SIGNIFICANT REMEDIES CHANGES IN THE 2023 MONTANA LEGISLATURE – AN OVERVIEW

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I. Introduction and Summary

The 2023 Montana legislature passed a significant number of bills relating to remedies, including preliminary injunctions, temporary restraining orders ("TROs"), and punitive damages. These changes are all already in effect and may create uncertainty for civil practitioners and parties while we wait for judicial interpretation of these provisions in actual cases and controversies. This article lays out some of the most significant 2023 legislative changes regarding judicial remedies and provides some initial reflections on their potential impacts.

The 2023 legislature altered the standard and process for preliminary injunctions and TROs. The preliminary injunction standard is now the four-factor test used by federal courts, and previously used in Montana state courts for preliminary injunctive relief in cases seeking money judgments.[1] The legislature's adoption of the federal four-factor test and explicit direction to rely on federal case law significantly widens the scope of relevant preliminary injunction precedent that parties and courts can draw upon. A significant change regarding the preliminary injunction process is that a preliminary injunction is now deemed denied by operation of law if not granted within 21 days of a preliminary injunction hearing.[2]

Regarding TROs without notice, the 2023 legislature changed the standard from the federal and previous state "immediate and irreparable harm" standard to requiring a "showing" that the new preliminary injunction standard is met.[3] However, a showing of potential "immediate and irreparable harm" will likely remain an important touchstone for courts ruling on TROs given their purpose and function even under the new standard. Practitioners will need to brief the merits and equities of their position, including a showing of potential irreparable harm, when seeking TROs without notice.[4]

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1. Univ. of Tex. v. Camenisch, 451 U.S. 390, 392 (1981); Van Loan v. Van Loan, 895 P.2d 614, 617 (Mont. 1995).
2. Mont. Code Ann. § 27-19-318(7) (2023).
3. S. 191, 68th Leg., Reg. Sess. (Mont. 2023); Mont. Code Ann. § 27-19-315(1).
4. Mont. Code Ann. §§ 27-19-201(1), 27-19-315(1).

TRO process changes include (1) requiring a preliminary injunction hearing within 20 days of the issuance of a TRO, (2) clarification that a TRO without notice lasts only 10 days, with one extension before a preliminary injunction hearing and with one 21-day extension after a preliminary injunction hearing, and (3) a requirement that a bond is considered during the preliminary injunction hearing or the TRO is invalid and unenforceable.[5] Several statutes were amended addressing TROs and preliminary injunctions in specific types of cases, including where the secretary of state promulgates an administrative rule, injunctions regarding construction work, and TROs without notice against the state.[6]

The 2023 legislature also made changes to punitive damages law, including (1) adding a "split recovery" provision in which the state is automatically entitled to 50% of a plaintiff's punitive award, (2) prohibiting plaintiffs from including claims for punitive damages in initial complaints, and (3) prohibiting advising juries that 50% of any punitive award will go to the state.[7] Litigation relating to these punitive damages changes will raise many interesting constitutional questions, implicating takings, excessive fines, and separation of powers. Cases outside of Montana provide illustrations of issues and potential challenges these new laws will face in Montana.

It will take several years of judicial opinions to fully establish the contours of these changes. It is crucial that practitioners and courts think through the long-term consequences of these changes as they advocate for and adopt interpretations of them. These laws will give Montana courts a unique opportunity to analyze some Montana Constitution provisions through a new lens.

II. Preliminary Injunctions

A. Adoption of the Federal Four-Factor Test as the Preliminary Injunction Standard

The previous version of Mont. Code Ann. § 27-19-201(1)–(3) allowed injunctions where (1) a plaintiff sought and appeared entitled to permanent injunctive relief, (2) to avoid great or irreparable injury, or (3) to enjoin an act that threatened the applicant's rights and would render a judgment ineffectual.[8] SB191 replaced these three subsections with the following four-factor test: "(a) the applicant is likely to succeed on the merits; (b) the applicant is likely to suffer irreparable harm in the absence of preliminary relief; (c) the balance of equities tip in the applicant's favor; and (d) the order is in

5. Mont. Code Ann. §§ 27-19-316(4), 27-19-318(3)–(6).
6. S. 136, 68th Leg., Reg. Sess. (Mont. 2023); Mont. Code Ann. § 27-19-103(9).
7. Mont. Code Ann. § 27-1-221(5), (9), (10).
8. Mont. Code Ann. § 27-19-201(1)–(3) (2021).

the public interest."[9] This is the preliminary injunction standard utilized by federal courts.[10] SB191 states the legislature's intent that this language "mirror the federal preliminary injunction standard" and that "interpretation and application" of it "closely follow United States supreme court case law."[11]

In 1995, the Montana Supreme Court adopted this four-factor test for preliminary injunctions where a plaintiff is seeking a monetary judgment that may be made ineffectual by the defendants' actual or threatened actions.[12] The Montana Supreme Court has applied this four-factor test several times since 1995 and already recognized its similarity to the newly revised Mont. Code Ann. § 27-19-201 in a recent non-cite opinion.[13] Additionally, elements of the previous version of Mont. Code Ann. § 27-1-201's disjunctive test also are relevant. For example, in 2022 the Montana Supreme Court observed the similarity between the "prima facie" case analysis under prior Mont. Code Ann. § 27-19-201(1) and the "likelihood of success on the merits" element of the new test.[14] Similarly, precedent analyzing alleged harm under prior Mont. Code Ann. § 27-19-201(2) is relevant when analyzing whether the plaintiff is "likely to suffer irreparable harm" without injunctive relief under the new test.

In addition to applicable existing Montana Supreme Court case law, SB191 gives practitioners and judges a huge body of federal case law from which to pull when briefing and ruling on preliminary injunctions. Federal decisions regarding preliminary injunctive relief in a panoply of cases, from state law claims heard in diversity to constitutional claims arising under 42 U.S.C. § 1983 are "on the table" for practitioners and courts. It is noteworthy that the manifest abuse of discretion standard applicable to the district court's decisions to grant or deny requests for preliminary injunctions remains in place.[15] It is also worth noting that preserving the status quo, which Montana courts have long used as their north star for determining whether to issue preliminary injunctions, remains centrally relevant.[16]

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9. Mont. Code Ann. § 27-19-201 (2023).

10. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). Some circuits use variations of this test, including the Ninth Circuit's sliding scale test. *See, e.g.*, All. for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011) (stating that "[u]nder this approach, the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another. For example, a stronger showing of irreparable harm to plaintiff might offset a lesser showing of likelihood of success on the merits."). It will ultimately be up to Montana courts whether to apply variations of this test.

