Punitive Damages And Regulatory Compliance:

When a Defendant is in Compliance with Governmental Regulations, and Industry-Accepted Standards, Should Plaintiffs be Able to Pursue a Claim for Punitive Damages?

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Depending on the jurisdiction, court, and applicable law, plaintiffs may be permitted to pursue a claim for punitive damages against a defendant in a tort case. The purposes of punitive damages are to deter future wrongdoing by a defendant, punish a defendant, and/or protect society from harm. The United States Supreme Court has explained that "[p]unitive damages are specifically designed to exact punishment in excess of actual harm to make clear that the defendant's conduct was especially reprehensible." *See Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 54 (1991). This country's highest Court also explained that punitive damages are "'quasi-criminal,' and operate as 'private fines' intended to punish the defendant and to deter future wrongdoing. A jury's . . . imposition of punitive damages is an expression of moral condemnation." *See Cooper Industries, Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424 (2001). In other words, the United States Supreme Court has made clear that punitive damages are only meant to be awarded in special circumstances where a defendant acted in a particularly egregious and reprehensible manner.

Some states that allow punitive damages place limits on these damages, such as a cap on the amount, but other states have no such cap. In addition to state-level restrictions or limits on punitive damages awards, federal law also places due process limitations on punitive damages awards. For example, in the case *BMW of North America, Inc. v. Gore*, the United States Supreme Court held that a defendant should be put on notice that a punitive damages claim is being brought against them: "[E]lementary notions of fairness enshrined in this Court's constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty the state may impose." *BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996).* In *Gore*, the Court also recognized a constitutional limit to punitive damages awards when an Alabama jury awarded $2 million in punitive damages to the plaintiff, an amount 500 times greater than the compensatory award. *Id. at 560.* The plaintiff in *Gore*, an automobile purchaser, sued an automobile manufacturer for fraud when the manufacturer failed to disclose the car being sold was damaged and repainted prior to being delivered to the purchaser. *Id. at 559.* The United States Supreme Court held that a $2 million award

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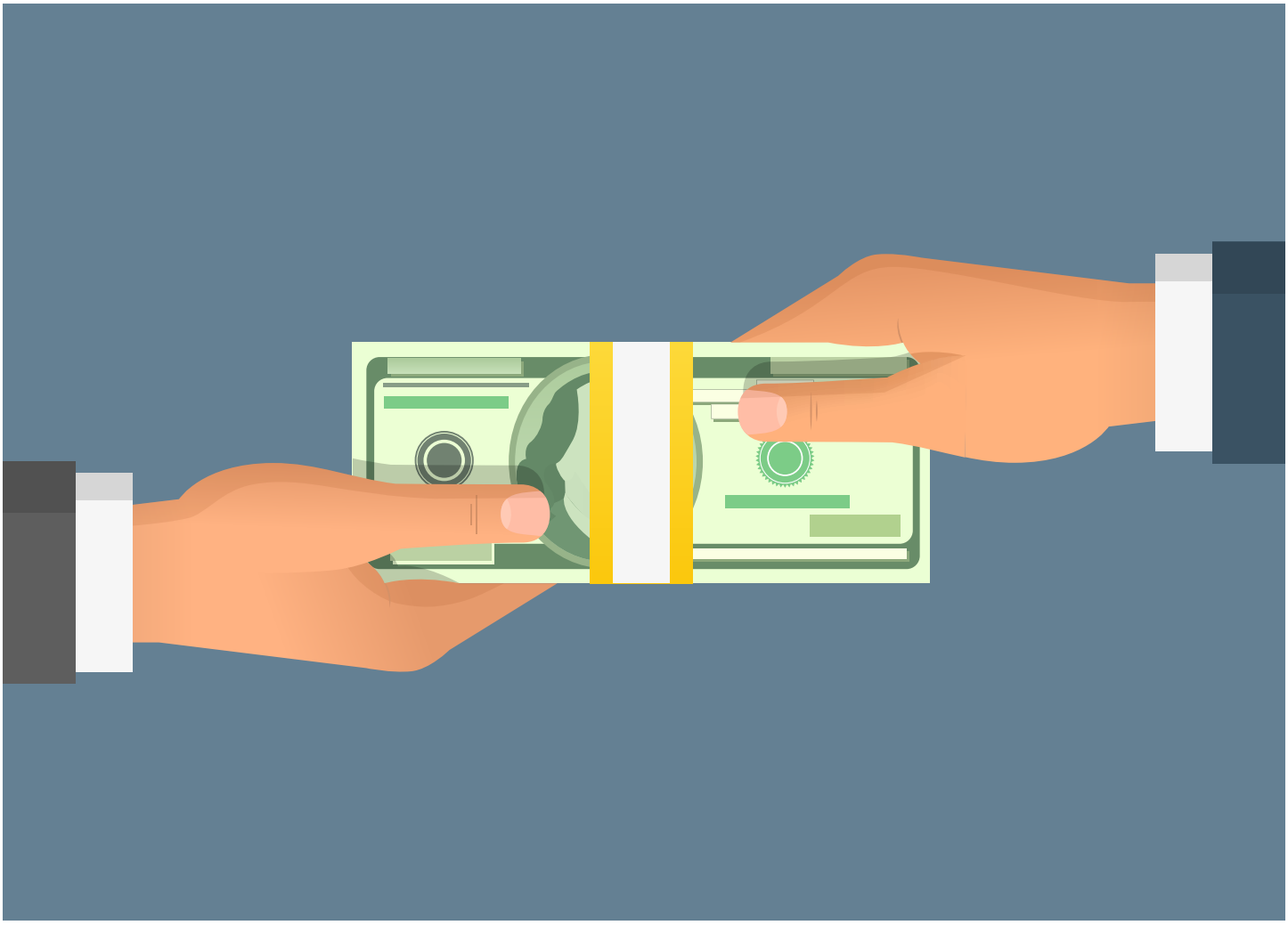

