

Whose Award Is It Anyway?: Implications of Awarding the Entire Sum of Punitive Damages to the State

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I. INTRODUCTION

A Texas jury recently awarded Carol Ernst, the widow of a Vioxx user, \$253.4 million in damages, based on a claim that the pain reliever caused her husband's death.¹ Of the \$253.4 million, the jury assessed \$229 million in punitive damages, and awarded Ernst \$450,000 in pecuniary damages and \$24 million in non-pecuniary damages.² Under Texas statutory law, however, the punitive damages levied against Merck, the maker of Vioxx, should not have exceeded \$1.65 million.³ Texas law caps punitive damages at twice the pecuniary damages award, \$900,000 in this case.⁴ If the jury also awards non-pecuniary damages, the statute allows an additional recovery of \$750,000.⁵ The jury exceeded the damages cap by over \$227 million.⁶ This verdict exemplifies the exorbitant punitive damages awards imposed by juries that have led almost all state legislatures to enact some type of tort reform.

One such legislative response was made by the 2005 Kansas legislature in the form of Senate Bill 96, which sought to distribute all punitive damages to the state.⁷ Although the Kansas legislature did not pass the proposed bill, such an initiative may signal the beginning of a shift away from allowing plaintiffs to retain punitive damages.⁸ Since

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1. See Anthony J. Sebok, *The \$253 Million Verdict Against the Maker of Vioxx: Its Likely Short-Term and Long-Term Impact for the Company*, Aug. 22, 2005, http://writ.news.findlaw.com/scripts/printer_friendly.pl?page=/sebok/20050822.html; see also Press Release, Am. Tort Reform Ass'n, *Vioxx Verdict Should Be Reduced* (Aug. 19, 2005), available at <http://www.atra.org/show/7941> [hereinafter ATRA Press Release].

2. See Sebok, *supra* note 1. The term "non-pecuniary damages" refers to damages awarded to compensate for injury not easily assessed in economic terms, such as pain and suffering. Peter G. Fischer, *The Victims' Trust Fund of the International Criminal Court—Formation of a Functional Reparations Scheme*, 17 EMORY INT'L L. REV. 187, 235-36 (2003).

3. ATRA Press Release, *supra* note 1. Some commentators advocate that the judge should reduce the punitive damages award in this case. *Id.*

4. TEX. CIV. PRAC. & REM. CODE ANN. § 41.008(b) (Vernon Supp. 2005); see Sebok, *supra* note 1.

5. See *supra* note 4.

6. See Sebok, *supra* note 1.

7. S. 96, 2005 Reg. Sess. (Kan. 2005).

8. Sections 60-3701, 60-3702, and 60-3703 of the 2000 Kansas Statutes Annotated currently address punitive damages. Section 60-3701 provides factors that the court may consider when assessing punitive damages, the maximum award available, and other limitations on punitive damages. Section 60-3702 directly mirrors the language of section 60-3701, while section 60-3703 provides that an amended pleading is required to file a punitive damages claim.

2003, several other states have proposed similar legislation.⁹ To date, however, no state has enacted legislation that entitles the state to one hundred percent of a punitive damages award.¹⁰

This note examines the potential ramifications of a statute that would grant the undivided sum of punitive damages awards to the state, rather than to plaintiffs who have established their claims. Although no state currently allocates the complete amount to the state, several states have split-recovery statutes that allot a portion of punitive damages to various state funds.¹¹ These split-recovery statutes may signal the first step toward awarding one hundred percent of punitive damages to a state fund. Legislation entitling the state to receive the entire sum of these awards will exacerbate problems associated with split-recovery statutes.

Legislative proposals that appropriate all punitive damages to the state aim to disperse the funds to society as a whole, rather than to plaintiffs who are typically viewed as undeserving of punitive damages.¹² While punitive damages may result in a windfall to plaintiffs, state-only recovery statutes also create significant problems. The distribution of punitive damages to the state, without apportioning any amount to the plaintiff who brought the action, raises constitutional issues, conflicts of interest between plaintiffs and their attorneys, and may result in increased compensatory damages awards from juries.

Part II of this note addresses the history, purpose, and expansion of punitive damages awards in the United States, in addition to the history, purpose, and types of tort reform measures enacted to limit such damages. Part III considers the criticisms of split-recovery statutes and applies those concerns to state-only recovery legislation.

9. H.R. Con. Res. 2054, 47th Leg., 1st Reg. Sess. (Ariz. 2005); S. 328, 2003 Leg., 22d Sess., Reg. Sess. (Haw. 2003); S. 860, 47th Leg., Reg. Sess. (N.M. 2005); S. 764, 49th Leg., 1st Sess. (Okla. 2003); S. 978, 104th Gen. Assem. (Tenn. 2005); H.R. 1857, 104th Gen. Assem. (Tenn. 2005).

10. See Dede W. Welles, Note, *Charitable Punishment: A Proposal to Award Punitive Damages to Nonprofit Organizations*, 9 STAN. L. & POL'Y REV. 203, 204 (1998).

11. See *id.* Currently, Alaska, California, Georgia, Illinois, Indiana, Iowa, Missouri, Oregon, and Utah have split-recovery statutes. See ALASKA STAT. § 09.17.020(j) (2004); CAL. CIV. CODE § 3294.5(b) (West Supp. 2006); GA. CODE ANN. § 51-12-5.1(e)(2) (2000); 735 ILL. COMP. STAT. ANN. 5/2-1207 (West 2003); IND. CODE ANN. § 34-51-3-6 (West 1999); IOWA CODE ANN. § 668A.1(2)(b) (West 1998); MO. ANN. STAT. § 537.675(g) (West Supp. 2005); OR. REV. STAT. § 31.735 (2003); UTAH CODE ANN. § 78-18-1(3) (Supp. 2004).

12. See Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 376 (2003).

II. BACKGROUND

A. Purposes and Characteristics of Punitive Damages

Punitive damages serve two well-recognized purposes: punishment and deterrence.¹³ Such damages punish a wrongdoer for engaging in socially undesirable conduct and seek to deter the wrongdoer, and other potential wrongdoers, from engaging in similar conduct in the future.¹⁴ Serving other public policy rationales, punitive damages may also provide recovery of plaintiffs' attorneys' fees, offer an incentive for plaintiffs to bring socially desirable claims, and allow recovery for non-pecuniary damages.¹⁵

Punitive damages are similar to criminal fines in that both punish a defendant for engaging in undesirable conduct by placing a monetary value on harm caused to plaintiffs.¹⁶ Traditionally, criminal law deals with the punishment of wrongdoers.¹⁷ Conversely, "civil law is designed to indemnify the plaintiff so as to make him whole."¹⁸ Many commentators note that, while civil punitive damages encroach on punishment under criminal law, imposing such damages lacks the procedural safeguards afforded to criminal defendants.¹⁹

Punitive damages serve an inherently different purpose than compensatory damages.²⁰ The goal of compensatory damages is to return the injured party to his "rightful" position—the position he would have occupied but for the defendant's wrongdoing.²¹ "In adjudicating compensatory damages, neither the tortfeasor, third persons, nor society play a decisive role. The defendant/tortfeasor is only viewed from the perspective of determining from whom to recover damages."²²

The goal of punitive damages is not to compensate the plaintiff or return him to his rightful position.²³ Instead, the purpose of punitive

13. Matthew J. Klaben, Note, *Split-Recovery Statutes: The Interplay of the Takings and Excessive Fines Clauses*, 80 CORNELL L. REV. 104, 112 (1994); Welles, *supra* note 10.

