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Toward a More Just and Predictable Civil Justice System

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TOWARD A MORE JUST AND PREDICTABLE CIVIL JUSTICE SYSTEM

George N. Meros, Jr.

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TOWARD A MORE JUST AND PREDICTABLE CIVIL JUSTICE SYSTEM

GEORGE N. MEROS, JR.*

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I. INTRODUCTION

Our tort system reflects the character and values of our society.¹ Like any moral code, it strives to bring out the best in citizens while discouraging the worst. To achieve these goals, the system must be fair and comport with common sense; be predictable, so that citizens can conform their conduct to the requisite norms; and encourage productive behavior and demand personal accountability.

However, today's tort system falls short of these goals.² It has drifted away from fault-based compensation to a system of social welfare.³ It is sometimes unfair and too often encourages antisocial behav-

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1. See William A. Worthington, The "Citadel" Revisited: Strict Tort Liability and the Policy of Law, 36 S. TEX. L. REV. 227, 229 & n.8 (1995). A "tort" is a "private or civil wrong or injury, including action for bad faith breach of contract, for which the court will provide a remedy in the form of an action for damages." BLACK'S LAW DICTIONARY 1489 (6th ed. 1990).

2. See Worthington, *supra* note 1, at 262-63.

3. Worker's compensation (FLA. STAT. ch. 440 (1997)) and automobile no-fault (FLA. STAT. §§ 627.730-7405 (1997)) are two examples of social welfare programs that have displaced parts of Florida's tort law system. In these and other similar instances, the welfare program guarantees compensation without regard to fault, in exchange for relinquishing traditional common law rights to sue in tort for personal injuries. See *Seaboard Coast Line R.R. v. Smith*, 359 So. 2d 427, 429 (Fla. 1978); *American Freight Sys., Inc. v. Florida Farm Bureau Cas. Ins. Co.*, 453 So. 2d 468, 470 (Fla. 2d DCA 1984). Under Florida's present tort system, however, some claimants can receive compensation without regard to the fault of the defendant, as in the dangerous instrumentality doctrine, or collect 100% of economic dan-

ior. For example, Florida's system permits a drunken driver to recover damages primarily caused by his own drunkenness, if another person also had some minimal responsibility for an accident.⁴ It permits a plaintiff to sue for a "defect" in a product fifty or more years old—well after the useful life of that product.⁵ It often requires a tortfeasor to pay more than his or her fair share of a loss.⁶ It also permits one to be punished repetitively for a single mistake.⁷

In 1997, the Florida Legislature proposed the Florida Accountability and Individual Responsibility Liability Bill (FAIR Bill).⁸ The FAIR Bill would place limits on vicarious liability, create a statute of repose for products, establish an alcohol and drug defense, and impose common-sense limits on the imposition of punitive damages. The FAIR Bill passed the House Financial Services Committee in the 1997 session. Under the applicable House rule,⁹ the bill remains pending during the 1998 session. The FAIR Bill, and other tort reform proposals, will be the subject of intense debate in 1998.

In Part II, this Article demonstrates that prudent tort reform is needed to ensure Florida's economic productivity and enhance the lives of individual citizens. Part III explains how modern Florida tort law has fallen out of balance and become unpredictable, costly, and unfair. Part IV highlights the FAIR Bill's proposed reforms and shows how these particular reforms will create a more just and predictable liability system. Finally, the Article concludes that the FAIR Bill is a step in the right direction for ensuring a fair and just tort system.

II. THE BENEFITS OF TORT REFORM

Tort liability imposes significant costs on society.¹⁰ In 1991, the nation spent \$131.6 billion on tort litigation, representing 2.3% of our

ages against a defendant only 5% at fault for those damages. See FLA. STAT. § 768.81 (1997). Yet, these same claimants retain all traditional common law remedies in tort. See *id.*

4. See *Livingston v. Smalley Transp. Co.*, 603 So. 2d 526, 528 (Fla. 3d DCA 1992); *City of Tamarac v. Garchar*, 398 So. 2d 889, 897 (Fla. 4th DCA 1981), overruled on other grounds, 502 So. 2d 1241 (Fla. 1987) (finding that the jury never clearly determined fault because they were not provided with intoxication instructions).

5. Florida repealed its 12-year-old statute of repose in 1986 by deleting it from section 95.03(2), Florida Statutes. See FLA. STAT. § 95.03(2) (1985); see also *Owens-Corning Fiberglass Corp. v. Corcoran*, 679 So. 2d 291, 291 (Fla. 3d DCA 1996); Alfred W. Cortese, Jr. & Kathleen L. Blaner, *The Anti-Competitive Impact of U.S. Product Liability Laws: Are Foreign Businesses Beating Us at Our Own Game?*, 9 J.L. & COM. 167, 175 & n.47 (1989).

6. See *Fabre v. Marin*, 623 So. 2d 1182, 1187 (Fla. 1993) (holding that joint and several liability is abolished only as to noneconomic damages).

7. See *W. R. Grace & Co.—Conn. v. Waters*, 638 So. 2d 502, 504 (Fla. 1994) (holding that prior punitive damages assessed against the defendant do not preclude subsequent awards against the same defendant for injuries arising from the same conduct).

8. Fla. HB 2117 (1997).

9. See FLA. H.R. RULE 96 (1996-98).

10. See Kirk W. Dillard, *Illinois' Landmark Tort Reform: The Sponsor's Policy Explanation*, 27 LOY. U. CHI. L.J. 805, 809 nn.1, 16-17 (1996).

gross domestic product.¹¹ In one recent year alone, state court juries in the seventy-five largest urban areas awarded over \$2.7 billion to plaintiffs.¹² Studies report that citizens pay a “tort tax” of \$1200 per individual, or nearly \$5000 for a family of four.¹³ Some have estimated that twenty percent of the cost of a ladder and fifty percent of the cost of a football helmet is attributable to tort liability.¹⁴ The cost of the tort system has risen sharply in the past thirty years¹⁵ and “at a pace far faster than in any other modern, competitive economy.”¹⁶

As tort costs have increased, so too has the unpredictability of liability, to the detriment of American commerce.¹⁷ Product manufacturers have become more risk averse, sacrificing research and innovation for the safe harbor of product uniformity.¹⁸ Socially beneficial products and services have not been developed, or have been withdrawn from the market for fear of tort lawsuits.¹⁹ American competitiveness in the worldwide market has suffered as well.²⁰ These inequities have increased the unpredictability, and therefore the cost, of the system, deterred commercial innovation, and stifled economic productivity.²¹

Tort liability imposes similar costs in Florida. A recent survey shows that Florida’s small businesses—the economic engine of the state—are significantly intimidated by the mere threat of liability.²² Eighty-five percent of those surveyed believe that liability laws improperly favor those who bring the suit.²³ Sixty percent have real concern about the possibility of a tort suit.²⁴ The concern is so acute that Florida businesses would rather be subject to a tax audit or OSHA in-

11. See *id.* at 809 n.17.

12. See BRIAN J. OSTROM & NEAL B. KAUDER, *EXAMINING THE WORK OF STATE COURTS, 1995: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT* 24 (1996).

