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Nadine E. Roddy

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## PUNITIVE DAMAGES IN STRICT PRODUCTS LIABILITY LITIGATION

In recent years courts and legislatures have accepted strict tort liability as a basis for recovery in products liability actions.<sup>1</sup> As a result, courts have had to consider whether and in what ways a strict liability suit differs from a traditional negligence action.<sup>2</sup> Historically courts permitted punitive damages in any negligence

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1. *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962), was the first major products liability case in which a court held a manufacturer strictly liable for injuries caused by its defective product. Although the court could have reached the same result on traditional negligence or breach of warranty grounds, it adopted a strict liability theory in order to relieve the plaintiff of proving manufacturer negligence in the design, manufacture, or distribution processes. *Id.* at —, 377 P.2d at 901, 27 Cal. Rptr. at 701. Following the same reasoning, the American Law Institute promulgated § 402A of the RESTATEMENT (SECOND) OF TORTS, which provides:

Special Liability of Seller for Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

Jurisdictions adopting § 402A or other theories of strict products liability are: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, and Wisconsin. 1 PROD. LIAB. REP. (CCH) ¶¶ 4015-16 (1979).

States refusing to adopt the theory of strict liability in products liability cases are: Delaware, Massachusetts, Michigan, North Carolina, Virginia, and Wyoming. *Id.*

2. Substituting strict liability for negligence as a theory of liability in products liability suits presents the question of whether traditional defenses, such as contributory negligence or assumption of risk, are appropriate. *See, e.g., Casrell v. Altec Indus., Inc.*, 295 Ala. —, 335 So. 2d 128 (1976). Courts also must consider the propriety of punitive damages in the strict liability context. *See, e.g., Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727, *cert. denied*, 101 S. Ct. 320 (1980).

suit when the defendant's conduct was particularly gross or reckless,<sup>3</sup> and most courts today allow punitive damages in products liability actions involving negligence when the defendant's conduct meets the same standard.<sup>4</sup> Because the theory of strict products liability focuses on the defective condition of a product rather than on the culpable conduct of its manufacturer,<sup>5</sup> a products liability suit based solely on strict liability raises the question of whether damages designed to punish wrongful conduct are appropriate. Scholars have vigorously debated the issue,<sup>6</sup> and courts in a grow-

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3. See generally D. DOBBS, *LAW OF REMEDIES* § 3.9 (1973); C. McCORMICK, *LAW OF DAMAGES* ch. 10 (1935); Belli, *Punitive Damages—Their History, Their Use and Their Worth in Present-Day Society*, 49 U.M.K.C. L. REV. 1 (1980); Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173 (1931); Morris, *Punitive Damages in Personal Injury Cases*, 21 OHIO ST. L.J. 216 (1960); Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517 (1957).

4. See, e.g., *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967); *Ostopowitz v. William S. Merrill Co.*, N.Y.L.J., Jan. 11, 1967, at 21, cols. 3-4 (Sup. Ct.).

5. The plaintiff in a strict products liability suit need show only that the product was in a defective condition unreasonably dangerous to the user or consumer, the seller regularly sells such products, and the product reached the consumer without substantial change. RESTATEMENT (SECOND) OF TORTS § 402A (1965). The degree of care exercised by the manufacturer or seller is irrelevant. *Id.* § 402A(2).

6. Commentators opposed to punitive damages in strict products liability suits include: Carsey, *The Case Against Punitive Damages: An Annotated Argumentative Outline*, 11 FORUM 57 (1975); Coccia & Morrissey, *Punitive Damages in Products Liability Cases Should Not Be Allowed*, 1978 TRIAL LAW. GUIDE 46; Duffy, *Punitive Damages: A Doctrine Which Should Be Abolished*, in DEFENSE RESEARCH INSTITUTE: THE CASE AGAINST PUNITIVE DAMAGES 4 (1969); Ford, *The Constitutionality of Punitive Damages*, in *id.* at 15; Fulton, *Punitive Damages in Products Liability Cases*, 15 FORUM 117 (1979); Ghiardi, *Should Punitive Damages Be Abolished?—A Statement for the Affirmative*, in A.B.A. INS., NEGL. & COMP. L. 282 (1965); Ghiardi & Koehn, *Punitive Damages in Strict Liability Cases*, 61 MARQ. L. REV. 245 (1977); Haskell, *The Aircraft Manufacturer's Liability for Design and Punitive Damages—The Insurance Policy and the Public Policy*, 40 J. AIR. L. & COM. 595 (1974); Hoemig, *Products Liability and Punitive Damages*, 687 INS. L.J. 198 (1980); Snyman, *The Validity of Punitive Damages in Products Liability Cases*, 44 INS. COUNS. J. 402 (1977); Tozer, *Punitive Damages and Products Liability*, 39 INS. COUNS. J. 300 (1972).

Commentators favoring punitive damages in strict products liability litigation include: Abramson, *Punitive Damages in Aircraft Accident Cases—A Debate*, 11 FORUM 50 (1975); Igoo, *Punitive Damages—An Analytical Perspective*, 14 TRIAL 48 (Nov. 1978); Igoo, *Punitive Damages in Products Liability Cases Should Be Allowed*, 22 TRIAL LAW. GUIDE 24 (1978); Kreindler, *Punitive Damages in Aviation Litigation—An Essay*, 8 CUM. L. REV. 607 (1978); Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257 (1976); Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CAL. L. REV. 116 (1968); Robinson & Kane, *Punitive Damages in Products Liability Cases*, 6 PEPPERDINE L. REV. 139 (1978); Note, *Allowance of Punitive Damages in Products*

ing number of jurisdictions have confronted the problem. Judicial resolution of the issue is not uniform, and the courts advance a variety of reasons to support or deny punitive damage awards.<sup>7</sup>

The issue of the appropriateness of punitive damages in strict products liability suits raises serious policy considerations. Strict liability, the most rapidly developing area of torts,<sup>8</sup> increasingly has replaced negligence and breach of warranty as the basis for products liability actions.<sup>9</sup> The availability of punitive damages in strict products liability suits may increase the attractiveness of the strict liability theory to injured plaintiffs because plaintiffs will be compensated more fully for costly and time-consuming litigation. Yet, if courts liberally award punitive damages, a defendant manufacturer<sup>10</sup> whose defective product injured a large number of persons may be pushed to financial ruin. Scholars and jurists disagree about whose interests merit greater protection. This Note will survey judicial determinations of whether punitive damages are appropriate in strict products liability actions, and, if punitive damages are appropriate, what circumstances merit such an award.<sup>11</sup>

### COURT DECISIONS

Despite the recent proliferation of products liability litigation premised on strict liability, relatively few courts have ruled on the

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*Liability Claims*, 6 GA. L. REV. 613 (1972); 1980 DET. C.L. REV. 647; 33 SW. L.J. 1117 (1979).

7. See, e.g., *Maxey v. Freightliner Corp.*, 623 F.2d 395, *reh. en banc granted*, 634 F.2d 1008 (5th Cir. 1980); *Thomas v. American Cystoscope Makers, Inc.*, 414 F. Supp. 255 (E.D. Pa. 1976); *Sturm, Ruger & Co. v. Day*, 594 P.2d 38 (Alaska 1979), *modified*, 615 P.2d 621 (Alaska 1980); *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727, *cert. denied*, 101 S. Ct. 320 (1980).

8. See W. KIMBLE & R. LESHER, *PRODUCTS LIABILITY* 66-67 (1979).

9. *Id.* at 67. Plaintiffs prefer the strict products liability theory over negligence or breach of warranty theories because plaintiffs need not prove negligent conduct by or privity of contract with a seller. See *id.* at 118-46; W. PROSSER, *LAW OF TORTS* § 98 (4th ed. 1971).

10. Because privity is not a requirement for a strict products liability suit, a plaintiff may sue all the parties in the distribution chain, from the manufacturer through the wholesaler to the retailer. RESTATEMENT (SECOND) OF TORTS § 402A, Comment f (1965). To simplify discussion, this Note will refer primarily to the manufacturer as defendant.

