IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,004

W.R. GRACE & CO.-CONN.,
a Connecticut corporation,

Petitioner

vs.

THOMAS WATERS and
ELOISE AGNES WATERS, his wife,

Respondents

Third DCA Case Nos. 90-1838; 90-2010; 91-282

BRIEF OF *AMICUS CURIAE* PRODUCT LIABILITY ADVISORY COUNCIL, INC.

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STATEMENT OF THE CASE AND THE FACTS

Amicus curiae Product Liability Advisory Council, Inc. ("PLAC") adopts the Statement of Case and Facts set forth in the Initial Brief of Petitioner W. R. Grace & Co. Conn ("W. R. Grace").

SUMMARY OF ARGUMENT

Multiple awards of punitive damages against the same defendant for the same act or course of conduct were unheard of at common law, both in England and in the United States. Since the promulgation of section 402A of the Restatements (Second) of Torts in 1964, however, product liability law has greatly expanded, culminating in the current prevalence of product-line litigation in which thousands of lawsuits are brought against the same manufacturer based on the same alleged product-line defect. As a result, multiple awards of punitive damages against the same defendant for the same act or cause of conduct have become commonplace.

This departure from the historically approved approach to punitive damages has, along with other modern developments, greatly increased the risk of duplicative, excessive punishments. The appellate courts of this state have not yet restored the required balance by establishing rules of law to ensure that multiple punitive damages awards will be allowed only when duplicative punishment will not occur. As a result, Florida's established deterrence and punishment principles, as well as due process requirements, are being violated. Accordingly, guidance from this Court, in the form of clearly articulated safeguards against duplicative punishment, is urgently needed.

The fairest, most effective, and most judicially efficient safeguards, and therefore the ones that should be adopted, would be presumptions that guard against duplicative punishment yet permit multiple punitive damages in appropriate circumstances.

Specifically, there should be a conclusive presumption that, when a defendant manufacturer proves to the trial court that it has paid or settled a prior punitive damages award based on the same alleged defect in the same product line and that at the prior trial the plaintiff adduced evidence of gains realized by the defendant from the entire product line or of harm caused to other individuals by the product line, no further punitive damages may be awarded against that defendant based on that defect in the product line. If, on the other hand, the defendant proves payment or settlement of a prior punitive damages award, but does not prove that the prior plaintiff introduced evidence of product-line harm to others or product-line benefits to the defendant, the presumption should be rebuttable by the later plaintiff's proving to the court that the jury in the prior case was expressly instructed to base its punitive damages decisions only on the defendant's conduct and benefits pertaining to the particular unit that harmed the prior plaintiff and on the harm to the prior plaintiff, rather than on any benefit the defendant derived from other units or on any harm to other individuals. If the later plaintiff thereby overcomes the presumption and is allowed to ask the later jury to award punitive damages, that jury, too, should be instructed that its punitive damages decisions must be based only on the particular unit that harmed the later plaintiff, and that later plaintiff should be precluded from introducing evidence of harm caused to other individuals or of product-line benefits realized by the defendant.

These safeguards will reasonably ensure that duplicative punishments are avoided without unduly limiting the state's legitimate interest in achieving appropriate deterrence and punishment. At least one punitive damages award will always be available, and multiple punitive damages awards will be available in all cases in which there is no substantial risk of duplicative punishments.

ARGUMENT

I. MULTIPLE PUNITIVE DAMAGES AWARDS FOR THE SAME COURSE OF CONDUCT WERE UNHEARD OF AT COMMON LAW, AND THEIR RECENT EMERGENCE HAS GREATLY INCREASED THE RISK OF IMPROPER, DUPLICATIVE PUNISHMENTS

In Pacific Mutual Life Insurance Co. v. Haslip, ____ U.S. ____, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991), the United States Supreme Court confirmed that punitive damages proceedings must satisfy due process requirements. The Court also made it clear that due process requires procedures which "reasonably accommodate[] [the defendant's] interest in rational decisionmaking and [the state's] interest in meaningful individualized assessment of appropriate deterrence and punishment." 111 S. Ct. at 1032. Although such a reasonable accommodation existed at common law and until well into this century, the recent emergence of multiple punitive damages awards unlimited by any judicial guidelines crafted to avoid duplicative, and therefore excessive, punishment has upset that historical balance and created a "destructive synergism between traditional punitive damages doctrine and modern mass tort litigation." Jeffries, A Comment on the Constitutionality of Punitive Damages, 72 Va. L. Rev. 139, 141 (1986).

A. The Absence of Multiple Punitive Damages Awards at English Common Law

English common law first approved of jury awards of punitive damages in 1763 in Wilkes v. Wood, 98 Eng. Rep. 489 (C.P. 1763), and Huckle v. Money, 95 Eng. Rep. 768 (C.P. 1763). For more than a hundred years thereafter, "all of these cases [allowing punitive damages] share[d] one common attribute: they involved acts that resulted in direct affronts to the honor of individual victims. The defendants' acts were insults that were likely to provoke reactions of outrage." Ellis, Fairness and Efficiency in the Law of Punitive Damages, 56 S. Cal. L. Rev. 1, 15 (1982). See K. Redden, Punitive Damages § 2.2(A)(2) (1980). Several of the early English cases explicitly justified punitive damages as both punishment and compensation for plaintiffs' intangible injuries. See K. Redden, supra, §§ 2.2(B) and 2.2(C); Note, Exemplary Damages in the Law of Torts, 70 Harv. L. Rev. 517, 518-19 (1957). There appears to be no reported decision at common law in England awarding multiple punitive damages against the same defendant for the same course of conduct.

In short, punitive damages historically were awarded in England (a) for intentional torts, (b) against the individuals who actually committed the wrongful acts, (c) only once for each act or course of conduct, (d) for wrongs that inflicted humiliation and emotional distress, and (e) in an era when compensatory damages for those forms of injury generally could not be recovered. See generally Ellis, supra, 56 S. Cal. L. Rev. at 14-18.