14. Klaben, *supra* note 13, at 113-14.

15. Clay R. Stevens, Comment, *Split-Recovery: A Constitutional Answer to the Punitive Damage Dilemma*, 21 PEPP. L. REV. 857, 860-61 (1994).

16. Kimberly A. Pace, *Recalibrating the Scales of Justice Through National Punitive Damage Reform*, 46 AM. U. L. REV. 1573, 1580 (1997).

17. LINDA L. SCHLUETER, PUNITIVE DAMAGES 30 (5th ed. 2005).

18. *Id.*

19. See, e.g., Semra Mesulam, Note, *Collective Rewards and Limited Punishment: Solving the Punitive Damages Dilemma with Class*, 104 COLUM. L. REV. 1114, 1119 & n.34 (2004). For example, imposing fines in a criminal proceeding requires a higher burden of proof. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 428 (2003).

20. Klaben, *supra* note 13. Juries may award punitive damages to plaintiffs to compensate for non-pecuniary losses. Stevens, *supra* note 15, at 860.

21. Volker Behr, *Punitive Damages in American and German Law—Tendencies Towards Approximation of Apparently Irreconcilable Concepts*, 78 CHI.-KENT L. REV. 105, 109-10 (2003).

22. *Id.* at 111.

23. SCHLUETER, *supra* note 17, at 29; Klaben, *supra* note 13.

damages centers on altering the defendant's conduct.²⁴ Most jurisdictions require an award of compensatory damages before the judge or jury may impose punitive damages.²⁵ In addition, awarding punitive damages requires more evidence of malevolent conduct, while compensatory damages do not require such a heightened standard.²⁶ Wanton, willful, intentional, or malicious conduct by the defendant is typically required to justify punitive damages.²⁷

B. *Origins and Development of Punitive Damages*

The origin of punitive damages dates back to the Code of Hammurabi in 2000 B.C.²⁸ The Code of Hammurabi imposed "multiple damages" similar to the manner in which punitive damages are imposed today.²⁹ Multiple damages, like punitive damages, provided monetary payment in excess of what was necessary to compensate for the injured party's actual harm.³⁰ The Bible and the Hindu Code of Manu also imposed damages in excess of the amount necessary to compensate the victim.³¹

Although the origin of punitive damages dates back to Hammurabi's Code, the American tradition of punitive damages developed from, and most closely resembles, the English tradition.³² English common law first permitted punitive damages in the thirteenth century; however, punitive damages were not explicitly recognized by the courts until the late-eighteenth century.³³ Early English courts limited the availability of punitive damages to intentional tort cases involving oppression, malice, or gross fraud.³⁴ Despite recognition, English common law struggled to define the purpose of punitive damages until

24. See SCHLUETER, *supra* note 17, at 29.

25. See Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation into "Punishment,"* 54 S.C. L. REV. 47, 57-58 (2002).

26. See Meredith Matheson Thoms, *Punitive Damages in Texas: Examining the Need for a Split-Recovery Statute,* 35 ST. MARY'S L.J. 207, 211 (2003).

27. See SCHLUETER, *supra* note 17, at 23.

28. *Id.* at 1.

29. *Id.* at 1-2.

30. *Id.*

31. EMILY GOTTLIEB & JOANNE DOROSHOW, CTR. FOR JUSTICE AND DEMOCRACY, WHAT YOU NEED TO KNOW ABOUT . . . PUNITIVE DAMAGES 3 (June/July 2001), <http://www.centerjd.org/private/papers/punitives.pdf#search=ancient%20s%20punitive%20damages>.

32. See Thoms, *supra* note 26, at 210.

33. SCHLUETER, *supra* note 17, at 5. In two companion cases, *Wilkes v. Wood* and *Huckle v. Money*, an English court first recognized punitive damages against agents of the King of England. *Id.* at 5-6; Mesulam, *supra* note 19, at 1121.

34. SCHLUETER, *supra* note 17, at 6.

the middle of the twentieth century.³⁵ Today, English law only permits punitive damages in three narrow categories of cases.³⁶

Since the late-eighteenth century, American courts have acknowledged the availability of awarding damages beyond what is necessary to compensate the plaintiff.³⁷ In 1851, the United States Supreme Court stated:

It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive or vindictive damages upon the defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff.³⁸

Courts in the United States initially limited the categories of cases that warranted punitive damages, as well as the size of the awards.³⁹ Until the middle of the twentieth century, American courts limited the availability of punitive damages to “a relatively small group of torts involving conscious and intentional harm inflicted by one person on another.”⁴⁰

The 1960s marked the beginning of an immense growth in the amount of punitive damages awarded and an expansion of the types of cases warranting punitive damages, both of which continue today.⁴¹ Most notably, product liability cases began to serve as a springboard to sizeable punitive damages awards.⁴² State legislatures also began to allow punitive damages for unintentional torts.⁴³ Many jurisdictions expanded the conduct required to support a claim for punitive damages to include “willful, wanton, or gross misconduct.”⁴⁴ As punitive damages became more available, the amount awarded also increased exponentially as compared to compensatory damages.⁴⁵ Today, almost all states recognize punitive damages;⁴⁶ however, the “dramatic

35. *Id.* at 11. “In England, where exemplary damages had their origin, it is still not entirely clear whether the accepted theory is that they are a distinct and strictly punitive element of the recovery, or they are merely a swollen or ‘aggravated’ allowance of compensatory damages permitted in cases of outrage.” *Id.* (quoting C. McCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 78 (1935)). In 1964, the English court clarified the difference between compensatory and punitive damages. See *Rookes v. Barnard*, 1 All E.R. 367 (A.C. 1964).

36. SCHLUETER, *supra* note 17, at 12.

37. See Junping Han, Note, *The Constitutionality of Oregon’s Split-Recovery Punitive Damage Statute*, 38 WILLAMETTE L. REV. 477, 478 (2002).

38. *Day v. Woodworth*, 54 U.S. (13 How.) 362, 371 (1851).