was grossly excessive, and thereby recognized there is a constitutional limit to punitive damages awards. *Id. at 574*

The Court articulated three guideposts for courts to consider when determining whether an award for punitive damages is grossly excessive: (1) the degree of reprehensibility; (2) the ratio of the harm suffered versus the punitive damages awarded; and (3) the difference between the punitive damages awarded and the penalties authorized in similar cases. *Id. at 575-84.*

The United States Supreme Court has also mandated that punitive damages be case-specific, in the case *Philip Morris USA v. Williams,* the Court stated:

> [I]n our view, the Constitution's Due Process Clause forbids a state to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation. For one thing, the Due Process Clause prohibits a State from punishing an individual without first providing that individual with an opportunity to present every available defense. (Citing *Lindsey v. Normer*, 405 U.S. 56, 66 (1972) (internal quotation marks omitted). Yet a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing, for example in a case such as this, that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary. *549 U.S. 346 (2007).*

Furthermore, the United State Supreme Court held that a defendant should not be punished for being an "unsavory business", but instead should be punished for the conduct that harmed the plaintiff. *State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 423 (2003).*

In practice, when there is a claim for punitive damages in a case, a court must first determine whether there is sufficient evidence to allow the jury to consider an award of punitive damages. *Jim Fieweger, The Need for Reform of Punitive Damages in Mass Tort Litigation: Juzwin v. Amtorg Trading Corp., 39 DePaul L. Rev. 783 (1990).* Then, if the Court allows the claim for punitive damages to go forward, the jury will listen to the evidence at trial and determine whether to award punitive damages to the plaintiff, and in what amount. *Id. at 783-84.* If the jury ultimately decides to award punitive damages, that

award is subject to review by both the trial court and appellate courts. The standard of review is deferential, because the jury is considered "the body best capable of determining the appropriate level of punishment in a given case." *Id. at 784 (citing Petsch v. Florom, 538 P.2d 1011, 1014 (Wyo. 1975)).*

Punitive Damages In Asbestos Litigation

In asbestos litigation, the concept of punitive damages has been criticized by some due to the unique nature of the litigation, and in recent years, punitive damages have increasingly become a greater issue for defendants involved in asbestos cases in the United States. *See, e.g., Helen E. Freedman, Selected Ethical Issues in Asbestos Litig., 37 Sw. U.L. Rev. 511, 527 (2008).* As more and more asbestos defendants file for bankruptcy, plaintiffs are searching for ways to garner larger sums of money from defendants remaining in the litigation. Notably, most defendants who today are left in asbestos litigation did not manufacture thermal insulation or other high-dose asbestos-containing products, but instead are generally low-dose defendants or those defendants that merely incorporated an asbestos-containing part into their product(s). The high-dose defendants that mined and manufactured thermal insulation and other asbestos-containing products are the defendants that arguably had certain knowledge and information regarding the hazards of over-exposure to asbestos, and they are now bankrupt. The defendants remaining in asbestos litigation didn't suspect or believe there were any hazards associated with their materials or equipment since they are low dose-defendants or defendants that merely incorporated an asbestos containing part into their product(s).