B. The Absence of Multiple Punitive Damages Awards at American Common Law

In this country, too, punitive damages long were available only in a "comparatively small class of torts" (1 T. Street, The Foundations of Legal Liability 479 (1906)). For the most part, these offenses were "dignitary torts" personally inflicted by one individual on another -- primarily "the traditional intentional torts" such as assault, slander, seduction, and false imprisonment (Symposium Discussion, 56 S. Cal. L. Rev. 155, 156 (1982)). Pollock was able to summarize the law near the turn of the century by stating that "[t]he kind of wrongs to which [punitive damages] are applicable are those which, besides the violation of the right or the actual damage, impart insult or outrage . . . ." F. Pollock, The Law of Torts: A Treatise on the Principles of Obligations Arising From Civil Wrongs in the Common Law 186 (1904). See T. Shearman & A. Redfield, A Treatise on the Law of Negligence § 600 (1869) (punitive damages reserved for "morally criminal" conduct).

With rare exceptions, punitive damages historically were assessed only against individuals, the persons who actually inflicted the insult or harm, and there appears to be no report of multiple punitive damages awards against any such individual. The exceptions seem to have arisen almost exclusively in actions against common carriers and public utilities, based on the theory that such defendants had assumed special obligations to the public, especially with respect to safety. See J. During, The Law of Negligence § 415 (1986); 2 S. Greenleaf, A Treatise on the Law of Evidence 263 n.a. (S. Croswell 14th rev. ed. 1983); 1 T.

Sedgwick, A Treatise on the Measure of Damages § 371a (A. Sedgwick & J. Beale 9th rev. ed. 1912). Even as to these entities, there appears to be no report of multiple punitive damages awards against the same defendant for the same act or course of conduct.

The sums awarded as punitive damages were in the same range as were the fines set by statute for the type of conduct that gave rise to the punitive damages. It appears that the largest combined award of punitive and compensatory damages in the nineteenth century was $20,000. See Caldwell v. New Jersey Steamboat Co., 47 N.Y. 282, 283 (1872) (awarded to plaintiff passenger "maimed and crippled for life" by exploding steamboat boiler). Criminal fines were not substantially different. See, e.g., F. Wharton, A Treatise on the Criminal Law of the United States (1852) (citing statutes) (fines for assault and battery ranging from $500 - $3,000; fines for malicious mischief of up to $1,000; fines for seduction of up to $5,000).

As recently as 1930, Dean McCormick characterized verdicts of $50,000, $33,333.33 (reduced to $10,000), and $12,650 (reduced by $5,000) as "startlingly large verdicts of punitive damages." McCormick, Some Phases of the Doctrine of Exemplary Damages, 8 N.C. L. Rev. 129, 149 & n.114 (1930), citing Duncan v. Record Publishing Co., 145 S.C. 196, 143 S.E. 31 (1927); Livesley v. Stock, 281 P. 70 (Cal. 1929); Seaman v. Dexter, 96 Conn. 334, 114 A. 75 (1921). In 1955 an award of $75,000 was the largest punitive damages verdict in California history and one of the two largest in the history of the United States. Levit, Punitive

Damages: Yesterday, Today and Tomorrow, Ins. L.J., May 1980, at 257, 259.

In sum, until recently, common-law punitive damages in this country, as in England, were awarded for a narrow category of tortious conduct, in part as compensation, against wrongdoing individuals, one time only for a given act or course of conduct, and in modest amounts closely related to the criminal fines for similar conduct. See generally Haslip, 111 S. Ct. at 1066 (O'Connor, J., dissenting).

C. The Recent Emergence of Multiple Punitive Damages Awards and the Resulting Increase in the Risk of Excessive Punishments

The last 25 years, however, have witnessed dramatic changes in the context and manner in which punitive damages are applied. For example, although punitive damages historically were justified in part on the ground that they were needed to fill in the gap that existed because compensatory damages were not allowed for various intangible harms, every jurisdiction has now greatly expanded the category of intangible harms for which compensatory damages are awarded. Modern damages law permits compensatory damages, for example, for pain and suffering (see, e.g., American Cyanamid Co. v. Roy, 498 So. 2d 859, 863 (Fla. 1987)); humiliation (see, e.g., Gertz v. Robert Welch, Inc., 418 U.S. 323, 350, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974)); and loss of consortium (see, e.g., Miami Transit Co. v. Scott, 58 So. 2d 542, 544 (Fla. 1952)). See generally Fla. Stat. Ann. § 768.21 (West 1993) (setting forth damages recoverable in wrongful death action, including damage for loss of consortium, loss of parental instruction and guidance, and mental pain and suffering).

Also unlike the historical common-law approach is the modern infliction of punitive damages not on the individuals who actually inflicted the harm, but on corporations who employ those individuals. Whereas punitive damages historically were awarded almost exclusively against individuals who committed insult torts such as slander, seduction, assault, and battery, today's awards typically are against corporations and often are based on acts that (1) involved no "insult," (2) were not aimed at the plaintiff, (3) were not intended to cause harm, and (4) were the acts of low-level corporate employees. See, e.g., Mattison v. Dallas Carrier Corp., 947 F.2d 95 (4th Cir. 1991) (reversing judgment holding corporate trucking company liable for $100,000 in punitive damages when one of its drivers stopped his truck on the side of road to use a roadside telephone in a hard rain, and plaintiff drove his car into back of the truck.)

These and other modern departures, in Florida and elsewhere, from the historical common-law approach to punitive damages have significantly upset the common-law balance between punitive-damages defendants' interest in rational decisionmaking and the states' interest in appropriate deterrence and retribution. When punitive damages were awarded for clear-cut personal torts such as assault, battery, seduction, and false imprisonment, there was a relatively low risk that the jury would erroneously attribute to the tortfeasor an intent to do wrong. Today, on the other hand, the risk is considerably greater.

