

# Law of Unintended Consequences May Rule Punitives Plan

By Daniel J. Callahan

Gov. Arnold Schwarzenegger proposed in his May revision to the 2004-05 proposed budget that the state take 75 percent of all punitive damages awards in California.

The rationale for this proposal is that punitive damages are intended to punish and deter tortfeasors for violations of public policy. They are not intended to compensate the plaintiff, nor does the plaintiff have a right to receive a punitive damages award.

Schwarzenegger suggested that under his proposal, the state could reap a benefit of \$450 million a year. Some commentators question the actual amount, suggesting that \$200 million a year is a more probable result given the punitive damages awards rendered between 1991 and 2000.

Whatever the amount, the question remains whether the state has a constitutional right to take property in this fashion and whether the plan would increase or decrease the number and amount of punitive awards; encourage more settlements, and give big business the relief from punitive damages awards that it seeks.

Presently, one of the best arguments that defendants have in urging a lesser punitives award is that it would be a windfall for the plaintiff to receive a vast amount of money over and above that necessary to compensate it for the harm suffered. The wind would be taken out the sails of that argument if 75 percent of the punitive-damages award went to the state.

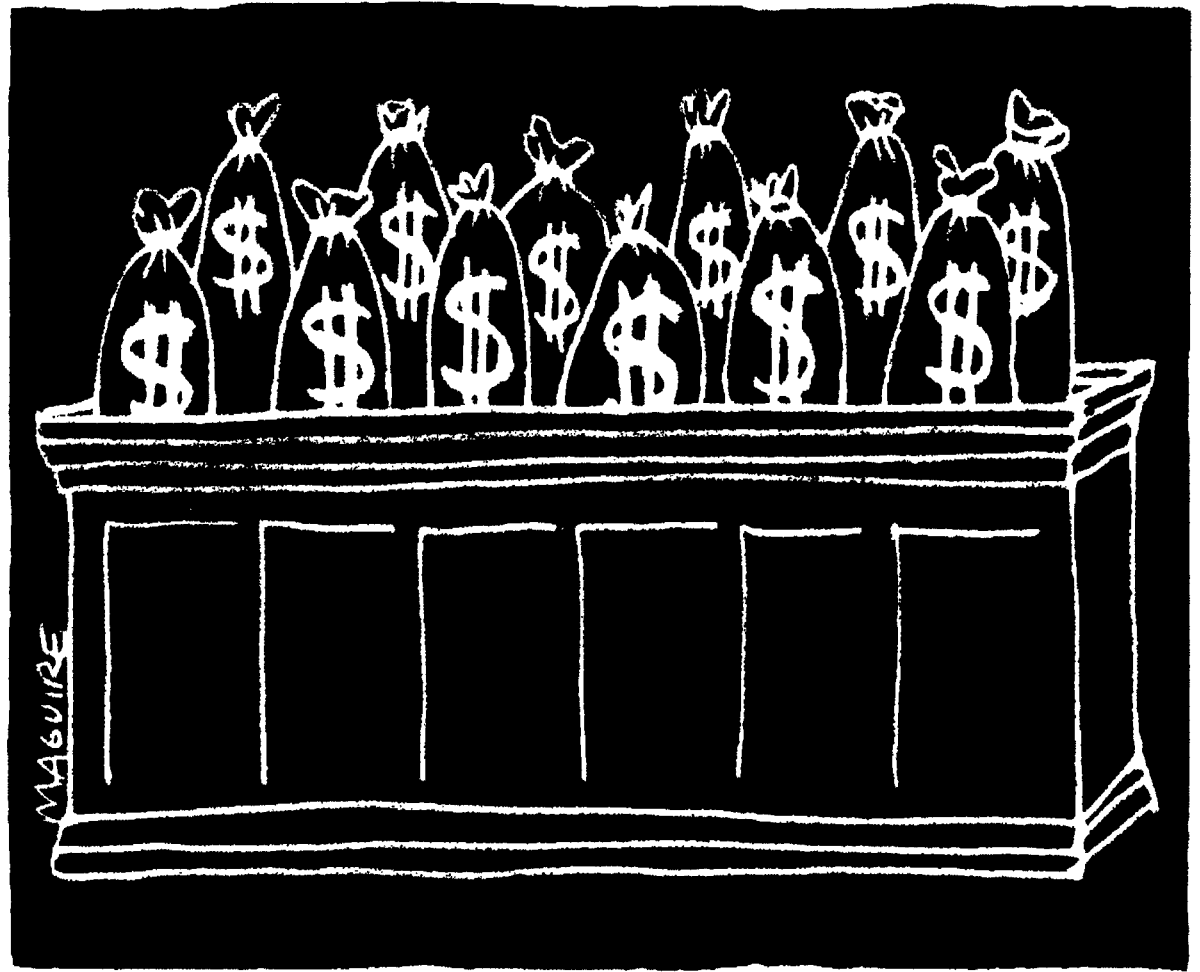
Even if courts forbid attorneys from mentioning in the courtroom that the state would be the beneficiary of 75 percent of a punitive-damages award, one can assume that at least a few of the 12 empaneled jurors would be knowledgeable enough to be aware of an enacted split-recovery statute and would share this information in the jury room during deliberations. Given that punitive damages are awarded out of anger against a defendant, the jury could, in their own economic interest, decide that it would be better for this malicious, oppressive or fraudulent defendant to contribute greater sums toward the state's budget crisis than for themselves and their fellow citizens to suffer an increase in taxes.