11. S. 191, 68th Leg., Reg. Sess. (Mont. 2023).

12. Van Loan v. Van Loan, 895 P.2d 614, 617 (Mont. 1995).

13. Shammel v. Canyon Res. Corp., 82 P.3d 912, 917 (Mont. 2003); Caldwell v. Sabo, 308 P.3d 81, 87 (Mont. 2013). In a non-cite opinion following the effective date of Senate Bill 191, the Montana Supreme Court noted the similarity between the *Van Loan* test and the new four-factor test in the recently amended Mont. Code Ann. § 27-19-201. *See* Benesh v. Herbert, 530 P.3d 1293 (Mont. 2023).

14. Planned Parenthood v. State, 515 P.3d 301, 309 (Mont. 2022).

15. BAM Ventures, LLC v. Schifferman, 437 P.3d 142, 144 (Mont. 2019).

16. Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981) (stating that "[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held");

B. Process Changes Regarding Preliminary Injunction Hearings

The pre-2023 version of Mont. Code Ann. § 27-19-318 required that whenever a TRO without notice is granted, a preliminary injunction hearing must be "set for hearing at the earliest possible time and takes precedence over all other matters."[17] SB134 amended this statute to require a preliminary injunction hearing be held within "20 days of issuance of a [TRO]" unless the parties otherwise stipulate.[18] Given crowded dockets, the practical reality exists that a hearing within this timeframe may simply not be possible.

At the hearing, the district court judge must "address whether a bond is required," and if a judge does not do so, the "temporary restraining order is invalid and unenforceable."[19] This language is confusing because in many situations a TRO is already in place at a preliminary injunction hearing. It is unclear whether this language means a TRO extended after a hearing until a preliminary injunction is granted or denied, or this language used TRO when it means preliminary injunction. According to the plain language of the amendment, however, this bond amendment likely only applies to any TRO in place during or after a preliminary injunction hearing.

SB134 makes another important and confusing change potentially impacting preliminary injunctions. "If the court has not ruled on the preliminary injunction within 21 days of the hearing on the [TRO], the preliminary injunction is considered denied unless otherwise stipulated in writing by the parties."[20] This language is confusing because hearings are generally not on TROs, but rather on preliminary injunctions. It is likely what the legislature meant was, if after a preliminary injunction hearing the court has not ruled on the preliminary injunction for 21 days, the preliminary injunction is deemed denied. However, because of the plain language rule, this is likely to create some confusion in practice.[21] Practitioners will likely want to prepare draft preliminary injunction orders for the court immediately upon completion of preliminary injunction hearings and assume that a preliminary injunction is

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Grounds for Granting or Denying a Preliminary Injunction, 11A Fed. Prac. & Proc. Civ. § 2948 (3d ed.) ("It often has been observed that the purpose of the preliminary injunction is the preservation of the status quo and that an injunction may not issue if it would disturb the status quo. This formulation is unobjectionable when used simply to articulate the desire to prevent defendant from changing the existing situation to plaintiff's irreparable detriment. Likewise, 'it has long been established that where a defendant with notice in an injunction proceeding completes the acts sought to be enjoined the court may be mandatory injunction restore the status quo.'") (citations omitted).

17. Mont. Code Ann. § 27-19-318 (2021).

18. Mont. Code Ann. § 27-19-318(3) (2023). When read together with § 27-19-318(1), assumedly this requirement only applies to TROs without notice, however, the wording of the amended language does not so specify.

19. Mont. Code Ann. § 27-19-318(6).

20. Mont. Code Ann. § 27-19-318(7).

21. Mont. Code Ann. § 1-2-101 (stating that "[i]n the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted").

deemed denied if not ruled on in 21 days until there is clarification by the courts or legislature.

C. Case-Specific Preliminary Injunction Changes

SB135 prohibits injunctions "to prevent the secretary of state from issuing a temporary or final administrative rule before the administrative rule is issued."[22] SB136 addresses preliminary injunctions and TROs relating to construction or remodeling work and requires that such injunctions allow the enjoined party to protect the property.[23]

III. Temporary Restraining Orders

A. From "Immediate and Irreparable Harm" to a "Showing" that the Plaintiff is Entitled to a Preliminary Injunction

While Montana law moved closer to federal law regarding preliminary injunctions with the 2023 changes, it moved away from the federal standard for TROs without notice. Since 1938, Federal Rule of Civil Procedure 65(b)(1)(A) has required an applicant seeking a TRO without notice to show "immediate and irreparable injury."[24] Montana law mirrored this requirement in Mont. Code Ann. § 27-19-315(1), enacted in 1979.[25] This "immediate and irreparable injury" standard highlights a TRO's purpose to avoid such injury, as opposed to a preliminary injunction's purpose to preserve the status quo pending litigation. While both seek to avoid injury, it is the primary focus of a TRO, and the underlying reason why TROs without notice are allowed for short periods of time.

SB191 struck this "immediate and irreparable injury" standard, and replaced it with the following: "A [TRO] may be granted without written or oral notice . . . only if the applicant or the applicant's attorney makes a showing that the requirements of § 27-19-201(1) are met."[26] The requirements of § 27-19-201(1) are the four-factor federal test for preliminary injunctions.

To now obtain a TRO without notice, instead of showing immediate and irreparable harm, an applicant must now "make a showing" that (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tip in the applicant's favor, and (4) a preliminary injunction is in the public interest. An application for a TRO without notice will now require an affidavit showing

22. Mont. Code Ann. § 27-19-103(9) (2023).
23. S. 136, 68th Leg., Reg. Sess. (Mont. 2023).
24. Fed. R. Civ. P. 65(b)(1)(A).
25. Mont. Code Ann. § 27-19-315 (2021).
26. Mont. Code Ann. § 27-19-315 (2023).

irreparable harm, as before, but additionally, will require some amount of briefing on the merits of the applicant's underlying legal claims, and an analysis of the equities and public interest. When setting forth the federal four-factor test, SB191 stated "a preliminary injunction order or temporary restraining order may be granted" when the plaintiff establishes the four factors.[27] This suggests best practice is for plaintiffs seeking a TRO with or without notice to address all four factors in their TRO application. Given the purpose of a TRO, the early procedural posture in which they are addressed, and the long federal and state history of focusing on avoiding immediate and irreparable history, it is likely that the second factor, likelihood of irreparable harm in the absence of preliminary relief, will be most important in seeking a TRO.