That risk is especially great in product liability cases, which did not exist at common law but came into vogue in 1964 with the promulgation of section 402A of the Restatement (Second)

of Torts; and the risk is greatest of all in product-line litigation, a phenomenon that is of even more recent origin but is now by far the predominant type of product liability lawsuit. Product-line litigation is that in which the plaintiff alleges that the particular product that injured him was defective because the design used in the entire product line from which that item was taken was defective, or because the entire product line was sold without adequate warnings or instructions. In this type of litigation, unlike in a lawsuit based on an alleged manufacturing defect in a single item or batch of items out of a much larger production volume,* a manufacturer may be sued by thousands of persons who used or were otherwise exposed to the allegedly defective product. Notable examples are the more than 100,000 suits pending against manufacturers of asbestos products,** the more than 1,000 suits brought against manufacturers of diethylstilbestrol, a pharmaceutical used to prevent miscarriages,*** the more than 1,900 suits brought against

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* By definition, manufacturing defects are aberrational. A manufacturing defect, generally speaking, is a risk-producing departure, in a single item or batch, from the manufacturer's own design specifications or performance standards or from the attributes of otherwise identical units in the same product line. See, e.g., Schwartz, Foreword: Understanding Products Liability, 67 Cal. L. Rev. 435, 435-36 (1979); Wade, On Product "Design Defects" and Their Actionability, 33 Vand. L. Rev. 551, 551-52 (1980). A typical example of a manufacturing defect is a bottled soft drink that, upon being opened, is found to have an insect in it. See, e.g., Cohen v. Allendale Coca-Cola Bottling Co., 351 S.E.2d 897 (S.C. Ct. App. 1986).

** See Schuck, The Worst Should Go First: Deferral Registries in Asbestos Litigation, 15 Harv. J.L. & Pub. Pol'y 541 (1992).

*** See GAO, Product Liability: Extent of "Litigation Explosion" in Federal Courts Questioned 12 n.20 (1988).

manufacturers of bendectin, a pharmaceutical used to prevent morning sickness,* and the more than 14,000 suits brought against the manufacturer of the Dalkon Shield birth control device.**

Plaintiffs in product-line litigation almost always characterize the alleged design defect or failure to warn as an intentional, calculated choice made by the manufacturer. It is in this context that juries now regularly hear plaintiffs' pleas to punish manufacturers for "trading lives for profits."*** It is in this context that multiple punitive damages awards occur without limitation.

Moreover, the risk that these multiple punishments will be unjustified and excessive is exacerbated by the fact that the prevalent "risk-utility" test for a design defect requires a jury to try to comprehend and analyze arcane engineering, scientific, and statistical determinations far more difficult and judgmental than the common historical issues such as whether a defendant intended to shoot at the plaintiff or acted knowingly in seducing the plaintiff's spouse. See generally In re Standard Jury Instructions (Civil Cases), 435 So. 2d 782 (Fla. 1983) (authorizing publication of expanded product liability jury instruction, including risk-benefit test). In addition, the more carefully

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* Id. at 35, table 7.

** See In re A.H. Robins, Co., 89 Bankr. 555, 557 (E.D. Va. 1988).

*** See, e.g., Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 800, 174 Cal. Rptr. 348, 376 (1981); see also Sella, The 10 Largest Jury Verdicts of 1988, 75 A.B.A. J., Mar. 1989, at 45 (summarizing arguments of plaintiffs' attorneys in cases with 10 largest verdicts).

and explicitly a manufacturer tries to conduct and record the detailed risk-utility analysis required to make a product that is nondefective under product liability law, the more likely it is that, if the jury later disagrees with the manufacturer's judgment, the jury also will conclude that the manufacturer acted in a calculated manner with "conscious indifference to the rights or welfare of others" and will award punitive damages.

The risk of unjustified multiple punishments has increased still further as a result of the modern focus on corporate defendants, rather than on the individuals who actually committed the harmful acts. The increased risk derives from the relative ease of requiring a corporate entity to pay several large sums of money and from the prejudice spawned by the relatively much greater assets of corporations, by the out-of-state location of many corporate defendants' headquarters, and by the general modern antipathy for corporations. Social science research now shows that the public holds corporations to "increasingly, and perhaps unrealistically, high standards," believes that "[e]ven if a corporation has unintentionally produced a defective product, . . . the company should still be punished," and generally is "cynic[al] about corporate ethics." Prod. Liab. Law & Strategy, Vol. XI, no. 3, at 4 (Sept. 1992).

The risk of excessive punishment is even further compounded by the fact that punitive damages today are awarded even though the large gaps in compensatory damages that historically existed no longer exist. The modern, more expansive compensatory damages awards largely serve the deterrent and punishment purposes that

punitive damages historically were needed to serve, but punitive damages have not been adjusted downward to reflect that fact.

Quite to the contrary, the result of these recent developments is that punitive damages awards generally, and multiple punitive damages awards in particular, have dramatically increased in size and frequency in product liability litigation in the last two decades. Before 1970 there was only one reported appellate decision upholding an award of punitive damages in a product liability case, and that was an award of $250,000. See Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967). As of 1976, only three punitive damages verdicts, none in excess of $250,000, had been upheld in reported appellate product liability decisions. See Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. Chi. L. Rev. 1, 2-3 n.9 (1982). Today, hardly a month goes by without a multimillion-dollar punitive damages verdict in a product liability case.* Multiple awards, unheard

