

Punitive Damages: The Controversy Continues

I.	Oregon’s Split-Recovery Statute: Laying the Groundwork for Oregon’s Current Punitive Damages Controversy	1481
	A. The Evolution of Oregon’s Split-Recovery Statute	1482
	B. Oregon’s Split-Recovery Statute Controversies: The Predecessors of <i>Patton v. Target</i>	1484
II.	The Controversy Continues: <i>Patton v. Target</i>	1485
	A. The Facts of <i>Patton v. Target</i>	1485
	B. Resolving the Controversy Under Oregon’s Methods of Statutory Construction	1487
	1. The State as a Judgment Creditor: The State’s Statutory Construction Argument.....	1488
	2. The Requirement of a Judgment: Target Corporation’s Statutory Construction Argument ...	1492
III.	Resolving <i>Patton v. Target</i> : Suggestions and Implications.	1494
	Conclusion.....	1498
	Addendum	1498

The idea is wrong. It is a monstrous heresy. It is an unsightly and unhealthy excrescence, deforming the symmetry and body of the

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law.”¹ Justice Foster of the New Hampshire Supreme Court spoke these words of disfavor about punitive damages in 1873. In contrast, the Wisconsin Supreme Court in 1914 believed that:

The law giving exemplary damages is an outgrowth of the English love of liberty regulated by law. It tends to elevate the jury as a responsible instrument of government, discourages private reprisals, restrains the strong, influential, and unscrupulous, vindicates the right of the weak, and encourages recourse to, and confidence in, the courts of law by those wronged or oppressed by acts or practices not cognizable in, or not sufficiently punished, by the criminal law.²

These words of disfavor and approval are indicative of the controversial nature of the punitive damages doctrine that has persisted since the doctrine’s earliest development in the United States.³

Oregon has often been involved in punitive damages controversies, with three of its punitive damages cases reaching the U.S. Supreme Court. In 1994, for example, in the case of *Honda Motor Co., Ltd. v. Oberg*, the U.S. Supreme Court held that Oregon’s denial of judicial review of the size of punitive damages awards violated the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.⁴ Then, in 2001, the U.S. Supreme Court held in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* that a court of appeals must review a Due Process Clause challenge to a punitive damages award under the *de novo* standard of review rather than the abuse of discretion standard.⁵ Finally, in 2009, the U.S. Supreme Court

¹ 2 JOHN J. KIRCHNER & CHRISTINE M. WISEMAN, PUNITIVE DAMAGES: LAW AND PRACTICE § 2:01 (2d ed. 2000) (quoting *Fay v. Parker*, 53 N.H. 342, 382 (1872)); *see also id.* (discussing the arguments that have been advanced either favoring or opposing the retention of punitive damages as a doctrine of the civil law); *see also* DAN B. DOBBS, LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION § 3.11(1) (2d ed. 1993). There has also been, however, debate over whether punitive damage awards have in fact increased in size and number in recent decades. Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 1–2 (1990). Judge Posner and Judge Landes, for instance, have reported a sample of products liability cases that indicate punitive damages were approved in only about five percent of cases, that those amounts were moderate, and that the ratios to actual damages were not incongruent. WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 302–07 (1987).

² *Luther v. Shaw*, 147 N.W. 18, 20 (Wis. 1914).

³ *See* DOBBS, *supra* note 1, § 3.11(1).

⁴ *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994).

⁵ *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001). In that case, the “manufacturer of [a] multifunction hand tool sued its competitor for, *inter alia*, false advertising.” *Id.* at 424. The jury awarded \$50,000 in compensatory damages and \$4.5 million in punitive damages. *Id.* The U.S. District Court for the District of

concluded Oregon's long-contested case of *Williams v. Philip Morris USA, Inc.*,⁶ in which Philip Morris, a tobacco company that opposed the amount of punitive damages awarded against it at the trial level, was handed "one of its few defeats ever in court."⁷

Oregon rejected the competitor's claim that the punitive damages award was unconstitutionally excessive. *Id.* The U.S. Court of Appeals for the Ninth Circuit affirmed the punitive damage award, concluding that the district court's refusal to reduce the award was not an abuse of discretion. *Id.* The U.S. Supreme Court, however, held that courts of appeals should apply the *de novo* standard when reviewing a district court's determination of constitutionality of punitive damage award. *Id.*

⁶ *Williams v. Philip Morris Inc.*, 344 Or. 45, 176 P.3d 1255 (2008), *cert denied*, 129 S.Ct. 1436 (2009).

⁷ Robert S. Peck & James E. Rooks, Jr., *National Perspective*, DAVID B. ROBINSON, <http://davidbrobinson.com/Articles/Punitive-damage-awards-survive-appellate-court-scrutiny.html> (last visited Apr. 22, 2011). At the state trial court level, Mayola Williams sued Philip Morris, the manufacturer of her husband Jesse Williams's favorite brand of cigarettes, after Mr. Williams died of lung cancer in 1997. *Williams v. Philip Morris Inc.*, 182 Or. App. 44, 47, 48 P.3d 824, 828 (2002), *aff'd* 344 Or. 45, 176 P.3d 1255 (2008), *cert. denied*, 129 S. Ct. 1436 (2009). After a seven-week trial, an Oregon jury awarded Mrs. Williams \$821,485.80 in compensatory damages and \$79.5 million in punitive damages. *Id.* However, "Philip Morris was able to use its enormous financial resources to drag the litigation out for ten more years, including three trips to the United States Supreme Court." Peck & Rooks, *supra*. First, in 2003, after granting certiorari, the U.S. Supreme Court "held that punitive damages could not be used to punish and deter conduct in states beyond the court's jurisdiction and suggested that single-digit ratios were most likely to satisfy the test for due-process excessiveness." *Id.* The Court therefore "vacated the judgment and sent the case back to Oregon for reconsideration." *Id.* "On remand, however, the Oregon appellate courts reinstated the full punitive damages award, holding that extraterritorial impact had not been considered and that the award could be justified" because the defendant's conduct was "reprehensible on a scale not seen before in Oregon." *Id.* Subsequently, Philip Morris again "sought certiorari in the U.S. Supreme Court, which held that the Oregon Supreme Court had relied on faulty constitutional reasoning in rejecting a proffered jury instruction . . . and sent the case back to Oregon for reconsideration." *Id.* "On the latest remand, the Oregon Supreme Court held that it was obligated to consider Philip Morris' state-law objections to the jury instruction, believ[ing]" that it had decided the federal constitutional issues correctly. *Id.* The Oregon Supreme Court, in "[a]pplying Oregon's requirement that parties are obliged to proffer jury instructions that are clear and correct in all respects, [held] that Philip Morris had materially misstated relevant Oregon law and that the trial court had therefore committed no error in denying the instruction." *Id.* Finally, Philip Morris successfully petitioned the U.S. Supreme Court a third time on grounds "that the Oregon Supreme Court had defied the U.S. Supreme Court's . . . direction[s] on the jury instruction issue." *Id.* This time, however, the Supreme Court "issued a one-sentence per curiam decision that dismissed its writ of certiorari as 'improvidently granted.'" *Id.* Although the case would seem to be over, a final issue is now being litigated as to whether Philip Morris is obligated to pay sixty percent of Mayola Williams' punitive damages award to Oregon's State Crime Victim's Compensation Fund on the basis that Philip Morris's participation in the 1998 Tobacco Master Settlement Agreement fulfilled all of its obligations to state governments. *Id.* To review the Master Settlement Agreement, see *Master Settlement Agreement*, CAL. DEP'T OF JUSTICE, OFFICE OF THE ATTORNEY GEN., <http://ag.ca.gov/tobacco/msa.php> (last visited April 22, 2010).

