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STATUTORY CAPS AND JUDICIAL REVIEW OF DAMAGES

Colleen P. Murphy*

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I. INTRODUCTION

Statutory caps on the amount of damages recoverable in various types of litigation are now common. Courts and scholars alike have raised concerns about the constitutionality, fairness, and efficacy of such caps.¹ In this article, I examine two procedural questions arising from

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1. See, e.g., Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 N.Y.U. L. REV. 391, 391 (2005) (discussing her empirical study that demonstrates that "the imposition of caps on noneconomic damages has no statistically significant effect on overall compensatory damages in medical malpractice jury verdicts or trial court judgments"); Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263 (2004) (asserting that noneconomic damages caps may disproportionately affect women, children, and the elderly); PAUL C. WEILER, *MEDICAL MALPRACTICE ON TRIAL* 37 (Harv. Univ. Press 1991) (arguing that medical malpractice statutory caps raise serious fairness concerns because caps reduce recoveries only for the most severely injured patients); Colleen P. Murphy, *Determining Compensation: The Tension Between Legislative Power and Jury Authority*, 74 TEX. L. REV. 345 (1995) (casting doubt on the constitutionality of statutory caps under the Seventh Amendment); Ferdon *ex rel.* Petrucelli v. Wis. Patients Comp.

the use of statutory caps. First, how should a statutory cap affect judicial review of awards for possible excessiveness? Second, when a legislature has imposed a total cap on a combination of different types of damages (such as on the total of punitive and compensatory damages or on the total of economic and noneconomic damages), how should courts allocate multiple awards to conform to the cap? Courts have given a variety of answers to these questions.

I contend that beyond imposing an absolute limit on plaintiff recovery, statutory caps should not alter normal judicial review of jury awards.² Thus, a court should not be content to reduce an award to the statutory limit if that amount would otherwise be excessive on the facts of the case. Nor should a statutory cap be treated as a benchmark from which courts recalibrate jury awards, with the statutory limit reserved for the most egregious cases. With respect to multiple awards that exceed a total cap on different types of damages, I suggest that the appropriate way to conform multiple awards to the cap is to combine judicial review for excessiveness with plaintiff choice as to how to allocate the awards.

II. EXCESSIVENESS REVIEW

Traditionally, courts have reviewed jury awards for whether they are excessive.³ A court may set aside an excessive award and order a new trial on the entire case or on damages alone. Alternatively, the court may offer the plaintiff a remittitur, by which the court forces the plaintiff to choose between accepting a reduction of the excessive award or proceeding with a new trial.⁴ Courts have used a variety of

Fund, 701 N.W.2d 440 (Wis. S. Ct. 2005) (holding that Wisconsin legislative cap on noneconomic damages in medical malpractice cases violated the equal protection guarantees of the Wisconsin Constitution); *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1066-81 (Ill. S. Ct. 1997) (invalidating statutory cap); *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1092-95 (Ohio S. Ct. 1999) (same); *Lakin v. Senco Prods., Inc.*, 987 P.2d 463, 467-75 (Or. S. Ct. 1999) (same).

2. Although claims for damages may at times be tried to judges rather than juries, I will refer to "jury" awards throughout this article for ease of discussion.

3. See generally Colleen P. Murphy, *Judicial Assessment of Legal Remedies*, 94 NW. U. L. REV. 153, 188-90 (1999) (discussing historical and modern standards and techniques for reviewing damages). Legislatures may choose to specify the review standard for awards of damages. For example, a New York statute mandates judicial review for whether a jury award "deviates materially from what would be reasonable compensation." N.Y. CPLR 5501(c), McKinney's Consol. Laws 2006. The United States Supreme Court characterized this statutory standard as "tightening the range of tolerable awards" from the former "shock the conscience" standard applicable in New York. *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 423-25 (1996).

4. See generally 12 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 59.13[2][g][iii][A], at 59-82 (3d ed. 1999). The Supreme Court has held that under the Seventh Amendment, a federal court may not reduce outright a jury's award of compensatory damages;

formulations to describe the excessiveness inquiry, such as whether the award is “grossly” excessive⁵ or “obviously unreasonable.”⁶

Many courts have employed these review standards even when a statutory cap applies, and they accordingly have at times reduced awards to amounts below applicable caps.⁷ This is appropriate, for the mere enactment of a statutory cap does not mean that the legislature intended to restrict a court’s power to address excessive awards. At the same time, a cap on the amount of recoverable damages should not be read as imposing a new standard for reviewing excessiveness. The amount that the legislature has specified as the limit of recovery should not be a benchmark from which to reduce jury awards below the statutory maximum.

Some courts, however, have departed from the notion that traditional excessiveness review survives the enactment of statutory caps. In this part, I criticize the use of statutory caps as “floors” beyond which the judge may not reduce a jury’s award, and I challenge the use of statutory caps as guides for determining whether a jury award should be reduced below the statutory maximum.