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* Ross v. Black & Decker, Inc., 977 F.2d 1178 (7th Cir.), cert. denied, No. 92-1082, 61 U.S.L.W. 3481 (U.S. Feb. 22, 1992) ($10 million punitive damages verdict, remitted to $5 million); Drabik v. Stanley-Bostitch, Inc., 796 F. Supp. 1271 (W.D. Mo. 1992) ($7.5 million punitive damages verdict); Dunn v. Hess Oil Virgin Islands Corp., 1992 WL 228875 (3rd Cir. 1992) ($25 million punitive damages verdict, remitted to $2 million); TXO Production Corp. v. Alliance Resources Corp., 419 S.E.2d 870 (W. Va.), cert. granted, ___ U.S ___, 113 S. Ct. 594, 121 L. Ed. 2d 532 (1992) ($10 million punitive damages verdict appealed to U.S. Supreme Court); Holmes v. Wegman Oil Co., 492 N.W.2d 107 (S.D. 1992) ($2.5 million punitive damages awarded to five plaintiffs); Peter Applebome, G.M. is Held Liable Over Fuel Tanks in Pickup Trucks, N.Y Times, Feb. 4, 1993, at A1, C2 ($101 million punitive damages verdict); Havner v. Merrell Dow Pharmaceutical Inc., 21 Prod. Safety & Liab. Rep. (BNA) 189 (Tex. Ct. App. Jan. 28, 1993) ($30 million punitive damages verdict, remitted to $15 million); Johnson v. Bristol-Myers Squibb Co., 21 Prod. Safety & Liab. Rep. (BNA) 33 (Tex. Dist. Ct. Dec. 23, 1992) ($20 million punitive

(continued...)

of at common law, are now commonplace. For example, punitive damages have been awarded against A.H. Robins Co. in at least eleven cases for having sold the Dalkon Shield.* One analysis of only 141 asbestos cases shows that at least nineteen resulted in punitive damages awards, including one award for $23.6 million in a case that involved 54 plaintiffs.**

D. Judicial Recognition of the Need to Establish Safeguards Against Duplicative Multiple Punitive Damages Awards

More than twenty years ago, at the very incipiency of the vast expansion of manufacturers' product liability through the host of substantive, procedural, and evidentiary decisions that have made it easier for a greater variety of plaintiffs to recover greater sums, Judge Henry Friendly warned that the problem of repetitive punitive damages awards in product-line litigation was substantial and needed to be addressed. See Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir.

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*(...continued)
damages verdict); Robertson Oil Co. v. Phillips Petroleum Co., 21 Prod. Safety & Liab. Rep. (BNA) 7 (8th Cir. Nov. 18, 1992) ($8 million punitive damages verdict in Arkansas remanded for reconsideration of punitive damages).

* Robins Is Rebuffed in Bid to Combine Dalkon Shield Punitive-Damage Claims, Wall St. J., July 24, 1985, at 8, col. 2; see also In re A.H. Robins Co., 89 Bankr. 555 (E.D. Va. 1988).

** 2 G. Peters & B. Peters, Sourcebook on Asbestos Diseases: Medical, Legal, and Engineering Aspects 510-28 (1986). The case involving a $23.6 million punitive award to 54 plaintiffs is Stewart v. North Am. Asbestos, Ill. Cir. Ct., No. 78-L201. The study also reveals that $38.7 million in punitive damages and $53.2 million in compensatory damages were awarded in 108 cases that were decided for plaintiffs. 2 G. Peters & B. Peters, supra, at 510. See also Judge Limits Punitive Claims for Products, N.Y. Times, Mar. 10, 1989, at B1, col. 2, B7, col.1 (stating that Cary Canada Inc., an asbestos distributor, had been named as a defendant in 13,022 cases involving 18,118 plaintiffs, with about 9,000 plaintiffs seeking punitive damages).

1967) ("The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering . . . . We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill.") As the number and size of punitive awards have increased in recent years, so has the number of jurists recognizing the need for limits on repetitive punishment. See, e.g., King v. Armstrong World Indus., Inc., 906 F.2d 1022, 1031 (5th Cir. 1990) ("It must be said that a strong arguable basis exists for applying the due process clause of the United States and Texas Constitutions to a jury's award of punitive damages in a mass tort context."), cert. denied, ___ U.S. ___, 111 S. Ct. 2236, 114 L. Ed. 2d 478 (1991); Racich v. Celotex Corp., 887 F.2d 393, 398 (2d Cir. 1989) ("We agree that the multiple imposition of punitive damages for the same course of conduct may raise serious constitutional concerns, in the absence of any limiting principle."); In re School Asbestos Litigation, 789 F.2d 996, 1005 (3d Cir.) ("powerful arguments have been made that, as a matter of constitutional law or of substantive tort law, the courts shoulder some responsibility for preventing repeated awards of punitive damages for the same acts or series of acts"), cert. denied, 479 U.S. 852, 107 S. Ct. 182, 93 L. Ed. 2d 117 (1986); In re Federal Skywalk Cases, 680 F.2d 1175, 1187-88 (8th Cir.) (Heaney, J., dissenting) ("Unlimited multiple punishment for the same act determined in a succession of individual lawsuits . . . would violate the sense of 'fundamental fairness' that is essential to constitutional due process."), cert. denied, 459 U.S. 988, 103 S.

Ct. 382, 74 L. Ed. 2d 383 (1982); McBride v. General Motors Corp., 737 F. Supp. 1563, 1570 (M.D. Ga. 1990) ("due process may place a limit on the number of times and the extent to which a defendant may be subjected to punitive damages for a single course of conduct"); Juzwin v. Amtorg Trading Corp., 705 F. Supp. 1053 (D.N.J. 1989) (multiple awards of punitive damages against asbestos product manufacturer violate due process), modified, 718 F. Supp. 1233, 1234 (D.N.J.) ("the court abides by its previous ruling that repetitive awards of punitive damages for the same conduct violate a defendant's due process rights"); In re "Agent Orange" Product Liability Litigation, 100 F.R.D. 718, 728 (E.D.N.Y. 1983) ("There must be some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction."); In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation, 526 F. Supp. 887, 899-900 (N.D. Cal. 1981) ("overlapping damage awards violate that sense of 'fundamental fairness' which lies at the heart of constitutional due process"), rev'd on other grounds, 693 F.2d 847 (9th Cir. 1982), cert. denied, 459 U.S. 1171, 103 S. Ct. 817, 74 L. Ed. 2d 1015 (1983); Magallanes v. Superior Court, 167 Cal. App. 3d 878, 888-89, 213 Cal. Rptr. 547, 554 (1985) ("It is also fair to ask whether a defendant who has been punished with punitive damages when the first case is tried should be punished again when the second, or the tenth, or the hundredth case is tried."); Ellis, Fairness and Efficiency in the Law of Punitive Damages, 56 S. Cal. L. Rev. 1, 6-7 (1982) (general theories of punishment require limit on aggregate punitive awards); Jeffries, A Comment

