbestos product liability cases, there would be greater judicial discretion whether to consolidate such cases. The court's principal focus would be on whether the number or cost of separate actions threatens to deplete the defendant's assets.

Other principal groups supporting tort law reform are calling for similar federal action. A special committee of the American Bar Association that studied punitive damages proposed that Congress establish a process for creating a national class action for multiple punitive damage claims arising out of conduct that results in similar injuries. The American College of Trial Lawyers concluded that the preferred approach would be a multi-district or national class action requiring all litigants to appear in the same forum, with no option to opt out.

The difficulty with the Reporters' Study's, American Bar Association's, and American College of Trial Lawyers' proposals is that they require burdensome and complicated procedural reforms, and impose new or national choice-of-law rules. The proposals also fail to deal with situations involving lower numbers, but potentially devastating punitive damages claims (i.e., less than one hundred claims). Most importantly, many situations exist in which common facts are insufficient to justify a class. This is particularly true when product liability actions do not involve a single incident mass tort (i.e., a plane crash or hotel fire).

84. ALI STUDY, supra note 1, at 260.
85. Id. at 412-19.
86. Id. at 419-21.
87. See ABA REPORT, supra note 2, at 78-81. Upon motion by a defendant and a finding by a court that "there is a reasonable possibility that adequate compensatory damages will not be available if punitive damages are not brought under control," there would be a single mass trial in federal court on the punitive damages issue. Id. at 79. The results of that trial would be binding on all class members. Id. at 81.
88. See ACTL REPORT, supra note 2, at 20-26.
89. The principal advantage of these proposals is that they would apportion punitive damages awards to all claimants. Policymakers considering a solution to the mass tort problem, however, should not embrace these approaches — they contain the false assumption that punitive damages serve as a "bonus" to compensatory damages, rather than as a tool for punishment and deterrence.
A better solution would focus on the social goals of punitive damages—punishment and deterrence. This solution could establish a presumption that the first award of punitive damages imposed against the defendant, for harm arising out of a single act or course of conduct, is sufficient to punish the defendant and to deter others from similar wrongful conduct in the future. Subsequent claimants would be allowed, however, to overcome this presumption and pursue additional punitive damages, but only by presenting new and substantial evidence of previously undiscovered conscious and deliberate misconduct by the defendant. In this way, defendants and claimants will be guarded against the counter-productive effects of repetitive overpunishment. At the same time, society preserves a way to augment punishment if it is discovered that the original punishment was based on inadequate information. This process could be most easily established by federal law, but could also be carried out by the courts themselves through the principle of comity.

VI. CONCLUSION

The ALI Reporters' Study offers several recommendations to increase the consistency and predictability of punitive damages awards. Generally, the recommendations are fair and reasonable. Many of the Study's recommendations comport with the letter and spirit of the United States Supreme Court decision in Haslip,90 and many are supported by the other principal groups advocating punitive damages reform, including the American Bar Association and the American College of Trial Lawyers. While we do not agree with all of the Study's recommendations, we do believe they should be given close attention by both legislators and the courts.

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