11. The scope of this Note is limited to products liability actions involving strict liability theory and therefore does not discuss products liability suits based solely on negligence or breach of warranty. For an exhaustive discussion of products liability suits involving all three theories of recovery, see Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257 (1976).

propriety of punitive damage recovery in such suits.<sup>12</sup> Many plaintiffs who seek punitive damages in products liability litigation base their actions on negligence rather than strict liability,<sup>13</sup> and those plaintiffs who allege strict liability often include negligence, breach of warranty, and fraud as additional bases of liability.<sup>14</sup> When courts review punitive damage awards in such multi-theory cases, they often consider only whether punitive damages are permissible

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12. Reported products liability cases in which the plaintiff sought punitive damages include: *Maxey v. Freightliner Corp.*, 623 F.2d 395, *reh. en banc granted*, 634 F.2d 1008 (5th Cir. 1980); *d'Hedouville v. Pioneer Hotel Co.*, 552 F.2d 886 (9th Cir. 1977); *Johnson v. Husky Indus., Inc.*, 536 F.2d 645 (6th Cir. 1976); *Gillham v. Admiral Corp.*, 523 F.2d 102 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976); *Hoffman v. Sterling Drug, Inc.*, 485 F.2d 132 (3d Cir. 1973), *cert. denied*, 424 U.S. 913 (1976); *Kritser v. Beech Aircraft Corp.*, 479 F.2d 1089 (5th Cir. 1973); *Walbrun v. Berkel, Inc.*, 433 F. Supp. 384 (E.D. Wis. 1976); *Thomas v. American Cystoscope Makers, Inc.*, 414 F. Supp. 255 (E.D. Pa. 1976); *Commercial Union Ins. Co. v. Upjohn Co.*, 409 F. Supp. 453 (W.D. La. 1976); *Drayton v. Jiffie Chem. Corp.*, 395 F. Supp. 1081 (N.D. Ohio 1975); *Vollert v. Summa Corp.*, 389 F. Supp. 1348 (D. Hawaii 1975); *Drake v. Wham-O Mfg. Co.*, 373 F. Supp. 608 (E.D. Wis. 1974); *Sturm, Ruger & Co. v. Day*, 594 P.2d 38 (Alaska 1979), *modified*, 615 P.2d 621 (Alaska 1980); *Grimshaw v. Ford Motor Co.*, — Cal. App. 3d —, 74 Cal. Rptr. 348 (1981); *Sabich v. Outboard Marine Corp.*, 60 Cal. App. 3d 591, 131 Cal. Rptr. 703 (1976); *G.D. Searle & Co. v. Superior Court*, 49 Cal. App. 3d 22, 122 Cal. Rptr. 218 (1975); *Pease v. Beech Aircraft Corp.*, 38 Cal. App. 3d 450, 113 Cal. Rptr. 416 (1974); *Barth v. B.F. Goodrich Tire Co.*, 265 Cal. App. 2d 228, 71 Cal. Rptr. 306 (1968); *American Motors Corp. v. Ellis*, No. 80-767 (Fla. Dist. Ct. App. Aug. 12, 1981); *Moore v. Jewel Tea Co.*, 116 Ill. App. 2d 109, 253 N.E.2d 636 (1969), *aff'd*, 46 Ill. 2d 288, 263 N.E.2d 103 (1970); *American Laundry Mach. Indus. v. Horan*, 45 Md. App. 97, 412 A.2d 407 (1980); *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727, *cert. denied*, 101 S. Ct. 320 (1980); *Rinker v. Ford Motor Co.*, 567 S.W.2d 655 (Mo. App. 1978); *Leichtamer v. American Motors Corp.*, 67 Ohio St. 2d 456, 424 N.E.2d 568 (1981); *Newding v. Kroger Co.*, 554 S.W.2d 15 (Tex. Civ. App. 1977).

13. See, e.g., *Stonehocker v. General Motors Corp.*, 587 F.2d 151 (4th Cir. 1978); *Knippen v. Ford Motor Co.*, 546 F.2d 993 (D.C. Cir. 1976); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967); *Walbrun v. Berkel, Inc.*, 433 F. Supp. 385 (E.D. Wis. 1976); *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967); *E.R. Squibb & Sons, Inc. v. Stickney*, 274 So. 2d 898 (Fla. Dist. Ct. App. 1973), *cert. denied*, 416 U.S. 961 (1974); *Hafner v. Guerlain, Inc.*, 34 App. Div. 2d 162, 310 N.Y.S.2d 141 (1970).

14. See, e.g., *Hoffman v. Sterling Drug, Inc.*, 485 F.2d 132 (3d Cir. 1973), *cert. denied*, 424 U.S. 913 (1976); *Commercial Union Ins. Co. v. Upjohn Co.*, 409 F. Supp. 453 (W.D. La. 1976); *Drayton v. Jiffie Chem. Corp.*, 395 F. Supp. 1081 (N.D. Ohio 1975); *Sabich v. Outboard Marine Corp.*, 60 Cal. App. 3d 591, 131 Cal. Rptr. 703 (1976); *G.D. Searle & Co. v. Superior Court*, 49 Cal. App. 3d 22, 122 Cal. Rpt. 218 (1975); *Pease v. Beech Aircraft Corp.*, 38 Cal. App. 3d 450, 113 Cal. Rptr. 416 (1974); *Barth v. B.F. Goodrich Tire Co.*, 265 Cal. App. 2d 228, 71 Cal. Rptr. 306 (1968); *Moore v. Jewel Tea Co.*, 116 Ill. App. 2d 109, 253 N.E.2d 636 (1969), *aff'd*, 46 Ill. 2d 288, 263 N.E.2d 103 (1970); *American Laundry Mach. Indus. v. Horan*, 45 Md. App. 97, 412 A.2d 407 (1980); *Newding v. Kroger Co.*, 554 S.W.2d 15 (Tex. Civ. App. 1977).

in products liability actions based on negligence in order to avoid the more difficult question of whether punitive damages are appropriate in suits based solely on strict liability.<sup>15</sup>

### *Recovery Based Solely on Strict Liability*

Courts in at least four jurisdictions have upheld punitive damage awards in products liability suits based solely on strict liability. In *Sturm, Ruger & Co. v. Day*,<sup>16</sup> the Supreme Court of Alaska first considered matters of policy before holding that punitive damage claims were permissible in strict products liability actions. Noting an exhaustive article by David G. Owen, the foremost advocate of punitive damages in the strict products liability context,<sup>17</sup> the court stated that punitive damages would have a strong deterrent effect on manufacturers when a defective product caused numerous minor injuries to people who could not afford to sue if punitive damages were not available, when payment of compensatory dam-

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15. See, e.g., *Forest City Mach. Works, Inc. v. Aderhold*, 273 Ark. 33, 616 S.W.2d 720 (1981); *American Laundry Mach. Indus. v. Horan*, 45 Md. App. 97, —, 412 A.2d 407, 416 (1980); *Newding v. Kroger Co.*, 554 S.W.2d 15, 18 (Tex. Civ. App. 1977).

16. 594 P.2d 38 (Alaska 1979), modified, 615 P.2d 621 (Alaska 1980).

17. Owen, *supra* note 11. Professor Owen is co-editor of the casebook, *PRODUCTS LIABILITY AND SAFETY* (1980). He believes that the traditional functions of punitive damages, punishment of wrongful conduct and deterrence of similar conduct in the future, are as appropriate in the modern products liability context as in other torts for which punitive damages customarily have been allowed. Punitive damages punish a manufacturer by diminishing any unfair competitive advantage it may have gained by making a cheaper but more dangerous product. At the same time, punitive damages deter other manufacturers from producing unsafe products by providing an example of the kind of conduct that is unacceptable and by giving an economic incentive to manufacturers to correct their defective products. Owen, *supra* note 11, at 1257, 1277-87.

Professor Owen rejects the argument that strict products liability theory, which focuses on the condition of the product, is conceptually incompatible with the doctrine of punitive damages, which focuses on the conduct of the manufacturer. He points out that strict liability theory is a *liability* doctrine designed to compensate a plaintiff who meets the requisite burden of proof, but strict liability does not limit the *remedies* available to the plaintiff if the injury was attributable to the aggravated conduct of the manufacturer. In a strict products liability suit, a plaintiff can prove the product was defective to establish the defendant's liability and also make a showing of the defendant's culpable conduct to support a punitive damage award. *Id.* at 1268-70.

Professor Owen proposes a special standard for punitive damage recovery in products liability actions: "Punitive damages may be assessed against the manufacturer of a product injuring the plaintiff if the injury is attributable to conduct that reflects a flagrant indifference to the public safety." *Id.* at 1367.

ages by the manufacturer would cost less than correcting the defect, or when a reckless manufacturer had gained an unfair advantage over more responsible competitors.<sup>18</sup> The court then identified the legal standard for punitive damage recovery, which in Alaska is section 908 of the Restatement (Second) of Torts: "outrageous [conduct] such as acts done with malice or bad motives or a reckless indifference to the interests of another."<sup>19</sup> Applying this standard in the products liability context, the court held that if a plaintiff could prove that the manufacturer knew its product was defective, was aware of resulting injuries or deaths, and nevertheless continued to market the product in reckless disregard of the public's safety, a jury could award punitive damages.<sup>20</sup> Because the acts of the defendant manufacturer fit this standard, the court affirmed the jury's finding of "reckless indifference," but reduced the amount of the lower court award.<sup>21</sup>

The Supreme Court of Minnesota also addressed the propriety of punitive damages in suits based solely on strict products liability theory in *Gryc v. Dayton-Hudson Corp.*<sup>22</sup> In *Gryc* the court adopted Professor Owen's rationale that punitive damages constitute an appropriate device to prevent manufacturers from market-

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18. 594 P.2d at 46-49.

19. *Id.* at 46 (quoting RESTATEMENT (SECOND) OF TORTS § 908 (Tent. Draft No. 19, 1973)). Section 908 provides:

(1) Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.