13. See Dillard, *supra* note 10, at 809 n.16.

14. See Worthington, *supra* note 1, at 250; Dillard, *supra* note 10, at 811 n.27.

15. See PETER W. HUBER & ROBERT E. LITAN, *THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION* 3 (1991).

16. *Id.* (citation omitted).

17. See *id.* at 7-8.

18. See *id.*

19. See Worthington, *supra* note 1, at 245-49.

20. See Cortese & Blaner, *supra* note 5, at 173-86.

21. See *id.*; Worthington, *supra* note 1, at 230, 245-53.

22. See MASON DIXON & HANK FISHKIND, *NATIONAL FEDERATION OF INDEPENDENT BUSINESS SURVEY OF FLORIDA BUSINESS* (1997) (presented at the FAIR Press Conference on April 15, 1997) (on file with Fla. St. U. L. Rev., Tallahassee, Fla.) [hereinafter *SURVEY*]. The survey was taken from 772 business owners and executives from Florida firms with less than 500 employees. The interviews were conducted by telephone from March 24 through April 10, 1997. See also HENRY H. FISHKIND, *EXECUTIVE SUMMARY: ECONOMIC EFFECTS OF TORT REFORM ON FLORIDA'S ECONOMY* (1997) (on file with Fla. St. U. L. Rev., Tallahassee, Fla.) [hereinafter *EXECUTIVE SUMMARY*].

23. See *SURVEY*, *supra* note 22, at 7.

24. See *EXECUTIVE SUMMARY*, *supra* note 22, at 2.

spection than a liability suit.²⁵ Similarly, Florida businesses would rather lose their best customer or most valued employee than have to defend a tort lawsuit.²⁶ Close to 200 businesses indicated that they have withheld, failed to develop, or refused to market products or services to limit exposure to liability suits.²⁷ These small businesses consider tort reform as one of the three most important actions the Florida Legislature could take on behalf of business.²⁸

Empirical data confirm the benefits of sensible tort reform. A 1994 Stanford University study analyzed the impact of tort liability reforms on economic performance, using data from seventeen industries in states that had enacted tort reform.²⁹ The study focused on whether reforms had a significant impact on a state's productivity and employment.³⁰ The findings are notable. They demonstrate that a state's adoption of additional liability-reducing reforms generally enlarges levels of output per worker and employment in a broad range of industries.³¹ In contrast, a state's adoption of liability-increasing reforms generally causes lower productivity and employment.³² The study concludes that liability-decreasing reforms help a state's economy, and liability-increasing reforms hinder a state's economy.³³

Prudent tort reform will not pose a threat to public safety, as critics suggest, or create tort immunity for wrongdoers.³⁴ To the contrary, a balanced system will enhance public safety, punish wrongdoers for negligent conduct, and demand personal responsibility.³⁵

The present system does little to advance public safety. Florida's citizens are not protected by a system that permits drunk drivers and drug users to collect thousands for their own wrongdoing.³⁶ They are

25. See *id.* at 3; see also SURVEY, *supra* note 22, at 4.

26. See EXECUTIVE SUMMARY, *supra* note 22, at 3; see also, SURVEY, *supra* note 22, at 5.

27. See SURVEY, *supra* note 22, at app. 5.

28. See EXECUTIVE SUMMARY, *supra* note 22, at 2. Dr. Fishkind's summary of findings showed that almost 68% of the businesses surveyed named liability reform as one of the top three issues to be addressed by the Legislature, and another 31% ranked it among the top 10 issues.

29. See THOMAS J. CAMPBELL ET AL., LIABILITY REFORMS' CAUSES AND ECONOMIC IMPACTS: SOME EMPIRICAL EVIDENCE 27 (National Bureau of Econ. Research Working Paper, No. 4989, 1995).

30. See *id.*

31. See *id.*

32. See *id.*

33. See *id.*; see also Dillard, *supra* note 10, at 816 n.43.

34. See George L. Priest, Products Liability Law and the Accident Rate, in LIABILITY: PERSPECTIVES AND POLICY 184 (1988); Fla. HB 2117 (1997). The FAIR Bill does not create absolute bars to liability or cap damages. The statute of repose is, at most, a temporal limitation to suit, not a complete bar to liability. See *id.*

35. See Fla. H.R. Comm. on Educ. Servs., PCB 97-06 (1997) (Economic Impact Statement of Apr. 14, 1997) (on file with comm.).

36. See, e.g., *Livingston v. Smalley Transp. Co.*, 603 So. 2d 526, 528 (Fla. 3d DCA 1992) (holding that the defendant could be held liable for the accident even though the driver was

not protected when the law discourages small businesses and product manufacturers from developing newer, safer products for fear of lawsuits.³⁷ All citizens lose when tort liability is based not on fault, but on how much insurance or savings one has.³⁸

It is little wonder that studies have found that the expansion in tort liability around the nation has had little impact on consumer safety. A study by Professor George Priest demonstrated that while the number of tort suits and insurance premiums rose sharply in the 1980s, injury rates for consumers and workers, death rates for medical procedures, and aviation accident rates declined no faster than in the 1970s when premium costs and the volume of tort suits were much lower.³⁹ Stated more directly, Professor Priest found no empirical evidence whatsoever that the explosion in tort liability in the 1970s and '80s made society any safer.⁴⁰

If common sense reforms are enacted, Florida citizens will have a system that requires compensation for wrongful conduct, that refuses to reward drunken drivers and drug users, and that encourages businesses to invent and develop new and safer products and services. It is the fair thing to do.

III. FLORIDA TORT LAW: A SYSTEM OUT OF BALANCE

In the past thirty years, Florida's judiciary has liberalized and expanded tort liability, in part to remedy perceived historical anomalies. In so doing, however, the court retained other legal relics that permit wrongdoers to benefit from their own wrongs and require some tortfeasors to pay more than their fair share of a loss. The result is a system that is unpredictable, costly, and often just plain unfair.

A. Contributory Negligence

Before 1973, Florida applied the doctrine of contributory negligence.⁴¹ First adopted in Florida in 1886, the doctrine barred a plaintiff from seeking damages for injuries caused by negligence if the plaintiff was even 1% responsible for that loss.⁴² The supreme court described it as, "[t]he injury must be 'solely' caused by the neg-

50% at fault and there was evidence to suggest that the driver was under the influence of alcohol); see also FLA. STAT. § 768.81 (1997).

37. See SURVEY, *supra* note 22, at App. 5; George L. Priest, The Modern Expansion of Tort Liability: Its Sources, Its Effects and Its Reform, 5 J. ECON. PERSPECTIVES 31, 31 (1991).

38. See *Walt Disney World Co. v. Wood*, 515 So. 2d 198, 202 (Fla. 1987).

39. See HUBER & LITAN, *supra* note 15, at 5.

40. "[I]f courts had been attaching liability on grounds of accident prevention, then claims and claims payouts would have mirrored the accident rate." *Id.* at 5 (citation omitted).

