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Split Recovery Statutes

Split recovery statutes attempt to align the impact of punitive damages awards more closely with their purposes, by eliminating a perceived windfall aspect while maintaining the deterrence effect. These two objectives are met through redistribution of the award - instead of the plaintiff receiving all of it, a portion is allocated to the State.

Acceptance of split recovery schemes has been slow, based on concern that the statutes raise problems of over-deterrence, conflicts of interest, and the potential inflation of punitive awards. Further, in practice, some States have found split recovery statutes to be ineffective, either due to poor statutory construction or time limits on the legislation. Other States, however, have found split recovery statutes to be an effective means of punishing tortfeasors while also distributing money to arguably deserving third parties.

Ultimately, the Sedona Working Group concludes a well-constructed split recovery statute can be a useful mechanism for achieving important societal interests and improving the judicial process.

I. Operation of Split Recovery Laws

In general terms, split recovery statutes provide that, after punitive damages are awarded to a plaintiff, a portion of the punitive award is turned over to the State. Split recovery statutes are not new, nor are they the acts of one or two rogue State legislatures. In response to a perceived rise in the volume and amounts of punitive damage awards in the 1980s, many States engaged in a wave of tort reform in an attempt to curb punitive damage awards. All told, one

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quarter of U.S. States have experimented with splitting punitive damage awards between plaintiffs and the State. Eight States currently require that a portion of any punitive damage judgment be shared with the State: Alaska, Georgia, Illinois, Indiana, Iowa, Oregon, Missouri and Utah.¹ Five other States formerly had split recovery statutes which are no longer in force: California, Colorado, Florida, Kansas and New York.²

There are a number of differences in the way split-recovery statutes operate. First, there is a wide range in the portion of the punitive damage award that is allocated to the State. Georgia, Indiana, and Iowa allocate 75% to the State; New York's now- inoperative statute gave the State only 20%.³ Most other States fall somewhere in between, although Utah awards the first \$50,000 in punitive damages to the plaintiff and then provides for a 50/50 split of the remainder.⁴ The Illinois statute is discretionary, leaving to the judgment of the court both the decision whether to split and also the amount to allocate to each party.⁵

¹ See state statutes cited in footnotes 3-5. A ninth state, Ohio, has no split recovery statute; however, in the case of *Dardinger v. Anthem Blue Cross & Blue Shield*, 781 N.E.2d 121 (Ohio 2002), the court exercised its judicial discretion *sua sponte* to split the recovery between the plaintiff and a cancer research Fund. Although *Dardinger* is frequently cited for other punitive damages concepts, it has not been followed for the proposition that a judge may split a punitive damage award absent legislative authority.

² Cal. Civil Code § 3294.5 (2004) (California); C.R.S. 13-21-102 (1994) (Colorado); Fla. Stat. § 768.73 (1991) (Florida); K.S.A. § 60-3402 (1991) (Kansas); NY CLS CPLR §8701 (1994) (New York).

³ Ga. Code Ann. § 51-12-5.1(e)(2); Ind. Code Ann. § 34-51-3-6(c); Iowa Code Ann. § 668A.1; NY CLS CPLR § 8701 (1994).

⁴ Alaska Stat. § 09.17.020(j) (50% of punitive damage award goes to general Fund of the State); Mo. Ann. Stat. § 537.675 (50% of award paid into tort victim's compensation Fund); Or. Rev. Stat. Ann. § 31.735(1) (40% goes to the prevailing party and 60% goes to crime victims Fund); Utah Code Ann. § 78B-8-201(3)(a).

⁵ 735 Ill. Comp. Stat. Ann. 5/2-1207.

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Second, some States differentiate among the types of cases in which punitive damages may be awarded in deciding whether splitting applies. Georgia's statute singles out product liability cases for apportionment. In all other statutes currently in force, the split recovery scheme applies to all cases where punitive damages are allowed.