Now, the Oregon Supreme Court has been confronted with a new punitive damages controversy in the case of *Patton v. Target*.⁸ This new controversy requires the court to determine whether, pursuant to the language of Oregon's split-recovery statute, the parties to a case must obtain the State's consent before settling in a manner that would deprive the State of its sixty percent share of any punitive damages awarded to the plaintiff.⁹

The controversy presented in *Patton* stems from one of the biggest punitive damages debates in recent decades,¹⁰ namely the dramatic increase in the size and number of such awards, particularly in products liability litigation.¹¹ The concern underlying this controversy is that large punitive damage awards "are generally seen as a windfall to plaintiffs, who are entitled to receive full compensation for their injuries—but no more."¹² Some sources have argued that the possible consequences of such windfalls are far-reaching.¹³ For instance, large awards of punitive damages have been criticized for "putting plaintiffs in a superior bargaining position in negotiations and for increasing the cost of insurance."¹⁴

As a result of the "windfall" controversy, punitive damages have often been the target of tort reform¹⁵ by businesses and insurance companies who have carried their messages of reform to the courts and legislatures.¹⁶ Courts and legislatures have responded by adopting laws that have limited the availability of punitive damages in a variety of ways.¹⁷ For instance, many states, including Oregon, require plaintiffs to meet stringent burdens of proof such as establishing by clear and convincing evidence that the plaintiff has the

⁸ *Patton v. Target Corp.*, 580 F.3d 942, 942 (9th Cir. 2009).

⁹ Under ORS 31.735, sixty percent of a punitive damages award must be paid to the Criminal Injuries Compensation Account of the Department of Justice Crime Victims' Assistance Section.

¹⁰ See DOBBS, *supra* note 1, § 3.11(1).

¹¹ David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 371 (1994).

¹² *Smith v. Wade*, 461 U.S. 30, 59 (1983).

¹³ Junping Han, *The Constitutionality of Oregon's Split-Recovery Punitive Damages Statute*, 38 WILLAMETTE L. REV. 477, 490 (2002).

¹⁴ *Id.* at 493.

¹⁵ Thomas C. Galligan, Jr., *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 LA. L. REV. 3, 34 (1990).

¹⁶ Owen, *supra* note 11, at 371.

¹⁷ *Id.*

right to recover punitive damages.¹⁸ Other states either have placed caps on the amount of recoverable punitive damages or passed “legislation authorizing the bifurcation of punitive damages cases separating the liability/compensatory damages aspects of the case from the punitive damages aspect.”¹⁹

Dissatisfied with the solutions described above, Oregon became one of the first states to respond to the windfall controversy by implementing a split-recovery statute.²⁰ Under Oregon’s statute, upon entry of a verdict including an award of punitive damages, the State becomes a judgment creditor as to the punitive damages portion of the award.²¹ While forty percent of the punitive damages amount of the award goes to the prevailing party, with no more than twenty percent of that going to the prevailing party’s attorney, sixty percent is paid to the Criminal Injuries Compensation Account of the Department of Justice Crime Victims’ Assistance Section.²²

Although Oregon’s split-recovery statute was intended to remedy the windfall controversy and still provide for attorneys’ fees, it created the new controversy now confronting the Oregon Supreme Court in *Patton v. Target*. In that case, after the verdict but before the district court entered a final judgment, the parties settled and jointly moved for a judgment dismissing the case, effectively cutting the State out of its portion of the punitive damages award.²³ Although the State moved to intervene, arguing that the parties could not settle without the State’s consent, the district court denied the State’s claim.²⁴ On appeal, the Ninth Circuit certified to the Oregon Supreme Court the question of whether the parties to a case must first obtain the State’s consent before settling the case in a manner that deprives the State of its sixty percent share of those punitive damages.²⁵

The question to be answered by the Oregon Supreme Court has important consequences for the State as well as for plaintiffs and defendants. For Oregon, the split-recovery statute serves as an

¹⁸ See, e.g., ALASKA STAT. ANN § 09.17.020 (West 2010); MONT. CODE ANN. § 27-1-221(5) (2009); OR. REV. STAT. § 31.730(1) (2009).

¹⁹ Galligan, *supra* note 15, at 35.

²⁰ Han, *supra* note 13, at 494–95.

²¹ OR. REV. STAT. § 31.735(5).

²² *Id.* § 31.735(1)(a)–(b).

²³ *Patton v. Target Corp.*, 580 F.3d 942, 943 (9th Cir. 2009).

²⁴ *Id.*

²⁵ *Id.* at 948–49.

important source of State revenue. The State therefore has a significant interest in protecting that revenue. Plaintiffs and defendants also have a significant interest in the outcome of this issue because the parties to litigation in split-recovery states often have incentive to settle after verdicts that include punitive damages awards.²⁶ Under Oregon's split-recovery statute, for instance, plaintiffs who settle may be able to "recoup personally what otherwise would be allocated to the state."²⁷ Because plaintiffs in Oregon can expect to recover only forty percent of a punitive damages award,²⁸ to the plaintiff, "any settlement above the expected forty percent recovery after the litigation [and attorney] costs would be favored."²⁹ Moreover, because punitive damages are includable in a plaintiff's taxable income,³⁰ plaintiffs can obtain a greater recovery amount and avoid paying taxes on that amount by entering into settlements that exclude punitive damages. Additionally, "any settlement less than the amount of the estimated punitive award would be acceptable to the defendant."³¹

This Note discusses the resolution of the issue currently certified to the Oregon Supreme Court in three Parts. Part I reviews the evolution of Oregon's split-recovery statute as well as the significant issues that have preceded and inform the current controversy presented in *Patton*. Part II then explains the current controversy involved in *Patton* as well as the parties' arguments regarding its resolution. Finally, Part III offers a resolution to the question pending before the Oregon Supreme Court.

Ultimately, the "key to answering the . . . question" certified to the Oregon Supreme Court lies in distinguishing "between a *claim* for punitive damages . . . and an *award* of punitive damages."³² Such a distinction indicates that parties to litigation may settle their dispute prior to a final judgment without the State's consent for several reasons. First, the most the Oregon Legislature had the power to grant the State of Oregon after a verdict for punitive damages was an expectancy interest in a future punitive damages judgment. Second,

²⁶ Han, *supra* note 13, at 499.

²⁷ *Id.* at 500.

²⁸ OR. REV. STAT. § 31.735(1)(a) (2009).

²⁹ Han, *supra* note 13, at 500.

³⁰ O'Gilvie v. United States, 519 U.S. 79, 85 (1996).

³¹ Han, *supra* note 13, at 500.

³² Brief of Amicus Curiae Oregon Trial Lawyers Ass'n at 1, *Patton v. Target Corp.*, 580 F.3d 942 (9th Cir. 2009) (No. 08-35177).

ORS 31.735 does not grant the State of Oregon any right to control a plaintiff's underlying claim. Third, the Oregon Legislature has enacted ample safeguards to protect the State of Oregon's interest in punitive damages awards.