41. See *Louisville and Nashville R.R. v. Yniestra*, 21 Fla. 700, 729 (1886).

42. See *id.*

ligence of the defendant. It is not enough that it should be 'essentially' so caused."⁴³

While contributory negligence sometimes yielded harsh results, the harshness was ameliorated by another common law doctrine—joint and several liability. Joint and several liability provides that each defendant is liable for the entire damage to the plaintiff, regardless of that defendant's percentage of real culpability.⁴⁴ The doctrine derives from the principal that "the act of one is the act of all."⁴⁵ Under joint and several liability, the liability is "'joint' in that all defendants may be joined to render compensation for an injury; it is 'several' in that each defendant is liable for the entire damage amount; and it is 'joint and several' in that no defendant's liability is extinguished until the plaintiff's judgment is completely satisfied."⁴⁶ Joint and several liability was considered a necessary evil under contributory negligence because principles of causation deemed injuries "indivisible," and there was no way to determine each tortfeasor's degree of negligence.⁴⁷

B. The Illicit Union of Comparative Fault and Joint and Several Liability

In *Hoffman v. Jones*,⁴⁸ the Florida Supreme Court, describing contributory negligence as "unjust" and "inequitable," abolished the doctrine in favor of comparative negligence.⁴⁹ The court reasoned that the liability of the defendant should depend upon "what damages he caused"⁵⁰ because "[i]n the field of tort law, the most equitable result that can ever be reached by a court is the equation of liability with fault."⁵¹ In addition, the court adopted "pure" comparative negligence, under which a plaintiff is entitled to collect from each defendant his proportionate share of damages, regardless of the degree of the plaintiff's fault.⁵² Under this rule, a plaintiff can recover damages caused in part by his own negligence, even if he is 99% responsible for his injuries.⁵³

43. *Id.*

44. See Pamela Burch Fort et al., *Florida's Tort Reform: Response to a Persistent Problem*, 14 *FLA. ST. U. L. REV.* 505, 508-09 (1986).

45. *Id.* at 508.

46. *Id.* at 509.

47. See *id.*

48. 280 So. 2d 431 (Fla. 1973).

49. *Id.* at 437.

50. *Id.* at 439 (emphasis omitted).

51. *Id.* at 438.

52. See *id.* (holding that "[i]f plaintiff and defendant are both at fault, the former may recover, but the amount of his recovery may be only such proportion of the entire damages plaintiff sustained as the defendant's negligence bears to the combined negligence of both the plaintiff and the defendant").

53. See *id.* at 439.

The Hoffman Court's laudable goal of equating liability with fault went unrealized, however, because the court neglected to correct another historical anomaly at the same time—joint and several liability.⁵⁴ Since 1973, comparative negligence has coexisted with joint and several liability, often yielding unfair results. Hoffman teaches that a co-defendant responsible for 10% of a plaintiff's loss should pay only 10% of the damages.⁵⁵ But this is not the case in a multi-defendant personal injury case, due to joint and several liability. Even today, a tortfeasor 10% at fault can, under certain circumstances, be forced to pay all of a plaintiff's damages, or at least a much greater share than his actual fault warrants.⁵⁶

The inequity is best illustrated by the decision in *Walt Disney World Co. v. Wood*.⁵⁷ In *Wood*, a jury returned a verdict finding the plaintiff 14% at fault, Walt Disney World 1% at fault, and the plaintiff's fiancée (who was not joined as a defendant) 85% at fault.⁵⁸ Because joint and several liability remained in effect at that time, Walt Disney World was responsible for payment of 86% of the plaintiff's damages.⁵⁹ The supreme court, however, declined to abolish joint and several liability.⁶⁰ In 1986, the Legislature abolished the doctrine with regard to noneconomic damages, but only partially abolished it for economic damages.⁶¹ Comparative negligence and joint and several liability co-exist in Florida today, at times requiring persons to pay more than their fair share of a loss.⁶²

54. See *id.*

55. See *id.*

56. See FLA. STAT. § 768.81(3) (1997).

57. 515 So. 2d 198 (Fla. 1987).

58. See *id.* at 199.

59. See *id.*

60. See *id.* at 202.

61. See Tort Reform and Insurance Act, ch. 86-160, § 60, 1986 Fla. Laws 695, 755 (amending FLA. STAT. § 768.81(3) (1985)). As for noneconomic damages, "each defendant is liable for only his own percentage share of noneconomic damages." *Smith v. Department of Ins.*, 507 So. 2d 1080, 1091 (Fla. 1987); see also FLA. STAT. § 768.81(2) (1997). As for economic damages, "with respect to a party whose percentage of fault equals or exceeds that of a particular claimant, the court shall enter judgment . . . against that party on the basis of the doctrine of joint and several liability." *Id.* § 768.81(3). Joint and several liability continues to apply to all actions in which damages (economic/noneconomic) do not exceed \$25,000. See FLA. STAT. § 768.81(5) (1997).

62. See FLA. STAT. § 768.81 (1997). In his dissent in *Walt Disney World*, Justice McDonald explained the intrinsic unfairness of combining comparative fault with joint and several liability in Florida's tort system:

The doctrines of joint and several liability and contributory negligence are consistent with each other. Each tortfeasor, as a part of the whole, is liable for the whole. Comparative negligence, which does not bar, but reduces a recovery to the extent of individual fault, requires a separation of fault between the injured party and the other tortfeasors. It would be a mismatch of legal concepts to have a separation theory for the plaintiffs and joint liability responsibility for defendants. Comparative negligence recognized the ability of a court to determine and apportion damages in relation to the harm caused. Joint and several, in contrast,

In the last three decades, Florida citizens have witnessed other revolutionary changes in tort liability that have contributed to the imbalance in this state's tort system. In 1976, the Florida Supreme Court abolished the requirement of privity in tort and adopted strict liability.⁶³ Not long after, the court imposed upon automobile manufacturers the obligation to make vehicles "crashworthy."⁶⁴ The court has also reaffirmed the dangerous instrumentality doctrine, which departed from the essential premise of Hoffman and imposed liability without fault.⁶⁵ In 1985, the Legislature repealed the statute of repose on product liability actions, making manufacturers theoretically liable for products 50, 75, or even 100 years old.⁶⁶

Not surprisingly, as tort liability expanded, litigation exploded in Florida. From 1975 to 1995, tort filings in Florida increased by 45%.⁶⁷ From 1980 through 1994, tort filings increased 43%, while Florida's population increased by only 28%.⁶⁸ Expanded liability has been profitable for Florida claimants and their attorneys. Between 1991 and 1996, Florida claimants had a 61% probability of recovering a personal injury verdict, while the national average was only 50%.⁶⁹ In 1997, the median personal injury award in Florida was a whopping 40% higher than the national median.⁷⁰

IV. THE FAIR BILL: A FIRST STEP TOWARD SENSIBLE TORT REFORM

During the 1997 legislative session, the House Committee on Financial Services, chaired by Representative "Sandy" Safley,⁷¹ intro-

presumes the inability of the judiciary to divide fault among parties. We have now said that we can. Accordingly, when the comparative negligence doctrine comes into play, as it did in this case, the law of joint and several liability should be repudiated and each defendant held accountable for only the percentage of damage determined by the trier of fact to have been caused by his conduct.

Id. at 202 (McDonald, J., dissenting).

63. See *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 89 (Fla. 1976) (holding that "a manufacturer may be liable under the theory of strict liability in tort, as distinct from breach of implied warranty of merchantability").

64. *Ford Motor Co. v. Hill*, 404 So. 2d 1049, 1052 (Fla. 1981) (holding that because collisions are foreseeable events, "the scope of the liability should be commensurate with the scope of foreseeable risks").