These changes leave many open questions. If a "showing" is made that a plaintiff is entitled to a TRO, does that create a presumption leading up to the preliminary injunction hearing? Is the opposite true if a showing is not made? What is the standard required to make a "showing"? What is the standard for a TRO with, as opposed to without, notice?[28]

B. Other TRO Changes

HB695 prohibits courts from granting TROs without notice against the "state, the state's departments, agencies, or political subdivisions, or officers of the state or a political subdivision acting in their official capacities" unless "notice could not be provided through no fault of the moving party" or the suit is brought under Title 40, such as actions relating to dependent neglect and child protection.[29] This bill may be superfluous given the existing requirement that an applicant's attorney must certify her efforts to give notice and reasons why notice should not be required.[30] Assumedly, this new standard is met when the old standard is met by the plaintiff's attorney providing a certification explaining attempts to provide notice.

SB134 clarifies that a TRO without notice is "not enforceable after 10 days unless extended," and can only be extended once for 10 additional days.[31] Unfortunately, the time a TRO with notice is in effect was not clarified. At a preliminary injunction hearing, a court can extend a TRO for up

27. S. 191, 68th Leg., Reg. Sess. (Mont. 2023) (emphasis added).

28. In federal court, the standard for a TRO with notice is generally the same as a preliminary injunction. *See* Imperial Sovereign Ct. of Mont. v. Knudsen, WL 4847007 at *2 (D. Mont. July 28, 2023) (stating that "[t]he standard for issuing a TRO proves 'essentially identical' as that for issuing a preliminary injunction").

29. Mont. Code Ann. § 27-19-315(2) (2023).

30. Mont. Code Ann. § 27-19-315(1).

31. S. 134, 68th Leg., Reg. Sess. (Mont. 2023).

to 21 days, and as discussed above, it appears that a court must rule on the preliminary injunction within that time or it is deemed denied.

IV. Punitive Damages

A. Introduction

In SB169, the 2023 legislature made significant changes to Montana law regarding punitive damages.[32] Some of these implicate recovery of the award, and others impact civil procedure surrounding punitive damages claims. Most of these changes came from a handful of other states' punitive damages statutes, some of which have been found constitutional and some found unconstitutional. There is no doubt these changes will be the subject of court challenges, and it will be up to Montana courts to apply unique provisions of the Montana Constitution to determine their constitutionality and enforceability. SB169 will likely also result in more cases involving punitive damages settling just prior to judgment since the state receives no portion of such settlements.[33]

B. SB169's "Split Recovery" Provision Giving the State 50% of Punitive Damages Awards Above $200,000

SB169 states "the judge shall divide the award of punitive damages equally between the prevailing party and the state and shall enter judgment accordingly."[34] Plaintiffs are required to provide written notice of a judgment awarding punitive damages to the state through the attorney general.[35] The state cannot intervene at any stage in the proceeding, but may intervene to enforce or execute a judgment in favor of the state.[36] Punitive damages awards of $200,000 or less need not be split with the state.[37]

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32. S. 169, 68th Leg., Reg. Sess. (Mont. 2023). The 2023 legislature also passed Montana Senate Bill 216, which vastly expanded allowable affirmative defenses in products liability cases, including strict liability, created a rebuttable presumption of non-defective products, and added additional procedural restrictions on products liability claims. This legislation is outside the scope of this article, but important for practitioners to be aware of practicing in this area.

33. *See* Scott Dodson, Note, *Assessing the Practicality and Constitutionality of Alaska's Split-Recovery Punitive Damages Statute*, 49 Duke L.J. 1335, 135152 (2000) (discussing split recovery provisions' settlement incentive); *see also* Skyler Sanders, *Uncle Sam and the Partitioning Punitive Problem: A Federal Split-Recovery Statute or a Federal Tax?*, 40 Pepp. L. Rev. 785, 825 (2013); Patrick White, Note, *The Practical Effects of Split-Recovery Statutes and Their Validity as a Tool of Modern Day "Tort Reform"*, 50 Drake L. Rev. 593, 60709 (2002).

34. Mont. Code Ann. § 27-1-221(9)(a) (2023).

35. Mont. Code Ann. § 27-1-221(9)(b).

36. Mont. Code Ann. § 27-1-221(9)(f).

37. Mont. Code Ann. § 27-1-221(9) (g).

At least seven other states currently have "split recovery" provisions in which a percentage of a punitive award goes to the state.[38] Some states have repealed their split recovery statutes.[39] Colorado repealed its split recovery provision after the Colorado Supreme Court ruled it was unconstitutional.[40] Each state is somewhat different in the percentage the state receives and the state's involvement in the process. Percentages to the state range from to 50% to 75%.[41] Illinois gives courts discretion to apportion a punitive damages award to the state after considering relevant factors, including whether a special duty was owed by the defendant to the plaintiff.[42]

Plaintiffs have challenged the constitutionality of split recovery provisions in other states with limited success. Challenges include claims that the provision is a taking and an excessive fine, or that it violates due process, equal protection, and separation of powers. These challenges implicate federal and state constitutional rights. It will ultimately be up to Montana courts to analyze subsequent challenges relating to SB169's split recovery provision pursuant to Montana-specific rights.

1. Takings and Due Process Challenges to Split Recovery Provisions – When Does a Plaintiff's Property Right Vest?

Courts upholding the constitutionality of split recovery provisions in the face of takings and due process claims have generally rejected such claims on the basis that that plaintiffs do not have a property interest in a punitive award sufficient to trigger protection from a taking or due process violation.[43] This

38. Alaska Stat. Ann. § 09.17.020(j) (2023); Ga. Code Ann. § 51-12-5.1(e)(2) (2021); 735 Ill. Comp. Stat. Ann. 5/2-1207 (2023); Ind. Code Ann. § 34-51-3-6(c) (2023); Mo. Ann. Stat. § 537.675(g)(3) (2023); Or. Rev. Stat. § 31.735(1)(b) (2023); Utah Code Ann. § 78B-8-201(3)(a). *See also* Sanders, *supra* note 33, at 803 (listing states with split recovery provisions); Dodson, *supra* note 33, at 1337.

39. *See* Sanders, *supra* note 33, at 803 ("The state legislatures in California, Florida, Kansas, and New York allowed their split-recovery statutes to expire without renewal.").

40. Colo. Rev. Stat. Ann. § 13-21-102 (1986), *repealed by* H.R. 95-1090, 60th Gen. Assemb., 1st Sess. § 1 (Colo. 1995); Kirk v. Denver Publ'g Co., 818 P.2d 262, 273 (Colo. 1991) (holding Colorado's previous split recovery provision unconstitutional).