on the Constitutionality of Punitive Damages, 72 Va. L. Rev. 139, 147 (1986) (due process cannot permit unlimited multiple punitive damages awards for a single course of conduct; Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. Chi. L. Rev. 1, 50 (1982) (stricter judicial scrutiny "may well be necessary to prevent such [multiple] awards from violating a corporation's due process rights"); Riley, Punitive Damages: The Doctrine of Just Enrichment, 27 Drake L. Rev. 195, 252 (1977-78); Schwartz & Magarian, Multiple Punitive Damage Awards in Mass Disaster and Product Liability Litigation: An Assault on Due Process, 8 Adelphi L. J. 101 (1992); Seltzer, Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control, 52 Fordham L. Rev. 37, 61 (1983); Surrick, Punitive Damages and Asbestos Litigation in Pennsylvania: Punishment or Annihilation?, 87 Dick. L. Rev. 265, 295-96, 300 (1993); "Punitive Damages: A Constructive Examination," 1986 ABA Section of Litigation, Special Committee on Punitive Damages 78-81; Report of Punitive Damages of the Committee on Special Problems in the Administration of Justice, American College of Trial Lawyers 20-26 (Mar. 3, 1989).

A few courts have held that, because the same defendant had already paid punitive damages for the same conduct, punitive damages could not be imposed on that defendant, but in those cases the same plaintiff was seeking to add general punitive damages on top of statutory treble damages, not on top of a prior award of general punitive damages. See, e.g., Hometowne Builders, Inc. v. Atlantic Nat'l Bank, 477 F. Supp. 717, 720 (E.D. Va. 1977) ("combination of treble damages and punitive damages is

necessarily duplicative"); Troensgaard v. Silvercrest Indus., Inc., 175 Cal. App. 3d 218, 227-28, 220 Cal. Rptr. 712, 717-718 (1986) (by seeking civil penalty under statute allowing treble damages, plaintiff waived claim for general punitive damages); John Mohr & Sons v. Jahnke, 55 Wis. 2d 402, 198 N.W.2d 363 (1972) (disallowing $500 punitive damages award to plaintiff who already had recovered treble damages). Most courts, expressing concern for national uniformity of treatment, deference to the appropriate legislature, deference to the appropriate court of last resort, or, in the case of federal courts, deference to the states under principles of federalism, have considered themselves unable to restrict repetitive awards of general punitive damages, even while recognizing the constitutional need to do so. See, e.g., Juzwin v. Amtorg Trading Corp., 718 F. Supp. 1233, 1235 (D.N.J. 1989) ("Until there is uniformity either through Supreme Court decision or national legislation, this court is powerless to fashion a remedy which will protect the due process rights of this defendant or other defendants similarly situated.").

The principle of avoiding duplicative punishment applied in cases such as Hometowne Builders, Troensgaard, and John Mohr & Sons applies with identical force, however, when the duplicative punishment arises from repetitive awards of general punitive damages based on the same course of conduct. In fact, the need for courts of last resort in the various jurisdictions, including this Court, to provide lower courts with guidance as to how to properly treat such claims for repetitive punitive damages awards has reached crisis proportions. Thousands of punitive damages complaints are now pending against manufacturers of a wide

variety of mass-produced products, including automobiles, all-terrain vehicles, airplanes, heart valves, asbestos, formaldehyde, paint, PCB lubricants, diethylstilbestrol, Agent Orange, tampons, Copper-7, cigarettes, pesticides, alcohol, handguns, Dalkon Shields, bendectin, breast implants, wood-treatment chemicals, word-processing equipment, and microwave-generating equipment, to name but a few. See generally Seltzer, Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control, 52 Fordham L. Rev. 37 (1983).

The industry of which Petitioner W.R. Grace is a part provides a dramatic example of the harm that can be suffered by working men and women who lose their livelihoods, investors who lose their savings, and the economies of towns, cities, and even whole regions when repetitive punitive damages awards, along with other mass tort problems, are left unchecked. As of 1991, faced with tens of thousands of lawsuits seeking compensatory and punitive damages, at least fourteen former manufacturers of asbestos products had filed for bankruptcy, and numerous smaller distributors of asbestos products had been sued and become insolvent. See Schuck, The Worst Should Go First: Deferral Registries in Asbestos Litigation, 15 Harv. J.L. & Pub. Pol'y 541, 555 (1992); Hon. William W. Schwarzer, Punishment Ad Absurdum, Cal. Law. 116 (Oct. 1991); Summary of the Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 14 (Mar. 1991).

Accordingly, there is an urgent need for this Court to specify the principles that Florida's lower courts must follow when faced with the modern phenomenon of repetitive punitive

damages claims. By doing so, this Court not only will provide guidance to those courts, but will provide guidance to the many other jurisdictions that have recognized the need to act, but that have been unable to determine the appropriate action.