Third, the Funds into which the State's portion of the punitive damage awards is paid have varying purposes. Several States have attempted to direct monies received from punitive damage awards toward other injured persons whose only recourse may be State assistance; examples are Missouri's Tort Victims' Compensation Fund or Iowa's Civil Reparations Trust Fund. The State Funds are not always a close fit to the harms giving rise to the punitive damage awards -- for example, Indiana's Fund benefits victims of violent crime. Some States simply deposit the money into their General Fund.

Finally, the statutes differ on whether attorneys' fees are segregated from the punitive damage award before dividing the total award among the recipients. In most States, the amount allocated to the State is calculated after payment of all applicable costs and fees, including the plaintiff attorney's full contingency fee, based upon the entire punitive award. In other States, however, the State's percentage is calculated before the attorneys' fees and costs are deducted, leaving the plaintiff to bear the full burden of the expenses of the litigation. And, in Illinois, the trial court has discretion to apportion the punitive award among the plaintiff, his attorney, and the State of Illinois Department of Human Services, using whatever calculation it deems best.

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II. Pros and Cons of Split Recovery Laws

There are a number of State policy and legal objectives that are advanced by split recovery statutes. Arguments in favor of apportioning punitive damage awards using split recovery statutes include the following:

- Prevents large windfalls to individual plaintiffs;
- Recognizes that punitive damage awards are often levied where there is widespread harm to individuals other than the plaintiff, and allows the award to be allocated in a manner that reaches more potentially injured people;
- Resolves the disconnect between the societal purposes for which punitive damages are awarded (punishment, deterrence) and the individualized receipt of such awards;
- Raises revenue for the States;
- Improves the business climate within States by signaling a willingness to embrace innovation. This in turn increases State revenue;
- Decreases the number and size of punitive damage awards, thereby slowing increases to liability insurance premiums and improving availability of insurance;
- Addresses indirect costs incurred by the State, such as increased health care costs;
- Properly directs punitive damages, which are analogous to criminal fines, to the State;
and
- Produces similar deterrence at lower social cost by reducing the strain on courts caused by frivolous suits.

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Split recovery laws also raise a number of policy and incentive issues that some argue counsel against their use. These issues include:

- ❖ Allows awards to go to individuals not appearing before the court, thus denying parties a full opportunity to defend;
- ❖ Where there is no obvious fit between the harm being punished and the purpose of the State Fund receiving the award, individuals who were unharmed by the defendant may be compensated while other potential plaintiffs are left uncompensated;
- ❖ When left to judicial discretion, the statutes open the possibility for judges to allocate to their favorite charities;
- ❖ Potentially violates the Takings Clause of the Federal Constitution;
- ❖ Potentially violates the Excessive Fines Clause of the Federal Constitution;
- ❖ Potentially violates the Due Process Clause of the Federal Constitution where awards go to court-administered Funds;
- ❖ Jurors may increase awards if they know the plaintiff will not receive all of it;
- ❖ Encourages jurors to think of people beyond the plaintiff who may have been harmed, which could lead to larger awards;
- ❖ Risks over-deterrence, since defendants may also be subject to criminal or civil fines that are received by the State and are designed to address the same societal harm as the punitive damage award;
- ❖ Disincentivizes plaintiffs and their attorneys from developing case facts supportive of punitive damages because they will not benefit sufficiently from any recovery;

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- ❖ Encourages parties to settle after the announcement of a verdict and before the entry of judgment in order to avoid paying a portion of the award to the State;
- ❖ Reduces the availability of contingent fee arrangements for plaintiffs unable to pay in advance of judgment;
- ❖ A few statutes allow the States to “ride in the attorney’s pocket” by recovering an award without sharing the legal costs.