Likewise, a jury may feel more inclined to grant larger awards more frequently if they felt that the money, in large part, would go to serve societal needs. As a result, the proposal itself would encourage more and larger punitive-damages awards.

If such a split-recovery statute were enacted, it is quite likely that plaintiffs would give serious consideration to a settlement before trial which would allow the plaintiff to receive 100 percent of the recovery and attribute all of that recovery to some form of compensatory versus punitive damages. Likewise, defendants may fear an overly generous jury pool and be willing to enter into an early settlement.

The net effect would be to reduce congestion in the courts, making access to trial courts more available for all litigants and reducing expenses otherwise incurred by the judiciary. Thus, although the state may not reap its percentage of the punitive-damages award, it may reap the benefit of reduced costs of the administration of justice. The plaintiffs who agreed to settle also would gain certainty in their recovery versus years of delay and risk in the appellate process. In light of the general mood against punitive damages recently emanating from our courts in cases such as *Campbell v. State Farm* and *Diamond Woodworks, Inc. v. Argonaut Insurance Co.*, escaping the oversight and scrutiny of the appellate courts, including the California and U.S. Supreme Courts, may be a fortuitous result for plaintiffs.

I recently tried a case entitled *Beckman Coulter v. Flextronics*, which resulted in a jury verdict of \$934 million, the largest jury verdict in the state in 2003. I believe a



split-recovery statute would only have worked to the detriment of the defendant under the facts of *Beckman*. In *Beckman*, \$931 million of the verdict was for punitive damages. Thus, roughly \$700 million would have been earmarked for the state.

Given the pressures of *Campbell* and the appellate court cases that followed, imposing guidelines for ratios between compensatory and punitive damages, we sensed which way the pendulum was swinging and settled for \$23 million, netting \$20 million in punitive damages. Under Schwarzenegger's proposal, the state would have received \$15 million.

In hindsight, I do not believe a split-recovery statute would have changed my handling of the case. Flextronics, a Singapore corporation, through a combination of arrogance and greed, never contemplated that it actually could be hit for punitive damages, so it is unlikely that it would have taken the possibility of punitive damages into account in its settlement negotiations.

On the other hand, the jury concluded that Flextronics was arrogant and oppressive in its conduct and gave very little consideration to the impact of its conduct on the American public's health and safety. Rather, the jury believed that Flextronics focused solely on profit at any cost, or, as I pointed out to the jury, "worshiped at the altar of the almighty dollar."

It is interesting to speculate how much the jury would have awarded if they felt that 75 percent of the money would go to help cure the woes of the state budget, fund social services or even fix the potholes in the streets in front of their homes. I venture that the award could have been much greater.

Lastly, if such a split-recovery statute were in place, would the government seek to make indentured servants out of plaintiffs' counsel? In other words, would the state attempt to deny plaintiffs' counsel his or her rightful contingency share in the benefit produced through

his or her genius and efforts, or would the entire recovery be subject to the attorneys' contingency-fee agreement?

At this point, there are at least 12 states that have enacted some form of split-fee recovery — Alaska, Colorado, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Missouri, New York (statute expired), Oregon and Utah. Jurisdictions are split regarding how plaintiffs' counsel's contingency fee is determined. The majority view is exemplified by states such as Georgia and Missouri, where the plaintiffs' lawyers are paid out of the entire punitive-damages award before the state gets its share.

On the other hand, in some states, such as Florida, the attorney is entitled to a percentage of the amount collected by the plaintiff only after the state collects its portion of the punitive award.

If the majority position is adopted in California, plaintiffs' lawyers actually may reap a benefit through the enactment of a split-recovery statute, if one accepts the premise that juries would grant punitive damages more often and in larger amounts, or that defendants would more readily settle cases at a higher amount than face a jury with yet another reason to impose a punitive award. From the perspective of the plaintiff's attorney, that does not appear to be a bad result.

Given the foregoing, big business or insurance companies that find Schwarzenegger's proposal friendly to business and a potential disincentive to large punitive-damage claims may wish to rethink their analysis and consider the "law of unintended consequences" before they back such a bill.

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