I

OREGON'S SPLIT-RECOVERY STATUTE: LAYING THE GROUNDWORK FOR OREGON'S CURRENT PUNITIVE DAMAGES CONTROVERSY

“Under Oregon’s punitive damages scheme, the function of punitive damages is to ‘punish a willful, wanton, or malicious wrongdoer and to deter that wrongdoer and others similarly situated from like conduct in the future.’”³³ As such, punitive damages may be awarded if a defendant has acted with “wanton disregard”³⁴ for the health and safety of others as long as such conduct is proven by “clear and convincing evidence.”³⁵ Moreover, in Oregon, punitive damages are not awarded to compensate for expenses, inconvenience, or other injuries suffered, but they are allowed in addition to compensatory damages, which compensate plaintiffs for their losses,³⁶ in part, to provide for a plaintiff’s attorney’s fees.³⁷

Additionally, Oregon juries have great discretion in determining the amount of punitive damages awards and, in doing so,

consider the likelihood of serious harm, the defendant’s awareness of the likelihood that the misconduct will cause such harm, the profitability of the misconduct, the duration and concealment of the misconduct, the attitude and conduct of the defendant upon discovery of the misconduct, the deterrent effect of other punishments, and the defendant’s financial condition.³⁸

Although Oregon juries are “not required to consider the actual amount of compensatory damages” when “determining the amount of punitive awards,” the amount of such awards “must be reasonably related to the compensatory damages.”³⁹ There must also exist “some

³³ *Honeywell v. Sterling Furniture Co.*, 310 Or. 206, 210, 797 P.2d 1019, 1021 (1990).

³⁴ OR. REV. STAT. § 30.925 (1993) (amended 1995).

³⁵ *Id.*

³⁶ *Honeywell*, 310 Or. at 210, 797 P.2d at 1021.

³⁷ See REGINALD C. NETTLES, 1 DAMAGES § 3.2 (Oregon CLE 1998).

³⁸ Han, *supra* note 13, at 489 (internal quotation marks omitted).

³⁹ *Id.* In *BMW of North America, Inc. v. Gore*, the U.S. Supreme Court ruled that punitive damages must be reasonable based on the degree of reprehensibility of the conduct, the ratio of punitive damages to compensatory damages, and any criminal or civil penalties applicable to the conduct. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

rational nexus” between an award of punitive damages and the evidence of damages in the record, although the Oregon Supreme Court has not defined a “specific, mathematically precise outer limit on punitive damages.”⁴⁰

A. *The Evolution of Oregon’s Split-Recovery Statute*

Unsatisfied with other methods of statutory reform, the Oregon Legislature enacted a tort reform package in 1987 in response to a financial crisis in the liability insurance industry, which resulted in Oregon’s first split-recovery statute.⁴¹ ORS 18.540 provided that after a prevailing party’s attorney was paid, the plaintiffs and the State were to share equally in the remaining punitive damages award.⁴²

In 1990, however, the weakness of Oregon’s first split-recovery statute was revealed in *Eulrich v. Snap-On Tools Corp.*, in which the court determined that the State had no interest in an award of punitive damages until a fund capable of distribution existed.⁴³ The Oregon Legislature responded in 1991 by providing that, upon the entry of a judgment for punitive damages, the Department of Justice would become a judgment creditor as to the punitive damages portion of the award to which the Criminal Injuries Compensation Account would be entitled.⁴⁴ The amended statute also recalculated the time frame for when the State’s interest in the punitive damage award accrued.⁴⁵ Under the amended statute, the Department of Justice became a judgment creditor as to the portion of the punitive award allocated to the Victims’ Compensation Fund “upon entry of a judgment.”⁴⁶

However, even the new version of Oregon’s split-recovery statute was deemed by the Oregon Legislature to insufficiently protect the State’s interest.⁴⁷ Thus, Oregon’s split-recovery statute was again amended in 1995 when the State’s share of punitive damages was increased to sixty percent and plaintiff’s attorneys were to be paid up

⁴⁰ *Oberg v. Honda Motor Co.*, 320 Or. 544, 551, 556 n.12, 888 P.2d 8, 11, 14 n.12 (1995).

⁴¹ See Kathy T. Graham, *1987 Oregon Tort Reform Legislation: True Reform or Mere Restatement?*, 24 WILLAMETTE L. REV. 283, 301 (1988).

⁴² 1987 Or. Laws ch. 774 § 3 (current version at OR. REV. STAT. § 31.735).

⁴³ *Eulrich v. Snap-On Tools Corp.*, 103 Or. App. 610, 613, 798 P.2d 715, 716 (1990).

⁴⁴ 1991 Or. Laws. ch. 862 § 1.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Patton v. Target Corp.*, 580 F.3d 942, 944 (9th Cir. 2009).

to twenty percent out of the plaintiff's forty percent share.⁴⁸ Additionally, the statute was amended such that the Department of Justice became a judgment creditor "upon the entry of a verdict," rather than upon entry of a judgment in the hope of preventing clever litigants from settling their claims and depriving the State of its share of punitive damages awards.⁴⁹

Oregon's split-recovery statute provided a solution to the windfall problem and preserved the purposes of punitive damages such as deterrence and punishment.⁵⁰ The standard for the imposition of punitive damages, for instance, remains the same,⁵¹ and Oregon courts still instruct juries to award punitive damages for the purpose of punishment and deterrence.⁵² Oregon courts also prohibit the split-recovery statute from affecting punitive damages awards by prohibiting jury instructions from including information about the allocation of the award.⁵³ Thus, split-recovery statutes maintain balance between the windfall problem and the goals of punishment and compensation.

The effectiveness of the split-recovery system can be further understood by comparing it to the methods of reform adopted by other states. Because capping systems place limits on punitive damage awards without consideration of defendants' financial situations, they may not adequately punish wealthy defendants.⁵⁴ Thus, although a capping system may reduce windfalls, it may also

⁴⁸ 1995 Or. Laws. ch. 688 § 1(1)(a); *Patton*, 580 F.3d at 944.

⁴⁹ 1995 Or. Laws ch. 688 § 1(1). Although the latest amendment to Oregon's split-recovery statute was made in 1997, no significant changes were made to the previous version. 1997 Or. Laws ch. 73 § 1.

⁵⁰ Lynda A. Sloane, *The Split Award Statute: A Move Toward Effectuating the True Purpose of Punitive Damages*, 28 VAL. U. L. REV. 473, 484–85 (1993).

⁵¹ OR. REV. STAT. § 31.730 (2009).

⁵² *Honeywell v. Sterling Furniture Co.*, 310 Or. 206, 210–11, 797 P.2d 1019, 1021 (1990) (noting, "[t]here is nothing that we have found . . . indicating the legislature intended [ORS 18.540] to change the purposes behind the punitive damages award" of punishment and deterrence "when it enacted a new mandate for distribution of the proceeds of such awards").

⁵³ *Id.* at 211, 797 P.2d at 1022 (holding it reversible error to permit "a jury to consider as a part of its deliberations on punitive damages that a plaintiff should receive a certain amount of money and, in order to ensure that he does, to add additional amounts to pay for attorney fees and contributions to the Criminal Injuries Compensation Account" (internal quotation marks omitted)).

⁵⁴ Nicholas M. Miller, Note, *'Tis Better to Give Than to Receive: Charitable Donations of Medical Malpractice Punitive Damages*, 12 J.L. & HEALTH 141, 157–62 (1997–98) (discussing statutory caps and the split-recovery scheme).

fail to achieve the purpose of punishment and deterrence.⁵⁵ Split-recovery schemes, on the other hand, allow juries to assess each defendant's particular financial situation, ensure adequate punishment and deterrence, and address the windfall problem by allocating a portion of a plaintiff's award to the State.⁵⁶

B. Oregon's Split-Recovery Statute Controversies: The Predecessors of Patton v. Target

Despite the benefits of Oregon's split-recovery statute, it has resulted in litigation involving various aspects of the State's rights to a portion of punitive damages awards. The issues that emerge in these cases are instrumental to understand the current punitive damages controversy presented in the case of *Patton v. Target*.