A. Statutory Caps as “Floors”

Rarely, a legislature may indicate that if a jury award exceeds the statutory cap, the court should reduce the award to the statutory maximum and no less. In this sense, the statutory cap serves as a floor beyond which a judge may not reduce the jury’s award. Consider a Kansas statute that limits noneconomic damages to \$250,000 in personal injury actions.⁸ The statute provides that: “If the verdict results in an award for noneconomic loss which exceeds the limits of this section, *the*

instead, the court must follow remittitur practice. *Hetzel v. Prince William County*, 523 U.S. 208, 211 (1998) (per curiam); *Kennon v. Gilmer*, 131 U.S. 22, 27-29 (1889). Lower federal courts are divided on whether judges may reduce jury awards of punitive damages outright. *See Colleen P. Murphy, Judgment as a Matter of Law on Punitive Damages*, 75 TUL. L. REV. 459 (2000) (discussing cases and arguing that the Seventh Amendment does not permit outright reduction of punitive damages).

5. *Dimick v. Shiedt*, 293 U.S. 474, 486 (1935) (stating judges may review jury awards to ensure that they are not “palpably and grossly inadequate or excessive”).

6. *Peyton v. DiMario*, 287 F.3d 1121, 1126-27 (D.C. Cir. 2002).

7. *See, e.g., Nolan v. Tankoos*, No. 9599, 1989 WL 646275 (Va. Cir. Ct. May 23, 1989) (reducing compensatory damages in personal injury case to less than the applicable malpractice cap); *Velez v. Roche*, 335 F. Supp.2d 1022 (N.D. Cal. 2004) (reducing compensatory damages to applicable cap under Title VII and deciding that the capped amount was not excessive on the facts of the case).

8. K.S.A. § 60-19a02 (b) (2005).

court shall enter judgment for \$250,000 . . .”⁹ This statutory language led the Kansas Supreme Court to assert that the statute “insure[s] the injured plaintiff that the court will not exercise its discretion to award less than \$250,000 when higher damages are awarded by the jury.”¹⁰ Thus, the statute precludes excessiveness review that would result in an award below the statutory cap. The Kansas Supreme Court found that this protection for the plaintiff provided the necessary “quid pro quo” that, under the court’s precedents, avoided state constitutional problems.¹¹ The Kansas scheme appears to be an outlier. Most legislatures that enact caps likely do not wish to dispense with traditional excessiveness review that might result in a reduction of a jury award below the statutory maximum. Moreover, federal due process might be violated if a legislature enacts a cap but forbids excessiveness review of damages.¹²

Even if a legislature has not precluded excessiveness review, a court might be tempted to reduce a jury award to the statutory maximum without further reflection on whether the statutory maximum would be an excessive amount under the individual circumstances of the case. Certainly, courts should tread cautiously in declaring jury awards to be excessive when the amount of damages is not susceptible to precise measurement. Nonetheless, the presence of a statutory cap should not lead a court to ignore the possibility of an excessive jury award.

B. Statutory Caps as Benchmarks for Excessiveness Review

Some courts have viewed statutory caps as guides for determining the upper limit of a reasonable jury award, with many of the cases

9. *Id.* at § 60-19a02 (d) (emphasis added).

10. *Samsel v. Wheeler Transpt. Servs., Inc.*, 789 P.2d 541, 558 (Kan. S. Ct. 1990) (emphasis added).

11. *Id.* at 557.

12. *See Honda Motor Co. v. Oberg*, 512 U.S. 415, 415 (1994) (holding that Due Process Clause of the Fourteenth Amendment invalidated a provision of the Oregon Constitution that prohibited judicial review of the amount of punitive damages awarded by a jury “unless the court can affirmatively say there is no evidence to support the verdict”). *But cf. Lust v. Sealy, Inc.* 383 F.3d 580, 590-91 (7th Cir. 2004) (Judge Posner suggesting that: “The purpose of placing a constitutional ceiling on punitive damages is to protect defendants against outlandish awards. . . . That purpose falls out of the picture when the legislature has placed a tight cap on total, including punitive, damages and the courts honor the cap.”). The Supreme Court has not addressed whether federal due process may be violated by excessive awards of compensatory damages, but at least one commentator has advocated that noneconomic compensatory damages be subject to due process review similar to that applicable to punitive damages. *See Paul DeCamp, Beyond State Farm: Due Process Constraints on Noneconomic Compensatory Damages*, 27 HARV. J.L. & PUB. POL’Y 231 (2003).

involving federal employment discrimination claims.¹³ The Civil Rights Act of 1991 authorizes plaintiffs to recover compensatory and punitive damages for violations of various employment discrimination statutes, including Title VII, but the Act has a sliding scale of caps on the total amount of compensatory and punitive damages that plaintiffs may recover.¹⁴ The caps are pegged to the number of employees working for the employer, with \$300,000 as the highest cap.¹⁵ The Act expressly exempts awards of back pay from the caps, and the Supreme Court has interpreted the statute as not imposing caps on awards of front pay either.¹⁶

Neither the text nor the legislative history of the 1991 Act indicates that the maximum statutory amounts should be reserved for the most serious cases. Yet, some courts have reduced jury awards to amounts less than the statutory maximum on the notion that the maximum applies only to the most egregious cases.¹⁷ This interpretation, which is a minority view, means that jury awards that are reasonable under traditional review standards might be reduced to amounts less than the statutory cap. The Seventh Circuit has been the leading proponent for treating statutory caps as benchmarks for excessiveness review. In its most recent decision on the issue, *Lust v. Sealy, Inc.*,¹⁸ the court, in an opinion authored by Judge Posner, explained:

13. See, e.g., *Lust v. Sealy, Inc.*, 383 F.3d 580, 591 (7th Cir. 2004) (reducing damages in Title VII case to amount below statutory cap because “[w]e are concerned that to uphold the award of the maximum damages allowed by the statute in a case of relatively slight, because quickly rectified, discrimination would impair marginal deterrence”); *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1356 (7th Cir. 1995) (reducing jury’s award of punitive damages in Title VII action to less than the statutory maximum because the case was not “so egregious that an award at 100 percent of what can legally be awarded . . . is appropriate”); *Nyman v. Fed. Deposit Ins. Corp.*, 967 F. Supp. 1562, 1572 (D.D.C. 1997) (opining that the maximum amount recoverable under the applicable cap in a Title VII case “should be reserved for the most egregious cases of unlawful conduct”). The rule announced by the district court in *Nyman* was rejected by the D.C. Circuit in *Peyton v. DiMario*. 287 F.3d 1121 (D.C. Cir. 2002).

The discussion here of caps as a benchmark for excessiveness review draws in part on my earlier work in Colleen P. Murphy, *Judicial Assessment of Legal Remedies*, 94 NW. U. L. REV. 153, 192-93 (1999).

14. 42 U.S.C. § 1981a(b)(3)(A)-(D).

15. 42 U.S.C. § 1981a(b)(3)(D).

16. *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 852 (2001) (holding that front pay is not covered by the 1991 Civil Rights Act caps because front pay does not constitute “compensatory damages” within the meaning of the statute).

17. See *supra* note 13.

18. 383 F.3d 580 (7th Cir. 2004). The Seventh Circuit had earlier indicated that a statutory maximum should be reserved for the most egregious cases. *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1356 (7th Cir. 1995) (commenting that case was not “so egregious that an award at 100 percent of what can legally be awarded . . . is appropriate”).

We are concerned that to uphold the award of the maximum damages allowed by the statute in a case of relatively slight, because quickly rectified, discrimination would impair marginal deterrence. If [defendant] must pay the maximum damages for a relatively minor discriminatory act, it has no monetary disincentive . . . to escalate minor into major discrimination. It's as if the punishment for robbery were death; then a robber would be more inclined to kill his victim in order to eliminate a witness and thus reduce the probability of being caught and punished, because if the murdering robber were caught he wouldn't be punished any more severely than if he had spared his victim.¹⁹

It is questionable whether employers are tempted in the manner that Posner suggests. The robbery analogy is overstated because the robber gains the chance at continued freedom when he kills the witness; unless the employer has a conscious preference to discriminate, it is not clear what the employer would gain from ratcheting up its discriminatory acts. The robber in Posner's scenario knows in advance that there is one legal consequence for robbery—death—and the robber makes the decision to kill the witness based on that certain consequence. By contrast, the employer knows far less in advance about the eventual legal consequences for discrimination. A particular plaintiff's remedy, beyond any back pay or front pay, can range from \$0 to the capped amount. Due to this range of possible liability, the employer has the incentive *not* "to escalate minor into major discrimination." Moreover, compensatory damages beyond back pay and front pay typically are a remedy for the plaintiff's emotional distress; damages are thus highly specific to the individual plaintiff's circumstances. Although the employer may have been held liable for the statutory maximum in one case, the possibility exists that another act of discrimination will cause less harm to a different plaintiff. As a result, a monetary incentive remains for the employer not to escalate minor into major discrimination. Finally, awarding the maximum under a statutory cap would not "impair marginal deterrence" if additional sources of law, such as state law, afford plaintiffs the right to uncapped damages.²⁰

19. *Id.* at 591.

20. For example, state or local law may provide a right to recover against an employer for discrimination, with no caps on recovery. The possible result is that a plaintiff may recover up to the capped amount under Title VII, plus additional damages under local law. *See, e.g., Martini v. Fed. Nat'l Mortgage Assoc.*, 178 F.3d 1336 (D.C. Cir. 1999) (holding that the district court should have reallocated the portion of Title VII damages above the statutory cap to employee's recovery under District of Columbia law). For further discussion of how courts allocate jury awards of damages between state and federal claims, *see* Catherine M. Sharkey, *Dissecting Damages: An*

Several circuits have rejected the notion that the statutory maximum in the 1991 Civil Rights Act should be reserved for the most serious cases.²¹ These courts have asserted that the statute does not create or imply a scale for damages and that recalibrating reasonable jury awards to amounts less than the statutory maximum would invade the province of the jury.²² Thus, these circuits have adhered to normal review standards.²³

Courts rejecting the benchmark approach have the better stance. If a legislature has not indicated that a statutory maximum should be reserved for the most egregious cases, courts should reduce a jury award to an amount below the statutory cap only if the award is excessive under common law, statutory, or constitutional review standards.²⁴ Mere enactment of a statutory cap does not indicate that the legislature sought to depart from otherwise applicable judicial review standards. Rather than enact a cap, the legislature could have chosen to enact a schedule of damages assigning award levels to different types of plaintiff harm or defendant conduct. Courts that consider the statutory maximum to be

Empirical Exploration of Sexual Harassment Awards, 3 JOURNAL OF EMPIRICAL LEGAL STUDIES 1 (2006) (discussing how courts allocate damages between Title VII claims and state law claims and stating that “[m]ost courts have concluded that a district court has virtually unfettered discretion to allocate damages between federal and state claims.”).