(2) Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

RESTATEMENT (SECOND) OF TORTS § 908 (1979).

Comment b discusses the character of the defendant's conduct. Punitive damages may be awarded only for acts involving a bad motive or a reckless indifference to the interests of others. Punitive damages are not given for mere carelessness. *Id.* Comment b.

20. 594 P.2d at 46.

21. *Id.* at 48-49. At trial the jury awarded \$2,895,000 in punitive damages, but on appeal the supreme court reduced the award to \$250,000. On rehearing, the court modified its ruling and raised the award to \$500,000. 615 P.2d 621, 624 (Alaska 1980), *modifying* 594 P.2d 38 (Alaska 1979).

22. 297 N.W.2d 727, *cert. denied*, 101 S. Ct. 320 (1980).

ing defective products in "flagrant disregard of the public safety."<sup>23</sup> The court expressed concern for the possibility of overpunishing a manufacturer that is potentially liable to many plaintiffs,<sup>24</sup> but stated that if consideration is given to the manufacturer's wealth and the degree to which it already had been punished, excessive verdicts would not result.<sup>25</sup>

The Minnesota Supreme Court applied the standard used by the trial court when it reviewed the punitive damage award of \$1,000,000:<sup>26</sup> the defendant must act "maliciously or in a willful or wanton manner."<sup>27</sup> A wanton act is one committed in "reckless disregard of the rights of others, evincing reckless indifference to consequences to the life or limb or health of another."<sup>28</sup> Applying this standard to the facts of the case, the court found that the evidence supported the punitive damage award even though the defendant had complied with federal safety regulations in the manufacture of its product.<sup>29</sup> The evidence showed that although the defendant knew the federal safety test to be so unreliable that indisputably dangerous products could pass it,<sup>30</sup> the defendant did not develop more accurate safety indicators of its own. These facts, coupled with the defendant's failure to warn of the danger and refusal to reduce the hazard of its product, warranted the jury's substantial

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23. *Id.* at 733 (quoting Owen, *supra* note 11, at 1258-60).

24. *Id.* at 740-41. The undesirability of financially running manufacturers through numerous large punitive damage awards is the most frequently raised argument against punitive damages in products liability suits. See Coccia & Morrissey, *supra* note 6; Fulton, *supra* note 6; Hoening, *supra* note 6; Snyman, *supra* note 6; Tozer, *supra* note 6. At least one court has accepted this argument. See Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1967).

25. 297 N.W.2d at 741. Professor Owen suggests that when determining the amount of punitive damages a jury should consider, among other factors, the financial condition of the manufacturer and the probable effect of a particular judgment, and the total civil punishment the manufacturer probably would receive from other lawsuits. Owen, *supra* note 11, at 1319.

26. 297 N.W.2d at 739. The court noted that in 1978 the Minnesota legislature had changed the legal standard for punitive damage recovery, but ruled that the former standard was appropriate for this case, which originally was tried before the change in the law. *Id.* at 739 n.6.

27. *Id.* at 738 n.5.

28. *Id.*

29. *Id.* at 734-35.

30. *Id.* at 734. The flammability test was so unreliable that newspaper print would pass with a 48% margin of safety. *Id.*



punitive damage award.<sup>31</sup>

In *Grimshaw v. Ford Motor Co.*,<sup>32</sup> a products liability suit based on negligence and strict liability, the California Court of Appeal held that an injured plaintiff could recover punitive damages in a strict products liability suit. The court reasoned that because both government safety standards and the criminal law had failed to protect consumers from defective products, the punitive damage remedy was necessary to deter manufacturer misconduct.<sup>33</sup> The court applied the standard for punitive damage recovery set forth in section 3294 of the California Civil Code, which authorizes punitive damages where the defendant's acts constituted "oppression, fraud, or malice."<sup>34</sup> Interpreting "malice" to include conduct "evincing callous and conscious disregard of public safety by those who manufacture and market mass produced articles,"<sup>35</sup> the court found the \$3,500,000 punitive damage award to be amply supported by the evidence. The manufacturer had shown callous indifference to public safety in marketing a product that its own tests had shown to be highly dangerous. Although the manufacturer could have corrected the defect at minimal cost, it made a conscious decision not to do so.<sup>36</sup> Calling the manufacturer's conduct "reprehensible," the court held that the \$3,500,000 punitive damage award was not excessive.<sup>37</sup>

The Supreme Court of Ohio recently upheld awards of punitive damages in *Leichtamer v. American Motors Corp.*,<sup>38</sup> a strict products liability suit brought by two plaintiffs injured in the same accident. Without discussing the narrow issue of the propriety of punitive damages in products liability litigation, the court stated that

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31. *Id.* at 741.

32. — Cal. App. 3d —, 174 Cal. Rptr. 348 (1981).

33. *Id.* at —, 174 Cal. Rptr. at 382-83.

34. *Id.* at —, 174 Cal. Rptr. at 383. CAL. CIV. CODE § 3294(a) (West Supp. 1981) provides:

In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

*Id.*

35. — Cal. App. 3d at —, 174 Cal. Rptr. at 382.

36. *Id.* at —, 174 Cal. Rptr. at 384-85.

37. *Id.* at —, 174 Cal. Rptr. at 388-89.

38. 67 Ohio St. 2d 456, 424 N.E.2d 568 (1981).

Ohio law always had permitted punitive damages in tort cases involving "fraud, malice, or insult."<sup>39</sup> Citing *Columbus Finance Inc. v. Howard*,<sup>40</sup> the court said that "intentional, reckless, wanton, willful and gross acts which cause injury to person or property" could constitute malice.<sup>41</sup> In the products liability context, manufacturer conduct manifesting a "flagrant indifference to the possibility that the product might expose consumers to unreasonable risks of harm" could support an award of punitive damages.<sup>42</sup> Because the manufacturer represented its product as "tough and reliable" without having performed safety tests on it, the court upheld the punitive damage awards of \$100,000 and \$1,000,000.<sup>43</sup>

### *Recovery Based on Multiple Theories of Liability*

Courts in other jurisdictions also have upheld punitive damage awards in products liability suits based on multiple theories of liability. Typically the plaintiff alleged some combination of strict liability, breach of warranty, negligence, and fraud as alternative bases of liability, and the jury returned a general verdict, finding the defendant liable. When the jury returned a general verdict, the court could not determine which theory served as the basis for the jury's finding, or whether all of the theories supported the jury's conclusion. Because the jury may have based its finding on the strict liability theory alone, the court's subsequent allowance of a punitive damage award was at least an implicit holding that punitive damages are appropriate in strict products liability cases.

In *Moore v. Jewel Tea Co.*,<sup>44</sup> a products liability suit based on strict liability and negligence, the jury returned a general verdict against the defendant, awarding \$900,000 in compensatory and \$10,000 in punitive damages. Without discussing whether punitive damages were appropriate when strict liability had been a possible basis for the jury's finding of liability, the Illinois Court of Appeals

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39. *Id.* at 657 (citing *Roberts v. Mason*, 10 Ohio St. 277 (1859)).

40. 42 Ohio St. 2d 178, 327 N.E.2d 654 (1975) (punitive damages not allowed for judgment creditor's wrongful execution).

41. 67 Ohio St. 2d at —, 424 N.E.2d at 579.

42. *Id.*

43. *Id.* at —, 424 N.E.2d at 582.

44. 116 Ill. App. 2d 109, 253 N.E.2d 636 (1969), *aff'd*, 46 Ill. 2d 288, 263 N.E.2d 103 (1970).

affirmed the punitive damage award.<sup>45</sup> The court identified willful and wanton conduct as the standard for punitive damage recovery and interpreted this standard to include conduct where "the failure to exercise care is so gross that it shows a lack of regard for the safety of others."<sup>46</sup> Under this standard, the court concluded that the defendant's knowledge of the dangerous propensities of its product, coupled with its repeated failure to warn consumers, presented a jury question as to willful and wanton behavior.<sup>47</sup> Accordingly, the court did not disturb the jury's punitive damage award.<sup>48</sup>

Similar conduct by the manufacturer in *Gillham v. Admiral Corp.*<sup>49</sup> led the United States Court of Appeals for the Sixth Circuit to uphold a punitive damage award of \$100,000, reversing the district court's judgment *non obstante verdicto* in favor of the defendant manufacturer. At trial the plaintiff pleaded the alternative theories of strict liability, negligence, and breach of warranty, and the jury returned a general verdict as to liability. Without discussion, the appellate court assumed that Ohio law permitted a punitive damage award in such a case.<sup>50</sup> The court stated that a punitive damage award required a finding of "fraud, insult, or malice," but malice could be inferred from conduct and surrounding circumstances.<sup>51</sup> Conduct giving rise to an inference of malice included "reckless, wanton, willful and gross acts which cause injury to person or property."<sup>52</sup> The court concluded that the manufacturer's knowledge of the grave danger posed by its product and its failure to warn consumers or redesign the product were sufficient grounds to permit an inference of malice.<sup>53</sup>

In *Rinker v. Ford Motor Co.*,<sup>54</sup> another strict liability and negli-

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45. *Id.* at 147, 253 N.E.2d at 654.