The concerns listed above do not, however, appear to be the main reason behind the demise of split recovery statutes in the majority of the States where they are now inoperative. Four of the statutes were enacted with sunset provisions that automatically revoked the statute after a short period of time. These statutes were primarily revenue-raising attempts by the States, with the California legislature expressly noting in the text that “extraordinary and dire budgetary needs have forced the enactment” of the split recovery provision. Ironically, the sunset provisions may have defeated the very purpose for which these statutes were enacted, since plaintiffs could simply delay filing or slow down their cases and hope to push the verdict out past the termination of the statute.⁶

Only in Colorado has allocation to the State been repealed due to a direct challenge based on legal policy. Colorado’s statute apportioned 1/3 of any punitive damage award to the State

⁶ In California, an effort was made by the Attorney General to extend the sunset provision; however, it was opposed by the Chamber of Commerce out of concern that the statute incentivized higher punitive damages, despite a prohibition in the statute against instructing juries on the split recovery scheme. The Office of the Attorney General could not substantiate its claim that revenue from the bill would reach \$450 million, and the statute, which was largely viewed as politically motivated, rather than a sincere attempt at tort reform, was not extended.

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General Fund, without first subtracting attorney's fees or costs.⁷ The statute was ruled

unconstitutional by the Colorado Supreme Court in *Kirk v. Denver Pub. Co.*, 818 P.2d 262

(1991), for violating the Takings Clause of the Colorado and United States Constitutions. The

Colorado Supreme Court found the statute forced an illegal "taking" as a result of three factors:

(1) the State had no interest in the judgment prior to collection; (2) the lack of a nexus between deterring the undesirable conduct punishable by exemplary damages and the forced contribution by the injured party to the State; and (3) if the payment was viewed as a "court services fee", the fee was grossly disproportionate to the service provided and was also under-inclusive, as it did not apply to parties using court services who were not awarded exemplary damages.

Nevertheless, the decision in *Kirk* is by no means the final word on the constitutionality of split recovery statutes. To the contrary, other constitutional challenges, including invocations of the Takings Clause, have been repeatedly rejected by Supreme Courts in several other States.⁸ Moreover, the Colorado statute suffered from several drafting errors that are not present in most existing statutes and which could be easily avoided. For example, the Colorado statute did not vest the State with any interest in the punitive award until after it became due and had been collected by the plaintiff, making it plaintiff's property. By contrast, most split recovery statutes provide the State with an interest at the time of verdict or judgment; the State's share is paid directly to the court or the State and never becomes plaintiff's property. Also, because Colorado's statute did not segregate attorney's fees and costs prior to division of the award, the

⁷ C.R.S. 13-21-102 (1994).

⁸ *State v. Carpenter*, 171 P.3d 41 (Alaska 2007); *Cheatham v. Pohle*, 789 N.E.2d 467 (Indiana 2003); *DeMendoza v. Huffman*, 51 P.3d 1232 (Oregon 2002) (en banc); *Fust v. Missouri*, 947 S.W.2d 424, 431 (Missouri 1997); *Mack Trucks, Inc., v. Conkle et al.*, 436 S.E.2d 635, 639 (Georgia 1993); *Gordon v. State*, 608 So.2d 800, 801-02 (Florida 1992); *Shepherd Components, Inc., v. Brice Petrides-Donohue & Assoc.*, 473 N.W.2d 612, 619 (Iowa 1991).

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State did not bear its share of the expense of the litigation and thus was not providing “just compensation” for the property it took. In addition, because the State’s share went to the General Fund, rather than to a Fund with a closer nexus to the judicial process, the *Kirk* court did not consider the statute to be a proper revenue raising mechanism. By selecting a Fund that hews more closely to the grounds for the award, a well-drafted split recovery statute could diffuse this issue.