21. See, e.g., *Deters v. Equifax Credit Info. Servs.*, 202 F.3d 1262, 1273 (10th Cir. 2000) (“The statutory cap is not the limit of a damages spectrum, within which the judge might recalibrate the award given by the jury. . . . To treat it as such would be to invade the province of the jury.”); *Luciano v. Olsten Corp.*, 110 F.3d 210, 221 (2nd Cir. 1997) (“Nothing in the language of the statute suggests that the cap on damages is intended to diminish the jury’s role in assessing punitive damages or to alter the standard for judicial review of such awards. . . . The statutory limitation is not an endpoint of a scale according to which judges might recalibrate jury awards.”). See also *Peyton v. DiMario*, 287 F.3d 1121, 1126-27 (D.C. Cir. 2002). In *Peyton*, the majority stated:

It may well be that in the most egregious conceivable case a jury might award, for example, \$300,000,000, which would be reduced to \$300,000. The fact that some other hypothetical case might be only half as egregious (assuming such comparisons can be made) would not require either the trial or appellate court to reduce the award in that hypothetical case from \$150,000,000 to \$150,000.

Id. at 1127.

22. *Id.*

23. See, e.g., *Peyton*, 287 F. 3d at 1127 (“[T]he proper approach is to determine whether the judgment awarded, regardless of whether it is the statutory maximum, is supported by evidence, and does not shock the conscience, or is not inordinately large so as to be obviously unreasonable.”); *Deters*, 202 F.3d at 1273 (“[O]nly when an award would ‘shock the judicial conscience, and constitute a denial of justice,’ for example because it would ‘result in the financial ruin of the defendant’ or ‘constitute a disproportionately large percentage of a defendant’s net worth,’” will we reduce the award below the statutory cap.”) (*quoting* *Luciano v. Olsten Corp.*, 110 F.3d 210, 221 (2nd Cir. 1997); *EEOC v. W&O, Inc.*, 213 F.3d 600, 617 (11th Cir. 2000) (holding that punitive damages should be reduced below maximum allowed under the statutory cap only if award is unreasonable or shocks the conscience).

24. See *supra* note 3.

reserved for the most serious cases are in essence transforming the cap into an implied schedule of damages. This goes far beyond what the legislature provided in enacting a statutory cap—that certain losses or wrongs should not be remediable beyond a specified sum.

III. ALLOCATING MULTIPLE AWARDS SUBJECT TO A TOTAL CAP

A legislature may impose a cap on a combination of different types of damages, such as on the total of economic and noneconomic damages, or on the total of compensatory and punitive damages.²⁵ The Civil Rights Act of 1991, with its total cap on compensatory and punitive damages, is one illustration. State examples include a Virginia statute that imposes a \$1.5 million cap on the total of compensatory and punitive damages in medical malpractice cases,²⁶ and a Louisiana statute that imposes a \$500,000 cap on economic and noneconomic damages in cases of medical malpractice.²⁷ When actual awards on different types of damages are combined and exceed the cap, the court must make a reduction to conform to the cap.

This part explores the consequences to the litigants of how a court decides to make the reduction, and it sketches the various approaches that courts have taken to allocating awards under a total cap. I will then develop the argument that the best way to conform multiple awards to a total cap is to combine judicial review for possible excessiveness with the plaintiff's choice as to how to allocate multiple awards.

A. Consequences for Litigants of Allocations Under a Total Cap

In theory, the post-cap amount awarded the plaintiff should be the same regardless of how the court decides to adjust multiple awards to conform to the total cap. Nonetheless, the allocation of compensatory and punitive damages (or of economic and noneconomic damages) can have significant consequences for the litigants. For example, a plaintiff who receives “damages . . . on account of personal physical injuries or physical sickness” is subject to federal taxation on any punitive damages, but not on compensatory damages.²⁸ Moreover, awards of punitive damages generally are subject to more intensive appellate

25. See, e.g., 2 DAN B. DOBBS, LAW OF REMEDIES § 8.8, at 524 (2d ed. 1993) (citing statutes that cap total recovery against certain kinds of defendants).

26. Va. Code Ann. § 8.01-581.15 (2004).

27. La. Rev. Stat. Ann. § 40:1299.42 B(1) (2001).

28. 26 U.S.C. § 104(a)(2) (2002).

review than awards of compensatory damages.²⁹ These factors might lead a plaintiff to prefer that compensatory damages comprise most, if not all, of the post-cap award. The defendant, too, may prefer that compensatory damages be applied fully against the total cap if the defendant's liability insurance does not cover punitive damages.³⁰ Variables affecting either litigant's preferred allocation between different types of damages might include the possibility of prejudgment interest as to some or all of the awards,³¹ any applicable discounting to present value,³² and any offset of benefits from collateral sources.³³

In the few reported decisions adjusting damages to conform to total caps (all involving caps on the combination of compensatory and punitive damages), courts have not discussed these practical consequences. Moreover, some of these courts apparently have not denominated which portion of the post-cap award comprised compensatory or punitive damages.³⁴ It would seem, however, that for

29. For example, appellate courts must review de novo a trial court's determination whether a punitive damages award was unconstitutionally excessive. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 443 (2001).