65. See *Kraemer v. General Motors Acceptance Corp.*, 572 So. 2d 1363, 1365 (Fla. 1990); see also *Susco Car Rental Sys. v. Leonard*, 112 So. 2d 832, 837 (Fla. 1959).

66. See FLA. STAT. § 95.11 (1997) (providing for a four-year statute of limitation for product liability actions, without a statute of repose); see also *Owens-Corning Fiberglass Corp. v. Corcoran*, 679 So. 2d 291, 291 (Fla. 3d DCA 1996).

67. See OSTMOR & KAUDER, *supra* note 12, at 26.

68. See Florida Chamber of Com., Issue Brief: Characteristics of the Disposition of Negligence Cases in Florida, 1980-94, in FLORIDA'S COMPARATIVE FAULT LAW 8-11 (1995) (an economic consulting services special report prepared for the Florida Chamber of Commerce).

69. See JURY VERDICT RES. SERV., 1997 FLORIDA VERDICT SURVEY 12 (Lynn Godfrey & Traci Stocker eds., 1997).

70. See *id.* at 13.

71. *Repub.*, Clearwater.

duced and ultimately reported favorably on House Bill 2117, the FAIR Bill. The FAIR Bill is a modest first step toward meaningful tort reform. In summary, the bill creates a twelve-year statute of repose for product liability actions;⁷² limits vicarious liability for injuries caused by dangerous instrumentalities;⁷³ creates a common sense alcohol and drug defense;⁷⁴ limits joint and several liability in cases with damages less than \$25,000;⁷⁵ limits repetitive punitive damages,⁷⁶ and clarifies the wrongful intent required for imposition of punitive damages.⁷⁷

A. Statute of Repose

In *West v. Caterpillar*,⁷⁸ the Florida Supreme Court adopted strict liability and greatly expanded the scope of liability for retailers and manufacturers of products.⁷⁹ Dispensing with time-honored concepts of privity and fault, the court held that a retailer or manufacturer could be held liable for injuries suffered by a remote user of a product, regardless of the care taken in designing or manufacturing that product, if the product was found to be “unreasonably dangerous.”⁸⁰ That standard requires a careful, complex evaluation of the risks of injury posed by a product, compared with the utility and cost of its design, its usefulness to society as a whole, and the ability to make the product safer at a reasonable cost.⁸¹

Unfortunately, Florida juries are not instructed on the necessary elements of this analysis. Rather, the jury is summarily instructed that a product is “unreasonably dangerous” and therefore defective if, by reason of its design or manufacture, “the product fails to perform as safely as an ordinary consumer would expect, . . . or if the risk of dan-

72. See Fla. HB 2117, § 2 (1997).

73. See *id.* § 3.

74. See *id.* § 4.

75. See *id.* § 8.

76. See *id.* § 6.

77. See *id.* § 7.

78. 336 So. 2d 80 (Fla. 1976).

79. See *id.* at 89.

80. *Id.*

81. See *Auburn Mach. Works Co. v. Jones*, 366 So. 2d 1167, 1169 (Fla. 1979). Among the factors that must be considered in this analysis are:

“(1) the usefulness and desirability of the product, (2) the availability of other and safer products to meet the same need, (3) the likelihood of injury and its probable seriousness, (4) the obviousness of the danger, (5) common knowledge and normal public expectation of danger (particularly for established products), (6) the avoidability of injury by care in use of the product (including the effect of instructions or warnings), and (7) the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive.”

Id. at 1170 (quoting an uncited article by Dean Wade). See also *Huddell v. Levin*, 537 F.2d 726, 735 (3d Cir. 1976); see generally *Radiation Tech., Inc. v. Ware Constr. Co.*, 445 So. 2d 329, 331 (Fla. 1983); *Cassisi v. Maytag Co.*, 396 So. 2d 1140, 1145-46 & n.9 (Fla. 1st DCA 1981).

ger in the product outweighs the benefits.”⁸² Thus, a finding of defect in Florida is nothing more than a retrospective second guess about complex, sophisticated design or manufacturing choices made by scientists and engineers years before.⁸³ Stated another way, “[y]esterday’s products are measured against tomorrow’s possibilities.”⁸⁴

Worse, retailers and manufacturers retain virtually unlimited exposure for alleged defects in their products. Under Florida law, a plaintiff can sue for a defective product even if that product is 50, 75, or 100 years old—well after the product has reached the end of its useful life.⁸⁵ Such unlimited exposure is both unfair and unwise. It leaves retailers and manufacturers unable to predict contingent liabilities and discourages the innovation and introduction of new products.⁸⁶

The problem is real, and one that has caused tangible harm to Florida’s citizens. In 1991, Piper Aircraft of Vero Beach filed for protection under Chapter Eleven of the Federal Bankruptcy Code, reporting that the potential for product liability litigation involving older planes had scared off potential lenders.⁸⁷ The fifty-four-year-old Florida company once had more than 3200 employees in four plants; on the day it sought Chapter Eleven protection, the company had only forty-five employees.⁸⁸

The FAIR Bill cures this inequity by reinstating a statute of repose for product liability actions. It provides that an action claiming a product defect must be commenced no later than twelve years after the product leaves the possession and control of the manufacturer.⁸⁹ As

82. FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES § PL 5 (1997).

83. See generally Cortese & Blaner, *supra* note 5, at 187 & nn. 118-121.

84. Worthington, *supra* note 1, at 247 (citation omitted).

85. Florida’s 12-year statute of repose for strict products liability claims was repealed in 1986. See *Owens-Corning Fiberglass Corp. v. Corcoran*, 679 So. 2d 291, 291 (Fla. 3d DCA 1996); see also Cortese & Blaner, *supra* note 5, at 175 & n.47.

86. See Cortese and Blaner, *supra* note 5, at 187-91. A design engineer in Florida is faced with an intractable dilemma due to this exposure for unlimited product liability. If an engineer develops a simple, inexpensive way to improve the safety of a 20-year-old widget, the present state of Florida law discourages that innovation. If a product liability suit is brought seeking damages for personal injuries arising from use of the 20-year-old widget, the plaintiff lawyer will use the newer, safer design as proof that the earlier design was “unreasonably dangerous.” Thus, the perpetual risk of liability concerning the older widget creates disincentives to the improvement of that product. See *id.*

87. See *Piper Aircraft Seeks Chapter 11 Protection*, N.Y. TIMES, July 4, 1991, at D1.

88. See *id.* In 1970, private aircraft manufacturers produced 17,000 planes. In 1987, they produced less than 1100 planes. See Worthington, *supra* note 1, at 249. In large part because of the risk of perpetual product liability in the aircraft industry, thousands of aircraft workers were laid off, unemployment in the industry was over 50%, and the cost of liability insurance averaged \$100,000 per plane produced. See W. KIP VISCUSI, REFORMING PRODUCTS LIABILITY 8 (1991). In response to this liability crisis, Congress passed the General Aviation Revitalization Act of 1994, which was signed into law on August 17, 1994. It created an 18-year statute of repose in actions against manufacturers of general aviation aircraft. See General Aviation Revitalization Act of 1994, Pub. L. No. 103-298, 108 Stat. 1552 (1994).