41. Alaska Stat. Ann. § 09.17.020(j) (2023) (50%); Mo. Ann. Stat. § 537.675(3) (2023) (50% after attorneys fees and expenses); Utah Code Ann. § 78B-8-201(3)(a)(ii) (2023) (50% after the first $50,000); Or. Rev. Stat. § 31.735(1)(a)(c) (2023) (70%); Ga. Code Ann. § 51-12-5.1(e)(2) (2021) (75% less costs and reasonable attorneys fees); Ind. Code Ann. 34-51-3-6(c)(2) (2023) (75%).

42. 735 Ill. Comp. Stat. Ann. 5/2-1207 (2023).

43. State court decisions upholding split recovery statutes include Cheatham v. Pohle, 789 N.E.2d 467, 474–75 (Ind. 2003); Evans ex rel. Kutch v. Alaska, 56 P.3d 1046, 1058 (Alaska 2002); Mack Trucks, Inc. v. Conkle, 436 S.E.2d 635, 644 (Ga. 1993); Gordon v. Florida, 608 So.2d 800, 801–02 (Fla. 1992); Shepherd Components, Inc. v. Brice Petrides-Donohue & Assoc., 473 N.W.2d 612, 619 (Iowa 1991); Engquist v. Or. Dep't of Agric., 478 F.3d 985, 1010 (9th Cir. 2007); DeMendoza v. Huffman, 51 P.3d 1232, 1245–48 (Or. 2002); Cisson v. C.R. Bard, Inc., No. 2:11-CV-00195, 2015 WL 251437, at *2 (S.D. W. Va. Jan. 20, 2015), *aff'd sub nom* In re C.R. Bard, Inc., MDL. No. 2187, Pelvic Repair Sys. Prod. Liab. Litig., 810 F.3d 913 (4th Cir. 2016). States that found split recovery statutes an unconstitutional taking include

issue has multiple dimensions, but is mainly a question of timing.[44] If a split recovery provision only entitles the state to a percentage of a punitive damage award *after* the plaintiff receives a judgment, such provision is a taking because the judgment creates a property right for the plaintiff to seek satisfaction of real and personal property in that amount. If, on the other hand, a split recovery provision gives the state a *pre*-judgment interest in a percentage of punitive awards, courts have generally rejected takings and due process challenges because the plaintiff does not yet have a vested property interest.[45]

For example, in 1991 the Colorado Supreme Court held that Colorado's split recovery provision was an illegal taking.[46] That statute

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Kirk v. Denver Publ'g Co., 818 P.2d 262, 273 (Colo. 1991), and Smith v. Price Dev. Co., 125 P.3d 945, 953 (Utah 2005).

44. Several law review articles, notes, and comments not specifically cited herein discuss constitutional challenges to split recovery statutes, including the cases discussed in this article. *See* Sharon G. Burrows*, Apportioning a Piece of a Punitive Damage Award to the State: Can State Extraction Statutes Be Reconciled with Punitive Damage Goals and the Takings Clause?*, 47 U. Miami L. Rev. 437 (1992); Kevin M. Epstein, *Punitive Damage Reform: Allocating a Portion of the Award to the State*, 13 Rev. Litig. 597 (1994); Lee Katherine Goldstein, *Split-Recovery Statutes do More Harm than Good*, 38-Aug. Colo. Lawyer 105 (2009); Paul F. Kirgis, *The Constitutionality of State Allocation of Punitive Damage Awards*, 50 Wash. & Lee L. Rev. 843 (1993); Paul. B. Rietma, *Reconceptualizing Split-Recovery Statutes:* Philip Morris USA v. Williams, *127 S.Ct. 1057 (2007*), 31 Harv. J.L. & Pub. Pol'y 1159 (2008); Meredith Matheson Thoms, *Punitive Damages in Texas: Examining the Need for a Split-Recovery Statute*, 25 St. Mary's L.J. 207 (2003); Clay R. Stevens, *Split-Recovery: A Constitutional Answer to the Punitive Damage Dilemma*, 21 Pepp. L. Rev. 857 (1994); *Eighth Amendment – Punitive Damages – Florida Supreme Court Upholds "Split-Recovery" Statute.* – Gordon v. State*, 608 So.2d 800 (Fla. 1992) (Per Curiam)*, 106 Harv. L. Rev. 1691 (1993).

45. *See e.g.,* Fust v. Att'y Gen. for the State of Mo., 947 S.W.2d 424, 431 (Mo. 1997) (en banc) (distinguishing Missouri from Colorado's voided split recovery provision because "a Missouri plaintiff never acquires a proprietary interest in more than one-half of a punitive damages judgment"); *DeMendoza*, 51 P.3d at 1245 (rejecting takings challenge, in part because "a plaintiff has no right or entitlement to punitive damages as a remedy" and therefore "before entry of a final judgment, a plaintiff in Oregon always has had, at most, an expectation of such an award"); *Cisson*, 2015 WL 251437, at *2 ("[i]f no cognizable property interest exists, then there is no violation of the Takings Clause"); *Evans*, 56 P.3d at 1058 ("[i]f [Alaska's split provision] is construed as a cap on punitive damages, limiting them *before* they are awarded to successful plaintiffs, no constitutional problem exists"). Alaska courts have upheld Alaska's split recovery provision despite recognizing "unlitigated claims are property interests that 'cannot be taken away from the plaintiff by government action without due process of law'" by interpreting the government taking as the split recovery provision, and thereby occurring prior to the accrual of such right. *See* Anderson v. Alaska ex rel. Cent. Bering Sea Fishermen's Ass'n, 78 P.3d 710, 714 (Alaska 2003) (citations omitted). For additional discussions of these and other cases relating to takings and due process challenges, *see* Benjamin F. Evans, *"Split-Recovery" Survives: The Missouri Supreme Court Upholds the State's Power to Collect One-Half of Punitive Damage Awards:* Fust v. Attorney General of Missouri, 63 Mo. L. Rev. 511 (1998). *See also* Matthew J. Klaben, Note, *Split-Recovery Statutes: The Interplay of the Takings and Excessive Fines Clauses*, 80 Cornell L. Rev. 104, 138 (1994) (noting state's pre or post-judgment interest is generally dispositive); White, *supra* note 33, at 601 ("the court's decision of constitutionality will usually hinge on the court's determination of whether the plaintiff, state, both or neither have a property interest in the punitive damage award before the state's share is deducted").