30. See ROBERT E. KEETON & ALAN I. WIDISS, *INSURANCE LAW* § 5.3(g) (discussing express exclusion of punitive damages from some liability policies and split in authority as to whether punitive damages are covered in the absence of an express exclusion); Catherine M. Sharkey, *Revisiting the Noninsurable Costs of Accidents*, 64 MD. L. REV. 409, 419-34 (2005) (discussing current state of law on insurability of punitive damages).

31. See 1 DOBBS, *supra* note 25, § 3.6(4) at 356-57 (noting that prejudgment interest generally is not applicable to awards for pain and suffering or mental anguish or to punitive damages, but that some statutes allowing prejudgment interest arguably encompass such awards).

32. Cf. 2 DOBBS, *supra* note 25, § 8.5(3) at 468 (noting traditional rule that damages for future pecuniary losses are discounted to present value and that courts are divided as to whether discounting to present value should apply to pain and suffering or punitive damages). Courts vary as to whether the judge or jury should determine the discount rate. See *id.* at 572 (citing cases); *Delta Air Lines, Inc. v. Ageloff*, 552 So.2d 1089, 1093 (Fla. S. Ct. 1989) (involving jury determination of discounting); *McCran v. U.S. Lines, Inc.*, 803 F.2d 771, 774-76 (2d Cir. 1986) (instructing trial judges to discount at 2 percent unless one of the parties proves a more appropriate rate).

33. Cf. 2 DOBBS, *supra* note 25, § 8.6(3) at 500 (noting complexities when defendant is entitled to both a collateral source credit and a cap on damages).

34. In cases involving punitive and compensatory damages under the caps in the 1991 Civil Rights Act, some courts have simply entered judgment for the capped amount and not designated which portion of the judgment represents either compensatory or punitive damages. See, e.g., *Quint v. A.E. Staley Mfg. Co.*, 172 F.3d 1, 14 n. 9 (1st Cir. 1999) (asserting that statutory language providing for caps in the Civil Rights Act of 1981 "neither contemplates nor requires" court to designate post-cap award as "being in the nature of 'compensatory damages'"); *Baty v. Willamette Indus.*, 985 F. Supp. 987, 998 n. 7 (D. Kan. 1997) (stating that "[n]either in the statute nor in any Supreme Court or Tenth Circuit case is there authority mandating or permitting an allocation by the district court of the cap amount between compensatory and punitive damages"). In *Baty*, the majority reduced the combined award at issue to \$300,000. *Id.* at 998. The majority further indicated that if the appellate court were to deem allocation necessary, the trial judge would allocate

purposes of taxation and other practical consequences mentioned earlier, there may be instances in which courts should determine which portions of the post-cap award represent compensatory or punitive damages.³⁵ In those cases in which the courts *have* designated whether the post-cap award comprised compensatory damages, punitive damages, or a combination of both, the courts have employed a variety of methods in making the allocations. I now turn to a discussion of those various approaches.

B. Court Methods

There is scant evidence in reported state decisions as to how courts make adjustments in multiple awards to comply with statutory caps. Several federal cases, however, have addressed the issue under the Civil Rights Act of 1991. With the statute failing to specify how a court is to conform a combination of compensatory and punitive awards to the total cap,³⁶ courts have employed a variety of methods. Some have applied compensatory damages first toward the statutory limit;³⁷ one court has applied punitive damages first toward the cap,³⁸ and others have sought to preserve some portion of both the compensatory and punitive awards.³⁹ Courts have also taken different approaches as to the timing of excessiveness review. Some courts have reviewed one or both of the awards for excessiveness and then allocated the awards under the cap,⁴⁰ while others have allocated the individual awards under the cap before reviewing for excessiveness.⁴¹ Some courts apparently did not review for

\$145,000 for compensatory and \$155,000 for punitive damages. *Id.* at n. 7.

35. Similarly, when a total cap applies to the combination of economic and noneconomic damages, there may be practical reasons why courts should denominate which portion of the post-cap award represents economic or noneconomic damages.

36. *See Lust*, 383 F.3d at 589 (“The statute does not prescribe a method for making this adjustment . . .”); *Jonasson v. Lutheran Child & Family Servs.*, 115 F.3d 436, 441 (7th Cir. 1997) (“The statute contains no command as to how a district court is to conform a jury award to the statutory cap.”).

37. *See infra* Part III(B)(1).

38. *See infra* Part III(B)(2).

39. *See infra* Part III(B)(3).

40. *See, e.g., Quint*, 172 F.3d at 13-15 (determining that jury award of punitive damages was reasonable and applying punitive damages against the total cap, leaving no room for compensatory damages); *David v. Caterpillar, Inc.*, 185 F. Supp.2d 918, 926-27 (C.D. Ill. 2002), *aff’d*, 324 F.3d 851 (7th Cir. 2003) (reducing compensatory award from \$100,000 to \$50,000 under common law review, then subtracting revised compensatory award from total cap amount of \$300,000, then reducing punitive award to \$250,000 to comply with cap and further reducing punitive award to \$150,000 under “most egregious” standard).

41. *See, e.g., Lust v. Sealy, Inc.*, 277 F. Supp.2d 973 (W.D. Wis. 2003), *modified and aff’d*, 383 F.3d 580 (7th Cir. 2004) (applying pro rata approach and then reviewing each award for

excessiveness.⁴² I will examine the various allocation approaches in turn.