89. See Fla. HB 2117, § 2 (1997).

the Florida Supreme Court noted, a statute of repose evinces a "rational and legitimate" policy that recognizes "perpetual liability places an undue burden on manufacturers."⁹⁰ It is based on the common-sense notion that "liability should be restricted to a time commensurate with the normal useful life of manufacturer products."⁹¹ Key states with which Florida competes for economic development, such as Georgia⁹² and Illinois,⁹³ have similar statutes of repose.

The FAIR Bill's statute of repose will not abolish an injured person's right to sue for injuries related to the use of a product.⁹⁴ It would limit only those actions brought for the allegedly defective design or manufacture of a product where injuries occur more than twelve years after the product leaves the possession of the manufacturer.⁹⁵ A plaintiff will continue to have the right to sue for the negligent repair of a product, its negligent use, or negligent alteration of a product.⁹⁶

B. Vicarious Liability

Section three of the FAIR Bill modifies a historical relic that is inconsistent with modern tort law—vicarious liability for use of dangerous instrumentalities.⁹⁷

Under the dangerous instrumentality doctrine, the owner or lessor of an automobile is held strictly liable for damages suffered by a third party due to the negligence of the person to whom the owner or lessor entrusted the automobile.⁹⁸ Liability is not based on the owner's negligence or fault in entrusting the vehicle; rather, it is based solely on ownership of the product and the original consent given to another to use the product.⁹⁹ The doctrine has been expanded beyond the permissive use of automobiles to golf carts and other products.¹⁰⁰

90. Pullum v. Cincinnati, Inc., 476 So. 2d 657, 659 (Fla. 1985).

91. Id. at 660.

92. See GA. CODE ANN. § 51-1-11(b)(2) (1997).

93. See ILL. COMP. STAT. ANN. 5/13-213(c)(1) (West 1997).

94. The statute cannot constitutionally be applied to situations where a person uses or consumes a product that inflicts injury within the 12-year period (giving rise to an accrued cause of action), but where injury does not manifest itself until after the period of repose. See Conley v. Boyle Drug Co., 570 So. 2d 275, 283 (Fla. 1990); Diamond v. E. R. Squibb & Sons, Inc., 397 So. 2d 671, 672 (Fla. 1981); Pullum, 476 So. 2d at 659.

95. See Fla. HB 2117, § 2 (1997).

96. See id.

97. See id. § 3.

98. See Kraemer v. General Motors Acceptance Corp., 572 So. 2d 1363, 1367 (Fla. 1990); Susco Car Rental Sys. v. Leonard, 112 So. 2d 832, 835-36 (Fla. 1959) (holding the owner of a car liable when the owner consents to the use of the vehicle "beyond his own immediate control"); Lynch v. Walker, 31 So. 2d 268, 271 (Fla. 1947).

99. See Susco Car Rental Sys., 112 So. 2d at 835-36.

100. See Meister v. Fisher, 462 So. 2d 1071 (Fla. 1984) (golf carts); Paterson v. Deeb, 472 So. 2d 1210 (Fla. 1st DCA 1985) (holding the owner liable for the conduct of the thief); see also Gomez v. Avis Rent A Car Sys., Inc., 596 So. 2d 510 (Fla. 3d DCA 1992); Stupak v. Winter Park Leasing, Inc., 589 So. 2d 396 (Fla. 5th DCA 1991); Lambert v. Indian River Elec.,

Florida's application of this doctrine is not in line with the national mainstream. Prosser and Keeton note that Florida is the only state that imposes such absolute liability:

If the owner is not present in the car, but has entrusted it to a driver who is not his servant, there is merely a bailment, and there is usually no basis for imputing the driver's negligence to the owner. It is here that the owner's liability to the injured plaintiff stops at common law. Only the Courts of Florida have gone the length of saying that an automobile is a "dangerous instrumentality" for which the owner remains responsible when it is negligently driven by another.¹⁰¹

The Florida Supreme Court admitted as much in 1993 in *Hertz Corp. v. Jackson*.¹⁰²

The doctrine is also fundamentally at odds with modern Florida tort law. Because liability is gauged by one's status and not one's fault, the doctrine contravenes *Hoffman*¹⁰³ and the comparative fault statute.¹⁰⁴ Because liability is vicarious rather than direct, the doctrine provides no guidance on how one can avoid or limit potential liability. The result is liability that is unpredictable (and therefore costly) and unfair.

Not surprisingly, the state's statutory and common law have moved toward limiting, if not abrogating, the dangerous instrumentality doctrine. In 1986, the Legislature abolished the doctrine with respect to long-term lease arrangements, provided that the lessee obtains certain levels of bodily injury liability and property damage insurance.¹⁰⁵

Perhaps most significantly, only months ago the Florida Supreme Court adopted negligent entrustment in Florida, under which a property owner is liable for injuries to a third person only if the owner was negligent in entrusting the property to a wrongdoer.¹⁰⁶ This concept, unlike the dangerous instrumentality doctrine, is faithful to Florida's efforts to equate liability with fault, and is a much fairer way to impose liability against owners of personal property.

Inc., 551 So. 2d 518 (Fla. 4th DCA 1989); *Michalek v. Shumate*, 524 So. 2d 426 (Fla. 1988); *Tribbitt v. Crown Contractors, Inc.*, 513 So. 2d 1084 (Fla. 1st DCA 1987).

101. W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* 523-24 (5th ed. 1984).

102. 617 So. 2d 1051, 1053 (Fla. 1993) (stating that "[i]t appears that Florida is the only jurisdiction that imposes . . . strict vicarious liability upon the owner of a motor vehicle who voluntarily entrusts it to another").

103. See *Hoffman v. Jones*, 280 So. 2d 431, 438 (Fla. 1973).

104. FLA. STAT. § 768.81 (1997).

105. See Act Effective Oct. 1, 1986, ch. 86-229, 1986 Fla. Laws 1771, 1772 (amending FLA. STAT. § 324.021 (9) (1985)).

106. See *Kitchen v. K-Mart Corp.*, 22 Fla. L. Weekly S435, S438 (Fla. July 17, 1997) (finding the store negligent for selling a firearm to an obviously intoxicated customer who subsequently shot the petitioner).

Under the FAIR Bill, the owner of personal property would not be vicariously liable for the negligent operation of the property by another, provided that the user has or obtains insurance containing limits of not less than \$100,000 and \$300,000 for bodily injury, or combined limits of \$500,000.¹⁰⁷ This provision would provide a substantial layer of protection to one injured by the negligent use of someone else's property, while moving Florida law in the direction of equating liability with fault.

C. Alcohol and Drug Defense

Alcohol and drugs kill with tragic frequency and societal cost. In 1996, there were 973 alcohol- or drug-related fatalities, 23,145 alcohol- or drug-related injuries, and 25,362 alcohol- or drug-related crashes in Florida.¹⁰⁸

In Florida, the use of alcohol and drugs can also pay. Under the present tort system, a drunk driver can be primarily responsible for his own injuries, but still collect thousands of dollars in compensation if another person was partially responsible for that loss.¹⁰⁹ Take, for example, a two-car collision at an intersection. Drunk Driver is young and severely intoxicated at the time of the accident, with a 3.0 blood alcohol level. Sober Driver is an elderly, usually careful driver. Drunk Driver runs a red light and careens into the intersection at high speed. Sober Driver enters the intersection at a reasonable speed, but fails to react quickly enough to avoid the collision. Drunk Driver is rendered a quadriplegic, while Sober Driver escapes with a broken leg. The jury finds Drunk Driver 90% responsible, incurring damages of \$4 million. Sober Driver is 10% responsible for the accident, with damages of \$20,000. Under this scenario, the drunk driver would recover a judgment against the sober, elderly citizen for \$382,000. This result rewards criminal conduct and is unconscionable.