46. *Id.* at 136, 253 N.E.2d at 648-49 (citing *Madison v. Wigal*, 118 Ill. App. 2d 564, 153 N.E.2d 90 (1958)).

47. *Id.* at 136-37, 253 N.E.2d at 649.

48. *Id.* at 146, 253 N.E.2d at 653-54.

49. 523 F.2d 102 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976).

50. *Id.* at 109.

51. *Id.* at 108.

52. *Id.* (quoting *Columbus Fin., Inc. v. Howard*, 42 Ohio St. 2d 178, 184, 327 N.E.2d 654, 658 (1975)).

53. *Id.* at 109.

54. 567 S.W.2d 655 (Mo. App. 1978). *Rinker* is discussed in 1979 WASH. U.L.Q. 298.

gence suit in which the jury returned a general verdict, the Missouri Court of Appeals upheld a punitive damage award of \$460,000. Although the court did not consider the narrow issue of punitive damages and strict products liability theory, it discussed the propriety of punitive damage awards in products liability suits generally.<sup>55</sup> After noting Professor Owen's article and decisions in other jurisdictions,<sup>56</sup> the court stated that punishment and deterrence were as much needed in the products liability area as in the more traditional torts.<sup>57</sup> The court rejected the argument that a manufacturer potentially liable to many plaintiffs would be overly punished by multiple punitive damage awards, pointing out that both trial and appellate courts in Missouri had means for controlling excessive jury awards.<sup>58</sup>

Having established the propriety of punitive damages in products liability suits, the court applied the standard for punitive damage recovery outlined in the Missouri Approved Jury Instructions: the defendant's conduct must show "complete indifference to or conscious disregard for the safety of others."<sup>59</sup> Evidence that the defendant had notice of injuries caused by its defective automobile but took no steps to warn owners or recall the automobiles supported the jury's finding of a "conscious disregard for the safety of others."<sup>60</sup>

In other products liability cases, courts allowed the plaintiffs to claim punitive damages, but for various reasons the punitive damage issue never reached the jury. In *Drake v. Wham-O Manufacturing Co.*,<sup>61</sup> a suit based on strict products liability, negligence,

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55. 567 S.W.2d at 667-69.

56. *Id.* at 668-69. The court cited *Gillham v. Admiral Corp.*, 523 F.2d 102 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976); *Roginsky v. Richardson-Merrell Inc.*, 378 F.2d 832 (2d Cir. 1967); *G.D. Searle & Co. v. Superior Court*, 49 Cal. App. 3d 22, 122 Cal. Rptr. 218 (1975); *Pease v. Beech Aircraft Corp.*, 38 Cal. App. 3d 450, 113 Cal. Rptr. 416 (1974); and *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967). 567 S.W.2d at 667-69.

57. 567 S.W.2d at 668.

58. *Id.* at 669. Generally, a trial judge can require a plaintiff to choose between remitting a portion of the punitive damage award or undergoing a new trial, and an appellate court can order remittitur or a new trial if the verdict is clearly excessive. See Owen, *supra* note 11, at 1321.

59. 567 S.W.2d at 667 (quoting MO. APPROVED JURY INSTR. § 10.02).

60. *Id.* at 668.

61. 373 F Supp. 608 (E.D. Wis. 1974).

and breach of implied warranty, the United States District Court for the Eastern District of Wisconsin permitted the plaintiff to amend her complaint to include a claim for punitive damages. In response to the defendant's argument that punitive damages were logically inconsistent with strict liability theory, the court acknowledged that because the elements of proof for strict products liability under section 402A of the Restatement (Second) of Torts did not address the manufacturer's conduct, facts alleged on a strict liability theory alone would not support a punitive damage claim. If, however, the plaintiff alleged additional facts demonstrating the manufacturer's wanton or reckless behavior, the court would permit the punitive damage claim.<sup>62</sup> Shortly after this ruling, the defendant settled the suit for \$65,000.<sup>63</sup>

Six years after the *Drake* decision, the Supreme Court of Wisconsin clarified the circumstances under which punitive damages could be recovered in products liability actions. In *Wangen v. Ford Motor Co.*,<sup>64</sup> a consolidated products liability suit brought by personal injury plaintiffs and wrongful death plaintiffs, the court held that: punitive damages are recoverable in products liability actions based on either strict liability or negligence; punitive damages are recoverable in survivors suits, but not in wrongful death actions; and punitive damages are recoverable by parents in actions for loss of society and companionship of a child.<sup>65</sup> In a detailed discussion, the court rejected the argument that punitive damage awards in products liability cases cause undesirable social consequences by financially ruining many businesses. The court pointed to studies showing that the number of cases in which punitive damages are awarded is minimal<sup>66</sup> and concluded that punitive damages are as much needed in the products liability field as in any other area of tort law to punish and deter socially unacceptable conduct.<sup>67</sup>

To recover punitive damages in Wisconsin, a plaintiff must demonstrate manufacturer conduct "showing a reckless indiffer-

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62. *Id.* at 610. Professor Owen refutes the incompatibility argument following the same reasoning as the court. *See* note 17 *supra*.

63. Owen, *supra* note 11, at 1327 n.333.

64. 97 Wis. 2d 260, 294 N.W.2d 437 (1980).

65. *Id.* at —, 294 N.W.2d at 441.

66. *Id.* at —, 294 N.W.2d at 453-62.

67. *Id.* at —, 294 N.W.2d at 453.

ence to or disregard of the rights of others.”<sup>68</sup> In addition, the plaintiff must prove such misconduct by “clear, satisfactory, and convincing” evidence.<sup>69</sup> Having clarified the circumstances under which a jury may award punitive damages in products liability cases, the supreme court affirmed the trial court’s denial of the manufacturer’s motion to dismiss the plaintiff’s claim for punitive damages, and remanded the case for trial.<sup>70</sup>

The District Court of Appeal of Florida recently decided in *American Motors Corp. v. Ellis*<sup>71</sup> that a plaintiff may recover punitive damages in a strict products liability case. At trial the plaintiff alleged both strict liability and negligence as bases for liability and claimed punitive damages. In reviewing the trial court’s directed verdict for the manufacturer on the punitive damage claim, the appellate court quoted approvingly from the Wisconsin Supreme Court’s decision in *Wangen*, which allowed punitive damage claims in products liability suits based on either strict liability or negligence.<sup>72</sup> The court then identified the standard for punitive damage recovery as “willfulness, recklessness, maliciousness, outrageous conduct, oppression or fraud.”<sup>73</sup> Because the evidence showed that the manufacturer was aware of the dangerous defect in its product before marketing and refused to correct the problem in order to save money, the claim for punitive damages presented a question for the jury.<sup>74</sup> Accordingly, the court of appeals reversed the trial court’s ruling and ordered a new trial.<sup>75</sup>

Courts in two other jurisdictions have held that punitive damage claims are appropriate in multi-theory products liability cases. The plaintiff in *Vollert v. Summa Corp.*<sup>76</sup> alleged strict liability, negligence, and breach of warranty against the manufacturer of a defective helicopter. In a memorandum opinion and order, the United States District Court for the District of Hawaii ruled that the pu-

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68. *Id.* at —, 294 N.W.2d at 442.

69. *Id.* at —, 294 N.W.2d at 458.

70. *Id.* at —, 294 N.W.2d at 467.

71. 403 So. 2d 459 (1981).

72. *Id.* at 467.

73. *Id.*

74. *Id.* at 468.

75. *Id.* at 469.

76. 389 F Supp. 1348 (D. Hawaii 1975).

nitive damage claim was proper.<sup>77</sup> The court discussed the danger of excessively punishing a manufacturer potentially liable to many plaintiffs, but decided that the Supreme Court of Hawaii would not bar a punitive damage claim "simply because there *might be* other suits filed against defendant."<sup>78</sup>

In *Casrell v. Altec Industries, Inc.*<sup>79</sup> and *Atkins v. American Motor Corp.*,<sup>80</sup> the Supreme Court of Alabama adopted the "extended manufacturer's liability doctrine" to serve as the basis for liability in products liability actions in Alabama. According to this doctrine, a manufacturer, supplier, or seller who marketed a product not reasonably safe for its intended use would be negligent as a matter of law.<sup>81</sup> The fault of the manufacturer was in marketing a defective product that caused injury to person or property.<sup>82</sup> As long as a causal relation existed between the manufacturer's conduct and the defective product, the manufacturer would be liable because it "created an unreasonable risk of harm."<sup>83</sup>

According to the Supreme Court of Alabama, the practical distinction between the extended manufacturer's liability doctrine and strict liability theory is that Alabama's doctrine of extended liability retains the traditional focus on the defendant's conduct, and thus allows the defenses of contributory negligence and assumption of risk.<sup>84</sup> The court stated that the new doctrine could serve as the basis of a wrongful death action as well as a personal injury suit.<sup>85</sup> In wrongful death actions in Alabama, the jury may award a plaintiff damages to punish a defendant and deter it and others from similar future conduct.<sup>86</sup> Thus, at least in wrongful death actions, punitive damages may be recovered even when the basis of the suit is the extended liability doctrine. In addition, because the new doctrine retains the concept of fault, it is concep-

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77. *Id.* at 1351.

78. *Id.*

79. 335 So. 2d 128 (1976).

80. 335 So. 2d 134 (1976).

81. *Casrell v. Altec Indus., Inc.*, 335 So. 2d at 131-32.

82. *Id.* at 132.

83. *Id.*

84. *Atkins v. American Motor Corp.*, 335 So. 2d at 143; *Casrell v. Altec Indus., Inc.*, 335 So. 2d at 134.

85. *Casrell v. Altec Indus., Inc.*, 335 So. 2d at 134.

86. *Id.*

tually compatible with traditional punitive damage doctrine and probably could serve as the basis of a punitive damage claim in a personal injury suit.

This brief survey of the decisions of courts which permit punitive damage claims in products liability suits reveals that the policy arguments against punitive damages in strict products liability cases have not been well received. Those courts offering a rationale for allowing punitive damage claims in strict products liability actions uniformly accepted Professor Owen's thesis that punitive damages effectively deter manufacturer misconduct.<sup>87</sup> Fears of pushing manufacturers to financial ruin through excessive damage awards are unfounded if juries consider the factors of the defendant's relative wealth and the degree to which it has been punished in prior lawsuits, and if judges closely control jury awards.<sup>88</sup> The size of the awards upheld by these courts<sup>89</sup> illustrates that the courts are very serious about punishing manufacturer misconduct and setting an example for other manufacturers through the punitive damage remedy.

Whatever the particular standard for punitive damage recovery,<sup>90</sup> certain types of manufacturer misconduct were punished consistently. Premarketing knowledge of a product's dangerous propensities coupled with a failure to warn consumers or reduce the hazard,<sup>91</sup> or postmarketing knowledge of product-related injuries together with a failure to warn consumers, recall the product, develop more accurate safety tests, or correct the defect<sup>92</sup> incurred

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87. See notes 18, 23 & accompanying text *supra*.

88. See notes 24, 58, 78 & accompanying text *supra*.

89. Day involved a \$500,000 award; *Gryc*, \$1,000,000; *Grimshaw*, \$3,500,000; *Leichtamer*, \$1,100,000; *Moore*, \$10,000; *Gillham*, \$100,000; *Rinker*, \$460,000. See notes 21, 26, 37, 43, 44, 49, 54 & accompanying text *supra*.

90. See notes 19, 27, 35, 41, 46, 52, 59, 73 & accompanying text *supra*.

91. See, e.g., *Grimshaw v. Ford Motor Co.*, — Cal. App. 3d —, 174 Cal. Rptr. 348 (1981) (manufacturer knew automobile gasoline tank was prone to explosion in rear-end collisions); *Moore v. Jewel Tea Co.*, 116 Ill. App. 2d 109, 253 N.E.2d 636 (1969) (manufacturer knew high percentage of caustic soda in its drain-cleaning product was extremely dangerous), *aff'd*, 46 Ill. 2d 288, 263 N.E.2d 103 (1970); *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727 (manufacturer knew its fabric, used in children's sleepwear, was highly flammable), *cert. denied*, 101 S. Ct. 320 (1980).

92. See *Sturm, Ruger & Co. v. Day*, 594 P.2d 38 (Alaska 1979) (manufacturer knew of injuries and deaths from defectively designed handgun), *modified*, 615 P.2d 621 (Alaska 1980); *Moore v. Jewel Tea Co.*, 116 Ill. App. 2d 109, 253 N.E.2d 636 (1969) (manufacturer



heavy punishment. Manufacturers and defense attorneys may argue that the standards for punitive damage recovery do not give adequate notice of unacceptable conduct,<sup>93</sup> but they cannot mistake the determination shown by some courts to punish manufacturers who refuse to remedy the situation when they have notice of a dangerous defect in their product.

### *Claims Permitted But Recovery Denied*

Courts in other jurisdictions, including Tennessee, Arizona, Texas, and California, also acknowledge that punitive damages may be appropriate in strict products liability suits under certain circumstances, but they so strictly apply the legal standards for punitive damage recovery that plaintiffs seldom recover punitive damage awards. In *Johnson v. Husky Industries, Inc.*,<sup>94</sup> a wrongful death action based solely on strict products liability, the United States Court of Appeals for the Sixth Circuit assumed without discussion that Tennessee courts would permit punitive damages in strict products liability suits. Accordingly the court upheld the submission of the punitive damage claim to the jury but set aside the jury's award of \$212,500.<sup>95</sup> Tennessee law allowed punitive damages in cases involving wrongful acts done "so recklessly as to imply a disregard for social obligations, or where there is such willful misconduct or entire want of care as to raise a presumption of conscious indifference to consequences."<sup>96</sup> Applying this standard of recovery to the facts of the case, the court held that the evidence showing the inadequacy of the defendant's warning was insufficient to support punitive damages as a matter of law.<sup>97</sup>

In *d'Hedouville v. Pioneer Hotel Co.*<sup>98</sup> the United States Court

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knew of numerous injuries caused by exploding Drano cans), *aff'd*, 46 Ill. 2d 288, 263 N.E.2d 103 (1970); *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727 (manufacturer knew of children suffering burns while clothed in its fabric), *cert. denied*, 101 S. Ct. 320 (1980); *Rinker v. Ford Motor Co.*, 567 S.W.2d 655 (Mo. App. 1978) (manufacturer knew of numerous accidents caused by broken fast-idle cams).

93. See, e.g., *Coccia & Moorisey*, *supra* note 6; *Fulton*, *supra* note 6; *Hoenig*, *supra* note 6.

94. 536 F.2d 645 (6th Cir. 1976).

95. *Id.* at 650-51.

96. *Id.* at 650 (citing *Inland Container Corp. v. March*, 529 S.W.2d 43, 45 (Tenn. 1975)).

97. *Id.* at 651.

98. 552 F.2d 886 (9th Cir. 1977).

of Appeals for the Ninth Circuit also did not discuss the propriety of punitive damages in a strict products liability case but assumed that Arizona law would permit such a claim. In this suit, which was based solely on strict products liability, the court applied the "reckless indifference" standard of section 908 of the Restatement (Second) of Torts<sup>99</sup> to determine whether the district court properly submitted the punitive damage issue to the jury.<sup>100</sup> Although the jury did not award punitive damages,<sup>101</sup> the Ninth Circuit held that evidence showing the defendant's failure to test the product adequately before marketing, and its misrepresentation of the product's safety after it became aware of the dangerous defect, would have supported a jury's finding of "reckless indifference."<sup>102</sup>

Pennsylvania also has adopted the Restatement standard for recovery of punitive damages. In *Hoffman v. Sterling Drug, Inc.*,<sup>103</sup> a products liability suit based on strict liability, negligence, and fraud in which the jury returned a general verdict, the United States District Court for the Middle District of Pennsylvania refused to allow the plaintiff's claim for punitive damages. On appeal, the United States Court of Appeals for the Third Circuit held that the district court should have permitted the punitive damage claim,<sup>104</sup> and that the jury should have decided whether the defendant's warning of possible harm from its product was so inadequate as to reflect "reckless indifference" to the safety of consumers.<sup>105</sup>

On retrial plaintiff Hoffman alleged that the defendant had marketed its product with actual knowledge of or wanton disregard for its harmful effects.<sup>106</sup> In a memorandum opinion, the United States District Court for the Middle District of Pennsylvania ruled that one plaintiff could not punish a defendant for the defendant's injuries to all consumers.<sup>107</sup> Noting that many other parties had filed

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99. See note 19 *supra*.

100. 552 F.2d at 894.

101. *Id.* at 894 n.18.

102. *Id.* at 894.

103. 485 F.2d 132 (3d Cir. 1973), *cert. denied*, 424 U.S. 913 (1976).

104. *Id.* at 144-46.

105. *Id.* at 145-46.

106. *Hoffman v. Sterling Drug, Inc.*, 374 F Supp. 850, 855 (M.D. Pa. 1974).