In 2002, the Oregon Supreme Court stated in *DeMendoza v. Huffman* that a vested property right in a punitive damages award cannot accrue before the entry of a final judgment because such awards represent, at most, an expectation interest.⁵⁷ In that case, the Supreme Court stated that Oregon's split-recovery statute unambiguously created "in the state a substantive right as a judgment creditor to 60 percent of any punitive damages award."⁵⁸

Then, in the 2008 case of *MAN Aktiengesellschaft v. Daimler Chrysler AG*, the Oregon Court of Appeals held that Oregon's split-recovery statute gives the State standing to intervene in a lawsuit.⁵⁹ Specifically, the State obtains a vested right to sixty percent of a jury's award of punitive damages upon the entry of a verdict for punitive damages.⁶⁰ Moreover, it is not necessary for the State to become a party to the case because the State's status as a judgment creditor gives it the ability to enforce a judgment for punitive damages.⁶¹

⁵⁵ Han, *supra* note 13, at 496.

⁵⁶ *Id.* at 497.

⁵⁷ *DeMendoza v. Huffman*, 334 Or. 425, 449, 51 P.3d 1232, 1245–46 (2002). In this case, the Oregon Supreme Court also held that Oregon's split-recovery "statute [did] not violate Article I, sections 10, 17, or 18; Article III, section 1; Article IV, section 18; Article VII (Amended), sections 1 or 3; or Article IX, sections 1 or 3, of the Oregon Constitution." *Id.* at 455, 51 P.3d at 1249.

⁵⁸ *Id.* at 432, 51 P.3d at 1236.

⁵⁹ *MAN Aktiengesellschaft v. Daimler Chrysler AG*, 218 Or. App. 117, 127, 179 P.3d 675, 680 (2008).

⁶⁰ *Id.* at 130, 179 P.3d at 681.

⁶¹ *Id.*

II

THE CONTROVERSY CONTINUES: *PATTON V. TARGET*

The current controversy surrounding the State's rights to its portion of a punitive damages award under Oregon's split-recovery statute, ORS 31.735, centers on whether the State's consent is required before a court may enter a judgment giving effect to any settlement between the parties that would reduce or eliminate the State's portion of the punitive damages award.

A. *The Facts of Patton v. Target*

In *Patton v. Target*, James Patton sued Target Corporation "in federal district court for asserted violations of the Uniformed Services Employment and Reemployment Rights Act (USERRA) and for wrongful discharge under Oregon law."⁶² A "jury found in Target's favor on the USERRA claim, but found in Patton's favor on the state law claim."⁶³ As such, the jury "awarded [the plaintiff] \$17,950 in economic damages, \$67,000 in noneconomic damages, and \$900,000 in punitive damages."⁶⁴

"Shortly after the verdict, . . . Patton and Target reached a settlement and jointly moved the court to approve a stipulated judgment dismissing the case."⁶⁵ "Neither the motion nor the stipulated judgment disclosed" the amount of the settlement "nor was [a] provision for . . . payment to the State included in the settlement."⁶⁶

Subsequently, the State moved to intervene, arguing that the parties could not settle without its consent because, as determined in *Aktiengesellschaft*, the State "had obtained a vested interest in 60 percent of the punitive damages award upon the entry of the verdict" and was, therefore, a judgment creditor.⁶⁷ Although the district court allowed the State to intervene, it "approved the proposed settlement and denied the State's claim, . . . reason[ing] that the State could not have obtained a vested interest in the punitive damages award prior to the entry of a judgment and that the parties were therefore free to

⁶² *Patton v. Target Corp.*, 580 F.3d 942, 943 (9th Cir. 2009) (citation omitted).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

settle without the State's . . . consent."⁶⁸ The State then "filed a motion for relief from the district court's judgment."⁶⁹

On appeal, the Ninth Circuit examined ORS 31.735 in order to answer the question of exactly when the State becomes a judgment creditor and is therefore entitled to participate in settlement agreements between the parties to litigation.⁷⁰ In doing so, the court noted that, because the 1991 version of Oregon's split-recovery statute provided that the State did not become a judgment creditor until the entry of a judgment for punitive damages, a loophole was created whereby the parties could, pursuant to confidential settlement, "stipulate to the entry of a judgment dismissing the case without an award of punitive damages."⁷¹ "Because no 'judgment' . . . would be entered, the State would not become a judgment creditor . . . and would have no claim on any proceeds from the suit."⁷² Thus, the court recognized that the purpose of the 1995 amendment, which made the State a judgment creditor "upon the entry of a verdict including an award of punitive damages," was to prevent the foreclosure of the State's ability to recover punitive damages.⁷³

However, the court went on to explain that, while the intent of the Legislature in amending the statute was to prevent litigants from using post-verdict settlements to deprive the State of its share of punitive damages, the text of the statute does not necessarily embody that intent.⁷⁴ According to the Ninth Circuit, there were several provisions of the statute that contradict the Legislature's intent.⁷⁵ For instance, the court found that the lack of a definition of the phrase "judgment creditor" in ORS 31.735, the appearance of the phrase in several other provisions of the statute in which "the concept of a 'judgment creditor' appears inseparable from the existence of a judgment," and "the generally accepted definition of a 'judgment creditor'" as a "person having a legal right to enforce execution of a judgment for a specific sum of money," leads to the reasonable

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 944.

⁷² *Id.*

⁷³ *Id.* at 945 (quoting OR. REV. STAT. § 31.735(1) (1995)).

⁷⁴ *Id.*

⁷⁵ *See id.* at 945 (discussing the use of the term "judgment creditor" throughout the statute).

conclusion that the State cannot be a judgment creditor prior to the entry of a judgment.⁷⁶

The Ninth Circuit therefore determined that the proper interpretation of the statute would require a court to “find some meaning in the legislature’s paradoxical decision to make the State a judgment creditor without a judgment.”⁷⁷ Realizing that this case turned on an open question of law and that a decision by the Ninth Circuit would not therefore be authoritative, the Ninth Circuit certified the issue to the Oregon Supreme Court. The Oregon Supreme Court granted the petition for review in October 2009.⁷⁸

B. Resolving the Controversy Under Oregon’s Methods of Statutory Construction

The parties in *Patton v. Target* argued that the Oregon Supreme Court’s resolution of this important issue should center on Oregon’s methods of statutory construction as outlined in *Portland General Electric Co. v. Bureau of Labor & Industries (PGE v. BOLI)*. Under Oregon’s approach to statutory construction, the court’s task in interpreting a statute is to discern the intent of the Legislature.⁷⁹ To do this, the court first examines both the text and context of the statute.⁸⁰ At this level of analysis, the text of the statute is the starting point for interpretation and is the best evidence of the Legislature’s intent.⁸¹ In trying to determine the meaning of a statutory provision, the court considers rules of construction of the statutory text that bear directly on how to read the text,⁸² such as not inserting what has been omitted and not omitting what has been inserted,⁸³ as well as giving common words their plain, natural, and ordinary meaning.⁸⁴ At this level, the court also considers the context of the statutory provision at issue. This includes considering provisions of the same and related

⁷⁶ *Id.* at 945 (quoting BLACK’S LAW DICTIONARY 921 (9th ed. 2009)).