II. PUNITIVE DAMAGES AWARDS THAT ARE IMPOSED ON A MANUFACTURER AND THAT FAIL TO TAKE INTO ACCOUNT PRIOR PUNITIVE DAMAGES PAID BY THE SAME MANUFACTURER FOR THE SAME ALLEGED DEFECT IN THE SAME PRODUCT LINE VIOLATE ESTABLISHED DETERRENCE AND PUNISHMENT PRINCIPLES AND THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION

Not only do unrestricted multiple punitive damages awards dramatically depart from common law practices, but they violate established deterrence and punishment principles and due process principles as well.

The United States Supreme Court in Haslip confirmed that punitive damages proceedings must satisfy the requirements of due process and that "general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus." 111 S. Ct. at 1043. More particularly, the Court made it clear that, both at the trial court level and at the appellate level, the core constitutional inquiry is whether the proceedings ensure "that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." 111 S. Ct. at 1045. Accord 111 S. Ct. at 1044. Similarly, this Court has held that the proper purposes of punitive damages in Florida are to deter and to punish, see, e.g., Mercury Motors Express, Inc. v. Smith, 393 So. 2d 545, 547 (Fla. 1981), and that punitive damages therefore may not be awarded if those purposes would not be served by the award, see,

e.g., Lohr v. Byrd, 522 So. 2d 845, 847 (Fla. 1988); Fisher v. City of Miami, 172 So. 2d 455, 457 (Fla. 1965); see also Waldron v. Kirkland, 281 So. 2d 70, 71 (Fla. 2d DCA 1973).

As a matter of established deterrence and punishment principles, and as a matter of simple logic, punitive damages that are awarded against a manufacturer who has previously paid punitive damages for the same alleged defect in the same product line and that are not adjusted to take account of those prior penalties are improper under Lohr and Fisher and constitutionally defective under Haslip if the punitive damages in the prior proceedings were based on profits or cost-savings realized by the defendant on the entire product line. In every such instance the defendant first will have been punished in the prior case for having produced every unit in the product line, including the unit that allegedly harmed the plaintiff in the later case, and then will be punished again either for having produced the unit that allegedly harmed the plaintiff in the later case or for having produced every unit in the product line. Regardless of whether the later punishment is based on the single unit or on the entire product line, the punishment will be duplicative and therefore will "exceed an amount that will accomplish society's goals of punishment and deterrence." Haslip, 111 S. Ct. at 1045. If the later punishment is based on the single unit, the duplication will be relatively modest; if the later punishment is based on the entire product line, the duplication will be total. In either event, the duplication violates deterrence principles, retributive principles, and the principle of fundamental fairness. In either event, therefore, the duplication conflicts with

Haslip, Lohr, and Fisher and violates the due process clause and Florida tort policies. Cf. Alexander & Alexander, Inc. v. B. Dixon Evander & Assocs., Inc., 88 Md. App. 672, 596 A.2d 687 (1991) (punitive damages award that exceeds amount needed to punish and deter violates due process), cert. denied, 326 Md. 435, 605 A.2d 137 (1991).

That duplicative punishments fail to promote the legitimate purposes of deterrence and retribution is all but self-evident. Rational deterrence requires that punishment be imposed in the amount, and only in the amount, necessary to ensure that the defendant, as well as others similarly situated, will conclude that, if he were again to engage in the same type of wrongful conduct, the total of all compensatory and punitive damages he would have to pay would exceed any benefit he might hope to gain. See, e.g., H. Packer, The Limits of the Criminal Sanction 45-48 (1968); Ellis, Fairness and Efficiency in the Law of Punitive Damages, 56 S. Cal. L. Rev. 1, 23-24, 43-53 (1982); Note, Punitive Damages for Libel, 98 Harv. L. Rev. 847, 849-51 (1985). Punishment in any other amount will either deter desirable activity or fail to deter undesirable activity. See, e.g., P. Huber, Liability: The Legal Revolution and Its Consequences 153-71 (1988); Ellis, supra, 56 S. Cal. L. Rev. at 46-53; Wheeler, The Constitutional Case for Reforming Punitive Damages Procedures, 69 Va. L. Rev. 269, 280 (1983).

Duplicative punitive damages awards also conflict with the fundamental underlying premise of deterrence -- namely, that potential actors will rationally weigh the benefits and costs that they are likely to encounter by engaging in the wrongful

conduct they are contemplating. If the total amount of punitive damages necessary to achieve optimal deterrence as to an entire product line can be awarded against a defendant not just once (either in parts in several cases or, for example, in a single class action), but multiple times, actors will be uninformed about the magnitude of the costs, including punishments, that they are likely to incur if they engage in the contemplated wrongful conduct. As a result, there will be little or no predictability and great uncertainty, a situation that "undermines the deterrent effect of these awards." Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 459, 601 A.2d 633, 652 (1992), citing 2 L. Schlueter & K. Redden, Punitive Damages, Appendix B, at 418-19 (2d ed. 1989); Elliott, Why Punitive Damages Don't Deter Corporate Misconduct Effectively, 40 Ala. L. Rev. 1053, 1057-60, 1065 (1989); Owen, The Moral Foundations of Punitive Damages, 40 Ala. L. Rev. 705, 729 (1989); Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. Chi. L. Rev. 1, 22-23, 47-49 (1982).

Similarly, duplicative punitive awards violate the basic principle of retribution -- namely, that punishment must be proportionate to the total wrongdoing. See Wheeler, Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment, 24 Stan. L. Rev. 838, 846 (1972); cf. St. Regis Paper Co. v. Watson, 428 So. 2d 243, 248 (Fla. 1983) (punitive damages award "must be proportionate to the magnitude of the wrongs committed"). If the first punitive award was proportioned to the magnitude of the wrong entailed in the defendant's production of the entire product line, any additional, subsequent punishment

for the defendant's production of all or part of that product line would make the aggregate punishment disproportionate to the total wrongdoing.