Section four of the FAIR bill is an alcohol and drug defense that infuses some common sense into the system and prohibits compensation under these circumstances.¹¹⁰ This provision would permit a defendant to assert drug or alcohol impairment of the plaintiff as a defense if the plaintiff was under the influence of drugs or alcohol and if, as a result of being under the influence, the plaintiff was more than 50% at fault for his own injuries.¹¹¹ The defense would not apply to over-the-counter or prescription drugs.¹¹²

107. See Fla. HB 2117, § 3 (1997).

108. See DEPARTMENT OF HIGH. SAF. & MOTOR VEH., TRAFFIC CRASH FACTS 5 (1996).

109. See, e.g., *Livingston v. Smalley Trans. Co.*, 603 So. 2d 526, 528 (Fla. 3d DCA 1992).

110. See Fla. HB 2117, § 4 (1997).

111. See *id.*

112. See *id.*

This proposal is simple and fair. It embodies Florida's strong public policy against the use of drugs and alcohol.¹¹³ It requires an individual to assume responsibility for his own wrongful conduct.

D. Comparative Fault/ Joint and Several Liability

In *Fabre v. Marin*,¹¹⁴ the Florida Supreme Court reaffirmed the underlying premise of *Hoffman*—that liability should equate with fault.¹¹⁵ There is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss, and there is no valid social policy that should compel defendants to pay more than their fair share of the loss. Plaintiffs now take the parties as they find them. If one of the parties at fault happens to be a spouse or a governmental agency and if by reason of some competing social policy the plaintiff cannot receive payment for his injuries from the spouse or agency, there is no compelling social policy that requires the co-defendant to pay more than his fair share of the loss.¹¹⁶

Unfortunately, Florida tort law still falls short of this goal. Joint and several liability persists in all actions where damages are less than \$25,000. In cases involving more than \$25,000 in damages, joint and several liability still applies to economic damages in some instances.¹¹⁷

Section eight of the FAIR Bill partially rectifies this inequity by applying Florida's partial abolition of joint and several liability to smaller cases with total damages of less than \$25,000.¹¹⁸ A person should pay only her fair share of a loss, no matter how big or small the case.

E. Punitive Damages

Punitive damages are, simply put, "out of control."¹¹⁹ The punishment is erratic, often does not fit the offense, and fails to distinguish

113. See *Kitchen v. K-Mart*, 22 Fla. L. Weekly S435, S438 (Fla. July 17, 1997) (applying negligent entrustment to a store for selling a firearm to an obviously intoxicated customer who subsequently shot the petitioner, thus equating liability with fault).

114. 623 So. 2d 1182 (Fla. 1993).

115. See *id.* at 1185.

116. See *id.* at 1187 (citing *Brown v. Keill*, 580 P.2d 867, 874 (Kan. 1978)).

117. See FLA. STAT. § 768.81(3) (1997).

118. See Fla. HB 2117, § 8 (1997).

119. See VICTOR E. SCHWARTZ, AM. TORT REFORM ASS'N, COMMENTS BEFORE THE UNITED STATES SENATE JUDICIARY COMMITTEE 2 (1995) (summarizing Mr. Schwartz's testimony before Congress on the imposition of punitive damages) (on file with author) [hereinafter SCHWARTZ'S SENATE COMMENTS]; Dillard, *supra* note 10, at 807 n.10; Robert D. Cooter, Punitive Damages for Deterrence: When and How Much?, 40 ALA. L. REV. 1143, 1145-46 (1989); Dorsey D. Ellis, Jr., Punitive Damages, Due Process, and the Jury, 40 ALA. L. REV. 975, 975-76, 987-88 (1989) [hereinafter Ellis, Punitive Damages]; Malcolm E. Wheeler, A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation, 40 ALA. L. REV. 919, 940-41 (1989); John Calvin Jeffries, Jr., A Comment

negligent from truly egregious conduct.¹²⁰ An editorial from The Washington Post presented it this way: "Legislation is needed because punitive damages are wildly unpredictable, so arbitrary as to be unfair and awarded without any guidance to juries, which simply pick numbers out of the air."¹²¹ The inequity in modern punitive awards has even prompted the United States Supreme Court to become active in the field, despite a long-held reluctance to intervene in state law issues.¹²²

1. The Expansion of Punitive Damages

Punitive damages are not intended to compensate a claimant. They are awarded solely for the purpose of punishing truly egregious conduct and deterring others from similar misconduct.¹²³ Their existence is derived from public policy, not individual entitlement. The Florida Supreme Court made that clear in 1992:

Unlike the right to compensatory damages, the allowance of punitive damages is based entirely upon considerations of public policy. Accordingly, it is clear that the very existence of an inchoate claim for punitive damages is subject to the plenary authority of the ultimate policy-maker under our system, the legislature. In the exercise of that discretion, it may place conditions upon such a recovery or even abolish it altogether.¹²⁴

Forty years ago, punitive damage verdicts were unusually rare.¹²⁵ Times have changed. Both the frequency of punitive claims and the magnitude of punitive awards have increased dramatically since then.¹²⁶ From 1968 to 1971, in the states of Florida, California, Texas, New York, and Illinois, ninety-one punitive damage awards were affirmed on appeal, totaling \$1.4 million.¹²⁷ Twenty years later, between 1988 and 1991, the same states had 433 punitive damage awards af-

on the Constitutionality of Punitive Damages, 72 VA. L. REV. 139, 139 (1986); Dorsey D. Ellis, Jr., Fairness and Efficiency in the Law of Punitive Damages, 56 S. CAL. L. REV. 1, 55-60 (1982) [hereinafter Ellis, Fairness and Efficiency].

120. See SCHWARTZ'S SENATE COMMENTS, supra note 119, at 1-2; see also Dillard, supra note 10, at 807 n.10.

121. Editorial, Trial Lawyers' Triumph, WASH. POST, Mar. 19, 1996, at A16.

122. See BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589 (1996); TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991); Browning-Ferris Ind. v. Kelco Disposal, Inc., 492 U.S. 257 (1989).

123. See Chrysler Corp. v. Wolmer, 499 So. 2d 823, 825 (Fla. 1986).

124. Gordon v. State, 608 So. 2d 800, 801 (Fla. 1992) (citation omitted).

125. See GEORGE L. PRIEST, COMMENTS BEFORE THE SENATE COMMITTEE ON THE JUDICIARY ON PUNITIVE DAMAGES TORT REFORM 2 (1995) (on file with author) [hereinafter PRIEST'S SENATE COMMENTS].