39. Victor E. Schwartz et al., *I’ll Take That: Legal and Public Policy Problems Raised by Statutes That Require Punitive Damages Awards to Be Shared with the State*, 68 MO. L. REV. 525, 528 (2003). “Historically, in England and then America, punitive damages were available only in a small class of lawsuits, ‘the traditional intentional torts,’ designed to punish an individual’s purposeful bad act against another.” *Id.*

40. Schwartz & Lorber, *supra* note 25, at 50.

41. Schwartz et al., *supra* note 39.

42. See *id.*

43. Mesulam, *supra* note 19, at 1122.

44. AM. TORT REFORM ASS’N, PUNITIVE DAMAGES REFORM, <http://www.atra.org/show/7343> (last visited Jan. 20, 2005).

45. Mesulam, *supra* note 19, at 1122-23.

46. See Han, *supra* note 37, at 478-79.

increase' in the incidence and size of punitive damages verdicts" has led to widespread legislative reform intended to curtail such awards.⁴⁷

C. Tort Reform Measures

Most states have enacted tort reforms to curb large punitive damages awards in response to the rise in availability, frequency, and size of those awards.⁴⁸ Despite the widespread implementation of tort reform measures, states do not take a uniform approach.⁴⁹ Most states limit the maximum amount that a plaintiff can recover.⁵⁰ Of these states, some impose a flat cap on punitive damages awards,⁵¹ while others impose a monetary restriction based on the amount of compensatory damages.⁵² Some states have also limited attorneys' contingency fees.⁵³ Many states require plaintiffs to prove a punitive damages claim by clear and convincing evidence, a higher standard than is traditionally required to secure compensatory damages.⁵⁴ Less commonly, some states have enacted split-recovery statutes that allocate a portion of punitive damages to someone other than the plaintiff.⁵⁵ Since 2003, several states, including Kansas, have proposed legislation that would eliminate a plaintiff's right to any portion of a punitive damages award.⁵⁶ No state has successfully enacted such legislation.⁵⁷

D. Split-Recovery Statutes

Historically, the plaintiff who brought an action for punitive damages retained all punitive damages levied against the defendant.⁵⁸ In response to criticism that punitive damages result in an unjustified windfall to plaintiffs, split-recovery statutes were enacted to disgorge plaintiffs of a portion of the damages in excess of their compensatory damages.⁵⁹ In 1877, Chief Justice Edward G. Ryan of the Wisconsin Supreme Court noted that

47. Schwartz et al., *supra* note 39, at 525-26.

48. Klaben, *supra* note 13, at 107; Pace, *supra* note 16, at 1589.

49. SCHLUETER, *supra* note 17, at 732; see Schwartz et al., *supra* note 39, at 531-34.

50. Schwartz et al., *supra* note 39, at 532-33.

51. SCHLUETER, *supra* note 17, at 732; see, e.g., VA. CODE ANN. § 8.01-38.1 (2000).

52. SCHLUETER, *supra* note 17, at 732; see, e.g., COLO. REV. STAT. ANN. § 13-21-102 (West 2005).

53. Patrick White, Note, *The Practical Effects of Split-Recovery Statutes and Their Validity as a Tool of Modern Day "Tort Reform,"* 50 DRAKE L. REV. 593, 595 (2002). Placing a cap on attorneys' contingency fees was likely implemented "under the theory that if there were less incentive for an attorney, fewer lawsuits would be filed." *Id.*

54. SCHLUETER, *supra* note 17, at 732.

55. See *infra* Part II.D-E.

56. See *supra* note 9; S. 96, 2005 Reg. Sess. (Kan. 2005).

57. See Welles, *supra* note 10.

58. See Scott Dodson, *Assessing the Practicality and Constitutionality of Alaska's Split-Recovery Punitive Damages Statute,* 49 DUKE L.J. 1335, 1340-41 (2000).

59. See Klaben, *supra* note 13, at 115-16.

[i]t is difficult on principle to understand why, when the sufferer by a tort has been fully compensated for his suffering, he should recover anything more. And it is equally difficult to understand why, if the tortfeasor is to be punished by exemplary damages, they should go to the compensated sufferer, and not to the public in whose behalf he is punished.⁶⁰

The American Bar Association (ABA) responded to the dramatic increase in punitive damages awards by creating the Action Commission to Improve the Tort Liability System.⁶¹ In 1987, the commission submitted a report to the ABA that recommended courts disgorge plaintiffs of a portion of their punitive damages awards.⁶² The commission recommended that courts should only allow plaintiffs and their attorneys to retain “a reasonable portion of the punitive damages award to compensate the plaintiff and counsel for bringing the action and prosecuting the punitive damages claim, with the balance of that award allocated to public purposes.”⁶³ The commission’s report served as an impetus to the enactment of split-recovery statutes.⁶⁴

E. *Differences Among Split-Recovery Statutes*

Split-recovery statutes represent some of the recent tort reform measures enacted by state legislatures.⁶⁵ Nine states currently have statutes that require courts to split punitive damages awards between plaintiffs and the state.⁶⁶ Georgia’s split-recovery statute only applies to punitive damages awarded in product liability cases.⁶⁷ The eight remaining statutes apply in all punitive damages cases.⁶⁸ Unlike the other statutes, California’s provision will expire on July 1, 2006, unless re-enacted by the legislature.⁶⁹

Four additional states, including Kansas, previously enacted split-recovery statutes; however, these statutes are no longer in effect.⁷⁰ In 1989, Kansas allowed its split-recovery statute, only applicable in med-

60. *Bass v. Chicago & Nw. Ry. Co.*, 42 Wis. 654, 672 (1877).

61. Todd M. Johnson, Comment, *A Second Chance: A Proposal to Amend Missouri’s Tort Victims’ Compensation Fund*, 67 UMKC L. REV. 637, 649 (1999).

62. *Id.*

63. AM. BAR ASS’N, REPORT OF THE ACTION COMMISSION TO IMPROVE THE TORT LIABILITY SYSTEM 19 (1987).

64. Johnson, *supra* note 61.

65. Thoms, *supra* note 26, at 223.

66. *See supra* note 11.

67. GA. CODE ANN. § 51-12-5.1(e)(2) (2000).

68. ALASKA STAT. § 09.17.020(j) (2004); CAL. CIV. CODE § 3294.5(b) (West Supp. 2006); 735 ILL. COMP. STAT. ANN. 5/2-1207 (West 2003); IND. CODE ANN. § 34-51-3-6 (West 1999); IOWA CODE ANN. § 668A.1.(2)(b) (West 1998); MO. ANN. STAT. § 537.675(g) (West Supp. 2005); OR. REV. STAT. § 31.735 (2003); UTAH CODE ANN. § 78-18-1(3) (Supp. 2004).