46. *See Kirk*, 818 P.2d at 273 ("We thus conclude that section 13–21–102(4) constitutes a taking of a judgment creditor's private property interest in an exemplary damages award without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article II, Section 15, of the Colorado Constitution.").

required payment of 1/3 of punitive damages only upon judgment and collection of the awarded funds by the plaintiff.[47] The Court reasoned this split recovery provision "contemplates the entry, and actual collection, of a final judgment on behalf of the injured party, for it is only after the injured party has invested the time, effort, and expense of obtaining and actually collecting the judgment that the statutory grant of one-third interest to the state comes into play."[48] Because the plaintiff had a judgment (and collected on it), the plaintiff had a property right, which the government then took without compensation or other legal justification.[49] The Court explained "[b]ecause a judgment for exemplary damages entitles the judgment creditor to a satisfaction out of the real and personal property of the judgment debtor, the taking of a money judgment from the judgment creditor is substantially equivalent to the taking of money itself."[50]

In Utah, the legislature enacted a split recovery statute in 1989, which stated "[i]n any judgment where punitive damages *are awarded and paid*, 50% of the amount of punitive damages in excess of $20,000 shall, after payment of attorneys fees and costs, be remitted to the state treasurer for deposit into the General Fund."[51] Following the Colorado court's decision in *Kirk*, the Utah Supreme Court found this split recovery statute was an unconstitutional taking because "[w]hen the judgment was satisfied, [plaintiffs] obtained a 'completed, consummated right' to the proceeds," thereby "they had a vested property interest" that was protectable for the purposes of a takings analysis.[52] Utah subsequently amended its split recovery provision to direct the court to enter judgment in favor of both the plaintiff and state to avoid the state taking a vested property right.[53] Utah's amended provision is the same approach taken by the Montana legislature in SB169.

Other states have taken various approaches to when the state's entitlement to a percentage of a punitive award triggers. Oregon's split recovery provision makes the state a judgment creditor upon entry of a verdict

47. *Id.* at 266–67.

48. *Id*.

49. *Id.* at 267 ("Because the term 'property' includes a 'legal right to damage for an injury' . . . it necessarily follows that the term 'property' also includes the judgment itself, which creates an independent legal right to full satisfaction from the 'goods and chattels, lands, tenements, and real estate of every person against whom any judgment is obtained.' § 13–52–102(1), 6A C.R.S. (1987). The filing of a certified transcript of the judgment with the county clerk and recorder creates a 'lien upon all the real property of such judgment debtor, not exempt from execution in such county, owned by him or which he may afterwards acquire until said lien expires.' . . . Indeed, the statutory disavowal in section 13–21–102(4) of any state interest in a claim for exemplary damages 'at any time prior to payment becoming due' is an implicit legislative acknowledgement of the property interest created in the judgment creditor by virtue of the judgment itself.").

50. *Id.* at 269.

51. Utah Code Ann. § 78-18-1(3) (1989) (emphasis added). The 1989 version of this statute is analyzed in Smith v. Price Dev. Co., 125 P.3d 945, 950 (Utah 2005).

52. *Smith*, 125 P.3d at 952 (citations omitted).

53. Utah Code Ann. § 78B-8-201(3)(a) (2023).

including an award of punitive damages.[54] Indiana states "the state's interest in a punitive damage award . . . is effective when a finder of fact announces a verdict that includes punitive damages."[55] Missouri creates a lien for the state of Missouri upon a party receiving a final judgment awarding punitive damages.[56] Georgia requires its percentage "shall be paid into the treasury of the state" and specifies that the state has all rights of a judgment creditor upon issuance of a judgment.[57] It remains to be seen at what stage in the punitive damages case process Montana courts will determine plaintiffs obtain a property interest for takings and due process purposes—after verdict or only after judgment?

2. Split Recovery Provisions as Excessive Fines

Defendants have had some success challenging split recovery provisions as excessive fines where the split recovery statute directs the state's share to go to the state's general fund, as opposed to a specific court-administered fund.[58] The Eighth Amendment to the U.S. Constitution and Article II, Section 22 of the Montana Constitution prohibit excessive fines.[59] In 1990, in *McBride v. General Motors Corporation*,[60] the U.S. District Court for the Middle District of Georgia found that a split recovery statute was an excessive fine where a defendant brought the challenge and the split recovery statute did not specify a specific fund to which the state's portion is allocated.[61]

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54. Or. Rev. Stat. § 31.735 (2023).

55. Ind. Code Ann. § 34-51-3-6(e) (2023).

56. Mo. Rev. Stat. § 537.675 (2023).

57. Ga. Code Ann. § 51-12-5.1 (2021) (stating that "seventy-five percent of any amounts awarded . . . as punitive damages . . . shall be paid into the treasury of the state").

58. For an in-depth discussion of excessive fines cases and arguments, *see* Klaben, *supra* note 45, at 107 (arguing "statutes giving the state a prejudment interest" in punitive damages awards are "least susceptible to takings challenges" but "the very statutes to which the Excessive Fines Clause is most likely to apply").

59. U.S. Const. amend. VIII; Mont. Const. art. II, § 22.

60. 737 F. Supp. 1563 (M.D. Ga. 1990).

61. *Id.* at 1578 (finding that Georgia's split recovery statute, "if the subsection allowing the State of Georgia to occupy the status of a judgment creditor entitled to 75% of any award of product liability punitive damages is allowed to stand, converts the civil nature action of the prior Georgia punitive damages statute into a statute where fines are being made for the benefit of the State, contrary to the constitutional prohibitions as to excessive fines and contrary to the double jeopardy clause of the Fifth Amendment to the Constitution of the United States"). *See also* Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854, 868 (Iowa 1994) (rejecting excessive fines challenge to split recovery statute because (1) the state did not prosecute the action and (2) the state's percentage goes to the Iowa Civil Reparations Trust Fund, and not the state treasury and therefore "the damage awards are not commingled with state revenues"). *But see* Tenold v. Weyerhaeuser Co., 873 P.2d 413, 529 (Or. Ct. App. 1994) (rejecting an excessive fines challenge to Oregon's split recovery provision brought by defendant because "the government of Oregon did not initiate the action" and "the purpose of the Eighth Amendment would not be furthered if applied under the circumstances"). *See also* Klaben, *supra* note 45, at 145 (discussing cases).

