

WILSON ELSE PUNITIVE DAMAGES REVIEW



50-STATE SURVEY

2014 Edition





Punitive Damages Review

2014 Edition

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50-STATE SURVEY

STATE BY STATE PUNITIVE DAMAGES ANALYSIS

| State | May Punitive Damages Be Awarded? | Are Punitive Damages Generally Insurable? | Standard Of Proof |
|----------------------|----------------------------------|---|---------------------------|
| Alabama | Yes | Yes | Clear and convincing |
| Alaska | Yes | Yes | Clear and convincing |
| Arizona | Yes | Yes | Clear and convincing |
| Arkansas | Yes | Yes | Clear and convincing |
| California | Yes | No | Clear and convincing |
| Colorado | Yes | No | Beyond a reasonable doubt |
| Connecticut | Yes | No | Preponderance of evidence |
| Delaware | Yes | Yes | Clear and convincing |
| District of Columbia | Yes | Undecided | Clear and convincing |
| Florida | Yes | No | Clear and convincing |
| Georgia | Yes | Yes | Clear and convincing |
| Hawaii | Yes | Yes | Clear and convincing |
| Idaho | Yes | Yes | Clear and convincing |
| Illinois | Yes | No | Preponderance of evidence |
| Indiana | Yes | Probably no | Clear and convincing |
| Iowa | Yes | Yes | Clear and convincing |
| Kansas | Yes | No | Clear and convincing |
| Kentucky | Yes | Yes | Clear and convincing |
| Louisiana | Yes, but only by statute | Yes | Preponderance of evidence |
| Maine | Yes | No | Clear and convincing |
| Maryland | Yes | Yes | Clear and convincing |
| Massachusetts | Yes | No | Preponderance of evidence |
| Michigan | No | Not applicable | Not applicable |
| Minnesota | Yes | No | Clear and convincing |
| Mississippi | Yes | Yes | Clear and convincing |
| Missouri | Yes | No | Clear and convincing |
| Montana | Yes | Yes | Clear and convincing |
| Nebraska | No | Not applicable | Not applicable |
| Nevada | Yes | Yes | Clear and convincing |
| New Hampshire | Yes, but only by statute | Yes | Undetermined |
| New Jersey | Yes | No | Clear and convincing |
| New Mexico | Yes | Yes | Preponderance of evidence |
| New York | Yes | No | No clear standard |
| North Carolina | Yes | Yes | Clear and convincing |
| North Dakota | Yes | Undetermined | Clear and convincing |
| Ohio | Yes | No | Clear and convincing |
| Oklahoma | Yes | No | Clear and convincing |
| Oregon | Yes | Yes | Clear and convincing |
| Pennsylvania | Yes | No | Clear and convincing |
| Puerto Rico | No | Not applicable | Not applicable |
| Rhode Island | Yes | No | Clear and convincing |
| South Carolina | Yes | Yes | Clear and convincing |
| South Dakota | Yes, but only by statute | Probably no | Clear and convincing |
| Tennessee | Yes | Yes | Clear and convincing |
| Texas | Yes | Possibly | Clear and convincing |
| Utah | Yes | No | Clear and convincing |
| Vermont | Yes | Yes | Preponderance of evidence |
| Virginia | Yes | Yes | Preponderance of evidence |
| Washington | No | Not applicable | Not applicable |
| West Virginia | Yes | Yes | Preponderance of evidence |
| Wisconsin | Yes | Yes | Clear and convincing |
| Wyoming | Yes | Yes | No clear standard |

Punitive Damages Overview

The imposition of punitive damages continues to be a hotly debated topic in the United States as to whether and to the extent that punitive damages should be allowed and, should such recoveries be allowed, whether insurance can be purchased to protect exposure to a punitive damages award. With the exception of Michigan, Nebraska, Puerto Rico and Washington, most U.S. jurisdictions allow the imposition of punitive damages. A number of states, either through statute or case law, place limitations on the ability to obtain such awards and/or the amounts that are permitted to be awarded. The U.S. Supreme Court has further limited the amount of punitive damages that can be awarded, finding that excessive punitive damages awards violate the Constitution's Fifth and Fourteenth Amendments, which prohibit the taking of property without due process.

Punitive damages in the United States developed through the common law as a means of punishing a defendant bad actor in cases where the civil award was deemed insufficient to punish the defendant. This extra level of punishment is generally reserved for situations when a defendant's tortious conduct is found to be malicious, wanton, intentional, outrageous or reckless.

Punitive damages are not to compensate for plaintiffs' losses. In many jurisdictions, the level of punitive damages is considered only after a jury has awarded the plaintiffs their compensatory damages. As such, punitive damages are a means of securing an award beyond plaintiffs' compensatory losses.

As punitive damages awards are not considered to compensate a plaintiff for their losses, some states will share in plaintiffs' recovery of punitive damages through taxation of the punitive award and/or by statute requiring a percentage of the award be paid directly to a state agency. For example, in Georgia 75 percent of any punitive award is to be paid to the Georgia State Treasury.

Insurability of Punitive Damages

Plaintiffs may threaten a punitive damages claim to force a greater settlement as the possible exposure is enhanced, especially in those cases where the compensatory damages are limited and the defendant's conduct is questionable. An insured may be pressured to resolve a matter in situations where a punitive award is not insurable, rather than risk a potentially outsized uncovered award.

Some insurers will specifically exclude coverage for punitive damages. Also, such damage awards may not be insured due to various other policy provisions. A majority of the states (26) permit punitive damages to be insured.

A minority of the states, however, do not permit punitive damages to be insured. Notably, several large states housing major U.S. business centers, such as California, New York, Illinois and Pennsylvania, fall within this minority category. Some of these jurisdictions will allow insurance for punitive damages due to vicarious liability. For example, in Illinois and Florida, an employer would be able to insure against vicarious liability of a punitive award assessed in consequence of an employee's wrongful conduct. Further, some states that would not otherwise allow punitive damages to be insured have narrow exceptions allowing certain risks to be insured for punitive damages. For example, in Pennsylvania, an insurer is permitted to provide punitive damages coverage to operators of downhill skiing areas, unless such punitive damages are awarded due to the intentional tort of the operator.

Many jurisdictions have found that insuring against punitive damages is against the state's public policy. Allowing punitive damages to be insured arguably frustrates the purpose of an award meant to punish the wrongdoer for its bad conduct and deter such conduct by that entity in the future. The "punishment" may not be felt if an insurer is paying rather than the wrongdoer or if the only consequence is paying higher insurance premiums in the future.

Insured entities increasingly have turned to the non-admitted and offshore markets to secure punitive damages coverage. These policies often will specifically insure punitive damages or, potentially, provide stand-alone punitive damages coverage. These policies may specifically apply a favorable jurisdiction's law to the interpretation of the punitive damage coverage, regardless of the jurisdiction where the punitive award was rendered. When such coverage is sought, care must be taken to assure compliance with various states' regulations impacting insurance coverage for punitive damages.

PUNITIVE DAMAGES OVERVIEW

Insured entities that operate in multiple jurisdictions may be presented with a punitive award in a jurisdiction that does not permit punitive damages to be insured and an insurance policy that provides such coverage. In these situations, both the insurer and insured may be concerned as to how the policy should be applied. Generally, the insured will want the coverage, but the insurer may be concerned with paying proceeds that are prohibited by law.

The availability of punitive damages in each state as well as each state's determination of the insurability of punitive damage awards are discussed herein.¹

Reining in Punitive Damages Awards

Eye-popping headlines of significant punitive awards have inflated plaintiffs' expectations of ever higher damage awards and, simultaneously, caused state legislators to limit punitive damages by statute. Even with these limitations at the state level, the U.S. Supreme Court has further limited the level of punitive damages that can be awarded based on the U.S. Constitution.

Constitutional Limitations on Punitive Damages Awards

The U.S. Supreme Court found that outsized punitive damages awards did not satisfy due process under the U.S. Constitution and therefore could not be allowed. In *State Farm Mut. Automobile Ins. Co. v. Campbell*, (2003) 538 U.S. 408, 425 (*State Farm*), the jury had awarded \$145 million in punitive damages and \$1 million in compensatory damages for bad faith, fraud and intentional infliction of emotional distress caused by State Farm's refusal to settle a third-party claim for policy limits.

The U.S. Supreme Court analyzed the award in the context of the three guideposts for determining whether a punitive damages award is excessive:

- The degree of reprehensibility of the defendant's misconduct
- The disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award
- The difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

The U.S. Supreme Court also analyzed the defendant's conduct in light of five "reprehensibility factors" as follows:

1. Whether the harm was physical as opposed to economic
2. Whether the defendant's conduct evinced an indifference to or reckless disregard of the health or safety of others
3. Whether the plaintiff was financially vulnerable
4. Whether the conduct involved repeated actions or was an isolated incident
5. Whether the harm was the result of intentional malice, trickery or deceit, or was a mere accident.

Based on these factors, the Court held that "grossly excessive" punitive damages awards offend due process under the Fourteenth Amendment, and that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."

The Supreme Court, however, indicated that "the precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." The Court commented that higher ratios may be proper where there are egregious acts, but only a small amount of compensatory damages is awarded. In *State Farm*, the Supreme Court suggested that a lesser ratio, perhaps 1:1, would be appropriate where the compensatory damages are substantial.

In the Supreme Court's decision in *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008), the Court addressed a \$5 billion punitive damages award (which was previously reduced in 2000 to \$2.5 billion by the Ninth Circuit Court of Appeals). The *Exxon* case concerned an Exxon oil tanker's collision with a reef and the resulting release into Alaska's Prince William Sound of thousands of gallons of its oil cargo. Exxon paid in excess of \$3 billion to clean up the spill and to compensate those who were injured by the oil spill. It was claimed that the collision with the reef was the result of Exxon allowing its vessel (the Exxon Valdez) to be operated by a known alcoholic, who, unknown to Exxon at the time, was intoxicated while operating the Valdez. At trial, the jury awarded \$507.5 million in compensatory damages as well as \$5 billion in punitive damages.

¹We do not explore herein the numerous state and federal statutes that allow the recovery of other types of damages beyond compensatory damages (e.g., attorney fees) that are not referred to as "punitive damages."

PUNITIVE DAMAGES OVERVIEW

In *Exxon*, the Supreme Court did not review the constitutionality of the jury's award of approximately 10 times the compensatory award (or the 5:1 ratio that was allowed by the Ninth Circuit Court of Appeals), but instead applied federal maritime law to address the amount of punitive damages that would be allowed. In so doing, the Court found that the maximum punitive award should roughly equal the jury's compensatory award. As the Supreme Court was applying maritime law, the Court's decision in *Exxon* is not a binding precedent except in maritime matters, but the decision provides insight into the Court's perspective on fairness in assessing punitive damages. In this context, proponents of limiting the size of punitive damages awards opine that the decision in *Exxon* will be given greater weight in non-maritime matters.

In *Phillip Morris v. Williams*, 549 U.S. 346 (2007), the Supreme Court had another opportunity to overturn an outsized punitive damages award. However, instead of attacking the punitive damage award of \$79.5 million, which was more than 100 times the size of the compensatory award of \$821,000, the Court found that the award was improper for other reasons. The Supreme Court confirmed that it is proper for a jury to assess a defendant's actions against the plaintiff and third parties in determining whether the defendant's conduct was reprehensible (and therefore susceptible to the imposition of punitive damages). The Court, however, indicated that it was improper for a jury to award funds based on harm to third parties. Instead, the Court found that: "To permit punishment for injuring a non-party victim would add a near-standardless dimension to the punitive damages equation..." The Court ruled that a punitive damages award must be measured against the loss suffered by the individual plaintiff.

Federal Statutory Limitations on Punitive Damages Awards

There is no federal statute that prohibits or limits the imposition of punitive damages that a jury could award based on state common law or violation of a state statute. There are numerous federal statutes that specifically allow punitive awards² and/or specifically limit or prohibit the imposition of punitive damages.³

²The Clayton Antitrust Act, 15 U.S.C.A. §15, where a trebling of damages is mandatory; the Consumer Credit Protection Act, 15 U.S.C.A.

³Federal Tort Claims Act 28 U.S.C.A. § 2674 and the Foreign Sovereign Immunity Act 28 U.S.C.A. § 1606.

Where federal statutes are silent as to whether punitive damages can be awarded, the courts have interpreted the statutes to decide whether punitive awards are available.⁴

Federal statutes often used by plaintiffs to obtain damages beyond compensatory damages include the civil Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.A. §1961 et seq. (RICO), and the 1991 Civil Rights Act, 42 USCA §1981a, the latter of which allows the imposition of punitive damages under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990 and the federal employment section of the Rehabilitation Act of 1973. Generally, attorney fees also can be awarded to a plaintiff.

The unavailability of punitive damages under certain federal statutes does not necessarily foreclose a plaintiff from seeking punitive damages through concurrent claims. For example, the Corporate and Criminal Fraud Accountability Act of 2002, better known as the Sarbanes-Oxley Act, does not provide for punitive damages. The statute, however, does not preempt state law. Thus, a plaintiff filing a claim under Sarbanes-Oxley will also include claims under state law, which – depending upon the state – may allow the plaintiff to seek punitive damages.

State Limitations on Punitive Damages Awards

The U.S. Supreme Court's holding in *State Farm* suggested that in matters where the compensatory damages are substantial, a punitive award with 1:1 ratio may be appropriate with higher ratios where there is a smaller award and there are egregious acts. While the Court did not impose a bright-line test, the Court suggested that a punitive to compensatory ratio above 9:1 would likely be in violation of the due process clause of the U.S. Constitution.

While pundits have asserted this has led to reductions in punitive awards, there are a number of state courts that have upheld punitive awards at or above the 9:1 ratio. For example, in 2011 a California appellate court in *Bullock vs. Philip Morris*, 198 Cal. App.4th 543, justified a 16:1 ratio based on the reprehensibility of the conduct of the defendant. Further, in 2005, the California Supreme in *Johnson v. Ford Motor Co.*, 35 Cal. 4th 1191, disagreed with the appellate court's reversal of a \$10 million punitive damages award in connection with the sale of a used car where the compensatory damages were \$17,811. The Court of Appeal reduced the punitive damage award to a ratio of

⁴Courts have held that punitive damages are not available under the Employee Retirement Income Security Act (ERISA); the Securities Exchange Act of 1934; and the Consumer Product Safety Act. The courts have, however, interpreted the Federal Aviation Act (FAA) to allow for recovery of punitive damages even though the statute is silent on this issue.

PUNITIVE DAMAGES OVERVIEW

3:1. The California Supreme Court reversed and indicated that the Court of Appeal failed to adequately consider whether the reprehensible conduct was part of a larger corporate practice.

The California Supreme Court determined that:

To be sure, *State Farm* requires reasonable proportionality between punitive damages and actual or potential harm to the plaintiff. But what ratio is reasonable necessarily depends on the reprehensibility of the conduct, “the most important indicium of the reasonableness of the award” [citation omitted] which in turn is influenced by the frequency and profitability of the defendant’s prior or contemporaneous similar conduct. As the high court has recognized, that a defendant has repeatedly engaged in profitable but wrongful conduct tends to show that “strong medicine is required” to deter the conduct’s further repetition. [citation omitted]

In certain cases, as we explain in *Simon* ... “the state may have to partly yield its goals of punishment and deterrence to the federal requirement that an award stay within the limits of due process.” The scale and profitability of a course of wrongful conduct by the defendant cannot justify an award that is grossly excessive in relation to the harm done or threatened, but scale and profitability nevertheless remain relevant to reprehensibility and hence to the size of award warranted, under the guideposts, to meet the state’s interest in deterrence. *BMW* and *State Farm* limit the size of individual awards but leave undisturbed the states’ “discretion” [citation omitted] in use of punitive damages generally. Nothing the high court has said about due process review requires that California juries and courts ignore evidence of corporate policies and practices and evaluate the defendant’s harm to the plaintiff in isolation.

California law has long endorsed the use of punitive damages to deter continuation or limitation of a corporation’s course of wrongful conduct, and hence allowed consideration of that conduct’s scale and profitability in determining the size of award that will vindicate the state’s legitimate interests. We do not read the high court’s decisions, which specifically acknowledge that states may use punitive damages for punishment and deterrence, as mandating the abandonment of that principle.

The California Supreme Court’s decision suggests that individual jurisdictions have the ability to craft justifications of punitive awards that are arguably outside of the parameters established by the U.S. Supreme Court.

Most state legislatures, however, have enacted statutes placing limitations on the ability to obtain a punitive damages award. A majority of jurisdictions impose a higher burden of proof in obtaining punitive damages (a “clear and convincing” standard). Some states will limit the type of case in which a punitive damages claim can be pursued. For example, Illinois statutes prohibit punitive damages in medical malpractice, legal malpractice, intentional infliction of emotional harm and loss of consortium cases. A majority of states do not allow punitive damages to be awarded at all, unless compensatory damages are awarded.

In addition, more than half the states have enacted specific statutory limitations on the amount of punitive damages that may be awarded. These monetary limitations generally consist of a dollar amount limit, a limit tied to a multiple of compensatory damages awarded and/or a limit tied to a percentage of a defendant’s net worth. Generally, these “caps” will not apply to cases in which the defendant acted criminally or with an ill intent. A brief summary of these caps follows.

This publication is intended to provide useful information about punitive damages, but readers are cautioned that matters involving punitive damages typically are complex, involve unique situations and require careful consideration. Nuances of particular factual situations, local practice, choice of law and other issues often significantly impact analysis of a punitive damages matter. By necessity, this publication, which contains time-sensitive information, does not address every permutation that may impact a specific punitive damages matter. Instead, this publication is intended for use as a ready reference tool to assist in a complete and thorough investigation. This publication is not intended to be dispositive of any particular punitive damages matter.

PUNITIVE DAMAGES OVERVIEW

| State | Dollar Cap | Multiple of Compensatory | Type of Case/Other Limitation |
|----------------|--|--|---|
| Alabama | \$ 500,000 \$1,500,000 | 3 x compensatory 3 x compensatory | Nonphysical injury Physical injury Further limits for small businesses |
| Alaska | \$ 500,000 | 3 x compensatory | Several limitations, in certain circumstances a recovery up to \$7 million may be allowed |
| Arkansas | \$ 250,000 | 3 x compensatory | Not to exceed \$1 million |
| Colorado | None | 1 x compensatory | Can increase to 3 x compensatory |
| Connecticut | Litigation expense | None | Limited to litigation expenses, with certain exceptions |
| Florida | \$ 500,000 \$2,000,000 | 3 x compensatory 4 x compensatory | In certain circumstances If unreasonable financial gain or if likelihood of injury was known |
| Georgia | \$ 250,000 | None | Does not apply to product liability cases |
| Idaho | \$ 250,000 | 3 x compensatory | |
| Indiana | \$ 50,000 | 3 x compensatory | |
| Iowa | None | 3 x clean-up costs | Applies only to environmental cases |
| Kansas | \$5,000,000 | None | 3 x defendant's annual gross income or 1.5 x profit |
| Maine | \$ 75,000 | None 3x clean up costs | Wrongful death actions Environmental cases |
| Massachusetts | \$ 100,000 | None | Only applies to certain actions |
| Mississippi | 2% - 4% depending on net worth, capped at \$20,000,000 | None | No cap if defendant's conduct resulted in a felony conviction or if defendant was under the influence of alcohol or drugs |
| Missouri | \$ 500,000 | 5 x compensatory | |
| Montana | \$10,000,000 | 3% of net worth | Limitations do not apply to certain claims or when the State is the plaintiff Does not apply to class actions |
| Nevada | \$ 300,000 if compensatory is less than \$100,000 | 3 x compensatory damages if compensatory is in excess of \$100,000 | Limitations do not apply to an insurer that acted in bad faith and in certain other specified actions. |
| New Jersey | \$ 350,000 | 5 x compensatory | Limitations do not apply to certain specified actions |
| North Carolina | \$ 250,000 | 3 x compensatory | Limitations do not apply to actions under the "Driving While Impaired" statutes |
| North Dakota | \$ 250,000 | 2 x compensatory | |
| Ohio | 10% of defendant's net worth | 2 x compensatory | Cap of \$350,000 |
| Oklahoma | \$ 100,000 \$ 500,000 | 1 x compensatory 2 x compensatory | Different caps or no caps apply depending on acts committed |
| Oregon | None | 4 x compensatory | Cap applies only to cases in which harm is purely economic |
| Rhode Island | None | 2 x compensatory | Willful and malicious misappropriation cases |
| Texas | \$ 200,000 | 2 x economic + non-economic damages up to \$750,000 | |
| Utah | None | 3 x compensatory | |
| Virginia | \$ 350,000 | None | |

Punitive Damages Laws of Each State

Key aspects of the punitive damages laws and decisions of each state are summarized below. As each state's punitive damages jurisprudence has developed independently, there is considerable variation among the states as reflected in the summaries that follow.



I. PUNITIVE DAMAGES

A. May they be awarded?

Yes. The purpose of punitive damages is to deter wrongful conduct and to punish those who may profit by such conduct. See *Am. Pioneer Life Ins. Co. v. Williamson*, 704 So. 2d 1361, 1366 (Ala. 1997); *BMW of N. Am., Inc. v. Gore*, 701 So. 2d 507, 513 (Ala. 1997); *Ayres v. Lakeshore Cmty. Hosp.*, 689 So. 2d 39, 41 (Ala. 1997); *Reserve Nat'l Ins. Co. v. Crowell*, 614 So. 2d 1005, 1009 (Ala. 1993); *Smith v. Schulte*, 671 So. 2d 1334, 1346 (Ala. 1995), overruled in part on other grounds by *Ex Parte Apicella*, 809 So. 2d 865 (Ala. 2001).

B. If so, in what circumstances?

Standard of Conduct. Alabama allows punitive damages when a plaintiff shows that the acts complained of were committed with malice, willfulness, or wanton and reckless disregard of the rights of others. *Gulf Atl. Life Ins. Co. v. Barnes*, 405 So. 2d 916, 925 (Ala. 1981). See *Whitt v. Hulsey*, 519 So. 2d 901, 906 (Ala. 1987).

Standard of Proof. With the exception of wrongful death actions, punitive damages may be awarded in a civil action for tort only where it is proven by clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff. ALA. CODE ANN. § 6-11-20(a) (LexisNexis 2010).

Fraud is defined by the Alabama statute as an intentional misrepresentation, deceit, or concealment of a material fact the concealing party had a duty to disclose, which was gross, oppressive, or malicious and committed with the intention on the part of the perpetrator to thereby deprive a person or entity of property or legal rights or otherwise cause injury. ALA. CODE ANN. § 6-11-20 (b)(1). *Malice* is defined as an intentional wrongful act without just cause or excuse, either (1) with an intent

to injure the person or property of another person or entity or (2) under such circumstances that the law will imply an evil intent. ALA. CODE ANN. § 6-11-20(b)(2). *Wantonness* is defined as conduct that is carried on with a reckless or conscious disregard of the rights or safety of others. ALA. CODE ANN. § 6-11-20(b)(3). It requires some degree of consciousness on the part of the defendant that the injury is likely to result from the act or omission. *Coca-Cola Bottling Co. United v. Stripling*, 622 So. 2d 882, 884-85 (Ala. 1993). *Oppression* is defined as subjecting a person to cruel and unjust hardship in conscious disregard of that person's rights. ALA. CODE ANN. § 6-11-20(b)(5).

Action Against State. Punitive damages may not be awarded against the state or any county, municipality, or agency thereof. ALA. CODE ANN. § 6-11-26 (LexisNexis 2010). An exception applies, however, to any entity covered under the Medical Liability Act. § 6-5-480.

Arbitration. A pre-dispute arbitration clause that prohibits an arbitrator from awarding punitive damages is void as contrary to Alabama public policy. *Sloan Southern Homes, LLC v. McQueen*, 955 So. 2d 401 (Ala. 1996).

Breach of Contract. Generally, punitive damages are not recoverable for breach of contract. *Boros v. Baxley*, 621 So. 2d 240, 245 (Ala. 1993); *Corson v. Universal Door Sys., Inc.*, 596 So. 2d 565, 572 (Ala. 1991); *John Deere Indus. Equip. Co. v. Keller*, 431 So. 2d 1155, 1157 (Ala. 1983); *Geohagan v. Gen. Motors Corp.*, 279 So. 2d 436, 438 (Ala. 1973). Punitive damages, however, may be awarded in a breach of contract suit if a party is found to have acted wantonly, spitefully, or maliciously. *Gross v. Lowder Realty Better Homes & Gardens*, 494 So. 2d 590, 597 n.4 (Ala. 1986) (overruled on other grounds by *White Sands Group, L.L.C. v. PRS II, LLC*, 2009 WL 2841114 (Ala. Sep. 04, 2009)).

PUNITIVE DAMAGES REVIEW

Employer Liability for Employee Conduct. Under Alabama law, an employer is not liable for punitive damages for the conduct of an employee unless the employer:

- (i) knew or should have known of the unfitness of the employee and employed him or continued to employ him, or used his services without proper instruction and with a disregard of the rights or safety of others; or
- (ii) authorized the wrongful conduct; or
- (iii) ratified the wrongful conduct, unless the acts of the employee were calculated to or did benefit employer, except where the plaintiff knowingly participated with the employee to commit fraud or wrongful conduct with full knowledge of the import of his act.

Ala. Code § 6-11-27(a). However, this code section's heightened evidentiary standard is not applicable to wrongful death claims, because all damages in wrongful death actions are punitive. Ala. Code § 6-11-29; *Cherokee Elec. Coop. v. Cochran*, 706 So. 2d 1188, 1193 & n.5 (Ala. 1997).

Environmental Liability. Penalties regarding harm to the environment and any threat to the health or safety of the public are governed by Alabama Code section 22-22A-5. Punitive damages are not allowed in addition to fines or penalties for violations of this section. ALA. CODE ANN. § 22-22A-5 (LexisNexis 2010).

Insurer's Bad Faith. In a fraud action against an insurer, if the jury does not award either compensatory or nominal damages,

the jury is not permitted to award punitive damages. *Life Ins. Co. of Ga. v. Smith*, 719 So. 2d 797 (Ala. 1998); *Ala. Dep't of Envtl. Mgmt. v. Wright Bros. Constr. Co.*, 604 So. 2d 429 (Ala. Civ. App. 1992).

Product Liability. Punitive damages are available in an action for product liability. See *Hobart Corp. v. Scoggins*, 776 So. 2d 56 (Ala. 2000). There must be clear and convincing evidence of wantonness in order to sustain a punitive damages award. *Id.* (holding that plaintiff failed to present clear and convincing evidence that defendant designed and manufactured the slant-blade saw with knowledge that it had dangerous propensities, and reversed the award of punitive damages).

Professional Liability. Punitive damages may be awarded in a medical malpractice case. The plaintiff has the burden to prove breach of an applicable medical standard of care as to each asserted instance of wantonness. *Ferguson v. Baptist Health Sys.*, 910 So. 2d 85, 93 (Ala. 2005) (citing ALA. CODE ANN. § 6-5-548(a)). The plaintiff must produce expert medical testimony to establish each applicable standard and to establish the standard has been breached. *Tuck v. Health Care Auth. of Huntsville*, 851 So. 2d 498 (Ala. 2002).

Wrongful Death. Punitive damages may be awarded in wrongful death actions. ALA. CODE ANN. § 6-5-410 (LexisNexis 2010). Further, the Alabama Supreme Court upheld the statutory provision that punitive damages in wrongful death actions may not be apportioned among joint tortfeasors. *Campbell v. Williams*, 638 So. 2d 804, 809 (Ala. 1994).

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

Yes. It is not against public policy in Alabama to allow punitive damages to be covered by insurance in wrongful death cases. *Montgomery Health Care Facility, Inc. v. Ballard*, 565 So. 2d 221, 226 (Ala. 1990). See also *Capital Motor Lines v. Loring*, 189 So. 897, 899 (Ala. 1939) (holding that although damages were not imposed to punish the insurer, liability to pay damages arose out of the insurer's voluntary obligation to pay a judgment rendered against the insured); *Am. Fid. & Cas. Co. v. Werfel*, 162 So. 103, 106 (Ala. 1935) (holding that policy was broad enough to cover personal injury or death as a result of an accident and, therefore, would also cover punitive damages awarded as a result of wrongful death).

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

Not applicable.

C. What is the relationship of punitive to compensatory damages?

Compensatory or nominal damages must be awarded in order to support a punitive damages award. *Life Ins. Co. of Ga. v. Smith*, 719 So. 2d 797, 806 (Ala. 1998) (overruling long-standing rule that compensatory damages were not a prerequisite for punitive damages). See also *Employees' Benefit Ass'n v. Grissett*, 732 So. 2d 968, 980 n.6 (Ala. 1998); *S. Exposition Mgmt. Co. v. Univ. Auto. Sales, Inc.*, 740 So. 2d 992 (Ala. 1998).

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

Yes. Pursuant to ALA. CODE ANN. § 6-11-21 (LexisNexis 2010), effective June 7, 1999, in all civil actions in Alabama where an entitlement to punitive damages shall have been established under applicable laws, no award of punitive damages may exceed three times the compensatory damages of the party claiming punitive damages or \$500,000, whichever is greater.

If the defendant is a small business (defined as having a net worth of \$2 million or less), no award of punitive damages may exceed \$50,000 or 10 percent of the business's net worth, whichever is greater. § 6-11-2 (b).

In all civil actions for physical injury wherein entitlement to punitive damages has been established, the award may not

exceed three times the compensatory damages of the party claiming punitive damages or \$1.5 million, whichever is greater. § 6-11-2 (d).

These limitations do not apply to class actions, actions for wrongful death, or actions for intentional infliction of physical injury. § 6-11-2 (h),(j).

E. To whom are punitive damages payable?

Punitive damages are payable to the claimant. Although the statute does not specifically delineate a recipient, it may be inferred that punitive damages are payable to the party claiming them. See ALA. CODE ANN. § 6-11-21 (LexisNexis 2010). In addition, "no portion of a punitive damages award shall be allocated to the state or any agency or department of the state." *Id.*



I. PUNITIVE DAMAGES

A. May they be awarded?

Yes. *Brandner v. Hudson*, 171 P.3d 83 (Alaska 2007); *State Farm Mut. Auto. Ins. Co. v. Weiford*, 831 P.2d 1264 (Alaska 1992); *Barber v. Nat'l Bank of Alaska*, 815 P.2d 857 (Alaska 1991). See also *Sturm, Ruger & Co. v. Day*, 594 P.2d 38 (Alaska 1979), modified, 615 P.2d 621 (Alaska 1980), cert. denied, 454 U.S. 894 (1981), overruled in part by *Dura Corp. v. Harned*, 703 P.2d 396 (Alaska 1985) (superseded by statute on other grounds).

B. If so, in what circumstances?

Standard of Conduct. ALASKA STAT. § 09.17.020 (2010) states that "punitive damages may be awarded in an action only if the plaintiff proves by [the applicable standard] that the defendant's conduct (1) was outrageous, including acts done with malice or bad motives or (2) evidenced reckless indifference to the interest of another person." See *Alaska Marine Pilots v. Hendsch*, 950 P.2d 98 (Alaska 1997); see also *Reust v. Alaska Petroleum Contrs., Inc.*, 127 P.3d 807, 820 (Alaska 2005) (citing *Robles v. Shoreside Petroleum, Inc.*, 29 P.3d 838, 846 (Alaska 2001) quoting *Chizmar v. Mackie*, 896 P.2d 196, 210 (Alaska 1995)).

Punitive damages have been limited to cases where the wrongdoer's conduct could fairly be categorized as "outrageous,

such as acts done with malice or bad motives or reckless indifference to the interests of another." See also *Great Divide Ins. Co. v. Carpenter*, 79 P.3d 599 (Alaska 2003); *State Farm Fire & Cas. Co. v. Nicholson*, 777 P.2d 1152, 1158 (Alaska 1989); *Alyeska Pipeline Serv. Co. v. Beadles*, 731 P.2d 572, 574 (Alaska 1987); *Ross Lab. v. Thies*, 725 P.2d 1076, 1081 (Alaska 1986).

Malice may be inferred if the acts exhibit "a callous disregard for the rights of others." *Alyeska Pipeline Serv. Co. v. O'Kelley*, 645 P.2d 767, 774 (Alaska 1982). Thus, where there is no evidence of malicious or outrageous conduct, the jury is not permitted to receive an instruction on punitive damages. *Hancock v. Northcut*, 808 P.2d 251, 259 (Alaska 1991).

Standard of Proof. Clear and convincing evidence is required to sustain a punitive damages award. ALASKA STAT. § 09.17.020 (b) (2010).

Actions Against State. Punitive damages may not be awarded against the state. ALASKA STAT. § 09.50.280 (2010).

Breach of Contract. Punitive damages are not available in a breach of contract action unless the wrongdoer's conduct can be characterized as outrageous, such as acts done with malice or

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bad motives or reckless indifference to the interests of another. *Alaska N. Dev. v. Alyeska Pipeline Serv. Co.*, 666 P.2d 33, 41 (Alaska 1983), cert. denied, 464 U.S. 1041 (1984). Additionally, punitive damages may be recovered in an action for breach of contract if the conduct constituting the breach is also a tort for which punitive damages are recoverable. *Great W. Sav. Bank v. George W. Easley Co.*, 778 P.2d 569, 580 (Alaska 1989); see also *Zeman v. Lufthansa German Airlines*, 699 P.2d 1274, 1286 (Alaska 1985); *Spence v. Se. Alaska Pilots' Ass'n*, 789 F. Supp. 1014, 1026 (D. Alaska 1992).

Employer Liability for Employee Conduct Under ALASKA STAT. § 09.17.020(k), punitive damages may not be awarded against an employer for the acts of an employee unless:

1. the employer or the employer's managerial agent
 - a. authorized the employee's conduct and the manner in which it occurred; or
 - b. ratified or approved the employee's conduct after it occurred; or
2. the employee
 - a. was unfit to engage in the particular conduct and the employer or the employer's managerial agent acted recklessly in employing or retaining the employee; or
 - b. was employed in a managerial capacity and was acting within the scope of employment.

A "managerial agent" is a management-level employee with the stature and authority to exercise control, discretion, and independent judgment over a certain area of the employer's business and with some power to set policy for the employer.

Environmental Liability. Punitive damages are available in an environmental liability case. *Maddox v. Hardy*, 187 P.3d 486, 495 (Alaska 2008).

General Liability. Punitive damages may be awarded in a personal injury claim against a drunken driver. *Lamb v. Anderson*, 126 P.3d 132 (Alaska 2005). Where picketing involves "threats of bodily harm, personal assaults, and property destruction," the picketing is not constitutionally protected as free speech, and such actions may warrant a punitive damages award under the clear and convincing standard. *Int'l Bhd. of Elec. Workers, Local 1547 v. Alaska Util. Constr., Inc.*, 976 P.2d 852 (Alaska 1999).

Insurer's Bad Faith. Not all conduct that amounts to the tort of bad faith on the part of the insurer is sufficient to justify an award of punitive damages. *State Farm Mut. Auto. Ins. Co. v. Weiford*, 831 P.2d 1264 (Alaska 1992). Instead, the insured must present evidence to support a conclusion that the insurer is guilty of a "gross breach of accepted standards of conduct which might be characterized as outrageous or malicious." *Id.* at 1269.

Product Liability. Punitive damages are available in product liability cases. See *Sturm, Ruger & Co.*, 594 P.2d 38, *supra*.

Professional Liability. The attorney-client relationship involves a fiduciary duty and punitive damages may be awarded when this duty is breached through conduct manifesting reckless indifference to the client's rights. *Bohna v. Hughes*, 828 P.2d 745, 760 (Alaska 1992). See also *Cummings v. Sea Lion Corp.*, 924 P.2d 1011 (Alaska 1996) (Punitive damages were permitted where the attorney's failure to disclose his financial interest in a company with which the client was doing business amounted to fiduciary fraud.).

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

Yes. Payment of punitive damages under an auto insurance policy, which covered "any amount" the insured became legally liable for as a result of bodily injury or property damage caused by his or her wrongful actions, does not violate public policy. Alaska's public policy in imposing punitive damages is not strong enough to justify voiding the contractual rights of the insured. This does not apply where punitive damages expressly are excluded by the insurance contract. *Le Doux v. Cont'l Ins. Co.*, 666 F. Supp. 178 (D. Alaska 1987); see also *Aetna Cas. & Sur. Co. v. Marion Equip. Co.*, 894 P.2d 664, 670 (Alaska 1995).

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

All punitive damages are insurable unless expressly excluded by the insurance contract. *Le Doux v. Cont'l Ins. Co.*, 666 F. Supp. 178 (D. Alaska 1987); see also *Aetna Cas. & Sur. Co. v. Marion Equip. Co.*, 894 P.2d 664, 670 (Alaska 1995).

C. What is the relationship of punitive to compensatory damages?

There must be a reasonable relation between the award of compensatory damages and punitive damages, but no precise

ratio is mandated. See *Clary Ins. Agency v. Doyle*, 620 P.2d 194, 204 (Alaska 1980); see also *Sturm, Ruger & Co. v. Day*, 615 P.2d 621 (Alaska 1980), modifying 594 P.2d 38, 48 (Alaska 1979), *cert. denied*, 454 U.S. 894 (1981), overruled in part by *Dura Corp. v. Harned*, 703 P.2d 396 (Alaska 1985). A punitive damages award is deemed excessive if it is manifestly unreasonable, resulting from passion or prejudice or disregard of the rules of law. See *Ace v. Aetna Life Ins. Co.*, 139 F.3d 1241, 1248 (Ninth Cir. 1998). Relevant factors include the compensatory damages amount, magnitude of the offense, importance of the policy violated and the defendant's wealth. *Id.* In *Ace*, the court held that although not dispositive itself, the 130:1 ratio of punitive to compensatory damages is far beyond any ratio approved by Alaska courts. *Id.*

Punitive damages cannot be awarded if there has been no award of compensatory damages. *Deland v. Old Republic Life Ins. Co.*, 758 F.2d 1331, 1339 (Ninth Cir. 1985).

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

Yes. ALASKA STAT. § 09.17.020 (f) (2010) limits punitive damages so that they generally do not exceed the greater of (1) three times the amount of compensatory damages awarded to the plaintiff or (2) \$500,000. There are two exceptions to this rule.

First, if the fact finder determines that (1) the conduct proven was motivated by financial gain and (2) the adverse consequences of the conduct were actually known by the defendant or the person responsible for making policy decisions on behalf of the defendant, it may award an amount of punitive damages not to exceed the greatest of (1) four times the amount of compensatory damages awarded to the plaintiff or (2) four times the aggregate amount of financial gain that the defendant received as a result of the defendant's misconduct or (3) \$7 million. See ALASKA STAT. § 09.17.020 (g) (2010).

Second, in an action against an employer to recover damages for an unlawful employment practice, the punitive damages may not exceed (1) \$200,000 if the employer has fewer than 100 employees in the state; (2) \$300,000 if the employer has 100 or more, but fewer than 200 employees in the state; (3) \$400,000 if the employer has 200 or more, but fewer than 500 employees in the state; and (4) \$500,000 if the employer has 500 or more employees in the state. See ALASKA STAT. § 09.17.020 (h) (2010).

E. To whom are punitive damages payable?

Fifty percent of a punitive damages award is paid to the claimant, and the remaining 50 percent must be paid to the state. See ALASKA STAT. § 09.17.020(j) (2010) (Court must order 50 percent of an award of punitive damages to be deposited into the general fund of the state.).

Arizona

I. PUNITIVE DAMAGES

A. May they be awarded?

Yes. *Rawlings v. Apodaca*, 726 P.2d 565 (Ariz. 1986).

B. If so, in what circumstances?

Standard of Conduct. Punitive damages are appropriate only where the defendant's wrongful conduct was guided by evil motives or willful or wanton disregard of the interests of others. An "evil mind" may be shown by evidence that defendant pursued a course of conduct knowing that it created a substantial risk of significant harm to others. *Rawlings v. Apodaca*, 726 P.2d 565; *Warner v. Sw. Desert Images, LLC*, 180 P.3d 986 (Ariz. Ct. App. 2008); *Medasys Acquisition Corp. v. SDMS, PC*, 55 P.3d 763 (Ariz. 2002).

Standard of Proof. The standard of proof is clear and convincing evidence. See *Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn*, 907 P.2d 506 (Ariz. Ct. App. 1995), *cert. denied*, 517 U.S. 1234; *Linthicum v. Nationwide Life Ins. Co.*, 723 P.2d 675 (Ariz. 1986); see also *Thompson v. Better-Bilt Aluminum Prods. Co.*, 832 P.2d 203 (Ariz. 1992); *Saucedo v. Salvation Army*, 24 P.3d 1274 (Ariz. Ct. App. 2001).

Actions Against State. "Neither a public entity nor a public employee acting within the scope of his employment is liable for punitive or exemplary damages." ARIZ. REV. STAT. § 12-820.04 (LexisNexis 2010).

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Breach of Contract. Punitive damages are not available for breach of contract, *Cont'l Nat'l Bank v. Evans*, 489 P.2d 15 (Ariz. 1971), unless the breach also constitutes a tort. *In re Marriage of Benge*, 726 P.2d 1088 (Ariz. Ct. App. 1986).

Employer Liability for Employee Conduct. In Arizona, punitive damages may be assessed against a principal for wrongs committed by its agent only if the acts were committed in furtherance of the employer's business and within the scope of the agent's employment. *Echols v. Beauty Built Homes*, 647 P.2d 629, 633 (Ariz. 1982). Moreover, where no punitive damages have been awarded against an employee, no punitive damages can be vicariously imputed to the employer. *Wiper v. Downtown Dev. Corp.*, 732 P.2d 200, 202 (Ariz. 1987).

Environmental liability. Punitive damages may be awarded in the context of environmental liability. ARIZ. REV. STAT. § 49-287(J) (LexisNexis 2010).

General liability. Punitive damages may be awarded in personal injury cases where the misconduct is aggravated, wanton, reckless, malicious or evidences spite or ill will. *Ranburger v. S. Pac. Transp. Co.* says "punitive damages are appropriate only if the defendant acted with an "evil mind." This "evil mind" may be established where a defendant acts with the intent to injure or where his acts are motivated by spite or ill will. It may also be inferred when a defendant acts to serve his own interests, consciously disregarding a substantial risk of significant harm

to others. *Ranburger v. S. Pac. Transp. Co.*, 760 P.2d 551 (Ariz. 1988); see *County Escrow Serv. v. Janes*, 591 P.2d 999 (Ariz. Ct. App. 1979).

Insurer's Bad Faith. Punitive damages may be recovered by a first-party claimant for an insurer's bad faith refusal to defend or pay benefits, if the insured can prove that the decision not to pay or defend was made with the intent to consciously and knowingly disregard the insured's rights. *Rawlings v. Apodaca*, *supra*. Also, "Plaintiff must show that the evil hand that unjustifiably damaged the objectives sought to be reached by the insurance contract was guided by an evil mind which consciously sought to damage the insured or acted intentionally, knowing that its conduct was likely to cause unjustified, significant damage to the insured." *Id.*

Product Liability. Punitive damages may be awarded against a defendant manufacturer if the plaintiff can establish the requisite intent as established in *Rawlings*, *supra*, and *Linthicum*, *supra*. See, e.g., *Volz v. Coleman Co.*, 748 P.2d 1191 (Ariz. Ct. App. 1986); *Piper v. Bear Med. Sys.*, 883 P.2d 407 (Ariz. Ct. App. 1993). The manufacturer or seller of a drug, however, is not liable for exemplary or punitive damages if the drug alleged to cause the harm has been approved by the U.S. Food and Drug Administration. ARIZ. STAT. ANN. §12-701 (LexisNexis 2010).

Professional liability. Punitive damages may be awarded against a law partnership for the acts of one of its partners in the ordinary course of partnership business through Arizona's Uniform Partnership Act. *Hyatt Regency Phoenix Hotel Co.*, 907 P.2d 506, *supra*.

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

Yes, punitive damages generally are insurable. *State v. Sanchez*, 579 P.2d 568 (Ariz. Ct. App. 1978). See also *Price v. Hartford Accident & Indem. Co.*, 502 P.2d 522 (Ariz. 1972); but see *State Farm Fire & Cas. Co. v. Wise*, 721 P.2d 674 (Ariz. Ct. App. 1986) (interpreting insurance policy provision and finding that the language of specific policy wording at issue did not cover punitive damages).

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

Not applicable.

C. What is the relationship of punitive to compensatory damages?

Punitive damages may not be awarded without an award of compensatory damages. *Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn*, 907 P.2d 506 (Ariz. Ct. App. 1995). See also *Bridgestone/Firestone N. Amer. Tire, LLC v. Naranjo*, 79 P.3d 1206 (Ariz. Ct. App. 2003). There is, however, no specifically required compensatory-to-punitive-damages ratio. *Neinsted v. Wetzel*, 651 P.2d 876 (Ariz. Ct. App. 1982). See also *Bridgestone/Firestone*, 79 P.3d 1206 (citing *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (declining "to impose a bright line ratio which punitive damages award cannot exceed" but "in practice, few awards exceeding a single digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process").

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

No.

E. To whom are punitive damages payable?

Arizona follows the general rule that punitive damages are payable to the claimant. *Watts v. Golden Age Nursing Home*, 619 P.2d 1032 (Ariz. 1980).



I. PUNITIVE DAMAGES

A. May they be awarded?

Yes. "Punitive damages punish and deter. Their premise is that the compensatory damages have made the plaintiff whole, but further sanctions are justified to punish the defendant for its conduct in the case and to deter future, similar conduct by the defendant and others." *Jim Ray, Inc. v. Williams*, 99 Ark.App. 315, 260 S.W.3d 307 (Ark. Ct. App. 2007).

B. If so, in what circumstances?

Standard of Conduct. "In order to recover punitive damages from a defendant, a plaintiff has the burden of proving that the defendant is liable for compensatory damages and that *either or both* of the following aggravating factors were present and related to the injury for which compensatory damages were awarded: (1) The defendant knew or ought to have known, in light of the surrounding circumstances, that his or her conduct would naturally and probably result in injury or damage and that he or she continued the conduct with malice or in reckless disregard of the consequences from which malice may be inferred. (2) The defendant intentionally pursued a course of conduct for the purpose of causing injury or damage.

ARK. CODE ANN. § 16-55-206 (2010); *Yeakley v. Doss*, 257 S.W.3d (Ark. 2007). An award of punitive damages is justified only where evidence indicates that the defendant acted wantonly in causing injury or with such a conscious indifference to consequences that malice might be inferred. See *J.B. Hunt Transp., Inc. v. Doss*, 899 S.W.2d 464, 469 (Ark. 1995); see also *Alpha Zeta Chapter of P. Kappa Alpha Fraternity v. Sullivan*, 740 S.W.2d 127, 132 (Ark. 1987) ("[I]n order to warrant a submission of the question of punitive damages, there must be an element of willfulness or such reckless conduct on the part of the defendant as is equivalent thereto."). Negligence, however gross, will not justify an award of punitive damages. *Mo. P. R. Co. v. Mackey*, 760

S.W.2d 59, 63 (Ark. 1988). In addition, punitive damages are recoverable whenever authorized by statute, but there is no legal "right" to such damages. See ARK. CODE ANN. § 16-55-201 (2010).

Standard of Proof. Clear and convincing evidence is required to sustain an award of punitive damages. See ARK. CODE ANN. § 16-55-207 (2010) ("A plaintiff must satisfy the burden of proof required under § 16-55-206 by clear and convincing evidence in order to recover punitive damages from the defendant."); *Uniguard Ins. Co. v. Murphy Oil USA, Inc.*, 962 S.W.2d 735, 742 (Ark. 1998).

Actions Against State. State and local governments are not liable for punitive damages. ARK. CODE ANN. § 21-9-203.

Breach of Contract. Generally, punitive damages are not recoverable in actions for breach of contract unless a willful or malicious act was committed in connection with the contract. *Delta Rice Mill, Inc. v. Gen. Foods Corp.*, 583 F. Supp. 564, 566 (E.D. Ark. 1984); *Dews v. Halliburton Indus., Inc.*, 708 S.W.2d 67, 71 (Ark. 1986). A bare allegation of fraud that results in monetary loss is insufficient for punitive damages. See *McClellan v. Brown*, 632 S.W.2d 406 (Ark. 1982).

Employer Liability for Employee Conduct. Under Arkansas law, punitive damages may be recovered from an employer for acts or omissions of his employee in the scope and course of his employment whenever the employee's acts are of such character as to form the basis for an allowance of exemplary damages. *Miller v. Blanton*, 213 Ark. 246, 251 (Ark. 1948). This is true even though these acts were done without the employer's knowledge or authorization and were not subsequently ratified by him, regardless of whether he did or did not know the employee to be incompetent or disqualified for the service in which he was engaged. *Id.* See also *Ray Dodge, Inc. v. Moore*, 479 S.W.2d 518, 523 (Ark. 1972) ("[A] corporation may be held liable for

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exemplary or punitive damages for such acts of its agents or servants acting within the scope of their employment as would, if done by an individual acting for himself, render him liable for such damages.”).

Environmental Liability. “If any person who is liable for a release or threat of release of a hazardous substance fails without sufficient cause to properly provide remedial or removal action upon order of the Arkansas Department of Environmental Quality, the person may be liable to the state for punitive damages.” ARK. CODE ANN. § 8-7-517 (2010).

Express Statutory Authorization. Punitive damages are recoverable whenever authorized by statute, but there is no legal “right” to punitive damages. See ARK. CODE ANN. § 16-55-201 et seq.

General Liability. Liability for punitive damages in any action for personal injury, medical injury, property damage, or wrongful death shall be several only and shall not be joint. ARK. CODE ANN. § 16-55-201 (2010).

Insurer’s Bad Faith. An insured was not entitled to punitive damages for insurer’s failure to defend or indemnify the insured in connection with claims that the insured negligently hired and supervised an employee who sexually molested a child; in light of split of authority concerning liability coverage in such

circumstances, insurer’s breach of contract was clearly based upon good faith belief that the insured’s acts were not covered. *Silverball Amusement v. Utah Home Fire Ins. Co.*, 842 F. Supp. 1151 (W.D. Ark. 1994).

Interference with Contract. Punitive damages for the tort of interference with contractual relations may be awarded. *Stewart Title Guar. Co. v. Am. Abstract & Title Co.*, 215 S.W.3d 596, 609-10 (Ark. 2005); see also *United Bilt Homes, Inc. v. Sampson*, 832 S.W.2d 502, 504 (Ark. 1992) (“We hold that United Bilt’s conduct was tortious interference with an existing contract. We further hold that the circuit court’s award of punitive damages was not in error.”).

Product Liability. Punitive damages may be awarded in product liability cases. *Lockley v. Deere & Co.*, 933 F.2d 1378 (Eighth Cir. 1991).

Professional Liability. Punitive damages are recoverable under the Medical Malpractice Act. ARK. CODE ANN. §16-114-201 (2010); *HCA Health Servs. of Midwest, Inc. v. Nat’l Bank of Commerce*, 745 S.W.2d 120 (Ark. 1988). The Arkansas Supreme Court held that in enacting the Medical Malpractice Act, the Arkansas General Assembly “did not restrict an injured party from claiming punitive damages when a medical-care provider, as defined by the Act, is guilty of willful and wanton misconduct.” *Id.* at 528.

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

Yes. Punitive damages are insurable except for those damages that arise from an intentional tort. *Smith v. St. Paul Guardian Ins. Co.*, 622 F. Supp. 867 (W.D. Ark. 1985) (“There is nothing in the state’s public policy that prevents an insurer from indemnifying its insured against punitive damages arising from an ‘accident.’”); see also *Talley v. MFA Mut. Ins. Co.*, 620 S.W.2d 260 (Ark. 1981) (clarifying that the unintended consequences of intentional acts may be included in coverage); *S. Farm Bureau Cas. Ins. Co. v. Easter*, 45 S.W.2d 380 (Ark. 2001).

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

Not applicable.

C. What is the relationship of punitive to compensatory damages?

No recovery for punitive damages is permitted unless actual damages are proved and assessed. *Williams v. Walker*, 508

S.W.2d 52, 53 (Ark. 1974); see also *Growth Props. I v. Cannon*, 669 S.W.2d 447 (Ark. 1995) (there can be no recovery of punitive damages without actual damages). See ARK. CODE ANN. § 16-55-208 (2010).

The Arkansas Supreme Court has referenced the U.S. Supreme Court’s *State Farm v. Campbell*, 538 U.S. 408 (2003) decision. See *Advocat Inc. v. Sauer*, 111 S.W.3d 346, 359 (Ark. 2003). Though the court did not expressly apply the Supreme Court’s ratio (punitive damages not to exceed double-digit multipliers of compensatory damages), the state court ultimately remitted \$42 million of the \$63 million punitive damages award. *Id.* at 369. Up to that point, the highest punitive damages award affirmed by the state Supreme Court had been \$3 million. See *id.* (citing *Airco., Inc. v. Simmons First Nat. Bank*, 638 S.W.2d 660 (Ark. 1982)). The highest punitive damages award that had been affirmed by the Court of Appeals was \$4 million. See *id.* at 57-58 (citing *Arrow Int’l, Inc. v. Sparks*, 98 S.W.3d 48 (Ark. Ct. App. 2003)). Since then, the Arkansas Supreme Court has affirmed large punitive damages

awards, including a \$25 million punitive damages award in a negligence action that resulted in one person's death and caused severe and permanent injuries to another person. *Union Pac. R.R. Co. v. Barber*, 149 S.W.3d 325, 350 (Ark. 2004).

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

Arkansas enacted a statute, effective March 25, 2003, making defendants in personal injury, medical injury, property damage and wrongful death cases severally, but not jointly, liable for punitive and compensatory damages. ARK. CODE ANN. § 16-55-201(a) (2010). Furthermore, "[e]ach defendant shall be liable only for the amount of damages allocated to that defendant in direct proportion to that defendant's percentage of fault." *Id.* at § 16-55-201(b). Also, punitive damages recovery is limited to the greater of the following: \$250,000 or three times the compensatory damages, not to exceed \$1,000,000:

Except as provided in subsection (b) of this section, a punitive damages award for each plaintiff shall not be more than the greater of the following: (1) \$250,000 or (2) three times the amount of compensatory damages awarded in the action, not to exceed \$1,000,000.

ARK. CODE ANN. § 16-55-208(a) (2010). Notably, however, if the fact finder determines by clear and convincing evidence that the defendant intentionally pursued a course of conduct for the purpose of causing injury or damage, and that the defendant's conduct did in fact harm the plaintiff, the statutory limitations are inapplicable. ARK. CODE ANN. § 16-55-208(b). See generally 2003 Ark. Acts 649. These limits increase at three-year intervals in accordance with the Consumer Price Index rate for the previous year as determined by the Administrative Office of the Courts. ARK. CODE ANN. § 16-55-208(c). Accordingly, it is important to check the current limits when evaluating any particular punitive damages situation. This statute applies to causes of action accruing on or after the effective date of this act (March 25, 2003), excluding any action filed or cause of action accruing prior to March 25, 2003.

E. To whom are punitive damages payable?

Generally, an award of punitive damages is payable to the plaintiff.



I. PUNITIVE DAMAGES

A. May they be awarded?

Yes, except in an action for the breach of an obligation arising from a contract (CAL. CIV. CODE § 3294 (2010)) or against a public agency CAL. GOV'T CODE §§ 818, 825 (2010). Punitive damages are awarded to punish a defendant's deliberate wrongdoing or conscious disregard for the rights of others. *In re Hobbs v. Bateman Eichler Hill Richards, Inc.*, 210 Cal. Rptr. 387, 399 (Cal. Ct. App. 1985), distinguished on other grounds *Rubin v. Western Mut. Ins. Co.*, 84 Cal. Rptr. 2d 648 (Cal. Ct. App. 1999). Punitive damages awards are not limited to actions at law, and also may be awarded in an arbitration proceeding. *Baker v. Sadick*, 208 Cal. Rptr. 676, 678 (Cal. Ct. App. 1984).

B. If so, in what circumstances?

Standard of Conduct. Punitive damages may be awarded in an action for breach of an obligation, not arising from a contract,

where the defendant has been guilty of fraud, oppression or malice. CAL. CIVIL CODE §§ 3294 and 3295 (2010). There must be substantial evidence of (1) an intent to vex, annoy and injure or (2) a conscious disregard of the plaintiff's rights, before punitive damages may be awarded. *Betts v. Allstate Ins. Co.*, 201 Cal. Rptr. 528, 540 (Cal. Ct. App. 1984); criticized in *Gagnon v. Cont'l Cas. Co.*, 260 Cal. Rptr. 305, 307 (Cal. Ct. App. 1989) ("An appropriate and reasonable measure of punishment and deterrence can only be determined in relation to the actual harm suffered by the plaintiff."). Malice includes a manufacturer's conscious disregard for public safety. *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 376 (Cal. Ct. App. 1981); questioned by *Romo v. Ford Motor Co.*, 113 Cal. App. 4th 738 (2003). See also *Roberts v. Ford Aerospace & Communications Corp.*, 224 Cal. App. 3d 793, 274 Cal. Rptr. 139 (1990). Mere negligence, even gross negligence, is not sufficient to justify an award of

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punitive damages. *Jackson v. Johnson*, 7 Cal. Rptr. 2d 482 (Cal. Ct. App. 1992); *Ebaugh v. Rabkin*, 99 Cal. Rptr. 706, 708 (Cal. Ct. App. 1972).

The applicable California statute defines malice, oppression and fraud as follows:

Malice means conduct that is intended by the defendant to cause injury to the plaintiff, or despicable conduct that is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

Oppression means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

Fraud means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights, or otherwise causing injury. CAL. CIVIL CODE § 3294(c) (2010).

Standard of Proof. At trial, the plaintiff must prove the defendant's fraudulent, oppressive or malicious conduct by "clear and convincing evidence" in order to recover punitive damages. See CAL. CIVIL CODE § 3294(a); *Tomaselli v. Transamerica Ins. Co.*, 31 Cal. Rptr. 2d 433, 444-45 (Cal. Ct. App. 1994). On appeal, the reviewing court will not disturb the trial court's imposition of punitive damages if there is "substantial evidence" of malice, fraud or oppression. *Patrick v. Md. Cas. Co.*, 267 Cal. Rptr. 24, 31 (Cal. Ct. App. 1990).

Evidence of a defendant's financial condition is a condition precedent to an award of punitive damages. An appellate court cannot make a fully informed determination of whether an award of punitive damages is excessive unless the record contains evidence of defendant's financial condition as an element of the punitive damages claim. *Adams v. Murakami*, 813 P.2d 1348, 1350-51 (Cal. 1991). The plaintiff must produce evidence of a *prima facie* case for punitive damages before the plaintiff may conduct discovery or introduce evidence of the defendant's profits or financial condition. CAL. CIVIL CODE § 3295. Trial courts shall, on application of any defendant, preclude the admission of evidence of that defendant's financial condition until after the trier of fact finds that punitive damages are warranted because the defendant is guilty of malice, oppression or fraud in accordance with CAL. CIVIL CODE § 3294. See CAL. CIVIL CODE § 3295(d); *City of El Monte v. Sup. Ct.*, 34 Cal. Rptr. 2d 490, 492 (Cal. Ct. App. 1994).

Arbitration. Punitive damages awards are not limited to actions at law. These damages may also be awarded in an arbitration proceeding regarding a tort claim. *Baker v. Sadick*, 162 Cal. App. 3d 618, 627, 208 Cal. Rptr. 676 (1984); *Tate v. Saratoga Savings & Loan Association*, 216 Cal. App. 3d 843, 854, 265 Cal. Rptr. 440 (1989); disapproved by *Advanced Micro Devices, Inc. v. Intel Corp.*, 9 Cal. 4th 362, 36 Cal. Rptr. 2d (1994).

Actions Against State. Punitive damages may not be awarded against a California public agency under California statutes, and public agencies are forbidden from indemnifying their employees for their employees' punitive damages liability. CAL. GOV'T CODE §§ 818, 825 (2010).

Breach of Contract. Punitive damages are not recoverable in an action for a non-insurance contract breach in the absence of a violation of an independent duty arising from principles of tort law other than the denial of the existence of, or liability under, a breached contract. *Freeman & Mills, Inc. v. Belcher Oil*, 900 P.2d 669 (Cal. 1995). While punitive damages are not ordinarily recoverable for a breach of contract, regardless of whether the breach is intentional, willful or in "bad faith," such damages may be awarded where a defendant fraudulently induces the plaintiff to enter into a contract. *Las Palmas Assoc. v. Las Palmas Ctr. Assoc.*, 1 Cal. Rptr. 2d 301, 311 (Cal. Ct. App. 1991).

Employer Liability for Employee Conduct. Under California law, an employer is not liable for punitive damages, based upon acts of an employee, unless (i) the employer had advance knowledge of the unfitness of the employee and employed him with a conscious disregard of the rights or safety of others, or (ii) authorized or ratified the wrongful conduct for which the damages are awarded, or (iii) was personally guilty of oppression, fraud, or malice. Cal. Civ. Code § 3294(b).

With respect to a corporate employer, the wrongful conduct must be on the part of an officer, director, or managing agent of the corporation. *Id.*; *White v. Ultramar, Inc.*, 981 P.2d 944, 950 (Cal. 1999). A managing agent is an employee who has broad discretionary powers and exercises substantial discretionary authority in the corporation to determine corporate policy. A supervisor who has no discretionary authority over decisions that ultimately affect corporate policy would not be considered a managing agent, even though he has the ability to hire and fire other employees. *Id.* at 952.

Environmental Liability. Punitive damages may be assessed in those cases where the claimant presents, by clear and substantial proof, substantial evidence to demonstrate that the defendant's conduct in causing exposure to a toxic hazard amounts to oppression, fraud or malice. *Potter v. Firestone Tire & Rubber*

Co., 863 P.2d 795, 817 (Cal. 1993). In imposing such damages, courts consider whether the defendant is guilty of despicable conduct carried on in a willful and conscious disregard for the rights and safety of others. *Id.* at 817-18. The size of the potential class of plaintiffs is similarly significant and moral blame heightened where the defendant is aware of the danger posed by its conduct and acts in conscious disregard of the known risk. *Id.*

General Liability. Punitive damages may be awarded in an action for breach of an obligation, not arising from a contract, where the defendant has been guilty of fraud, oppression or malice. Cal. Civ. Code §§ 3294-3295.

Insurer's Bad Faith. An insurer is not liable for punitive damages except where the existence of malice, oppression and fraud is established by clear and convincing evidence. *Mock v. Mich. Millers Mut. Ins. Co.*, 5 Cal. Rptr. 2d 594, 606 (Cal. Ct. App. 1992). Evidence that an insurer has violated its duty of good faith and fair dealing does not automatically mean that the insurer has acted with the requisite malice, fraud or oppression to justify an award of punitive damages. *Id.* at 607.

Legal and Accounting Professional liability. In a lawsuit arising out of the professional negligence of a legal or accounting professional providing litigation services, a plaintiff

generally cannot recover punitive damages as a component of compensatory damages flowing from the underlying matter. *Ferguson v. Lieff, Cabraser, Heiman & Bernstein*, 69 P.3d 965, 970-73 (Cal. 2003) (a plaintiff in a legal malpractice action may not recover lost punitive damages as compensatory damages).

Medical Professionals and Religious Corporations. By statute, a litigant may not present any claim for punitive damages arising out of the professional negligence of a health care provider or against a religious corporation without a prior court order. To obtain such an order, a litigant must demonstrate a sufficient probability that the plaintiff will prevail on his or her claim for punitive damages. CAL. CODE CIV. P. §§ 425.13 and 425.14.

Pleading Requirements. In pleading a claim for punitive damages, the plaintiff may not specify an amount being sought. CAL. CIVIL CODE § 3295(e).

Product Liability. Punitive damages are recoverable in actions involving allegedly defective products. See, e.g., *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 382 (Cal. Ct. App. 1981). But see *Stevens v. Owens-Corning Fiberglass Corp.*, 57 Cal. Rptr. 2d 525, 541-42 (Cal. Ct. App. 1996) (liability under "market share" and "fraud on the market" doctrines are insufficient bases for an award of punitive damages).

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

No. CAL. INS. CODE § 533 (2010). Section 533 provides that an insurer "is not liable for a loss caused by the willful act of the insured." California public policy that permits the recovery of punitive damages only for the sake of example and by way of punishment, precludes passing punitive damages on to an insurer. *Ford Motor Co. v. Home Ins. Co.*, 172 Cal. Rptr. 59 (Cal. Ct. App. 1981). In *PPG Industries, Inc. v. Transamerica Ins. Co.*, 975 P.2d 652 (Cal. 1999), the California Supreme Court narrowly decided that California statutes and public policy prohibit an insurer from indemnifying its insured for punitive damages exposure.

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

Probably. Early cases held that CAL. INS. CODE § 533 does not apply where the insured is not personally at fault. *Arenson v. Nat'l Auto & Cas. Ins. Co.*, 286 P.2d 816 (Cal. 1955); *In re Related Asbestos Cases*, 566 F. Supp 818 (N.D. Cal. 1983). However,

the California Supreme Court in *PPG Indus., Inc. v. Transamerica Insurance Co.*, 20 Cal. 4th 310 (1999) applied the prohibition against a corporate successor that was not at fault, but was contractually liable for its predecessor's punitive damages liability.

C. What is the relationship of punitive to compensatory damages?

Punitive damages may not be awarded unless the plaintiff suffers actual damages; that is, proves his cause of action. See *Gagnon v. Cont'l Cas. Co.*, 260 Cal. Rptr. 305 (Cal. Ct. App. 1989); *Esparza v. Specht*, 127 Cal. Rptr. 493 (Cal. Ct. App. 1976). An award of actual damages, either compensatory or nominal, is a prerequisite for an award of punitive damages. If damages are actually suffered, punitive damages may be awarded in appropriate cases, even if the injured party is only awarded nominal damages. *Carr v. Progressive Cas. Ins. Co.*, 199 Cal. Rptr. 835 (Cal. Ct. App. 1984). See also *Cheung v. Daley*, 42 Cal. Rptr. 2d 164 (Cal. Ct. App. 1995).

Punitive damages should bear a reasonable relationship to the compensatory damages. See *Douglas v. Ostermeier*, 2 Cal. Rptr. 2d 594 (Cal. Ct. App. 1992). See also *Neal v. Farmers*

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Ins. Exch., 582 P.2d 980 (Cal. 1978). While California case law requires that punitive damages bear a reasonable relationship to compensatory damages, there is no ratio or formula for determining the proper proportion between the two. *Wyatt v. Union Mortgage Co.*, 157 Cal. Rptr. 392 (Cal. Ct. App. 1979); *Douglas v. Ostermeier*, 2 Cal. Rptr. 2d 594; *Michelson v. Hamada*, 36 Cal. Rptr. 2d 343 (Cal. Ct. App. 1994) (punitive damages awards generally are not allowed to exceed 10 percent of a defendant's net worth).

In determining whether an award of punitive damages is excessive as a matter of law, the reviewing court may look to three factors: (1) the reprehensibility of the defendant's conduct,

(2) the relationship between the punitive damages award and the compensatory damages award, and (3) the defendant's wealth. *Vallbona v. Springer*, 51 Cal. Rptr. 2d 311 (Cal. Ct. App. 1996).

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

Pursuant to state statute, a litigant may not seek punitive damages from either a health care provider or religious corporation without a prior court order, upon proof of a substantial probability that the applicant will prevail on his or her claim for punitive damages. CAL. CIVIL PROC. CODE §§ 425.13, 425.14 (2010).

E. To whom are punitive damages payable?

Generally, punitive damages are recoverable by the plaintiff.



I. PUNITIVE DAMAGES

A. May they be awarded?

Yes. Punitive damages are recoverable only pursuant to statute. See COLO. REV. STAT. § 13-21-102 (2010); *Seaward Constr. Co. v. Bradley*, 817 P.2d 971 (Colo. 1991); *Ark. Valley Alfalfa Mills, Inc. v. Day*, 263 P.2d 815 (Colo. 1953).

B. If so, in what circumstances?

Standard of Conduct. Punitive damages are recoverable in civil cases when it is established that the injury was inflicted through force or with malice, insult or a wanton and reckless disregard for the victim's rights and feelings. See *White v. Brock*, 584 P.2d 1224 (Colo. App. 1978); COLO. REV. STAT. § 13-21-102 (2010). An award of punitive damages is justified under section 13-21-102 "when the act causing the plaintiff's injuries was performed 'with an evil intent, and with the purpose of injuring the plaintiff, or with such a wanton and reckless disregard of his rights as evidence a wrongful motive.'" *Tri-Aspen Constr. Co. v. Johnson*, 714 P.2d 484, 486 (Colo. 1986) (quoting *Ress v. Rediess*, 278 P.2d 183, 187 (Colo. 1954)). Wanton and reckless disregard in the context of punitive damages involves "conduct that creates a substantial risk of harm to another and is purposefully performed with an awareness of the risk in disregard of the consequences." *Id.* (quoting *Palmer v. A. H. Robins Co.*, 684 P.2d 187, 215 (Colo. 1984)).

Standard of Proof. Colorado requires proof beyond a reasonable doubt to support a punitive damages award. COLO. REV. STAT. § 13-25-127(2) (2010). See *Frick v. Abell*, 602 P.2d 852, 198 Colo. 508 (1979) (*en banc*), criticized in *Juarez v. United Farm Tools, Inc.*, 798 F.2d 1341 (Tenth Cir. 1986); see also *Gruntmeir v. Mayrath Industries, Inc.*, 841 F.2d 1037 (Tenth Cir. 1988).

Actions Against State. A public entity is not liable for punitive damages. COLO. REV. STAT. § 24-10-114(4) (2010). However, a public entity, after adoption of resolutions of an open public meeting, may defend, pay or otherwise settle a punitive damages claim against a public employee. COLO. REV. STAT. § 24-10-118(5) (2010). See, e.g., *Healy v. Counts*, 536 F. Supp. 600 (D. Colo. 1982).

Breach of Contract. Under Colorado law, there is no basis for an award of punitive damages in a contract action, absent the most egregious circumstances. *Strey v. Hunt International Resources Corp.*, 749 F.2d 1437 (Tenth Cir. 1984), *cert. denied*, 479 U.S. 870 (1986); see also *Riva Ridge Apartments v. Robert G. Fisher Co.*, 745 P.2d 1034 (Colo. App. 1987).

Employer Liability for Employee Conduct. Under Colorado law, an employer cannot be held liable for exemplary damages for the acts of a non-managerial employee unless it is shown

that (i) the employer authorized or approved the act for which exemplary damages are claimed, or (ii) the employer approved of or participated in the wrong of its employee, or (iii) the employer failed to exercise proper care in selecting its employees. *Holland Furnace Co. v. Robson*, 402 P.2d 628, 631 (Colo. 1965). In the case of a managerial employee, however, an employer may be held liable for punitive damages if the employee was acting in the scope of his employment. *Fitzgerald v. Edelen*, 623 P.2d 418, 423 (Colo. Ct. App. 1980); Restatement (Second) of Agency § 217C (1958).

Environmental Liability. Punitive damages are recoverable in civil cases when it is established that the injury was inflicted through force or with malice, insult or a wanton and reckless disregard for the victim's rights and feelings. See *White v. Brock*, 584 P.2d 1224 (Colo. App. 1978); COLO. REV. STAT. § 13-21-102 (2010).

Insurer's Bad Faith. Punitive damages may be recovered on a claim of bad faith breach of insurance contract if the breach is

accompanied by circumstances of fraud, malice or willful and wanton conduct. *S. Park Aggregates, Inc. v. Nw. Nat'l. Ins. Co.*, 847 P.2d 218 (Colo. App. 1992).

Product Liability. Punitive damages are recoverable in connection with a strict product liability claim in tort. *Palmer v. A.H. Robins Co., Inc.*, 684 P.2d 187 (Colo. 1984).

Professional Liability. COLO. REV. STAT. § 13-64-302.5 (2010) prohibits punitive damages from being alleged in a medical malpractice lawsuit until all discovery is completed. The measure also protects physicians from being held liable for punitive damages because of an adverse effect from prescription medicine that was administered in compliance with FDA guidelines. In addition, a physician is shielded from punitive damages for the act of another, unless the physician directed the act or ratified it.

Wrongful Death. The Wrongful Death Act of Colorado excludes any award of punitive damages in actions for wrongful death. *Mangus v. Miller*, 535 P.2d 219, 221 (Colo. App. 1975) (citing COLO. REV. STAT. § 13-21-203(1) (1973)).

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

No. An insurer that does not participate in the wrongful conduct is not obliged to cover punitive damages. *Union Ins. Co. v. Kjeldgaard*, 775 P.2d 55 (Colo. App. 1988), *appeal after remand, affirmed*, 820 P.2d 1183 (Colo. App. 1991) (bodily injury and property damage liability policy does not render insurer liable for punitive damages awarded against insured); *Universal Indem. Ins. Co. v. Tenery*, 39 P.2d 776 (Colo. 1934) (insurer that did not participate in the wrong is under no contractual duty to indemnify against punitive damages). See *Brown v. W. Cas. & Sur. Co.*, 484 P.2d 1252 (Colo. Ct. App. 1971) (insurer not liable for punitive damages recovered in motorist's default judgment against insured); *Gleason v. Fryer*, 491 P.2d 85 (Colo. App. 1971).

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

No statute or decision on point.

C. What is the relationship of punitive to compensatory damages?

In order to uphold a judgment for exemplary (punitive) damages, there must be proof of actual damages and there must be a rational relationship between punitive and compensatory damages. *Collister v. Ashland Oil Co.*, 687 P.2d 525 (Colo. App.

1984); *Mortgage Finance Inc. v. Podelski*, 742 P.2d 900 (Colo. 1987) (punitive damages must bear a reasonable relationship to compensatory damages). See *Frick v. Abell*, 602 P.2d 852 (Colo. 1979); *Mailloux v. Bradley*, 643 P.2d 797 (Colo. App. 1982).

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

COLO. REV. STAT. § 13-21-102 (effective as of March 19, 1995) provides under subsection (1)(a) that reasonable exemplary damages are limited to an amount that is equal to the amount of the actual damages awarded to the injured party. Under subsection (3), notwithstanding the provisions of subsection (1), the court may increase any award of exemplary damages to a sum not to exceed three times the amount of actual damages if certain conduct can be shown on the part of the defendant. Subsection (6) provides that evidence of the income or net worth of a party shall not be considered in determining the appropriateness or amount of punitive damages.

E. To whom are punitive damages payable?

Punitive damages are payable to the claimant. COLO. REV. STAT. 13-21-102 (2010). A prior statute (COLO. REV. STAT. § 13-21-102 (4)) requiring one third of punitive damages paid to go into the state fund, was repealed by a 1995 amendment.

PUNITIVE DAMAGES REVIEW

Connecticut



I. PUNITIVE DAMAGES

A. May they be awarded?

Yes. *Berry v. Loieau*, 614 A.2d 414 (Conn. 1992). The measure of punitive damages rests in the sound discretion of the trier of fact. *Freeman v. Alamo Mgmt. Co.*, 607 A.2d 370 (Conn.1992).

B. If so, in what circumstances?

Standard of Conduct. In order for punitive or exemplary damages to be awarded, the evidence must reveal a reckless indifference to the rights of others or an intentional and wanton violation of those rights. The basic requirement to justify an award of punitive damages is described in terms of wanton and malicious injury, evil motive and violence. A plaintiff may recover punitive damages even if he does not specifically plead them in the body of the complaint or the claims for relief. *Chapman Lumber, Inc. v. Clifford L. Tager*, Conn. Super. 2005 (LexisNexis 863).

The test for allowing punitive damages should not depend on the nature of the injury or the type of damage sustained, but on the nature of the consequences of the wrongful conduct involved. *Am. Airlines, Inc. v. Nat'l Automatic Prod. Co.*, 477 A.2d 171 (Conn. Super. Ct. 1984).

The purpose of punitive damages is to fully compensate plaintiffs for the harm that they have suffered. *Berry v. Loieau*, 614 A.2d 414 (Conn. 1992). As courts have uniformly held, no plaintiff has a right to punitive damages; the purpose of punitive damages is to vindicate the public interest, not that of a particular plaintiff. *Freeman v. Alamo Mgmt. Co.*, 607 A.2d 370 (Conn. 1992).

Standard of Proof. Preponderance of the evidence is the standard of proof required for a punitive damages award. *Freeman*, 607 A.2d at 370. The party seeking an award of punitive damages bears the burden of proving the amount of those damages. *Venturi v. Savitt, Inc.*, 468 A.2d 933 (Conn. 1983). To furnish a basis for recovery of punitive damages, the pleadings must allege and the evidence must show wanton or willful malicious misconduct, and the language contained in the pleadings must be sufficiently explicit to inform the court and opposing counsel that such damages are being sought. *Harold*

Stohlts et al. v. James F. Gilkinson et al., 2003 WL 22080510, Conn. Super (Aug. 22, 2003), judgment affirmed by *Stohlts v. Gilkinson*, 87 Conn. App. 634 (2005).

Action Against State. Connecticut does not permit punitive damages to be assessed against a municipality unless expressly authorized by statute or through statutory construction. *Trimachi v. Conn. Workers Comp. Comm.*, 2000 Conn. Super. (LexisNexis 1548).

Breach of Contract. Punitive damages are not ordinarily recoverable for breach of contract. *Brodeur & Co., CPAs, P.C. v. Charlton*, 2003 Conn. Super. (LexisNexis 2833). However, in Connecticut, breach of contract founded on tortious conduct may allow the award of punitive damages. Such tortious conduct must be alleged in terms of wanton and malicious injury, evil motive and violence. *Silano v. Granfors*, 2004 Conn. Super. (LexisNexis 414).

Civil Actions. Under CONN. GEN. STAT. § 52-257, where defendant intentionally struck plaintiff, and as a direct and proximate result of the harmful and offensive conduct plaintiff sustained personal injuries and continuing pain and suffering and medical expenses, the court awarded plaintiff economic, non-economic, and punitive damages. *Murphy v. Lachapell*, 2000 Conn. Super. (LexisNexis 3546).

Credit Practices. Under CONN. GEN. STAT. § 46a-98a, a creditor who discriminates in a credit transaction on the basis of sex, age, race, color, religious creed, national origin, ancestry, marital status, mental retardation, learning disability, blindness, physical disability or sexual orientation shall be liable for punitive damages.

Defamation. CONN. GEN. STAT. § 52-237 states that in any action for a libel, unless the plaintiff proves either malice in fact or that the defendant, after having been requested by the plaintiff in writing to retract the libelous charge failed to do so within a reasonable time, the plaintiff will recover nothing but actual damages. In *Silva v. Sinchak*, 1993 Conn. Super. (LexisNexis 345), the attorney alleged facts concerning the defendants' failure to properly retract the allegedly libelous statements. This was sufficient to sustain the claim for punitive damages.

Employer Liability for Employee Conduct. Under Connecticut law, punitive damages may be awarded against an employer only if:

1. the employer or a managerial agent of the employer authorized the employee's conduct and the manner of engaging in such conduct, or
2. the employee was unfit and the employer or a managerial agent was reckless in employing or retaining him, or
3. the employee was employed in a managerial capacity and was acting in the scope of employment, or
4. the employer or a managerial agent of the employer ratified or approved the employee's conduct

Stohlts v. Gilkinson, 867 A.2d 860, 874 (Conn. App. Ct. 2005) (citing 4 Restatement (Second) of Torts, § 909 (1979)).

Environmental Liability. There is no specific law in Connecticut addressing the issue of punitive damages and environmental liability. However, in civil cases, in order for punitive or exemplary damages to be awarded, the evidence must reveal a reckless indifference to the rights of others or an intentional and wanton violation of those rights. *Chapman Lumber, Inc. v. Clifford L. Tager*, 2005 Conn. Super. (LexisNexis 863) (Mar. 30, 2005).

General Liability. A punitive damages award cannot stand in the absence of a verdict in the plaintiff's favor on a cause of action sounding in tort. *Barry v. Posi-Seal Int'l Inc.*, 672 A.2d 514 (Conn. App. 1996).

Under section 52-257, where defendant intentionally struck plaintiff, and as a direct and proximate result of the harmful and offensive conduct plaintiff sustained personal injuries and continuing pain and suffering and medical expenses, the court awarded plaintiff economic, non-economic and punitive damages. *Murphy v. Lachapell*, 2000 Conn. Super. (LexisNexis 3546) (Dec. 13, 2000).

Health Care. Under CONN. GEN. STAT. § 19a-550(e), where the deprivation of any right or benefit created or established for the well-being of a patient is found to have been willful or in reckless disregard of the rights of the patient, punitive damages may be assessed.

Home Improvement. A contractor was subject to punitive damages and attorney fees where (1) he overcharged a homeowner; (2) he was unlicensed and unregistered, in violation of the Home Improvement Act, CONN. GEN. STAT. § 20-418; and (3)

the contract failed to include a provision advising the homeowner of his right to cancel, as required by CONN. GEN. STAT. § 42-134a. *Bevilacqua v. Petrillo*, 1996 Conn. Super. (LexisNexis 18) (1996).

Insurer's Bad Faith. Pursuant to CONN. GEN. STAT. § 38a-815, an insurer who acts unreasonably and in bad faith by withholding insurance benefits may be liable in tort, yet only if the insured sues for punitive damages must the tortious conduct be alleged in terms of wanton and malicious injury, evil motive and violence, and outrageous conduct. *Masik v. Costa*, 2000 Conn. Super. (LexisNexis 2550). A recipient's request for admission of financial records of a workers' compensation insurer was permitted because the insurer's financial circumstances were relevant to the award of punitive damages under the Connecticut Unfair Trade Practices Act, CONN. GEN. STAT. § 42-110g(a) (2010). The recipient alleged that the insurer unilaterally reduced his workers' compensation benefits in violation of CONN. GEN. STAT. § 31-296, and the court found that punitive damages were designed to deter future conduct. *Lenz v. CAN Assurance Co.*, 1993 Conn. Super. (LexisNexis 1200).

Landlord and Tenant. Where a landlord removed a tenant's belongings, placed them in a garage, and changed the locks, a court awarded double damages, punitive damages, attorney fees, and costs. *Gaylord v. Mosher*, 1991 Conn. Super. (LexisNexis 2691). Tenants established an entitlement to a punitive damages award when they showed that the landlord's action in locking them out of their office space and conversion of their valuable computer equipment was oppressive, unethical and unscrupulous conduct in violation of the CONN. GEN. STAT. § 42-110a. *Haskins v. Brown*, 2003 Conn. Super. (LexisNexis 1799).

Motor Vehicles. An employer of a truck driver could be liable for punitive damages where the truck driver deliberately or with reckless disregard caused a collision in violation of CONN. GEN. STAT. § 14-222 because CONN. GEN. STAT. §§ 14-295 and 52-183 expressed a legislative intent to alter the common law rule and impose vicarious liability on an employer for punitive damages. *Rosado v. Choiniere*, 1998 Conn. Super. (LexisNexis 438).

Product Liability. CONN. GEN. STAT. § 52-240(b) (2010) allows punitive damages to be awarded if the claimant proves that the harm suffered was the result of the product seller's reckless disregard for the safety of product users, consumers or others who were injured by the product. In a consumer's suit alleging that her hip prosthesis was defective, the consumer was unable to obtain punitive damages because there was no evidence that the manufacturer acted with disregard for consumer dangers. *Dunn v. Zimmer, Inc.*, 2005 U.S. Dist. (LexisNexis 5347) (D. Conn 2005).

PUNITIVE DAMAGES REVIEW

CONN. GEN. STAT. § 52-240(b) (2010). Connecticut permits awards of punitive damages for harm to property as well as to persons. *Greene v. Black & Decker*, 1998 Conn. Super. (LexisNexis 668).

Professional Liability. Where the deprivation of any right or benefit created or established for the well-being of a patient is found to have been willful or in reckless disregard of the rights of the patient, punitive damages may be assessed. CONN. GEN. STAT. § 19a-550(e) (2010). A contractor may be subject to punitive damages. *Bevilacqua v. Petrillo*, 1996 Conn. Super. (LexisNexis 18) (Jan. 2, 1996); CONN. GEN. STAT. § 19a-550(e).

Trade Secret. Under CONN. GEN. STAT. § 35-53, if the court finds willful and malicious misappropriation, the court may award punitive damages. The trial court did not abuse its discretion in awarding punitive damages under CONN. GEN. STAT. § 35-53(b) where the award was supported by an undisputed finding that former employees' conduct in misappropriating their corporate employers' trade secrets was willful and malicious. *Smith v. Snyder*, 267 Conn. 456 (2004). See also, *Elm City Cheese Co., Inc. v. Federico*, 251 Conn. 59 (1999) (Plaintiff's cheese manufacturing business operations were a protectable trade secret. Accordingly defendant, a former employee, was held liable for punitive damages and attorney fees, as also was enjoined from further use of the former employer's trade secret.)

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

No. Under *Tedesco v. Md. Cas. Co.*, 18 A.2d 357 (Conn. 1941), a tortfeasor may not protect himself from liability by seeking indemnity from his insurer for punitive damages that were imposed on him for his own intentional or reckless wrongdoing. See also *Bodner v. United Serv. Auto. Ass'n*, 610 A.2d 1212 (Conn. 1992); *Laudette v. Peerless Ins. Co.*, 2000 Conn. Super. (LexisNexis 1750).

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

There is no statute or decision on point.

C. What is the relationship of punitive to compensatory damages?

Compensatory and punitive damages, although usually awarded at the same time, serve different purposes. Compensatory damages are intended to redress the concrete loss that a plaintiff has suffered by reason of a defendant's conduct. By contrast, punitive damages are aimed at deterrence and retribution. *Stack v. Jaffee*, 306 F. Supp. 2d 137 (D. Conn. 2003). However, under Connecticut law, common law punitive damages primarily serve compensatory purposes. *Lyons v. Nichols*, 1999 Conn. Super. (LexisNexis 1297). By requiring the payment of actual costs and attorney fees, punitive damages leave to the injured party the full payment and full use of his compensatory damages award, no more and no less, undiminished by having to pay costs and attorney fees from the award. *Engram v. Zapert*, 1996 Conn. Super. (LexisNexis 2955).

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

Punitive damages are limited to the costs of litigation, less taxable costs. *Purcell v. Vogt*, 2003 Conn. Super. (LexisNexis 1339). However, there are statutory exceptions to the rule that punitive damages are limited to litigation expenses in excess of taxable costs. *Freeman v. Alamo Mgmt. Co.*, 607 A.2d 370 (Conn. 1991). For example, CONN. GEN. STAT. § 47a-46 states that double damages are allowed in a civil action if the defendant has entered into the land, tenement or dwelling unit by force or after entry held the same by force or otherwise injured the party aggrieved in the manner described in § 47a-43. Additionally, in *Staehle v. Michael's Garage, Inc.*, 646 A.2d 888 (Conn. App. 1994), the court held that the recognized method of determining punitive damages under the Connecticut Unfair Trade Practices Act was to award an amount equal to the plaintiff's actual damages.

E. To whom are punitive damages payable?

Generally, an award of punitive damages is payable to the claimant. Punitive damages may be awarded to a spouse in connection with a loss of consortium claim. *Champagne v. Raybestos-Manhattan, Inc.*, 562 A.2d 1100 (Conn. 1989).

Delaware



I. PUNITIVE DAMAGES

A. May they be awarded?

Yes. Punitive damages generally are available in Delaware. *Littleton v. Young*, 608 A.2d 728 (Del. 1992); *Jardel Co., Inc. v. Hughes*, 523 A.2d 518 (Del. 1987). An award of punitive damages must subsist on grounds other than making the plaintiff whole. *Jardel Co., Inc. v. Hughes*, 523 A.2d 518 (Del. 1987); but see *Beals v. Wash. Int'l Inc.*, 386 A.2d 1156 (Del. Ch. 1978) (where the court states that the Court of Chancery has no jurisdiction to assess punitive damages).

B. If so, in what circumstances?

Standard of Conduct. The penal aspect and public policy considerations that justify the imposition of punitive damages require that they be imposed only after a close examination of whether the defendant's conduct is outrageous because of evil motive or reckless indifference to the rights of others. Mere inadvertence, mistake or errors of judgment that constitute mere negligence will not suffice. It is not enough that a decision be wrong. It must result from a conscious indifference to the decision's foreseeable effect. *Eby v. Thompson*, 2005 Del. Super. (LexisNexis 63) (Feb. 8, 2005); *Jardel Co. v. Hughes*, 523 A.2d 518 (Del. 1987).

Standard of Proof. Clear and convincing evidence is required to obtain punitive damages. *Kanga v. Gannett Co.*, 1998 Del. Super. (LexisNexis 427) (1998). When addressing the amount of punitive damages to assess, the defendant is entitled to present mitigating evidence. *Wilhem v. Ray*, 903 A.2d 745 (2006).

Breach of Contract. Exemplary damages are not recoverable as a general rule in the pure action for breach of contract. Only when there appears in the record a willful wrong, in the nature of deceit, will the court award punitive damages. *G.K.T., Inc. v. Jackson*, 2000 Del. C.P. (LexisNexis 32).

Punitive damages will not be justified based solely on a showing that the defendant took a stance that was unreasonable or unjustified or that the conduct was intentional, unless the intentional breach is similar in character to an intentional tort. *Pierce v. Int'l Ins. Co. of Ill.*, 671 A.2d 1361 (Del. 1996). Punitive damages may be recoverable for breach of contract if the conduct of the defendant amounts to an independent tort. *E.I.*

DuPont de Nemours & Co. v. Pressman, 679 A.2d 436 (Del. Super. Ct. 1996). Although the UCC imposes a duty of good faith and fair dealing, punitive damages generally are not awarded for a breach of this duty. *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436 (Del. 1996).

Credit Services. A buyer injured by a violation of Chapter 24 dealing with credit services organizations may be awarded punitive damages. 6 Del. C. § 2409.

Commerce and Trade. 6 Del. C. § 2513 addresses consumer fraud. Under this section, the act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact in connection with the sale, lease or advertisement of any merchandise, is an unlawful practice. If the fraud is gross, oppressive or aggravated, or where it involves breach of trust or confidence, the plaintiff may recover punitive damages. *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069 (Del. 1983).

Employer Liability for Employee Conduct. Under Delaware law, punitive damages may be awarded against an employer only if:

1. the employer or a managerial agent of the employer authorized the employee's conduct and the manner of engaging in such conduct, or
2. the employee was unfit and the employer or a managerial agent was reckless in employing or retaining him, or
3. the employee was employed in a managerial capacity and was acting in the scope of employment, or
4. the employer or a managerial agent of the employer ratified or approved the employee's conduct.

Ramada Inns, Inc. v. Dow Jones & Co., Inc., No. 83C-AU-56, 1988 Del. Super. (LexisNexis 29), at *3-4 (citing 4 Restatement (Second) of Torts, § 909 (1979)).

Environmental Liability. There is no law in Delaware specifically allowing or denying punitive damages in the case of

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environmental liability. However DEL. CODE ANN. tit. 7 § 6309(b) imposes civil penalties with regard to hazardous waste disposal. *Wilson v. Chem-Solv, Inc.*, 1988 Del. Super. (LexisNexis 372).

Housing. Under 6 Del. C. § 4613, if a discriminatory housing practice is found to have occurred, the aggrieved person may be awarded punitive damages.

Insurer's Bad Faith. Punitive damages may be available if, for example, a delay in payment or the denial of coverage was willful or malicious. *Pierce v. Int'l Ins. Co. of Ill.*, 671 A.2d 1361 (Del. 1996).

Under Del. Super. Ct. Civ. R. 12, where there were no plausible circumstances under which it could be proven that an insurer withheld benefits without any reasonable justification, the plaintiffs' punitive damages claims were dismissed. *Krauss v. State Farm Mut. Auto. Ins. Co.*, 2004 Del. Super. (LexisNexis 127) (2004).

A cause of action for bad faith delay, or the nonpayment of an insured's claim in a first-party insured-insurer relationship, is cognizable under Delaware law as a breach of contractual obligations. Punitive damages may be recoverable for an intentional or malicious breach of a contract of insurance. *Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254 (Del. 1995).

Product Liability. In the product liability context, imposition of punitive damage claims is limited to the persistent distribution of an inherently dangerous product with knowledge of its injury-causing effect among the consuming public. Punitive damages are imposed only after a close examination of whether the defendant's conduct is outrageous because of evil motive or reckless indifference to the rights of others. Inadvertence, mistakes or errors of judgment that constitute mere negligence will not suffice. *Greenlee v. Imperial Homes Corp.*, 1994 Del. Super. (LexisNexis 386).

Professional Liability. There is no outright bar against awarding punitive damages on an attorney malpractice action. *Lillquist v. Rodriguez*, 1995 Del. Super. (LexisNexis 553); *Jardel Co. v. Hughes*, 523 A.2d 518 (Del. 1987). While ordinary negligence will not suffice to support an award of punitive damages, intentional or willful conduct with reckless disregard for the interests of a client may subject an attorney to the imposition of punitive damages. *Cummings v. Pinder*, 574 A.2d 843 (Del. 1990). In any action for medical negligence, punitive damages may be awarded only if it is found that the injury complained of was maliciously intended or was the result of willful or wanton misconduct by the health care provider. 18 Del. C. § 6855 (2005).

Property. Under 25 Del. C. § 1501, addressing the liability of owners or occupiers of land for injury to guests or trespassers, punitive damages were warranted against a mall lessee who took no security precautions in the face of numerous crimes on mall property, which resulted in the rape and murder of a mall employee. *Craig v. A.A.R. Realty Corp.*, 576 A.2d 688 (Del. Super. Ct. 1989); but see *Jardel Co. v. Hughes*, 523 A.2d 518 (Del. 1987), where the court stated that while mercantile landlords should be encouraged to provide safe premises for their customers and employees, they should not be punished for mere inadequacy, as a lesson to other landlords.

Uninsured/Underinsured Motorists. 18 Del. C. § 3902 does not preclude an insurer from agreeing to provide coverage to its insured for any punitive damages that might be assessed against an uninsured motorist involved in an accident with its insured. Absent explicit policy wording clearly excluding or not extending coverage for punitive damages, Delaware courts generally hold that liability coverage includes punitive damages. *Jones v. State Farm Auto. Ins. Co.*, 610 A.2d 1352, 1354 (Del 1992).

The General Assembly has formulated no policy forbidding insurance coverage of punitive damages. In declaring its intent to protect the public in its possible claims against a tortfeasor, the General Assembly did not limit automobile liability insurance to compensatory damages. *Valley Forge Ins. Co. v. Jefferson*, 628 F. Supp. 502 (Del. 1986).

Wrongful Death. Where death is simultaneous with an accident, damages based upon pain and suffering that decedent experiences prior to death and punitive damages are not recoverable. *Benson v. Lynch*, 404 F. Supp. 8 (Del. 1975). Punitive damages are not allowed under the wrongful death statute, but are available under the survival action statutes for the pain and suffering incurred by the deceased prior to death, and such damages could be awarded against defendants where the evidence was sufficient to find a reckless indifference to the risk their actions posed. However, such damages would not be awarded against a defendant who had taken necessary and reasonable precautions against the injury suffered by the deceased. *Sterner v. Wesley College, Inc.*, 747 F. Supp. 263 (Del. 1990); see also 10 Del. C. § 3701.

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

Yes. Delaware law permits insurance for punitive damages awards to the benefit of the wrongdoer. *Whalen v. On Deck Inc.*, 514 A.2d 1072 (Del. 1986).

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

Not applicable.

C. What is the relationship of punitive to compensatory damages?

The trial court has the duty to ensure that punitive damages have the required factual showing of recklessness and that any award of punitive damages be proportionate to the award of compensatory damages. *Gannett Co. v. Kanaga*, 750 A.2d 1174 (Del. 1998).

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

Courts reviewing punitive damages must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 2003 U.S. (LexisNexis 2713).

E. To whom are punitive damages payable?

An injured plaintiff may recover punitive damages. *Jardel Co., Inc. v. Hughes*, 523 A.2d 518 (Del. 1987). Punitive damages are recoverable by the administrator of a decedent's estate, where the conduct of the defendant was wanton, because the purpose of the award is to punish the tortfeasor. *Reynolds v. Willis*, 209 A.2d 760 (Del. 1965).

District of Columbia

I. PUNITIVE DAMAGES

A. May they be awarded?

Yes. See Standardized Civil Jury Instructions for the District of Columbia at 16.01-16.03 (2010); *King v. Kirlin Enters., Inc.*, 626 A.2d 882 (D.C. Cir. 1993).

B. If so, in what circumstances?

Standard of Conduct. Under District of Columbia law, **punitive damages** are warranted only when the defendant commits a tortious act accompanied with fraud, ill will, recklessness, wantonness, oppressiveness, willful disregard of the plaintiff's right, or other circumstances tending to aggravate the injury. *Pitt v. D.C.*, 377 U.S. App. D.C. 103 (D.C. Cir. 2007) (citations and quotations omitted). Punitive damages are justified where defendant "commits a tortious act accompanied by fraud, ill will, recklessness, wantonness, oppressiveness, willful disregard of plaintiff's rights or other circumstances tending to aggravate the injury. Whether punitive damages will lie depends on the intent with which the wrong was done..." *Wash. Med. Ctr. v. Holle*, 573 A.2d 1269 (D.C. 1990); see also *Dalo v. Kivitz*, 596 A.2d 35 (D.C. 1991).

Standard of Proof. In order to sustain an award of punitive damages, the plaintiff must prove by a preponderance of the evidence that the defendant committed a tortious act, and by clear and convincing evidence that the act was accompanied by conduct and a state of mind evincing malice or its equivalent. *Jonathan Woodner Co. v. Breeden*, 665 A.2d 929, 938 (D.C. 1995). **Punitive damages** may be awarded "only if it is shown by **clear and convincing** evidence that the tort committed by the defendant was aggravated by egregious conduct and a state of mind that justifies **punitive damages**." *Oliver v. Mustafa*, 929 A.2d 873 (D.C. 2007) (citations and quotations omitted). In order to impose **punitive damages**, the jury must find by **clear and convincing** evidence that the tortious act was accompanied by conduct and a state of mind evincing malice or its equivalent. *Pitt v. D.C.*, 491 F.3d 494 (D.C. Cir. 2007) (citations omitted). The jury may infer the requisite state of mind from the surrounding circumstances. *Id.*

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Actions Against District. Punitive damages may not be awarded in contract disputes against the District of Columbia. D.C. CODE § 2-308.02 (LexisNexis 2010).

Breach of Contract. Punitive damages are not awarded for mere breach of contract, regardless of motives or conduct of breaching party. *Walch v. Ford Motor Co.*, 627 F. Supp. 1519 (D.D.C. 1986). Punitive damages may be awarded when conduct constituting breach of contract amounts to an independent tort or is accompanied by fraudulent conduct. *Wash. v. Gov't Employees Ins. Co.*, 769 F. Supp. 383 (D.D.C. 1991).

Although punitive damages generally are not recoverable for breach of contract, this rule is inapplicable if an independent fiduciary relationship exists between the parties. *Wagman v. Lee*, 457 A.2d 401 (D.C. 1983), *cert. denied*, 464 U.S. 849 (1983). Breach of duty, whether characterized as merely contractual or fiduciary, must be sufficiently willful, malicious, or outrageous to warrant an assessment of punitive damages. *Dwyer*, 657 A.2d 1132, *supra*.

Employer Liability for Employee Conduct. Under District of Columbia law, an employer cannot be held liable for exemplary or punitive damages merely by reason of wanton, oppressive or malicious intent on the part of an employee. *Aetna Life Ins. Co. v. Brewer*, 12 F.2d 818, 821 (D.C. Cir. 1926). An employer will not be held liable for exemplary damages for the act of an employee unless it is proven that: (i) the employer authorized or approved the act for which the exemplary damages are claimed, or (ii) the employer approved of or participated in the wrong of which the employee was guilty, or (iii) the employer did not exercise proper care in selecting the employee. *Id.*

Environmental Liability. Punitive damages are awarded where statutorily allowed, such as pursuant to the Resource

Conservation and Recovery Act. See *Chem. Waste Mgmt., Inc. v. U.S.E.P.A.*, 649 F. Supp. 347 (D.D.C. 1986). In interpreting the Comprehensive Environmental Response Compensation and Liability Act, punitive damages were held not consistent with statutory provision. *State of Ohio v. U.S. Dept. of Interior*, 880 F.2d 432 (D.D.C. 1989). See also D.C. CODE Title 8, Environmental and Animal Control and Protection at § 8-1446 (authorizing award of punitive damages for release of hazardous materials in transit if plaintiff's injuries were caused by the defendant's wanton or reckless disregard for public safety) and numerous sections authorizing penalties.

Insurer's Bad Faith. A tort claim for bad faith breach of contract is not recognized in the District of Columbia. *Fireman's Fund Ins. Co. v. CTIA- The Wireless Ass'n*, 480 F. Supp. 2d 7 (D.D.C. 2007). An insured may not request punitive damages for its traditional breach of contract claims. *Id. In dicta*, the court in *Fireman's* also indicates that it "is not convinced that in the District of Columbia the duty to defend gives rise to a fiduciary duty between the insurer and insured such that punitive damages may be awarded for its breach," although the court acknowledges that there is some support in District of Columbia law for the notion that punitive damages can be awarded for a breach of a fiduciary duty. *Id.* (citing *Wagman v. Lee*, 457 A.2d 401, 404 (D.C. 1983)).

Product Liability. Punitive damages may be awarded if the plaintiff can prove that the defendant's conduct supports the claim, and the conduct is clearly established. See *Nakajima v. Gen. Motors Corp.*, 857 F. Supp. 100 (D.D.C. 1994).

Professional Liability. Punitive damages may be awarded in cases for legal malpractice so long as the award is not excessive. *Breezevale Ltd. v. Dickinson*, 879 A.2d 957, 969 (D.C. 2005). Recovery of punitive damages requires a showing of willful misconduct or malice. *Dalo v. Kivitz*, 596 A.2d 35 (D.C. 1991).

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

The District of Columbia is undecided on the insurability of punitive damages. Although it is clear that under District of Columbia law, contract provisions may be invalidated when they are contrary to public opinion, there is no District of Columbia precedent specifically declaring that indemnification of punitive damages awards is contrary to public policy. See *Salus v. Cont'l Cas. Co.*, 478 A.2d 1067, 1070 (D.C. 1984) (suggesting, but not holding, that indemnification of punitive damages may be contrary to public policy).

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

The District of Columbia is undecided on this issue. See Section II. A. above.

C. What is the relationship of punitive to compensatory damages?

An award of punitive damages is impermissible without a valid basis for compensatory damages. *Bernstein v. Fernandez*, 649 A.2d 1064 (D.C. 1991). Before punitive damages may be

awarded, there must be a basis in the record for an award of actual damages, even if nominal. *Maxwell v. Gallagher*, 709 A.2d 100 (D.C. 1998). A plaintiff, however, need not prove anything more than nominal actual damages to justify the imposition of punitive damages. *Robinson v. Sarisky*, 535 A.2d 901 (D.C. 1988).

A judge must always be prepared to adjust an award of punitive damages that is clearly excessive in light of all circumstances, including the financial situation of the defendant. *Quinn v. DiGuilian*, 739 F.2d 637 (D.C. Cir. 1984). The defendant has the burden of producing evidence of his own financial condition. See *Hutchinson v. Stuckey*, 952 F.2d 1418, n.4 (D.C. Cir. 1992).

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

The court has discretion to grant *remittitur* when the verdict is so large that it is beyond all reason, or so great as to shock

conscience; however, in such a case, the verdict must be so inordinately large as obviously to exceed the maximum limit of the reasonable range within which the jury may properly operate. See *Daka, Inc. v. Breiner*, 711 A.2d 86 (D.C. 1998). Where there is no express statutory limit of punitive damages, punitive damages cannot be of a magnitude to constitute a deprivation of property without due process. See *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal Inc.*, 492 U.S. 257 (1989).

E. To whom are punitive damages payable?

Generally, punitive damages are payable to the plaintiff. Limitations on those persons authorized to receive punitive damages are set forth in statute.



I. PUNITIVE DAMAGES

A. May they be awarded?

Yes. A plaintiff's right to claim punitive damages is subject to the plenary authority of the legislature. *Alamo Rent-A-Car v. Mancusi*, 632 So. 2d 1352 (Fla. 1994). The statutes governing punitive damages awards were amended, with an effective date of October 1, 1999, unless otherwise expressly provided. See 1999 Fla. Laws ch. 99-225, amending FLA. STAT. ANN. §§ 768.72, 768.725, 768.73, 768.735, 768.736 and 768.737.

B. If so, in what circumstances?

Standard of Conduct. A defendant may be held liable for punitive damages only if the trier of fact finds that the defendant was personally guilty of intentional misconduct or gross negligence. FLA. STAT. ANN. § 768.72(2) (LexisNexis 2010). Punitive damages may be awarded when the acts complained of have been committed with malice, moral turpitude, wantonness, willfulness, outrageous aggravation or with a reckless indifference for the rights of others. See, e.g., *W.R. Grace & Co. v. Waters*, 638 So. 2d 502 (Fla. 1994); see also *Alamo Rent-A-Car*, 632 So. 2d 1352. Something more than gross negligence is needed to justify the imposition of punitive damages. *White Constr. Co. v. Dupont*,

455 So. 2d 1026 (Fla. 1984) receded from on other grounds by *Murphy v. Int'l Robotic Sys. Inc.*, 766 So. 2d 1010 (Fla. 2000); *S & S Toyota, Inc. v. Kirby*, 649 So. 2d 916 (Fla. Dist. Ct. App. 1995).

Standard of Proof. Clear and convincing evidence is required to sustain an award of punitive damages. FLA. STAT. ANN. § 768.725 (LexisNexis 2010).

Prior Punitive Damages Award. Effective October 1, 1999, punitive damages may not be awarded against a defendant in a civil action if that defendant establishes, before trial, that punitive damages have previously been awarded against that defendant in any state or federal court in any action alleging harm from the same act or single course of conduct for which the claimant seeks compensatory damages. If the court determines, however, by clear and convincing evidence, that the amount of prior punitive damages was insufficient to punish that defendant, the court may permit the jury to consider an award of subsequent punitive damages. See FLA. STAT. ANN. §§ 768.73(2)(A) and (B).

In *Owens-Corning Fiberglass Corp. v. Ballard*, 749 So.2d 483 (Fla. 1999), the Supreme Court of Florida affirmed a punitive damages award of \$31 million, almost 18 times the amount of

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compensatory damages awarded, against a manufacturer of an asbestos-containing product. The court acknowledged that under the amended version of FLA. STAT. ANN., § 768.73, effective October 1999, the punitive damages award likely would not be affirmed.

Actions Against State. Punitive damages are not permitted against the state and its agencies. Fla. Stat. Ann. § 768.28(5).

Breach of Contract. Punitive damages may be recovered in breach of contract actions only where the act constituting the breach would also give rise to an independent cause of action sounding in tort. *Ferguson Transp., Inc. v. N. Am. Van Lines, Inc.*, 687 So. 2d 821 (Fla. 1997); see also *In re St. Laurent*, 991 F.2d 672 (Eleventh Cir. 1993) citing *Lewis v. Guthartz*, 428 So. 2d 222 (Fla. 1982).

Employer Liability for Employee Conduct. In order to support a claim of vicarious liability against an employer for punitive damages under Florida law, the plaintiff must (a) establish that the conduct of the employee was willful and wanton and (b) establish some fault on the part of the employer. *Schropp v. Crown Eurocars*, 654 So. 2d 1158, 1160 (Fla. 1995). It is not necessary for the plaintiff to establish that the employer acted with the same heightened culpability as the employee. It is sufficient if the plaintiff establishes ordinary negligence on the part of the employer. *Id.*

General Liability. In personal injury claims, punitive damages are not permitted unless the defendant's conduct constitutes the crime of culpable negligence or the conduct must warrant punitive damages under Florida Statutes section 440.11(1). See, e.g., *Mekamy Oaks v. Snyder*, 659 So. 2d 1290 (Fla. Dist. Ct. App. 1995) (supervisor's conduct did not rise to the level of warranting punitive damages where the injured employee alleged that the supervisor had removed a safety device from a riding mower, resulting in injury). Punitive damages may be awarded in an action against property owners in a personal injury claim. See, e.g., *Southstar Equity, LLC v. Chau*, 998 So. 2d 625 (Fla. Dist. Ct. App. 2008). In *Southstar Equity*, the court found evidence was sufficient to establish either gross negligence or intentional misconduct so as to support an award for punitive damages

where a tenant was told, based on management policy, that there was no crime problem at the apartment complex and was later carjacked in the complex parking lot and shot. *Id.*

Insurer's Bad Faith. In Florida, an action brought by an insured tortfeasor against an insurer sounds in contract, unlike most jurisdictions where it can be in tort or a combination of both tort and contract. *Swamy, M.D. v. Caduceus Self Ins. Fund, Inc.*, 648 So. 2d 758, 760 (Fla. Dist. Ct. App. 1995). Specifically, the damages for the insurer's breach of its contractual duty to its insured are limited to those damages contemplated by the parties at the time of contract formation. *Id.* However, under Florida Statutes, punitive damages may be awarded against an insurer where "the acts giving rise to the violation occur with such frequency as to indicate a general business practice and these acts are: (a) willful, wanton, and malicious; (b) in reckless disregard for the rights of any insured; or (c) in reckless disregard for the rights of a beneficiary under a life insurance contract." FLA. STAT. ANN. § 624.155 (LexisNexis 2010); see, e.g., *Scott v. Progressive Express Ins. Co.*, 932 So. 2d 475 (Fla. Dist. Ct. App. 2006). (The insurer's failure to pay benefits to the insured under his policy within 60 days of receiving notice under Florida Statutes section 624.155 was sufficient to state a cause of action for punitive damages.)

Product Liability. Punitive damages are available in product liability cases. In *Owens-Corning Fiberglass Corp. v. Rivera*, 683 So. 2d 154 (Fla. 3d DCA 1996), the Third District Court of Appeals affirmed a \$1.5 million punitive damages award against a manufacturer of an asbestos-containing product, holding that the punitive damages award did not violate the due process clause.

Professional Liability. Prior to October 1, 1999, punitive damages were recoverable based on the malpractice of a professional who had been more than grossly negligent. *Ray-Mar Beauty Coll., Inc. v. Ellis Rubin Law Offices, P.A.*, 475 So. 2d 718 (Fla. Dist. Ct. App. 1985). However, after October 1, 1999, pursuant to statute, a defendant in any civil action may be held liable for **punitive damages** if the defendant was personally guilty of intentional misconduct or gross negligence. FLA. STAT. ANN. § 768.72(2) (LexisNexis 2010.)

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

No. One may not insure against liability for punitive damages that results from one's own misconduct. *U.S. Concrete Pipe Co. v. Bould*, 437 So. 2d 1061 (Fla. 1983); see also *Morgan Int'l Realty, Inc. v. Dade Underwriters Ins. Agency, Inc.*, 617 So. 2d 455 (Fla. Dist. Ct. App. 1993); *Aromin v. State Farm Fire & Cas. Ins. Co.*, 908 F.2d 812 (Eleventh Cir. 1990).

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

Public policy does not preclude insurance coverage of punitive damages when insured is vicariously liable for another's wrong. *U.S. Concrete Pipe Company v. Bould*, 437 So. 2d 1061 (Fla. 1983).

While vicariously assessed punitive damages may be insured, an insurer is relieved of the responsibility to provide coverage where the insured's direct fault constitutes gross negligence or willful and wanton misconduct. See *Highlands Ins. Co. v. McCutchen*, 446 So. 2d 1073 (Fla. 1984) approving, 424 So. 2d 26 (Fla. Dist. Ct. App. 1982) (based upon the authority of *U.S. Concrete*, supra); see also *Morgan Int'l Realty, Inc. v. Dade Underwriters Ins. Agency, Inc.*, 617 So. 2d 455 (Fla. Dist. Ct. App. 1993).

C. What is the relationship of punitive to compensatory damages?

A compensatory damages award need not underlie a punitive damages award in a case in which the jury has made express findings against the defendant. A jury finding of liability is equivalent to a finding of nominal damages. *Ault v. Lohn*, 538 So. 2d 454 (Fla. 1989); *Ad-Vantage Tel. Directory Consultants, Inc. v. GTE Directories Corp.*, 943 F.2d 1511 (Eleventh Cir. 1991); *Platte v. Whitney Realty Co.*, 538 So. 2d 1358 (Fla. Dist. Ct. App. 1989).

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

Yes. In any civil action based on negligence, strict liability, product liability, misconduct in commercial transactions, professional liability, or breach of warranty, and involving willful, wanton or gross misconduct, the judgment for the total amount of punitive damages awarded to a claimant may not

exceed three times the amount of compensatory damages or \$500,000, whichever is higher. FLA. STAT. ANN. § 768.73(1)(a)-(b) (LexisNexis 2010). The statute provides only two exceptions. First, where the trier of fact finds that the wrongful conduct was motivated solely by unreasonable financial gain and determines that the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, were actually known by the defendant, the judgment for the total amount of punitive damages awarded to a claimant may not exceed four times the amount of compensatory damages or \$2 million, whichever is higher. *Id.*

Second, if the fact finder determines that at the time of the injury the defendant had a specific intent to harm the claimant, and the defendant's conduct did in fact harm the claimant, there shall be no cap on punitive damages. *Id.*

The court may not exclude one of the elements of the compensatory damages award when reviewing the amount of a punitive damages award. *Christenson & Assocs. v. Palumbo-Tucker*, 656 So. 2d 266 (Fla. Dist. Ct. App. 1995) (prejudgment interest is an element of compensatory damages).

While a punitive damages award should provide some retribution and deterrence, it should not be in an amount that will financially destroy or bankrupt the defendant. *Arab Termite & Pest Control, Inc. v. Jenkins*, 409 So. 2d 1039 (Fla. 1982); see also *Brooks v. Rios*, 707 So. 2d 374 (Fla. Dist. Ct. App. 1998).

E. To whom are punitive damages payable?

Generally, punitive damages are payable only to the plaintiff directly injured as a result of the misconduct giving rise to the entitlement to the award. A spouse of the injured plaintiff is not entitled to punitive damages under a derivative claim against the tortfeasor(s). See *Martin v. Story*, 97 So. 2d 343 (Fla. Dist. Ct. App. 1957); *Moran v. Stephens*, 265 So. 2d 379 (Fla. Dist. Ct. App. 1972). No statutory authority or case law in Florida addresses the issue of whether a parent may be awarded punitive damages for injuries to his or her child. Based upon the rationale set forth above with respect to spousal claims, however, a parent would likely be prohibited from receiving a punitive damages award under his or her derivative claim under Florida law.

PUNITIVE DAMAGES REVIEW

Georgia



I. PUNITIVE DAMAGES

A. May they be awarded?

Yes. Ga. Code Ann. § 51-12-5.1(c) (2010). Under Georgia law, damages are awardable solely to punish, penalize or deter the defendant; however, something more than mere commission of a tort is always required for punitive damages, and there must be circumstances of aggravated conduct or outrage, such as spite and malice, or fraudulent or evil motive on the part of the defendant, or such conscious and deliberate disregard of the interests of others that the conduct may be called willful or wanton. *Banks v. ICI Ams.* 469 S.E. 2d 171, 175 (Ga. 1996).

B. If so, in what circumstances?

Standard of Conduct. Punitive damages may be awarded where the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression or that entire want of care that would raise the presumption of conscious indifference to consequences. Ga. Code Ann. § 51-12-5.1(b) (2010); *Banks*, 469 S.E.2d at 175 (where there are aggravated circumstances in the tort, including malice, willfulness, wantonness or conscious indifference to the consequences of conduct, punitive damages may be awarded); *Fickling & Walker Co. v. Giddens Constr. Co.*, 376 S.E.2d 655, 659 (Ga. 1989).

Standard of Proof. Clear and convincing evidence is required to sustain a punitive damages award. Ga. Code Ann. § 51-12-5.1(b); *Banks*, 469 S.E.2d 171, *supra*; *Mack Trucks, Inc. v. Conkle*, 436 S.E.2d 635 (Ga. 1993).

Actions Against State. Punitive or exemplary damages may not be awarded against the state. Ga. Code Ann. § 50-21-30.

Breach of Contract. Punitive damages may not be awarded in a breach of contract action. Ga. Code Ann. §§ 13-6-10, 51-12-5.1 (2010); *Trust Co. Bank v. Citizens & S. Trust Co.*, 390 S.E.2d 589, 592 (Ga. 1990).

Employer Liability for Employee Conduct. Under Georgia law, employers may be vicariously liable for punitive damages arising from the acts or omissions of their employees if the employee's tortious conduct is committed in the course of the employer's business, within the scope of the employee's employment, and

is sufficiently wrongful to support recovery of punitive damages under Ga. Code Ann. § 51-12-5.1. *May v. Crane Bros.*, 576 S.E.2d 286, 287 n.3 (Ga. 2003).

Environmental Liability. Punitive damages may be awarded. "To authorize the imposition of punitive or exemplary damages there must be evidence of willful misconduct, malice, fraud, wantonness, or oppression, or that entire want of care which would raise the presumption of a conscious indifference to consequences." *Bracewell v. King*, 250 S.E.2d 25, 27 (Ga. Ct. App. 1978) (quoting *S. R. Co. v. O'Bryan*, 45 S.E. 1000 (Ga. 1903)).

General Liability. In automobile collision cases, punitive damages are not recoverable where the driver at fault simply violated a rule of the road. *Doctoroff v. Perez*, 615 S.E.2d 623, 624 (Ga. Ct. App. 2005). Instead, the defendant's violation must have been the proximate cause of the accident or part of a pattern or policy of dangerous driving. *Id.* (citing *Brooks v. Gray*, 585 S.E.2d 188 (Ga. Ct. App. 2003)).

Insurer's Bad Faith. An insurance company may be liable for damages to its insured for failing to settle the claim of an injured person where the insurer is guilty of negligence, fraud or bad faith in failing to compromise the claim. *S. Gen. Ins. Co. v. Holt*, 416 S.E.2d 274, 276 (Ga. Ct. App. 1992) (automobile insurer's failure to settle within the time limit set by injured party's counsel constituted negligence and bad faith so as to sustain an award of punitive damages).

Product Liability. In a tort action where a cause of action arises from product liability, there shall be no limitation regarding the amount that may be awarded as punitive damages. Ga. Code Ann. § 51-12-5.1(e)(1). Only one award of punitive damages may be recovered in a court in this state from a defendant for any act or omission if the cause of action arises from product liability, regardless of the number of causes of action that may arise from such act or omission. § 51-12-5.1(e)(1); *Gen. Motors Corp., v. Moseley*, 447 S.E.2d 302, 312 (Ga. Ct. App. 1994) (where a jury awarded \$4.2 million in compensatory damages and \$101 million in punitive damages for the death of 17-year-old Shannon

Moseley when Moseley's GM pickup truck burst into flames as a result of an alleged design defect in the fuel tank), *abrogated on other grounds by Webster v. Boyett*, 496 S.E.2d 459 (Ga. 1998).

Professional Liability. An attorney's concealment and misrepresentation of matters affecting his client's case will give rise to a claim for punitive damages. *Houston v. Surrentt*, 474 S.E.2d 39, 41 (Ga. Ct. App. 1996).

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

Yes. The Legislature's expressed policy in favor of coverage for any legal liability is broad enough to include punitive damages. *Greenwood Cemetery, Inc. v. Travelers Indem. Co.*, 232 S.E.2d 910, 913 (Ga. 1977); *Lunceford v. Peachtree Cas. Ins. Co.*, 495 S.E.2d 88, 91 (Ga. Ct. App. 1997) (the public policy against insuring for injuries intentionally inflicted was not violated when an automobile liability insurance contract covered the liability of the insured arising out of willful and wanton misconduct).

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

Not applicable.

C. What is the relationship of punitive to compensatory damages?

Punitive damages may be recovered only when there is entitlement to compensatory damages. *S. Gen. Ins. Co.*, 416 S.E.2d at 276. While there is no fixed rule regarding the proportional relationship between the amounts of punitive and actual damages awards, the court may always consider the collective conscience of the jury when reviewing an award. *Hosp. Auth. of Gwinnett County v. Jones*, 386 S.E.2d 120 (Ga. 1989); *vacated and remanded*, 499 U.S. 914 (1991); *affirmed on remand*, 409 S.E.2d 501 (Ga. 1991).

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

In the absence of evidence of specific intent, the amount that may be awarded in a case shall be limited to a maximum of \$250,000. Ga. Code Ann. § 51-F2-5.1(g) (2010); *J.B. Hunt Transp. v. Bentley*, 427 S.E.2d 499 (Ga. Ct. App. 1992), *cert. denied*, 1993 Ga. (LexisNexis 421) (1993) (where the court found that there was no evidence that the driver in a car accident acted with specific intent to cause harm and therefore there was no basis to award more than \$250,000 in punitive damages on the claims). The statutory cap, however, is inapplicable to product liability actions, and this punishment is limited by there being only one such

cause of action allowed for suits arising from the same common nucleus of operative facts. *Mack Trucks, Inc. v. Conkle*, 436 S.E.2d 635, 638 (Ga. 1993).

Ga. Code Ann. § 51-12-5.1, applicable to causes of action on or after April 14, 1997, abolished punitive damages when the only injury to the plaintiff is emotional distress, and capped punitive damages awards at \$250,000, except in product liability actions or when the court rules that a defendant intended to harm the plaintiff. Punitive damages are not capped in those cases. Despite the language used by the legislature in 51-12-5.1(h), substituting April 14, 1997, for the effective date of July 1, 1987, punitive damages were still recoverable in Georgia during the period of July 1, 1987, through April 14, 1997. *K-Mart Corp. v. Hackett*, 514 S.E.2d 884, 888 (Ga. Ct. App. 1999). Section 51.12.5 applies to causes of action arising prior to July 1, 1987.

E. To whom are punitive damages payable?

Ga. Code Ann. § 51-12-5.1(e)(2) requires 75 percent of amounts awarded as punitive damages to be paid to the state treasury. Although this is the largest contributory provision in the country, it has been upheld as not in violation of the constitutional takings clause, and not a revenue-raising measure in contravention of the Georgia Constitution. *State v. Moseley*, 463 S.E.2d 632, 633 (Ga. 1993). A jury instruction that 75 percent of a punitive damages award would go to the state treasury has been held to be improper. *Ford v. Uniroyal Goodrich Tire Co.*, 476 S.E.2d 565, 566 (Ga. 1996).

With regard to the remaining 25 percent, punitive damages are generally payable to the plaintiff directly injured as a result of the misconduct giving rise to the entitlement to the award. No statutory authority or case law addresses whether a spouse of the injured plaintiff is entitled to punitive damages under a derivative claim against the tortfeasor(s).

PUNITIVE DAMAGES REVIEW

Hawaii

I. PUNITIVE DAMAGES:

A. May they be awarded?

Yes. Where clear and convincing evidence exists, Hawaii permits an award of punitive damages when "there has been some willful misconduct or that entire want of care which would raise the presumption of a conscious indifference to consequences." *Ditto v. McCurdy*, 947 P.2d 952 (Haw. 1997). The plaintiff's right to punitive damages award is derived from common law authority.

B. If so, in what circumstances?

Standard of Conduct. Punitive damages may be awarded only in cases where the wrongdoer has acted wantonly or oppressively with such malice as implies a spirit of mischief or criminal indifference to civil obligations. *Kang v. Harrington*, 587 P.2d 285, 291 (Haw. 1978); *Masaki v. Gen. Motors Corp.*, 780 P.2d 566, 573 (Haw. 1989).

Standard of Proof. A plaintiff must show by clear and convincing evidence that the defendant's behavior meets the standard of conduct stated above. *AMFAC, Inc. v. Waikiki Beachcomber Inv. Co.*, 839 P.2d 10, 82 (Haw. 1992).

Actions Against State. Punitive damages are not permitted in actions against the state. Haw. Rev. Stat. Ann. § 662-2.

Breach of Contract. In order to recover punitive damages based on breach of contract, one must show that the contract was breached in such a willful, wanton and reckless manner as to result in tortious injury. *Ross v. Stouffer Hotel Co.*, 879 P.2d 1037 (Haw. 1994); *AMFAC, supra*.

Employer Liability for Employee Conduct. Federal courts interpreting Hawaii law have found that: "The law in Hawaii regarding a corporation's liability for punitive damages appears well-settled. Punitive damages may be recovered against a corporate defendant only if the corporation expressly or impliedly authorized or ratified the tortious act of its agent. *Baldwin v. Hilo Tribune-Herald, Ltd.*, 32 Haw. 87, 106-09 (1931); *Chin Kee v. Kaeleku Sugar Co., Ltd.*, 29 Haw. 524, 537 (1926). Furthermore, any such authorization or ratification must come from "officers or any other person actually wielding the executive power of the corporation." *Kealoha v. Halawa Plantation Ltd.*, 24 Haw. 579, 588 (1918), quoted in *Chin Kee*, 29 Haw. at 537; see also *W.*

Prosser, Handbook of the Law of Torts § 2, at 12 (4th ed. 1971). *Jenkins v. Whittaker Corp.*, 551 F.Supp. 110, 112 (D.Haw.1982). See also, *Man v. Raymark Industries*, 728 F. Supp. 1461, 1470 (D. Haw. 1989).

Environmental Liability. Punitive damages may be recovered. Haw. Rev. Stat. Ann. § 128D-8 (LexisNexis 2010).

Insurer's Bad Faith. To recover punitive damages, a plaintiff must show more than the commission of the tort of bad faith denial of a claim; the plaintiff must also show evidence that the insurer's conduct met the standard of conduct discussed above. *Best Place, Inc. v. Penn Am. Ins. Co.*, 920 P.2d 334, 348 (Haw. 1996).

Product Liability. In product liability actions, punitive damages may be awarded even in strict liability cases, based on a showing by clear and convincing evidence of the defendant's "aggravated" or "outrageous" conduct. *Masaki, supra*.

Professional Liability. Punitive damages may be recovered when a wrongful act is done willfully, wantonly or maliciously or is characterized by some aggravating circumstances. *Howell v. Associated Hotels, Ltd.*, 40 Haw. 492 (1954). Creditors may be liable for punitive damages for failure to comply with the Fair Credit Extension statutory provisions. Haw. Rev. Stat. Ann. § 477E-4 (LexisNexis 2010). Punitive damages may be recovered in an action for medical malpractice. *Ditto v. McCurdy*, 44 P.3d 274 (Haw. 2002).

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

Yes. Haw. Rev. Stat. Ann. § 431:10-240 states that coverage under any policy of insurance in Hawaii shall not be construed to provide coverage for punitive or exemplary damages unless specifically included. By implication, policies must specifically include coverage for such damages if a policy is to respond to a punitive damages award.

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

Not applicable.

C. What is the relationship of punitive to compensatory damages?

Punitive damages need not bear any relation to the damages allowed by way of compensation. However, the measure of such damages should be the degree of malice, oppression, or gross negligence that forms the basis for the award, and the amount of money necessary to punish the defendant considering his

financial condition. *Howell v. Associated Hotels, Ltd.*, 40 Haw. 492, 501 (Haw. 1954); *Kang v. Harrington*, 587 P.2d 285, 293 (Haw. 1978).

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

Appellate courts will review punitive damages awards to determine "if the award was not palpably supported by the evidence or is so excessive and outrageous when considered with the circumstances of the case as to demonstrate that the jury in assessing damages acted against rules of law or suffered their passions or prejudices to mislead them." *Kang*, 587 P.2d at 292.

E. To whom are punitive damages payable?

There is no statutory authority declaring that the state shall be entitled to a portion of any punitive damages award. The common law fails to specify whether the recipient of a punitive damages award must be the plaintiff alone, or whether a spouse or parent may collect on a punitive damages award.



I. PUNITIVE DAMAGES

A. May they be awarded?

Yes. *Curtis v. Firth*, 850 P.2d 749 (Idaho 1993).

B. If so, in what circumstances?

Standard of Conduct. Punitive damages may be awarded when a defendant's conduct is found to be malicious, fraudulent, grossly negligent or oppressive. *Curtis v. Firth*, 850 P.2d 749 (Idaho 1993). The justification for punitive damages must be that the defendant acted with an extremely harmful state of mind, whether that state of mind be termed "malice, oppression, fraud or gross negligence" or simply "deliberate or willful." *Cheney v. Palos Verdes Inv. Corp.*, 665 P.2d 661 (Idaho 1983).

The decision of whether to instruct the jury on punitive damages is within the discretion of the trial judge. *Fitzgerald v. Walker*, 826 P.2d 1301 (Idaho 1992). An award of punitive damages will be upheld on appeal only where it is shown that the defendant's

conduct is an extreme deviation from reasonable standards. *Blaser v. Ricci*, 810 P.2d 1120 (Idaho 1991); see also *Anderson v. Anderson, Kaufman, Ringert, and Clark*, 775 P.2d 1201 (Idaho 1989); *Bethel v. Van Stone*, 817 P.2d 188 (Idaho Ct. App. 1991).

Standard of Proof. IDAHO CODE § 6-1604(1) (2010) sets a standard of proof of "clear and convincing evidence" and requires a plaintiff to prove oppression, fraud, malicious or outrageous conduct as a prerequisite to the award of punitive damages. The inclusion of a prayer for punitive damages is prohibited in any initial pleading by § 6-1604(2). The court shall allow motion to amend pleadings if after weighing the evidence presented the court concludes the moving party has established a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages. § 6-4604(2). No judgment for punitive damages shall exceed the greater of \$250,000 or an

PUNITIVE DAMAGES REVIEW

amount that is three times the compensatory damages contained in such judgment. If a case is tried to a jury, the jury shall not be informed of this limitation. § 1-604(3).

Actions Against State. Punitive damages are not recoverable against governmental entities and their employees (see IDAHO CODE § 6-918 (1990)). However, where an action is brought under the Idaho Human Rights Act (IHRA), § 6-918 does “not preclude the entry of a **punitive damages** award **against the state.**” *Paterson v. State*, 915 P.2d 724 (Idaho 1996) (holding that “the more specific imposition of liability under IHRA controls over the more general immunity contained in § 6-918”).

Breach of Contract. Punitive damages may be awarded for breach of contract where the conduct is outrageous, similar to crime, an intentional tort or carried out with reckless indifference for the rights of others. See *Jones v. Panhandle Distribs.*, 792 P.2d 315 (Idaho 1990); *Yacht Club Sales & Serv. v. First Nat’l Bank*, 623 P.2d 464 (Idaho 1980), *overruled in part by Cheney v. Palos Verdes Inv. Corp.*, 665 P.2d 661 (Idaho 1983), *supra*. CF. *Hoglan v. First Sec. Bank, N.A.*, 819 P.2d 100 (Idaho 1991) (jury awarded punitive damages where conduct did not evidence a harmful state of mind).

The award of punitive damages in the context of a contractual relationship requires conduct that is unreasonable and irrational in the business context, or that breaches a duty to act in good faith, or that shows a lack of professional regard for the consequences of the breach of the contractual agreement. *Luzar v. W. Sur. Co.*, 692 P.2d 337 (Idaho 1984). Other factors may play a determinative role in deciding whether there is substantial evidence of an extreme deviation from standards of reasonable conduct: (1) the presence of expert testimony, (2) whether the unreasonable conduct actually caused harm to the plaintiff, (3) whether there is a special relationship between the parties, (4) proof of a continuing course of oppressive conduct and (5) proof of the actor’s knowledge of the likely consequences of the conduct. See *Cuddy Mountain Concrete, Inc. v. Citadel Constr., Inc.*, 824 P.2d 151 (Idaho Ct. App. 1992).

Employer Liability for Employee Conduct. To recover punitive damages against a corporation under Idaho law, one must show

that an officer or director participated in or ratified the conduct underlying the punitive damages award. *Weinstein v. Prudential Prop. & Cas. Ins. Co.*, 233 P.3d 1221, 1235 (Idaho 2010). This requirement may be met by indirect evidence, as direct evidence that an officer or director participated in or ratified the wrongful conduct is not required in order to sustain an award of punitive damages against the corporation. *Id.* at 1236.

Environmental Liability. In any action for punitive damages, the plaintiff must show by “clear and convincing evidence, oppressive, fraudulent, malicious or outrageous conduct by the party against whom the claim for punitive damages is asserted.” Idaho Code Ann. § 6-1604.

Insurer’s Bad Faith. An insurer may be liable for punitive damages where the company refuses to pay a claim and the company’s refusal is an extreme deviation from reasonable standards of conduct, performed with an understanding of its consequences. *Linscott v. Rainer Nat’l Life Ins. Co.*, 606 P.2d 958 (Idaho 1980).

Product Liability. Punitive damages may be awarded in actions for strict liability, negligence, and breach of an implied warranty. *Sliman v. Aluminum Co. of America*, 731 P.2d 1267, 1270 (Idaho 1986). In order to support the award for punitive damages, the evidence must show that the defendant acted in a manner that was an extreme deviation from reasonable standards of conduct. See *Cheney v. Palos Verdes Inv. Corp.*, 665 P.2d 661 (Idaho 1983).

Punitive damages may also be awarded in cases of “repeated or flagrant violations of the Idaho Consumer Protection Act.” See IDAHO CODE § 48-608(1). This statutory “repeated or flagrant” standard is separate and independent of the common law standards. *Mac Tools, Inc. v. Griffen*, 879 P.2d 1126 (Idaho 1994) (punitive damages award 26 times greater than the compensatory award was upheld).

Professional Liability. In any action for punitive damages, the plaintiff must show by “clear and convincing evidence, oppressive, fraudulent, malicious or outrageous conduct by the party against whom the claim for punitive damages is asserted.” Idaho Code Ann. § 6-1604.

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

Yes. Noting the public policy of deterrence and punishment upon which many courts rely in holding punitive damages uninsurable, the Supreme Court of Idaho nevertheless decided

that the countervailing policy of affording a fund from which to compensate injured persons sufficiently tipped the balance in favor of coverage. See *Abbie Uriguen Oldsmobile Buick v. U.S. Fire Ins. Co.*, 511 P.2d 783 (Idaho 1973).

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

Not applicable. See II. A. above.

C. What is the relationship of punitive to compensatory damages?

There must be a reasonable relationship between the amount of compensatory damages awarded and the amount of punitive damages allowed. *Yacht Club Sales & Serv. v. First Nat'l Bank*, 623 P.2d 464 (Idaho 1980), overruled in part by *Cheney v. Palos Verdes Inv. Corp.*, 665 P.2d 661 (Idaho 1983). Nominal damages may serve as a basis for punitive damages. *Davis v. Gage*, 682 P.2d 1282 (Idaho Ct. App. 1984).



I. PUNITIVE DAMAGES

A. May they be awarded?

No, punitive damages are not generally available for medical malpractice, legal malpractice, intentional infliction of emotional distress, and loss of consortium. Punitive damages generally are available for other causes of action.

735 ILCS 5/2-1115 (2008) expressly prohibits punitive damages in medical malpractice or legal malpractice cases. See *Loitz v. Remington Arms Co.*, 138 Ill. 2d 404, 150 Ill. Dec. 510, 563 N.E.2d 397 (1990). Punitive damages are not available for intentional infliction of emotional distress, *Frazier v. Harris*, 266 F. Supp. 2d 853 (C.D. Ill. 2003), or loss of consortium. *Hammond v. N. Amer. Asbestos Corp.*, 454 N.E.2d 210 (Ill. 1983). Because of their penal nature, punitive damages are not favored, and courts need to be careful and not award them unwisely. *Ainsworth v. Century Supply Co.*, 693 N.E.2d 510, 512 (Ill. App. Ct. 1998). Punitive damages may be awarded where a defendant has committed a tort with actual malice. *Int'l Union of Operating Eng'rs, Local 150 v. Lowe Excavating Co.*, 870 N.E.2d 303 (Ill. 2006).

B. If so, under what circumstances?

Standard of Conduct. Punitive damages may be awarded when a tort is committed with "fraud, actual malice, deliberate violence or oppression or when the defendant acts willfully or with such

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

Idaho Code Ann. § 6-1604(3) provides that "no judgment for punitive damages shall exceed the greater of \$250,000 or an amount which is three (3) times the compensatory damages contained in such judgment. If a case is tried to a jury, the jury shall not be informed of this limitation." This limitation applies to causes of action accruing after July 1, 2003. See § 6-1604(3).

E. To whom are punitive damages payable?

Generally, an award of punitive damages is payable to the plaintiff.

gross negligence as to indicate a wanton disregard for the rights of others or for conduct involving some element of outrage similar to that found in a crime." *Ainsworth v. Century Supply Co.*, 693 N.E.2d 510, 515 (Ill. App. Ct. 1998) quoting *Homewood Fishing Club v. Archer Daniels Midland Co.*, 605 N.E.2d 1140 (Ill. App. Ct. 1992).

Standard of Proof. While Illinois codified a "clear and convincing evidence" standard of proof for punitive damages as part of its 1995 tort reform efforts, the legislation was deemed unconstitutional by the Illinois Supreme Court. *Best v. Taylor*, 689 N.E. 2d 1057 (Ill. 1997). The clear and convincing evidence standard is therefore not applicable, and a preponderance of the evidence standard applies. *Brdar v. Cottrell, Inc.*, 867 N.E. 2d 1085, 1102 (Ill. App. Ct. 2007).

For actions on account of bodily injury or property damage involving non-intentional torts, and for product liability actions based on strict tort liability, a plaintiff must establish "a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages." 735 ILCS 5/2-604.1 (LexisNexis 2010). For all other cases, the usual standard of a persuasion that the proposition is "more probably true than not" applies. *Estate of Ragen*, 398 N.E.2d 198 (Ill. App. Ct. 1979) (discussing and comparing degrees of proof).

PUNITIVE DAMAGES REVIEW

Pleading Requirements. An initial complaint that is based on non-intentional conduct cannot seek punitive damages, and a plaintiff must obtain leave of court before seeking such damages. 735 ILCS 5/2-604.1 (2008). Specifically, section 2-604.1 of the Illinois Code of Civil Procedure states that “[i]n all actions on account of bodily injury or physical damage to property, based on negligence, or product liability based on any theory or doctrine [of] strict tort liability, where punitive damages are permitted[,] no complaint shall be filed containing a prayer for relief seeking punitive damages. However, a plaintiff may, pursuant to a pretrial motion and after a hearing before the court, amend the complaint to include a prayer for relief seeking punitive damages. The court shall allow the motion to amend the complaint if the plaintiff establishes at such hearing a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages. Any motion to amend the complaint to include a prayer for relief seeking punitive damages shall be made not later than 30 days after the close of discovery. A prayer for relief added pursuant to this section shall not be barred by lapse of time under any statute prescribing or limiting the time within which an action may be brought or right asserted if the time prescribed or limited had not expired when the original pleading was filed.” 735 ILCS 5/2-604.1 (2008); see *McCann v. Presswood*, 308 Ill.App.3d 1068, 721 N.E.2d 811 (Fourth Dist. 1999) (holding that the statute applied even where only part of the complaint was based on negligence); *LaSalle Nat’l Bank v. Willis*, 378 Ill. App.3d.307, 880 N.E.2d 1075 (First Dist. 2007).

Punitive damages need not be specially pleaded, *Kimes v. Trapp*, 52 Ill.App.2d 442, 202 N.E. 2d 42 (Third Dist. 1964), but a complaint must allege outrageous conduct, or acts perpetrated by evil motive or with reckless indifference to the rights of others. *Guice v. Sentinel Technologies, Inc.*, 294 Ill.App.3d 97, 689 N.E.2d 355 (First Dist. 1997).

Actions Against State. Punitive damages are not allowed against a local or public entity. 745 ILCS 10/2-102.

Breach of Contract. Illinois does not ordinarily allow punitive and emotional distress damages for breaches of contract. A plaintiff must prove an independent tort to recover exemplary damages. Damages for breach will not be given as compensation for mental suffering, except where the breach was wanton or reckless and caused bodily harm, or where the defendant had reason to know, when the contract was made, that its breach would cause mental suffering for reasons other than mere pecuniary loss. Even in cases where plaintiffs have sued builders and contractors over construction defects in their homes, courts have refused to award punitive damages unless the conduct causing the breach is also a tort. The breach must amount to an independent tort and there must be proper allegations of malice, wantonness or oppression. See *Parks v. Wells Fargo Home Mortgage, Inc.*, 398 F.3d 937 (Seventh Cir. 2005).

Employer Liability for Employee Conduct. Under Illinois law, punitive damages may be awarded against an employer for the act of an employee if: (a) the employer authorized the doing and the manner of the act, or (b) the employee was unfit and the employer was reckless in employing him, or (c) the employee was employed in a managerial capacity and was acting in the scope of his employment, or (d) the employer or a managerial agent of the employer ratified or approved the act. *Lawlor v. N. Am. Corp.*, 949 N.E.2d 155, 174 (Ill. App. Ct. 1st Dist. 2011) (citing Restatement (Second) of Agency § 271C (1958)).

Environmental Liability. Punitive damages may be recovered against a person who violates the Illinois Environmental Protection Act. See 415 ILCS 5/1 (LexisNexis 2010); *People v. NL Indus.*, 604 N.E.2d 349 (Ill. 1992).

Product Liability. The recovery of punitive damages is permitted in certain product liability cases. *Townsend v. Sears, Roebuck & Co.*, 858 N.E.2d 552 (Ill. App. Ct. 2006), *vacated on other grounds*, 879 N.E.2d 893 (Ill. 2007). Punitive damages may be assessed against the manufacturer of a product injuring the plaintiff if the injury is attributable to conduct that reflects a flagrant indifference to the public safety. *Moore v. Remington Arms Co.*, 427 N.E.2d 608 (Ill. App. Ct. 1981). Punitive damages were awarded against a drug manufacturer when it knew of the adverse effects of a drug and promoted and developed the off-label use of the drug with financial and technical assistance to doctors. The manufacturer then used the doctors’ case reports (prepared with the manufacturer’s assistance) to promote the drug. *Proctor v. Davis Co.*, 682 N.E.2d 1203, 1216 (Ill. App. Ct. 1997). In a product liability action, “willful and wanton conduct” required for a punitive damages award has been defined as a course of action that shows utter indifference to, or conscious disregard for, the safety of others. *Id.*

Professional Liability. Punitive damages are not recoverable in medical malpractice or legal malpractice cases. 735 ILCS 5/2-1115 (2008); see *Loitz v. Remington Arms Co.*, 138 Ill. 2d 404, 150 Ill. Dec. 510, 563 N.E.2d 397 (1990).

Wrongful Death Actions. Punitive damages for personal injuries are not recoverable under Illinois’s Wrongful Death Act. 740 ILCS 180/2 (2008). See *Howe v. Clark Equip. Co.*, 104 App. 3d 45, 59 Ill. Dec. 835, 432 N.E.2d 621 (Fourth Dist. 1982); *Winter v. Schneider Tank Lines*, 107 Ill. App. 3d 767, 63 Ill. Dec. 531, 438 N.E.2d 462 (First Dist. 1982). Punitive damages are not recoverable in wrongful death actions in Illinois. *Gardner v. Geraghty*, 98 Ill.App.3d, 53 Ill. Dec. 517, 423 N.E.2d 1321 (First Dist. 1981).

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

No. Public policy prohibits insuring against liability for punitive damages that arise from the insured's own misconduct. *Beaver v. County Mut. Ins. Co.*, 420 N.E.2d 1058 (Ill. App. Ct. 1981); *Crawford Labs. v. St. Paul Ins. Co.*, 715 N.E.2d 653 (Ill. App. Ct. 1999).

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

No. An employer may insure against vicarious liability for punitive damages assessed in consequence of his employees' wrongful conduct. *Beaver v. Country Mut. Ins. Co.*, 420 N.E.2d 1058.

C. What is the relationship of punitive damages to compensatory damages?

An award of actual damages must accompany a punitive damages award. *Mitchell v. Elrod*, 655 N.E.2d 1104 (Ill. App. Ct. 1995). An award for one dollar in damages does not support punitive damages. *Kemner v. Monsanto*, 576 N.E.2d 1146 (Ill. App. Ct. 1991). But punitive damages need not bear a proportional relationship to the amount of actual damages. See *Dowd & Dowd, Ltd. v. Gleason*, 816 N.E.2d 754 (Ill. App. Ct. 2004); *Tower Oil & Tech. Co. v. Buckley*, 425 N.E.2d 1060 (Ill. App. Ct. 1981); *Loitz v. Remington Arms Co.*, 563 N.E.2d 397 (Ill. 1990).

D. Are there any other statutory caps or limitations on the amount of punitive damages that may be awarded?

No. The 1995 tort reform legislation imposed a statutory limitation on punitive damages of three times the amount awarded for economic damages. However, the limitation itself and the legislation as a whole were deemed unconstitutional. *Best v. Taylor*, 179 Ill. 2d 367, 689 N.E. 2d 1057 (1997).

E. To whom are punitive damages payable?

The trial court has discretion, which seldom is used in practice, to apportion punitive damages among the plaintiff, the plaintiff's attorney and the State of Illinois Department of Human Services. 735 ILCS 5/2-1207 (LexisNexis 2010).

Common law actions for punitive damages do not survive the death of the injured person, *Froud v. Celotex*, 456 N.E.2d 131 (Ill. 1983), except where punitive damages are provided in the statute under which the plaintiff has sued (as in the Public Utilities Act). *In re Air Crash Disaster near Chicago, Illinois, on May 25, 1979*, 644 F.2d 594, 605-06 (Seventh Cir. 1981) (construing Illinois Survival Act, 755 ILCS 5/27-6 (LexisNexis 2010)).

An action for retaliatory discharge seeking punitive damages survives the death of the discharged employee because of its statutory basis. *Raisl v. Elwood Indus., Inc.*, 479 N.E.2d 1106 (First Dist. 1985).

Indiana

I. PUNITIVE DAMAGES

A. May they be awarded?

Yes. *Forte v. Connerwood Healthcare, Inc.*, 745 N.E.2d 796, 799 (Ind. 2001); *Ford Motor Co. v. Ammerman*, 705 N.E.2d 539 (Ind. Ct. App. 1999).

B. If so, under what circumstances?

Standard of Conduct. Punitive damages are only awarded if the plaintiff shows that the defendant acted with malice, fraud, gross

negligence or oppressiveness that was not the result of a mistake or other human failing. *Erie Ins. Co. v. Hickman by Smith*, 622 N.E.2d 515 (Ind. Ct. App. 1993).

Upon showing of a quasi-criminal state of mind or willful and wanton misconduct that the defendant knows will probably result in injury, punitive damages are appropriate. *Cacdac v. West*, 705 N.E.2d 506, 510 (Ind. Ct. App. 1999). See also *Mitchell v. Stephenson*, 677 N.E.2d 551 (Ind. Ct. App. 1997).

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Standard of Proof. Clear and convincing evidence is required. Ind. Code Ann. § 34-51-3-2 (LexisNexis 2010); *Cheatham v. Pohle*, 789 N.E.2d 467 (Ind. 2003). However, because punitive damages do not compensate the plaintiff, the plaintiff has no right or entitlement to an award of punitive damages in any amount. Unlike a claim for compensatory damages, the trier of fact is not required to award punitive damages, even if the facts that might justify an award are found. *Id.* at 471.

Actions Against State. Punitive damages are not permitted against a governmental entity or an employee of a governmental entity acting within the scope of employment. Ind. Code Ann. § 34-13-3-4.

Breach of Contract. To receive punitive damages from a breach of contract claim, a plaintiff must plead and prove an independent tort for which Indiana awards punitive damages. *Am. Family Life Assurance Co. v. Russell*, 700 N.E.2d 1174, 1178 (Ind. Ct. App. 1998) (citing *USA Life One Ins. Co. v. Nuckolls*, 682 N.E.2d 534, 537 (Ind. 1997)).

Employer Liability for Employee Conduct. Under Indiana law, *respondeat superior* makes an employer liable for the punitive as well as compensatory damages of its employee's or agent's torts. *Infinity Prods. v. Quandt*, 775 N.E.2d 1144, 1154 (Ind. Ct. App. 2002), *rev'd on other grounds*, 810 N.E.2d 1028, 1034 (Ind. 2004). See also *Hibschman Pontiac, Inc. v. Batchelor*, 362 N.E.2d 135, 137 (Ind. 1977) (upholding award of punitive damages against employer for acts of employee). For punitive damages to be awarded against an employer, the employee's tortious conduct must have occurred within the scope of his employment. *Stroud v. Lints*, 760 N.E.2d 1176, 1185 (Ind. Ct. App. 2002) *vacated in part on other grounds*, 790 N.E.2d 440, 447 (Ind. 2003).

Notably, under Indiana law, an employer can be vicariously liable for the criminal acts of an employee if the employee's actions were, at least for a time, authorized by his employer and occurred within the scope of the employee's employment. *City of Fort Wayne v. Moore*, 706 N.E.2d 604, 607 (Ind. Ct. App. 1999).

Environmental Liability. Punitive damages are permitted. Ind. Code Ann. § 13-25-4-10.

Insurer's Bad Faith. Insurer's negligence cannot support awarding punitive damages, but intentionally failing to conduct an investigation presented a genuine issue of material fact regarding insurer's bad faith. *Gooch v. State Farm Mut. Automobile Ins. Co.*, 712 N.E.2d 38, 41 (Ind. Ct. App. 1999).

Insurer's misconduct, including intentionally denying the plaintiff was insured when the plaintiff was financially vulnerable, was sufficient basis for punitive damages. *Michigan Mut. Ins. Co. v. Sports, Inc.*, 698 N.E.2d 834 (Ind. Ct. App. 1998).

Product Liability. Punitive damages were upheld where plaintiffs proved by clear and convincing evidence that a car manufacturer engaged in a course of action that showed utter indifference for the rights of consumers when it sold dangerous and defective cars. *Ford Motor Co. v. Ammerman*, 705 N.E.2d 539 (Ind. Ct. App. 1999).

Professional Liability. The Medical Malpractice Act does not prohibit awards of punitive damages against medical professionals. *Cacdac v. West*, 705 N.E.2d 506 (Ind. 1999) (citing Ind. Code Ann. § 34-18-14-3).

Wrongful Death. An action for wrongful death of an "adult person" may not include recovery of punitive damages. Ind. Code Ann. § 34-23-1-2 (LexisNexis 2010).

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

Probably not. A federal district court, predicting Indiana law on the issue, has held that Indiana public policy would be violated if a wrongdoer were permitted to insure against punitive damages arising from his own misconduct. See *Grant v. N. River Ins. Co.*, 453 F. Supp. 1361 (N.D. Ind. 1978) (city could not shift responsibility to insurer for payment of punitive damages for which city was directly liable).

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

Probably not. See *Norfolk & W.R. Co. v. Hartford Acc. & Indemn. Co.*, 420 F. Supp. 92 (N.D. Ind. 1976). The court granted the insured's motion for summary judgment because the insured was held vicariously liable, which was held to be within the scope of the policy's coverage.

C. What is the relationship of punitive to compensatory damages?

Compensatory damages are a prerequisite to an award of punitive damages. *First Bank of Whiting v. Schuyler*, 692 N.E.2d 1370, 1374 (Ind. Ct. App. 1998).

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

Pursuant to Ind. Code Ann. § 34-51-3-4, a punitive damages award may not be more than the greater of (1) three times the amount of compensatory damages awarded in the action or (2) \$50,000.

Indiana has adopted the three-part test laid out in *BMW of N. Am. v. Gore*, 517 U.S. 559, 573 (U.S. 1996) in order to determine whether a punitive damages award is grossly excessive: (1) the degree of reprehensibility of the conduct at issue, (2) the disparity between the harm or potential harm suffered by the complaining party and the punitive damages the complaining party received, and (3) the difference between the punitive damages remedy and the civil penalties authorized or imposed in comparable cases. *Ford Motor Company*, 705 N.2d at 561.

Furthermore, Indiana has traditionally recognized that a defendant's wealth is an important factor in determining whether a verdict is excessive. *Stroud v. Lints*, 790 N.E.2d 440, 447 (Ind. 2003); *Executive Builders, Inc. v. Trisler*, 741 N.E.2d 351, 359 (Ind. Ct. App. 2000).



I. PUNITIVE DAMAGES

A. May they be awarded?

Yes. Punitive damages are allowed to punish the defendant and to deter the defendant and like-minded people from committing similar acts. *Midwest Home Distrib., Inc. v. Domco Indus. Ltd.*, 585 N.W.2d 735, 743 (Iowa 1998).

B. If so, under what circumstances?

Standard of Conduct. Punitive or exemplary damages may be awarded only where the conduct of the defendant from which the claim arose constitutes willful and wanton disregard for the rights or safety of another. Iowa Code § 668A.1 (2010).

E. To whom are punitive damages payable?

Punitive damages awards are split: 25 percent to plaintiff; 75 percent to the state. Pursuant to Ind. Code Ann. § 34-51-3-6:

1. Except as provided in 13-25-4-10, when a finder of fact announces a verdict that includes a punitive damages award in a civil action, the party against whom the judgment was entered shall pay the punitive damages award to the clerk of the court where the action is pending.
2. When a punitive damages award is paid, the party against whom the judgment was entered shall pay the punitive damages award to the clerk of the court where the action is pending.
3. Upon receiving the payment described in subsection (b), the clerk of the court shall:
 - a. Pay the person to whom punitive damages were awarded twenty-five percent (25%) of the punitive damages award and
 - b. Pay the remaining seventy-five percent (75%) of the punitive damages award to the treasurer of state, who shall deposit the funds into the violent crime victims' compensation fund established by IC 5-2-6.1-40.

Standard of Proof. Punitive damages require proof by a preponderance of clear, convincing and satisfactory evidence. Iowa Code § 668A.1.a.

Actions Against State. Punitive damages are not recoverable against the government. Iowa Code §§ 669.4 & 670.4.

Breach of Contract. The general rule is that "the mere breach of a promise is never enough in itself"; breach of contract does not support a punitive damages award. The exception is when the breach constitutes an intentional tort and is committed maliciously with willful and wanton disregard for the rights or safety of another. *Magnusson Agency v. Public Entity Nat'l Co.*

PUNITIVE DAMAGES REVIEW

Midwest, 560 N.W.2d 20, 29 (Iowa 1997). See also *Wilson v. Vanden Berg*, 687 N.W.2d 575 (Iowa 2004) (“although a breach of contract will ordinarily not support a punitive damages award, where the breach also constitutes an intentional tort committed maliciously, punitive damages may be given”).

Employer Liability for Employee Conduct. Under Iowa law, punitive damages may be awarded against an employer only if:

- (a) the employer or a managerial agent of the employer authorized the employee’s conduct and the manner of engaging in such conduct, or
- (b) the employee was unfit and the employer or a managerial agent was reckless in employing or retaining him, or
- (c) the employee was employed in a managerial capacity and was acting in the scope of employment, or
- (d) the employer or a managerial agent of the employer ratified or approved the employee’s conduct.

Brinder v. Hyslop, 337 N.W.2d 858, 861 (Iowa 1983) (citing Restatement (Second) of Torts § 909 (1979)).

Environmental Liability. Punitive or exemplary damages may only be awarded where the conduct of the defendant from which the claim arose constitutes willful and wanton disregard for the rights or safety of another. Iowa Code § 668A.1.

Product Liability. A manufacturer’s failure to institute a warning campaign for many years despite knowledge of numerous similar occurrences constitutes willful and wanton disregard for the rights of others and supported a punitive damages award. *Lovick v. Wil-Rich*, 588 N.W.2d 688, 699 (Iowa 1999); see also *Mercer v. Pittway Corp.*, 616 N.W.2d 602 (Iowa 2000) (in a product liability suit against a manufacturer of a smoke detector, plaintiffs failed to provide sufficient evidence that defendant’s conduct was willful and wanton as to warrant submission of a punitive damages question to the jury).

Professional Liability. A court found sufficient evidence to support a jury’s verdict of punitive damages where a pharmacy had misfilled a prescription. *McClure v. Petersen*, 613 N.W.2d 225 (Iowa 2000).

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

Yes. Iowa decisions have permitted insurance coverage of punitive damages. Specifically, the Supreme Court of Iowa interpreted “damages” in a CGL policy as referring to both punitive and compensatory damages, and allowed coverage for punitive damages awarded against an insured. *A.Y. McDonald Indus. v. Ins. Co. of N. Am.*, 475 N.W.2d 607 (Iowa 1991); *Grinnell Mut. Reinsurance Co. v. Jungling*, 654 N.W.2d 530 (Iowa 2002); see also *Skyline Harvestore Sys., Inc. v. Centennial Ins. Co.*, 331 N.W.2d 106 (Iowa 1983) (unless a contract specifically differentiates between punitive and compensatory, the court will construe “damages” as including both).

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

Not applicable. See II. A. above.

C. What is the relationship of punitive to compensatory damages?

Punitive damages are not compensatory; they are for punishment and deterrence and must be related to the defendant’s wrongful conduct. *Beeman v. Manville Corp. Asbestos Disease Comp.*

Fund, 496 N.W.2d 247 (Iowa 1993). Under Iowa law, a plaintiff is not required to recover actual damages in order to qualify for a punitive damages award, but is only required to “show” actual damage. See *Ryan v. Arneson*, 422 N.W.2d 491 (Iowa 1988). However, the amount of punitive damages must bear “some proportion” and a reasonable relationship to the harm that actually occurred. The reasonableness of the relationship in any given case depends on the likelihood and amount of potential damages, the offensiveness of the complained-of conduct and the wealth of the defendant. *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 661 (8th Cir. 1995) (held that a 250,000:1 ratio of punitive damages and actual damages is unreasonable and violates due process).

D. Are there any other statutory caps or limitations on the amount of punitive damages that may be awarded?

Yes. Upon finding willfulness in failing to clean up environmental damage, punitive damages of triple the cost of the state’s cleanup may be assessed; absent willfulness, no punitive damages are allowed. See Iowa Code § 455B.392 (2010).

E. To whom are punitive damages payable?

Iowa Code § 668A.1 provides that:

1. In a trial of a claim involving the request for punitive or exemplary damages, the court shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating all of the following:
 - a. Whether, by a preponderance of clear, convincing, and satisfactory evidence, the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another.
 - b. Whether the conduct of the defendant was directed specifically at the claimant or at the person from whom the claimant's claim is derived.
2. An award for punitive or exemplary damages shall not be made unless the answer or finding pursuant to subsection 1, paragraph "a" is affirmative. If such answer or finding is affirmative, the jury, or court if there is no jury, shall fix the amount of punitive or exemplary damages to be awarded, and such damages shall be ordered paid as follows:
 - a. If the answer or finding pursuant to subsection 1, paragraph "b" is affirmative, the full amount of the punitive or exemplary damages awarded shall be paid to the claimant.

- b. If the answer or finding pursuant to subsection 1, paragraph "b" is negative, after payment of all applicable costs and fees, an amount not to exceed 25 percent of the punitive or exemplary damages awarded may be ordered paid to the claimant, with the remainder of the award to be ordered paid into a civil reparations trust fund administered by the state court administrator. Funds placed in the civil reparations trust shall be under the control and supervision of the executive council, and shall be disbursed only for purposes of indigent civil litigation programs or insurance assistance programs.
3. The mere allegation or assertion of a claim for punitive damages shall not form the basis for discovery of the wealth or ability to respond in damages on behalf of the party from whom punitive damages are claimed until such time as the claimant has established that sufficient admissible evidence exists to support a *prima facie* case establishing the requirements of subsection 1, paragraph "a."

Iowa Code §668A.1 (2010). The Iowa Supreme Court upheld this statute in the context of denying punitive damages to a plaintiff. See *Cawthorn v. Catholic Health Initiatives Iowa Corp.*, 743 N.W.2d 525 (Iowa 2007).



I. PUNITIVE DAMAGES

A. May they be awarded?

Yes. The purpose of punitive damages is to punish the defendant and deter others from committing similar acts. The plaintiff must establish actual damages before punitive damages can be awarded. However, an equitable remedy might satisfy the actual damages requirement so that punitive damages may be awarded. *Capitol Fed. Sav. & Loans v. Hohman*, 675 P.2d 384 (Kan. Ct. App. 1984); *Plain Res., Inc. v. Gable*, 682 P.2d 653 (Kan. 1984). See also *Watkins v. Layton*, 324 P.2d 130 (Kan. 1958).

B. If so, in what circumstances?

Standard of Conduct. To warrant an award of punitive damages, a party must prove to the trier of fact willful or wanton conduct, fraud or malice. *Reeves v. Carlson*, 969 P.2d 252 (Kan. 1988); *Trendel v. Rogers*, 955 P.2d 150, 152 (Kan. Ct. App. 1998). See

Mynatt v. Collins, 57 P.3d 513 (Kan. 2002). A wanton act is more than ordinary negligence, but less than a willful act. *Reeves*, 969 P.2d at 255. Punitive damages are to punish the wrongdoer for malicious, vindictive or willful and wanton invasion of another's rights. *Cerretti v. Flint Hills Rural Elec. Co-op Ass'n*, 837 P.2d 330, 334 (Kan. 1992). *Gloconda Screw Inc. v. W. Bottoms Ltd.*, 894 P.2d 260, 265 (Kan. Ct. App. 1995).

Standard of Proof. Clear and convincing evidence is required to sustain an award of punitive damages. *Reeves v. Carlson*, 969 P.2d 252 (Kan. 1988).

Actions Against State. No recovery is permitted for punitive or exemplary damages or interest in actions against the state. Kan. Stat. Ann. § 75-6105 (2010).

PUNITIVE DAMAGES REVIEW

Breach of Contract. Punitive damages may not be recovered for breach of contract, even if the breach is intentional and unjustified. Such damages are allowable if there is an independent tort indicating malice, fraud or wanton disregard of the rights of others. *Farrell v. Gen. Motors Corp.*, 815 P.2d 538, 549 (Kan. 1991); *Cornwell v. Jespersen*, 708 P.2d 515, 523 (Kan. 1985). Punitive damages were proper because there was evidence of reckless behavior and an actual intent to deceive. *Haywood v. Orkin Exterminating Co.*, 785 P.2d 183 (Kan. Ct. App. 1989).

Employer Liability for Employee Conduct. Under Kansas law, punitive damages may only be assessed against an employer for the acts of an employee if the conduct at issue was authorized or ratified by a person expressly empowered to do so on behalf of the employer. Kan. Stat. Ann. § 60-3701(d)(1).

Authorization under section 60-3701(d)(1) may be either express or implied and generally is accomplished before or during the employee's questioned conduct. *Smith v. Printup*, 866 P.2d 985, 1003 (Kan. 1993). Ratification may be based on an express grant of authority or on a course of conduct indicating that the employee was empowered or given the right or authority to engage in the questioned conduct. *Id.*

Ratification under section 60-3701(d)(1) may be either express or implied and may be accomplished before, during, or after the employee's questioned conduct. *Smith v. Printup*, 866 P.2d

at 1003. It may be based on an express ratification or based on a course of conduct indicating the approval, sanctioning, or confirmation of the questioned conduct. *Id.*

Environmental Liability. Punitive damages may be permitted. See, e.g., *Rusch v. Phillips Petroleum Co.*, 180 P.2d 270 (Kan. 1947) (Court held that evidence raised a jury question on the issue of punitive damages where seepage from slush ponds caused pollution damages to land leased for farming and stock-raising purposes).

Product Liability. Punitive damages may be awarded. See *Delaney v. Deere & Co.*, 999 P.2d 930 (Kan. 2000); *Tetvan v. Alt. Robins Co.*, 738 P.2d 1210 (Kan. 1987). In assessing punitive damages, the nature, extent and enormity of the wrong, and the intent of the party committing the wrong, may be considered to reduce damages. See *Tetvan*, 738 P.2d 1210 (an award of \$7.5 million in punitive damages was not excessive where plaintiff had a Dalkon Shield IUD inserted without being informed of the risks); see also *Brand v. Mazda Motor Corp.*, 978 F. Supp. 1382 (D. Kan. 1997) (punitive damages were not awarded because no reasonable jury could have found that the Motor Corp. deliberately or recklessly failed to either correct the defect or prevent the injury).

Professional Liability. In an action for malpractice, punitive damages may be permitted only if the defendant acted with willful or wanton conduct, fraud or malice. See Kan. Stat. Ann. § 60-3701(c) (2010); *McConwell v. FMG, Inc.*, 861 P.2d 830 (Kan. Ct. App. 1993).

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

No. Kansas public policy requires that payment of punitive damages rests ultimately, as well as nominally, on the party who committed the wrong, otherwise such damage would often serve no useful purpose; the objective to be obtained in imposing punitive damages is to make the culprit, not the culprit's insurer, feel the pecuniary "punch." Specifically, permitting insurance coverage of punitive damages assessed against insureds would violate public policy. *Hartford Acc. & Indem. Co. v. Am. Red Ball Transit Co., Inc.*, 938 P.2d 1281, 1293 (Kan. 1997), cert. denied, 118 S. Ct. 372, 139 L. Ed. 2d 290. See also *Smith v. Printup*, 866 P.2d 985, 994 (Kan. 1993) (each wrongdoer is liable to pay the punitive damages assessed against him or her); *St. Paul Surplus Lines Ins. Co. v. International Playtex, Inc.*, 777 P.2d 1259,

1268 (Kan. 1989). See also *Flint Hills Rural Electric Cooperative Assoc. v. Federated Rural Electric Insurance Corp.*, 941 P.2d 374 (Kan. 1997).

B. If not generally insurable to the benefit of the wrongdoer, would such a prohibition apply as well to those whose liability is vicarious?

No. It is not against public policy to obtain insurance to cover liability for punitive damages or exemplary damages assessed against an insured as a result of the acts of employees, agents, servants or any other person for whom the insured is vicariously liable. KAN. STAT. ANN. § 40-2,115 (2010); see also *Hartford*, 938 P.2d at 1290.

C. What is the relationship of punitive to compensatory damages?

A verdict for actual damages is a prerequisite to an award of punitive damages. *Printup II*, 938 P.2d at 1273; *Enlow v. Sears, Roebuck & Co.*, 822 P.2d 617, 624 (Kan. 1991); *Floyd v. Gen. Motors Corp.*, 960 P.2d 763, 767 (Kan. Ct. App. 1998).

To determine the amount of exemplary damages to be awarded under this section, the court may consider:

1. The likelihood at the time of the alleged misconduct that serious harm would arise from the defendant's misconduct
2. The degree of the defendant's awareness of that likelihood
3. The profitability of the defendant's misconduct
4. The duration of the misconduct and any intentional concealment of it
5. The attitude and conduct of the defendant upon discovery of the misconduct
6. The financial condition of the defendant
7. The total deterrent effect of other damages and punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, compensatory, exemplary and punitive damages awards to persons in situations similar to those of the claimant, and the severity of the criminal penalties to which the defendant has been or may be subjected.

In *Mason v. Texaco*, the court held that the amount of profit received as a result of the wrongdoing is not the ceiling of the

amount of punitive damages that can be awarded. It is important to look at the financial status of the defendant, since punitive damages are supposed to have a deterrent effect. *Mason v. Texaco, Inc.*, 741 F. Supp. 1472 (D. Kan. 1990). KAN. STAT. ANN. § 60-3701(b) (2010).

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

Kansas statute limits the award of exemplary or punitive damages to the lesser of (1) the annual gross income earned by the defendant as determined by the court based upon the defendant's highest gross annual income earned for any one of the five years immediately preceding the act for which such damages are awarded or (2) \$5 million. KAN. STAT. ANN. § 60-3701(e) (2010). If the court finds that the profitability of the defendant's misconduct exceeds or is expected to exceed these limitations, the limitation on the amount of exemplary or punitive damages that the court may award shall be equal to one and a half times the amount of profit that the defendant gained or is expected to gain as a result of the defendant's misconduct. KAN. STAT. ANN. § 60-3701(f) (2010). *Acker v. Burlington N. and Santa Fe Ry. Co.*, 215 F.R.D. 645, 654 (D. Kan. 2003) (plaintiff's request to amend so that she could add punitive damages totaling \$50 million was granted because, despite the limitation provided in 60-3701(e), the court found that the profitability of the defendants' misconduct exceeded or was expected to exceed the limitation of subsection (e), and therefore subsection (f) applies).

E. To whom are punitive damages payable?

Generally, an award of punitive damages is payable to the plaintiff.



I. PUNITIVE DAMAGES

A. May they be awarded?

Yes, punitive damages are available in Kentucky. KY. REV. STAT. §§ 411.184, 411.186 (LexisNexis 2010). See *Horton v. Union Light, Heat & Power Co.*, 690 S.W.2d 382 (Ky. 1985); *Bisset v. Goss*, 481 S.W.2d 71 (Ky. 1972); *Cont'l Ins. Cos. v. Hancock*, 507 S.W.2d 146 (Ky. 1973); *Klepper v. First Am. Bank*, 916 F.2d 337 (Sixth Cir. 1990).

B. If so, in what circumstances?

Standard of Conduct. Punitive damages are authorized only when the circumstances surrounding a tortious act indicate malice, willfulness or a reckless or wanton disregard for the rights of others. See *Holloway Constr. Co. v. Smith*, 683 S.W.2d 248 (Ky. 1984). See also *Sand Hill Energy, Inc. v. Smith*, 142 S.W.3d 153 (Ky. 2004); *Fowler v. Mantooth*, 683 S.W.2d 250, 253 (Ky.

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1984) (assessment of punitive damages requires consideration of the nature of the defendant's acts and the extent of the harm resulting from those acts); *Ostendorf v. Clark Equip. Co.*, 122 S.W.3d 530 (Ky. 2003) (the required *mens rea* is intentional conduct or gross negligence); *Harrod v. Fraley*, 289 S.W.2d 203 (Ky. 1956). See also *Simpson County Steeplechase Ass'n v. Roberts*, 898 S.W.2d 523 (Ky. Ct. App. 1995); *Holliday v. Campbell*, 873 S.W.2d 839 (Ky. Ct. App. 1994).

The following factors should be considered when awarding punitive damages:

1. The likelihood at the time of such misconduct that serious harm would arise from it
2. The degree of awareness of that likelihood
3. The profitability of the misconduct
4. The duration of the misconduct and any concealment of it
5. Any actions to remedy the misconduct once it became known.

Standard of Proof. The party seeking punitive damages must prove, by clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud or malice. See KY. REV. STAT. 411.184(2) (LexisNexis 2010). See also *Ostendorf v. Clark Equip. Co.*, 122 S.W.3d 530 (Ky. 2003).

Actions Against State. Kentucky statutory law does not prohibit punitive damages against the state. See Ky. Rev. Stat. Ann. § 411.184 (LexisNexis 2010) ("this statute supersedes any and all existing statutory or judicial law insofar as such law is inconsistent with the provisions of this statute"). See also Ky. Rev. Stat. Ann. § 411.186 (sections 411.184 and 186 "are applicable to all cases in which punitive damages are sought").

Assault and Battery. Punitive damages may be awarded in assault and battery actions where the assault is willful, malicious and without justification. KY. REV. STAT. § 411.010. See *Bank v. Fritsch*, 39 S.W.3d 474 (Ky. 2001).

Breach of Contract. If a breach of contract rises to the level of an independent tort, punitive damages may be recoverable. See *Curry v. Fireman's Fund Ins. Co.*, 784 S.W.2d 176 (Ky. 1989). Moreover, the breach must be substantial. *Motorists Mut. Ins. Co. v. Glass*, 996 S.W.2d 437 (Ky. 1997). However, ordinarily punitive damages are not recoverable for breach of contract. *Gen. Accident Fire & Life Insur. v. Judd*, 400 S.W.2d 685 (Ky. 1966).

Employer Liability for Employee Conduct. Under Kentucky law, punitive damages may not be assessed against an employer for

the act of an employee unless the employer authorized or ratified or should have anticipated the conduct in question. KY. REV. STAT. ANN. § 411.184(3).

Environmental Liability. Punitive damages are expressly permitted in an action involving alleged discharge of hazardous waste. KY REV. STAT. § 411.470 (LexisNexis 2010). In a nuisance claim, punitive damages are only available where the party against whom such damages are sought engaged in "misconduct involving something more than merely commission of the tort." *Radcliff Homes v. Jackson*, 766 S.W.2d 63 (Ky. Ct. App. 1989) citing *Fowler v. Mantoath*, 683 S.W.2d 250 (Ky. 1984). Also, a plaintiff must prove a present physical injury. *Wood v. Wyeth Aerst Labs*, 82 S.W.3d 849 (Ky. 2002).

Insurer's Bad Faith. Three aspects of a bad faith case include whether the action is one of contract or tort, what are the proper measures of damages, and whether the question is one of law for the court or of fact for the jury. One additional factor for which an insurer may be liable for punitive damages is unreasonable delay. See *Deaton v. Allstate Ins. Co.*, 548 S.W.2d 162 (Ky. Ct. App. 1977). Where there is a reasonable basis for an insurer to deny an insured's claim, even if found incorrect, it is improper to allow punitive damages absent some proof that the insurer acted intentionally, willfully, or in reckless disregard. See *Blue Cross & Blue Shield of Ky., Inc. v. Whitaker*, 687 S.W.2d 557 (Ky. Ct. App. 1985). See *Motorists Mut. Ins. Co. v. Glass*, 996 S.W.2d 437 (Ky. 1997).

Product Liability. An award of punitive damages in a product liability case requires assessing the nature of the defendant's act and the extent of the harm to the plaintiff. See *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409 (Ky. 1998). *Suffix, USA Inc. v. Cook*, 128 S.W.3d 838 (Ky. 2004) (punitive damages should be awarded when a defendant acted recklessly with conscious disregard of a substantial risk, and when it inadequately tested a product that could cause serious bodily harm). *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409 (Ky. 1998) (a defendant should not be relieved from paying punitive damages simply because other plaintiffs have previously recovered damages arising out of the same conduct).

Professional Liability. Suit in concealment resulting in misconduct must be separate and distinct damages from those flowing from the malpractice. *Hardway Mgmt. v. Southerland*, 977 S.W.2d 910 (Ky. 1998). Attorney's fraud exacerbated the damages suffered by the plaintiff-client in the underlying suit. Therefore, an award of \$50,000 in punitive damages was supported by a claim independent from the negligence action. See *Bierman v. Klapheke*, 967 S.W.2d 16 (Ky. 1998).

Wrongful Death. Punitive damages may be awarded in wrongful death actions. KY. REV. STAT. ANN. § 411. 130.

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

Yes. Kentucky courts may permit the insurability of punitive damages if either (1) public policy favors such an award or (2) the language of the insurance policy is broad enough to encompass such an award. See *Md. Cas. Co. v. Baker*, 200 S.W.2d 757 (Ky. 1947); *Grimes v. Nationwide Mut. Ins. Co.*, 705 S.W.2d 926 (Ky. 1985). In addition, punitive damages may be insurable where the underlying conduct is not intentional, but simply grossly negligent. See *Cont'l Ins. Cos. v. Hancock*, 507 S.W.2d 146, *supra*.

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

Not applicable. See II. A. above.

C. What is the relationship of punitive to compensatory damages?

It appears that the plaintiff must recover at least nominal damages to be entitled to a punitive damages award. *Fowler v. Mantooth*, 683 S.W.2d 250 (Ky. 1984). Punitive damages need bear no reasonable relation to actual damages, but there must exist a reasonable basis for concluding that a prejudiced, impassioned jury did not award them. See *Henderson v. Henderson Funeral Home Corp.*, 320 S.W.2d 113 (Ky. 1958).

However, an award of punitive damages need not bear reasonable relation to actual damages sustained, which might

warrant only “nominal” damages, if the claimant’s evidence regarding the extent of conscious wrongdoing is sufficient to sustain the award. *Fowler v. Mantooth*, 683 S.W.2d 250, *supra*.

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

Pursuant to statute, Kentucky requires an assessment of punitive damages using five considerations in every case where punitive damages are sought:

1. The likelihood at the relevant time that serious harm would arise from the defendant’s misconduct
2. The degree of the defendant’s awareness of that likelihood
3. The profitability of the misconduct to the defendant
4. The duration of the misconduct and any concealment once it became known to the defendant
5. Any actions by the defendant to remedy the misconduct.

KY. REV. STAT. § 411.186 (LexisNexis 2010).

E. To whom are punitive damages payable?

The Constitution of Kentucky and various Kentucky statutes authorize awards of punitive damages to the plaintiff.



I. PUNITIVE DAMAGES

A. May they be awarded?

Yes, punitive damages are available in Louisiana, but only when expressly authorized by statute. *Jaufre v. Taylor*, 2004 U.S. Dist. (LexisNexis 11767), 8 (La. 2004); see *Mosing v. Domas*, 830 So.2d 967, 973 (La. 2002); *Int’l Harvester Credit Corp. v. Seale*, 518 So.2d 1039, 1041-42 (La. 1988); see also *Alexander v. Burroughs Corp.*, 359 So.2d 607, 610 (La. 1978); *Fairley v. Ocean Drilling & Exploration Co.*, 689 So.2d 736, 737 (La. App. 1997); *Price v. La. Dep’t of Transp. & Dev.*, 608 So.2d 203 (La. Ct. App. 1992).

Furthermore, even when a statute authorizes punitive damages, such statutory language is to be strictly construed. *Seale*, 518 So.2d at 1041-42. While statutes imposing a penalty or punitive damages are rare, the legislature has chosen to provide such recovery in the commercial context in several instances. *Id.*; e.g., LA. REV. STAT. ANN. § 32:1257 (2010).

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B. If so, in what circumstances?

Standard of Conduct. Before punitive damages are allowed, it must be shown that the defendant's conduct was wanton or reckless. The wanton or reckless conduct that must be proved is highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent. It must also be shown that the danger created by the defendant's wanton or reckless conduct threatened or endangered the public safety and that the plaintiff's injury was caused by the wanton or reckless conduct. *Rivera v. U.S. Gas Pipeline Co.*, 697 So. 2d 327, 334 (La. Ct. App. 1997). Additionally, the Civil Code permits punitive damages awards in two situations: (1) under article 2315.4., when the injuries on which the action is based were caused by wanton or reckless disregard for the rights and safety of others by a defendant whose intoxication while operating a motor vehicle was a cause-in-fact of the plaintiff's injuries and (2) under article 2315.7., when the injuries on which the action is based were caused by a wanton and reckless disregard for the rights and safety of the person through criminal sexual activity that took place when the victim was 17 years old or younger. La. Civ. Code Ann. art. 2315.4, 7 (2010).

Standard of Proof. Generally, punitive damages merely require proof by a preponderance of the evidence. *Rivera v. U.S. Gas Pipeline Co.*, 697 So.2d 327.

Actions Against State. No Louisiana statute specifically permits or prohibits punitive damages against the state. There is, however, a \$500,000 cap in actions against the state. LA. REV. STAT. ANN. § 13:5106

Breach of Contract. Under Louisiana law, there can be no punitive damages for breach of contract, even when a party has acted in bad faith in breaching an agreement. *Chambers v. NASCO, Inc.*, 501 U.S. 32, (1991); see *Doxey v. Lake Charles Pilots, Inc.*, 781 So.2d 589 (La. Ct. App. 2001).

Employer Liability for Employee Conduct. Under Louisiana law, employers are answerable for the damage occasioned by their employees in the exercise of the functions in which they are employed. This responsibility only attaches, however, when the employer might have prevented the act which caused the damage, but did not do so. La. Civ. Code Ann. art. 2320.

Environmental Liability. Punitive damages are no longer permitted in hazardous and toxic substance cases. Act 2 of 1996, repealing La. Civ. Code Ann. art. 2315.3.

Insurer's Bad Faith. By statute, Louisiana permits punitive damages to be assessed for an insurer's bad faith. Specifically, the statute provides that: "In addition to any general or special damages to which a claimant is entitled for breach of the imposed duty, the claimant may be awarded penalties assessed against the insurer in an amount not to exceed two times the damages sustained or five thousand dollars, whichever is greater." La. Rev. Stat. Ann. § 22:1973 (2010).

Intoxicated Defendant. Punitive damages may be awarded upon proof that the injuries on which the action is based were caused by a wanton or reckless disregard for the rights and safety of others. LA. Rev. Stat. Ann. § 13:5106 (2010).

Product Liability. Punitive damages are not permitted for products liability. Under Louisiana law, punitive damages are not allowable unless expressly authorized by statute. "The Louisiana Products Liability Act provides the statutory framework for a products liability claim and does not authorize punitive damages." *Brookshire Bros. Holding Inc. v. Total Containment, Inc.*, 455 F. Supp. 2d 541, 543 (W.D. La. 2006).

Professional Liability. Punitive damages are not expressly authorized by statute for cases involving professional liability.

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

Yes. Under Louisiana law, insuring of punitive damages generally does not violate public policy. *Fagot v. Ciravola*, 445 F. Supp. 342, 344 (E.D. La. 1978) (liability policy covered punitive damages arising out of false arrest, false imprisonment and malicious prosecution). Punitive damages are recoverable from insured victim's uninsured motorist carrier where the insurer promises to pay all sums the insured was legally entitled to recover, unless

such punitive damages were specifically excluded under the policy. *Malbreagh v. CNA Reinsurance Co.*, 887 So.2d 494 (La. Ct. App. 2004) (quoting LA. REV. STAT. ANN. § 22:680 (West 2005)); the Louisiana Civil Code does not prohibit insurance coverage of punitive damages. *Morvant v. U.S. Fid. & Guar. Co.*, 538 So. 2d 1107, 1109-11 (La. Ct. App. 1989). However, forcing an insurer to pay punitive damages over and above its policy limits is illogical considering that the purpose of punitive

damages is to punish defendants for this egregious behavior and deter similar conduct. *Davis v. Counts*, 880 So.2d 968 (La. Ct. App. 2004). One court has held that it should be against public policy to allow someone to obtain insurance coverage for his or her voluntary and intentional wrongful acts. *Vallier v. Oilfield Constr. Co., Inc.*, 483 So.2d 212, 219 (La. Ct. App. 1986). This court held that an exclusion for exemplary damages was enforceable.

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

Not applicable.

C. What is the relationship of punitive to compensatory damages?

Recovery of punitive damages must necessarily turn on recovery of compensatory damages. *Richard v. City of Harahan*, 6 F. Supp. 2d 565, 576 (E.D. La. 1998). *Grefer v. Alpha Tech.*, 901 So. 2d 1117, 1148 (La. Ct. App. 2005), vacated by *Exxon Mobil Corp.*

v. Grefer, 549 U.S. 1249 (2007) for further consideration in light of *Philip Morris USA v. Williams*, 549 U.S. 346 (2007). Punitive damages must be reasonably related to the reprehensibility of the defendant's conduct and to the compensatory damages awarded to the plaintiffs; punitive damages turn on the recovery of compensatory damages. *Allison v. Citgo Petro. Corp.*, 151 F.3d 402, 417-18 (Fifth Cir. 1998); *Grefer v. Alpha Tech.*, 901 So. 2d 1117, 1148 (La. Ct. App. 2005) (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 426 (2003)).

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

No; *Mosing v. Domas*, 830 So.2d 967, 974-75 (La. 2002) (legislature deliberately left the assessment on the amount to the discretion of the jury).

E. To whom are punitive damages payable?

Generally, an award of punitive damages is payable to the party claiming them.



I. PUNITIVE DAMAGES

A. May they be awarded?

Yes. Punitive damages survives in Maine because it continues to "serve the useful purposes of expressing society's disapproval of intolerable conduct and deterring such conduct where no other remedy would suffice." *Rand v. Bath Iron Works Corp.*, 832 A.2d 771, 775 (Me. 2003) (quoting *Tuttle v. Raymond*, 494 A.2d 1353, 1355 (Me. 1985)); see *Kopenga v. Davric Maine Corp.*, 727 A.2d 906, 911 (Me. 1999). "To recover punitive damages, the plaintiff must demonstrate that the defendant acted with malice." *McAlister v. Slosberg*, 658 A.2d 658, 660 (Me. 1995). As such, punitive damages are impermissible absent an award of compensatory damages. *Zemero Corp. v. Hall*, 831 A.2d 413, 416 (Me. 2003).

B. If so, in what circumstances?

Standard of Conduct. A plaintiff seeking to recover punitive damages "must prove by clear and convincing evidence that the defendant acted with malice." *St. Francis De Sales Fed. Credit Union v. Sun Ins. Co. of N.Y.*, 818 A.2d 995, 1001 (Me. 2003) (quoting *Tuttle v. Raymond*, 494 A.2d 1353, 1354 (Me. 1985));

see *Newbury v. Virgin*, 802 A.2d 413, 418 (Me. 2002); *Palleschi v. Palleschi*, 704 A.2d 383, 385-6 (Me. 1998); *Batchelder v. Realty Res. Hospitality, LLC*, 914 A.2d 1116 (Me. 2007). "Malice can be express or implied. Express malice exists when the 'defendant's tortious conduct is motivated by ill will toward plaintiff.' Implied malice arises when 'deliberate conduct by the defendant, although motivated by something other than ill will toward any particular party, is so outrageous that malice toward a person injured as a result of that conduct can be implied. Implied malice, however[,] is not established by the defendant's mere reckless disregard of the circumstances.'" *Sun Ins. Co.*, 818 A.2d at 1001 (quoting *Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985)).

Standard of Proof. Clear and convincing evidence is required to obtain punitive damages. *St. Francis De Sales Fed. Credit Union v. Sun Ins. Co. of N.Y.*, 818 A.2d 995 (Me. 2003). See *Batchelder v. Realty Res. Hospitality, LLC*, 914 A.2d 1116 (Me. 2007).

Actions Against State. Punitive damages are not recoverable against a governmental entity. Me. Rev. Stat. Ann. tit. 14, § 8105(5) (2010).

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Breach of Contract. No matter how egregious the breach, punitive damages are unavailable under Maine law for breach of contract. *Stull v. First Am. Title Ins. Co.*, 745 A.2d 975, 981 (Me. 2000) (quoting *Drinkwater v. Patten Realty Corp.*, 563 A.2d 772, 776 (Me. 1989)). See also *Halco v. Davey*, 919 A.2d 626 (Me. 2007).

Employer Liability for Employee Conduct. An employer is not vicariously liable for the conduct of its employees unless such conduct is authorized by the employer. See *Angelica v. Drummond*, 2003 Me. Super. (LexisNexis 197), at *29 (Me. Super. Ct. Sept. 9, 2003) (citing Restatement (Second) of Agency, § 217C); see also *Robinson v. Maine Med. Ctr.*, 1998 Me. Super. (LexisNexis 30), at *11 (Me. Super. Ct. Feb. 4, 1998) (applying Restatement (Second) of Torts § 909(a)–(d)).

The two restatement sections cited by the Maine courts are similar in content. Section 909 provides that “[p]unitive damages can properly be awarded because of an act by an agent if, but only if:

1. the principal or a managerial agent authorized the doing and the manner of the act, or
2. the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or
3. the agent was employed in a managerial capacity and was acting in the scope of employment, or
4. the principal or a managerial agent of the principal ratified or approved the act.”

Restatement (Second) of Torts § 909. Similarly, Restatement (Second) of Agency § 217 (C) provides that “[p]unitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if:

1. the principal authorized the doing and the manner of the act, or
2. the agent was unfit and the principal was reckless in employing him, or
3. the agent was employed in a managerial capacity and was acting in the scope of employment, or
4. the principal or a managerial agent of the principal ratified or approve the act.”

Restatement (Second) of Agency § 217 (C).

Environmental Liability. The state may seek punitive damages from a defendant if a defendant fails, without sufficient cause, to undertake a removal or remedial action promptly in accordance with a clean-up order (Me. Rev. Stat. Ann. tit. 38 § 568(4)(B) (2010)), if a defendant fails to reimburse the state for the costs and payment of damages that are not covered by the Ground Water Oil Clean-up Fund within 30 days after demand (Me. Rev. Stat. Ann. tit. 38 § 569-B(6) (West 2010)), or if a defendant fails, without sufficient cause, to abate or remedy an order to abate lead paint (Me. Rev. Stat. Ann. tit. 38 § 1296 (2010)).

Insurer’s Bad Faith. Maine courts refuse “to recognize an independent tort of bad faith resulting from an insurer’s breach of its duty to act in good faith and deal fairly with an insured.” *Marquis v. Farm Family Mut. Ins. Co.*, 628 A.2d 644, 652 (Me. 1993) (“[W]e believe sufficient motivation presently exists to stifle an insurer’s bad faith tendencies without the further imposition of the specter of punitive damages under an independent tort cause of action.”).

Product Liability. Punitive damages are available for product liability cases when actual or implied malice is proven. *Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985) (“We hold that punitive damages are available based upon tortious conduct only if the defendant acted with malice.”).

Professional Liability. A plaintiff may recover damages for severe emotional distress arising out of a legal malpractice action. *McAlister v. Slosberg*, 658 A.2d 658, 660 (Me. 1995). Punitive damages may be recovered for intentional infliction of emotional distress. *Palleschi v. Palleschi*, 704 A.2d 383, 385 (Me. 1998). Punitive damages are available if the plaintiff establishes by clear and convincing evidence that the defendant acted with malice. *St. Francis De Sales Fed. Credit Union v. Sun Ins. Co. of N.Y.*, 818 A.2d 995 (Me. 2003); see *Palleschi*, 704 A.2d at 385.

Wrongful Death. By statute, punitive damages are recoverable in wrongful death actions. Me. Rev. Stat. Ann. tit. 18-A M.R.S. § 2-804 (West 2004).

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the wrongdoer)?

No. The Supreme Court of Maine has held that: "Allowing punitive damages to be awarded against an insurance company can serve no deterrent function because the wrongdoer is not the person paying the damages." *Brale v. Berkshire Mut. Ins. Co.*, 440 A.2d 359 (Me. 1982) (citing *Nw. Nat'l Cas. Co. v. McNulty*, 307 F.2d 432 (Fifth Cir. 1962)).

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

No. Maine requires punitive damages to be paid by the wrongdoer against which they were assessed, holding that punitive damages serve no deterrent function if the wrongdoer is not responsible for payment of the punitive damages award. *Brale v. Berkshire Mut. Ins. Co.*, 440 A.2d 359 (Me. 1982) (citing *Nw. Nat'l Cas. Co. v. McNulty*, 307 F.2d 432 (Fifth Cir. 1962)).

C. What is the relationship of punitive to compensatory damages?

Punitive damages are impermissible absent an award of compensatory damages. *Zemero Corp. v. Hall*, 831 A.2d 413, 416 (Me. 2003). The amount awarded by the jury in punitive damages will not be disturbed unless the punitive damages assessed are clearly excessive. *Haworth v. Feigon*, 623 A.2d 150 (Me. 1993). Factors in determining the propriety of the award of punitive damages are the degree of reprehensibility of the conduct, the disparity between the punitive award and the actual harm, and the amount of sanctions generally imposed for comparable conduct. *Shrader v. Miller*, 855 A.2d 1139, 1145 (Me. 2000) (citing

Harris v. Solely, 756 A.2d 499, 508 (Me. 2000)). When addressing disparity, Maine courts may begin with a determination of the ratio between the punitive damages award and the compensatory damages. According to the Supreme Judicial Court in *Harris*, the ratio may be high, so long as not "breathtaking." *Harris v. Solely*, 756 A.2d 499, 508 (Me. 2000) (citing *BMW of N. Am. v. Gore*, 517 U.S. 559, 583 (1996)).

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

Yes. By statute, punitive damages caps apply. See 18-A Me. Rev. Stat. Ann. § 2-804(b) (caps punitive damages in wrongful death actions at \$75,000); 38 Me. Rev. Stat. Ann. § 568(4)(B) (2010) (caps punitive damages at three times the clean-up costs in certain environmental matters); and 38 Me. Rev. Stat. Ann. § 1296 (caps punitive damages at three times the amount the state expended to take proper action, including the abatement or remediation that should have been conducted by the party so ordered by the court). Otherwise, the amount of an award of punitive damages is within the sound discretion of the fact finder. The amount awarded by the jury in punitive damages will not be disturbed unless the damages assessed are "clearly excessive." A punitive damages award should reflect the degree of outrage with which the fact finder views the defendant's tortious conduct, as well as other relevant aggravating and mitigating factors. *Haworth v. Feigon*, 623 A.2d 150 (Me. 1993).

E. To whom are they payable?

Generally, an award of punitive damages is payable to the plaintiff. *Tuttle v. Raymond*, 494 A.2d 1353 (Me. 1985).



I. PUNITIVE DAMAGES

A. May they be awarded?

Yes, punitive damages are available in Maryland. *Hoffman v. Stamper*, 867 A.2d 276 (Md. 2005).

B. If so, in what circumstances?

Standard of Conduct. Proof of actual malice is required to sustain a punitive damages award. *Hoffman v. Stamper*, 867 A.2d 276 (Md. 2005) (although an alternative mental state of reckless indifference may suffice to support a finding of fraud, "it does not suffice to justify an award of punitive damages"). "Actual malice"

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is defined as conduct of the defendant characterized by evil motive, intent to injure, ill will, or fraud. *Darcars Motors of Silver Spring, Inc. v. Marcin Borzym*, 841 A.2d 828 (Md. 2004).

Standard of Proof. Punitive damages may be awarded only when a plaintiff has demonstrated by **clear and convincing evidence** that the defendant acted with actual malice. *Darcars Motors of Silver Spring, Inc. v. Marcin Borzym*, 841 A.2d 828 (Md. 2004).

Actions Against State. Punitive damages are not permitted in actions against the state. Md. Code Ann., Cts. & Jud. Proc. § 5-522 (2010).

Breach of Contract. Punitive damages are recoverable in a suit arising out of a contractual relationship only upon proof of actual malice. Punitive damages are prohibited in a pure action for breach of contract. *Carter v. Aramark Sports & Entm't Servs.*, 835 A.2d 262, 268 (Md. Ct. Spec. App. 2003); *Schaefer v. Miller*, 587 A.2d 491 (Md. 1991); *Battista v. Sav. Bank of Baltimore*, 507 A.2d 203 (Md. 1986). If an independent tort arises out of a contractual relationship, punitive damages may be proper. *Gen. Motors Corp. v. Piskor*, 381 A.2d 16 (Md. 1977). See also *First Union Nat'l Bank v. Steele Software Sys. Corp.*, 834 A.2d 404 (Md. Ct. Spec. App. 2003) (recovery of punitive damages was permitted where a claim was not merely for breach of contract, but also for fraud). Where recovery of punitive damages is based on a tort arising out of a contractual relationship, however, plaintiff must prove actual malice. *Nunes v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 609 F. Supp. 1055 (D. Md. 1985). See also *Darcars Motors of Silver Spring, Inc. v. Borzym*, 841 A.2d 828 (Md. 2004) (when conversion occurs in the absence of actual malice, punitive damages are not appropriate).

Employer Liability for Employee Conduct. Under Maryland law, an employer ordinarily is responsible for the tortious conduct

of an employee committed while the employee was acting within the scope of the employment relationship. This rule of *respondeat superior* arises from the relationship of principal and subordinate and rests on the power of control and direction which the superior has over the subordinate. *Embrey v. Holly*, 442 A.2d 966, 969 (Md. 1982).

Environmental Liability. A responsible person who fails without sufficient cause to comply with a final order issued under subtitle § 7-266 is subject to punitive damages, not exceeding three times the amount of any costs that are incurred by the State. MD. CODE ANN. ENVIRONMENT § 7-266.1 (2010).

Product Liability. In product liability cases, "actual malice" necessary to support an award of punitive damages is actual knowledge of a defect and deliberate disregard of consequences; the standard looks to the state of mind of the defendant. *ACandS v. Godwin*, 667 A.2d 116 (Md. 1995). In product liability cases, the equivalent of the "evil motive," "intent to defraud" or "intent to injure" that generally characterizes "actual malice" is actual knowledge of defect and deliberate disregard of the consequences. *Owens-Ill., Inc.*, 601 A.2d 633 (Md. 1992), *supra*.

Professional Liability. In attorney malpractice cases, punitive damages may be awarded against an attorney for violating his fiduciary duties. *Finch v. Hughes Aircraft Co.*, 469 A.2d 867 (Md. Ct. Spec. App. 1983). In medical malpractice claims, punitive damages may be awarded by the Health Claims Arbitration Committee, as well as the court. *Bishop v. Holy Cross Hosp.*, 410 A.2d 630 (Md. Ct. Spec. App. 1980).

Wrongful Death. Punitive damages are not recoverable under the wrongful death statute. *Cohen v. Rubin*, 460 A.2d 1046 (Md. Ct. Spec. App. 1983).

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

Yes. Public policy is no bar to liability insurance coverage for exemplary damages assessed against the insured. *First Nat'l Bank v. Fid. & Deposit Co.*, 389 A.2d 359 (Md. 1978). An intermediate appellate court has held that punitive damages are insurable even if they are assessed as a result of criminal conduct. See *Med. Mut. Liab. Ins. Soc. v. Miller*, 451 A.2d 930 (Md. Ct. Spec. App. 1982).

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

Not applicable. See II. A. above.

C. What is the relationship of punitive damages to compensatory damages?

Punitive damages must be predicated upon an award of at least nominal compensatory damages. *Darcars Motors of Silver Spring, Inc. v. Borzym*, 841 A.2d 828 (Md. 2004); *V.F. Corp. v. Wrexham Aviation Corp.*, 715 A.2d 188 (Md. 1998). Punitive

damages should be apportioned among multiple wrongdoers depending upon degree of culpability and pecuniary status of each. *Embrey v. Holly*, 442 A.2d 966 (Md. 1982). It is proper for the court to consider the pecuniary circumstances of a defendant before imposing exemplary damages to punish the defendant for a wrong. *Crawford v. Mindel*, 469 A.2d 454 (Md. Ct. Spec. App. 1984). See also *Hoffman v. Stamper*, 385 Md. 1 (Md., 2005). In personal injury cases, however, evidence of a defendant's financial means is not admissible until there has been a finding of liability. MD. CODE CTS. & JUD. PROC. § 10-913 (a) (2010).

D. Are there any statutory caps or other limitations?

There are no statutory caps or other limitations on the amount of punitive damages that may be awarded in Maryland. The standard that is followed is that the award should be (1) in an amount that will deter the defendant and others from similar conduct (see *Owens-Ill., Inc. v. Zenobia*, 601 A.2d 633, *supra*); (2) proportionate to the wrongfulness of the defendant's conduct and the defendant's ability to pay; and (3) not designed to bankrupt or financially destroy a defendant. See *Fraidin v. Weitzman*, 611 A.2d 1046 (Md. Ct. Spec. App. 1992), *cert. denied*, 617 A.2d 1055 (Md. 1993); *Elerin v. Fairfax Sav. Bank, F.S.B.*, 652 A.2d 1117 (Md. 1995). The amount of a punitive damages award does not violate due process when the punitive damages awarded are proportionate to the compensatory damages award, and the trial judge reviews and explains the reasons for allowing the punitive damages award to stand. *Mkt. Tavern, Inc. v. Bowen*, 610 A.2d 295, *cert. denied*, 614 A.2d 84 (Md. 1992).

Maryland courts generally consider punitive damages in the context of nine non-exclusive legal principles articulated by the Court of Appeals in *Bowden v. Caldor, Inc.*, 710 A.2d 267 (Md. 1998). The factors are "guideposts to assist a court in reviewing an award." *Id.* at 41.

The nine *Bowden* factors are:

1. The defendant's ability to pay
2. The relationship of the award to statutorily imposed criminal fines
3. The amount of the award in comparison to other final punitive damages awards in the jurisdiction and, in particular, in somewhat comparable cases
4. The gravity of the defendant's conduct
5. The deterrent value of the award with respect to both the defendant and the general public
6. Whether compensatory damages, including litigation expenses, sufficiently compensate the plaintiff
7. Whether a reasonable relationship exists between compensatory and punitive damages
8. Whether evidence of other final and satisfied punitive damages awards against the same defendant for the same conduct should be considered
9. If separate torts are implicated, whether they grew out of the same occurrence or episode. *Id.*

E. To whom are punitive damages payable?

Punitive damages are generally payable to the plaintiffs. In medical malpractice claims, only the patients (and not their spouses) can recover punitive damages. *Homer v. Long*, 599 A.2d 1193 (Md. Ct. Spec. App. 1992). Punitive damages are also recoverable in survivorship cases (by the estate), but not in wrongful death suits (by the next of kin). *Potomac Elec. Power Co. v. Smith*, 558 A.2d 768, *cert. denied*, 564 A.2d 407 (Md. 1989).

Massachusetts

I. PUNITIVE DAMAGES

A. May they be awarded?

Yes. Massachusetts consistently has maintained that punitive damages are allowable only when expressly authorized by statute, and not at common law. See *Porcaro v. Chen*, 2004

Mass. Super. (LexisNexis 576) (Mass. Super. Ct., 2004); *Santana v. Registrars of Voters*, 502 N.E.2d 132 (Mass. 1986); *Torres v. Attorney Gen.*, 460 N.E.2d 1032, 1039 (Mass. 1984); *USM Corp. v. Marson Fastener Corp.*, 467 N.E.2d 1271 (Mass. 1984); *Int'l*

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Fid. Ins. Co., 443 N.E.2d 1308 (Mass. 1983); *Lowell v. Mass. Bonding & Ins. Co.*, 47 N.E.2d 265 (Mass. 1943). See also *Jensen v. Jordan*, 1994 Mass. App. Div. 82 (Mass. Dist. Ct. 1994). Notably, punitive damages are not favored in Massachusetts. See *Pine v. Frederic W. Rust, Third*, 535 N.E.2d 1247 (Mass. 1989). Massachusetts, however, has long-standing statutes providing for treble damages. See *Int'l Fid. Ins. Co.*, 443 N.E.2d 1308 (Mass. 1983); Mass. Gen. Laws Ch. 93A (2010).

B. If so, in what circumstances?

Standard of Conduct. The conduct required to obtain an award of punitive damages in Massachusetts is set for each cause of action by the statute authorizing the award of punitive damages. See *Santana, supra*.

Standard of Proof. Massachusetts has not specifically addressed the standard of proof in the context of punitive damages. In this context, it is likely that the traditional Massachusetts burden of proof in civil cases, a preponderance of the evidence, would apply. See *LaLonde v. LaLonde*, 566 N.E.2d 620 (Mass. App. Ct. 1991).

Actions Against State. There is no statute expressly authorizing punitive damages against the state. "Absent statutory language that indicates by express terms a waiver of sovereign immunity the Legislature's intent to subject the Commonwealth to liability may be found only when such an intent is clear 'by necessary implication' from the statute's terms." *DeRoche v. Mass. Comm'n Against Discrimination*, 848 N.E.2d 1197, 1206 (Mass. 2006) (citing *Woodbridge v. Worcester State Hosp.*, 423 N.E.2d 782 (Mass. 1981)). However, in an action brought for unlawful discrimination under General Laws of Massachusetts, chapter 151B, section 1, punitive damages may be awarded. *DeRoche*, 848 N.E.2d at 1206 (citing *Bain v. Springfield*, 678 N.E.2d 155 (1997)) (interpreting the statutory language of the General Laws of Massachusetts, chapter 151B, section 1). See also MASS. GEN. L. ANN. c. 93A.

Breach of Contract. Punitive damages are not available in breach of contract cases. *DeRose v. Putnam Mgmt. Co.*, 496 N.E.2d 428, 432 (Mass. 1986) (citing *Hall v. Paine*, 112 N.E. 153 (Mass. 1916)).

Employer Liability for Employee Conduct. Massachusetts courts have yet to address the extent to which punitive damages may be assessed against an employer for the wrongful acts of an employee.

Environmental Liability. MASS. GEN. L. ANN. c. 131, § 5C (2005) allows for punitive damages in claims alleging interference with a lawful taking of fish or wildlife.

General Liability. The statute addressing actions for death by negligence allows for punitive damages "in an amount of not less than \$5,000 in such case as the decedent's death was caused by the malicious, willful, wanton or reckless conduct of the defendant or by the gross negligence of the defendant." MASS. GEN. L. ANN. c. 229, § 2. A decedent's negligence is not taken into account in assessing punitive damages under MASS. GEN. L. ANN. c. 229, § 2. *Lane v. Meserve*, 482 N.E.2d 530 (Mass. App. Ct. 1985). See also *Brockman v. Sweetheart Cup Co.*, 2005 Mass. Super. (LexisNexis 250) (Mass. Super. Ct., 2005).

Massachusetts law denying punitive damages in personal injury actions while allowing them in wrongful death actions does not violate equal protection where there is a rational basis for the distinction in reducing the possibility of excessive damages being awarded in cases where injuries do not result in death. *Freeman v. World Airways, Inc.*, 596 F. Supp. 841 (D.C. Mass. 1984).

Insurer's Bad Faith. Punitive damages are allowable where evidence warrants a finding of willful or knowing unfair and deceptive insurance practices. *Cohen v. Liberty Mut. Ins. Co.*, 673 N.E.2d 84 (Mass. App. Ct. 1996). See also *Kapp v. Arbella Mut. Insur. Co.*, 689 N.E.2d 1347 (Mass. 1998) (automobile liability insurer's refusal to settle claim without insisting on release for insured was a knowing, willful and deceptive insurance practice and justified punitive damages).

Product Liability. Punitive damages are not recoverable against manufacturers under Massachusetts law unless expressly authorized by statute. *Moser v. Bostitch Div. of Textron, Inc.*, 609 F. Supp. 917 (D. Mass. 1985); see also *Caperci v. Huntoon*, 397 F.2d 799, *supra*.

Liability under the Massachusetts Consumer Protection Act for intentional misrepresentation or breach of warranty does not automatically trigger an award of punitive damages. *Cambridge Plating Co., Inc. v. Napco, Inc.*, 85 F.3d 752 (First Cir. 1996). See also *Lyon v. Triram Corp.*, 18 Mass. L. Rep. 419 (Mass. Super. Ct., 2004).

Professional Liability. Punitive damages are recoverable against a professional in an action authorized under a specific statute. See, e.g., MASS. GEN. L. ANN. c. 142A § 7 (2010).

In Massachusetts, any person who engages in the conduct of any trade or commerce and who suffers any loss of money or property, real or personal, as a result of the use or employment by another person who engages in any trade or commerce of an unfair method of competition or an unfair or deceptive act or practice may seek treble damages if the court finds that the use or employment of the method of competition or the act or practice was a willful or knowing violation of chapter 93A. MASS. GEN. L. ANN. c. 93A § 11.

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

No. Massachusetts courts have given limited treatment to the question of the insurability of punitive damages. See *Santos v. Lumbermens*, 556 N.E.2d 983 (Mass. 1990). Based on the uninsured motor vehicle statute and the language of insurance policies, the *Santos* court held that punitive damages were not recoverable under the terms of the plaintiff's uninsured motorist policy.

In *Andover Newton Theological School Inc. v. Continental Casualty Co.*, the Supreme Judicial Court held that M.G.L. c. 175 § 47 (prohibiting insurer from insuring "any person against legal liability for causing injury, other than bodily injury, by his deliberate or intentional crime or wrongdoing") prohibits insurance coverage only if the insured knew that the act was wrongful. *Andover Newton Theological Sch. Inc. v. Cont'l Cas. Co.*, 409 Mass. 350 (1991).

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

Massachusetts courts have yet to address the insurability of punitive damages in other contexts beyond *Santos v. Lumbermens*.

C. What is the relationship of punitive to compensatory damages?

In Massachusetts, punitive damages may be awarded without an award of compensatory damages. See *Robin Bain v. City of Springfield*, 678 N.E.2d 155 (Mass. 1997) ("There is no requirement that punitive damages may only be awarded if there is an award of compensatory damages."). See also *Gasior v. Mass. Gen. Hosp.*, 846 N.E.2d 1133 (Mass. 2006) (discussing that the purpose of punitive damages has been described as punishment and deterrence, rather than compensation of an injured party).

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

Any such limitations or caps on the amount of punitive damages that may be assessed are addressed specifically in each Massachusetts statute that authorizes an award of punitive damages. See, e.g., MASS. GEN. L. ANN. c. 258, § 2, which limits punitive damages to \$100,000 in actions against municipal entities; MASS. GEN. L. ANN. c. 15C, § 22A, which limits punitive damages to \$100,000 in actions against the state student loan authority; MA. ST. 23A§2-164, which limits punitive damages to \$100,000 in actions against the state home mortgage finance authority.

E. To whom are they payable?

Where a decedent has no spouse or issue, the next of kin may recover consortium-like damages only, but any punitive damages and damages for conscious pain and suffering are recoverable by the decedent's estate. See *Santos, supra*. See also *Lyon v. Triram Corp.*, 18 Mass. L. Rep. 419 (Mass. Super. Ct. 2004) (a defendant found liable under General Laws of Massachusetts chapter 22, section 2 is liable for punitive damages) 419, *supra*.; *Burt v. Meyer*, 508 N.E.2d 598 (Mass. 1987) (punitive damages of \$200,000 were awarded to the widow of a decedent who left all of his property in his will to his wife and nothing to his children).

PUNITIVE DAMAGES REVIEW

Michigan



I. PUNITIVE DAMAGES

A. May they be awarded?

No. It is well established that only compensatory damages are available in Michigan, and punitive sanctions may not be imposed. *Rafferty v Markovitz*, 602 N.W.2d 367 (Mich. 1999); *McAuley v. Gen. Motors Corp.*, 578 N.W.2d 282 (Mich. 1998). While statutory exemplary damages may be permitted, these exemplary damages are recoverable as compensation and not as punishment. *McPeak v. McPeak*, 593 N.W.2d 180, 184 (Mich. Ct. App. 1999). Exemplary damages are proper if they compensate for the humiliation, sense of outrage, and indignity resulting from injustices maliciously, willfully, and wantonly inflicted upon the other party. *Id.* at 490.

B. If so, in what circumstances?

Standard of Conduct. In order to verify an award of exemplary damages, the act complained of must be voluntary and inspire feelings of humiliation, outrage and indignity. *McPeak*, 593 N.W.2d at 183; *Veselenak v. Smith*, 327 N.W.2d 261 (Mich. 1982). The act or conduct must be malicious or so willful and wanton

as to demonstrate a reckless disregard of the plaintiff's rights. *McPeak*, 593 N.W.2d at 183; *Bailey v. Graves*, 515, N.W.2d 166 (Mich. 1981). It is not essential to prove direct evidence of an injury to the plaintiff's feelings. *Id.* at 184. Rather, the question is whether the injury to feelings and mental suffering are natural and proximate in view of the nature of the defendant's conduct. *Id.*, *Green v. Evans*, 401 N.W.2d 250 (Mich. Ct. App. 1985).

Standard of Proof. Exemplary damages are only recoverable if the plaintiff has proven by a preponderance of the evidence, malice, willful and wanton misconduct or negligence so great as to indicate reckless disregard of the rights of another. *Id.* at 152; *Bailey v. Graves*, 411 Mich. 510, 515, N.W.2d 166 (1981).

Employer Liability for Employee Conduct. Under Michigan law, exemplary or punitive damages are recoverable as compensation to the plaintiff, not as punishment of the defendant. *Peisner v. Detroit Free Press*, 304 N.W.2d 814, 817 (Mich. Ct. App. 1981). Thus, standard vicarious liability rules apply.

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

Not applicable. See I.A. above. However, because of the compensatory rather than punitive character of exemplary damages, the public policy disfavoring the shifting of punishment arguably does not apply to exemplary damages awards. No case or statute, however, specifically addresses this point.

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

It is likely that an award of exemplary damages that are assessed vicariously would be insurable for the reasons stated above in II.A., *supra*.

C. What is the relationship of punitive to compensatory damages?

Exemplary damages are a class of compensatory damages that allow for compensation for injury to feelings. *McPeak*, 593

N.W.2d 180. Proof of actual damages is not a bar to an award of exemplary damages, since actual damages include compensation for injury to feelings.

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

No.

E. To whom are punitive damages payable?

Exemplary damages are payable to the party claiming them as compensation for injury to feelings. *McPeak*, 593 N.W.2d 180.

Minnesota



I. PUNITIVE DAMAGES

A. *May they be awarded?*

Yes, punitive damages are available under MINN. STAT. § 549.20 (2010).

B. *If so, in what circumstances?*

Standard of Conduct.

The standard of conduct that must be proven to obtain punitive damages is specified in MINN. STAT. § 549.20, which provides as follows:

Subd. 1. Standard.

1. Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others.
2. A defendant has acted with deliberate disregard for the rights or safety of others if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others and:
 - a. deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others or
 - b. deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.

Subd. 2. Master and principal.

Punitive damages can properly be awarded against a master or principal because of an act done by an agent only if the:

3. Principal authorized the doing and the manner of the act
4. Agent was unfit and the principal deliberately disregarded a high probability that the agent was unfit
5. Agent was employed in a managerial capacity with authority to establish policy and make planning-level decisions for the principal and was acting in the scope of that employment or

6. Principal or a managerial agent of the principal, described in clause (c), ratified or approved the act while knowing of its character and probable consequences.

Subd. 3. Factors.

Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public arising from the defendant's misconduct, the profitability of the misconduct to the defendant, the duration of the misconduct and any concealment of it, the degree of the defendant's awareness of the hazard and of its excessiveness, the attitude and conduct of the defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of the defendant, and the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damages awards to the plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the defendant may be subject.

Subd. 4. Separate proceeding.

In a civil action in which punitive damages are sought, the trier of fact shall, if requested by any of the parties, first determine whether compensatory damages are to be awarded. Evidence of the financial condition of the defendant and other evidence relevant only to punitive damages is not admissible in that proceeding. After a determination has been made, the trier of fact shall, in a separate proceeding, determine whether and in what amount punitive damages will be awarded.

Subd. 5. Judicial review.

The court shall specifically review the punitive damages award in light of the factors set forth in subdivision 3 and shall make specific findings with respect to them. The appellate court, if any, also shall review the award in light of the factors set forth in that subdivision. Nothing in this section may be construed to restrict either court's authority to limit punitive damages.

PUNITIVE DAMAGES REVIEW

Standard of Proof. “Clear and convincing evidence” that the acts of the defendant show deliberate disregard for the rights or safety of others is required to obtain punitive damages. Minn. Stat. § 549.20(1)(a) (2010). Clear and convincing evidence is that which is more than a preponderance, but less than proof beyond a reasonable doubt. *Hammond v. Northland Counseling Ctr., Inc.*, 1998 U.S. Dist. (LexisNexis 9133) (D. Minn. Feb. 27, 1998). “Where the evidence is sufficient to permit the jury to conclude that it is ‘highly probable’ that the defendant acted with deliberate disregard to the rights or safety of others, the ‘clear and convincing’ standard would be satisfied.” *Weber v. Anderson*, 269 N.W.2d 892 (Minn. 1978).

Pleading Requirements. Pursuant to MINN. STAT. § 549.191 (2007), the claimant may not include a prayer for punitive damages in the initial pleading. After filing suit, a party seeking punitive damages may make a motion to amend the pleadings to claim punitive damages. The motion must allege the applicable legal basis under section 549.20 or other law for awarding punitive damages, and must be accompanied by one or more affidavits showing the factual basis for the claim. The court need find only *prima facie* evidence in support of the motion to allow the moving party to amend his/her pleading to claim punitive damages. For purposes of tolling the statute of limitations, pleadings amended under this section relate back to the time the action was commenced. Minn. Stat. § 549.191.

Actions Against State. Punitive damages are not permitted on any claim against the state. Minn. Stat. § 466.04.

Breach of Contract. Punitive damages are not recoverable “except in exceptional cases where the breach is accompanied by an independent tort.” *Minn.-Iowa Television Co. v. Watonwan T.V. Improvement. Assoc.*, 294 N.W.2d 297, 309 (Minn. 1980) (citing *Haagenson v. Nat’l Farmers Union Prop. & Cas. Co.*, 277 N.W.2d 648, 652 (Minn. 1979)); *Olson v. Rugloski*, 277 N.W.2d 385 (Minn. 1979).

Employer Liability for Employee Conduct. Under Minnesota law, punitive damages may properly be awarded against an employer because of an act done by an employee only if the:

1. Employer authorized the doing and the manner of the act;
2. Employee was unfit and the employer deliberately disregarded a high probability that the employee was unfit;
3. Employee was employed in a managerial capacity with authority to establish policy and make planning-level decisions for the employer and was acting in the scope of that employment; or
4. Employer or a managerial agent of the employer, described in clause (c), ratified or approved the act while knowing of its character and probable consequences.

MINN. STAT. § 549.20, subdiv. 2.

Product Liability. Punitive damages may be recovered for product liability only by providing ‘clear and convincing’ evidence that the defendants operated with intent or indifference to threaten the rights or safety of others with respect to the manufacture, distribution, and sales of the allegedly defective product. *Berczyk v. Emerson Tool Co.*, 291 F. Supp. 2d 1004, 1008 (D. Minn. 2003) (citing Minn. Stat. § 549.20); *see also Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826 (Minn. 1988) (held punitive damages award is proper where manufacturer’s conduct exhibited willful indifference to safety of others).

Professional Liability. No statute or case law prohibits or otherwise limits imposition of punitive damages against professionals. Punitive damages are available against professionals under agency principles, along with other categories of defendants under general statutory authority. Accordingly, punitive damages may be assessed against professionals “upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others.” Minn. Stat. § 549.20(1)(a) (2010).

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

No. Minnesota courts have held that “public policy is not served by permitting transfer of the responsibility for payment of punitive damages to another. For that reason we have been most reluctant to permit insurance against liability for punitive

damages.” *See Rosenbloom v. Flygare*, 501 N.W.2d 597, 602 (Minn. 1993); *Diocese of Winona v. Interstate Fire & Cas. Co.*, 841 F. Supp. 894 (D. Minn. 1992).

However, the Minnesota Supreme Court has held that treble damages awards for retaliatory discharge, or awards that are

characterized as partially compensatory, may not be excluded from insurance coverage. *Wojciak v. N. Package Corp.*, 310 N.W.2d 675, 679 (Minn. 1981).

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

Probably not. See *Lake Cable Partners v. Interstate Power Co.*, 563 N.W.2d 81, 86 (Minn. Ct. App. 1997) (holding defendant directly liable, but stating that punitive damages may be insured against by those who may be vicariously liable); MINN. STAT. § 549.20 subd. 2) (2010)) (provides that the master can be vicariously liable for punitive damages of its employee under certain circumstances).

C. What is the relationship of punitive to compensatory damages?

Punitive damages are not available without compensatory damages. *Meixner v. Buecksler*, 13 N.W.2d 754 (Minn. 1944). See also *Bucko v. First Minn. State Bank*, 452 N.W.2d 244 (Minn. Ct. App. 1990), *aff'd in part, and rev'd in part*, 471 N.W.2d 95 (punitive damages award reversed because plaintiff "did not demonstrate any compensable loss").

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

No. However, Minnesota courts have discretion to cap a punitive damages award if the award is deemed unreasonable. See MINN. STAT. § 549.20 subd. 5) (2010); *Hammerstein v. Reiling*, 115 N.W.2d 259 (Minn. 1962); *Hamlin v. Super 8 Motel of Fosston, Inc.*, 2000 Minn. App. (LexisNexis 460) (Minn. Ct. App. May 16, 2000) (holding that punitive damages awards must fall within a "realistic appraisal of [a defendant's] ability to pay").

E. To whom are punitive damages payable?

Punitive damages are payable to the plaintiff, and perhaps to "other similarly situated persons." See MINN. STAT. § 549.20 subd. 3) (2010). Minnesota also allows punitive damages in wrongful death cases to be payable to the surviving spouse and next of kin in proportion to the pecuniary loss severally suffered by the death. MINN. STAT. § 573.02 subd. 1); *Swenson v. Emerson Elec. Co.*, 374 N.W.2d 690 (Minn. 1985); *Montpetit v. Allina Health Sys.*, 2000 Minn. App. (LexisNexis 1051) (Minn. Ct. App. October 10, 2000).



I. PUNITIVE DAMAGES

A. May they be awarded?

Yes, punitive damages are available in Mississippi. MISS. CODE ANN. § 11-1-65 (2010).

B. If so, in what circumstances?

Standard of Conduct. Punitive damages may be awarded only if a claimant proves that the defendant against whom punitive damages are sought acted with actual malice, gross negligence that evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud. MISS. CODE ANN. § 11-1-65(1)(a). See also *J.C. Johnson v. Diversified Health Servs., Inc.*, 735 So. 2d 1051, 1052 (Miss. 1999) (directed verdict on punitive damages was not in error where no reasonable fact finder could be convinced that appellees defrauded appellants or that their conduct was grossly negligent); *Wallace*, 672 So. 2d at 728. See also *Spann v. Robinson Prop. Group, L.P.*, 970 F. Supp. 564 (N.D. Miss. 1997) (customer at a casino could not

recover punitive damages for injuries sustained when cocktail waitress spilled hot coffee on his back, where the customer admitted that someone bumped into the waitress and that the waitress did not act with gross negligence). Punitive damages may be awarded where there is a finding of intentional infliction of damage or aggravated conduct that amounts to infliction of harm, such as willfulness, wantonness, malice, gross negligence, oppression, gross fraud or reckless disregard. See *U.S. Indus., Inc. v. McClare Furniture Co.*, 371 So. 2d 391, 393 (Miss. 1979). See also *Weems v. American Sec. Ins. Co.*, 486 So. 2d 1222, 1226 (Miss. 1986); *Caldwell v. Alfa Ins. Co.*, 686 So. 2d 1092, 1095 (Miss. 1996); *Universal Life Ins. Co. v. Veasley*, 610 So. 2d 290, 293 (Miss. 1992).

In determining an award of punitive damages, the trier of fact is required to consider the following:

1. Defendant's financial condition and net worth

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2. The nature and reprehensibility of the defendant's wrongdoing, for example, the impact of the defendant's conduct on the plaintiff, or the relationship of the defendant to the plaintiff
3. The defendant's awareness of the amount of harm being caused and the defendant's motivation in causing such harm
4. The duration of the defendant's misconduct and whether the defendant attempted to conceal such misconduct
5. Any other circumstances shown by the evidence that bear on determining a proper amount of punitive damages.

MISS. CODE ANN. § 11-1-65(1)(e) (2010).

Standard of Proof. To obtain punitive damages, clear and convincing evidence is required that the defendant against whom punitive damages are sought acted with actual malice, gross negligence that evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud. MISS. CODE ANN. § 11-1-65(1)(a).

Actions Against State. Punitive damages are not permitted against a governmental entity or its employee for any act or omission for which immunity is waived. Miss. Code Ann. § 11-46-15 (2010).

Breach of Contract. Although punitive damages are not ordinarily recoverable in cases involving breach of contract, punitive damages are recoverable where the breach results from an intentional wrong, insult, or abuse, as well as from such gross negligence as constitutes an independent tort. *Sessoms v. Allstate Ins. Co.*, 634 So. 2d 516, 519 (Miss. 1993). In these instances, punitive damages act to punish and are to set an example, thereby discouraging others from similar behavior. As such, punitive damages are allowed only with caution and within narrow limits. *Am. Funeral Assur. Co. v. Hubbs*, 700 So. 2d 283, 285-86 (Miss. 1997), *reh'g denied*, 700 So. 2d 331; see also *Snow Lake Shores Prop. Owners v. Smith*, 610 So. 2d 357, 362 (Miss. 1992); and *Sessoms v. Allstate Ins. Co.*, 634 So. 2d 516, 519 (Miss. 1993). The issue of punitive damages in suits for tortious breach of contract, breach of fiduciary duties and fraud is governed by the common law, not by the provisions of § 11-1-65(1). This is because § 11-1-65(2)(a) specifically exempts contract actions from the provisions of the statute. *Hurst v. Sw. Miss. Legal Servs. Corp.*, 708 So. 2d 1347, 1348 (Miss. 1998).

Employer Liability for Employee Conduct. In Mississippi, punitive damages can be assessed against an employer for an employee's actions within the scope of employment, when the employer acted with actual malice, gross negligence which

evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud. *Doe v. Salvation Army*, 835 So. 2d 76, 77 (Miss. 2003) (Upholding the trial court's determination that a punitive damages claim against an employer would not be submitted to the jury, where the trial court found no actual malice, no intentional acts and no gross negligence by the employer). See also, Miss. Code Ann. § 11-1-65 (a) (specifying the proof required for punitive damages to be awarded).

Environmental Liability. Punitive damages are permitted in the context of environmental liability. Miss. Code Ann. § 17-17-29.

Insurer's Bad Faith. Mississippi courts have upheld punitive damages awards in insurance bad faith suits. See *Mut. Life Ins. Co. v. Estate of Wesson by Hall*, 517 So. 2d 521, 533 (Miss. 1987), *cert. denied*, 486 U.S. 1043 (1988) (court reduced punitive damages recovery to life insurance policy's beneficiaries from \$8 million to \$1.5 million, but did allow the punitive damages against the insurer for bad faith refusal to pay the value of the policy); *Ross-King-Walker, Inc. v. Henson*, 672 So. 2d 1188, 1191 (Miss. 1996) (workers' compensation agent misrepresentation is sufficient to support punitive damages award against insurer); *Valley Forge Ins. Co./CNA Ins. Co. v. Strickland*, 620 So. 2d 535, 541 (Miss. 1993) (auto insurer's breach of a duty to seriously injured insured justified an award of punitive damages); *Bankers Life & Cas. Co. v. Crenshaw*, 483 So. 2d 254, 270 (Miss. 1985) (denial of insured's claim based on exclusion known to be invalid under Mississippi law); *Standard Life Ins. Co. v. Veal*, 354 So. 2d 239, 248 (Miss. 1977) (refusal to pay legitimate claim). The test to award punitive damages "is the same in bad faith refusal cases as in any other case where punitive damages are sought." *Weems v. Am. Sec. Ins. Co.*, 486 So. 2d 1222, 1226 (Miss. 1986).

Libel and Slander. Mississippi courts allow for recovery of punitive damages in libel and slander actions. See *Journal Publ'g Co. v. McCullough*, 743 So. 2d 352 (Miss. 1999).

Product Liability. In product liability matters, the seller of a product other than the manufacturer shall not be liable for punitive damages unless the seller exercised substantial control over that aspect of the design, testing, manufacture, packaging or labeling of the product that caused the harm for which recovery of damages is sought; the seller altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought; the seller had actual knowledge of the defective condition of the product at the time he supplied same; or the seller made an express factual representation about the aspect of the product that caused the harm for which recovery of damages is sought. Miss. Code Ann. § 11-1-65(2).

Professional Liability. Punitive damages may be recovered against a professional only where the defendant acted with actual malice, gross negligence that evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud. Miss. Code Ann. § 11-1-65; *see also Causey v. Sanders*,

998 So. 2d 393 (Miss. 2008) (court found punitive damages were not proper in a medical malpractice action where there was no evidence that the doctor demonstrated a willful or malicious wrong or a gross and reckless disregard for the rights of others).

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

Yes, in Mississippi, an insurance company's liability for all damages arising from bodily injury includes punitive damages. Insurance coverage of punitive damages does not violate Mississippi public policy. The extent or limit of an insurer's liability for punitive damages is governed by the agreement of the parties as reflected by the actual language in the policy of insurance. *Old Sec. Cas. Ins. Co. v. Clemmer*, 455 So. 2d 781, 783 (Miss. 1984), as corrected 458 So. 2d 732.; *see also Anthony v. Frith*, 394 So. 2d 867, 868 (Miss. 1981).

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

Not applicable, as insurance coverage of punitive damages is permitted in Mississippi. See II.A. above.

C. What is the relationship of punitive to compensatory damages?

Actual damages must be awarded in any case prior to a punitive damages award. *Hopewell v. Trustmark Nat'l Bank*, 680 So. 2d 812, 820 (Miss. 1996); *Miss. Power Co. v. Jones*, 369 So. 2d 1381, 1386-87 (Miss. 1979). Punitive damages may be considered if, but only if, compensatory damages have been awarded. MISS. CODE ANN. § 11-1-65(1)(c) (2010). An award of punitive damages must be reasonable and must be rationally related to the purpose to punish what occurred giving rise to the award and to deter its repetition by the defendant and others. MISS. CODE ANN. § 11-1-65(1)(f)(i). In determining whether an award of punitive damages is excessive, the court shall take into account the following factors:

1. Whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct, as well as the harm that actually occurred
2. The degree of reprehensibility of the defendant's conduct, the duration of the conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct

3. The financial condition and net worth of the defendant
4. In mitigation, the imposition of criminal sanctions on the defendant for its conduct and the existence of other civil awards against the defendant for the same conduct.

MISS. CODE ANN. § 11-1-65(1)(f)(ii).

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

Yes, MISS. CODE ANN. § 11-1-65(3) provides as follows:

"In any civil action where an entitlement to punitive damages has been established under applicable laws, no award of punitive damages shall exceed the following:

1. \$20 million for a defendant with a net worth of more than \$1 billion;
2. \$15 million for a defendant with a net worth of more than \$750 million but not more than \$1 billion;
3. \$5 million for a defendant with a net worth of more than \$500 million but not more than \$750 million;
4. \$3.75 million for a defendant with a net worth of more than \$100 million but not more than \$500 million;
5. \$2.5 million for a defendant with a net worth of more than \$50 million but not more than \$100 million; or
6. Two percent (2%) of the defendant's net worth for a defendant with a net worth of \$50 million or less."

The limitations imposed shall not be disclosed to the trier of fact but shall be applied by the court to any punitive damages verdict. MISS. CODE ANN. § 11-1-65(3)(c). The limitations also do not apply to actions for damages or injury resulting from a defendant's acts/failure to act if the defendant was (1) convicted of a felony under the laws of the state or under federal law that caused the damages or injury or (2) while the defendant

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was under the influence of alcohol or drugs other than lawfully prescribed drugs administered in accordance with a prescription. MISS. CODE ANN. § 11-1-65(3)(d).

Nothing in this statute shall be construed as creating a right to a punitive damages award or to limit the duty of the court, or the appellate courts, to scrutinize all punitive damages awards,

ensure that all punitive damages awards comply with applicable procedural evidentiary and constitutional requirements, and to order *remittitur* where appropriate. MISS. CODE ANN. § 11-1-65(4).

E. To whom are punitive damages payable?

Generally, punitive damages are payable to the plaintiff.



I. PUNITIVE DAMAGES

A. May they be awarded?

Yes, punitive damages generally are available in Missouri. *Litchfield v. May Dep't Stores Co.*, 845 S.W.2d 596, 600 (Mo. Ct. App. 1992). However, where a statute creates a cause of action unknown to common law, punitive damages will not be allowed unless specified in that statute. *Williams-Payton v. Williams*, 12 S.W.3d 302 (Mo. 2000). If so, in what circumstances?

Standard of Conduct. "In a negligence action, punitive damages may be awarded if the defendant knew or had reason to know a high degree of probability existed that the action would result in injury." *Letz v. Turbomeca Engine Corp.*, 975 S.W. 2d 155, 164-165 (Mo. Ct. App. 1998). Punitive damages are not appropriate for mere inadvertence, mistake or errors of judgment that constitute ordinary negligence. *Litchfield*, 845 S.W.2d 596, 600 (Mo. Ct. App. 1992) *supra*, citing Restatement (Second) of Torts § 908 (1979).

Standard of Proof. Clear and convincing evidence is required to obtain punitive damages. *Smoot v. Sinclair Oil Corp.*, 1999 Mo. App. (LexisNexis 2439) (1999). A defendant "shall only be severally liable for the percentage of **punitive damages** for which fault is attributed to such defendant by the trier of fact." Mo. Rev. Stat. § 537.067 (2010).

Actions Against State. Under the Missouri Revised Statutes, there shall be no award for punitive or exemplary damages on any claim **against a public entity** within the scope of sections 537.600 to 537.650. Mo. Rev. Stat. § 537.610(3).

Breach of Contract. Missouri recognizes an exception to the general rule that punitive damages are not available for breach of contract, and permits punitive damages when the plaintiff alleges

and proves conduct in addition to the breach of contract that amounts to an independent and willful tort. *Ladeas v. Carter*, 845 S.W.2d 45 (Mo. Ct. App. 1992).

Employer Liability for Employee Conduct. Under Missouri law, an employer may be vicariously liable for punitive damages related to employee misconduct in the same manner as the employer would be liable for compensatory damages. See *Peak v. W. T. Grant Co.*, 386 S.W.2d 685 (Mo. Ct. App. 1964). Accordingly, an employer may be found liable for the act of an employee where the act was done in the scope of his employment, and to accomplish the purpose of that employment, even if it was done contrary to the express orders of the employer. *Id.* at 690.

Environmental Liability. Punitive damages may be recovered in the context of environmental liability. See Mo. Rev. Stat. § 260.530; *Bower v. Hog Builders, Inc.*, 461 S.W.2d 784 (Mo. 1970). In *Bower*, the Missouri Supreme Court held that property owners were entitled to recover punitive damages against a hog farm that allowed waste to overflow from the farm to the plaintiffs' properties and contaminate their wells.

Insurer's Bad Faith. Punitive damages may be recovered against an insurer for bad faith. Mo. Rev. Stat. § 375.420; *Smith v. AF & L Ins. Co.*, 147 S.W.3d 767 (Mo. Ct. App. 2004).

Product Liability. To submit punitive damages to the jury in a product liability case, a plaintiff must present evidence that the defendant placed in commerce an unreasonably dangerous product with actual knowledge of the product's defect. *Letz*, 975 S.W.2d 155, 164-165, *supra*.

Professional Liability. Any resident of a convalescent, nursing or boarding home who is deprived of any right created by statute may seek punitive damages. Mo. Rev. Stat. § 198.093. Punitive damages were proper in a case where a nonregistered pharmacist filled a prescription without supervision of a registered

pharmacist. *Duensing v. Huscher*, 431 S.W.2d 169 (Mo. 1968). “All actions tried before a jury involving **punitive damages**, including tort actions based upon improper health care, shall be conducted in a bifurcated trial before the same jury if requested by any party.” Mo. Rev. Stat. § 510.263.

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

Directly assessed punitive damages generally are not insurable in Missouri, except when awarded against police officers under a false arrest policy. *Colson v. Lloyd's of London*, 435 S.W.2d 42 (Mo. Ct. App. 1968) (permitting insurance of punitive damages under an insurance policy covering false arrest); *Nw. Nat'l Cas. Co. v. McNulty*, 307 F.2d 432 (5th Cir. 1962) (finding insurance coverage of punitive damages against public policy); *Crull v. Gleb*, 382 S.W.2d 17 (Mo. Ct. App. 1964) (finding insurance coverage of punitive damages contrary to public policy).

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

Vicariously assessed punitive damages may be insurable under Missouri law. See *Ohio Cas. Ins. Co. v. Welfare Fin. Co.*, 75 F.2d 58 (Eighth Cir. 1934), cert. denied, 295 U.S. 734 (1935).

C. What is the relationship of punitive to compensatory damages?

“Punitive damages must be related to the wrongful act and the actual or potential injury although there is no fixed mathematical relation between actual and punitive damages.” *Bigler v. Conn*, 959 S.W.2d 134, 139 (Mo. Ct. App. 1998).

D. Are there any statutory limitations or other limitations on the amount of punitive damages that may be awarded?

Yes. No award of punitive damages will exceed the greater of \$500,000 or five times the net amount of the judgment awarded to the plaintiff against the defendant. Mo. Rev. Stat. § 510.265. This, however, does not apply in certain actions. The limitation also does not apply to any action in which the State of Missouri is the plaintiff requesting the punitive damages or in situations where the defendant pleads guilty to or is convicted of a felony arising out of the acts or omissions pled by the plaintiff.

E. To whom are punitive damages payable?

Fifty percent of a punitive damages award is payable to the claimant; fifty percent of a punitive damages award is payable to the state. “The state of Missouri shall have a lien for deposit into the tort victims’ compensation fund to the extent of fifty percent of the punitive damages final judgment which shall attach in any such case after deducting attorney’s fees and expenses.” Mo. Rev. Stat. § 537.675 (3) (2008). “The lien shall not be satisfied out of any recovery until the attorney’s claim for fees and expenses is paid.” Mo. Rev. Stat §537.675(3).



I. PUNITIVE DAMAGES

A. May they be awarded?

Yes, punitive damages are available under Montana law. See MONT. CODE ANN. § 27-1-221 (2010).

B. If so, in what circumstances?

Standard of Conduct. Reasonable punitive damages may be awarded when the defendant has been found guilty of actual fraud or actual malice. MONT. CODE ANN. § 27-1-221 (2010);

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Crystal Springs Trout Co. v. First State Bank of Froid, 732 P.2d 819 (Mont. 1987); see also *Kiefer v. McCafferty*, 1994 Mont. Dist. (LexisNexis 611) (Mont. Dist. 1994).

A defendant is guilty of actual malice if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the plaintiff and deliberately proceeds to act in conscious disregard or acts with indifference to the high probability of injury to the plaintiff. MONT. CODE ANN. § 27-1-221 (2)(a),(b) (2010).

A defendant is guilty of actual fraud if the defendant makes a representation with knowledge of its falsity or conceals a material fact with the purpose of depriving the plaintiff of property or legal rights, or otherwise causing injury. MONT. CODE ANN. § 27-1-221 (3) (a), (b) (2010).

Standard of Proof. All elements of a claim for punitive damages must be proved by clear and convincing evidence, which means there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. MONT. CODE ANN. § 27-1-221(5) (2007); *Cartwright v. Equitable Life Assurance Soc’y*, 914 P.2d 976 (Mont.1996).

Liability for punitive damages is to be determined by the trier of fact, whether judge or jury. MONT. CODE ANN. § 27-1-221(6) (2007). Evidence regarding a defendant’s financial affairs, financial condition and net worth is not admissible in a trial to determine whether a defendant is liable for punitive damages. MONT. CODE ANN. § 27-1-221(7)(a) (2007). When the jury returns a verdict finding a defendant liable for punitive damages, the amount of punitive damages must then be determined by the jury in an immediate, separate proceeding and be submitted to the judge for review. *Id.* In the separate proceeding to determine the amount of punitive damages to be awarded, the defendant’s financial affairs, financial condition and net worth must be considered. *Id.*

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

Yes, punitive damages are insurable under Montana law. *First Bank (N.A.) of Billings v. Transamerica Ins. Co.*, 679 P.2d 1217 (Mont. 1984). Punitive damages may be insured against in Montana, and insurance coverage of punitive damages does not violate Montana public policy. Montana public policy generally favors the insurability of punitive damages. Chapter 19, *Appleman on Insurance* § 128.27 (2010). Following Montana

Actions Against State. Punitive damages are not permitted against the state. Mont. Code Ann. § 2-9-105 (2010).

Breach of Contract. Pursuant to statute, punitive damages may not be recovered in any action arising from contract or breach of contract. MONT. CODE ANN. § 27-1-220(2)(a)(ii) (2007). Montana courts, however, have allowed recovery of punitive damages in tort actions involving underlying contracts, i.e., tortious interference with business relations, conversion or fraud or breach of its implied covenant of good faith. See *Daniels v. Dean*, 833 P.2d 1078 (Mont. 1992); *Lane v. Dunkle*, 753 P.2d 321 (Mont. 1988); *Purcell v. Auto. Gas Distrib., Inc.*, 673 P.2d 1246 (Mont. 1983); *Firestone v. Oasis Telecomms., Data, and Records, Inc.*, 2003 ML 3972 (Mont. Dist. Ct. 2003).

Employer Liability for Employee Conduct. An employer is liable in exemplary damages for the willful and malicious acts of one of its employees. *Rickman v. Safeway Stores*, 227 P.2d 607, 612 (Mont. 1951).

Environmental Liability. Punitive damages may be recovered in the context of environmental liability. *Ferguson v. Town Pump*, 580 P.2d 915 (Mont. 1978), *overruled on other grounds by Bohrer v. Clark*, 590 P.2d 117 (Mont. 1978); see also *Sunburst School Dist. No 2 v. Texaco, Inc.* 338 Mont. 259 (2007).

Insurer’s Bad Faith. Under Montana law, punitive damages are recoverable in insurer bad faith actions. *Bostwick v. Foremost Ins. Co.*, 539 F. Supp. 517 (D. Mont. 1982); *Gibson v. W. Fire Ins. Co.*, 682 P.2d 725 (Mont. 1984).

Product Liability. Punitive damages are recoverable in product liability actions. MONT. CODE ANN. § 27-1-220 (b) (2007).

Professional Liability. In civil actions, “reasonable punitive damages may be awarded when the defendant has been found guilty of actual fraud or actual malice.” Mont. Code Ann. § 27-1-221 (2010).

public policy, an insurance policy may cover punitive damages, but only on the express condition that the insurance policy specifically states that punitive damages are covered. MONT. CODE ANN. § 33-15-317 (1) (2007).

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

Not applicable, as punitive damages are insurable under Montana law. See II. A. above.

C. What is the relationship of punitive to compensatory damages?

Neither statutory nor common law mandates any relationship between compensatory and punitive damages awards. Punitive damages may be awarded even where the plaintiff is granted nominal damages or where the actual damages suffered have no monetary value. *Weinberg v. Farmers St. Bank of Warden*, 752 P.2d 719 (Mont. 1988). Without a finding of actual damages, however, punitive damages are improper. *Doll v. Major Muffler Ctrs., Inc.*, 687 P.2d 48 (Mont. 1984).

When punitive damages are awarded by the judge, the judge must clearly state the reasons for making the award in findings of facts and conclusions of law, demonstrating consideration of the following issues: (1) the nature and reprehensibility of the defendant's wrongdoing; (2) the extent of the defendant's wrongdoing; (3) the intent of the defendant in committing the wrong; (4) the profitability of the defendant's wrongdoing, if applicable; (5) the amount of actual damages awarded by the

jury; (6) the defendant's net worth; (7) previous awards of punitive or exemplary damages against the defendant based upon the same wrongful act; (8) potential or prior criminal sanctions against the defendant based upon the same wrongful act; and (9) any other circumstances that may operate to increase or reduce, without wholly defeating, punitive damages. See MONT. CODE ANN. § 27-1-221 (7) (b) (2010). The same list of factors is considered by the judge when reviewing a jury's award of punitive damages. Upon review of the jury's award, the judge has the authority to change the amount awarded based on clearly stated findings of facts and conclusions of the law. MONT. CODE ANN. § 27-1-221 (7) (c).

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

Yes. "An award for punitive damages may not exceed \$10 million or 3% of a defendant's net worth, whichever is less. This subsection does not limit punitive damages that may be awarded in class action lawsuits." MONT. CODE ANN. § 27-1-220 (3) (2007).

E. To whom are punitive damages payable?

Punitive damages are payable to the plaintiff. *Cartwright*, 914 P.2d 976, *supra*.

Nebraska

I. PUNITIVE DAMAGES

A. May they be awarded?

No. Punitive damages are unconstitutional under the Nebraska constitution. NEB. CONST. ART. VII § 5; *see also Enron Corp. v. Lawyers Title Ins. Corp.*, 940 F.2d 307 (Eighth Cir. 1991); *Distinctive Printing & Packaging Co. v. Cox*, 443 N.W.2d 566 (Neb. 1989) (punitive, vindictive or exemplary damages contravene state constitutional provision). *But see (I. B.) below for exceptions.*

B. If so, in what circumstances?

By statute, treble damages may be awarded for unlawful restraint of trade. *See, e.g., Barish v. Chrysler Corp.*, 3 N.W.2d 91 (Neb. 1942).

Where the action is grounded on a federal constitutional right and is brought in federal court, it may not violate Nebraska public policy to award punitive damages. *See Gilliam v. Ohama*, 331 F. Supp 4 (D. Neb. 1971), *rev'd on other grounds*, 459 F.2d 63 (Eighth Cir. 1972).

PUNITIVE DAMAGES REVIEW

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

Not applicable.

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

Not applicable.

C. What is the relationship of punitive to compensatory damages?

Not applicable.

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

Not applicable.

E. To whom are punitive damages payable?

Not applicable.

Nevada

I. PUNITIVE DAMAGES

A. May they be awarded?

Yes, punitive damages are available under Nevada law. NEV. REV. STAT. § 42.005 (2010); see *Ace Truck & Equip. Rentals v. Kahn*, 746 P.2d 132 (Nev. 1987). Punitive damages provide a means by which the community, usually a jury, can express communal outrage or distaste for the misconduct of an offensive, fraudulent or malicious defendant and by which others may be deterred and warned that such conduct will not be tolerated. The allowance of punitive damages provides a benefit to society by punishing undesirable conduct that is not punishable by the criminal law. *Phillips v. Lynch*, 704 P.2d 1083 (Nev. 1987); *Hale v. Riverboat Casino, Inc.*, 682 P.2d 190 (Nev. 1984); *Bull v. McCuskey*, 615 P.2d 957 (Nev. 1980); *Tahoe Vill. Realty v. DeSmet*, 590 P.2d 1158 (Nev. 1979). See also NEV. REV. STAT. § 47.010 (2010) (exemplary and punitive damages allowed when an injury is caused by operation of a vehicle after consumption of alcohol or controlled substance).

B. If so, in what circumstances?

Standard of Conduct. By statute, punitive damages are available for breach of obligations not arising from contract if the wrongdoer is guilty of express or implied oppression, fraud or malice. See NEV. REV. STAT. § 42.005 (1) (2010). "Malice, express or implied" means conduct that is intended to injure a person or despicable conduct that one engages in with a conscious disregard of the rights or safety of others. See NEV. REV. STAT. § 42.001(3). These damages are designed not to reward the victim

but to punish the wrongdoer and deter fraudulent, malicious or oppressive conduct. *Turnbow v. State Dept. of Human Res.*, 853 P.2d 97 (Nev. 1993); *Granite Constr. Co. v. Rhyne*, 817 P.2d 711 (Nev. 1991), *overruled on other grounds by Countrywide Home Loans, Inc. v. Thitcehner*, 192 P.3d 243 (Nev. 2008); *Nev. Nat'l Bank v. Huff*, 582 P.2d 364 (Nev. 1978); *Coughlin v. Tailhook Ass'n*, 818 F. Supp. 1366 (D. Nev. 1993), *aff'd*, 112 F.3d 1052 (Ninth Cir. 1997) (claim for punitive damages may proceed where plaintiff alleges that defendant acted with conscious disregard for known safety standards and measures); *Miller v. Schnitzer*, 371 P.2d 824 (Nev. 1962) ("Punitive damages are recoverable in a malicious prosecution case."). See *Allen v. Anderson*, 562 P.2d 487 (Nev. 1977) (punitive damages claims survive the aggrieved party's death against a living tortfeasor; however punitive damages claims do not survive the death of the tortfeasor and cannot be sought from the deceased tortfeasor's estate). See *Bergerud v. Progressive Cas. Ins.*, 453 F. Supp. 2d 1241 (Nev. 2006) (Punitive damages are available when an insurer breaches the implied covenant of good faith.).

Standard of Proof. Punitive damages may be awarded when it is proven by clear and convincing evidence that the defendant's conduct constitutes oppression, fraud or malice. NEV. REV. STAT. § 42.005(1) (2010).

Actions Against State. Punitive damages are not permitted in actions against the state. Nev. Rev. Stat. Ann. § 41.035.

Breach of Contract. Nevada law does not permit punitive damages for breach of contract. See NEV. REV. STAT. ANN. § 42.005; see *Clark v. Lubritz*, 944 P.2d 861 (Nev. 1997). See also *S.J. Amoroso Constr. Co. v. Lazovich & Lazovich*, 810 P.2d 775 (Nev. 1991) (punitive damages are not available on a count for breach of contract and are precluded in the absence of compensatory damages for a claim sustaining the punitive award).

Employer Liability for Employee Conduct. Under Nevada law, an employer is not liable for exemplary or punitive damages arising from an employee's misconduct unless:

1. The employer had advance knowledge that the employee was unfit for the purposes of the employment and employed the employee with a conscious disregard of the rights or safety of others;
2. The employer expressly authorized or ratified the wrongful act of the employee for which the damages are awarded; or
3. The employer is personally guilty of oppression, fraud or malice, express or implied.

NEV. REV. STAT. § 42.007(1). Moreover, if the employer is a corporation, the employer is not liable for exemplary or punitive damages unless one or more of the elements specified above are met by an officer, director or managing agent of the corporation who was expressly authorized to direct or ratify the employee's conduct on behalf of the corporation. *Id.*

Environmental Liability. Punitive damages may be awarded in any action for the breach of an obligation not arising from contract, including actions involving environmental liability, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied. Nev. Rev. Stat. Ann. § 42.005. The statutory cap on punitive damages, set forth in section 42.005 (1) does not apply to actions brought against a person for damages or an injury

caused by the emission, disposal or spilling of a toxic, radioactive or hazardous material or waste. Nev. Rev. Stat. Ann. § 42.005 (2)(d).

General Liability. In an action for wrongful death, punitive damages may be awarded. Nev. Rev. Stat. Ann. § 41.085. Punitive damages may also be recovered in an action for personal injury where the defendant caused an injury by the operation of a motor vehicle after willfully consuming or using alcohol or another substance, knowing that he would thereafter operate the motor vehicle. Nev. Rev. Stat. Ann. § 42.010.

Insurer's Bad Faith. Punitive damages may be awarded in any action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied. Nev. Rev. Stat. Ann. § 42.005. The statutory cap on punitive damages, set forth in section 42.005 (1), does not apply to actions brought against an insurer who acts in bad faith regarding its obligations to provide insurance coverage. NEV. REV. STAT. ANN. § 42.005 (2)(b).

Product Liability. In a product liability context, malice in fact warranting punitive damages may be established by showing that the defendant consciously and deliberately disregarded known safety measures in reckless disregard of possible results. *Murray*, 708 P.2d 297, *supra*; cf. *Granite Constr. Co. v. Rhyne*, 817 P.2d 711 (Nev. 1991) (holding a contractor who ignored highway safety requirements liable for punitive damages). The statutory cap on punitive damages set forth in NEV. REV. STAT. ANN. § 42.005 (1), does not apply to actions brought against a manufacturer, distributor or seller of a defective product. Nev. Rev. Stat. Ann. § 42.005 (2)(a).

Professional Liability. Punitive damages may be awarded in any action for the breach of an obligation not arising from contract, including professional liability, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied. Nev. Rev. Stat. Ann. § 42.005.

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

Yes, punitive damages may be insured against, as long as the punitive damages do not arise from a wrongful act of the insured committed with intent to cause injury to another. NEV. REV. STAT. § 681A.095 (2007).

PUNITIVE DAMAGES REVIEW

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

It is unclear whether vicariously assessed punitive damages are insurable. To date there is no statutory or case law in Nevada indicating whether the prohibition against indemnification applies to those whose liability is vicarious.

C. What is the relationship of punitive to compensatory damages?

An award of compensatory damages is needed before punitive damages are authorized. *S.J. Amoroso Constr. Co v. Lazovich & Lazovich*, 810 P.2d 775 (Nev. 1991); *Miller v. Schnitzer*, 371 P.2d 824 (Nev. 1962). The amount of punitive damages awarded lies in the discretion of the court. *Randono v. Turk*, 466 P.2d 218 (Nev. 1970). Since punitive damages are not, as in the case of compensatory damages, awarded to compensate the plaintiff for harm incurred, they need not bear any relationship to the compensatory damages award. *Ace Truck & Equip. Rentals, Inc. v. Kahn*, 746 P.2d 132 (Nev. 1987); *Hale v. Riverboat Casino*, 682 P.2d 190 (Nev. 1984); see also NEV. REV. STAT. § 42.010 (2010) (permitting recovery of punitive damages and compensatory damages for injury caused by an intoxicated person operating a motor vehicle).

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

Yes, NEV. REV. STAT. § 42.005 provides that an award of exemplary or punitive damages may not exceed (1) three times the amount of compensatory damages awarded to the plaintiff if the amount of compensatory damages is \$100,000 or more, or (2) \$300,000 if the amount of compensatory damages awarded to the plaintiff is less than \$100,000.

These limitations, however, do not apply to an action brought against:

1. A manufacturer, distributor or seller of a defective product
2. An insurer who acts in bad faith regarding its obligations to provide insurance coverage
3. A person for violating a state or federal law prohibiting discriminatory housing practices, if the law provides for a remedy of exemplary or punitive damages in excess of the limitations prescribed in subsection 1 (of § 42.005)
4. A person for damages or an injury caused by the emission, disposal or spilling of a toxic, radioactive or hazardous material or waste
5. A person for defamation.

In determining whether a punitive damages award is excessive, Nevada courts consider the financial position of the defendant; culpability and blameworthiness of the tortfeasor; vulnerability and injury suffered by the offended party; the extent to which the punished conduct offends the public's sense of justice and propriety; and the means that are judged necessary to deter future misconduct of this kind. See *Albert H. Wohlers & Co. v. Bartgis*, 969 P.2d 949 (Nev. 1998), cert. denied 527 U.S. 1038 (1999).

Punitive damages are legally excessive when the amount of damages awarded is clearly disproportionate to the degree of blameworthiness and harmfulness inherent in the oppressive, fraudulent or malicious misconduct of the tortfeasor under the circumstance of a given case. If the awarding jury or judge assesses more in punitive damages than is reasonably necessary and fairly deserved in order to punish the offenders and deter others from similar conduct, then the award must be set aside as unreasonable. See *Ace Truck & Equip. Rentals v. Kahn*, 746 P.2d 132 (Nev. 1987).

E. To whom are punitive damages payable?

In Nevada, a punitive damages award is payable to the plaintiff. In a wrongful death action, the personal representative of the decedent on behalf of the estate may recover any punitive damages that the decedent would have recovered if he had lived. Nev. Rev. Stat. Ann. § 41.085 (2010).

New Hampshire

I. PUNITIVE DAMAGES

A. May they be awarded?

No, punitive damages may not be awarded under New Hampshire law unless they are expressly authorized by statute. N.H. REV. STAT. ANN. § 507:16 (LexisNexis 2010); see also *Aubert v. Aubert*, 529 A.2d 909, 914 (N.H. 1987) (“No damages are to be awarded as a punishment to the defendant or as a warning and example to deter him and others from committing like offenses in the future”). When the act involved is wanton, malicious or oppressive, the compensatory damages awarded may reflect the aggravating circumstances. Such damages are termed liberal compensatory damages and are available only in exceptional cases. The mere fact that an intentional tort is involved is not sufficient. See *Micro Data Base Sys. v. Dharma Sys.*, 148 F.3d 649 (Seventh Cir. 1998) (applying N.H. law).

B. If so, in what circumstances?

Standard of Conduct. By statute, courts are permitted to order liberal consequential damages where malice or fraud is involved. *In re Guardianship of Dorson*, 934 A.2d 545, 549 (N.H. 2007). Also, liberal consequential damages may be awarded as permitted by statute.

“Liberal compensatory damages” (which technically are not punitive damages because they are awarded to compensate plaintiff rather than to punish defendant) may be awarded “when the act involved is wanton, malicious, or oppressive.” *Aubert v. Aubert*, 529 A.2d 909, 914 (N.H. 1987) (quoting *Vratsenes v. N.H. Auto, Inc.*, 289 A.2d 66, 68 (N.H. 1972)). To award “liberal compensatory damages,” there must be ill will, hatred, hostility, or evil motive on the part of the defendant. *Aubert*, at 914.

Standard of Proof. The standard of proof for assessing liberal compensatory damages is undetermined under New Hampshire law. See *Micro Data Base Sys. v. Dharma Sys.*, 148 F.3d 649 (Seventh Cir. 1998) (applying N.H. law). (In this case the court followed Seventh and First Circuit law, stating “so a victim of a breach of contract who wants to keep the contract breaker’s money above and beyond the amount necessary to compensate for the breach may be said to be ‘unjustly enriched,’ entitling the contract breaker to restitution.” *Id.*)

C. Actions Against State. Punitive damages are not recoverable for bodily injury, personal injury or property damage. N.H. Rev. Stat. Ann. § 507-B:4.

Breach of Contract. Punitive damages are generally not recoverable in breach of contract cases. *But see* N.H. REV. STAT. ANN. § 339-E:3 (2004) (recovery of exemplary damages of up to three times the commission owed against one who breaches a contract entered into under the statute relating to the payment of a commission); and N.H. REV. STAT. ANN. § 359-D:11 (recovery of punitive damages where a buyer is injured by the breach of a contract by credit services organizations). See also *Lawton v. Great Sw. Fire Ins. Co.*, 392 A.2d 576 (N.H. 1978).

Employer Liability for Employee Conduct. The Supreme Court of New Hampshire in the context of employer liability for sexual harassment of an employee by a co-worker held that even if an employer’s managing agent has acted with the requisite “malice” or “reckless indifference” to subject it to liability for punitive damages, an employer will be absolved from liability if the managing agent has acted contrary to the employer’s good-faith efforts to comply with sexual harassment law. *Madeja v. MPB Corp.*, 821 A.2d 1034, 1048 (N.H. 2003) (citing *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 545 (1999)).

Environmental Liability. Punitive damages are not recoverable in cases involving environmental claims. N.H. REV. STAT. ANN. § 507:16 (LexisNexis 2010).

General Liability. Punitive damages for general liability claims are recoverable only if specifically provided by statute. N.H. REV. STAT. ANN. § 507:16 (LexisNexis 2010). See (a) N.H. REV. STAT. ANN. § 149-I:23 (2010), which permits recovery of treble damages by the owner for the malicious or wanton injury to any part of any sewer system or sewage disposal plant; (b) N.H. REV. STAT. ANN. § 167:61 (2004) (recovery of punitive damages for fraudulently obtaining public assistance benefits); (c) N.H. REV. STAT. ANN. § 231:189 (2010) (recovery of treble damages against any person who wantonly and maliciously injures any aqueduct, or the pipes, logs or other property of any gaslight company, aqueduct company or person); (d) N.H. REV. STAT. ANN. § 350-B:3 (recovery of exemplary damages for willful and malicious misappropriation of trade secrets); (e) N.H. REV. STAT. ANN. §

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359-B:16 (2004) (recovery of punitive damages by the consumer against a consumer reporting agency or user of information that willfully fails to comply with the consumer credit reporting act); (f) N.H. REV. STAT. ANN. § 539:3 (2004) (recovery of treble damages against anyone who knowingly throws down, damages, or leaves open any fence, gate or bar belonging to or enclosing land held in common, or belonging to another person); and (g) N.H. REV. STAT. ANN. § 539:4 (2004) (recovery of treble damages against anyone who willfully and unlawfully digs or carries away any stone, ore, gravel, clay, sand, turf or mold upon or from land held in common or from the land of another person).

Insurer's Bad Faith. Punitive damages are not recoverable in cases claiming that an insurer acted in bad faith. See *Jarris v. Prudential Ins. Co.*, 448 A.2d 407 (N.H. 1982).

Product Liability. Punitive damages are not recoverable in product liability cases.

Professional Liability. Punitive damages are not recoverable in professional liability matters, but liberal compensatory damages may be awarded for wanton, malicious or oppressive conduct. See *Weeks v. St. Paul Fire and Marine Ins. Co.*, 673 A.2d 772 (N.H. 1996) (attorney general sought civil penalties and compensatory surcharges against trustee of nursing home for mismanagement of nursing home's funds).

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

Punitive damages are insurable under New Hampshire law. Specifically, municipalities may insure against punitive damages assessed pursuant to federal statutes. *Am. Home Assurance Co. v. Fish*, 451 A.2d 358 (N.H. 1982). Further, in *Weeks v. St. Paul Fire and Marine Ins. Co.*, 673 A.2d 772 (1996), the Superior Court ruled that a health care professional liability policy (PLP) provides coverage for civil penalties sought by the attorney general. Although the civil penalties and the compensatory surcharges sought by the attorney general were penal in nature, and therefore neither "damages" as defined by the CGL nor "compensation for injury or death" covered under the PLP, the New Hampshire court held an insurance company liable for exemplary damages where fines and penalties are not expressly excluded by the policy language.

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

New Hampshire permits insurance coverage for punitive damages as discussed above.

C. What is the relationship of punitive to compensatory damages?

Punitive damages are generally not recoverable in New Hampshire, except where provided by statute. See N.H. REV. STAT. ANN. § 507:16 (LexisNexis 2010). As noted above, New Hampshire statutes that permit punitive damages generally impose treble damages.

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

Yes, recovery of punitive damages may be limited by statute. Where a statute permits recovery of punitive damages, the statute may set forth the limitations or permit damages "as the court may allow." See N.H. REV. STAT. ANN. § 359-B:16 (civil liability for willful noncompliance) ("such amount of punitive damages as the court may allow").

E. To whom are they payable?

State statute sets forth the individuals or entities that may recover punitive damages. See, e.g., N.H. REV. STAT. ANN. § 359-B:16 (allowing recovery of punitive damages by consumer against consumer reporting agency or user of information that willfully failed to comply with consumer credit reporting act); N.H. REV. STAT. ANN. § 149-I:23 (permitting recovery of treble damages by owner for malicious or wanton injury to part of sewer system or sewage disposal plant); and N.H. REV. STAT. ANN. § 167:61 (permitting recovery of punitive damages by state for fraudulently obtaining public assistance benefits).

New Jersey



I. PUNITIVE DAMAGES

A. May they be awarded?

Yes, punitive damages are available in New Jersey. N.J.S.A. § 2A:15-5.9 (2010) (The New Jersey Punitive Damages Act applies to causes of action filed on or after the effective date October 27, 1995.); *Leimgruber v. Claridge Assocs., Ltd.*, 375 A.2d 652 (N.J. 1997).

B. If so, in what circumstances?

Standard of Conduct. N.J.S.A. § 2A:15-5.12 (2005) provides as follows:

Punitive damages may be awarded to the plaintiff only if the plaintiff proves, by clear and convincing evidence, that the harm suffered was the result of the defendant's acts or omissions, and such acts or omissions were actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions. This burden of proof may not be satisfied by proof of any degree of negligence including gross negligence.

Standard of Proof. Clear and convincing evidence is required to obtain punitive damages. N.J.S.A. § 2A:15-5.12 (2005). See *Ripa v. Owens-Corning Fiberglas Corp.*, 660 A.2d 521 (N.J. Super. Ct. App. Div. 1995) (lack of direct willful and wanton conduct defeated claim for punitive damages); *Nappe v. Anselwitz, Barr, Ansell & Bonello*, 477 A.2d 1224 (N.J. 1984) (punitive damages awarded when nature of conduct establishes spite, malice, fraud, evil motivation, or deliberate disregard of injured party's rights); *Di Giovanni v. Pessel*, 260 A.2d 510 (N.J. 1970). In arriving at an amount of punitive damages, the trier of fact is to consider all relevant evidence including (1) the likelihood at the relevant time that serious harm would arise from the defendant's action; (2) the defendant's awareness of reckless disregard of the likelihood that serious harm would arise from his conduct; (3) the conduct of the defendant upon learning that his initial conduct would likely cause harm; (4) the duration of the conduct or any concealment of it by the defendant; (5) the profitability of the conduct; (6) when the misconduct stopped; and (7) the financial condition of the defendant. N.J.S.A. § 2A:15-5.12(c).

Actions Against State. Punitive damages are not recoverable against a public entity. N.J.S.A. § 59:9-2 (2010).

Administrative Proceedings. Punitive damages are not available in an administrative proceeding arising out of alleged violation of civil rights. *Maczik v. Gilford Park Yacht Club*, 638 A.2d 1322 (N.J. Super. Ct. App. Div. 1994).

Breach of Contract. Punitive damages are not awarded for breach of contract unless there are aggravated circumstances, but may be awarded for torts that may arise out of the contractual activity. See *Unifoil Corp. v. Cheque Printers & Encoders*, 622 F. Supp. 268 (D.N.J. 1985); *Cappiello v. Ragen Precision Indus., Inc.*, 471 A.2d 432 (N.J. Super. Ct. App. Div. 1984).

Criminal Conduct. If the tortfeasor's wrong constitutes a criminal act, punitive damages may effectively supplement the criminal law in punishing the defendant. See *Nappe*, 477 A.2d 1224, *supra*. In order to sustain a claim for punitive damages, a plaintiff would have to show something other than a breach of a good faith obligation (defendant's conduct must be wantonly reckless or malicious). *Id.*

Employer Liability for Employee Conduct. Under New Jersey law, an employer may be held liable for punitive damages only when the employee's wrongful conduct was authorized, participated in, or ratified by the employer. *Lehmann v. Toys 'R' Us*, 626 A.2d 445, 464 (N.J. 1993). In the context of a hostile work environment discrimination, punitive damages may be assessed against an employer only in the event of actual participation by upper management in the wrongful conduct or willful indifference thereto.

Environmental Liability. There is no express law in New Jersey permitting or denying recovery of punitive damages in the context of environmental liability. However, under New Jersey law, punitive damages may be recovered where "the harm suffered was the result of the defendant's acts or omissions," and such acts "were actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions." N.J. Rev. Stat. § 2A:15-5.12 (2010).

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General Liability. As noted above, under New Jersey law, punitive damages may be recovered where “the harm suffered was the result of the defendant’s acts or omissions,” and such acts “were actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions.” N.J. Rev. Stat. § 2A:15-5.12 (2010). If the tortfeasor’s wrong constitutes a criminal act, punitive damages may effectively supplement the criminal law in punishing the defendant. *Nappe v. Anselwitz*, 477 A.2d 1224 (N.J. 1984).

Insurer’s Bad Faith. Under New Jersey law, to recover punitive damages for insurer’s failure to pay a first-party claim, an insured must show egregious circumstances; for example, it must be shown that the insurer’s conduct was wantonly reckless or malicious. See *Polizzi Meats Inc. v. Aetna Life & Cas. Co.*, 931 F. Supp. 328 (D.N.J. 1996). In the highly regulated area of personal injury protection, absent egregious circumstances, wrongful failure to pay benefits or any other violation of statute does not give rise to a claim for punitive damages. See *Paul Revere Life Ins. Co. v. Patniak*, 2004 U.S. Dist. (LexisNexis 7669) (D.N.J. Apr. 1, 2004); *Nestle Foods Corp. v. Aetna Cas. & Sur. Co.*, 842 F. Supp. 125 (D.N.J. 1993); *Pickett v. Lloyd’s & Peerless Ins. Agency, Inc.*, 621 A.2d 445 (N.J. 1993); *Nappe v. Anselwitz, Barr, Ansell & Bonello*, 477 A.2d 1224 (N.J. 1984).

Multiple Defendants. In any action in which there are two or more defendants, an award of punitive damages must be specific as to a defendant, and each defendant is liable only for the amount of the award made against the defendant. N.J.S.A. § 2A:15-5.13(e). In other words, New Jersey’s Punitive Damages Act has abolished joint and several liability for punitive damages. In federal court, however, the form of jury instructions is critical

to apportioning liability. *But see Inter Med. Supplies Ltd. v. EBI Medical Sys.*, 975 F. Supp. 681 (D.N.J. 1997) (flawed verdict sheet that allowed jury to enter an award without specifying against which defendant it should run was not fatal error when defendant did not object to jury instructions as required under Fed. R. Civ. Pro. 51).

Product Liability. Actual knowledge of the defect required to sustain an award of punitive damages in the product liability context. *Fischer v. Johns-Manville Corp.*, 512 A.2d 466 (N.J. 1986) (defendant took affirmative steps to conceal information regarding serious health hazards associated with asbestos from the public). Under New Jersey case law, punitive damages are available in product liability actions against suppliers of asbestos-containing products. *Gogol v. Johns-Manville Sales Corp.*, 595 F. Supp. 971 (D.N.J. 1984). Barring subsequent plaintiffs from recovering punitive damages after one plaintiff has recovered punitive damages would be unworkable and unfair; however, justice dictates that defendants would be permitted to introduce evidence of other punitive damages awards assessed against it. *Germanio v. Goodyear Tire & Rubber Co.*, 732 F. Supp. 1297 (D.N.J. 1990).

Professional Liability. Punitive damages may be awarded for the violation of a fiduciary duty if the violation is an intentional act. See *Albright v. Burns*, 503 A.2d 386 (N.J. Super. Ct. App. Div. 1986). Mere negligence is generally held to be insufficient. *Id.* Fraudulent misrepresentation would be sufficient to warrant punitive damages, since the intent requirement would be satisfied. *Id.* Where fraud is found, damages may be presumed. See *Jewish Ctr. of Sussex City v. Whale*, 397 A.2d 712 (N.J. Super. Ct. Ch. Div. 1978) *aff’d*, 411 A.2d 475 (N.J. Super. Ct. App. Div. 1980) *aff’d*, 432 A.2d 521 (N.J. 1981).

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

No. Directly assessed punitive damages are not insurable under New Jersey law. See *Johnson & Johnson v. Aetna Cas. & Sur. Co.*, 667 A.2d 1087 (N.J. Super. Ct. App. Div. 1995) (insurance coverage of punitive damages is against public policy in product liability claim).

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

Yes, punitive damages are insurable when the wrongdoer’s liability is solely vicarious. In *Johnson & Johnson*, 667 A.2d 1087,

supra, the court distinguishes *Malanga v. Mfrs. Cas. Ins., Co.*, 146 A.2d 105 (N.J. 1958) (where the insurer made no distinction between compensatory and punitive damages, and the court ordered coverage on behalf of a vicariously liable partnership). The *Johnson & Johnson* court states that public policy bars coverage, even if the insured was held vicariously liable, but only *in dicta*, since the insured in that case was held directly liable. See also *LoRocco v. N.J. Mfrs. Indem. Ins. Co.*, 197 A.2d 591 (N.J. Super. Ct. App. Div. 1964) (holding when liability is solely vicarious, one may insure against punitive damages).

C. What is the relationship of punitive to compensatory damages?

Punitive damages may be awarded only if compensatory damages have been awarded in the first stage of the trial. Any actions involving punitive damages shall, if requested by the defendant, be conducted in a bifurcated trial. In the first stage of a bifurcated trial, the trier of fact shall determine liability for compensatory damages and the amount of compensatory damages or nominal damages. In the second stage, the trier of fact shall determine if a defendant is liable for punitive damages. An award of nominal damages cannot support an award of punitive damages. N.J.S.A. § 2A:15-5.13 (2010).

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

Yes, by statute, a defendant shall not be liable for punitive damages in any action in an amount in excess of five (5) times

the liability of that defendant for compensatory damages or \$350,000, whichever is greater. N.J.S.A. § 2A:15-5.14(b). The Punitive Damages Act limitations on punitive damages do not apply to bias crimes, discrimination, AIDS testing disclosure, sexual abuse or drunken driving. N.J.S.A. § 2A:15-5.9. An award of punitive damages must be specifically prayed for in the complaint. N.J.S.A. § 2A:15-5.11.

E. To whom are punitive damages payable?

Punitive damages are payable to the plaintiff. *Bell Atl. Network Servs., Inc. v. P.M. Video Corp.*, 730 A.2d 406 (N.J. Super. Ct. App. Div. 1999), cert. denied, 741 A.2d 98 (1999).



I. PUNITIVE DAMAGES

A. May they be awarded?

Yes. *Romero v. Mervyn's*, 784 P.2d 992 (N.M. 1989); see also *N.M. Banquest Investors Corp. v. Peters Corp.*, 141 N.M. 632 (N.M.Ct. App. 2007).

B. If so, in what circumstances?

Standard of Conduct. Punitive damages may be awarded only when the wrongdoer's conduct may be said to be maliciously intentional, fraudulent, oppressive, or committed recklessly or with a wanton disregard of the plaintiff's rights. *Gonzalez v. Surgidev Corp.*, 899 P.2d 594 (N.M. 1995); *Constr. Contracting & Mgmt., Inc. v. McConnell*, 815 P.2d 1161 (N.M. 1991); *Green Tree Acceptance, Inc. v. Layton*, 769 P.2d 84 (N.M. 1989); *Romero*, 784 P.2d 992, *supra*. Mere negligence is inadequate to establish liability for punitive damages. *Paiz v. State Farm Fire & Cas. Co.*, 880 P.2d 300 (N.M. 1994); *Hood v. Fulkerson*, 699 P.2d 608 (N.M. 1985); *Ramsey v. Culpepper*, 738 F.2d 1092 (Tenth Cir. 1984). Gross negligence may, however, serve as a basis for punitive damages. *Jessen v. Nat'l Excess Ins. Co.*, 776 P.2d 1244 (N.M. 1989); *Sutherland v. Fenega*, 810 P.2d 353 (N.M. Ct. App. 1991); *Valdez v. Warner*, 742 P.2d 517 (N.M. Ct. App. 1987). The imposition of punitive damages rests with the discretion of the

trier of fact. *New Mexico Hosp. Assoc. v. A.T. & S.F. Mem'l Hosp., Inc.*, 734 P.2d 748 (N.M. 1987); *Padilla v. Lawrence*, 685 P.2d 964 (N.M. Ct. App. 1984).

Standard of Proof. Preponderance of the evidence. *Gallegos v. Citizens Ins. Agency*, 779 P.2d 99 (N.M. 1989).

Actions Against State. Punitive damages are not recoverable against a governmental entity or public employee for any tort for which immunity has been waived under the Tort Claims Act. N.M. Stat. Ann. § 41-4-19 (2010).

Arbitration. Under the Uniform Arbitration Act, as amended effective July 1, 2001, an arbitrator may award punitive damages to the extent that such an award is permitted by law. *Aguilera v. Palm Harbor Homes, Inc.*, 54 P.3d 993 (N.M. 2002).

Breach of Contract. A plaintiff cannot recover punitive damages for breach of contract unless that breach is maliciously intentional, fraudulent or oppressive, or committed recklessly or with wanton disregard of the plaintiff's rights. *Rhein v. ADT Auto.*, 930 P.2d 783 (N.M. 1996); *Albuquerque Concrete Coring Co. Inc. v. Pan*

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Am World Services, Inc., 879 P.2d 772 (N.M. 1994); *Constr. Contracting & Mgmt., Inc.*, 815 P.2d 1161, *supra*; *Kueffer v. Kueffer*, 791 P.2d 461 (N.M. 1990).

Employer Liability for Employee Conduct. Under New Mexico law, punitive damages are not awarded to compensate the plaintiff. They are awarded to punish the offender and as a warning to others, and thus can only be awarded against one who has participated in the offense. *Sanchez v. Sec. Acceptance Corp.*, 260 P.2d 703, 706 (N.M. 1953). Accordingly, under New Mexico law, absent participation, authorization or ratification by an employer of the tortious act of an employee, the employer cannot be held liable for punitive damages. *Id.*

Environmental Liability. Punitive damages are permitted only where the defendant acted with a culpable mental state, or evil motive, that rose to a level of conduct that was willful, wanton, malicious, reckless, oppressive or fraudulent. *McNeill v. Rice Eng'g & Operating, Inc.*, 70 P.3d 794, 803879 P.2d 772, *supra*; *Newberry*, 773 P.2d 1231, *supra*.

Insurer's Bad Faith. A punitive damages instruction was to be given to the jury in every common law insurance bad faith case where the evidence supported a finding either that the insurer failed or refused to pay a claim for frivolous or unfounded reasons or that the insurer's failure or refusal to settle was based on a dishonest or unfair balancing of interests. *Sloan v. State Farm Mut. Auto. Ins. Co. (In re Sloan)*, 85 P.3d 230 (N.M. 2004).

Product Liability. Punitive damages are permitted in an action for product liability where "the manufacturer is shown to have knowledge that its product is inherently dangerous to persons or property and that its continued use is likely to cause injury or death, but nevertheless continues to market the product without making feasible modifications to eliminate the danger or making adequate disclosure and warning of such danger." *Gonzales v. Surgidev Corp.*, 899 P.2d 576 (N.M. 1995) (citing *Baker v. Firestone Tire & Rubber Co.*, 793 F.2d 1196 (Eleventh Cir. 1986)).

Professional Liability. In the context of medical malpractice, gross negligence must rise to the level of "reckless indifference." *Sutherlin v. Fenenege*, 810 P.2d 353 (N.M. Ct. App. 1991); *Gonzalez v. Sansoy*, 703 P.2d 904 (N.M. Ct. App. 1984).

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

Yes. Insurance policies that covered "all sums" for which the insured became liable included awards of punitive damages unless the contract contained language excluding such coverage. *Rummel v. St. Paul Surplus Lines Ins. Co.*, 945 P.2d 985 (N.M. 1997); *Baker v. Armstrong*, 744 P.2d 170 (N.M. 1987); *Wolff v. Gen. Cas. Co. of Am.*, 361 P.2d 330 (N.M. 1961). See also *Stinbrink v. Farmers Ins. Co.*, 803 P.2d 664 (N.M. 1990) (exclusion for punitive damages in uninsured motorists provision was void because such coverage was mandated by statute); *Stewart v. State Farm Mut. Auto. Ins. Co.*, 726 P.2d 1374 (N.M. 1986) (uninsured motorist provision of automobile policy covered punitive damages; an insured may recover punitive damages from his insurer if he would be legally entitled to recover them from the uninsured tortfeasor). The total amount of punitive and compensatory damages for which the insurer was liable could not exceed the policy limits. *Stewart*, 726 P.2d 1374, *supra*.

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

Not applicable. See II. A. above.

C. What is the relationship of punitive to compensatory damages?

The plaintiff must first establish actual damages. See N.M. U.J.I. Civ. 13-1827 (2005); *Allsup's Convenience Stores, Inc. v. N. River Ins. Co.*, 976 P.2d 1 (N.M. 1998); *Gonzales*, 899 P.2d 594, *supra*; *Sanchez v. Clayton*, 877 P.2d 567 (N.M. 1994); *N.M. Banquest Investors Corp. v. Peters*, *supra*. No specific ratio must be shown between the amount of actual damages and the punitive award. *Green Tree Acceptance, Inc.*, 769 P.2d 84, *supra*; *Robinson v. Campbell*, 683 P.2d 510 (N.M. Ct. App. 1984). But see *Littell v. Allstate Ins. Co.*, 177 P.3d 1080 (N.M. Ct. App. 2008) (ratio of punitive damages to compensatory damages of 3.6 to 1 was within range deemed by U.S. Supreme Court to be consistent with due process). Punitive damages are excessive when there is no rational relationship between the defendant's alleged acts and the amount sought in punitive damages. *Aken v. Plains Elec. Generation & Transmission Coop., Inc.*, 49 P.3d 662 (N.M. 2002); *Stanton v. Gordon Jewelry Corp.*, 768 P.2d 888 (N.M. 1989). The amount of punitive damages must be based on reason and justice taking into account all the circumstances, including the nature of the wrong and such aggravating and mitigating circumstances as may be shown. The amount awarded, if any, must be reasonably related to the injury and to any damages given as compensation and not disproportionate to the

circumstances. N.M. U.J.I. Civ. 13-1827 (2010). In a suit based on intentional torts, the jury may award nominal damages to punish the wrongdoer for violating rights of the victim. *Sanchez*, 877 P.2d 567, *supra*.

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

No.

E. To whom are punitive damages payable?

Punitive damages are generally payable to the plaintiff.



I. PUNITIVE DAMAGES

A. May they be awarded?

Yes. See, e.g., *Mathie v. Fries*, 121 F.3d 808 (2d Cir. 1997); *Zarcone v. Perry*, 572 F.2d 52 (Second Cir. 1978); *Rocanova v. Equitable Life Assurance*, 634 N.E. 2d 940 (N.Y. 1994); *Loughry v. Lincoln First Bank*, 494 N.E. 2d 70 (N.Y. 1986); *Sharapata v. Islip*, 437 N.E.2d 1104 (N.Y. 1982); *Ahrens v. Stalzer*, 791 N.Y.S.2d 867 (First Dept. Ct. 2004); *Merritt v. Ramos*, 639 N.Y.S.2d 643 (N.Y. City Civ. Ct. 1995).

B. If so, in what circumstances?

Standard of Conduct. In order to recover punitive damages, plaintiffs must demonstrate that the wrong complained of rose to a level of "such wanton dishonesty as to imply a criminal indifference to civil obligations." *Martin v. Group Health Inc.*, 767 N.Y.S.2d 803 (N.Y. App. Div. 2003); *Rocanova v. Equitable Life Assurance Soc'y. of U.S.*, 634 N.E. 2d 940 (N.Y. 1994) (quoting *Walker v. Sheldon*, 179 N.E. 2d 497 (N.Y. 1961)). Punitive damages are recoverable in all actions based upon tortious acts that involve ingredients of malice, fraud, oppression, insult, wanton or reckless disregard of one's rights, or other circumstances of aggravation. See *Walker v. Sheldon*, 179 N.E.2d 497 (N.Y.1961); *Cushing v. Seemann*, 668 N.Y.S.2d 791 (N.Y. App. Div. 1998); *Collins v. Willcox*, 600 N.Y.S.2d 884 (N.Y. Sup. Ct. 1992); *Witherwax v. Transcare, Inc.*, 801 N.Y.S.2d 782, (N.Y. Sup. Ct. 2005). See also *Outside Connection, Inc. v. DiGennaro*, 795 N.Y.S.2d 669 (N.Y. App. Div. 1995) ("[P]laintiffs failed to establish that the defendants' alleged conduct was so gross, wanton, or willful, or of such high moral culpability, as to warrant an award of punitive damages."). Furthermore, punitive damages are available "for the purpose of vindicating a public right only where the actions of the alleged tortfeasor constitute gross recklessness or intentional, wanton or malicious conduct aimed

at the public generally or are activated by evil or reprehensible motives." *Nooger v. Jay-Dee Fast Delivery*, 673 N.Y.S.2d 1006 (N.Y. App. Div. 1998); *Boykin v. Mora*, 711 N.Y.S.2d 904 (N.Y. App. Div. 2000).

Standard of Proof. The federal and state court cases on the question of standard of proof are "mired in a morass of ambiguity." *Greenbaum v. Svenska Handelsbanken*, 979 F. Supp. 973, 975 (S.D.N.Y. 1997). Compare *In re Seventh Jud. Dist. Asbestos Litig. v. Armstrong World Indus.*, 593 N.Y.S.2d 685 (N.Y. App. Div. 1993) (holding that the evidentiary standard for proving entitlement to punitive damages is preponderance of the evidence), with *Munoz v. Poretz*, 754 N.Y.S.2d 463 (N.Y. App. Div. 2003) (holding that an award for punitive damages must be supported by clear, unequivocal and convincing evidence).

Actions Against State. Recovery of punitive damages against the state is prohibited. *Pietras v. Gol Pak Corp.*, 520 N.Y.S.2d 683 (N.Y. App. Div. 1987). Waiver of sovereign immunity does not permit punitive damages to be assessed. *Sharapata v. Islip*, 437 N.E.2d 1104 (N.Y. 1982). Punitive damages are also not permitted against a municipality. *Rekemeyer v. Cerone*, [685 N.Y.S.2d 855](#) (N.Y. App. Div. 1999).

Breach of Contract. Punitive damages are generally not allowed in contract actions, but are properly allowed in tort actions. *Ft. Howard Paper Co. v. William D. Witter Inc.*, 787 F.2d 784 (Second Cir. 1986); *Bibeau v. Ward*, 645 N.Y.S.2d 107 (N.Y. App. Div. 1996). Breach of contract will not support a punitive damages award. See *Garrity v. Lyle Stuart, Inc.*, 353 N.E.2d 793 (N.Y. 1976); *Schneer v. Bellantoni*, 672 N.Y.S.2d 756 (N.Y. App. Div. 1998). Punitive damages are justified only upon a showing of extraordinarily disingenuous or dishonest failure

to carry out a contract, when the breach rests on fraud, or when deterring morally culpable conduct. Compare *Eccobay Sportswear Inc. v. Providence Wash. Ins. Co.*, 585 F. Supp. 1343 (S.D.N.Y. 1984); *Mon-Shore Mgmt., Inc. v. Family Media, Inc.*, 584 F. Supp. 186 (S.D.N.Y. 1984); *Banco Nacional De Costa Rica v. Bremar Holdings Corp.*, 492 F. Supp. 364 (S.D.N.Y. 1980); *Cross v. Zybuero*, 587 N.Y.S.2d 670 (N.Y. App. Div. 1992); *Bader's Residence for Adults v. Telecom Equip. Corp.*, 455 N.Y.S.2d 303 (N.Y. App. Div. 1982); *Beck v. Moishes's Moving & Storage, Inc.*, 167 Misc. 2d 960, 641 N.Y.S.2d 517 (Cortland County, Sup. Ct. 1995); *Bibeau*, 228 A.D.2d 943 (1996) with *Fisher Bros. Sales, Inc. v. United Trading Co., Desarrollo y Comercio, S.A.*, 191 A.D. 2d 310, 595 N.Y.S.2d 175 (N.Y. App. Div. 1993); *Nutri Cheese & Foods, Inc. v. M. Slavin & Sons*, 584 N.Y.S.2d 575 (N.Y. App. Div. 1992). To qualify, the fraud must be directed at the public generally. *Durham Ind. Inc. v. N. River Ins. Co.*, 673 F.2d 37 (2d Cir. 1982); *cert. denied*, 459 U.S. 827 (1982); *Hutton v. Klabal*, 726 F. Supp. 67 (S.D.N.Y. 1989); *Bd. of Educ. v. CNA Ins. Co.*, 647 F. Supp. 1495 (S.D.N.Y. 1986); *Rocanova v. Equitable Life Assurance Soc'y of the U.S.*, 634 N.E.2d 940 (N.Y. 1994).

Employer Liability for Employee Conduct. In *Loughry v. Lincoln First Bank*, 494 N.E.2d 70 (N.Y. 1986), New York's Highest court, the Court of Appeals, ruled that punitive damages can only be imposed on an employer where management has authorized, participated in, consented to or ratified the conduct giving rise to such damages, or deliberately retained the unfit employee. The court stated that this "complicity rule" results in employer liability for punitive damages only when a superior officer, in the course of employment orders, participates in or ratifies outrageous conduct. In order to further clarify this position, the court noted that the definition of a "superior officer" connotes more than an agent or ordinary officer or employee vested with some supervisory or decision-making responsibility. The term superior officer "must contemplate a high level of general managerial authority in relation to the nature and operation of the employer's business." *Id. Orange & Rockland Utils., Inc. v. Muggs Pub., Inc.*, 739 N.Y.S.2d 610 (N.Y. App. Div. 2002); *Father Belle Cmty. Ctr. v. N.Y. State Div. of Human Rights*, 642 N.Y.S.2d 739 (N.Y. App. Div. 1996).

Environmental Liability. A tort claim sounding in nuisance for environmental damage caused by contamination of a waste disposal site was a viable cause of action for punitive damages. *State of N.Y. v. Schenectady Chems., Inc.*, 479 N.Y.S.2d 1010 (N.Y. App. Div. 1984); *State of N.Y. v. Monarch Chems., Inc.*, 443 N.Y.S.2d 967 (N.Y. Sup. Ct. 1981), *mod. and aff'd*, 456 N.Y.S.2d 867 (N.Y. App. Div. 1982) (landlord that retains real control of property but fails to take adequate steps to correct improper waste disposal or management practices by tenants has breached

duty of reasonable care and is potentially liable for punitive damages; a complaint that pleads such allegations states a viable cause of action).

Insurer's Bad Faith. *Soto v. State Farm Insurance Company*, 83 N.Y.2d 718, 635 N.E.2d 1222, 613 N.Y.S.2d 352 (1994) (even where insurer is found to have acted in bad faith, plaintiff cannot recover excess award of punitive damages against insured from insurer); *Camelot Coach Corp. v. U.S. Fid. & Guar. Co.*, 657 N.Y.S.2d 335 (N.Y. App. Div. 1997) (absent sufficient allegations of fraudulent and deceitful scheme in dealing with the general public or implying criminal indifference to civil obligations, the insured failed to state a claim for punitive damages against the insurer); *Lavanant v. General Accident Ins. Co. of Am.*, 212 A.D.2d 450 (First Dept. 1995) (stating that punitive damages should be awarded only when insurer engaged in a fraudulent scheme against the general public evincing a high degree of moral turpitude, wanton or dishonest conduct as to imply a criminal indifference to civil obligations); *Desai v. Blue Shield, Inc.*, 178 A.D.2d 894, 577 N.Y.S.2d 932 (Third Dept. 1991); *Soto*, 83 N.Y.2d 718 (1994) (the insured was not entitled to punitive damages because the insured did not establish malice or intent to harm on the part of the insurer); *Supreme Automotive Mfg. Corp. v. Continental Casualty Co.*, 126 A.D.2d 153, 512 N.Y.S.2d 820 (First Dept. 1987); *Porter v. Allstate Ins. Co.*, 184 A.D.2d 685 (Second Dept. 1992); *Samovar of Russia Jewelry Antique Corp. v. Generali General Ins. Co.*, 102 A.D.2d 279, 476 N.Y.S.2d 869 (First Dept. 1984). *But see Bi-Economy Mkt., Inc. v. Harleysville Ins. Co. of N.Y.*, 886 N.E.2d 127 (N.Y. 2008); *Panasia Estates Inc. v. Hudson Ins. Co.*, 886 N.E.2d 135 (N.Y. 2008) (affirming the right of insureds to seek consequential damages in excess of the policy limits when there is a breach of the covenant of good faith and fair dealing).

Product Liability. Punitive damages are recoverable. See *Home Ins. Co. v. Am. Home Prod. Corp.*, 550 N.E.2d 930 (N.Y. 1990) (nothing in New York Law or public policy would preclude an award of punitive damages in a strict product liability case, where the theory of liability is failure to warn and where there is evidence that the failure was wanton or in conscious disregard of the rights of others); *Dumesnil v. Proctor & Schwartz, Inc.*, 606 N.Y.S.2d 394 (N.Y. App. Div. 1993) (punitive damages may be recovered in a strict product liability action, at least insofar as founded on a failure to warn); *Bikowicz v. Nedco Pharmacy*, 517 N.Y.S.2d 829 (N.Y. App. Div. 1987); *Baleno v. Jacuzzi Research, Inc.*, 461 N.Y.S.2d 659 (1983).

Professional Liability. In order to recover punitive damages in a medical malpractice action, a defendant's conduct must be so intentional, malicious, outrageous, or otherwise aggravated

beyond mere negligence to warrant such an award. *McDougald v. Garber*, 536 N.E.2d 372, 538 N.Y.S.2d 937 (N.Y. 1989); *Graham v. Columbia-Presbyterian Med. Ctr.*, 588 N.Y.S.2d 2 (N.Y. App. Div. 1992); *Sultan v. Kings Highway Hosp. Ctr.*, 562 N.Y.S.2d 204 (N.Y. App. Div. 1990). Punitive damages in a legal malpractice

action are recoverable when an act that is aimed at the public generally is gross and involves high moral culpability. See *Mosseri v. Zimmerman*, 494 N.Y.S.2d 327 (N.Y. App. Div. 1985); *Lavanant v. Gen. Accident Ins. Co. of Am.*, 622 N.Y.S.2d 726 (N.Y. App. Div. 1995).

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

No. In *Soto v. State Farm Ins. Co.*, 635 N.E.2d 1222 (N.Y. 1994), the Court of Appeals held that while an insurer who acts in bad faith is usually required to pay any judgment in excess of the policy limits, state policy precludes indemnification for punitive damages. See also *Home Ins. Co. v. Am. Home Prod., Corp.*, 550 N.E.2d 930 (N.Y. 1990) (where the Court of Appeals held that requiring an insurer to reimburse the insured for punitive damages awarded in an out-of-state action would violate New York public policy). See also *Biondi v. Beekman Hill House Apt. Corp.*, 731 N.E.2d 577 (N.Y. 2000) (holding that indemnification defeats the purpose of punitive damages, which is to punish and deter others from acting similarly).

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

Yes. Insurance coverage of vicariously assessed punitive damages is not permitted as a matter of New York public policy. *Zurich Ins. Co. v. Shearson Lehman Hutton, Inc.*, 642 N.E.2d 1065, 1070 (N.Y. 1994) (imposition of vicarious punitive damages can significantly advance the deterrence goal and thus vicariously assessed punitive damages are not excepted from the public policy prohibition against providing coverage for punitive damages).

C. What is the relationship of punitive to compensatory damages?

There is no separate cause of action for punitive damages. *N.Y. Univ. v. Cont'l Ins. Co.*, 662 N.E. 2d 763 (N.Y. 1995); *Fishgold v. C.O.F., Inc.*, 288 A.D.2d 827 (Fourth Dept. 2001); *Mulder v. Donaldson, Lufkin & Jenrette*, 623 N.Y.S.2d 560 (N.Y. App. Div. 1995); *Goldstein v. Winard*, 569 N.Y.S.2d 425 (N.Y. App. Div. 1991); *Bader's Residence for Adults v. Telecom Equip. Corp.*, 455 N.Y.S.2d 303 (N.Y. App. Div. 1982). Absent a valid claim for compensatory damages, there can be no claim for punitive damages. *Prote Contr. Co. v. Bd. of Educ.*, 276 A.D.2d 309 (N.Y. App. Div. 2000). However, in the context of a Title VII employment discrimination case, at least one court has held that punitive damages may be recovered even though the court finds that the plaintiff is not entitled to compensatory damages.

Cush-Crawford v. Adchem Corp., 94 F. Supp. 2d 294 (E.D.N.Y. 2000). Punitive damages need not bear a certain ratio to actual damages. *Home Ins. Co. v. Am. Home Prods. Corp.*, 550 N.E.2d 930 (N.Y. 1990); *Merritt v. Ramos*, 639 N.Y.S.2d 643 (N.Y. Civ. Ct. 1995); *Ahrens v. Stalzer*, 2004 Slip Op. 50864U (N.Y. Misc. 2004).

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

The award of punitive damages by a jury should not be disturbed unless it is so grossly excessive as to warrant the conclusion that it was "actuated by passion." *Nardelli v. Stamberg*, 377 N.E.2d 975, 977 (N.Y. 1978) (citations omitted). See also *Minichiello v. Supper Club*, 745 N.Y.S.2d 24 (N.Y. App. Div. 2002); *Buggie v. Cutler*, 636 N.Y.S.2d 357 (N.Y. App. Div. 1995); *Manolas v. 303 W. 2nd St. Enters., Inc.*, 569 N.Y.S.2d 701 (N.Y. App. Div. 1991) (finding the amount of the punitive damages award to be grossly excessive where the award was 80 times that of the compensatory award). In order to have a valid claim for punitive damages, a plaintiff must first have a valid claim for compensatory damages. *Hubbell v. Trans World Life Ins.*, 408 N.E.2d 918 (N.Y. 1980); *Prote Contr. Co. v. Bd. of Educ.*, 276 A.D.2d 309 (N.Y. App. Div. 2000).

E. To whom are punitive damages payable?

A plaintiff may recover punitive damages if he can show that the defendant's conduct rose to a level of "such wanton dishonesty as to imply a criminal indifference to civil obligations." 164 *Mulberry St. Corp. v. Columbia Univ.*, 771 N.Y.S.2d 16 (N.Y. App. Div. 2004); *Jeffrey BB v. Cardinal McCloskey Sch. and Home for Children*, 689 N.Y.S. 2d 721 (N.Y. App. Div. 1999).

In order for a plaintiff's spouse or parent to receive punitive damages, there must be a direct interference/injury to the spousal/parental right. *Pickle v. Page*, 169 N.E. 650 (N.Y. 1929); *Young v. Robertshaw Controls Co.*, 104 A.D.2d 84, 481 N.Y.S.2d 891 (N.Y. App. Div. 1984). Indirect injury, such as loss of services, does not constitute a basis for an award of punitive damages. *Tidd v. Skinner*, 122 N.E. 247 (N.Y. 1919). Punitive damages may be awarded in an action to recover damages for personal injury where the death occurs after August 31, 1982. N.Y. ESTATE, POWERS & TRUSTS LAW, § 11-3.2 (Consol. 2010).

North Carolina



I. PUNITIVE DAMAGES

A. May they be awarded?

Yes. N.C. GEN. STAT. Chapter 1D (2010); see *Rhyne v. K-Mart Corp.*, 594 S.E.2d 1 (N.C. 2004); *Stanback v. Stanback*, 254 S.E.2d 611 (N.C. 1979).

B. If so, in what circumstances?

Standard of Conduct.

Under N.C. GEN. STAT. § 1D-15:

Standards for recovery of punitive damages

1. Punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded: fraud, malice, or willful or wanton conduct.
2. The claimant must prove the existence of an aggravating factor by clear and convincing evidence.
3. Punitive damages shall not be awarded against a person solely on the basis of vicarious liability for the acts or omissions of another. Punitive damages may be awarded against a person only if that person participated in the conduct constituting the aggravating factor giving rise to the punitive damages, or if, in the case of a corporation, the officers, directors, or managers of the corporation participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages.
4. Punitive damages shall not be awarded against a person solely for breach of contract.

When a jury is determining the amount to award in punitive damages, it may consider the following evidence:

1. The reprehensibility of the defendant's motives and conduct
2. The likelihood, at the relevant time, of serious harm
3. The degree of the defendant's awareness of the probable consequences of its conduct

4. The duration of the defendant's conduct

5. The actual damages suffered by the claimant
6. Any concealment by the defendant of the facts or consequences of its conduct
7. The existence and frequency of any similar past conduct by the defendant
8. Whether the defendant profited from the conduct
9. The defendant's ability to pay punitive damages, as evidenced by its revenues or net worth.

N.C. GEN. STAT. § 1D-35 (2010).

Standard of Proof. Clear and convincing evidence. N.C. GEN. STAT. § 1D-15(b) (2010). The party seeking damages "must show that the amount of damages is based upon a standard that will allow the finder of fact to calculate the amount of damages with reasonable certainty." *Olivetti Corp. v. Ames Bus. Sys., Inc.*, 356 S.E.2d 578, 586 (N.C. 1987); *Case McCulloch, Inc. v. Freedman*, 610 S.E.2d 416 (N.C. Ct. App. 2005). This formulation is similar to the "preponderance of the evidence" standard. However, separate proof standards may be set forth in statutes authorizing punitive damages in specific contexts. See, e.g., N.C. GEN. STAT. § 1D-15(A)(1-3) (2010).

Pleading Requirements. *Holloway v. Wachovia Bank & Trust Co., N.A.*, 339 N.C. 338, 452 S.E.2d 233 (1994) (plaintiff need not plead punitive damages specifically if the facts of the case would support a finding of such damages); but see N.C. GEN. STAT. § 1D-20 (2004) ("claimant must elect, prior to judgment, between punitive damages and any other remedy pursuant to another statute that provides for multiple damages"); N.C. GEN. STAT. § 1A-1, Rule 9(K) (amended 1995) ("a demand for punitive damages shall be specifically stated, except for the amount, and the aggravating factor that supports the award of punitive damages shall be averred with particularity").

Actions Against State. Punitive damages may not be awarded against a municipality in actions arising under common law. *Long v. Charlotte*, 293 S.E.2d 101 (N.C. 1982). Punitive damages,

however, can be awarded against municipalities and their corporations if such a cause of action is created by statute. See, e.g., *Jackson v. Hous. Auth. of High Point*, 341 S.E.2d 523 (N.C. 1986) (permitting recovery of punitive damages against municipality under statute for wrongful death action). See also N.C. Gen. Stat. § 12-3 (6) ("The word 'person' shall extend and be applied to bodies politic and corporate...").

Breach of Contract. Generally, except for breach of contract to marry, punitive damages will not lie for breach of contract. N.C. GEN. STAT. § 1D-15 (d) (2010). Punitive damages are available where the breach of contract rises to the level of independent tort. *Shore v. Farmer*, 351 N.C. 166 (1999).

Employer Liability for Employee Conduct. Pursuant to N.C. GEN. STAT. § 1D-15(c), punitive damages are not available against a person solely on the basis of vicarious liability for the acts or omissions of another. Punitive damages may be awarded against a person only if that person participated in the conduct constituting the aggravating factor giving rise to the punitive damages or if, in the case of a corporation, the officers, directors, or managers of the corporation participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages.

Environmental Liability. The U.S. Court of Appeals for the Fourth Circuit affirmed a punitive damages award by the U.S. District Court for the Eastern District of North Carolina arising out of a defendant's violation of the Comprehensive Environmental

Response, Compensation, and Liability Act. *U.S. v. Carolina Transformer Co.*, 978 F.2d 832 (Fourth Cir. 1992). Punitive damages award of \$5,000 was affirmed for a property damage claim; however, the Sedimentation Pollution Control Act does not allow punitive damages. See *Huberth v. Holly*, 462 S.E. 2d 239 (N.C. Ct. App. 1995).

Insurer's Bad Faith. An insurer's violation of a good faith duty with aggravating factors (i.e., intentional, willful, oppressive, unscrupulous and reckless disregard for rights) is sufficient to state a claim for a bad faith refusal to settle, and support a claim for punitive damages. See *Miller v. Nationwide Mut. Ins. Co.*, 435 S.E. 2d 537 (N.C. Ct. App. 1993); *Lovell v. Nationwide Mut. Ins. Co.*, 522 S.E. 2d 73 (N.C. Ct. App. 1993).

Product Liability. Punitive damages may be available for a product liability claim where the plaintiff makes an adequate claim. See *Holmes v. Colombo*, 377 S.E.2d 261 (N.C. Ct. App. 1989).

Professional Liability. Punitive damages are allowed for a professional negligence claim where the plaintiff has proven at least nominal damages, and there is an element of aggravation. See *Estate of Smith v. Underwood*, 487 S.E.2d 807 (N.C. Ct. App. 1997). See also *Muse v. Charter Hosp. of Winston-Salam, Inc.*, 452 S.E.2d 589 (N.C. Ct. App. 1995) (discharge of a patient from a hospital when insurance ran out is a willful or wanton activity that supports a \$2 million punitive damages award against a hospital).

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

Yes. *Collins & Aikman Corp. v. Hartford Accident & Indem. Co.*, 436 S.E.2d 243 (N.C. 1993). *Mazza v. Med. Mut. Ins. Co.*, 319 S.E.2d 217 (N.C. 1984) (public policy does not preclude coverage for punitive damages); see *Lavender v. State Farm Mut. Auto. Ins. Co.*, 450 S.E.2d 34 (N.C. Ct. App. 1994) (automobile policy covered punitive damages award absent express exclusion); *New S. Ins. Co. v. Kidd*, 443 S.E.2d 85 (N.C. Ct. App. 1994) (automobile policy covered punitive damages even though it contained exclusion for intentional conduct; policy must explicitly state that punitive damages are excluded); *Boyd v. Nationwide Mut. Ins. Co.*, 424 S.E.2d 168 (N.C. Ct. App. 1993) (business automobile and commercial umbrella policy covered punitive damages).

Under N.C. GEN. STAT. § 58-41-50(a) (2004), with respect to liability insurance policy forms, an insurer may exclude or limit coverage for punitive damages awarded against its insured.

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

Not applicable. See II. A. above.

C. What is the relationship of punitive to compensatory damages?

Punitive damages may not be awarded unless compensatory damages are recoverable. N.C. GEN. STAT. § 1D-15 (a) (2004); *Shugar v. Guill*, 304 N.C. 332, 283 S.E.2d 507 (N.C. 1981); see *Mehovic v. Mehovic*, 514 S.E.2d 730 (N.C. Ct. App. 1999). Punitive damages, however, will be allowed where the plaintiff has proved at least nominal damages and where the element of aggravation accompanying the tortious conduct causes the

PUNITIVE DAMAGES REVIEW

injury. *Ingle v. Allen*, 317 S.E.2d 1 (N.C. Ct. App. 1984); *Jones v. Gwynne*, 323 S.E.2d 9 (N.C. 1984) (lack of showing of malice precluded the recovery of punitive damages); see also *Hawkins v. Hawkins*, 417 S.E.2d 447 (N.C. 1992) (permitting recovery of punitive damages without award of compensatory damages because plaintiff was entitled to recover nominal damages and, therefore, also punitive damages); *Jennings v. Jessen*, 407 S.E.2d 264 (N.C. Ct. App. 1991).

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

There is a limit on recovery of punitive damages of either three times the amount of compensatory damages or \$250,000, whichever is greater. This limit, however, shall not be made known to the trier of fact, who shall determine the award of

punitive damages separately from all other damages. N.C. GEN. STAT. § 1D-25 (a-c) (2010); *Rhyne v. K-Mart Corp.*, 594 S.E.2d 1 (N.C. 2004), *aff'g* 149 N.C. App. 672 (N.C. App. 2002). The cap for punitive damages awards does not apply to actions under the "Driving While Impaired" statutes. N.C. GEN. STAT. §§ 20-138.1, 20-138.2., 20-138.5 (2010). N.C. GEN. STAT. § 1D-26 (2010).

E. To whom are punitive damages payable?

Punitive damages are generally payable to the plaintiff under North Carolina law. See, e.g., N.C. GEN. STAT. § 15B-18 (2004) (punitive damages as crime victims' compensation), N.C. GEN. STAT. § 28A-18-2 (2004) (punitive damages under wrongful death statute), N.C. GEN. STAT. § 99D-1 (2004) (punitive damages for interference with civil rights).

North Dakota

I. PUNITIVE DAMAGES

A. May they be awarded?

Yes. N.D. CENT. CODE § 32-03.2-11 (2010); *Corwin Chrysler-Plymouth, Inc. v. Westchester Fire Ins. Co.*, 279 N.W.2d 638 (N.D. 1979). See also *Pioneer Fuels Inc. v. Mont.-Dakota Utils. Co.*, 474 N.W.2d 706 (N.D. 1991). Punitive damages need not be provided expressly by a statute in order to be awarded. N.D. CENT. CODE § 32-03-35.

B. If so, in what circumstances?

Standard of Conduct. Oppression, fraud or actual malice. N.D. CENT. CODE § 32-03.2-11 (1). See *Slaubaugh v. Slaubaugh*, 466 N.W.2d 573 (N.D. 1991); *Ingalls v. Paul Revere Life Ins. Group*, 561 N.W.2d 273 (N.D. 1997). The absence of a specific finding of oppression, fraud or malice, actual or presumed, is fatal to the award of exemplary damages. See *Ehrman v. Feist*, 568 N.W.2d 747 (N.D. 1997).

Standard of Proof. Punitive damages are only awardable when the defendant is liable by clear and convincing evidence. N.D. CENT. CODE § 32-03.2-11 (1).

Actions Against State. Punitive or exemplary damages are not permitted. N.D. CENT. CODE § 32 03.2-12 (2005).

Breach of Contract. Punitive damages may be awarded when the breach amounts to an independent willful tort. See *Delzer v. United Bank*, 527 N.W.2d 650 (N.D. 1995); *Vallejo v. Jamestown College*, 244 N.W.2d 753 (N.D. 1976).

Employer Liability for Employee Conduct. Under North Dakota law, punitive damages are not recoverable against the employer for the wrongful act of an employee, unless the employer participated in the wrongful act or approved the wrongful act either before or after its commission. *Rickbeil v. Grafton Deaconess Hosp.*, 23 N.W.2d 247, 260 (N.D. 1946).

Environmental Liability. There is no North Dakota case law or statute expressly authorizing punitive damages in the area of environmental liability. However, punitive damages need not be provided expressly by a statute in order to be awarded. N.D. Cent. Code § 32-03-35. Instead, the standard of conduct required for an award of punitive damages is oppression, fraud or malice, actual or presumed. N.D. Cent. Code § 32-03.2-11 (1).

General Liability. Punitive or exemplary damages may be awarded in cases involving comparative fault. N.D. Cent. Code § 32 03.2-12. North Dakota wrongful death law provides for the recovery of **punitive damages**. *Puppe by Puppe v. A.C. and S., Inc.*, 733 F. Supp. 1355 (D.N.D. 1990).

Insurer's Bad Faith. Punitive damages may be recovered. *Corwin Chrysler-Plymouth v. Westchester Fire Ins. Co.*, 279 N.W.2d 638 (N.D. 1979). However, bad faith alone is not enough; there must be a showing of oppression, fraud or malice, actual or presumed. *Id.* Although punitive damages are generally not available in contract, the insurer's duty to act in good faith does not emanate from the terms of the insurance contract, but rather "an obligation imposed by the law, under which the insurer must act fairly and in good faith in discharging its contractual responsibilities. Thus, in a proper case, an insurance company found to have acted in bad faith could be required to pay punitive damages to its insured." *Id.* (quoting *Gruenberg v. Aetna Ins. Co.*, 510 P.2d 1032, 1037 (Ca. 1973)).

Other Circumstances. By statute, punitive damages may be allowed against (1) a public utility that willfully violates the law; (2) for injuries to domestic animals resulting from gross negligence

or willful acts, N.D. CENT. CODE § 36-21-13 (1995); (3) for injury resulting from illegal sales of liquor; (4) for malicious mischief; and (5) for conversion of personalty, *Lamoreaux v. Randall*, 53 N.D. 697, 208 N.W. 104 (N.D. 1926); N.D. CENT. CODE § 32-03-23 (2005).

Product Liability. Punitive damages may be awarded. Only a finding of either actual malice or presumed malice will support an award of punitive damages. *Hebron Pub. Sch. Dist. No. 13 v. U.S. Gypsum*, 953 F.2d 398, 403 (Eighth Cir. 1992) (citing *Dahlen v. Landis*, 314 N.W.2d 63, 69 (N.D. 1981)).

Professional Liability. In an action for legal malpractice, an attorney who is guilty of deceit or collusion or consents to deceit or collusion, with intent to deceive the court or any party, forfeits to the party injured treble damages. N.D. Cent. Code § 27-13-08. The treble damages award may be characterized as punitive.

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

Undetermined. North Dakota does not have a statute that specifically addresses contracts that insure against an award of punitive damages. However, under North Dakota Administrative Code, "[a]ll contracts which have for their object, directly or indirectly, the exempting of anyone from responsibility for that person's own fraud or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." N.D. Cent. Code, § 9-08-02.

Despite section 9-08-02, in a case involving the interpretation of an ambiguous insurance policy, the North Dakota Supreme Court interpreted the contract to provide coverage for punitive damages because, under the doctrine of contract adhesion, this was the interpretation that was most favorable to the insured. *Cont'l Cas. Co. v. Kinsey*, 513 N.W.2d 66 (N.D. 1994) (insurer did not breach duty to settle case where it had duty to pay only compensatory damages and it also had a right to seek reimbursement from the insured for punitive damages).

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

Undetermined, but probably not.

C. What is the relationship of punitive to compensatory damages?

No award of exemplary damages may be made if the claimant is not entitled to compensatory damages. N.D. CENT. CODE § 32-03.2-11 (2005).

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

Yes. The amount of exemplary damages may not exceed two times the amount of compensatory damages or \$250,000, whichever is greater; provided, however, that no award of exemplary damages may be made if the claimant is not entitled to compensatory damages. Any jury award in excess of the limit must be reduced by the court. N.D. CENT. CODE § 32-03.2-11 (2005).

E. To whom are punitive damages payable?

Generally, an award of punitive damages is payable to the plaintiff. Parents of a deceased child can recover punitive damages under 42 U.S.C. § 1983 for the violation of their child's civil rights. *Falkenstein v. City of Bismarck*, 268 N.W.2d 787 (1978).

Ohio



I. PUNITIVE DAMAGES

A. May they be awarded?

Yes. OHIO REV. CODE ANN. § 2315.21 (LexisNexis 2010); *Springston v. Consol. Rail Corp.*, 130 F.3d 241 (Sixth Cir. 1997) (punitive damages available upon finding of actual malice); *Cabe v. Lunich*, 640 N.E.2d 159 (Ohio 1994).

B. If so, in what circumstances?

Standard of Conduct. Punitive damages are recoverable in tort actions for actions or omissions of the defendant that demonstrate malice, aggravated or egregious fraud, oppression or insult, where that defendant as principal or master authorized, participated in, or ratified such actions or omissions of an agent or servant. OHIO REV. CODE ANN. § 2315.21(B)(1); *Estate of Warren J. Schmidt v. Derenia*, 822 N.E.2d 401 (Ohio Ct. App. 2004); *Darulis v. Pennell*, 680 N.E.2d 684 (Ohio Ct. App. 1996); *Cashion v. Segal*, 1996 Ohio App. (LexisNexis 1913) (1996). But see *Schellhouse v. Norfolk & W. Ry. Co.*, 575 N.E.2d 453 (Ohio 1991) (no award of punitive damages when behavior is merely reckless). Actual malice is necessary for an award of punitive damages, but actual malice is not limited to the cases where the defendant can be shown to have an evil mind. *Buckeye Union Ins. Co. v. New Eng. Ins. Co.*, 720 N.2d 495, 501 (Ohio 1999). Rather malice is defined as (1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm. *Malone v. Courtyard by Marriott P'ship*, 659 N.E.2d 1242, 1259 (Ohio 1996).

Standard of Proof. Clear and convincing evidence is required. *Cabe v. Lunich*, 640 N.E.2d 159 (Ohio 1994); OHIO REV. CODE ANN. § 2315.21(D)(4) (LexisNexis 2010).

Actions Against State. Punitive damages are not available against the state in the Court of Claims, including, but not limited to, tort actions against a state university or college or political subdivisions of the state. OHIO REV. CODE ANN. § 2315.21(D) (1-5) (LexisNexis 2010); *Berke v. Ohio Dept. of Publ. Welfare*, 369 N.E.2d 1056 (Ohio Ct. App. 1976). Further, punitive or exemplary damages may not be awarded in an action against a government entity. Ohio Rev. Code Ann. § 2744.05.

Breach of Contract. Punitive damages are not available in an action for breach of contract alone. *In re Graham Square, Inc.*, 126 F.3d 823 (Sixth Cir. 1997); *Hoffner v. Davis*, 675 N.E.2d 1339 (Ohio Ct. App. 1996); *Power Motive Corp. v. Mannesmann Demag Corp.*, 617 F. Supp. 1048 (D.C. Colo. 1985) (applying Ohio law). However, breaches of contract giving rise to a separate tort may support an award of punitive damages. See *Arthur Young & Co. v. Kelly*, 623 N.E.2d 1303 (Ohio Ct. App. 1993) (continued and aggressive violations of a covenant not to compete in an employment contract may constitute a separate tortious action supporting an award of punitive damages); *Lannigan v. Pioneer S. & L.*, 1993 Ohio App. (LexisNexis 3964) (1993); *Hoffner v. Davis*, 675 N.E.2d 1339 (Ohio Ct. App. 1996); *Tibbs v. Nat'l Homes Constr. Corp.*, 369 N.E.2d 1218, 52 Ohio Ct. App. 2d 281 (1977) (punitive damages may be available where a separate tort is pleaded and proved); *Levin v. Nielsen*, 306 N.E.2d 173 (Ohio Ct. App. 1973).

Employer Liability for Employee Conduct. Under Ohio law, punitive damages are recoverable against an employer for the actions or omissions of an employee only where the employer authorized, participated in, or ratified the employee's wrongful conduct. Ohio Rev. Code Ann. § 2315.21(C)(1).

Environmental Liability. There is no law in Ohio expressly addressing the issue of punitive damages and environmental liability. However, in any civil action, an award of punitive damages requires that the "actions or omissions of that defendant demonstrate malice or aggravated or egregious fraud..." Ohio Rev. Code Ann. § 2315.21 (2010).

Insurer's Bad Faith. "Punitive damages may be recovered against an insurer who breaches his duty of good faith in refusing to pay a claim of its insured upon proof of actual malice, fraud or insult on the part of the insurer." *Staff Builders, Inc. v. Armstrong*, 525 N.E.2d 783 (Ohio 1988) (distinguishing evidence sufficient to award compensatory damages from evidence sufficient to award punitive damages); see also *Zoppo v. Homestead Ins. Co.*, 644 N.E.2d 397 (Ohio 1994).

Interference with Contract. Under Ohio law, punitive damages are recoverable for tortious interference with business relations if interference is attributable to ill will, spite or hatred. *McLaurin*

v. Fischer, 768 F.2d 98 (6th Cir. 1985). *Developers Three v. Nationwide Ins. Co.*, 582 N.E.2d 1130, 1135 (Ohio Ct. App. 1990) (in the absence of an unjust enrichment theory, courts will not be able to routinely punish all those who tortiously interfere with a contract, but may award punitive damages when tortfeasor consciously disregarded the rights of others).

Product Liability. Punitive damages are awardable in product liability actions. See OHIO REV. CODE ANN. § 2307.80 (allowing punitive damages if, through clear and convincing evidence, the plaintiff establishes manufacturer is liable for misconduct that manifested a flagrant disregard of the safety of persons using the product; mere defect is not enough). Liability is waived when the product was a drug approved by the FDA. See § 2307.80(C);

Conde v. Velsicol Chem. Corp., 816 F. Supp. 453 (S.D. Ohio 1992) (must establish a “great probability of causing substantial harm” in order to be awarded punitive damages).

Professional Liability. Punitive damages may be recovered. See, e.g., *Doe v. White*, 647 N.E.2d 198 (Ohio Ct. App. 1994) (award of \$75,000 for punitive damages against crisis counselor affirmed where counselor had consensual sexual intercourse with client shortly after client called crisis hot line).

Wrongful Death. Punitive damages can be awarded in wrongful death actions in limited circumstances. OHIO REV. CODE ANN. § 2125.02; *Gollihue v. Consol. Rail. Corp.*, 697 N.E.2d 1109 (Ohio Ct. App. 1997); *Case v. Norfolk & W. Ry. Co.*, 570 N.E.2d 1132 (Ohio Ct. App. 1988); *Rubeck v. Huffman*, 374 N.E.2d 411 (Ohio 1978).

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

No. OHIO REV. CODE ANN. § 3937.182 (prohibits casualty and motor vehicle insurance coverage for punitive damages); *Lumbermens Mut. Cas. Co. v. S-W Indus.*, 39 F.3d 1324 (Sixth Cir. 1994) (holding Ohio public policy prohibits coverage for punitive damages arising from the insured’s own conduct); *Sawchyn v. Buckeye Union Ins. Co.*, 1992 Ohio App. (LexisNexis 2508) (1992) (an insurance policy that bars coverage for bodily injury or property damage that is expected or intended does not provide coverage for punitive damages assessed by a jury in a lead poisoning case); *Ruffin v. Sawchyn*, 599 N.E.2d 852 (Ohio Ct. App. 1991) (holding a settlement void to the extent that the settlement purports to satisfy the punitive damages award with payments from co-defendant’s insurance carrier). *Casey v. Calhoun*, 531 N.E.2d 1348 (Ohio Ct. App. 1987) (court denied coverage for punitive damages under a liability policy as against public policy).

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

Probably. See II. A. above.

C. What is the relationship of punitive to compensatory damages?

For punitive or exemplary damages to be awarded, the plaintiff must prove that actual or compensatory damages resulted from the actions or omissions described above. OHIO REV. CODE ANN. § 2315.21(B)(2) (LexisNexis 2010); *Niessel v. Meijer*, 2001 Ohio App. (LexisNexis 5632) (Ohio Ct. App. Dec. 17,

2001); *Wilkins v. Onrovich*, 691 N.E.2d 1122, 93 (Ohio App. 12 Dist.1997); *McCullough v. Spitzer Motor Ctr., Inc.*, 671 N.E.2d 306, 530 (Ohio Ct. App. 1996); *Reynolds v. CSX Transp., Inc.*, 561 N.E.2d 1047 (Ohio Ct. App. 1989); *Seasons Coal Co. v. Cleveland*, 461 N.E.2d 1273 (Ohio 1984). The actual damages supporting an award of punitive damages do not have to be substantial. *Gollihue*, *supra*; *Leal v. Holtvogt*, 702 N.E.2d 1246 (Ohio Ct. App. 1998); *Uebelacker v. Cincom Sys., Inc.*, 608 N.E.2d 858 (Ohio. Ct. App. 1992).

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

Yes. Generally, the trier of fact determines the amount of punitive damages awarded to a successful plaintiff. The court, however, shall not enter judgment for punitive damages in excess of two times the amount of compensatory damages awarded to the plaintiff or 10 percent of the employer’s or individual’s net worth when the tort was committed up to a maximum of \$350,000. OHIO REV. CODE ANN. § 2315.21(D)(1), (2)(b) (LexisNexis 2010). Evidence of a plaintiff’s wealth is relevant when considering an award of punitive damages. *Spadafore v. Blue Shield, Ohio Med. Indem. Corp.*, 486 N.E.2d 1201, 1205 (Ohio Ct. App. 1985).

A jury verdict as to punitive damages that is not the result of passion and prejudice or prejudicial error will not be reduced on appeal. *Atwood Res., Inc. v. Lehigh*, 648 N.E.2d 548 (Ohio Ct. App. 1994). A court may award punitive damages even where they are not requested, but may not exceed the damages

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claimed in the demand. *Lance v. Bowe*, 648 N.E.2d 60 (Ohio Ct. App. 1994); *Horner v. Toledo Hosp.*, 640 N.E.2d 857 (Ohio Ct. App. 1993).

E. To whom are punitive damages payable?

Generally, an award of punitive damages is payable to the plaintiff. The estate of the decedent may pursue a claim for punitive damages against the wrongdoer. *Rubeck v. Hoffman*, 374 N.E.2d 411 (Ohio. 1978).



I. PUNITIVE DAMAGES

A. May they be awarded?

Yes, for the breach of noncontractual obligations. OKL. STAT. tit. 23 § 9.1 (2010); *Capstick v. Allstate Ins. Co.*, 998 F.2d 810, 821 (Tenth Cir. 1993); *Smith v. Johnson*, 591 P.2d 1260, 1264 (Okla. 1978).

B. If so, in what circumstances?

Standard of Conduct. Conduct that would cause punitive damages awards includes a wanton or reckless disregard for the rights of others, reckless disregard of a duty to deal fairly and act in good faith with the insured (for an insurer), or acting with actual malice, fraud or oppression. Reckless disregard and gross negligence may be used to infer malice. *Stroud v. Arthur Anderson & Co.*, 37 P.3d 783, 793 (Okla. 2001); OKL. STAT. tit. 23, § 9.1 (2010); *Silkwood v. Kerr-McGee Corp.*, 769 F.2d 1451 (Tenth Cir. 1985), cert. denied, 476 U.S. 1104 (1986); *Mitchell v. Ford Motor Credit Co.*, 688 P.2d 42 (Okla. 1984); *Oden v. Russell*, 251 P.2d 184 (Okla. 1952); *Graham v. Keuchel*, 847 P.2d 342 (Okla. 1993).

Standard of Proof. A “competent evidence standard” is used to award damages that are capped. In order to lift the cap and award punitive damages, a clear and convincing evidence standard must be met. *Badillo v. Mid Century Ins. Co.*, 121 P.3d 1080 (Okla. 2005); *Barnes v. Okla. Farm Bureau Mut. Ins. Co.*, 11 P.3d 162 (Okla. 2000).

Actions Against State. Punitive damages are not recoverable. Okla. Stat. tit. 51, § 154(C) (2010); *Estate of Weatherford v. Bd. of County Comm’rs*, 2009 U.S. Dist. (LexisNexis 9886) (E.D. Okla. Feb. 10, 2009).

Breach of Contract. Punitive damages are not awarded for breach of contract. However, punitive damages may be awarded where the breach amounts to an independent willful tort. *Woods Petroleum Corp. v. Delhi Gas Pipeline Corp.*, 700 P.2d 1023 (Okla. Ct. App. 1983); *Jackson v. Glasgow*, 622 P.2d 1088 (Okla. Ct. App. 1980); *Norman’s Heritage Real Estate Co. v. Aetna Cas. & Sur. Co.*, 727 F.2d 911 (Tenth Cir. 1984); *Zenith Drilling Corp. v. Internorth Inc.*, 869 F.2d 560 (Tenth Cir. 1989); *Okland Oil Co. v. Conoco Inc.*, 144 F.3d 1308 (Tenth Cir. 1998). But see, *Embry v. Innovative Aftermarket Systems L.P.*, 2010 OK 82, 247 P. 3d 1158 (2010), in which the Oklahoma Supreme Court allowed bad faith tort liability for breaching a contract in which the parties had a “special relationship” due to the disparity of bargaining power and the elimination of risk. In addition, 12 O.S. § 1-304 which eliminated tort liability for the breach of good faith in UCC contracts was declared unconstitutional and void, thus, providing a potential argument for tort liability. *Douglas v. Cox Retirement Properties, Inc.*, 2013 OK 37.

Employer Liability for Employee Conduct. Under Oklahoma law, exemplary damages may be awarded against an employer for the wrongful act of an employee even though the employer did not personally participate in, authorize, or ratify the act complained of. *Kurn v. Radencic*, 141 P.2d 580, 581 (Okla. 1943).

Environmental Liability. Punitive damages may be awarded. *Cities Serv. Oil Co. v. Merritt*, 332 P.2d 677 (Okla. 1958). In *Merritt*, the landowner sought damages from oil companies that polluted her water wells with saltwater. *Id.* The defendants, for more than 20 years, “had permitted immense quantities of salt water to escape into the creeks in the watershed in reckless and wanton disregard of the consequences.” *Id.* at 687. Lack of personal malice was no defense. *Id.*

Insurer's Bad Faith. Punitive damages may be awarded where a jury finds by clear and convincing evidence that an "insurer has recklessly disregarded its duty to deal fairly and act in good faith with its insured..." or that an "insurer has intentionally and with malice breached its duty to deal fairly and act in good faith with its insured." Okla. Stat. tit. 23, § 9.1 (2010).

Product Liability. Punitive damages may be awarded "under those circumstances where it is demonstrated that the defendant manufacturer acted 'with reckless disregard for public safety' in designing, advertising, manufacturing and/or distributing the product at issue." *Johnson v. Gen. Motors Corp.*, 889 F. Supp. 451, 454 (W.D. Okla. 1995) (citing *Thiry v. Armstrong World Ind.*,

661 P.2d 515, 518 (Okla. 1983)). Reckless disregard is shown when (1) the defendant was aware of a defect and that user injury would likely result from the defect; (2) the defendant was capable of preventing user injury; and (3) the defendant "deliberately failed to take any action to remedy the product's defect or to prevent the possibility of user injury." *Id.* (citing *Thiry*, 661 P.2d at 517).

Professional Liability. In medical malpractice actions, a breach of fiduciary duty between patient and physician can be the basis for an award of punitive damages. *Silman v. Whistler*, 790 P.2d 1125, 1126 (Okla. Ct. App. 1989) (citing *McCarroll v. Reed*, 679 P.2d 851, 854 (Okla. Ct. App. (1983))).

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

No. It is against public policy to allow a wrongdoer to escape punishment by insuring himself against a punitive damages award. *Magnum Foods Inc. v. Cont'l Cas. Co.*, 36 F.3d 1491 (Tenth Cir. 1994); *Oliver v. Producers Gas Co.*, 798 P.2d 1090 (Okla. Ct. App. 1990) (insurance proceeds must be allocated to compensatory damages and not to punitive damages); *Aetna Cas. & Sur. Co. v. Craig*, 771 P.2d 212 (Okla. 1989) (payment of punitive damages under uninsured motorist provision would violate public policy). But there is a narrow exception, allowing insurability solely in the vicarious liability context. *Aetna Cas. & Sur. Co. v. Craig*, 771 P.2d 212, 215-16 (Okla. 1989).

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

No. It does not violate public policy to allow one who is vicariously liable to insure against punitive damages, so long as his negligence is no more than ordinary and the employee commits an intentional tort or willful act. *Jordan*, 935 P.2d at 292; *Sides v. John Cordes, Inc.*, 981 P.2d 301, 306 n.16 (Okla. 1999).

C. What is the relationship of punitive to compensatory damages?

Oklahoma requires recovery of actual damages in order to recover punitive damages. See Okla. Stat. tit. 23, § 9.1 (2010); *Mitchell v. Griffin Television, L.L.C.*, 60 P.3d 1058, 1067 (Okla. Ct. App. 2002) (instructing trial court to vacate punitive damages where no compensatory damages were affirmed); *Smith v. Johnson*, 591 P.2d 1260 (Okla. 1978). Punitive damages cannot stand without at least a nominal compensatory award under a tort cause of action. *Norman's Heritage Real Estate Co. v. Aetna Cas. and Sur. Co.*, (Tenth Cir. 1984). Punitive damages must bear

some reasonable relation to the cause and extent of the injuries inflicted. *Timmons v. Royal Globe Ins. Co.*, 653 P.2d 907 (Okla. 1982); *Silkwood v. Kerr-McGee Corp.*, 769 F.2d 1451 (Tenth Cir. 1985).

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

Okla. Stat. tit. 23, § 9.1(B), (C), (D) set certain limits on punitive damages recoveries, depending on the magnitude of the culpable behavior. Particularly, these sections categorize the available recoveries. Category I and Category II cap punitive damages; Category III does not. The difference in standards of proof among the categories is relevant only to the question of whether to lift the punitive damages cap. See *Am. Nat'l Bank & Trust Co. v. Bic Corp.*, 880 P.2d 420 (Okla. Ct. App. 1994) (facts created a situation where the punitive damages cap could be lifted).

For Category I, the award may not exceed \$100,000 or the actual damages awarded (whichever is greater). See *Majors v. Good*, 832 P.2d 420 (Okla. 1992) (statute limiting punitive damages to the amount not exceeding the amount of actual damages awarded applies prospectively only, to awards made after 1986); *Nalley v. Kellwood Co.*, 867 P.2d 1336 (Okla. Ct. App. 1993) (facts outlined situation where punitive damages were reduced to accord to the actual damages); *Mitchell v. Ford Motor Co.*, 688 P.2d 42 (Okla. 1984) (verdict not necessarily subject to reversal because actual damages allowed were less than the amount of punitive damages).

For Category II, the award may not exceed \$500,000, twice the amount of actual damages, or the increased financial benefit derived by the defendant or insurer as a direct result of the

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conduct causing the injury to the plaintiff. See Okla. Stat. tit. 23, § 9.1(B), (C), (D); *Gilbert v. Security Finance Corp. of Oklahoma, Inc.*, 152 P.3d 165, 181 (Okla. 2006) (explaining Category II calculation).

For Category III, punitive damages may be awarded in any amount. If the judge finds evidence beyond a reasonable doubt that the defendant committed the act intentionally and with malice and engaged in conduct that threatened the life of others, then punitive damages can be awarded in any amount. See Okla. Stat. tit. 23, § 9.1(B), (C), (D); *Badillo v. Mid Century Ins. Co.*, 2005 Ok. 48 (Okla. 2005); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 940-41 (Tenth Cir. 2001) (applying Oklahoma law). To fall within Category III, there must be a preliminary finding by the court that the defendant acted with actual or presumed malice, wanton or reckless disregard of rights of another, fraud, or oppression, and finding must be supported by clear and convincing evidence.

Rodebush v. Okla. Nursing Homes, Ltd., 867 P.2d 1241, 1247 (Okla. 1993). The requisite malice may be inferred from gross negligence that indicates conscious indifference to consequences of one's acts or reckless disregard for safety of others. *Silkwood v. Kerr-McGee Corp.*, 769 F.2d 1451, 1455 (Tenth Cir. 1985).

The wealth of the defendant and risk created by the defendant's negligent conduct are substantial factors, among others, to be considered in calculation of punitive damages. Okla. Stat. tit. 23; § 9.1 (A) (2010); *Silkwood*, 769 F.2d at 1460.

12 O.S. § 990.4 which eliminated a bond for the appeal of punitive damages was declared unconstitutional and void. *Douglas v. Cox Retirement Properties, Inc.*, 2013 OK 37.

E. To whom are punitive damages payable?

Punitive damages may be awarded to the plaintiff. OKL. STAT. tit. 23; § 9.1 (2010).



I. PUNITIVE DAMAGES

A. May they be awarded?

Yes. See OR. REV. STAT. § 31.730 (2010). Pursuant to the Oregon Tort Claims Act, no award for damages on any tort action against a public body may include punitive damages. OR. REV. STAT. § 30.270 (2010).

B. If so, in what circumstances?

Standard of Conduct. The party against whom punitive damages are sought must have acted with malice or shown a reckless and outrageous indifference to a highly unreasonable risk of harm and have acted with a conscious indifference to the health, safety and welfare of others. See OR. REV. STAT. § 31.730 (2010). The Supreme Court of Oregon has interpreted this to mean that punitive damages are a penalty for conduct that is culpable by reason of motive, intent, or extraordinary disregard of or indifference to known or highly probable risks to others. See *Andor v. United Air Lines*, 739 P.2d 18 (Or. 1987); see also *Schusterowitz v. Salem Assoc. LLC*, 2001 U.S. Dist. (LexisNexis 22742), 16-23 (D. