PUNITIVE DAMAGE ISSUES

The undersigned were appointed as co-Chairmen of a Committee assigned to investigate whether certain punitive damage issues should be placed on the agenda for the 2011 meeting of the Conference. Three of the members of the proposed Committee were legislators and although the Chairmen have discussed the matter, no input was received from any of the other members, with the exception of Professor Kent Sinclair. The purpose of this presentation is to be informative as well as to solicit input from current Conference members as to whether this issue should become an agenda item.

The areas that we were requested to review and make recommendations on are:

1. Whether the current law in Virginia should be changed so that punitive damages, when awarded, would be paid to the general fund of the Commonwealth, instead of being paid to the plaintiff who has prevailed at trial.

2. If such a law is enacted, whether the current cap on punitive damages be removed.

Neither of us were aware of whether any state had implemented a law in this area, but fortunately we consulted with Professor Sinclair who provided to us the attached materials. Although a small number of states have adopted some version of the proposal outlined here, it appears that a number of them have subsequently changed back to the more traditional system. Interestingly, some states have made changes in their law by judicial fiat which, of course, would be highly unlikely in Virginia. Both of us feel that the current legal environment and the makeup of the Boyd-Graves Conference are such that a proposal in this area would have little, if any chance of receiving a substantial majority vote within
the Conference. We also believe that within context of the current legal and political environment in Virginia, there is virtually no chance that the General Assembly would approve such changes in our law, even if they were recommended by the Boyd Graves Conference.

We both feel that this is an area in which we need more input from the Conference, before doing anything further. There is a Steering Committee meeting scheduled in January, at which time the preliminary 2011 agenda will be determined. If anyone attending the 2010 Conference, or any other member of the Virginia Bar is interested in pursuing this topic, we suggest that you contact either or both of the two Chairmen.

Very truly yours,

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Split Recovery Statutes

1. Starting in the mid 1980s some 13 states have adopted statutes on splitting PD awards, but 4 states have later let these laws expire or repealed them. Courts in 2 states held the version of such laws unconstitutional, in whole or in part. The Courts of Ohio and Alabama have created a PD split recovery regime by case law.

2. As a result of these developments in the past two decades, as of 2010 there are 7 states where a PD split recovery statute system is presently applicable.

<table>
<thead>
<tr>
<th>State</th>
<th>Percentage to State</th>
<th>Applicable Cases</th>
<th>Fund destination</th>
</tr>
</thead>
<tbody>
<tr>
<td>Georgia</td>
<td>75% less proportion of attorney’s fees</td>
<td>Products Liability only</td>
<td>Office of Treasury</td>
</tr>
<tr>
<td>Iowa</td>
<td>75% after fees have been paid</td>
<td>When conduct was directed at the claimant specifically</td>
<td>Civil Reparations Trust</td>
</tr>
<tr>
<td>Indiana</td>
<td>75%</td>
<td>All</td>
<td>Violent Crimes Victim Fund</td>
</tr>
<tr>
<td>Oregon</td>
<td>60%</td>
<td>All</td>
<td>Criminal Injuries Compensation Account¹</td>
</tr>
<tr>
<td>Alaska</td>
<td>50%</td>
<td>All</td>
<td>General State Fund</td>
</tr>
<tr>
<td>Missouri</td>
<td>50% after attorney’s fees deducted</td>
<td>All</td>
<td>Tort Victim’s Compensation Fund</td>
</tr>
<tr>
<td>Illinois</td>
<td>Court Discretion</td>
<td>All</td>
<td>State Dept. of Human Services</td>
</tr>
</tbody>
</table>
The ALR Annotation and the Drake Article provide very good overviews.


Clay R. Stevens, *Split-Recovery: A Constitutional Answer to the Punitive Damage Dilemma*, 21 PEPP. L. REV. 857, 860-61 (1994) (noting commentators "universally recognize and accept" punitive damages for at least some of their stated purposes, for example, deterrence, punishment, and vindication).

Matthew J. Klaben, *Split-Recovery Statutes: The Interplay of the Takings and Excessive Fines Clauses*, 80 COR- 50 DRAKE LR 593 Page 8


According to the most comprehensive data set available of punitive damages awards in civil trials (jury and bench) in 1996, collected in forty-five sampled jurisdictions chosen to represent the nation's seventy-five largest counties, punitive damages were awarded in 4.5% of all trial cases won by plaintiffs. Carol J. DeFrances & Marika F.X. Litras, U.S. Dep't of Justice, *Civil Justice Survey of State Courts, 1996: Civil Trial Cases and Verdicts in Large Counties* 9 tbl.8, 17 (1999), http://www.ojp.usdoj.gov/bjs/pub/pdf/ctcvlc96.pdf. The percentage figures were greater, however, for cases won by plaintiffs in intentional tort (24%), employment discrimination (19.4%), slander or libel (17%), fraud (15.4%), other employment disputes (12.5%), and other products liability (excluding asbestos and breast implant) (12.8%).

Id. at 9 tbl.8.

An earlier 1991-1992 data set highlights these same categories: While punitive damages were awarded in 5.9% of all jury trials won by plaintiffs in the nation's seventy-five largest counties, the figures were greater in cases won by plaintiffs for slander or libel (29.8%), employment (26.8%), fraud (21.2%), and intentional tort (18.5%). The figure for products liability is much lower (2.2%). Carol J. DeFrances et al., U.S. Dep't of Justice, *Civil Justice Survey of State Courts, 1992: Civil Jury Cases and Verdicts in Large Counties* 8 tbl.8 (1995), htt-

[FN16]. See ALASKA STAT. § 09.17.020(j) (requiring that fifty percent of the punitive award be paid to the state); GA. CODE ANN. § 105-2002.1(e)(2) (requiring that seventy-five percent of the total punitive award be paid to the state); IND. CODE ANN. § 34-51-3-6 (requiring that seventy-five percent of the total punitive award be paid to the state); IOWA CODE § 668A.1(2)(b) (requiring that seventy-five percent of the total punitive award be paid to the state); MO. ANN. STAT. § 537.675(2) (requiring that fifty percent of the total punitive award be paid to the state); OR. REV. STAT. § 18.540(1) (requiring that sixty percent of the total punitive award be paid to the state); UTAH CODE ANN. § 78-18-1(3) (requiring that fifty
percent of any punitive amount exceeding $200,000 be paid to the state). Illinois, the one state that does not
statutorily specify the percentage, states that the trial court “in its discretion” may apportion part of the
award to the state. 735 ILL. COMP. STAT. § 5/2-1207. I found no instance in which Illinois’ split-recovery
statute has been challenged on appeal for constitutionality or for purposes of evaluating the judge’s
determination for abuse of discretion. Therefore, this Note cannot comment on those issues or the amounts
dictated by trial judges.

See Scott Dodson, Note, Assessing the Practicality and Constitutionality of Alaska’s Split-Recovery
Punitive Damages Statute, 49 DUKE L.J. 1335, 1346-52 (2000) (examining potential effects of split-
recovery statutes).

Todd M. Johnson, Comment, A Second Chance at a Proposal to Amend Missouri’s Tort Victims’
Compensation Fund, 67 U.M.K.C. L. REV. 637, 648 (1999) (“It is difficult on principal to understand why,
when the sufferer of a tort has been fully compensated for his suffering, he should recover anything
more.”).

See Dodson, supra note 64, at 1345 (“A more sensible distribution would thus allocate the award to some
public purpose benefitting a part of society than just the already-compensated plaintiff.”);

Janie L. Shores, A Suggestion for Limited Tort Reform: Allocation of Punitive Damage Awards to
Eliminate Windfalls, 44 ALA. L. REV. 61, 93 (1992) (considering that by use of split-recovery, the
judiciary will benefit society “by allocating part of the verdict to the state general fund or some special fund
that will advance the cause of justice”); Stevens, supra note 4, at 869 (“Instead of bestowing a windfall
recovery on the plaintiff, split-recovery of punitive damage awards allows society to distribute the award to
a higher-valued use.”).