Subsequently in *Burke v. Deere & Company*,[62] the U.S. District Court for the Southern District of Iowa distinguished *McBride* on the basis that Georgia's split recovery statute in *McBride* allocated a percentage to the state generally, as opposed to a specific court-controlled fund in Iowa.[63]

The Missouri Supreme Court also rejected a plaintiff's excessive fines challenge in 2002, in part because private parties, as opposed to the government, bring punitive damages claims, and the government does not determine the amount of punitive damages awarded.[64] In 2007, the Ninth Circuit held the excessive fines clause only applies to actions that constitutes punishment on the aggrieved party, and therefore, a plaintiff in a punitive damages claim has no excessive fines claim.[65] This leaves open the question of whether a defendant who is required to pay a portion of a punitive damages award to the state, as opposed to a plaintiff who is losing a portion of a punitive damages award to the state, has a viable excessive fines claim.

3. Other Issues – Equal Protection, Separation of Powers, Right to a Remedy, Right to a Jury Trial and Accrual

This section addresses a handful of other issues relating to split recovery provisions. Equal protection, right to a remedy, and separation of powers challenges to split provisions generally have not met with success.[66] As discussed below, however, SB169's initial pleadings prohibition and jury silence mandate may implicate these rights. Additionally, parties will likely litigate whether a punitive damage claim that accrued before the passage of SB169 is subject to its limitations.

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62. 780 F. Supp. 1225 (S.D. Iowa 1991), *rev'd on other grounds*, 6 F.3d 497 (8th Cir. 1993).

63. *Id.* at 1242 (Iowa's previous split recovery provision "does not provide the State of Iowa with any interest in the punitive damage award. A clear distinction can be made between funds that are to be placed into the state treasury and those funds that are to be placed into a civil reparations trust fund to be administered by the courts."). *See also* Klaben, *supra* note 45, at 126–55 (discussing excessive fines cases, including *McBride* and *Burke*); Victor E. Schwartz, Mark A. Behrens & Cary Silverman, *I'll Take That: Legal and Public Policy Problems Raised by Statutes that Require Punitive Damages Awards to be Shared with the State*, 68 Mo. L. Rev. 525, 546–56 (2003).

64. Hoskins v. Bus. Men's Assurance, 79 S.W.3d 901, 904 (Mo. 2002) (en banc). Arguably, however, the government's determination of the percentage is the government's determination of the "fine" relative to the amount awarded.

65. Engquist v. Or. Dep't of Agric., 478 F.3d 985, 1006–07 (9th Cir. 2007). *See* Sanders, *supra* note 33, at 819 (discussing *Engquist* and noting "the Ninth Circuit found that, because the 'operation' of the statute was unrelated to the plaintiff's culpability, no punishment of the plaintiff occurred"). *See also* Mack Trucks, Inc. v. Conkle, 436 S.E.2d 635, 640 (Ga. 1993) (rejecting excessive fines challenge).

66. *See* Schwartz, Behrens & Silverman, *supra* note 63, at 553–54, 556–57 (discussing cases involving these challenges).

Equal protection challenges to split recovery provisions have generally been unsuccessful.[67] It is possible that such claims may develop depending on how SB169's split recovery provision is applied in state court and in federal court sitting in diversity. Marked differences in process and recovery may lead to equal protection-related challenges by plaintiffs or defendants required to participate in the process to their relative detriment by virtue of being an out-of-state or in-state corporation.

Some plaintiffs have challenged split provisions as a violation of state constitutions' separation of powers provisions, which courts have generally rejected.[68] Courts have held a statutory mandate that the state receive a portion of a punitive award is not a "hindrance" or "substantial destruction" of the court's adjudicatory powers or function.[69]

State constitutions generally guarantee access to justice and remedy for injury. For example, Montana's constitution guarantees that "[c]ourts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character."[70] Because punitive damages punish the defendant, as opposed to compensating the plaintiff for injury, courts have generally rejected challenges based on this type of right.[71] In response to challenges based on the right to a jury trial, courts distinguish between the jury's assessment of punitive damages and the ultimate distribution of those damages, finding that split recovery provisions only impact the latter, and therefore, do not implicate the former.[72]

The accrual question is crucial in that it could allow for inapplicability of the split provision all together, thereby obviating the need for changed procedures and stripping away the myriad issues associated with split provisions. Good precedent exists for the argument that a plaintiff seeking punitive damages for actions by a defendant that occurred before SB169's effective date is not subject to SB169's split recovery provision or initial pleading

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67. *See Mack Trucks, Inc.*, 436 S.E.2d at 543; Evans ex rel. Kutch v. Alaska, 56 P.3d 1046, 1051–55 (Alaska 2002).

68. *See* DeMendoza v. Huffman, 51 P.3d 1232, 1248 (Or. 2002).

69. *Id.* (citations omitted). *See also* Fust v. Att'y Gen. for the State of Mo., 947 S.W.2d 424, 430–31 (Mo. 1997).

70. Mont. Const. art. II, § 16. *See* Lenz v. FSC Sec. Corp., 414 P.3d 1262, 1272 (Mont. 2018) (stating that "[t]he Montana constitutional rights to full legal redress and jury trial are fundamental rights entitled to the highest level of constitutional scrutiny and protection"). *But see DeMendoza*, 51 P.3d at 1237 (deciding "a punitive damages award is not a 'remedy' that [the Oregon Constitution] guarantees to a particular party for injury to person, property, or reputation").

71. *DeMendoza*, 51 P.3d at 1238.

72. *Id.* at 1245*; See also Evans*, 56 P.3d at 1059 (rejecting right to jury trial challenge). Arguably, not distributing what the jury thought they were awarding to the plaintiff functionally voids the jury's assessment, particularly when the jury is prohibited from knowing that half of what it is assessing will go to the state instead of the plaintiff.

prohibition.[73] This is more complicated where, as here, the legislature has specifically stated the amendments apply to any action filed on or after the effective date.[74] This issue will most likely come up where a complaint includes a punitive damages count as plaintiffs traditionally have in Montana and alleges accrual before May 19, 2023, the date the governor signed SB169.