III. Split Recovery Statutes - Can They Be Justified After *Philip Morris*?

While the supreme courts of most split recovery States have upheld the constitutionality of their statutes, the United States Supreme Court’s decision in *Philip Morris USA v. Williams*, 549 U.S. 346 1057 (2007) has called split recovery schemes into question. Some commentators have suggested that, because the *Philip Morris* decision prohibits the award of punitive damage awards for harms done to persons other than the plaintiff⁹, it undermines one of the primary justifications for split recovery statutes.¹⁰

The argument goes that split recovery statutes are justified by the belief that punitive damages redress both harm to the individual and harm to society, giving the State an interest in the recovery. And for punitive damages to redress societal harm, they must cause a tortfeasor to pay for harms -- not just to the plaintiff -- but also to others who are similarly harmed but unable or unwilling to sue. On the assumption that this is the main -- or only -- justification for split

⁹ “[T]he Constitution’s Due Process Clause forbids a State to use a punitive damage award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation.” 549 U.S. at 353.

¹⁰ *E.g.*, Paul B. Rietema, *Recent Developments: Reconceptualizing Split-Recovery Statutes: Philip Morris USA v. Williams* 127 S.Ct. 1057 (2007), 31 HARV. J.L. & PUB. POL’Y 1159 (2008).

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recovery statutes, it is then argued that *Philip Morris* bars extra-plaintiff compensation of this very kind.

Critics who rely on *Philip Morris* to argue against split recovery statutes, however, do so based on a very narrow interpretation of the societal goals served by punitive damages. They assume, for example, that in order for punitive damages to promote the appropriate level of deterrence, they must fully capture injury to third parties. This is not necessarily the case. Rather, punitive damages can make the cost of an individual tort more accurately reflect the harm caused to that individual. For example, assume the following:

- Driver can bill an additional \$100 each work day by speeding on the way to work, yielding \$25,000 more income each year;
- Driver perceives there is a 10% chance of getting into an accident;
- The harm caused by the accident is likely to be \$100,000.

Under this set of facts, Driver will continue to speed because the probable discounted cost of speeding is only \$10,000. Punitive damages increase the perceived cost of speeding and encourage safety measures, not because they cause Driver to bear the cost of harm to multiple absent third parties, but because they make the cost of a single accident prohibitively high. Assume for example, that the facts above are the same, but a Plaintiff may recover punitive damages up to five times actual damages. Now, Driver's total potential liability is \$600,000, which means that, even with a 10% chance of getting into an accident, the cost of speeding (\$60,000) exceeds the benefit (\$25,000). This scenario illustrates one way in which punitive damage awards can have an appropriate deterrent effect without redressing harm to persons other than the plaintiff.

Comment [A1]: Question for Working Group-- Does this hypothetical work? Is there a better one?

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Commentators who question the validity of split recovery statutes in light of *Philip*

Morris also blur the distinction between use of punitive damage awards to compensate for societal harm, and use of such awards to promote societal goals such as deterrence of future bad conduct and punishment for harm even to a single individual. Because *Philip Morris* only calls into question the former justification and not the latter, the decision does not necessarily portend the end of split recovery statutes.

Certainly, courts grappling with split-recovery statutes have noted that punitive damages serve societal *aims* such as deterrence.¹¹ But deterrence is not the same as redressing third-party *harms*. Even where there has been no harm to third parties, a defendant's conduct can justify a punitive damage award, simply because the conduct is outrageous and offensive.

Indeed, society has an important interest in punishing bad behavior, either because society deems such conduct blameworthy, or because the gains to the tortfeasor from such conduct are illicit. The goal of punishment is focused on the conduct *of the defendant* and is thus divorced from any actual measure of injury to society.

Also, some commentators mistakenly assume that because split recovery statutes contemplate harms to third parties during the distribution of the award, they necessarily force

¹¹ *E.g., DeMendoza v. Huffman*, 51 P.3d 1232 (Or. 2002) (finding that, because punitive damages serve to punish and deter egregious behavior and not to remedy any injury, the split-recovery statute did not violate a state constitutional provision guaranteeing a remedy "to every man" only for an "injury done him in his person, property, or reputation"); *Dardinger v. Anthem Blue Cross & Blue Shield*, 781 N.E.2d 121, 144 (Ohio 2002) ("The award must be sufficient to persuade Anthem to pay more attention to patient care; to install a system in which appeals are answered, and not purposely delayed; to achieve a system where appeals move forward on their own merit, and are not dropped because Anthem has outlasted the patient in the waiting game. The award must respect the fact that Anthem's bad acts were perpetrated on people who were in their most desperate State. And the award must reflect that, unlike in *Wightman*, the central event in this case was not accidental").

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consideration of third parties during the determination of the award. They do not. Rather, the factfinder first determines that a defendant should pay the plaintiff because there is evidence that the defendant harmed that individual plaintiff. Then, societal values are applied to decide whether the defendant's conduct warrants punitive damages. The size of the punitive damage award is a function of how egregious the conduct of the defendant. The State's interest in receiving a share of a litigation award between private parties does not develop until after the fact-finder has determined a punitive award is warranted. Only after the State has received a share does a split recovery statute look to whether there are others who were similarly harmed and, possibly, redistribute the award to third parties. The restrictions of *Philip Morris* are not implicated by split recovery schemes because third parties are not considered when determining if or how much to award; rather they become relevant only when deciding how to distribute an existing award.

Moreover, the State maintains an interest in punitive damage awards because they exist solely by virtue of the social construct of the law. Such damages are noncompensatory and a plaintiff has no inherent right to such damages. Rather, they exist -- if at all -- because State legislatures want to punish and/or deter certain kinds of conduct by permitting larger jury awards. Measuring the size of such an award by reference to conduct directed toward a particular plaintiff does not change the essential nature of punitive damages as an award "on top of" being made whole, the right to which can be altered or even eliminated by the legislature. The potential windfall to a plaintiff may be smaller post-*Philip Morris*, but it is still a windfall.

IV. Looking Forward: Recommendations for Implementation of Split Recovery Statutes

As with any attempt at tort reform, split recovery schemes come with a number of

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challenges with respect to shifting incentives and the practicalities of devising a workable enforcement procedure. First, States contemplating adoption of split recovery statutes must first consider whether their current system -- which presumably allows all of a punitive damage award to go to an individual plaintiff -- adequately serves the societal goals of both deterrence and punishment. The Sedona Working Group believes that, in most cases, traditional punitive damage schemes are reasonably tailored to achieve appropriate levels of deterrence and punishment. The Working Group further recognizes, however, there is a very real possibility of a windfall to a particular plaintiff. Accordingly, the Working Group believes that split recovery statutes may offer States an opportunity to mitigate some of the perceived inequities of the current punitive damages landscape, without diluting the power of exemplary awards to promote ethical conduct through punishment and deterrence. Should other States consider adopting or modifying a split recovery statute, particularly for mass tort cases, we offer the following recommendations.

A. Types of Cases

Following the majority of States that presently allocate punitive damage awards, split-recovery statutes should be drawn to apply to every type of case in which punitive damages are available. Since the main goal of splitting awards is to prevent large windfalls to single plaintiffs, there does not appear to be any strong reason to treat plaintiffs with different injuries unequally. Application of a split recovery scheme should be mandatory in all cases where punitive damages are available, to avoid the due process challenges and potential for judicial favoritism that occur with discretionary statutes. Mass tort litigation is particularly suitable for the use of split recovery schemes, as there is usually a distinct, identifiable injury, a knowable group of potential claimants, and an identifiable group of organizations that would be appropriate

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beneficiaries of split recovery Funds.