126. See id.

127. See STEPHEN M. TURNER ET AL., WASHINGTON LEGAL FOUNDATION, PUNITIVE DAMAGES EXPLOSION: FACT OR FICTION? 2, 4 (1992).

firmed on appeal, totaling \$342.9 million.¹²⁸ “By all measures, punitive damage award amounts increased dramatically between 1985-1989 and 1990-1994.”¹²⁹ In addition, the frequency of punitive claims has affected the settlement process, both increasing the litigation rate and increasing the ultimate magnitude of settlements.¹³⁰

This explosion in punitive damage awards is attributable to at least two factors. First, while punitive damages were historically limited to a narrow class of intentional torts such as battery and trespass, courts in modern times have expanded punitive liability for less than intentional misconduct.¹³¹ The standards governing this liability are at best fuzzy, at worst, incomprehensible.¹³² For example, in Florida a jury might be told that punitive damages are appropriate to punish “wanton” conduct.¹³³ Few jurors understand what that standard means (or, just as importantly, what it does not mean) and even fewer citizens can discern how to conform their conduct to avoid committing “wanton conduct.”¹³⁴ The result is wildly erratic and unpredictable punitive awards.¹³⁵

Second, courts have begun to impose repetitive awards against a defendant for a single course of conduct, particularly in the field of product liability.¹³⁶ The policies underlying punitive damages, and society as a whole, are poorly served by punishing a defendant time and again for a single course of conduct. Federal Circuit Judge Henry Friendly noted in 1967 that “we have the greatest 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.”¹³⁷ In fact, overkill is precisely what has occurred. Multiple windfall recoveries of punitive damages deplete a defendant’s limited resources

128. See *id.*

129. ERIK MOLLER, TRENDS IN CIVIL JURY VERDICTS SINCE 1985 40 (1996).

130. See PRIEST’S SENATE COMMENTS, *supra* note 125, at 2.

131. See SCHWARTZ’S SENATE COMMENTS, *supra* note 119, at 4; see also *Adams v. Whitfield*, 290 So. 2d 49, 51-52 (Fla. 1974) (holding that evidence of legal malice, not actual malice, is needed to justify a punitive damage award).

132. See *Campbell v. Government Employees Ins. Co.*, 306 So. 2d 525, 531-32 (Fla. 1974) (holding that punitive damages were available for “evil-doing,” “outrageous highhandedness,” or for conduct committed with “malice, moral turpitude, [or] wantonness”) (citation omitted).

133. FLORIDA STANDARD JURY INSTRUCTIONS IN CIVIL CASES § PD(a)(2)(3) (1997) [hereinafter 1997 CIVIL JURY INSTRUCTIONS]; see also *Glickstein v. Setzer*, 78 So. 2d 374, 375 (Fla. 1955).

134. 1997 CIVIL JURY INSTRUCTIONS, *supra* note 133; see also *Glickstein*, 78 So. 2d at 375.

135. See *Jeffries*, *supra* note 119, at 139; see also *Cooter*, *supra* note 118, at 1145-46; *Ellis*, *Punitive Damages*, *supra* note 119, at 975-76, 987-88; *Ellis*, *Fairness and Efficiency*, *supra* note 119, at 55-60; *Wheeler*, *supra* note 119, at 940-41.

136. See *W. R. Grace & Co.—Conn. v. Waters*, 638 So. 2d 502, 504 (Fla. 1994); see also SCHWARTZ’S SENATE COMMENTS, *supra* note 119, at 1, 4.

137. *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967).

and endanger the ability of future claimants to recover even compensatory damages.¹³⁸

Even the threat of repetitive punitive awards can drive a company into bankruptcy. Dow-Corning Corporation is a recent example. When breast implant recipients began to experience unexplained symptoms of malaise, plaintiffs' attorneys throughout the country flooded the judicial system with lawsuits, claiming that silicone breast implants were defective.¹³⁹ Faced with years of future litigation, including multiple punitive damages awards, Dow-Corning offered to create a fund of \$2 billion—at the time the largest single settlement fund in modern American history. at that time¹⁴⁰ In order to preserve the integrity of this fund and to maintain its financial viability, Dow-Corning sought class action certification to foreclose repetitive punitive awards by opt-out claimants.¹⁴¹ Nonetheless, Dow-Corning succumbed to Chapter Eleven bankruptcy in 1995, putting the settlement fund in jeopardy, or at least delaying the availability of these billions to pay compensatory damages.¹⁴²

Even worse, despite thousands of pending claims, there is precious little, if any, scientific proof that silicone implants are defective.¹⁴³ The United States District Court for the District of Oregon convened an independent panel of scientists and medical experts to assess the probative value of plaintiffs' proffered evidence that silicone implants cause auto-immune disease.¹⁴⁴ After exhaustive analysis by the independent panel and full presentations by plaintiffs' and defendants' experts, the judge concluded that there was no competent scientific evidence to show that breast implants cause auto-immune disease.¹⁴⁵ Yet, because of the mere pendency of thousands of costly lawsuits, as well as the corrosive threat of multiple punitive damage awards in the future, Dow-Corning Corporation remains mired in bankruptcy.¹⁴⁶

138. See SCHWARTZ'S SENATE COMMENTS, *supra* note 119, at 5-6.

139. See Joseph Nocera, *Dow-Corning Succumbs*, FORTUNE, Oct. 30, 1995, at 137; Richard Hazelton, *The Tort Monster That Ate Dow-Corning*, WALL ST. J., May 17, 1995, at A21.

140. See Memorandum of Law of Defendants Dow-Corning Corporation and Dow-Corning Wright Corporation in Support of Their Motion for Certification of a Mandatory Class Action as to Punitive Damages, In re Silicone Gel Breast Implant Prod. Liab. Litigation, No. CV 92-P-10000-S (N.D. Ala. Oct. 25, 1994).

141. See *id.*

142. See Voluntary Petition, In re Dow-Corning Corp., No. 95-20512 (Bankr. E.D. Mich. May 15, 1995); see also Nocera, *supra* note 139, at 137; Hazelton, *supra* note 139, at A21.

143. See Hall v. Baxter Healthcare Corp., 947 F. Supp. 1387, 1394 (D. Or. 1996).

144. See *id.* at 1392-94.

145. See *id.* at 1394, 1414-15.

146. See *id.* at 1394, 1402, 1407, 1411, 1417; see also, Nocera, *supra* note 139, at 137; Hazelton, *supra* note 139, at A21.

The breast implant controversy is far from over. On July 30, 1997, Bankruptcy Judge Arthur J. Spector ruled that common issue causation trials should be held in Dow-Corning's Chapter 11 case to resolve the threshold question of whether scientific evidence supports claims that breast implants cause disease. See Court Issues Opinion That Common Issue

The devastating effect of punitive damages extends beyond the corporate entity. Bankruptcy forces employees to lose their jobs. Small businesses that rely on the company for income lose their business and also their employees. Economic harm to the company also affects shareholders, pension funds, and investors, who face a loss of their savings.

The threat of multiple punitive damage awards has an equally detrimental impact on settled cases. Judge Weis of the United States Circuit Court of Appeal for the Third Circuit recently wrote:

[T]he potential for punitive awards is a weighty factor in settlement negotiations and inevitably results in a larger settlement agreement than would ordinarily be obtained. To the extent that this premium exceeds what would otherwise be a fair and reasonable settlement for compensatory damages, assets that could be available for satisfaction of future compensatory claims are dissipated.¹⁴⁷

Similarly, in repetitive or mass tort litigation, the threat of repetitive punitive damage awards makes a comprehensive settlement more difficult and limits the ability of a claimant to recover quickly for his injury.¹⁴⁸ The Director of the Federal Judicial Center has written that “[b]arring successive punitive damage awards against a defendant for the same conduct would remove the major obstacle to settlement of mass tort litigation and open the way for the prompt resolution of the damage claims of many thousands of injured plaintiffs.”¹⁴⁹

2. Reform Is Needed, Even if Punitive Damages Are Few

The infrequency of punitive damage awards does not diminish their inequity or adverse impact on society. It is not the frequency of punitive damages awards that is the problem, but rather the erratic, un-

Causation Trials Should Resolve Legal Debate on Breast Implants, *FINANCIAL NEWS*, July, 30, 1997, at 8. No causation trial has yet been scheduled. On August 25, 1997, Dow-Corning announced a proposed reorganization plan, which could provide \$2.4 billion for resolving breast implant claims, depending upon the number of claimants voting to accept the plan. See Dow-Corning Announces New Plan of Reorganization to Resolve Chapter 11 Filing, *FINANCIAL NEWS*, Aug. 25, 1997, at 2. As more people vote in support of the plan, individual settlement amounts increase, because less money is required for the trial process. See *id.* The Bankruptcy Court has not yet ruled on this plan of reorganization. See *id.*

On August 19, 1997, a jury in Louisiana rendered a verdict against Dow Chemical, one of Dow-Corning's parents, finding that Dow Chemical had failed to investigate or had concealed evidence concerning the health risks of breast implants. See *Spitzfaden v. Dow Corning Corp.*, No. 92-2589 (Orleans Parish Civ. Dist. Ct. 1997). That jury verdict did not, however, address the question of whether breast implants caused the pervasive disease claimed by plaintiffs. On December 3, 1997, a Louisiana judge decertified the suit as a class action. See *Pamela Coyle, Implant Suit in Pieces After Ruling Cases Not Alike, Judge Decides*, *NEW ORLEANS TIMES-PICAYUNE*, Dec. 2, 1997, at A1.

147. *Dunn v. HOVIC*, 1 F.3d 1371, 1398 (3d Cir. 1993) (Weis, J., dissenting).

148. See *Nocera*, *supra* note 139, at 137; *Hazelton*, *supra* note 139, at A21.

149. William W. Schwarzer, *Punishment Ad Absurdum*, *CAL. LAW.*, Oct. 1991, at 116.

predictable, and repetitive nature of these awards.¹⁵⁰ The result is a chilling effect on innovation, American competitiveness, and the introduction of socially beneficial products.¹⁵¹

Moreover, statistics show that the total dollar amount of punitive damages is substantial, both in Florida and across the nation. A recent Rand Corporation study notes that "punitive damage award amounts increased dramatically between 1985-1989 and 1990-1994."¹⁵² It also concluded that "[b]ecause punitive damage awards have increased so substantially, punitive damages represent a large portion of overall total damages awarded—approximately half in some jurisdictions."¹⁵³ In Florida, juries have awarded punitive damages over 150 times since 1989, totaling \$481 million.¹⁵⁴ Data also show that from 1992 to 1994 Texas, Alabama, Georgia, and Tennessee affirmed punitive damage awards on appeal in 158 cases.¹⁵⁵ Thus, in Florida, California, and the four states mentioned above, there have been at least 561 punitive damage awards since 1989.

3. Sensible Reform

The FAIR Liability Act takes some prudent initial steps to return equity to the award of punitive damages in Florida. First, the FAIR Bill would prohibit repetitive punitive damage awards for the same course of conduct, if the defendant established before trial that punitive damages had been awarded in a prior action in Florida involving the same act or course of conduct.¹⁵⁶ A repetitive award would nonetheless be permitted if the court makes specific findings of fact that the earlier award was insufficient to punish the defendant's behavior.¹⁵⁷

Second, the FAIR Bill clarifies the type of misconduct that should be punished.¹⁵⁸ A plaintiff must prove that the misconduct was intentional, which is defined as conduct which the defendant knew to be

150. See SCHWARTZ'S SENATE COMMENTS, *supra* note 119, at 2.

151. See Jeffries, *supra* note 119, at 139; see also Coiter, *supra* note 119, at 1145-46; Ellis, Punitive Damages, *supra* note 119, at 975-76, 987-88; Ellis, Fairness and Efficiency, *supra* note 118, at 55-60; Wheeler, *supra* note 119, at 940-41.

152. MOLLER, *supra* note 129, at 40.

153. *Id.*

154. See GEORGE MEROS, PUNITIVE DAMAGES SURVEY: 1989-1996 (1997) (compiling information from the punitive damage statistics in the FLORIDA JURY VERDICT REPORTER from 1989-1996) (on file with author).

155. See SCHWARTZ'S SENATE COMMENTS, *supra* note 119, at 16.

156. See Fla. HB 2117, § 7(2)(a) (1997). The Florida Supreme Court noted in *W. R. Grace & Co.—Conn. v. Waters*, 638 So. 2d 502, 505 (Fla. 1994), that only Congress could resolve definitively the problem of repetitive punitive damage awards, due to the limited reach of individual state legislation. However, in the absence of a comprehensive federal solution, an incremental improvement in Florida is at least a step in the right direction.

157. See Fla. HB 2117, § 7(2)(b) (1997).

158. See *id.* § 6.

wrongful, or conduct that the defendant knew had a high probability of causing injury.¹⁵⁹

Third, the FAIR Bill requires that the plaintiff prove the right to punitive damages by clear and convincing evidence,¹⁶⁰ a standard that has been embraced by a number of other states, including California, Texas, Kentucky, and North Carolina.¹⁶¹ Because the imposition of punitive damages is penal in nature and tantamount to a fine, it should be imposed only under an enhanced burden of proof, just as is required when one is subject to a governmental fine or a criminal penalty.

V. CONCLUSION

It all comes down to fairness and common sense. It is not fair to permit a drunk driver to collect damages for his own misconduct. It defies common sense to permit one to claim a defect in a product that is thirty or fifty years old. It is wrong to base liability on the mere ownership of property rather than one's fault, and it is just as wrong to make a wrongdoer pay more than his or her fair share of a loss. It offends basic notions of justice to punish one repetitively for a single act of misconduct.

Florida can have a system that protects the safety of its citizens and provides fair compensation to injury victims, yet demands socially responsible conduct and personal accountability. House Bill 2117 is a prudent first step in the right direction.

159. See *id.*

160. See *id.*

161. See ALA. CODE § 6-11-20(a) (1996); ALASKA STAT. § 09.17.020 (Michie 1996); CAL. CIV. CODE § 3294 (West 1996); KY. REV. STAT. ANN. § 411.184(2) (Michie 1997); MISS. CODE ANN. § 11-1-65 (1)(a) (1997); N.C. GEN. STAT. § 1D-15(b) (1996); N.D. CENT. CODE § 32-03.2-11 (1997); OR. REV. STAT. § 18.537 (1996); TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(a) (West 1997).