C. SB169's Initial Pleading Prohibition

SB169 adds a provision that states "a request for an award of punitive damages may not be contained within an initial pleading."[75] Instead it requires the plaintiff to file a motion asking the court to allow it to amend its complaint to assert a punitive damages claim.[76] SB169 prohibits a court from allowing a party to assert a punitive damages claim "unless the affidavits and supporting documentation submitted by the party seeking punitive damages set forth specific facts supported by admissible evidence adequate to establish the existence of a triable issue on all elements of a punitive damages claim."[77]

While at least seven states currently have split recovery provisions in their punitive damages statutes, only Colorado's punitive damages statute has an initial pleading prohibition. Colorado's statute prohibits a claim for exemplary damages "in any initial claim for relief." [78] It appears that the Iowa legislature considered adding an initial pleading prohibition in its punitive statute, but the proposed amendment failed.[79]

Colorado allows punitive damages claims "by amendment to the pleadings only after exchange of initial disclosures under rule 26 of the Colorado rules of civil procedure and the plaintiff establishes prima facie proof of a

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73. *See* Seltzer v. Morton, 154 P.3d 561, 595 (Mont. 2007) (statutory cap on punitive damages did not apply to cause of action that accrued prior to effective date of statutory cap); Braun v. Medtronic Sofamor Danek, Inc., 30 F. Supp. 3d 1260, 1264–65 (D. Utah 2014) (applying punitive damages statutes in effect at time of defendant's conduct, as opposed to subsequently amended punitive damages statute); *DeMendoza*, 51 P.3d at 1245–46 (rejecting takings claim because in part, "the tort that gave rise to plaintiffs' claim occurred after [Oregon's split recovery statute] was enacted"); Anderson v. Alaska ex rel. Cent. Bering Sea Fishermen's Ass'n, 78 P.3d 714, 715 (Alaska 2003) (Alaska's split recovery provision existed at the time plaintiff's claim arose, thereby limiting her reasonable expectations to 50% of any punitive damages claim).

74. S. 169, 68th Leg., Reg. Sess. (Mont. 2023).

75. Mont. Code Ann. § 27-1-221(5) (2023).

76. *Id.*

77. *Id.*

78. Colo. Rev. Stat. § 13-21-102(1.5)(a) (2023). It is unclear whether a plaintiff has challenged this initial pleading prohibition. One Colorado decision dismissed a prisoner's punitive damages claim in his initial complaint as premature based on this prohibition. *See* Adams v. Corr. Corp. of Am., 187 P.3d 1190, 1197–98 (Colo. App. 2008).

79. For the draft bill, see H.R. 201, 99th Gen. Assemb., Reg. Sess. (Iowa 2023). For the enrolled bill, and legislative process amending the initial bill, see H.R. Journal, 99th Gen. Assemb. 737–78 (Iowa 2023), *available at* https://perma.cc/Z8AC-E9DT.

triable issue."[80] The Colorado statute states "[a]fter the plaintiff establishes the existence of a triable issue of exemplary damages, the court may, in its discretion, allow additional discovery on the issue of exemplary damages as the court deems appropriate."[81] Unlike Montana, Colorado's Rule 26 requires very broad initial disclosures, including disclosure of all witnesses and documents relevant to claim and defenses whether or not supportive of the disclosing party's position.[82] This may lessen the initial pleading prohibition's impact on plaintiffs in Colorado.

In Montana, a plaintiff must allege and prove the required elements in Mont. Code Ann. § 27-1-221(1)–(4) to establish a defendant's liability for punitive damages prior to a subsequent hearing as to the amount awarded.[83] This requires proving actual fraud or actual malice, as statutorily defined.[84] It is only if liability is found that the question of amount of damages is then analyzed by the jury subject to detailed statutory requirements.[85] Although punitive damages can be awarded for violation of other causes of action where actual fraud and actual malice are proven by clear and convincing evidence, plaintiffs generally assert punitive damages claims as a separate cause of action in complaints. Defendants can assert affirmative defenses in response to initial pleadings alleging punitive damages claims.[86] Functionally, therefore, in Montana a punitive damages claim is both a claim and a category of damages.[87] Like all causes of action, a party must allege that the defendant violated the requisite elements, in this case, actual malice or actual fraud as defined in Mont. Code Ann. § 27-1-221.[88] The effect of SB169 is that unlike all other causes of action, when a plaintiff asserts this particular cause of action, it cannot do so in its initial complaint.

Because the requisite elements of punitive damages are generally specifically pled, SB169's amendment procedure is potentially inconsistent with several Montana Rules of Civil Procedure, including Rules 8, 15, 16, and 26. Rule 8 requires a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief" and "a demand for the relief sought, which may include relief in the alternative or different types of relief."[89] How can a plaintiff comply with Rule 8 if it is prohibited from asserting a claim for punitive damages in its initial complaint?

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80. Colo. Rev. Stat. Ann. § 13-21-102(1.5)(a) (2023).

81. *Id.*

82. Colo. R. Civ. P. 26.

83. Mont. Code Ann. § 27-1-221 (2023).

84. *Id.*

85. Mont. Code Ann. § 27-1-221(8).

86. Mont. R. Civ. P. 8.

87. Finstad v. W.R. Grace & Co., 8 P.3d 778, 782 (Mont. 2000) (stating that "punitive damages are merely a component of recovery of the underlying civil cause of action").

88. Mont. Code Ann. § 27-1-221.

89. Mont. R. Civ. P. 8(a)(1), (2).

Rule 15 governs amended pleadings and sets forth specific situations in which a party may amend its pleadings without leave of court,[90] and Rule 16 governs case deadlines and scheduling orders.[91] SB169's initial pleading prohibition is inconsistent with Rule 15 and 16's strictures, which attorneys rely upon when scheduling discovery and engaging in litigation strategy regarding amendments. Unlike all other amendments under Rules 15 and 16, an amendment to include a punitive damages claim is subject to a specific heightened motions process and evidentiary burden shifting standards inconsistent with existing rules.[92]

SB169's initial pleading prohibition also creates significant questions regarding Rule 26. Rule 26 states: "Parties may obtain discovery regarding any non-privileged matter that is *relevant* to any party's claim or defenses. . . .The information sought need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."[93] If a plaintiff cannot plead a punitive damages cause of action, the plaintiff cannot obtain discovery regarding that cause of action because such discovery would not be relevant to any claims in the original complaint without first amending the complaint to include any punitive damages claim or defense, which require evidentiary support to include. How then, can a plaintiff obtain discovery regarding a punitive damages claim? It is likely that SB169's initial pleadings prohibition will require longer discovery periods. SB169 will also cause confusion regarding how punitive damages-related discovery deadlines will co-exist with amendments deadlines. It is further unclear how the initial pleadings prohibition interrelates with existing scheduling orders and responsive pleadings, such as answers.

These inconsistencies may implicate separation of powers, given that the Montana Constitution gives the Montana Supreme Court the authority to "make rules governing procedure, practice and procedure for all other courts, admission to the bar and the conduct of its members."[94] The court is best positioned to govern procedures in state courts, which is likely why the

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90. MONT. R. CIV. P. 15.

91. MONT. R. CIV. P. 16.

92. *See* MONT. R. CIV. P. 15; MONT. R. CIV. P. 16; MONT. CODE ANN. § 27-1-221(5).