Despite the status of the current defendants remaining in asbestos litigation, plaintiffs' attorneys continue to push for punitive damages in any jurisdiction or court where they may have the opportunity to do so. Additionally, there is little surprise that the states where plaintiffs file most of their cases—California, New York, and Illinois—are not only plaintiff-friendly but are also jurisdictions where punitive damages are generally available and allowed by the court.

This article argues that compliance with state- or federal-government regulations and industry-accepted standards should be a strong factor against allowing plaintiffs to pursue a claim for punitive damages, specifically in the context of asbestos litigation when there is an absence of other culpable behavior by a defendant warranting an award of punitive damages. This article further contends that it goes against logic to argue a defendant should be held responsible for "quasi-criminal" damages when that defendant can show its product complied with mandated government regulations, i.e., exposure limits and warnings addressed by OSHA, and industry-accepted standards regarding permissible exposure limits to asbestos.

Defendants should seriously consider fighting punitive damages at every opportunity. This would include filing a motion for partial summary judgment as to a claim for punitive damages. Even in those instances when the defendant believes it may be difficult to prevail on a summary judgment motion, the motion can serve to educate the judge on the issues related to punitive damages. The court may also be more inclined to entertain a motion on directed verdict on this issue if they have had time to contemplate the issue through the course of plaintiff's case. Furthermore, this argument can be used as a defense at trial when a plaintiff is allowed to pursue a claim for punitive damages against an asbestos defendant. When a jury sees the defendant's compliance with government-mandated regulations and industry-accepted standards pertaining to permissible exposure to asbestos or warnings on products containing asbestos during the course of a trial, then they may take this evidence into account when deliberating on the issue of punitive damages.

Case Law Examining Regulatory Compliance And Punitive Damages

While regulatory compliance has historically been used as defense in product liability actions (including in the context of punitive damages), state and federal case law is not generally in favor of allowing a blanket preclusion of punitive damages when a defendant shows regulatory compliance. *See, Dorsey v. Honda Motor Co., 655 F.2d 650, 656 (5th Cir. 1981) (holding compliance with federal motor vehicle safety standard does not exclude punitive damages); O'Gilvre v. International Playtex, Inc., 821 F.2d 1438, 1446 (10th Cir. 1987) (holding FDA compliance does not preclude punitive damages); Phillips v. Cricket Lighters, 584 Pa. 179 (2005) (holding compliance with industry and governmental standards "does not, standing alone, automatically insulate a defendant from punitive damages").* In the context of asbestos litigation, defendants through the years have attempted to use regulatory compliance as a defense to punitive damages, but it has not always been successful due to variety of circumstances, including other behavior by these defendants that supported an award of punitive damages. However, there has been at least one instance where a defendant who showed regulatory compliance (and had no other culpable behavior that would allow for an award of punitive damages) and had a punitive damages award overturned. *See Drabczyk v. Fisher Controls Int'l, et al., 92 A.D.3d 1259, 1260 (4th Dep't 2012).* Thus, this is a defense that is ripe for development and should be pursued by defendants in asbestos litigation to push back against plaintiffs' incessant push for punitive damages.

This defense has also been used successfully by defendants in cases involving automobile safety regulations, aviation industry regulations, industry standards for chemical exposure, and environmental regulations.

Compliance with Asbestos Industry Regulations and Punitive Damages

An appellate-level court in New York agreed that punitive damages were improper when a plaintiff's exposure to asbestos from his work repairing and refurbishing valves fell well below relevant OSHA standards. *See Drabczyk v. Fisher Controls Int'l, et al., 92 A.D.3d 1259, 1260 (4th Dep't 2012).* In *Drabczyk*, the plaintiff's expert relied on:

> [T]ransmission electron microscopy to establish the level of asbestos to which the decedent may have been exposed from a defendant's products exceeded the OSHA standards

established in 1976 and revised in 1986. Id.

That technology, however, was not developed during the plaintiff's alleged exposure period in the 1970's and 1980's. *Id*. The Court further determined that "measurements taken by plaintiff's expert were well below the OSHA standards of 1986" and thus found that the plaintiff failed to show the defendant "engaged in outrageous or oppressive intentional misconduct or [acted] with reckless or wanton disregard of [the] safety of others." *Id*. (internal citations omitted).