1. Apply Compensatory Damages First Toward the Total Cap

Under an “apply compensatory damages first” method, if compensatory damages are less than the statutory limit, the court will reduce punitive damages to the difference between compensatory damages and the capped amount.⁴³ If compensatory damages equal or exceed the statutory limit, then no punitive damages are awarded.⁴⁴

Some courts have justified this method as avoiding or mitigating issues related to punitive damages, such as whether the threshold requirements for an award of punitive damages were met or whether the punitive award was excessive.⁴⁵ To the extent awards of punitive damages are deemed to raise thornier issues than compensatory awards, this reasoning has some force. Judge Posner’s opinion in *Lust* advocated the “apply compensatory damages first” approach on a different rationale—that normally, “punitive damages are something added on by the jury after it determines the plaintiff’s compensatory damages.”⁴⁶ Even if Posner is correct in asserting that juries normally “add on” punitive damages after compensatory damages, it is unclear why the

excessiveness); *Goico v. Boeing Co.*, 358 F. Supp.2d 1028 (applying compensatory damages to cap and then reviewing for excessiveness; because compensatory damages exhausted the cap, court did not review punitive award).

42. See, e.g., *Johnson v. Spencer Press*, 364 F.3d 368, 377-78 (1st Cir. 2004); *Hall v. Consolidated Freightways*, 337 F.3d 669, 672-76 (6th Cir. 2003).

43. See, e.g., *Hall*, 337 F.3d at 671, 676 (jury awarded \$50,000 in compensatory damages and \$750,000 in punitive damages; court assumed \$2,400 of the compensatory award was for back pay and subtracted the remaining \$47,600 from the applicable statutory cap of \$300,000, leaving a punitive damages award of \$252,400); *EEOC v. CEC Entm’t, Inc.*, 2000 WL 1339288, 1 (W.D. Wis. 2000) (jury awarded \$70,000 in compensatory damages and \$13 million in punitive damages; court upheld compensatory award of \$70,000 and reduced punitive award to \$230,000 to comply with statutory cap).

44. See, e.g., *Hogan v. Bangor & Aroostock R.R. Co.*, 61 F.3d 1034, 1037 (1st Cir. 1995); *Johnson*, 364 F.3d at 377 (1st Cir. 2004); *Goico*, 358 F. Supp.2d 1028 (D. Kan. 2005).

45. See, e.g., *Hogan*, 61 F.3d at 1037 (reinstating the jury’s award of compensatory damages that was equal to the statutory cap, “thus obviating the need to reach the question of punitive damages”); *Johnson*, 364 F.3d at 377 (responding to defendant’s argument that punitive damages were not available as a matter of law by stating that “[t]he availability of punitive damages is not a live issue” because “the compensatory damages award was itself greater than the statutory cap”); *Goico*, 358 F. Supp.2d at 1032 (deciding that defendant’s challenge to amount of punitive damages was “moot” because compensatory damages award—deemed reasonable in amount—exhausted the statutory limit).

46. 383 F.3d 580 (7th Cir. 2004). The Seventh Circuit did not, however, conclude that the pro rata method used by the district judge was reversible error because the defendant did not on appeal challenge the pro rata approach. *Id.* at 589.

order in which juries may deliberate should have any bearing on how judges should allocate multiple awards to comply with a cap. Beyond the justifications that courts have offered for applying compensatory damages first toward a statutory cap, one might add the intuitive appeal of affording a plaintiff at least some amount of compensation for harm suffered.

Courts applying compensatory damages first toward a statutory cap often have not indicated if or when they evaluated the compensatory award for possible excessiveness.⁴⁷ It would make little sense, however, to apply the jury's full compensatory award toward the statutory cap if the award was otherwise excessive.⁴⁸

2. Apply Punitive Damages First Toward the Total Cap

In one case, the First Circuit applied punitive damages against the capped amount, with the result that no compensatory damages were represented in the post-cap award.⁴⁹ The jury had awarded compensatory damages equal to, and punitive damages in excess of, the applicable \$300,000 total cap. The district court then reduced the combined awards to the statutory limit and characterized the post-cap award as "compensatory damages."⁵⁰ The First Circuit disregarded the district court's label, asserting that the statute "neither contemplates nor requires such a characterization" because the statute simply mandates that "the sum" of compensatory and punitive damages not exceed \$300,000.⁵¹ (As I asserted earlier, however, there may be compelling practical reasons why courts should denominate which portions of the post-cap award represent compensatory or punitive damages).⁵²

The First Circuit found that the evidence supported the punitive damages award. Because the punitive award exceeded the cap, the court concluded that "there is no need to revisit the compensatory damages

47. See, e.g., *Johnson*, 364 F.3d at 377-78;; *Hall*, 337 F.3d at 672-76. But see *Hogan*, 61 F.3d at 1037 (appellate court reviewing full compensatory award for excessiveness after announcing that it would apply compensatory damages first against the cap).

48. Cf. *Lust*, 383 F.3d at 589 ("[T]he sensible thing for the judge to do is . . . to determine the maximum reasonable award of compensatory damages, subtract that from [the applicable cap] and denote the difference punitive damages"); *CEC Entm't*, 2000 WL 1339288 at 15 (determining that compensatory award was not excessive and then applying the compensatory award toward the total cap).

49. *Quint v. A.E. Staley Mfg. Co.*, 172 F.3d 1 (1st Cir. 1999). In *Quint*, the defendant had argued that the compensatory award for emotional harms was unreasonable. *Id.* at 13-14.