Lynda A. Sloane, Note, The Split Award Statute: A Move Toward Effectuating the True Purpose of
these statutes is] to compensate society for the injury inflicted by the defendant” and split-recovery statutes
allow “the public to receive some compensation for the losses it suffered as a result of the defendant’s
outrageous conduct”).

Benjamin F. Evans, “Split-Recovery” Survives: The Missouri Supreme Court Upholds
the State’s Power to Collect One-Half of Punitive Damage Awards, 63 MO. L. REV. 511, 518 (1998)

Michael B. Kelly, Do Punitive Damages Compensate Society?, 41 San Diego L. Rev. 1429, 1429-30
(2004);
Jennifer K. Robbennolt, Determining Punitive Damages: Empirical Insights and Implications for Reform,
50 Buff. L. Rev. 103, 132-33 (2002);

[FN58]. See, e.g., Michael Rustad & Thomas Koenig, The Historical Continuity of Punitive Damages

[FN96]. Victor E. Schwartz, Mark A. Behrens & Cary Silverman, I’ll Take That: Legal and Public Policy
Problems Raised by Statutes That Require Punitive Damages Awards to be Shared with the State, 68 Mo.

[FN98]. Nicholas M. Miller, Note, Tis Better to Give Than To Receive: Charitable Donations of Medical
Malpractice Punitive Damages, 12 J.L. & Health 141, 144 (1997-98) (“[T]he entire tort system...
resembles a ‘lottery’ for all involved.”).

[FN104]. Dorsey D. Ellis, Jr., Fairness and Efficiency in the Law of Punitive Damages, 56 S. Cal. L. R. 1, 11
(1982). Professor Ellis asserted:
If wealth is taken from a defendant to achieve retribution or deterrence or for other reasons, we must do something with the money. It could be destroyed as is often done with confiscated contraband, deposited in the public treasury as are fines, donated to an object of our benevolence, or randomly distributed. That none of these uses has been chosen may reflect society’s decision that the best use of the wealth acquired through punitive damages the use that will result in the greatest increase in welfare, utility, or happiness--is to compensate plaintiffs.


FN221]. See Dede W. Welles, Note, Charitable Punishment: A Proposal to Award Punitive Damages to Nonprofit Organizations, 9 Stan. L. & Pol’y Rev. 203 (1998);

James A. Breslo, Comment, Taking the Punitive Damage Windfall Away From the Plaintiff: An Analysis, 86 Nw. U. L. Rev. 1130, 1137-42 (1992)


Meredith Matheson Thomas, Comment, Punitive Damages in Texas: Examining the Need for a Split-Recovery Statute, 35 St. Mary’s L.J. 207 (2003) (arguing that split recovery is more beneficial in tort reform than caps on punitive damages).


See Janie L. Shores, A Suggestion for Limited Tort Reform: Allocation of Punitive Damage Awards to Eliminate Windfalls, 44 Ala. L. Rev. 61, 84-89 (1992) (comprehensively outlining the limits that many states have placed on punitive damage awards).

2 James D. Ghiardi & John J. Kirchner, Punitive Damages Law and Practice s 21.17 (Supp. 1989) (discussing the legislative abolition of punitive damages in various states).

Victor E. Schwartz & Mark A. Behrens, Punitive Damages Reform -- State Legislatures Can and Should Meet the Challenge Issued by the Supreme Court of the United States in Haslip, 42 Am. U. L. Rev. 1365, 1381 & nn.98-99 (1993) (reporting that 26 states have enacted a clear and convincing standard either by statute or judicial decision).

Sharon G. Burrows, Comment, Apportioning a Piece of a Punitive Damage Award to the State: Can State Extraction Statutes Be Reconciled with Punitive Damage Goals and the Takings Clause?, 47 U. Miami L. Rev. 437, 443 (1992) (noting that “the manner in which the money is to be directed to the state fund is not clear in most of these statutes”);

Leo M. Stepanian II, Comment, The Feasibility of Full State Extraction of Punitive Damages Awards, 32 Duq. L. Rev. 301, 303 (1994);
The ABA proposal suggested that the courts should determine how the punitive award should be allocated. Only Illinois enacted a statute leaving the allocation to court discretion. See Ill. Ann. Stat. ch. 735, para.5/2-1207 (Smith-Hurd 1992). Janie Shores, a Justice on the Alabama Supreme Court, argues that the ideal split recovery arrangement is one that leaves the determination of how to allocate punitive damages to court discretion. See Shores, supra note 9, at 62. Schwartz and Behrens, on the other hand, contend that legislatures are in a much better position to carry out tort reform. See Schwartz & Behrens, supra note 26, at 1373-74. That all states, except Illinois, which have enacted split-recovery statutes have not left the allocation of the punitive award to court discretion, despite the ABA proposal, indicates that legislators may find the ABA proposal to be an unworkable and unenforceable solution. State legislators, it appears, do not wish to rely upon the flexible discretion of trial judges to carry out the allocation of punitives between plaintiffs and the state. Thus, it appears that the majority of state legislators have sided with Schwartz and Behrens.

Lynda A. Sloane, Note, The Split Award Statute: A Move Toward Effectuating the True Purpose of Punitve Damages, 28 Val. U. L. Rev. 473, 490 (1993) (noting that split-recovery statutes maintain the beneficial retributive function of punitive damages while eliminating plaintiffs' windfalls);

See, e.g., Gerald W. Boston, Punitive Damages and the Eighth Amendment: Application of the Excessive Fines Clause, 5 Cooley L. Rev. 667 (1988);


E.g., Ala. Code 1975 §§ 6-11-21(a) to (b) (2006) ("Except as provided [in other sections] ... no award of punitive damages shall exceed three times the compensatory damages of the party claiming punitive damages or five hundred thousand dollars."). For small businesses, this number is limited to $50,000 or 10% of the business' net worth, whichever is greater. Id.; see also Colo. Rev. Stat. §13-21-102(1)(a) (2006) ("Exemplary damages shall not exceed an amount which is equal to the amount of the actual damages awarded to the injured party."); Fla. Stat. §768.73(1) (2006) (limiting the ratio between punitive and compensatory damages to 3:1 or $500,000, except in certain circumstances where it is limited to a higher amount or no cap at all).

[FN65]. E.g., Ala. Code 1975 § 6-11-21(g); Fla. Stat. §768.73(4).


[FN69]. E.g., Ala. Code 1975 §6-11-20(a); Alaska Stat. § 09.17.020(b); Fla. Stat. §768.72(1); see also Okla. Stat. Ann. tit. 23, §9.1(D) (West 2006) (stating that in a particular set of circumstances, the Court must use the beyond a reasonable doubt standard).


[FN71]. Arizona, Connecticut, Delaware, the District of Columbia, Hawaii, Maine, Maryland, New York, Rhode Island, Tennessee, Vermont, West Virginia, and Wyoming do not have statutory restrictions on punitive damage awards.

Indiana, Iowa, and Oregon all provide for this limit in their statutes. Ind. Code Ann. § 34-51-3-6(c) (West 2006) (75% of punitive damage award is paid to the violent crimes victims' compensation fund); Iowa Code Ann. § 668A.1 (2006) (at least 75% of award goes to a civil reparations trust fund); Or. Rev. Stat. Ann. § 31.735(1) (West 2006) (60% of award goes to the Criminal Injuries Compensation Account of the Department of Justice Crime Victims' Assistance Section, unless the prevailing party is a public entity, in which case this portion is paid to the general fund of that public entity).