In the following asbestos exposure cases, defendants attempted to use regulatory compliance as a defense against punitive damages but were unsuccessful for a variety of reasons. For example, in an appellate-level court in California, the court took into consideration a defendant's defense that it complied with certain OSHA regulations regarding asbestos exposures in its workplace, but the court still affirmed an awarded punitive damage against the defendant. *See Pfeifer v. John Crane, inc. 220 Cal.App.4th 1270, 1301 (2013)*. In this case, there was ample evidence that the defendant manufacturer knew asbestos was hazardous and protected its own employees from asbestos hazards, but never tested its own products to determine if working with the products would cause exposure to asbestos that would be higher than the regulatory limits. *See id. at 1300-01*. Thus, the defendant manufacturer in this case had "especially reprehensible" behavior the court took into consideration when it decided to affirm an award of punitive damages.

The Supreme Court of Mississippi came to a similar decision to uphold an award for punitive damages against an asbestos defendant when that defendant complied with asbestos regulations, but at the same time knew those regulations were inadequate. *See Union Carbide Corp. v. Nix, Jr., 142 So.2d 374, 391 (2014)*. Finally, in a Missouri Court of Appeals case, defendants argued their adherence to asbestos testing of their products "complied with and exceeded industry standards" and thus punitive damages were inappropriate. *Ingham v. Johnson & Johnson, 608 S.W.3d 663, 718 (Mo.App.E.D. 2020)*. The court disagreed explaining that "mere compliance with industry standards is not enough to prevent a trial court from finding a plaintiff made a submissible case for punitive damages." *See id*. The court in that case also noted that there was other compelling evidence relating to punitive damages, explaining there was evidence that defendants in this case improperly influenced the industry to adopt a deficient standard. *See id.*

In the following cases, despite evidence of regulatory compliance and a lack of other evidence supporting an award for punitive damages, courts have allowed the issue of punitive damages to go in front of the jury. Specifically, regulatory compliance was used as a defense in an asbestos case in Kentucky. *See Garlock Sealing Technologies, LLC v. Robertson, 2001 WL 1811683, *8 (Court of Appeals Kentucky, 2011)*. In that case, the defendant argued it should not be held liable for punitive damages since it complied with relevant OSHA regulations. See id. The court found that whether the defendant complied with OSHA regulations was a disputed fact for the jury to decide, and the court also found that whether defendant evinced "reckless disregard for the health and safety of others" was also for the jury to decide. *See id.* In Ohio, an appellate-level court came to a similar conclusion, remanding a new trial on punitive damages. *Schwartz v. Honeywell Internatl., Inc., 66 N.E.3d 118, 134-35 (2016)*. In that case, the lower court entered a directed verdict in favor of a defendant brake manufacturer after the facts showed, among other things evidence, that the defendant complied with governmental safety and performance standards with respect to any of its brakes. *See id.* The appellate-level court held that compliance with governmental safety or performance standards is a matter that should go to the weight of the evidence. *See id.*

Compliance with Automobile Industry Regulations and Preclusion of Punitive Damages.

In the context of the automobile industry, punitive damages were precluded in a 2015 Kentucky case where defendant Nissan demonstrated compliance with federal automobile safety regulations. *See Nissan Motor Company, Ltd. v. Maddox,* 386 S.W.3d 838 (2015). In this case, the plaintiff suffered injuries after she was hit by a drunk driver while traveling in her Nissan Pathfinder. *See id*. at 839. Plaintiff sued the driver's estate along with Nissan. *See id.* Plaintiff alleged that the seatbelt system was defectively designed and constructed; however, the facts in this case showed that the seatbelt system in plaintiff's Nissan Pathfinder met all standards promulgated by federal safety regulations and testing. *See id*. at 843. In fact, the undisputed evidence in this case showed that the Nissan Pathfinder at issue in this lawsuit met the "most rigorous frontal crash testing offered by the Federal government at the time." *See id.* Thus, as to punitive damages, the court held:

> Meeting and then exceeding base safety requirements is, at the very least, facial evidence of exercising slight care. Federal courts applying Kentucky law have correctly observed this standard. *See id*. (citing *Cameron v. DaimlerChrysler Corp*., No. Civ.A.5:04–CV–24, 2005 WL 2674990, at *9 (E.D.Ky. Oct. 20, 2005) (holding that the undisputed fact that manufacturer complied with Federal safety standards weighed against punitive damages).

In another case involving an injured motorist who brought a defective design action against defendant Honda, the United States Supreme Court similarly stated, albeit in dicta, that compliance with government-mandated standards should weigh in favor of precluding an award of punitive damages. *See Geier v. American Honda Motor Co., 529 U.S. 861, 861 (2000).* The Court stated in pertinent part that:

> Even though good-faith compliance with the minimum requirements of Standard 208 would not provide Honda with a complete defense on the merits, I assume that such compliance would be admissible evidence tending to negate charges of negligent and defective design. In addition, if [the defendant] were ultimately found liable, such compliance would presumably weigh against an award of punitive damages. See id. at 893.

Compliance with Federal Aviation Administration Regulations.

In the context of Federal Aviation Administration("FAA") Regulations, when

a defendant aircraft company was able to show an aircraft at issue was in compliance with all relevant FAA Regulations, the United States District Court for the Northern District of Texas held:

> [W]hile evidence of regulatory compliance does not foreclose an award of punitive damages as a matter of law, such evidence may demonstrate the absence of a genuine dispute of material fact as to gross negligence and malice, thus obligating the nonmovant to produce evidence proving that a genuine dispute of material fact exists. *Morris v. Cessna Aircraft Co., 833 F. Supp. 2d 622, 641 (N.D. Tex. 2011).*

Compliance with FDA Regulations and Preclusion of Punitive Damages.

Additionally, in the context of FDA regulations, punitive damages were precluded under Maryland law when defendants showed compliance with FDA regulations. In *Sloman v. Tambrands, Inc*., the court held "[s]ince defendant successfully proved that it complied with federal regulations, the Court concludes that [defendant] did not act with malice in its TSS warning and thus plaintiff is not entitled to punitive damages." *841 F.Supp. 699, 703, n.8 (D. Md. 1993).*

Compliance with Environmental Regulations and Punitive Damages.

In a lawsuit involving compliance with environmental regulations, the Supreme Court of Georgia held that punitive damages were improper when an operator of a quarry showed compliance with regulations and industry standards. The court held the following:

> [C]ompliance with county, state, and federal regulations is not the type of behavior which supports an award of punitive damages; indeed, punitive damages, the purpose of which is to "punish, penalize or deter," are, as a general rule, improper where a defendant has adhered to environmental and safety regulations. Accordingly, we hold that the award of punitive damages in this case is not supported by the evidence and must be reversed. *See Stone Man, Inc. v. Green, 263 Ga. 470, 472 (1993).*

Compliance with Chemical Industry Guidelines and Punitive Damages.

Finally, in a case involving compliance with industry guidelines for the labeling of "toxic" chemicals, the Supreme Court of Florida reversed an award of punitive damages against a defendant company that manufactured a product containing the chemical acrylamide. *American Cyanamid Co. v. Roy, 498 So. 2d 859, 860 (1986).* The evidence at trial showed that the defendant company complied with industry guidelines regarding the proper labeling of its "toxic" chemical product. The Court held that "in no way can [defendant's] corporate behavior in relationship to its product…sustain the award of punitive damages against it," *See id. at 861,* and further held that "compliance with industry guidelines…may certainly bear on whether a party's behavior represents such an extreme departure from accepted standards of car as to justify punitive damages." *See id. at 861.*

Developing A Regulatory Compliance Defense And Preparing For Plaintiffs' Opposition Thereto, In The Context Of Asbestos Litigation

Given that courts have precluded punitive damages in at least one asbestos exposure case involving regulatory compliance, and in the context of automobile safety regulations, FDA regulations, environmental regulations, and industry guidelines in the context of labeling toxic chemicals, there is support for the defense that compliance with asbestos-industry standards and government regulations should be taken into account when determining whether plaintiffs alleging exposure to asbestos are able to pursue punitive damages against a particular defendant. If defendants in asbestos lawsuits can affirmatively show they met government-mandated regulations and industry-accepted standards, then plaintiffs should not be allowed to pursue punitive damages against these defendants (absent other compelling evidence that punitive damages are proper against a particular defendant). Especially given the unique set of circumstances involving exposure to asbestos, i.e., the knowledge that asbestos can be hazardous to human health evolved over time, combined with the long latency period for asbestos-related diseases.

Developing a Defense Based on Compliance with Permissible Exposure Limits to Asbestos.

Before 1970, government and industry standards permitted the use of asbestos at emission levels that were orders of magnitude greater than would be permitted today. The threshold limit value ("TLV") is a definition used by the American Conference of Industrial Hygienists ("ACIH"), an organization comprised of governmental and educational Industrial Hygienists that has been around since the 1930's. In or around 1946, ACIH established its first TLV for asbestos exposure, which was five million particles per cubic foot (approximately 30 f/cc).

Five million particles per cubic foot remained the accepted standard by state and federal agencies, trade journals, and the ACIH until OSHA was passed in 1970. *Standard for Exposure to Asbestos Dust, Fed. Reg. 36,234 (Dec. 7, 1971) (to be codified at 29 C.F.R. pt. 1518).* When the William Steiger Occupational Health and Safety Act passed in 1970, OSHA adopted a Permissible Exposure Limit ("PEL") for exposure to asbestos. *See id*. The PEL adopted by OSHA was 12 f/cc or 2 million particles per cubic foot. *See id.* This was the PEL until 1971. In 1971 the PEL became 5 fibers/cc or .83 million particles per cubic foot and that lasted until about 1976. *Standard for Exposure to Asbestos* Dust, Fed. Ref. 37, 110 (June 7, 1972) (to be codified at 29 C.F.R. pt. 1910).

In 1972, OSHA's standard for exposure to asbestos dust was published in the Federal Register. In the explanation for this standard, OSHA stated the following:

> No one has disputed that exposure to asbestos of high enough intensity and long enough duration is casually related to asbestosis and cancer. The dispute is as to the determination of a specific level below which exposure is safe. Various studies attempting to establish quantitative relations between specific levels of exposure to asbestos fibers and the appearance of adverse biological manifestations, such as asbestosis, lung cancers, and mesothelioma, have given rise

> to controversy as to the validity of the measuring techniques used and the reliability of the relations attempted to be established. Because of the long lapse in time between onset of exposure and biological manifestations, we have now evidence of the consequences of exposure, but we do not have, in general accurate measure of the levels of exposure occurring 20 or 30 years ago, which have given rise to these consequences…It is fair to say that the controversy has centered in the area between a two-fiber TWA [time-weighted average] concentration and a five-fiber TWA concentration, with variations on the time needed for compliance. *See id.*

This excerpt shows that although there was a recognition in 1972 that asbestos could potentially pose a health hazard at certain levels, there was not a consensus as to a specific level below which exposure was safe, and a debate occurred on whether the standard should be 2 f/cc or 5 f/cc for a time-weighted average. *See id.* Thereafter, from July 1976 to 1986, the PEL under OSHA standard was set at 2 f/cc. *29 C.F.R. §§ 1990 - 1919 (1976).* The PEL was then reduced to .2 f/cc in 1986 through 1994. *29 C.F.R. §1910.1101 (1986).* Finally, in 1994, it was revised to .1 f/cc. *29 C.F.R. §§ 1910.1001, 1915.1001, 1926.58 (1994).*

Many defendants in asbestos litigation can use recent studies to show that their product complied with permissible exposure limits to asbestos at the time the plaintiff alleged exposure to said product. There have been published studies where experts conducted tests on boilers, valves, brakes, pumps, gaskets, clutches, and many other products to show the asbestos released into the air from working on these products was within regulatory mandates and industry guidelines. Plaintiffs may try to push back on this argument by contending there were no such studies conducting during the time-period when the plaintiff alleges exposure, but that doesn't change the fact that the defendant's product was shown to be in compliance with permissible exposure limits to asbestos.

Conclusion

In conclusion, if asbestos defendants can affirmatively show the asbestos released into the air from their product could not have been higher than these industry-accepted, government-mandated standards, and there is no other damaging evidence present that is relevant to an award of punitive damages, then plaintiffs should not be allowed to pursue punitive damages against that defendant. It goes against logic to allow punitive damages under these circumstances. Especially when the history of asbestos-related exposure limits shows that the limits enacted by the industry and the government were reduced over time as the science and understanding of asbestos exposure became clearer. It is both unfair and unreasonable to allow plaintiffs to pursue punitive damages against asbestos defendants who were compliant with the government-mandated regulations and industry-accepted standards during the relevant exposure periods.

Furthermore, even if the Court does allow a plaintiff to pursue a claim for punitive damages when a defendant is able to show regulatory compliance, the defendant's regulatory compliance can be used as strong evidence during trial that punitive damages should not be awarded.