69. CAL. CIV. CODE § 3294.5(i).

70. White, *supra* note 53, at 598. Kansas, Colorado, Florida, and New York no longer have split-recovery statutes. *See id.*; *see also* COLO. REV. STAT. § 13-21-102(4) (2002) (repealed 1995); FLA. STAT. ANN. § 768.73 (West 1997) (repealed 1995); KAN. STAT. ANN. § 60-3402 (1994) (expired 1989); N.Y. C.P.L.R. 8701 (McKinney Supp. 1994) (repealed 1994).

ical malpractice cases, to expire.⁷¹ Similarly, in 1994, New York also let its statute expire.⁷² Both Florida and Colorado repealed their statutes in 1995.⁷³

Among the states that currently have split-recovery statutes, considerable variation exists among state apportionment schemes.⁷⁴ There are three significant differences. The first, and most marked difference, concerns the monetary distribution between the state and the plaintiff. Illinois leaves the percentage determination to the trial judge's discretion.⁷⁵ All other states allocate between fifty and seventy-five percent of the award to the state.⁷⁶

The second major difference relates to how the state may allocate the money. Three of the nine statutes mandate that the state's general fund receive the state's portion of the award.⁷⁷ The remaining six statutes specifically assign the award to various funds within the state.⁷⁸ For example, Indiana's split-recovery statute requires the state's share of punitive damages awards to be deposited in the "violent crime victims compensation fund."⁷⁹

The last difference involves whether the state's share is calculated before or after the disbursement of plaintiffs' attorneys' fees. Although Illinois leaves the determination to the trial judge's discretion, the other eight state statutes specify whether the state's portion of the award is determined before or after the plaintiff's attorney is paid.⁸⁰ States that calculate attorneys' contingency fees based on the entire award allow attorneys a greater percentage of the overall award than

71. KAN. STAT. ANN. § 60-3402 (1994) (expired 1989); White, *supra* note 53, at 598.

72. White, *supra* note 53, at 598.

73. COLO. REV. STAT. § 13-21-102(4) (2002) (repealed 1995); FLA. STAT. ANN. § 768.73 (West 1997) (repealed 1995).

74. White, *supra* note 53.

75. 735 ILL. COMP. STAT. ANN. 5/2-1207 (West 2003).

76. Alaska, Missouri, and Utah apportion fifty percent of punitive damages awards to the state. ALASKA STAT. § 09.17.020(j) (2004); MO. ANN. STAT. § 537.675(g)(3) (West Supp. 2005); UTAH CODE ANN. § 78-18-1(3)(a) (Supp. 2004). Oregon allocates sixty percent of the award to the state. OR. REV. STAT. § 31.735 (2003). California, Georgia, Indiana, and Iowa permit the state to retain seventy-five percent of punitive damages awards, although Georgia only permits the state to retain part of the award in product liability cases. CAL. CIV. CODE § 3294.5(b)(1) (West Supp. 2006); GA. CODE ANN. § 51-12-5.1(e)(2) (2000); IND. CODE ANN. § 34-51-3-6 (West 1999); IOWA CODE ANN. § 668A.1(2)(b) (West 1998).

77. Alaska, Georgia, and Utah require the state's portion to be deposited into a general state fund. ALASKA STAT. § 09.17.020(j); GA. CODE ANN. § 51-12-5.1(e)(2); UTAH CODE ANN. § 78-18-1(3)(a).

78. California, Illinois, Indiana, Iowa, Missouri, and Oregon specify a particular fund into which the state's portion must be deposited. CAL. CIV. CODE § 3294.5(b)(1); 735 ILL. COMP. STAT. ANN. 5/2-1207; IND. CODE ANN. § 34-51-3-6(b)(2); IOWA CODE ANN. § 668A.1(2)(b); MO. ANN. STAT. § 537.675(g)(2); OR. REV. STAT. § 31.735(1)(b).

79. IND. CODE ANN. § 34-51-3-6(b)(2).

80. See ALASKA STAT. § 09.17.020(j); CAL. CIV. CODE § 3294.5(b)(1); GA. CODE ANN. § 51-12-5.1(e)(2); 735 ILL. COMP. STAT. ANN. 5/2-1207; IND. CODE ANN. § 34-51-3-6(b)(2); IOWA CODE ANN. § 668A.1(2)(b); MO. ANN. STAT. § 537.675(g)(3); OR. REV. STAT. § 31.735(4); UTAH CODE ANN. § 78-18-1(3)(a).

states that require their percentage to be calculated only based on the plaintiff's portion of the award.⁸¹

III. ANALYSIS

A. *The Possible Move Toward State-Only Punitive Damages Recovery Statutes*

Since 2003, six states, including Kansas, have proposed legislation that would deny plaintiffs any portion of punitive damages awards; however, no state has yet enacted such legislation.⁸² As with the split-recovery statutes, the proposed legislation varies considerably.⁸³ Typically, this legislation calls for one hundred percent of punitive damages to be deposited in a general state fund; however, Arizona's proposed legislation calls for the award to be distributed to several specific state funds.⁸⁴ Only Arizona would allocate a percentage of the award to the plaintiff's attorney.⁸⁵ Additionally, Kansas Senate Bill 96 required that the jury not be instructed as to the award distribution.⁸⁶

B. *Criticism of Split-Recovery Statutes and Potential Problems Under State-Only Punitive Damages Recovery Statutes*

Those challenging the propriety of split-recovery statutes argue that the statutes present several potential problems. Both plaintiffs and defendants have levied constitutional challenges against these statutes, citing issues under the takings, excessive fines, and double jeopardy clauses.⁸⁷ These statutes also present potential conflicts of

81. See Schwartz et al., *supra* note 39, at 537-38.

82. See *supra* note 9; S. 96, 2005 Reg. Sess. (Kan. 2005).

83. See *supra* note 9; Kan. S. 96.

84. H.R. Con. Res. 2054, 47th Leg., 1st Reg. Sess. (Ariz. 2005). After attorneys' fees have been deducted, Arizona's proposed legislation provides for allocation of the remaining damages in the following manner: "(a) Twenty-five percent to a crime victim compensation program. (b) Twenty-five percent to a crime victim assistance program. (c) Fifty percent to child protective services in the department of economic security for remedial or supplemental education for children who are or have been in a state foster care program." *Id.*

85. *Id.* Before allocating the state's portion, the statute mandates that "[a]n amount that equals the actual expenses incurred on punitive damages research by the attorney representing the plaintiff for whom the punitive damages were awarded, plus ten percent." *Id.*

86. The bill resembles California's current split-recovery statute. Compare Kan. S. 96 ("If exemplary or punitive damages are awarded, the entire award shall be ordered to be deposited in the state treasury and credited to the state general fund. If such civil action is to a jury, the court shall not instruct the jury on the award distribution imposed by this subsection upon recovery of punitive or exemplary damages."), with CAL. CIV. CODE § 3294.5(g) (West Supp. 2006) ("A jury shall not be informed that any portion of a punitive damages award will be paid to a government fund, and no argument or inference shall be made to a jury that a punitive damages award would result in a windfall to the plaintiff or plaintiffs. However, nothing in this section shall be construed to affect a punitive damages award if a juror or jurors had independent knowledge that a portion of a punitive damages award will be paid to a government fund.").