⁷⁷ *Id.* at 946 (citing OR. REV. STAT. § 174.010 (2009)).

⁷⁸ *Patton v. Target Corp.*, 347 Or. 260, 260 (2009) (Table, NO. S057752).

⁷⁹ *Portland Gen. Elec. v. Bureau of Labor & Indus. (PGE v. BOLI)*, 317 Or. 606, 610, 859 P.2d 1143, 1145 (1993), *superseded by statute*, OR. REV. STAT. 174.020, *as recognized in State v. Gaines*, 346 Or. 160, 171–72, 206 P.3d 1042, 1050–51 (2009).

⁸⁰ *Id.* at 610; 859 P.2d at 1146.

⁸¹ *Id.*

⁸² *Id.* at 611; 859 P.2d at 1146.

⁸³ OR. REV. STAT. § 174.010 (2009).

⁸⁴ *State v. Langley*, 314 Or. 247, 256, 839 P.2d 692, 698 (1992), *adhered to on reconsideration*, 318 Or. 28, 861 P.2d 1012 (1993).

statute as well as using rules of construction that bear directly on the interpretation of the statutory provision in context, such as the rule that a particular intent shall control a general one that is inconsistent.⁸⁵

If the intent of the Legislature is not clear from the text and context of the statute, the court will then consider legislative history to inform its analysis of legislative intent to determine whether, taken together, the legislative history, the text, and the content make the legislative intent clear.⁸⁶ If the legislative intent is clear, then the court's inquiry into legislative intent and the meaning of the statute is complete, and the court interprets the statute to have the meaning thus determined.⁸⁷

However, if the Legislature's intent remains unclear, then the court may resort to general maxims of statutory construction to aid in resolving any uncertainty.⁸⁸ One such maxim requires that, where no legislative history exists, the court must attempt to determine how the Legislature would have intended the statute to be applied had it considered the issue.⁸⁹

1. The State as a Judgment Creditor: The State's Statutory Construction Argument

The State argued that, under Oregon's methods of statutory construction, as outlined in *PGE v. BOLI*, the plain meaning and context of the statutory text, as well as the legislative history of ORS 31.735, indicate that the State becomes a judgment creditor upon the entry of a verdict for punitive damages, thereby requiring the parties to obtain the State's consent before settling a case in a manner that deprives the State of its sixty percent share of those punitive damages.⁹⁰

The State first argued that, under *PGE v. BOLI*, the statutory text and context of ORS 31.735 indicate that the State becomes a judgment creditor upon the entry of a verdict that includes punitive damages. ORS 31.735 states that:

⁸⁵ *PGE v. BOLI*, 317 Or. at 612, 859 P.2d at 1146; OR. REV. STAT. § 174.020 (2009).

⁸⁶ *PGE v. BOLI*, 317 Or. at 611–12, 859 P.2d at 1146.

⁸⁷ *Id.* at 612, 859 P.2d at 1146.

⁸⁸ *Id.*

⁸⁹ *Id.* at 612, 859 P.2d at 1147.

⁹⁰ Appellant's Brief at 11–12, *Patton v. Target*, 627 F.3d 1304 (9th Cir. 2010) (No. 08-35177), 2008 WL 4974001.

(1) Upon the *entry* of a verdict including an award of punitive damages, the Department of Justice *shall* become a judgment creditor as to the punitive damages portion of the award to which the Criminal Injuries Compensation Account is entitled pursuant to paragraph (b) of this subsection, and the punitive damage portion of an award shall be allocated as follows:

(a) Forty percent shall be paid to the prevailing party

(b) Sixty percent shall be paid to the Criminal Injuries Compensation Account of the Department of Justice Crime Victims' Assistance Section

. . . .

(4) Whenever a judgment includes both compensatory and punitive damages, any payment on the judgment by or on behalf of any defendant, whether voluntary or by execution or otherwise, shall be applied first to compensatory damages, costs and court-awarded attorney fees awarded against that defendant and then to punitive damages awarded against that defendant *unless all affected parties, including the Department of Justice, expressly agree otherwise*

(5) Whenever any judgment creditor of a judgment which includes punitive damages governed by this section receives any payment on the judgment by or on behalf of any defendant, the judgment creditor receiving the payment shall notify the attorney for the other judgment creditors and all sums collected shall be applied as required by subsections (1) and (4) of this section, *unless all affected parties, including the Department of Justice, expressly agree otherwise*⁹¹

According to the State, the plain meaning of this statutory text is not ambiguous and indicates that the State becomes a judgment creditor upon the entry of a verdict for punitive damages for several reasons.⁹²

First, the statute declares that, “[u]pon the entry of a verdict including an award of punitive damages, [the State] shall become a judgment creditor.”⁹³ The simplest, plain meaning interpretation of the phrase “entry” is that it is the “entry of a verdict” that triggers the State’s status as a judgment creditor.⁹⁴ Moreover, nothing else in the statute suggests that the State’s judgment creditor status is contingent upon any additional events.⁹⁵

Second, the simplest plain meaning interpretation of the phrase “shall” is “that recognition of the state’s judgment creditor status is

⁹¹ OR. REV. STAT. § 31.735 (2009) (emphasis added).

⁹² Appellant’s Brief, *supra* note 90, at 11.

⁹³ OR. REV. STAT. § 31.735 (1997).

⁹⁴ Appellant’s Brief, *supra* note 90, at 15–20.

⁹⁵ BLACK’S LAW DICTIONARY, *supra* note 76, at 1499 (indicating that the drafters’ general understanding of the word ‘shall’ is that one is “required to”).

mandatory”.⁹⁶ Thus, use of the word “shall” in the statute indicates that the State must be accorded judgment creditor status upon the entry of a verdict.⁹⁷

Third, when the statutory language is considered within the context of other provisions of the same and related statutes, the rule “that a particular intent controls a general intent that is inconsistent with the particular intent” also indicates that the plain, ordinary language of the statute confers judgment creditor status upon the entry of a verdict.⁹⁸ Thus, although other provisions in Chapter 18 state that judgment creditor status is created by the entry of a judgment, ORS 31.735 is the more particular provision with respect to the specific circumstances at issue and should therefore apply to the statutory provision at issue.⁹⁹ Moreover, while the phrase “judgment creditor” is used throughout Chapter 18, it is never expressly defined, nor does anything in Chapter 18 purport to apply such a definition to ORS 31.735.¹⁰⁰

Finally, subsections (4) and (5) of the statute, “when read in combination with subsection (1) . . . suggest that entry of a punitive damages verdict [also] renders the state a ‘party.’”¹⁰¹ As such, parties to litigation “are not free to eliminate a punitive damages award without the state’s involvement.”¹⁰²

For all of these reasons, the State argued that the plain language of ORS 31.735 indicates that the State becomes a judgment creditor upon the entry of a verdict for punitive damages.¹⁰³

However, if the Supreme Court of Oregon determines that the statutory language remains ambiguous, it may then look to the legislative history of the statute. The State therefore asserts that an examination of the legislative history in this case also indicates that ORS 31.735 confers judgment creditor status on the State upon the entry of a verdict for several reasons.¹⁰⁴ First, the Legislature’s 1991 amendment of Oregon’s split-recovery statute clearly indicates that

⁹⁶ Appellant’s Brief, *supra* note 90, at 16.