50. *Id.* at 13-14 n. 9.

51. *Id.*

52. See *supra* Part III(A).

issue.”⁵³ The court did not explain why it chose to apply punitive damages first against the statutory limit, although perhaps it was influenced by the fact that the defendant had challenged the jury’s compensatory award as unreasonable.

Applying punitive damages first toward a statutory limit, with the result that the plaintiff’s recovery under the cap does not include any compensatory damages, seems odd. A jury found the defendant liable to the plaintiff, and a necessary element of that liability may have been that harm was caused the plaintiff. Yet, no portion of the adjusted award under the cap is deemed compensation for the plaintiff’s harm. Moreover, applying punitive damages first toward a total cap is in tension with the reality that compensation for harm to the plaintiff is the norm; punitive damages are the exception.

3. Preserve Both Types of Damages Under the Total Cap

Some courts have sought to preserve both compensatory and punitive awards under a total cap. For example, in *Jonasson v. Lutheran Child & Family Services*,⁵⁴ in which the jury awarded \$200,000 in compensatory damages and \$100,000 in punitive damages, a district court within the Seventh Circuit reduced the compensatory award to \$100,000 so as to preserve the full punitive award under the applicable \$200,000 cap.⁵⁵ Although admitting that the plaintiff’s losses arguably exceeded \$100,000, the district court believed it “more appropriate to reduce [the plaintiff’s] compensatory damage award than to make any reduction in her punitive damage award in view of the evidence of defendant’s inadequate response to an egregious situation.”⁵⁶ The Seventh Circuit in *Jonasson* approved the district court’s approach.⁵⁷

Another method for preserving both compensatory and punitive awards under a total cap is to reduce the awards pro rata. Courts have split on whether a pro rata approach is a legitimate method for conforming awards to a total cap. For example, in *Lust*, the federal district court used this method after the jury awarded \$100,000 for emotional distress and \$1 million in punitive damages.⁵⁸ The plaintiff

53. See *Quint*, 172 F.3d. at 13-14.

54. *Jonasson v. Lutheran Child & Family Servs.*, 1996 WL 327965 (N.D. Ill. 1996), *aff’d*, 115 F.3d 436 (7th Cir. 1997).

55. *Id.* at 3.

56. *Id.*

57. *Jonasson v. Lutheran Child & Family Servs.*, 115 F.3d 436, 441 (7th Cir. 1997).

58. *Lust v. Sealy*, 277 F. Supp.2d 973 (W.D. Wis. 2003), *modified and aff’d*, 383 F.3d 580 (7th Cir. 2004).

argued that to comply with the applicable \$300,000 cap, the court should reduce both awards by 73%, leaving approximately \$27,000 for emotional distress and \$273,000 in punitive damages.⁵⁹ The defendant argued that the court should reduce punitive damages only, leaving emotional distress damages at \$100,000.⁶⁰ The plaintiff perhaps sought the pro rata reduction because she believed that the full \$100,000 award for emotional distress would not be upheld by the court based on the facts of the case and on emotional distress awards in comparable cases.⁶¹ The trial court followed the plaintiff's suggestion for reducing pro rata, and it found that the reduced \$27,000 compensatory award for emotional distress and the \$273,000 punitive award were not excessive.⁶²

The Seventh Circuit, in *Lust*, objected to the trial court's pro rata approach, and it expressed a strong preference for applying compensatory damages first toward a statutory cap.⁶³ In this regard, the opinion in *Lust* seemed to contradict the earlier Seventh Circuit decision in *Jonasson*, which upheld the trial court's reduction of compensatory damages so that the full punitive award could remain intact.

Rather than remand to the trial court to implement the "apply compensatory damages first" approach, the Seventh Circuit in *Lust* accepted, with defendant's assent, the trial court's pro rata reduction of the compensatory and punitive awards. The appellate court then proceeded to review each award for excessiveness. The court upheld the pro-rata-reduced compensatory award of \$27,000, but it declared the pro-rata-reduced punitive award to be excessive under the Seventh Circuit rule that the high range of a statutory cap should be reserved for the most egregious cases.⁶⁴ The court deemed \$150,000 to be the maximum permissible punitive award.⁶⁵ The reduction of punitive damages to \$150,000 meant that the plaintiff could have received the original compensatory award of \$100,000 without exceeding the total

59. *Id.* at 996.

60. *Id.*

61. Indeed, the district court opinion stated that "plaintiff's evidence of emotional distress is far from overwhelming," and it noted awards in comparable cases that ranged from \$40,000 to \$50,000. *Lust*, 277 F. Supp.2d at 997.

62. *Id.* at 996-99. In following the plaintiff's suggested pro rata approach, the district court stated: "In the absence of a compelling reason why the statutory cap should apply to one form of damages and not to another in a particular case, I see no reason why § 1981a(b)(3) should not be applied proportionally to both damages for emotional distress and punitive damages." *Id.* at 996.

63. 383 F.3d 580, 589 (7th Cir. 2004). The Seventh Circuit did not, however, conclude that the pro rata method used by the district judge was reversible error because the defendant did not on appeal challenge the pro rata approach. *Id.*

64. *Id.* at 589-91.