107. *Id.* at 856.

suit against the same defendant, the court stated that the purpose of punitive damages was not to punish an outrage to society, but to penalize the defendant for its conduct in relation to the particular plaintiff.<sup>108</sup> Thus, a plaintiff's punitive damage recovery must be reasonably related to his recovery of compensatory damages.<sup>109</sup>

Three years after *Hoffman*, the United States District Court for the Eastern District of Pennsylvania allowed a punitive damage claim in *Thomas v. American Cystoscope Makers, Inc.*,<sup>110</sup> an action based solely on strict products liability. In the absence of relevant Pennsylvania decisions, the court followed *Hoffman* and assumed that no "per se preclusion" existed in Pennsylvania against punitive damages in strict products liability cases.<sup>111</sup> Interpreting the standard of section 908 of the Restatement,<sup>112</sup> the court said that a finding of "recklessness" required "a conscious choice on the part of the alleged wrongdoer to act despite clear knowledge of a highly probable risk of serious harm."<sup>113</sup> Mere negligence, or even gross negligence, could not support a claim for punitive damages.<sup>114</sup> Applying this standard, the court found that the defendant had failed to take steps to avoid a clearly foreseeable risk of harm but had not realized fully the risk involved.<sup>115</sup> Because the manufacturer had not possessed the conscious awareness required by section 908, the court set aside the punitive damage award.<sup>116</sup>

Texas is another jurisdiction in which courts permit punitive damage claims in strict products liability cases but apply the standard of recovery so strictly that punitive damages have not been recovered. In Texas, punitive damage claims have been made only in strict products liability suits involving wrongful death,<sup>117</sup> and

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108. *Id.*

109. *Id.* at 857. This ruling reflects the concern of some scholars that a defendant potentially liable to many plaintiffs should not be punished excessively. See note 24 *supra*.

The defendant settled the suit for \$600,000. 18 AM. TRIAL LAW. A. NEWS LETTER 120 (1975).

110. 414 F. Supp. 255 (E.D. Pa. 1976).

111. *Id.* at 264 n.13. The court also stated that it knew of no reason why it should disallow the punitive damage claim on policy grounds. *Id.*

112. See note 19 *supra*.

113. *Id.* at 266.

114. *Id.* at 267.

115. *Id.*

116. *Id.*

117. See, e.g., *Maxey v. Freightliner Corp.*, 623 F.2d 395, *reh. en banc granted*, 634 F.2d

the courts have allowed the claim on the authority of the Texas Constitution, which provides that "[e]very person, corporation, or company, that may commit a homicide, through willful act, or omission, or gross neglect, shall be responsible, in exemplary damages, to the surviving husband, widow, heirs of his or her body, or such of them as there may be . . . ."<sup>118</sup> Thus the Texas Constitution provides both the rationale for allowing punitive damage claims and the legal standard for determining when they are proper.

In *Kritser v. Beech Aircraft Corp.*,<sup>119</sup> a wrongful death action based on strict products liability, the United States Court of Appeals for the Fifth Circuit held that under Texas law a finding of "gross neglect" was precluded because the manufacturer had warned consumers of possible defects in an aircraft fuel system. Even though the warning may have been inadequate, the manufacturer's conduct was not the "conscious indifference toward the public" that constituted the gross neglect sufficient to support a claim for punitive damages.<sup>120</sup> The court held that in the absence of evidence of a willful act or omission by the defendant, the district court properly had refused to submit the punitive damage claim to the jury.<sup>121</sup>

In *Maxey v. Freightliner Corp.*,<sup>122</sup> the Fifth Circuit applied the same "willful act, or omission, or gross neglect" standard to reverse a \$10,000,000 punitive damage award in a wrongful death action based on strict products liability. The court said that under Texas law a showing that the defendant had exercised even "slight care" would preclude a finding of gross neglect.<sup>123</sup> Accordingly, the manufacturer's compliance with industry custom in designing a truck's fuel system was the "slight care" that avoided gross neglect.<sup>124</sup>

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1008 (5th Cir. 1980); *Kritser v. Beech Aircraft Corp.*, 479 F.2d 1089 (5th Cir. 1973); *Heil Co. v. Grant*, 534 S.W.2d 916 (Tex. Civ. App. 1976).

118. TEX. CONST. art. 16, § 26; *see, e.g., Maxey v. Freightliner Corp.*, 623 F.2d 395, 398, *reh. en banc granted*, 634 F.2d 1008 (5th Cir. 1980).

119. 479 F.2d 1089 (5th Cir. 1973).

120. *Id.* at 1097.

121. *Id.*

122. 623 F.2d 395, *reh. en banc granted*, 634 F.2d 1008 (5th Cir. 1980).

123. *Id.* at 398-99 (citing *Hernandez v. Smith*, 552 F.2d 142 (5th Cir. 1977)).

124. *Id.* at 399. The dissenting judge took issue with the majority's view that "slight care" precluded a finding of gross negligence. He pointed out that in *Atlas Chem. Indus.*,

Neither the Texas legislature nor judiciary has decided whether punitive damage claims are proper in strict products liability suits not involving wrongful death. In *Newding v. Kroger Co.*,<sup>125</sup> an injured plaintiff instituted a products liability suit on strict liability and negligence theories. The Texas Court of Civil Appeals stated that a punitive damage claim was proper as part of the plaintiff's negligence action, and punitive damages could be awarded if the plaintiff proved gross negligence.<sup>126</sup> The court defined gross negligence as an "entire want of care [that raises an inference] of a conscious indifference to the right or welfare of [others]."<sup>127</sup> Applying this standard to the facts of the case, the court held that, as a matter of law, the manufacturer's failure to use a safer bottle cap was not gross negligence.<sup>128</sup>

When confronted with a punitive damage claim in a personal injury suit based solely on strict products liability theory, the Texas courts may choose to expand the holding of *Newding* and allow the claim. If so, plaintiffs may expect to have their punitive damage claims subjected to a strict application of the Texas standard for punitive damage recovery.

The California courts have taken an approach to punitive damages in products liability suits similar to that of Texas courts. California courts allow punitive damage claims in strict products liability actions, but they rarely permit recovery.<sup>129</sup> In *Barth v. B.F. Goodrich Tire Co.*,<sup>130</sup> a combined wrongful death and personal injury action based on strict liability, negligence, and breach of warranty, the jury returned a general verdict of liability, awarding substantial compensatory but no punitive damages. The California Court of Appeal held that the punitive damage claims of the personal injury plaintiffs were proper, but that because the California

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*Inc. v. Anderson*, 524 S.W.2d 681 (Tex. 1975), the Texas Supreme Court had ruled that evidence of "slight care" on the part of the defendant would not preclude an award of exemplary damages. The judge believed that the court should have followed *Atlas Chemical* rather than *Hernandez*. 623 F.2d at 400-03 (Johnson, J., dissenting).

125. 554 S.W.2d 15 (Tex. Civ. App. 1977).

126. *Id.* at 18.

127. *Id.* (quoting *Atlas Chem. Indus., Inc. v. Anderson*, 524 S.W.2d 681, 688 (Tex. 1975)).

128. *Id.*

129. *Grimshaw v. Ford Motor Co.*, — Cal. App. 3d —, 174 Cal. Rptr. 348 (1981) is a major exception. See notes 32-37 & accompanying text *supra*.

130. 265 Cal. App. 2d 228, 71 Cal. Rptr. 306 (1968).

Code of Civil Procedure prohibited punitive damages in wrongful death actions,<sup>131</sup> the punitive damage claims of the wrongful death plaintiffs should not have been permitted.<sup>132</sup> In *Pease v. Beech Aircraft Corp.*,<sup>133</sup> a products liability suit based on strict liability, negligence, and fraud, the court of appeal held that although plaintiffs could not claim punitive damages in wrongful death suits, they could recover punitive damages in survivors' actions because the California Probate Code authorized punitive damages in such suits.<sup>134</sup> Thus, in California, punitive damage claims are appropriate in strict products liability actions not involving wrongful death.

In products liability cases the California courts apply the standard for punitive damage recovery set forth in section 3294 of the California Civil Code, which authorizes punitive damages when the defendant's acts constitute "oppression, fraud, or malice."<sup>135</sup> In *Pease*, the plaintiff alleged fraud as the basis of his punitive damage claim, but because of error in the jury instructions, the court ordered a new trial on the issue of punitive damages.<sup>136</sup> In *G.D.*

131. CAL. CIV. PROC. CODE § 377 (West 1973) provides:

When the death of a person is caused by the wrongful act or neglect of another, his heirs may maintain an action for damages against the person causing the death. In every action under this section, such damages may be given as under all the circumstances of the case, may be just, but shall not include damages recoverable under Section 573 of the Probate Code, [that is, punitive damages].

*Id.*

132. 265 Cal. App. 2d at —, 71 Cal. Rptr. at 313.

133. 38 Cal. App. 3d 450, 113 Cal. Rptr. 416 (1974).

134. *Id.* at —, 113 Cal. Rptr. at 424. CAL. PROB. CODE § 573 (West Supp. 1981) provides:

When a person having a cause of action dies before judgment, the damages recoverable by his executor or administrator are limited to such loss or damage as the decedent sustained or incurred prior to his death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had he lived

*Id.* In California, as in most jurisdictions, a survivor's action is brought by the administrator of the decedent's estate against the tortfeasor to recover damages for the injury the decedent himself suffered before death. A wrongful death action, on the other hand, is brought by the decedent's personal representative on behalf of dependents of the decedent who suffered loss of support as a result of the decedent's death. See D. DOBBS, LAW OF REMEDIES § 8.2 (1973); W. PROSSER, LAW OF TORTS §§ 126-127 (1971).