93. MONT. R. CIV. P. 26(b)(1) (emphasis added).

94. MONT. CONST. art. VII, § 2; *see also* MONT. CODE ANN. § 3-2-701 ("The supreme court of this state shall have the power to regulate the pleading, practice, procedure, and the forms thereof in civil actions in all courts of this state by rules promulgated by it from time to time for the purpose of simplifying judicial proceedings in the courts of Montana and for promoting the speedy determination of litigation upon its merits. Such rules shall not abridge, enlarge, or modify the substantive rights of any litigant and shall not be inconsistent with the constitution of the state of Montana."); McLaughlin v. Hart, 690 P.2d 431, 433 (Mont. 1984) (stating that "the power of the Montana Supreme Court to make rules of practice and procedure for all other courts, including district courts, is found in the state Constitution"); Potter v. Dist. Ct. of the Sixteenth Jud. Dist., 880 P.2d 1319, 1323 (Mont. 1994) (stating that "[t]his Court may make rules governing the practice and procedure in all courts of this state").

Montana Constitution entrusted it with this function. If the initial pleading prohibition is upheld, plaintiffs will be required to assert causes of action such as fraud and intentional infliction of emotional distress, that have shared elements with the punitive damages requirements of actual fraud or malice, in order to obtain relevant discovery and subsequently seek to add a punitive damages claim.

SB 169's initial pleading prohibition may create interesting issues when plaintiffs seek punitive damages in federal courts sitting in diversity. The initial pleading prohibition is likely inconsistent with the Federal Rules of Civil Procedure as well as the Montana Rules of Civil Procedure discussed above. Therefore, the initial pleading prohibition is potentially inapplicable in federal court, where the federal rules trump inconsistent state procedural mandates.[95]

D. SB169's Prohibition on Telling Juries About the Split Recovery Provision

SB169 has a unique provision not found in other states' split recovery provisions that states "[t]he jury may not be advised" of the split recovery provision allocating 50% of the punitive award to the state.[96] Although other states' split recovery provisions do not have this language, the issue of whether the jury can be informed of the mandated allocation to the state has come up in other states. Some decisions held that telling the jury about the split recovery provision was reversible error, while others found it was not.[97] Decisions finding it reversible error emphasized the difference between the

95. *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 (1996) (stating that "[u]nder the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law"); Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co., 559 U.S. 393, 421 (2010) (Stevens, J., concurring) (stating that "[w]hen both a federal rule and a state law appear to govern a question before a federal court sitting in diversity, our precedents have set out a two-step framework for federal courts to negotiate this thorny area. At both steps of the inquiry, there is a critical question about what the state law and the federal rule mean" and setting forth the required analyses). For discussions of split recovery statutes and diversity, see DeMendoza v. Huffman, 51 P.3d 1232, 1237 (Or. 2002) (concluding that "the legislature contemplated that [Oregon's split recovery statute] would apply in federal cases arising under Oregon law"); Sanders, *supra* note 33, at 821–25.

96. Mont. Code Ann. § 27-1-221(10).

97. For cases finding instructing jury as to split recovery provision was reversible error, *see* Honeywell v. Sterling Furniture Co., 797 P.2d 1019, 1021 (Or. 1990) (affirming court of appeals holding that instructing the jury how the punitive award will be distributed was reversable error); Ford v. Uniroyal Goodrich Tire Co., 476 S.E.2d 565, 571 (Ga. 1996) (affirming court of appeals holding that instructing jury that 75% of any punitive damages award would be paid to state treasury was reversible error). *See also* Schwartz, Behrens & Silverman, *supra* note 63, at 546–47 (discussing *Honeywell* and *Ford*). For cases finding instructing jury as to split recovery provision was not reversible error, *see* Blanks v. Fluor Corp., 450 S.W.3d 308 (E.D. Mo. Ct. App. 2014); *DeMendoza*, 51 P.3d at 1245 (relying on *Honeywell* to conclude that a split recovery provision did not violate the plaintiff's right to a jury trial because a split

jury's charge of determining whether the defendant's conduct warrants punitive damages and if so how much, and the conceptually distinct fact of how that award will be allocated.[98] They focus on the purpose of punitive damages to punish the defendant for acts that likely impacted society in addition to the plaintiff. Therefore, unlike compensatory damages, it is less important for the jury to know the plaintiff will end up with all the money.[99] Courts voiced concern that the jury will award additional money with the knowledge that not all of it will go to the plaintiff, or potentially could award greater amounts to go to the state.[100]

Related Montana precedent exists. In *Finstad v. W.R. Grace & Co.*, a vermiculite mine worker and his wife brought suit against W.R. Grace alleging workplace exposure to asbestos.[101] After trial, the jury awarded Mr. Finstad and his wife compensatory and punitive damages.[102] During closing argument, defendant's counsel told the jury that any punitive award would only go to Mr. Finstad and his wife, and not to other mine workers.[103] On appeal, the Montana Supreme Court found no error in the defendant telling the jury specifically who would receive the award for two reasons.[104] First, "[i]n enacting the statutory scheme for punitive damages, the legislature did not prohibit juries from considering where a punitive damage payment would go when determining the amount of the award."[105] Second, "party plaintiffs are the true recipients of punitive damage awards and keeping such information from jurors would only frustrate the goal of every trial which is a search for the truth."[106] While the first reason no longer applies, the second reason remains salient.

One can imagine a myriad of case-specific issues that this raises—what if a juror is aware of the split recovery prohibition, which after all is a public law? What if a juror learns of it and tells the other jurors about it? What if a juror asks about it during voir dire in front of all other potential jurors? As with other provisions of SB169, it will be up to Montana district courts and ultimately the Montana Supreme Court to determine whether this statutory prohibition violates any rights unique to the Montana Constitution.

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recovery provision "does not require a court to reexamine any factual determination that a jury might have made").

98. *Honeywell*, 797 P.2d at 1021–22; *Ford*, 476 S.E.2d at 570.
99. *Id.*
100. *Id.*
101. 8 P.3d 778, 781 (Mont. 2000).
102. *Id.* at 781.
103. *Id.* at 785.
104. *Id.*
105. *Id.*
106. *Id.*

V. Conclusion

The 2023 legislature evidenced a clear desire to modify standards and processes involving preliminary injunctive relief, particularly where the state is involved, and significantly change the process and allocation of punitive damages cases. Determining the functional realities of these changes will take time as attorneys and courts interpret these changes in concrete cases with actual litigants. Like other states that have applied new laws to their state constitutions, these laws will be an opportunity to analyze aspects of the Montana Constitution through a new lens.