⁹⁷ *Id.*

⁹⁸ *Id.* at 18–19 (quoting OR. REV. STAT. § 174.020 (2009)).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 19.

¹⁰¹ *Id.* at 20.

¹⁰² *Id.*

¹⁰³ *Id.* at 15–20.

¹⁰⁴ *Id.* at 21–22.

the Legislature intended to confer judgment creditor status on the State upon entry of a verdict for punitive damages.¹⁰⁵ The 1991 amendment was promulgated by the case of *Eulrich v. Snap-On Tools Corp.*, in which the Oregon Court of Appeals held that the State had no interest in an award of punitive damages until a fund capable of distribution existed, thus suggesting that “no state right was created by entry of either a verdict or a judgment granting punitive damages.”¹⁰⁶

The 1991 Legislature amended its split-recovery statute in response to *Eulrich*.¹⁰⁷

As the Oregon Court of Appeals has observed, Oregon Attorney General Frohnmayer testified as follows to the House Committee on the Judiciary:

“Mr. Chairman, the case to which you may be referring is [*Eulrich*], a case decided in 1990 by the Court of Appeals . . . that effectively precludes us from intervening in a potential punitive damages case which is why we submit to the committee proposed legislation so that it would be clear that the state has an interest in a legitimate punitive damages award at the time that it is given.”¹⁰⁸

The legislature responded to the state’s request by amending then “[ORS] 18.540 to provide that entry of a judgment awarding punitive damages renders the Department of Justice a judgment creditor.”¹⁰⁹

Second, the Legislature again amended the split-recovery statute in 1995, in response to concerns that the 1991 amendment still left a loophole whereby clever litigants could settle their claims and deprive the State of its share of the punitive damages award.¹¹⁰ When considering the amendment, one legislator said,

I heard Attorney General Kulongoski describe that in some situations after a verdict is reached that maybe the parties go back and rework the settlement The state’s interest in these awards sometimes is defeated by some maneuvering that seems to enrich and maybe even more than—windfall might be kind of a gentle

¹⁰⁵ *Id.* at 22.

¹⁰⁶ *Id.* at 23–24.

¹⁰⁷ *Id.* at 25.

¹⁰⁸ *Id.* at 25 (quoting *MAN Aktiengesellschaft v. DaimlerChrysler AG*, 218 Or. App. 117, 126 n.4, 179 P.3d 675, 679 n.4 (2008) (quoting Tape Recording, House Committee on Judiciary, HB 3524, Mar. 27, 1991)).

¹⁰⁹ *Id.*

¹¹⁰ *Patton v. Target Corp.*, 580 F.3d 942, 944 (9th Cir. 2009).

phrase to describe the activity but it seems like maybe the plaintiff and their lawyer come out a lot better than perhaps they should.¹¹¹

A representative of the bill's sponsor made a similar statement:

The Attorney General's right does not vest until after the judgment is entered. And so if the parties are smart and if there is a large punitive damages award entered, the parties will sit down and construct a . . . settlement which will provide that no final judgment will be awarded or that they will stipulate to a final judgment that will provide an award of general damages of a certain amount. And parties do that quite often, by the way, because they like to avoid the expense of appeal potentially. But they can under the present statute in essence cut out the Attorney General from that portion of the award because again, the Attorney General does not have the right to intervene until the judgment is entered.¹¹²

The Legislature subsequently amended the statute to declare that the Department of Justice became a judgment creditor upon "entry of a *verdict*," rather than upon entry of a judgment.¹¹³ Thus, the State argues, it is clear that "[t]he 1995 Legislative Assembly intended to prevent plaintiffs . . . from doing precisely what was done in" *Patton v. Target*.¹¹⁴

For all of these reasons, the State asserts that the legislative history of ORS 31.735 clearly indicates that the State becomes a judgment creditor upon the entry of a verdict for punitive damages.¹¹⁵

2. *The Requirement of a Judgment: Target Corporation's Statutory Construction Argument*

In contrast, the defendant-appellee, Target Corporation, argues that under the methods of statutory construction described in *PGE v. BOLI*, the Oregon Supreme Court need not examine the legislative history of ORS 31.735 because its statutory text and context are not ambiguous and clearly indicate that parties to litigation may settle their disputes without the State's permission for several reasons.¹¹⁶

¹¹¹ *Id.* at 117, 179 P.3d at 680 (quoting Tape Recording, S. Judiciary Subcommittee on Civil Process, S.B. 482, Tape 28, Side A (Or. 1995) (statement of Randy Miller)).

¹¹² *Id.* at 117, 179 P.3d at 680–81 (quoting Tape Recording, S. Judiciary Subcommittee on Civil Process, S.B. 482, Tape 28, Side A (Or. 1995) (statement of John DiLorenzo)).

¹¹³ Appellant's Brief, *supra* note 90, at 28.

¹¹⁴ *Id.* at 27.

¹¹⁵ *Id.* at 23–29.

¹¹⁶ Appellee's Brief at 2, *Patton v. Target Corp.*, 627 F.3d 1304 (9th Cir. 2010) (No. 08-35177), 2008 WL 6690720.

First, in examining the statutory text of ORS 31.735 as required by *PGE v. BOLI*, Target argues that the central terms at issue, “judgment,” “creditor,” and “judgment creditor,” each have a well-defined legal definition that indicates a plain, unambiguous meaning.¹¹⁷ This plain, unambiguous meaning is that a judgment must be rendered before the State can possibly become a “judgment creditor.”¹¹⁸

According to *Black’s Law Dictionary*, for instance, a “judgment” is defined as “[a] court’s final determination of the rights and obligations of the parties in a case.”¹¹⁹ Moreover, a “creditor” is “[o]ne to whom a debt is owed A person or entity with a definite claim against another, esp[ecially] a claim that is capable of adjustment and liquidation.”¹²⁰ Lastly, a “judgment creditor” is “[a] person having a legal right to enforce execution of a judgment for a specific sum of money.”¹²¹ The phrase “specific sum of money” is significant because a verdict that includes punitive damages “is, at best, an expectancy” and cannot be considered a “specific sum” because there is no guarantee that a verdict will be upheld.¹²² Thus, while the language of ORS 31.735 provides that the State shall become a judgment creditor upon the entry of a *verdict* that includes an award of punitive damages, Target argues that the above definitions indicate that the State cannot be a “judgment creditor” unless a final *judgment* exists, giving the State a legal right to enforce execution of a judgment for a specific sum of money.¹²³

Second, “under ORS 174.010, a court may not ‘insert what has been omitted’ in a statute.”¹²⁴ This is significant because ORS 31.735 does not say anything about parties being “forbidden from settling their own dispute[s] without the State’s permission before entry of a judgment.”¹²⁵ Thus, Target argues that a “[c]ourt cannot . . . insert a prohibition on litigants that the Oregon legislature did not.”¹²⁶

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 4.

¹¹⁹ BLACK’S LAW DICTIONARY, *supra* note 76, at 918.

¹²⁰ *Id.* at 424.

¹²¹ *Id.* at 921.

¹²² Appellee’s Brief, *supra* note 116, at 4.

¹²³ *Id.* at 3–4.

¹²⁴ *Id.* at 5.