135. See note 34 *supra*.

136. *Pease v. Beech Aircraft Corp.*, 38 Cal. App. 3d 470, 474, 113 Cal. Rptr. 416, 427-32 (1974).

*Searle & Co. v. Superior Court*,<sup>137</sup> a products liability suit based on strict liability and negligence, the court of appeal stated that in products liability cases the "malice in fact" required by the Civil Code was a "conscious disregard of the safety of others."<sup>138</sup> Using this standard, the court found the punitive damage claim insufficient because it did not allege an "intent to injure" or a "conscious disregard of the safety of others."<sup>139</sup>

The California Court of Appeal in *Sabich v. Outboard Marine Corp.*<sup>140</sup> discussed the burden of proof a plaintiff must sustain in order to recover punitive damages. At trial the plaintiff alleged strict products liability and fraud as theories of liability, and fraud as the statutory basis for punitive damages.<sup>141</sup> The jury returned a general verdict as to liability, and awarded the plaintiff \$600,000 in compensatory and \$1,254,000 in punitive damages.<sup>142</sup> The appellate court reversed the punitive damage award because the trial court had not instructed the jury that the fraud required by the Civil Code must be established by "clear and convincing" evidence.<sup>143</sup> According to the court, this requirement would apply with equal force to malice and oppression as bases for punitive damages.<sup>144</sup>

These cases demonstrate that in California recovery of punitive damages in strict products liability cases will depend on a clear and convincing showing of oppression, fraud, or malice. In the products liability context, a "conscious disregard of the safety of

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137. 49 Cal. App. 3d 22, 122 Cal. Rptr. 218 (1975).

138. *Id.* at 31-32, 122 Cal. Rptr. at 225.

139. *Id.* at 32, 122 Cal. Rptr. at 225. The court stated that charges of wrongful, willful, wanton, reckless, or unlawful conduct do not allege malice, and thus cannot support a punitive damage claim. *Id.*

140. 60 Cal. App. 3d 591, 131 Cal. Rptr. 703 (1976).

141. *Id.* at —, 131 Cal. Rptr. at 709.

142. *Id.* at —, 131 Cal. Rptr. at 705.

143. *Id.* at —, 131 Cal. Rptr. at 711.

144. *Id.* at —, 131 Cal. Rptr. at 711 n.4. The United States Department of Commerce's Model Uniform Product Liability Act, 44 Fed. Reg. 62714 (1979), calls for the same evidentiary standard. Section 120(A) of the Act provides: "Punitive damages may be awarded if the claimant proves by clear and convincing evidence that the harm suffered was the result of the product seller's reckless disregard for the safety of product users, consumers, or others who might be harmed by the product." *Id.* at 62748. In § 102(I), the Act defines "clear and convincing evidence" as: "Proof that not only carries with it the power to persuade the mind as to its probable truth or correctness of fact, but also has an additional element of clinching such truth." *Id.* at 62720.

others" will constitute malice in fact. The failure of most plaintiffs to recover punitive damages indicates that the courts strictly apply the legal standard and the burden of proof, perhaps reflecting Professor Owen's concern that punitive damages be awarded only in the clearest of cases.<sup>145</sup>

This brief examination of decisions in jurisdictions that have allowed punitive damage claims in strict products liability cases, but have not permitted actual recovery, shows that the courts often do not give any rationale for allowing punitive damage claims in the strict products liability context.<sup>146</sup> Those courts that do explain their holdings base their allowance of punitive damage claims on state constitutional guarantees,<sup>147</sup> statutory provisions,<sup>148</sup> or the absence of any indication that state law would prohibit such claims in strict products liability suits.<sup>149</sup>

These cases also show that the success of the plaintiff on the punitive damage issue depends on how strictly the courts construe the applicable standard for punitive damage recovery. For instance, the Ninth Circuit in *Maxey* interpreted the "gross neglect" standard narrowly by ruling that evidence of "slight care" by the defendant precluded gross neglect as a matter of law.<sup>150</sup> Similarly, the United States District Court for the Eastern District of Pennsylvania in *Thomas* read the state standard narrowly to require actual awareness by the defendant that its product was causing injuries.<sup>151</sup> Such strict interpretation of the standards for punitive damage recovery requires the plaintiff to show very aggravated manufacturer misconduct, a burden most plaintiffs have been unable to meet.

In addition, to narrow construction of the punitive damage stan-

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145. See Owen, *supra* note 17, at 1364-68.

146. See *d'Hedouville v. Pioneer Hotel Co.*, 552 F.2d 886 (9th Cir. 1977); *Johnson v. Husky Indus., Inc.*, 536 F.2d 645 (6th Cir. 1976); *Hoffman v. Sterling Drug, Inc.*, 485 F.2d 132 (3d Cir. 1973), *cert. denied*, 424 U.S. 913 (1976).

147. See *Maxey v. Freightliner Corp.*, 623 F.2d 395, *reh. en banc granted*, 634 F.2d 1008 (5th Cir. 1980); *Kritser v. Beech Aircraft Corp.*, 479 F.2d 1089 (5th Cir. 1973).

148. See *Pease v. Beech Aircraft Corp.*, 38 Cal. App. 3d 450, 113 Cal. Rptr. 416 (1974); *Barth v. B.F. Goodrich Tire Co.*, 265 Cal. App. 2d 228, 71 Cal. Rptr. 306 (1968).

149. See *Thomas v. American Cystoscope Makers, Inc.*, 414 F. Supp. 255 (E.D. Pa. 1976).

150. See notes 121-23 & accompanying text *supra*.

151. See notes 110-16 & accompanying text *supra*.



dards, plaintiffs in California must prove their entitlement to punitive damages by "clear and convincing" evidence. The California court explained that this burden of proof required a greater showing than a "preponderance of the evidence," but somewhat less than "beyond a reasonable doubt."<sup>152</sup> Most other jurisdictions merely require that the plaintiff meet the "preponderance of the evidence" burden of proof that is usual in civil cases.<sup>153</sup>

### *Punitive Damages Claims Not Permitted*

Only Louisiana courts have ruled that a plaintiff may not claim punitive damages in a products liability suit. In *Commercial Union Insurance Co. v. Upjohn Co.*,<sup>154</sup> a products liability suit based on strict liability, negligence, and breach of warranty, the United States District Court for the Western District of Louisiana granted the defendant's motion to dismiss the plaintiff's punitive damage claim. The court stated that Louisiana law allowed only compensatory damages in civil suits, leaving punishment to criminal statutes.<sup>155</sup> Therefore, no plaintiff may claim punitive damages in a products liability action governed by Louisiana law, no matter what theory of recovery is involved.<sup>156</sup>

### SUMMARY

This Note has focused on two principal questions: are punitive damages appropriate in a strict products liability suit, and, if so, when are punitive damages warranted? Taken together, the decisions examined in the previous sections indicate that most courts

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152. See notes 140-44 & accompanying text *supra*. The "clear and convincing" standard satisfies those scholars who argue that a punitive damage award is akin to a criminal penalty and thus warrants a stricter burden of proof. See Kirscher, *supra* note 6. Some commentators argue that punishment is exclusively the responsibility of the criminal law, and awards of punitive damages in a civil case, without the procedural safeguards of the criminal process, violate the fourth, fifth, sixth, eighth, and fourteenth amendments to the United States Constitution. See Carsey, *supra* note 6; Ford, *supra* note 6.

153. See, e.g., *Sturm, Ruger & Co. v. Day*, 594 P.2d 38, 47 (Alaska 1979), *modified*, 615 P.2d 621 (Alaska 1980); *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727, 739 (1980), *cert. denied*, 101 S. Ct. 320 (1980).

154. 409 F Supp. 453 (W.D. La. 1976).

155. *Id.* at 458 (following *Vincent v. Morgan's La. & Tex. R.R. & S.S. Co.*, 140 La. 1027, 74 So. 541 (1917)).

156. *Id.*

hold that punitive damages are appropriate in strict products liability suits. The jurisdiction that automatically barred punitive damage claims did so not because of any inherent conflict between strict liability theory and punitive damage doctrine, or because of reasons of public policy, but because the jurisdiction did not recognize punitive damages in civil suits.<sup>157</sup> The majority of jurisdictions have no general ban on punitive damages, and the courts in those states hold uniformly that punitive damages may be claimed in a strict products liability action.<sup>158</sup>

Not all courts permitting punitive damage claims offered reasons to support their action.<sup>159</sup> Typically these courts reviewed a multi-theory products liability suit and a general verdict as to liability. Even though the jury possibly had based its verdict on strict liability theory alone, the court permitted the punitive damage award without discussion. This silence may be taken as an implicit holding that punitive damages are proper in products liability suits regardless of the theory of liability.