The conflict between duplicative punishments and fundamental fairness is equally clear. The double jeopardy clause of the United States Constitution expressly guards against double punishment in the criminal context, and more than a century ago the United States Supreme Court indicated that duplicative punishments are just as unacceptable in civil cases. Cf. Ex parte Lange, 85 U.S. (18 Wall.) 163, 168-69 (1873) ("In civil cases . . . no man shall be twice vexed for one and the same cause. . . . [In criminal cases no] one can be twice punished for the same crime . . . ."). As this Court has stated, "A defendant does have a right to be free from unreasonable punishment inflicted by an excessive punitive damage award." St. Regis Paper Co. v. Watson, 428 So. 2d 243, 248 (1983).

III. TO PROTECT AGAINST IMPROPER, DUPLICATIVE PUNISHMENTS, THIS COURT SHOULD ESTABLISH APPROPRIATE PRESUMPTIONS FOR CASES IN WHICH A DEFENDANT MANUFACTURER PROVES TO THE TRIAL COURT THAT IT HAS PAID OR SETTLED A PRIOR PUNITIVE DAMAGES AWARD BASED ON THE SAME ALLEGED DEFECT IN THE SAME PRODUCT LINE

In modern product liability litigation, plaintiffs seeking punitive damages regularly introduce evidence of profits made or costs saved by the defendant from the entire product line and evidence of harm caused to other individuals by the product line. The evidence may include, for example, records of the number of units sold, documents projecting the total cost-savings to be realized by choosing one design over another, accounting records showing the annual profit derived from the product line, or annual reports showing the defendant's net worth or total assets,

both of which reflect not only the total profit derived from the product line in question, but profits derived from all of the defendant's other activities, as well. See, e.g., Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 790-91, 820, 174 Cal. Rptr. 348, 369-70, 388-89 (1981) (plaintiff introduced evidence of purported cost-savings on "all Ford cars" in the 1974-1976 period, even though the only vehicle in issue was a single 1972 Pinto; plaintiff also introduced evidence of a deferred expenditure of $100 million on all car lines for the period 1973 to 1976, danger to "thousands of Pinto purchasers," defendant's net worth, and defendant's total after-tax income); Tetuan v. A.H. Robins Co., 241 Kan. 441, 738 P.2d 1210 (1987) (plaintiff introduced evidence that defendant sold 4.4 million Dalkon Shields in the United States and abroad, with a unit production cost of $.30 and a unit sales price of $4.35; plaintiff also presented evidence of A. H. Robins' total reported net sales and before- and after-tax earnings); Ross v. Black & Decker, Inc., 977 F.2d 1178 (7th Cir. 1992), cert. denied, No. 92-1082, 61 U.S.L.W. 3481 (U.S. Feb. 22, 1992) (plaintiff introduced evidence of profits earned from defendant's total sales of "power tools," although the only product at issue in the case was the 10-inch electrical power saw used by plaintiff; in addition, plaintiff presented evidence of defendant's net worth); Kociemba v. G.D. Searle & Co., 707 F. Supp. 1517 (D. Minn 1989) (in product liability suit arising out of the implantation of a single intrauterine device, plaintiff introduced evidence of the total profits derived from the sale of all such devices and evidence of the defendant's book value of $860 million).

The purpose of all such evidence, of course, is to persuade the jury that the enormity of the harm caused by, or of the defendant's total gain from, all of the units in the product line not only justifies a punitive damages award, but one of substantial size. As a result, juries frequently base punitive damages awards on the entire product line, rather than on the harm to the particular plaintiff or the gain realized by the defendant from the particular unit that harmed the plaintiff. See, e.g., Grimshaw, 119 Cal. App. 3d at 790, 174 Cal. Rptr. at 370 ($125 million in punitive damages awarded by jury to plaintiff injured in accident in a 1972 Ford Pinto; plaintiff introduced evidence and argued that defendant manufacturer saved $100 million on all cars made during 1973 through 1976 by choosing the challenged fuel-system design); Ross, 977 F.2d at 1189 ($10 million dollars in punitive damages awarded by jury to plaintiff who sustained injuries while operating a power saw manufactured by defendant; plaintiff presented evidence that defendant "turned $51,095,000 in profits in 1990 from the sale of power tools"); Kociemba, 707 F. Supp. at 1537 ($7 million in punitive damages awarded by jury to plaintiff injured by defective intrauterine device; plaintiff presented evidence that defendant "reaped approximately $80 million in profits" from the sale of the device).

In fact, in any case in which (a) the plaintiff is permitted to try to persuade the jury to award punitive damages on the basis of harm caused not only to himself, but to others as well, by an entire product line, or on benefits derived by the defendant from the entire product line, and (b) the jury in fact awards punitive damages, it is reasonably likely that the

punitive award is based on the product line, rather than on just the particular unit that harmed the plaintiff. In such instances, as shown in Section II above, any additional punitive award in a later case will result in duplicative punishment that violates both due process and Florida punitive damages law.

The fairest, most effective, and most judicially efficient way to prevent such duplicative punishments is through appropriately tailored presumptions. First, there should be a conclusive presumption that, when a defendant manufacturer proves to the trial court that it has paid or settled a prior punitive damages award based on the same alleged defect in the same product line and that at the prior trial the plaintiff adduced evidence of gains realized by the defendant from the entire product line or of harm caused to other individuals by the product line, no further punitive damages may be awarded against that defendant based on that defect in the product line. If, on the other hand, the defendant proves payment or settlement of the prior punitive damages award, but does not prove that the prior plaintiff introduced evidence of product-line harm to others or product-line benefits to the defendant, the presumption should be rebuttable by the later plaintiff's proving to the court that the jury in the prior case was expressly instructed to base its punitive damages decisions only on the defendant's conduct and benefits pertaining to the particular unit that harmed the prior plaintiff and on the harm to the prior plaintiff, rather than on any benefit the defendant derived from other units or on any harm to other individuals. If the later plaintiff thereby overcomes the presumption and is allowed to ask the later jury to award

punitive damages, that jury, too, should be instructed that its punitive damages decisions must be based only on the particular unit that harmed the later plaintiff, and that later plaintiff should be precluded from introducing evidence of harm caused to other individuals or of product-line benefits realized by the defendant.*