¹²⁵ *Id.*

¹²⁶ *Id.*

Target also argues that, even if the Oregon Supreme Court does determine that the statutory text is ambiguous and that it must therefore examine the statute's legislative history, the court could not arrive at the interpretation urged by the State because "a court [may only] give effect to legislative intent *if possible*."¹²⁷ Here, Target asserts that implementing the State's interpretation of Oregon's split-recovery statute would be *impossible* because it would create "illogical and impractical" consequences.¹²⁸

For instance, Target argues that "the Oregon Supreme Court's decision in *DeMendoza v. Huffman* . . . precludes [a] [c]ourt from interpreting ORS 31.735 to prevent the parties from settling their dispute without the State's consent" because the court held in that case "that a party does not have a vested right in a punitive damages award before judgment is entered."¹²⁹ In addition, *Black's Law Dictionary* defines "vested" as "having become a completed, consummated right for present or future enjoyment; not contingent; unconditional; absolute."¹³⁰ Punitive damages awards, however, are "necessarily contingent and discretionary."¹³¹ Target therefore concludes that the statute cannot possibly be interpreted as giving the State a vested right in a punitive damages verdict.¹³²

For all of these reasons, Target asserts that the State cannot claim the status of a judgment creditor and that parties to litigation may therefore settle prior to a judgment without the State's consent.¹³³

III

RESOLVING *PATTON V. TARGET*: SUGGESTIONS AND IMPLICATIONS

Ultimately, as argued by the Oregon Trial Lawyers Association in an amicus curiae brief, "[t]he key to answering the certified question" to the Oregon Supreme Court lies in distinguishing "between a *claim* for punitive damages and an *award* of punitive damages."¹³⁴ Such a distinction indicates that parties to litigation may settle their dispute

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 7 (emphasis omitted).

¹³⁰ BLACK'S LAW DICTIONARY 1595 (8th ed. 2004).

¹³¹ Appellee's Brief, *supra* note 116, at 11 (quoting *Engquist v. Or. Dep't of Agric.*, 478 F.3d 985, 1002 (9th Cir. 2007)).

¹³² *Id.* at 13.

¹³³ *Id.*

¹³⁴ Brief of Amicus Curiae Oregon Trial Lawyers Ass'n, *supra* note 32, at 1.

prior to a final judgment without the State's consent for several reasons.

First, the Oregon Legislature had the power to grant the State of Oregon only an expectancy interest in a future punitive damages judgment.¹³⁵ Although the State relies heavily on its assertion that the Oregon Legislature intended “to grant the State an indefeasible interest in a share of a punitive damages verdict,” the Legislature’s “power only goes so far.”¹³⁶ For instance, a verdict for punitive damages is “subject to extensive judicial review, alteration, and possibly elimination.”¹³⁷ Thus, because “the amount of punitive damages that [will] ultimately be awarded [is] uncertain, the most that” the Legislature could confer upon the State “is an expectancy or contingen[cy] interest.”¹³⁸ Moreover, the Legislature cannot give the State a greater interest in a punitive damages verdict than a plaintiff’s expectancy interest by giving the State a vested interest in a punitive damages verdict even though a plaintiff would retain a mere expectancy interest.¹³⁹ This is because “Constitutional principles of due process command that the entire award at the time of [a] verdict is a mere expectancy [that is] subject to reduction or elimination for excessiveness.”¹⁴⁰ Thus, the Oregon Legislature had the power to grant the State only an expectancy interest in a punitive damages verdict and no more.¹⁴¹

Second, the State of Oregon is not granted any right to control a plaintiff’s underlying claim under ORS 32.735.¹⁴² Under *Webster v. Reproductive Health Services*, for example, “a fundamental maxim of the American judicial system [is] that ‘[p]laintiffs are masters of their complaints’ even after [a] verdict [or] judgment and through” the

¹³⁵ *Id.* at 3.

¹³⁶ *Id.*

¹³⁷ *Id.* Under ORS 31.730(2), a “court review of a jury’s decision for rationality” is required. *Id.* Additionally, “principles of due process [provide for] post-verdict review and reduction of a[punitive damages] award based on excessiveness.” *Id.* (citing *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996)). Moreover, “an entire case [can] be overturned on appeal.” *Id.*

¹³⁸ *Id.* at 3.

¹³⁹ *See id.* at 4.

¹⁴⁰ *Id.* (citing *BMW*, 517 U.S. at 568 (holding that when a punitive damages “award can fairly be categorized as ‘grossly excessive’ in relation to [state] interests . . . it enter[s] the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment”).

¹⁴¹ *Id.* at 5.

¹⁴² *Id.*

appellate process.¹⁴³ Moreover, “the only check on a plaintiff’s ability to waive or withdraw [a] claim[] [after a trial] is in the hands of a judge [rather than] the other parties.”¹⁴⁴ Under Rule 54A of Oregon’s Rules of Civil Procedure, for instance, a plaintiff may dismiss her claim with the consent of a judge.¹⁴⁵ Similarly, under Rule 41 of the Federal Rules of Civil Procedure, “[a]fter a defendant has answered, a plaintiff may [still] unilaterally dismiss [her claim] over a defendant’s objection.”¹⁴⁶ Thus, because ORS 31.735 does not give the State any interest in the claim itself but only in the award, the consent of other parties is not required before a plaintiff can decide to dismiss her claim.¹⁴⁷

Furthermore, the fact that the Legislature would give the State a legally protected interest in the proceeds of a claim but not control over the underlying claim is not an anomaly.¹⁴⁸ In wrongful death cases, for example, “the statutory beneficiaries of [the proceeds of a] claim are not parties and may not pursue the action on their own behalf.”¹⁴⁹

Third, the State of Oregon’s interest is amply protected through safeguards enacted by the Oregon Legislature.¹⁵⁰ For instance, “the Legislature requires court oversight at every stage of the process” by requiring courts to “review the jury’s award under the ‘rational juror’ standard” and by requiring courts to approve the dismissal of a claim after a verdict has been handed down.¹⁵¹ Additionally, “ORS 31.735(3) requires notice to the State . . . upon [the] entry of a verdict and upon [the] entry of a judgment.”¹⁵² Finally, the Court of Appeals in *MAN Aktiengesellschaft* has held that the State’s status as a judgment creditor, which gives it the ability to enforce a judgment for punitive damages, is sufficient protection.¹⁵³

¹⁴³ *Id.* (citing *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 512 (1989)).

¹⁴⁴ Brief of Amicus Curiae Oregon Trial Lawyers Ass’n, *supra* note 32, at 5; *see also* FED. R. CIV. P. 41(a)(1); OR. R. CIV. P. 54 A.

¹⁴⁵ Brief of Amicus Curiae Oregon Trial Lawyers Ass’n, *supra* note 32, at 6.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 7.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 7–8.

¹⁵² *Id.* at 8.

¹⁵³ *Id.* (citing *MAN Aktiengesellschaft v. DaimlerChrysler AG*, 218 Or. App. 117, 179 P.3d 675 (2008)).

In making the distinction between a *claim* for punitive damages and an *award* of punitive damages, it therefore becomes clear that, although the State may take steps to protect its interest in the ultimate award of punitive damages, it may not prevent a plaintiff from retaining control over her underlying claim.

Although the above distinction indicates that the parties to litigation do not need to obtain the State's consent before settling a claim, an examination of the implications of requiring them to do so also exemplifies the impracticability of such a requirement. First, requiring the State's consent before two parties may settle a claim might block worthy settlements that would otherwise end litigation and allow plaintiffs to obtain needed compensation without delay.

Second, if parties must obtain the State's consent prior to settlement, many attorneys may be reluctant to pursue claims for punitive damages at the risk of not being able to control the claim or minimize the potential risks of taxation, allocation, and appeal on behalf of their clients.