65. *Id.* at 591.

statutory cap of \$300,000. The Seventh Circuit, however, declined to adjust the compensatory award upwards from the pro-rata-reduced amount of \$27,000, commenting that even that amount “seem[ed] high.”⁶⁶ This raises a question, however, as to whether the trial court would have reached a different set of amounts if the case had been remanded for the trial court to perform excessiveness review in the first instance of the \$100,000 compensatory award.

A district court within the First Circuit also used the pro rata method.⁶⁷ The jury awarded the plaintiff \$200,000 each in compensatory and punitive damages.⁶⁸ The applicable cap was \$200,000, and the district court reduced the compensatory and punitive awards by 50%.⁶⁹ The First Circuit rejected this approach. Although not directly criticizing the pro rata method, the First Circuit decided to reinstate the jury’s award of \$200,000 in compensatory damages and vacate the award of punitive damages, “thus obviating the need to reach the question of punitive damages.”⁷⁰

If the goal is to reflect the jury’s judgment to the extent possible, then it would seem that a pro rata reduction of compensatory and punitive damages to comply with a total cap is superior to reducing only one of the awards. The First and Seventh Circuits, however, in disfavoring the pro rata approach, apparently rejected this goal in favor of other considerations.

In sum, the allocation of multiple awards to conform to a total cap may have significant consequences for the litigants. The allocation may affect taxation and insurance, and it may have an impact on possible prejudgment interest, discount to present value, or offset of benefits from collateral sources. In the reported cases, courts have not acknowledged these consequences. Instead, the courts have employed a variety of approaches to conform multiple awards to total caps, with little explanation for why one approach is preferred over another.

C. A Proposal for Allocating Multiple Awards

The general purpose of statutory caps is to limit plaintiff recovery or defendant liability;⁷¹ courts should resist extending the influence of

66. *Id.* at 589.

67. *Hogan v. Bangor & Aroostook R. Co.*, 61 F.3d 1034, 1037 (1st Cir. 1995).

68. *Id.* at 1036-37.

69. *Id.*

70. *Id.* at 1037.

71. Some statutory caps appear to reflect more the notion that liability of defendants should be limited rather than the notion that harms to plaintiffs are unworthy of remedy beyond a certain

statutory caps beyond that purpose. In the absence of statutory caps, juries typically have the initial job of assessing damages, judges have the authority to review jury awards for excessiveness, and plaintiffs are entitled to any awards that are authorized by law and not deemed excessive.

I suggest that these traditional rules for damages should carry over as much as possible when a statutory cap applies and the sum of multiple awards exceeds the cap. The best way to achieve this is a combination of excessiveness review and plaintiff choice as to how to allocate the awards.⁷² Because the defendant receives the benefit of the total cap regardless, it is appropriate that the plaintiff, who in the absence of the cap would have received a larger recovery, be afforded the choice of how to allocate. The plaintiff is in the best position to decide how to maximize his or her ultimate recovery under the total cap in light of tax and other consequences.

Whether excessiveness review by the court should precede the plaintiff's choice of allocation or vice versa would depend on the circumstances of the individual case. In some situations, it may be evident to the plaintiff how she would like to allocate the awards before the court engages in any excessiveness review. Indeed, the plaintiff's allocation choice may minimize the need for the court to review for excessiveness. In other circumstances, such as when both jury awards separately exceed the statutory maximum, and the maximum reasonable amount of one or both of the awards likely is below the statutory limit, the judge should decide the maximum reasonable amount for the awards before the plaintiff chooses how to allocate.

amount. This focus on limiting defendant liability can be seen quite clearly with the caps in the 1991 Civil Rights Act, the amounts of which vary depending on the size of the employer. Some caps reflect more of a focus on limiting plaintiff recovery than on limiting individual defendant liability. For example, some caps are pegged to the seriousness of the harm suffered by the plaintiff, and some limit the amount a plaintiff can recover against all defendants combined. *See Sharkey, supra* note 1, at 498-500 (discussing recent malpractice legislation in several states).

72 Perhaps in some of the reported cases, courts did abide by the plaintiff's choice (if any) as to how to allocate the awards, and the reported decisions simply did not so indicate. But in at least one of the reported cases, the court clearly rejected the plaintiff's choice and employed a different allocation approach. *Baty v. Willamette Indus. Inc.*, 985 F. Supp. 987, 998 n. 7 (D. Kan. 1997) (rejecting plaintiff's request that the post-cap award should be comprised entirely of compensatory damages and stating that if an allocation "is deemed necessary and the jury awards remain unchanged after appeal, the court would allot \$145,000 for compensatory damages and \$155,000 for punitives").

IV. CONCLUSION

Statutory caps on damages have altered the traditional rule that plaintiffs are entitled to the full amount of damages awarded by a jury, as long as those damages are not excessive on the facts of the case. If a court treats the cap as a benchmark for reviewing awards for excessiveness, the court is implying a schedule of damages that the legislature has not chosen to enact. Moreover, if the legislature has enacted a total cap on different types of damages, its purpose in limiting plaintiff recovery or defendant liability should be achieved in the way that least interferes with the traditional rule that the plaintiff is entitled to any nonexcessive damages that have been awarded. Judicial review for possible excessiveness, combined with plaintiff choice as to how to allocate multiple awards to conform to the cap, serves legislative purposes while maximizing the plaintiff's ultimate recovery.