The federal courts that permitted punitive damage claims based their holdings on state law allowing punitive damages in general tort actions.<sup>160</sup> The courts in *d'Hedouville*, *Thomas*, and *Vollert* found no indication in the law of Arizona, Pennsylvania, and Hawaii that punitive damages would be prohibited in products liability actions so they permitted plaintiffs to assert claims for punitive damages.

The courts of Texas and California permitted punitive damage claims in special cases pursuant to constitutional or statutory mandate.<sup>161</sup> The Texas Constitution authorizes punitive damages in

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157. See notes 153-56 & accompanying text *supra*.

158. See text accompanying notes 16, 23, 45, 49, 54, 61, 77, 94, 98, 104, 110, 119-23, 131-34, 137-44 *supra*.

159. See *Johnson v. Husky Indus., Inc.*, 536 F.2d 645 (6th Cir. 1976); *Gillham v. Admiral Corp.*, 523 F.2d 102 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976); *Hoffman v. Sterling Drug, Inc.*, 485 F.2d 132 (3d Cir. 1973), *cert. denied*, 424 U.S. 913 (1976); *Sabich v. Outboard Marine Corp.*, 60 Cal. App. 3d 591, 131 Cal. Rptr. 703 (1976); *G.D. Searle & Co. v. Superior Court*, 49 Cal. App. 3d 22, 122 Cal. Rptr. 218 (1975); *Moore v. Jewel Tea Co.*, 116 Ill. App. 2d 109, 253 N.E.2d 636 (1969), *aff'd*, 46 Ill. 2d 288, 263 N.E.2d 103 (1970).

160. See *d'Hedouville v. Pioneer Hotel Co.*, 552 F.2d 886 (9th Cir. 1977); *Thomas v. American Cystoscope Makers, Inc.*, 414 F. Supp. 255 (E.D. Pa. 1976); *Vollert v. Summa Corp.*, 389 F. Supp. 1348 (D. Hawaii 1975).

161. See *Maxey v. Freightliner Corp.*, 623 F.2d 395, *reh. en banc granted*, 634 F.2d 1008 (5th Cir. 1980); *Kritser v. Beech Aircraft Corp.*, 479 F.2d 1089 (5th Cir. 1973); *Pease v.*

wrongful death actions,<sup>162</sup> and California statutes permit punitive damages in survivors' actions, but prohibit them in wrongful death suits.<sup>163</sup> In these special cases the courts needed no additional reasons to allow the punitive damage claims.

In the other cases, the courts offered explanations for their allowance of punitive damage claims in strict products liability suits. Adopting the arguments of Professor Owen, the courts of Minnesota, Alaska, Missouri, and Wisconsin stated that the traditional goals of punishment and deterrence were needed as much in the products liability field as in any other area of torts.<sup>164</sup> The threat of punitive damage awards would have a great deterrent effect in situations where the continued sale of a defective product remained profitable even after payment of compensatory damages to injured plaintiffs. Additionally, punitive damages would further the goal of law enforcement by providing an incentive to sue to persons not seriously injured by a defective product.

The court in *Drake* refuted the argument that punitive damage doctrine was inconsistent with strict liability theory by explaining that a plaintiff can establish the elements of proof addressed to the issue of strict liability and then make a supplemental showing of aggravated manufacturer conduct to support the remedy of punitive damages.<sup>165</sup> After this decision, other courts were not troubled by the incompatibility argument.<sup>166</sup>

Finally, the courts that explain their decisions to allow punitive damage claims reject the argument that punitive damages in products liability litigation will destroy socially useful enterprises by pushing manufacturers into bankruptcy.<sup>167</sup> The danger of overpunishment can be minimized by careful attention in the measurement of punitive damage awards to the manufacturer's financial status and the degree to which it has been punished in prior suits.<sup>168</sup> Furthermore, should the jury award an excessive amount despite these

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Beech Aircraft Corp., 38 Cal. App. 3d 450, 113 Cal. Rptr. 416 (1974).

162. See note 118 & accompanying text *supra*.

163. See note 134 & accompanying text *supra*.

164. See notes 16-18, 22-23, 32-33, 54-57, 61, 64-67 & accompanying text *supra*.

165. See note 61 & accompanying text *supra*.

166. See notes 18, 23, 33, 67 & accompanying text *supra*.

167. See notes 66-68 & accompanying text *supra*.

168. See notes 25, 58, 66-67 & accompanying text *supra*.

factors, trial and appellate judges can order a remittitur or grant a new trial.<sup>169</sup> Thus most courts take the overpunishment argument seriously, but do not accept it as a reason to bar completely punitive damage claims.

As for the question of when punitive damages are appropriate in a strict products liability action, courts will allow an award only when they are convinced that the plaintiff has met the legal standard for recovery. The courts have not developed a new, more specialized standard for products liability suits, but rather have applied the jurisdiction's traditional standard for punitive damage recovery in tort cases. Recovery of punitive damages depends not as much on the wording of the particular standard as on the court's construction of the standard. Generally, a narrow construction of any state standard will preclude a punitive damage recovery, whereas a more liberal interpretation of a standard usually will support a punitive damage award.<sup>170</sup> Perhaps the best example of how construction of a standard can yield different results is found in *Thomas and Day*.<sup>171</sup> Interpreting the identical standard, "acts done with malice or bad motives or a reckless indifference to the interests of another,"<sup>172</sup> the court in *Day* held that "reckless indifference" could include grossly negligent acts,<sup>173</sup> but the court in *Thomas* decided that negligence, no matter how gross or wanton, could not constitute "reckless indifference."<sup>174</sup> In *Day* the court affirmed the punitive damage award, and in *Thomas* the court set aside the punitive damage award. If the same interpretation of "reckless indifference" had been applied in both cases, however, the results should have been identical.

Because of the varying interpretations given the standards for punitive damage recovery by the courts, mere examination of the standards themselves does not determine when punitive damages will be appropriate in a strict products liability suit. A look at the type of manufacturer conduct that courts most often punish may suggest a more reliable answer. Courts punished premarketing be-

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169. See note 58 & accompanying text *supra*.

170. See notes 67, 89, 150 & accompanying text *supra*.

171. See notes 16, 110 & accompanying text *supra*.

172. See note 19 *supra*.

173. See note 20 & accompanying text *supra*.

174. See note 15 & accompanying text *supra*.

havior when the manufacturer had reason to know of the dangerous propensities of its product but failed to test the product adequately, take steps to reduce the hazard, or warn consumers of the danger.<sup>175</sup> Moreover, large punitive damage awards were upheld when a manufacturer had postmarketing notice of product-related injuries and still failed to warn consumers, recall the product, or correct the defect.<sup>176</sup> Certainly a combination of such premarketing and postmarketing behavior in any one case would present circumstances most likely to result in punitive damage recovery

Yet even a combination of premarketing and postmarketing misconduct may not warrant a punitive damage award in all jurisdictions. The defendants in *Maxey* and *Gryc* both knew of the danger associated with their products even though they had complied with industry custom and safety regulations in the design and manufacturing processes, and yet the courts punished only the manufacturer in *Gryc*.<sup>177</sup> The different result is attributable to the different standards applied by the courts of Texas and Minnesota. If *Gryc*, a Minnesota case, had been decided under Texas law, the manufacturer's compliance with federal safety regulations very possibly would have been the "slight care" that would have precluded a finding of gross negligence, and punitive damages would not have been recovered.<sup>178</sup>

Whether punitive damages are appropriate in a particular strict products liability suit depends on the jurisdiction. Jurisdictions that have punished premarketing and postmarketing conduct involving the manufacturer's failure to warn of or correct a known or suspected dangerous defect in its product will continue to do so in the future. Other jurisdictions that have allowed punitive damage claims but denied recovery seem to require aggravated manufacturer conduct that borders on an intent to injure. In these jurisdictions, a more specific answer to the question of when punitive damages are warranted is impossible because the courts have not yet been presented with an example of punishable manufacturer misconduct.

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175. See note 91 *supra*.

176. See note 92 *supra*.

177. See notes 29-31, 123 & accompanying text *supra*.

178. See note 123 & accompanying text *supra*.

## CONCLUSION

This Note has shown that most courts allow punitive damage claims in strict products liability litigation. Those courts offering a rationale to support their ruling state that punitive damages are necessary to punish manufacturer misconduct and to deter similar conduct in the future. Other courts permit punitive damage claims on the authority of a state constitution or statute, and still others offer no rationale at all. Only in Louisiana do courts automatically bar punitive damage claims.

The decisions of the courts that upheld punitive damage awards in strict products liability suits indicate that such awards are warranted whenever the plaintiff meets the state standard for punitive damage recovery. The types of manufacturer misconduct that courts most often punish include premarketing knowledge of a dangerous defect in a product, coupled with a failure to warn of or correct the defect, and postmarketing notice of product-related injuries, along with a failure to warn consumers, recall the product, or correct the defect. No doubt the courts will clarify further the standard for punitive damage recovery as they continue to face punitive damage claims in strict products liability suits.

NADINE E. RODDY