87. Han, *supra* note 37, at 516.

interest between plaintiffs and their attorneys and a decreased incentive for plaintiffs and their attorneys to pursue legitimate claims.

State-only recovery statutes will exacerbate many of the concerns that arise under split-recovery statutes. This proposed legislation removes all financial incentive for plaintiffs to assert punitive damages claims and may create more pronounced conflicts of interest between plaintiffs and their attorneys. Additionally, constitutional concerns levied against split-recovery statutes will likely reappear with greater justification.

1. Federal Constitutional Challenges

Both plaintiffs and defendants have challenged the constitutionality of split-recovery statutes.⁸⁸ While plaintiffs have challenged these statutes under the Takings Clause and on due process and equal protection grounds, defendants have brought claims based on the excessive fines and double jeopardy clauses.⁸⁹ Plaintiffs typically attack “the facial constitutionality of the statutes,” while defendants commonly challenge the application of the statutes.⁹⁰ This note will address challenges made under the excessive fines, double jeopardy, and takings clauses.

a. Defendants’ Excessive Fines Clause Challenges

The Eighth Amendment’s Excessive Fines Clause prohibits the federal and state government from imposing excessive fines on individuals.⁹¹ To successfully bring such a challenge, a party must prove that governmental action implicates the clause and that the fine imposed is excessive.⁹² Defendants challenge split-recovery statutes as a violation of the Excessive Fines Clause by arguing that the state’s receipt of a portion of the award triggers the clause.⁹³

A significant decision from the United States Supreme Court provides the framework for the excessive fines debate under split-recovery statutes. In *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*,⁹⁴ the Supreme Court held that the “Excessive Fines Clause does not apply to awards of punitive damages in cases between private parties.”⁹⁵ In declining to apply the clause to punitive damages claims

88. *Id.*

89. *Id.*

90. *Id.*

91. U.S. CONST. amend. VIII. The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” *Id.*

92. Han, *supra* note 37, at 516-17.

93. *Id.* at 516.

94. 492 U.S. 257 (1989).

95. *Id.* at 259. The Court noted that

[t]his Court has never held, or even intimated, that the Eighth Amendment serves as a check on the power of a jury to award damages in a civil case. Rather, our concerns in

between private parties, the Court recognized that “the primary focus of the Eighth Amendment [is] the potential for governmental abuse of its ‘prosecutorial’ power, not concern with the extent or purposes of civil damages.”⁹⁶ The Court further stated that the clause “does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded.”⁹⁷ The Court explicitly left open whether the clause applies to split-recovery statutes,⁹⁸ but language from the Court implies that it might find that split-recovery statutes implicate the Excessive Fines Clause because such statutes grant states the “right to receive a share of the damages awarded.”⁹⁹ Since the Supreme Court decided *Browning-Ferris*, several lower courts have considered challenges to split-recovery statutes under the Excessive Fines Clause.¹⁰⁰ These decisions from the lower courts, however, are inconsistent.

While some courts hold that split-recovery statutes do not implicate the Excessive Fines Clause,¹⁰¹ one court applied the clause and invalidated the punitive damages award as an excessive fine in violation of the clause.¹⁰² In *McBride v. General Motors Corp.*,¹⁰³ the United States District Court for the Middle District of Georgia determined that Georgia’s split-recovery statute was unconstitutional under the Excessive Fines Clause.¹⁰⁴ In applying the clause to the split-recovery statute, the court noted that the statute makes fines available “for the benefit of the State.”¹⁰⁵ The court further observed that by apportioning seventy-five percent of a punitive damages award to the state treasury, the statute was a revenue producing measure for the state.¹⁰⁶

Several other lower courts, however, have found that split-recovery statutes do not implicate the Excessive Fines Clause. In *Burke v.*

applying the Eighth Amendment have been with criminal process and with direct actions initiated by government to inflict punishment. Awards of punitive damages do not implicate these concerns. We therefore hold, on the basis of the history and purpose of the Eighth Amendment, that its Excessive Fines Clause does not apply to awards of punitive damages in cases between private parties.

Id. at 259-60.

96. *Id.* at 266.

97. *Id.* at 264.

98. *Id.* at 275 n.21.

99. *See id.* at 264.

100. *See, e.g.,* *Burke v. Deere & Co.*, 780 F. Supp. 1225, 1241-43 (S.D. Iowa 1991); *McBride v. Gen. Motors Corp.*, 737 F. Supp. 1563, 1577-78 (M.D. Ga. 1990); *Tenold v. Weyerhaeuser Co.*, 873 P.2d 413, 527-30 (Or. Ct. App. 1994) (en banc).

101. *See, e.g.,* *Hoskins v. Bus. Men’s Assurance*, 79 S.W.3d 901, 904 (Mo. 2002) (en banc) (holding that the Excessive Fines Clause was not implicated by the Missouri split-recovery statute).

102. *McBride*, 737 F. Supp. at 1577-78.

103. 737 F. Supp. 1563 (M.D. Ga. 1990).

104. *Id.* at 1578.

105. *Id.*

106. *Id.*

Deere & Co.,¹⁰⁷ an Iowa district court held that the Iowa split-recovery statute did not implicate the clause after determining that the state had no interest in the money collected.¹⁰⁸ Because the state's share of the award was allocated to a civil reparations fund, the court reasoned that the state's responsibility for administration of the fund was insufficient to trigger the clause.¹⁰⁹

Like the court in *Burke*, in *Tenold v. Weyerhaeuser*,¹¹⁰ the Oregon Court of Appeals also found that the state's split-recovery statute was not subject to an excessive fines challenge.¹¹¹ The court relied on the Supreme Court's language in *Browning-Ferris* that limited the intended scope of the clause to those fines "directly imposed by, and payable to the government."¹¹² The court determined that the jury, not the government, imposed the punitive damages punishment.¹¹³

State-only recovery statutes may present stronger excessive fines challenges. From the Court's discussion in *Browning-Ferris*, it is likely that lower courts will use this language to subject state-only recovery statutes to constitutional scrutiny.¹¹⁴ Specifically, the Court in *Browning-Ferris* stated that "the history of the Eighth Amendment convinces us that the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government."¹¹⁵ When the state is statutorily entitled to receive the *entire* sum of all punitive damages awards, a stronger argument can be made.¹¹⁶ Conversely, courts may follow the reasoning from the court's decision in *Tenold* to determine that the *jury*, not the *state*, imposed the award. Nonetheless, once the clause is triggered, a defendant would still be required to establish that the particular fine imposed was excessive.¹¹⁷

b. Defendants' Double Jeopardy Clause Challenges

The Fifth Amendment's Double Jeopardy Clause protects individuals from being subject to multiple punishments for the same offense.¹¹⁸ Defendants facing civil and criminal liability have argued that because punitive damages may be imposed in addition to criminal

107. 780 F. Supp. 1225 (S.D. Iowa 1991).