These safeguards will reasonably ensure that duplicative punishments are avoided without unduly limiting the state's legitimate interest in achieving appropriate deterrence and punishment. At least one punitive damages award will always be available, and multiple punitive damages awards will be available in all cases in which there is no substantial risk of duplicative punishments.**

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* One state, Georgia, legislatively established a broader limitation for product liability actions by providing that only one punitive damage award may be recovered, regardless of the nature of the evidence and instructions in the case in which punitive damages are awarded. See Ga. Code Ann. § 51-12-5.1-(e)(1). The statute was declared unconstitutional, however, because it applied only in product liability cases and not in other tort cases. See McBride v. General Motors Corp., 737 F. Supp. 1563, 1579 (M.D. Ga. 1990).

** It might be suggested that improper duplicative punitive awards could be avoided by instructing the juries in all cases after the first one to take into account the prior compensatory and punitive awards in determining whether any punitive damages are necessary and, if so, in what amount. See Wangen v. Ford Motor Co., 97 Wis. 2d 260, 277, 294 N.W.2d 437, 449 (1980). As virtually every commentator who has examined that rational has recognized, however, that "protection" would be no protection at all, but instead would be likely to cause juries to be more inclined to find liability in the first instance. See, e.g., Jeffries, A Comment on the Constitutionality of Punitive Damages, 72 Va. L. Rev. 139, 146-47 (1986); Jones, et al., Multiple Punitive Damages Awards for a Single Course of Wrongful Conduct: The Need for a National Policy to Protect Due Process, 43 Ala. L. Rev. 1, 29-30 (1991); Morris, Punitive Damages in Tort Cases, 44 Harv. L. Rev. 1171, 1195 n.40 (1931); Seltzer, Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness,

(continued...)

In instances in which multiple punitive awards are disallowed, the plaintiffs who are precluded from obtaining punitive damages will have no legitimate basis to complain. Florida, like other jurisdictions, recognizes that punitive damages are awarded not to compensate individual plaintiffs, but to serve broad societal goals of deterrence and punishment. "Unlike the right to compensatory damages, the allowance of punitive damages is based entirely upon considerations of public policy." Gordon v. State, 608 So. 2d 800, 801 (Fla. 1992). Accordingly, no plaintiff has any right to any award of punitive damages. St. Regis Paper Co. v. Watson 428 So. 2d 243, 247 (Fla. 1983). Quite to the contrary, it is widely recognized that punitive damages are a "windfall" to private plaintiffs. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 267, 101 S. Ct. 2748, 2760, 69 L. Ed. 2d 616 (1981); IBEW v. Foust, 442 U.S. 42, 50, 99 S. Ct. 2121, 2127, 60 L. Ed. 2d 698 (1979); Adams v. Murakami, 54 Cal. 3d 105, 120, 813 P.2d 1348, 1359, 284 Cal. Rptr. 318, 320 (1991).

The safeguards urged above also present very little risk of any societal harm from underdeterrence in instances in which multiple punitive damages awards are disallowed. In the first place, six states do not allow even one award of punitive damages in product liability case,* yet no one has suggested, much less

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**(...continued)
Efficiency and Control, 52 Fordham L. Rev. 37, 59-60 (1983); Wheeler, The Constitutional Case for Reforming Punitive Damages Procedures, 69 Va. L. Rev. 269, 295 (1983).

* See Killebrew v. Abbott Laboratories, 359 So. 2d 1275, 1278 (La. 1978) (punitive damages not allowed unless expressly authorized by statute); City of Lowell v. Massachusetts Bonding & Ins. Co., 313 Mass. 257, 269, 47 N.E.2d 265, 272 (1943) (same); (continued...)

empirically shown, that citizens of those states have suffered excessive product-related injuries or that manufacturers in those states have produced more defective products than have other manufacturers. In addition, any slight risk of occasional under-deterrence is more than offset by the substantial over-deterrence consistently generated by modern, expansive compensatory damages awards and by the law's failure to take any account of the deterrence provided by defense costs, adverse publicity, loss of good will, regulatory proceedings and sanctions, and the numerous other costs inflicted on manufacturers when plaintiffs claim that a product line is defective.

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*(...continued)
Veselenak v. Smith, 414 Mich. 567, 572-77, 327 N.W.2d 261, 263-65 (1982) (exemplary damages not allowed when actual damages provide compensation for mental distress and anguish; Miller v. Kingsley, 194 Neb. 123, 124, 230 N.W.2d 472, 474 (1975) (punitive damages not allowed); Vratsenes v. N.H. Auto, Inc., 112 N.H. 71, 73, 289 A.2d 66, 67 (1972) (compensatory damages may be increased to compensate for vexation and distress, but not to punish); Standard v. Bolin, 88 Wash. 2d 614, 621, 565 P.2d 94, 98 (1977) (punitive damages not allowed because not authorized by statute).

CONCLUSION

For the foregoing reasons, the judgment of the district court of appeals should be reversed and this Court should establish the presumptions described herein as safeguards against multiple punitive damages awards that are duplicative and thereby excessive under established Florida tort law and under due process principles.

Dated: March 22, 1993.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 22nd day of March, 1993, to: Gail Leverett, Esquire, Kubicki, Draper, Gallagher & McGrane, P.A., City National Bank Building, Penthouse, 26 West Flagler Street, Miami, Florida, 33130; Alan K. Petrine, Esquire, 4700 Southeast Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131; Thomas Hart, Esquire, 1611 Allen Street, Post Office Box 365, Barnwell, South Carolina 29812; and by hand-delivery to Marc Cooper, Esquire, 700 Courthouse Tower, 44 West Flagler Street, Miami, Florida, 33130.

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