B. Amount Allocated to the State

Although several States have allocated a much larger share to the State, the Working Group concludes that any split recovery system must assure that the plaintiff receives at least as much as the State or public Fund. Because punitive damage awards are taxable, the Working Group believes any allocation must take into account the fact that some percentage of the plaintiffs' share (depending on tax bracket) will be paid to the government in taxes. (Indeed, it is arguable that the share of a punitive damage award that is paid to the government in taxes already constitutes a "split recovery.") We believe that, in general, a 75/25 split between the plaintiff and the State appropriately takes into account the tax consequences to most plaintiffs. Most importantly, a set percentage, as compared to discretionary allocation, has the advantage of allowing parties to predict recovery and plan for settlement, and also avoids the conflict of interest issues attendant to discretionary statutes. Regarding the amount given to each participant, tilting the numbers too far in favor of the State can result in the anomalous situation wherein the plaintiff ultimately receives less money than either the State or his attorney. By assuring that the plaintiff's actual, final share is no less than that of the State, a split recovery statute maintains the incentive for plaintiffs to pursue development of case facts for punitive damages, and recognizes it is the plaintiff who has borne the time, effort and general aggravation of pursuing the case to judgment. At the same time, this scheme will leave a sufficiently-sized share to justify the work required of the State to pursue collection and redistribution of the award.

In considering allocation of punitive damages between the plaintiff and a State or public Fund, one must consider the implications for settlement discussions. Encouragement of

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settlement is generally perceived as a worthy goal, and we believe it is likely that split recovery schemes that strike an appropriate balance between the plaintiff and a State or public Fund will further this goal. The plaintiff is incentivized to enter into settlement discussions because he/she recognizes that settlement may be preferable to going through the expense and burden of trial and then seeing a significant portion of an ultimate award going to the State. Similarly, defendants may see an opportunity to negotiate a lower overall amount than might result at trial, but with it all being paid to the individual plaintiff. Further, any settlement can still include a provision that the defendant will also make some payment to the State or a public Fund or charity.

C. Type of Fund

The selection of a State Fund to receive allocations of punitive damage awards should be made carefully to maximize fit between the underlying injury and the Fund, while still remaining administratively feasible. Awards to the State General Fund speak to revenue raising, not tort reform, and do little to achieve the goal of matching the award to others who were injured by the defendant's conduct. At the other extreme, creating a Fund only for victims of the same conduct described in a single lawsuit would require implementation of potentially extensive and expensive procedures to administer the Fund, the cost of which would drain Fund resources.¹²

¹² Some commentators have proposed reforms that would allow for only one punitive award per a given set of facts leading to a judgment against a tortfeasor, with a Fund created therefrom to compensate others harmed in a similar manner to the plaintiff. This proposal achieves the highest level of fit and does the most to prevent over-deterrence from repeat punishment for the same conduct. State sovereignty issues, however, would likely preclude out-of-State victims from receiving money from a State Fund, leading at best only to a reduction, not elimination, of multiple awards. Further, there are obvious problems in defining when a single set of facts leads to a judgment. For these reasons a law limiting plaintiffs to a single punitive award does not present an option superior to nationwide settlement agreements, which are already utilized in many torts involving large numbers of potential plaintiffs.

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Many awards are not large enough to justify this level of administration. In other cases, uniquely tailored Funds could be too small to compensate all victims, or there could be money left remaining in the Fund that could not then be re-appropriated to other worthwhile uses because of the narrow drawing of the Fund.

Accordingly, the Working Group recommends that a State's split recovery portion should be placed in a Fund designed to compensate persons with civil injuries, or solely tort victims, who are unable to achieve redress for their injuries for various reasons, such as their own indigency, or bankruptcy of the defendant. Examples of such Funds include Iowa's Civil Reparations Trust Fund and Missouri's Tort Victims' Compensation Fund.¹³ If the statutory scheme directs a Fund administrator to place punitive awards in an interest-bearing account for a minimum period of time prior to distribution, the interest can be used to defray the costs of administration.