108. *Id.* at 1242.

109. *Id.*

110. 873 P.2d 413 (Or. Ct. App. 1994) (en banc).

111. *Id.* at 423-24.

112. *Id.* at 423 (quoting *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 268 (1989)).

113. *Id.* at 423-24.

114. *Browning-Ferris*, 492 U.S. at 262-76.

115. *Id.* at 268 (emphasis added).

116. *See id.*

117. *See Han, supra* note 37, at 521.

118. *See United States v. Halper*, 490 U.S. 435, 440 (1989) (indicating that the Double Jeopardy Clause "protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense"); *see also Han, supra* note 37, at 522.

finer, such multiple punishments violate the clause.¹¹⁹ The Supreme Court, however, has held that in litigation between private parties, sufficient state action is not present to subject punitive damages to double jeopardy challenges.¹²⁰ Defendants in civil actions have also specifically attacked split-recovery statutes.¹²¹ Because the state receives a large percentage of the awards, defendants argue that sufficient state action is present to implicate the clause.¹²²

The Supreme Court has not explicitly addressed whether split-recovery statutes are subject to the clause. In *United States v. Halper*,¹²³ however, the Court considered whether a civil sanction may be considered punishment under the clause.¹²⁴ The Court indicated that a civil sanction may serve as punishment under the clause if the civil sanction has a retributive rather than remedial purpose.¹²⁵ In *Hudson v. United States*,¹²⁶ the Court enumerated the factors a court should consider when deciding whether a civil sanction is punitive for purposes of the clause: (1) “[w]hether the sanction involves an affirmative disability or restraint”; (2) “whether it has historically been regarded as a punishment”; (3) “whether it comes into play only on a finding of *scienter*”; (4) “whether its operation will promote the traditional aims of punishment—retribution and deterrence”; (5) “whether the behavior to which it applies is already a crime”; (6) “whether an alternative purpose to which it may rationally be connected is assignable for it”; and (7) “whether it appears excessive in relation to the alternative purpose assigned.”¹²⁷

Lower courts are inconsistent in their application of the Double Jeopardy Clause to split-recovery statutes. In *Spaur v. Owens-Corning Fiberglas Corp.*,¹²⁸ the Iowa Supreme Court held that the state’s receipt of a portion of a punitive damages award did not constitute sufficient state conduct to implicate the clause.¹²⁹ The court emphasized that the state’s portion was deposited in the Iowa Civil Reparations Trust Fund instead of the state’s general treasury.¹³⁰ In *Burke v. Deer & Co.*, the United States District Court for the Southern District

119. Han, *supra* note 37, at 522.

120. *Halper*, 490 U.S. at 451 (“The protections of the Double Jeopardy Clause are not triggered by litigation between private parties.”).

121. Han, *supra* note 37, at 522.

122. Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101, 109 n.20 (1995).

123. 490 U.S. 435 (1989).

124. *Id.* at 447-48.

125. *Id.* at 448.

126. 522 U.S. 93 (1997).

127. *Id.* at 99-100 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)).

128. 510 N.W.2d 854 (Iowa 1994).

129. *Id.* at 868-69.

130. *Id.* “The damage awards are not commingled with state revenues and are to be disbursed only for the ‘purposes of indigent civil litigation programs or insurance assistance programs.’” *Id.* (quoting IOWA CODE § 668A.1(2)(b)).

of Iowa also rejected the defendant's constitutional challenge to the Iowa split-recovery statute under the Double Jeopardy Clause.¹³¹ In *McBride v. General Motors Corp.*, however, the Georgia district court held the state split-recovery statute unconstitutional under the clause.¹³² The court in *McBride* determined that the statute transformed the punitive damages statute from a civil nature "into a statute where fines are being made for the benefit of the State, contrary to the constitutional prohibitions as to excessive fines and contrary to the double jeopardy clause."¹³³

Defendants may also successfully raise a constitutional challenge against state-only recovery statutes under the Double Jeopardy Clause. Although the majority of lower courts that addressed the issue have been reluctant to allow double jeopardy challenges to split-recovery statutes, courts may be more amenable to such challenges when considering state-only punitive damages statutes. When the state is the only party entitled to the punitive damages award, defendants may argue that the awards only benefit the state, not private parties. Under proposed state-only recovery legislation, defendants could more effectively argue that the state is benefited by the award distribution, particularly when the award is deposited into the state's general fund, instead of a specific fund that benefits certain citizens' groups.¹³⁴

c. Plaintiffs' Takings Clause Challenges

The Fifth Amendment's Takings Clause prohibits the government from taking private property "for public use, without just compensation."¹³⁵ Plaintiffs argue that by receiving a portion of punitive damages awards under split-recovery statutes, the state has taken their property interest in violation of the clause.¹³⁶ Most courts have upheld state split-recovery statutes by finding that plaintiffs do not have a vested right in punitive damages and, thus, no recognizable property interest until entry of a judgment.¹³⁷ A plaintiff who "never receive[s] a judgment for the full amount of the punitive damages award, does

131. *Burke v. Deer & Co.*, 780 F. Supp. 1225, 1242 (S.D. Iowa 1991).

132. *McBride v. Gen. Motors Corp.*, 737 F. Supp. 1563, 1578 (M.D. Ga. 1990). The court also held the Georgia split-recovery statute unconstitutional under the Excessive Fines Clause and on equal protection grounds. *Id.* at 1579.

133. *Id.* at 1578.

134. *See Spaur*, 510 N.W.2d at 868-69.

135. U.S. CONST. amend. V.

136. *See Han, supra* note 37, at 504-05.

137. *Id.* at 505; *see, e.g.*, *Gordon v. State*, 608 So. 2d 800, 801-02 (Fla. 1992) (per curiam); *State v. Moseley*, 436 S.E.2d 632, 634 (Ga. 1993); *Mack Trucks, Inc. v. Conkle*, 436 S.E.2d 635, 638 (Ga. 1993); *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs., Inc.*, 473 N.W.2d 612, 619 (Iowa 1991). *But see Kirk v. Denver Publ'g Co.*, 818 P.2d 262, 268-70 (Colo. 1991) (en banc) (holding that Colorado's split-recovery constituted a taking of private property in violation of the Takings Clause).

not have a 'vested' property right for more than his or her share of the award."¹³⁸ "Thus, a plaintiff who wins a lawsuit does not have a property right in the full punitive damages award if a statute provides that a portion of the award belongs to the state."¹³⁹ By granting the plaintiff's portion simultaneously with the state's portion, courts avoid a property interest vesting in the plaintiff.¹⁴⁰

Only Colorado has invalidated a split-recovery statute under the clause.¹⁴¹ Unlike the other state statutes, the Colorado statute required plaintiffs to surrender their portion of the award to the state after the judgment was rendered.¹⁴² The Colorado Supreme Court determined that, because a claimant had acquired a vested property right in his portion of the award, the statute violated the Takings Clause by requiring him to relinquish his portion to the state.¹⁴³

Courts will likely reject challenges to the proposed state-only recovery legislation under the Takings Clause. Under the proposed legislation, plaintiffs will have no basis for asserting a property right in the punitive damages award; the judgment will *only* grant the *state* an interest in the punitive damages award. Therefore, plaintiffs will not be able to assert a cognizable property interest in the punitive damages award because the court will not distribute that part of the award to them.