Third, the inability to settle a claim without the State's consent could render the recovery of punitive damages meaningless to plaintiffs and attorneys as a result of tax consequences. If, for example, a plaintiff receives the remaining forty percent of a punitive damages claim and must give upwards of twenty percent to his attorney, a plaintiff could therefore be left with an amount that is far less than he could have obtained through settlement.

Moreover, many plaintiffs might view such a requirement as unjust, considering the fact that the plaintiff must bring a claim and bear the risks and burdens of doing so, while the State bears no risk and offers nothing to a plaintiff's case but could nonetheless block a proposed settlement and prevent the plaintiff from being compensated. Although the State could possibly walk away with nothing when parties decide to settle after a verdict but prior to a judgment, fairness would seem to be more adequately served by allowing the State to walk away with nothing when it contributes nothing to the proceedings rather than allowing plaintiffs to bear the entire burden of litigation only to have control over their underlying claims stripped away.

Finally, if the Supreme Court of Oregon were to determine that the State can intervene under ORS 31.735 to prevent parties to litigation from settling, it would also have to determine how the State would do so without violating the principles of due process, the Federal Rules of Civil Procedure, and Oregon's Rules of Civil Procedure. If, on the

other hand, the Supreme Court were to determine that the split-recovery statute does not allow such intervention by the State, the issue of protecting the State's interest in punitive damages awards would seem to return to the Legislature, which would then need to determine how to provide the State with a vested interest in punitive damages verdicts. However, given the principles of the American judicial system described above, it would seem that this is also not a practical solution. In essence, the Legislature would be required to change long-held distinctions between claims for punitive damages and awards for punitive damages.

CONCLUSION

Over the last few decades, states have responded to the controversy of punitive damage windfalls by implementing numerous statutory schemes that include caps on punitive damages and stringent burdens of proof. Oregon's split-recovery scheme, while effectively curbing the problem of windfalls by allocating a portion to the State, has resulted in a new controversy. The Supreme Court of Oregon's resolution of this controversy will have far-reaching effects. However, the limits of the Oregon Legislature to grant the State control over a plaintiff's claim, the ample protections already provided for the State's interest in an ultimate award of punitive damages, and the impracticalities of changing long-held principles of the American judicial system all indicate that the parties to a case need not obtain the State's approval prior to settling a case.

ADDENDUM

On November 12, 2010, the Oregon Supreme Court filed an opinion¹⁵⁴ that answered the question certified to it by the Ninth Circuit.¹⁵⁵ In its opinion, the Oregon Supreme Court stated that

it [was] simply not possible . . . to conclude that ORS 31.735 as presently worded makes the state's consent necessary before a court may enter a judgment giving effect to a settlement between the parties that would reduce or eliminate punitive damages to which the state otherwise would be entitled, even if that is what the legislature intended.¹⁵⁶

¹⁵⁴ *Patton v. Target Corp.*, 349 Or. 230, 242 P.3d 611 (2010).

¹⁵⁵ *See Patton v. Target Corp.*, 580 F.3d 942, 948–49 (9th Cir. 2009) (certifying question).

¹⁵⁶ *Patton*, 349 Or. at 243–44, 242 P.3d at 619.

The court began its analysis by examining the text of the statute.¹⁵⁷ First, the court determined that, at the time the Oregon Legislature amended Oregon's split-recovery statute in 1991 to confer the status of judgment creditor upon the State, "the phrase 'judgment creditor' was not defined in the 1991 statute, nor is it [defined] today."¹⁵⁸ Moreover, there is no indication that the legislature in 1991 intended that phrase to carry any other than "its common and usual meaning—that is as a term intrinsically dependent on the existence of a judgment."¹⁵⁹ At the time of the 1991 amendment, *Black's Law Dictionary* defined a judgment creditor as "[a] person in whose favor a money judgment is entered or a person who becomes entitled to enforce it."¹⁶⁰ That definition is "consistent with the . . . understanding of the phrase . . . today."¹⁶¹

Furthermore, when the Legislature amended the split-recovery statute in 1995 to provide that the Department of Justice shall become a judgment creditor upon the entry of a verdict including an award of punitive damages, the Legislature again did nothing to signal its intention to alter the common understanding of any term used in the statute.¹⁶² Second, the court noted that nothing in the statutory language of "ORS 31.735(1)—where the 'judgment creditor' status at issue in this case is created—speaks to, much less expressly requires the state's consent to, a settlement."¹⁶³

Next, the court focused on the legislative history of the statute.¹⁶⁴ In its analysis, the court explained that the legislative history surrounding the 1995 revision of the statute does indeed seem to speak directly to the Legislature's intent to remedy the problem of parties eliminating the State's potential interest in a punitive damages award by settling prior to a judgment.¹⁶⁵ However, the court concluded "that there is an unbridged gap between what the legislature is said to have intended and what the words that the

¹⁵⁷ *Id.* at 233, 242 P.3d at 613.

¹⁵⁸ *Id.* at 236, 242 P.3d at 615.

¹⁵⁹ *Id.*, 242 P.3d at 615.

¹⁶⁰ BLACK'S LAW DICTIONARY 844–45 (6th ed. 1990).

¹⁶¹ *Patton*, 349 Or. at 237, 242 P.3d at 615 (citing BLACK'S LAW DICTIONARY, *supra* note 76, at 921 (A "judgment creditor" is "a person having a legal right to enforce execution of a judgment for a specific sum of money.")).

¹⁶² *Id.* at 237–38, 242 P.3d at 616.

¹⁶³ *Id.* at 240, 242 P.3d at 617.

¹⁶⁴ *Id.* at 241, 242 P.3d at 618.

¹⁶⁵ *Id.* at 243, 242 P.3d at 619.

legislature chose to use actually do.”¹⁶⁶ In other words, the Legislature “failed to ‘translate [its] intent into operational language’” that would have achieved its goal of “allowing the [S]tate to block parties from settling without its consent.”¹⁶⁷ Moreover, the court cannot “‘give effect to any supposed intention or meaning in the legislature, unless the words to be imported into the statute are, in substance at least, contained in it.’”¹⁶⁸

The effect of the Oregon Supreme Court’s decision is clear; at present, the State’s consent is not necessary before a court may enter a judgment giving effect to a settlement between the parties that would reduce or eliminate the sixty percent share of a punitive damages award to which the State would otherwise be entitled. However, the punitive damages controversy presented in *Patton v. Target* is not necessarily concluded. The Oregon Supreme Court focused its resolution of the case on the statutory analysis of ORS 31.735 and stated that “it is not possible . . . to conclude that ORS 31.735 as presently worded makes the state’s consent necessary”¹⁶⁹ before parties to a case can settle. When considered together, the court’s resolution of the case and the wording of its opinion seem to suggest that future analyses of Oregon’s split-recovery statute might be more favorable to the State should the Legislature succeed in translating its intent into operational language.

Successful translation of the Legislature’s intent into operational language, however, would not remedy other impediments to the State’s ability to block parties from settling prior to a final judgment. As discussed above, these impediments include the limits of the Oregon Legislature to grant the State control over a plaintiff’s claim, the ample protections already provided for the State’s interest, and the impracticalities of changing long-held principles of the American judicial system. Thus, it seems safe to say that, in Oregon, the punitive damages controversy will continue.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* (quoting *Whipple v. Howser*, 291 Or. 475, 480, 632 P.2d 782, 785 (1981)).

¹⁶⁹ *Id.* (emphasis added).