Another possibility would be to name a default State Fund, but include an option for the plaintiff to propose a charitable organization to be the recipient of the State's share. For example, in a case involving illegal dumping of toxic chemicals, the plaintiff might propose allocating the punitive award to an environmental group engaged in preservation and clean up efforts. Any such statute, however, must prescribe clear qualifications for the organization, to ensure it has the capacity to utilize the money in a circumspect manner and to prevent plaintiff from creating a sham organization to receive the award on his or her behalf. Such qualifications might include 501(c)(3) status, operation for a certain minimum number of years and a showing that neither plaintiff nor any close family member holds a controlling position in the organization

¹³ Consider also Florida's repealed statute, which allocated punitive awards from personal injury and wrongful death cases to a Medical Assistance Trust Fund.

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or its board. Defendants could be given the right to stipulate or object.

Regardless of where the State's share of the funds are directed, it is important that there be transparency and accountability. The public should be aware of where any punitive damage award funds are being directed, and perhaps have an opportunity to comment or object, particularly if the court has any discretion in the distribution of funds. Allocation to the State's or the court's general coffers should not be an option, as benefiting directly from an award of punitive damages would almost certainly put the court in a conflict situation.

D. Compensatory Awards, Attorney's Fees and Costs

Segregation of compensatory damages, attorneys' fees and costs from the award prior to apportioning shares is pivotal to the success and acceptance of split recovery statutes. This segregation maintains existing incentives for attorneys to accept contingent fee cases, thereby expanding access to justice for lower income plaintiffs, and to develop fully case facts supportive of punitive damages. It also prevents the States from recovering an award without sharing the legal costs, thus reducing the risk of constitutional challenges. Some States utilize another fair-minded, though somewhat more procedurally complex method, wherein the punitive award is divided between the plaintiff and the State, after which the State must pay plaintiff's attorney its proportion of the attorney fees.

Another key apportionment issue that States should address in any prospective legislation is payment of compensatory awards. Several States provide that punitive awards may not be paid to the State until the plaintiff receives full payment of any compensatory award. This restriction appropriately ensures that the actual harm at issue in the case is compensated fully before ancillary aims of punishment, deterrence, and reparation to other injured individuals is

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undertaken.

E. Jury Instructions

It has been theorized that if juries know the plaintiff will not receive the entire punitive damage award, they may feel greater comfort in awarding larger amounts than if there is no split recovery. Accordingly, some States have included a jury instruction provision in their split recovery legislation that is worth consideration. To reduce the temptation to inflate the punitive damage award, the statute can prohibit any instruction or argument on the split recovery scheme. This limitation, in combination with constitutionally-required jury instructions permitting consideration only of the individual plaintiff's injuries, should assist in keeping split recovery statutes from causing any inflationary result that is contrary to their intent.

F. Procedure

Split recovery schemes must be drafted with a clear process for vesting an interest in the State and for collection of the award. Otherwise, statutes run the risk of creating an award that the State has no ability to collect or distribute. First, the statute should include a clear, mandatory directive to courts to award the designated amount to the State, e.g. the court "shall enter judgment providing" or the award "shall be paid to" the State.

Next, the statute should include an obligation for the plaintiff to notify the State Attorney General of the punitive damage claim. This could be mandated within a certain number of days from the verdict or, in States where plaintiffs must file a separate motion for punitive damages, upon filing of the motion.

Third, the statute should specify that the State is vested with all the rights of a creditor or judgment debtor upon announcement of the verdict. This ensures the State is named in the

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judgment and thereafter has standing to pursue collection.

Statutes should also specify the order of payment of damages and priority of creditors.

To protect the plaintiff, punitive damages should not be paid until after full payment of compensatory damages, costs, and attorney fees. The enactment should require creditors to notify all other creditors when payments are received, so that it is apparent when the State may begin pursuing collection. In the event a judgment for a punitive damage award is not paid in full, the statute should provide that the State will receive its proportion of any amounts over and above compensatory damages, fees, and costs that are recovered.

Several States have included provisions in their split recovery statutes that prohibit the State from intervening in suits where they have no interest other than the recovery of punitive damage awards. California's statute also prohibited the filing of amicus briefs by the State in this situation. The advantage of these provisions is that it prevents the State from pressing for a higher punitive award to further its own interests in revenue. On the other hand, eliminating intervention rights may prevent States from collecting awards entered in federal court pursuant to State punitive damage law, since the federal court would not be bound to follow State procedure on identification of creditors and procedure for collection. We therefore suggest that where it is possible for State legislators to cooperate with the Attorney General on creating a standing policy of non-intervention prior to verdict, this may provide a more flexible method for limiting State intervention, while preserving the State's ability to collect.

Another potential difficulty may arise when the parties in a case subject to a split recovery statute decide to settle the case after the verdict is announced and before the judgment is entered. If the verdict includes a punitive damage award, a portion of which must be paid to

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the State, the parties each have an incentive to settle for an amount less than the total award but more than the plaintiff's portion of the award. To address such a scenario, legislatures could provide in the split recovery statute that any post-verdict settlement in a case where the verdict contains a punitive damage award is subject to court approval. The court would be charged with taking into account the State's interest in the punitive damage award. This arrangement, similar to the mechanism in place for the approval of class action settlements, could prevent parties from defeating the split recovery scheme without hampering their ability to settle their case. Several factors a judge could consider when determining whether a proposed post-verdict settlement is appropriate are:

- ❖ the total amount of damages awarded in the verdict and the proportion of compensatory to punitive damages;
- ❖ the proportion of the punitive damage award to which the State would be entitled pursuant to the applicable split recovery statute;
- ❖ whether the proposed settlement provides the plaintiff with an adequate portion of the total settlement proceeds in light of the proportion of economic to non-economic damages that make up the compensatory damage award;
- ❖ the likelihood of an appeal in the event there is no settlement and the potential expense involved.

In approving a proposed settlement, a judge should make a factual finding based on the above factors as to whether the proposed settlement is fair and reasonable and whether the State's interest is sufficiently protected.

G. Sunsets/Revenue Raising

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Depending on the priority given to differing reform goals, split recovery statutes may be most effective if enacted in combination with other civil reforms. If a State's aim is to significantly cut back on litigation, then a statute including a punitive damages cap will have an even larger inhibitory impact on the number of cases filed in a State than will any split recovery scheme. A punitive damages cap, however, will also diminish the State's ultimate allocations from punitive damage awards. Conversely, if a State is more interested in increasing deterrence and places a higher value on safety, then both split recovery schemes and punitive damages caps will reduce deterrent incentives.

Whatever societal goal is pursued, the one objective that is least desirable is fund-raising. When split recovery statutes are enacted with overt revenue-raising goals, instead of a sincere interest in tort reform, the results are often unpopular and poorly drafted. Revenue-raising measures are often associated with political figures or parties, whose enactments may be swiftly undone as soon as there is a change in office. Like sunset clauses, this can lead to statutes that are rendered invalid before there has been time for the real effects of the legislation to become clear. Litigants can circumvent a statute with a sunset provision by delaying or prolonging suits, thus defeating the revenue-raising goal. Using split recovery statutes as quick-fix revenue measures also runs the risk of drafting deficiencies, which increases the potential for constitutional challenges that could derail the statute and eliminate any real benefits.

V. Conclusion

Split recovery statutes are not a magic bullet to fix all perceived abuses involving punitive damage awards or to achieve perfect alignment with the intended purpose of punitive damages. They do, however, have the potential to produce a more equitable distribution of punitive damage awards, without constraining cases where a large punitive judgment is

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appropriate. These statutory schemes can also reduce the unease many feel over giving individual plaintiffs large windfalls, by directing money to others who may have been similarly harmed or to worthy public or private Funds. Split recovery schemes achieve levels of deterrence and punishment comparable to schemes without such allocation, but potentially at a reduced cost to society. With careful planning, these statutes may provide a useful tool for improvement of the judicial process.