2. Incentives to Bring Punitive Damages Claims

The prospect of winning punitive damages may encourage potential plaintiffs to bring lawsuits¹⁴⁴ and may relieve some of plaintiffs' financial burdens of litigation.¹⁴⁵ If plaintiffs are required to relinquish a percentage of their punitive damages awards to the state, they may be reluctant to bring claims.¹⁴⁶ Even if plaintiffs are not dissuaded from suing for compensatory damages, split-recovery statutes invariably decrease the financial incentive to assert punitive damages claims.¹⁴⁷ Plaintiffs and their attorneys will be reluctant to expend funds to prepare such claims, knowing that the state will retain a large percentage of the award.¹⁴⁸ Not all plaintiffs, however, will be dissuaded from asserting such claims. Plaintiffs who are motivated to

138. Schwartz et al., *supra* note 39, at 552.

139. *Id.*

140. See Dodson, *supra* note 58, at 1363.

141. *Kirk*, 818 P.2d at 268-70; Schwartz et al., *supra* note 39, at 553.

142. See Schwartz et al., *supra* note 39, at 553.

143. See *id.*

144. See Han, *supra* note 37, at 486.

145. *Id.* at 487-88.

146. *Id.* at 502.

147. See Sharkey, *supra* note 12, at 443.

148. See Han, *supra* note 37, at 502.

punish the defendant may not be discouraged by split-recovery statutes.¹⁴⁹

Statutes that apportion part of a punitive damages awards to the state decrease plaintiffs' incentives to assert punitive damages claims.¹⁵⁰ If one hundred percent of punitive damages are allocated to the state, such concerns will be exacerbated. In fact, plaintiffs will no longer have any financial incentive to bring claims against defendants for socially undesirable conduct.¹⁵¹ If states completely eliminate plaintiffs' incentives to bring punitive damages claims, then the state will have to identify other mechanisms to punish such behavior.¹⁵²

3. Parties' Incentives to Settle Litigation Prior to Trial

Split-recovery statutes may encourage both plaintiffs and defendants to settle punitive damages claims that may have otherwise proceeded to trial.¹⁵³ When plaintiffs only claim compensatory damages, parties are motivated to settle and avoid the uncertainty and expense of trial.¹⁵⁴ When plaintiffs also claim punitive damages, defendants may offer to settle to avoid negative publicity and precedent.¹⁵⁵

Split-recovery statutes present further incentives for both parties to settle. In split-recovery jurisdictions, the parties will presumably settle a claim for a figure greater than the plaintiff's estimated award under the split-recovery statute but less than the estimated total punitive damages award.¹⁵⁶ Such settlements would economically benefit both parties.¹⁵⁷ While plaintiffs would receive amounts equal to or greater than the maximum statutory allocation without incurring the cost and uncertainty of trial, defendants would escape paying the state its portion of the award.¹⁵⁸

Two potential problems arise in split-recovery jurisdictions in connection with the parties' increased incentive to settle cases prior to trial. First, no jurisdiction subjects punitive damages settlements to split-recovery statutes.¹⁵⁹ Thus, the state does not receive any portion of the settlement that it would receive had a punitive damages award been levied against a defendant at trial. Second, settlements do not

149. *Id.* at 503.

150. Dodson, *supra* note 58, at 1347; Han, *supra* note 37, at 502.

151. *See* Dodson, *supra* note 58, at 1339-40, 1347.

152. *See* Schwartz et al., *supra* note 39, at 541.

153. E. Jeffrey Grube, Note, *Punitive Damages: A Misplaced Remedy*, 66 S. CAL. L. REV. 839, 875-76 (1993); Han, *supra* note 37, at 499.

154. Grube, *supra* note 153, at 875.

155. Han, *supra* note 37, at 499.

156. Grube, *supra* note 153, at 875.

157. *See* Dodson, *supra* note 58, at 1351-52.

158. *See id.*

159. *See supra* note 11.

provide the appropriate level of deterrence to the defendant.¹⁶⁰ For example, if a \$500,000 penalty is necessary to deter the defendant from engaging in conduct, deterrence is no longer fully achieved if the parties settle for \$400,000.¹⁶¹ Despite these negative consequences, an increased number of settlements would unburden the judicial system by decreasing the number of trials.¹⁶²

State-only recovery statutes will also affect the pre-trial bargaining power of the parties.¹⁶³ Allocating a portion of punitive damages awards to the state reduces plaintiffs' economic motivation to bring such claims.¹⁶⁴ Similarly, if a state enacts a statute that strips plaintiffs of all punitive damages, then plaintiffs lose their entire economic motivation to assert these claims.¹⁶⁵

By offering to settle both compensatory and punitive damages claims prior to trial in a split-recovery state, defendants would avoid the possibility of paying the state's percentage of the punitive damages award.¹⁶⁶ In a state that allocates the entire award to the state, defendants may threaten to proceed to trial, rather than settling.¹⁶⁷ In the absence of a possible punitive damages award, plaintiffs may hesitate to take cases to trial because of the associated expense, allowing defendants to bargain for a lower settlement.

While defendants appear to benefit from statutes that allocate the entire award to the state, plaintiffs have viable counter-arguments. Plaintiffs may threaten to go to trial, even though they will not personally receive the punitive damages awards. Plaintiffs will argue that the court may award punitive damages to the state, which will serve the plaintiffs' deterrence goal. Moreover, plaintiffs will assert that it would be less expensive for defendants to settle than to confront the financial risk of large awards, in addition to negative publicity and precedent that accompanies an adverse verdict.

Concerns regarding the effective level of deterrence to the defendant will also be exacerbated.¹⁶⁸ Because proposed state-only recovery legislation strips plaintiffs of any portion of a punitive damages award, they will likely be willing to settle for less than they would in jurisdictions with split-recovery statutes. The less the defendant is forced to pay, the less likely the defendant will be deterred from engaging in socially undesirable conduct. Such statutes may also be

160. See Dodson, *supra* note 58, at 1352.

161. See Grube, *supra* note 153, at 875 (providing a similar example).

162. Dodson, *supra* note 58, at 1352.

163. See *id.*

164. See *id.*

165. See *id.*

166. See *id.*

167. See Grube, *supra* note 153, at 875-86.

168. See Dodson, *supra* note 58, at 1352.

problematic if states begin to rely on the revenue derived from their enactment, particularly if settlements become prevalent.¹⁶⁹

4. Conflicts of Interest Between Plaintiffs and Their Attorneys

Split-recovery statutes create conflicts of interest between plaintiffs and their attorneys.¹⁷⁰ Such statutes may motivate attorneys to pursue punitive damages at trial in an effort to collect larger fees, even though it would benefit the client to settle the claim.¹⁷¹ When punitive damages are available, attorneys frequently take cases on a contingency fee basis, under which an attorney does not charge for her services in exchange for a percentage of a judgment in favor of the plaintiff.¹⁷² “A plaintiff’s attorney who enters into a contingency fee agreement with a client has, in effect, purchased a portion of the client’s cause of action.”¹⁷³ The Model Rules of Professional Conduct provide that a “lawyer’s own interests should not be permitted to have an adverse effect on representation of a client.”¹⁷⁴ Even though the attorney is given a stake in the litigation, the model rules specifically permit contingency fee arrangements,¹⁷⁵ provided that they are signed by the client and in writing.¹⁷⁶

Split-recovery statutes present another problem because they usually allow the attorney’s contingency fee to be distributed before dividing the award between the plaintiff and the state.¹⁷⁷ Thus, “the lawyer, unlike the plaintiff, does not have to share any portion of his or her share of the punitive damages award with the state.”¹⁷⁸ Such statutes primarily benefit the attorney.¹⁷⁹ As a result of this benefit, attorneys may be motivated to advocate for trial, even though settlement may be in their client’s best interest.¹⁸⁰

Conflicts between plaintiffs and their attorneys will likely escalate if state-only recovery statutes are enacted. Under such statutes, plaintiffs will have no incentive to bring punitive damages claims.¹⁸¹ Conversely, plaintiffs’ attorneys may still benefit if the statute has a provision for attorneys’ fees. For example, Arizona’s proposed statute

169. See Schwartz et al., *supra* note 39, at 538-40.

170. *Id.* at 544-45.

171. *Id.* at 545.

172. *Id.* at 544.

173. Schwartz et al., *supra* note 39, at 544.

174. MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 10 (2003).

175. *Id.* R. 1.8(i)(2). “A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may . . . contract with a client for a reasonable contingent fee in a civil case.” *Id.*

176. *Id.* R. 1.5(c).

177. Schwartz et al., *supra* note 39, at 541.

178. *Id.* at 545.

179. *Id.*

180. *Id.*

181. See Han, *supra* note 37, at 502.

provides the attorney with ten percent of the total award plus costs.¹⁸² Under split-recovery statutes, asserting a punitive damages claim could potentially benefit the client. Under state-only recovery legislation, however, plaintiffs will derive no economic benefit from asserting punitive damages claims. Because of this problem, conflicts of interest between plaintiffs' attorneys and their clients will be unavoidable.

5. Increased Jury Awards

Some commentators assert that, while split-recovery statutes aim to reduce plaintiffs' windfalls, such statutes may actually increase punitive damages awards.¹⁸³ In jurisdictions that allow plaintiffs to keep all punitive damages awards, jurors may hesitate to grant such awards "because they are uncomfortable with giving a single successful plaintiff an enormous windfall."¹⁸⁴ By allocating a portion of the award to the state, juries may be encouraged "to award even larger recoveries than they do today."¹⁸⁵ In split-recovery jurisdictions, juries may also award larger punitive damages because they believe that distributing larger sums to the state may confer societal benefits, such as decreased taxes and improved highways.¹⁸⁶ Conversely, jurors who are aware of the distribution scheme may be reluctant to provide the state with additional funds.

Several commentators have also argued that jurors should not be informed how punitive damages are allocated because the purpose of punitive damages is to deter the defendant.¹⁸⁷ For that reason, it is irrelevant how the damages are ultimately distributed; it is only relevant that the defendant is forced to pay.¹⁸⁸ Despite this argument, only California's split-recovery statute specifically mandates that the jury not be instructed how the punitive damages award will be apportioned.¹⁸⁹

Similar to split-recovery statutes, legislative proposals to distribute one hundred percent of punitive damages to the state may affect the amount awarded by juries. If jurors are more likely to award larger punitive damages when they believe that a portion of the award will benefit the state, then statutes giving the state one hundred percent of punitive damages will also increase the amount awarded by juries.

182. H.R. Con. Res. 2054, 47th Leg., 1st Reg. Sess. (Ariz. 2005).

183. Schwartz et al., *supra* note 39, at 538.

184. *Id.*

185. *Id.*

186. *See id.*

187. *See, e.g., id.* at 547-48.

188. *Id.*

189. *See* CAL. CIV. CODE § 3294.5(g) (West Supp. 2006).

Of the six states that have proposed state-only punitive damages recovery statutes, only Kansas Senate Bill 96 provides that “the court shall not instruct the jury on the award distribution.”¹⁹⁰ By including such language, Kansas legislators demonstrated a belief that jurors should not be influenced by the manner in which the award is allocated. Despite language to conceal the proposed distribution scheme, jurors may nonetheless be informed through outside sources. If a state statute prohibits jurors from being informed of the proposed method of allocation, the statute should also specify that the award will not be affected even if a juror has outside knowledge of the distribution scheme.

IV. CONCLUSION

Over the last few decades, states have developed numerous mechanisms to curb excessive punitive damages awards. Split-recovery statutes are among the most recent of these tort reform measures. In response to split-recovery statutes that remove the plaintiffs’ windfall by giving a portion of the punitive damages to the state, opponents have levied constitutional challenges under the excessive fines, double jeopardy, and takings clauses. Challengers have also asserted arguments based on theories of conflicts of interest between plaintiffs’ attorneys and their clients, decreased incentives to bring claims, and increased jury awards.

Since 2003, six states, including Kansas, have attempted to enact state-only recovery legislation. Like split-recovery statutes, this proposed legislation addresses the plaintiffs’ windfall by allocating one hundred percent of punitive damages to the state. State-only recovery statutes may initially appear to be a viable tort reform mechanism, however, they do not offer a prudent solution. In fact, such statutes would exacerbate many of the concerns plaguing split-recovery statutes. State-only recovery statutes would likely be subject to the Eighth Amendment’s Excessive Fines Clause and possibly to the Double Jeopardy Clause. They would also likely result in conflicts of interest and remove all financial motivation for plaintiffs to pursue punitive damages against defendants who engage in socially destructive behavior. Therefore, states should not enact the proposed state-only recovery statutes as a method of tort reform.

190. S. 96, 2005 Reg. Sess. (Kan. 2005). “If such civil action is to a jury, the court shall not instruct the jury on the award distribution imposed by this subsection upon recovery of punitive or exemplary damages.” *Id.*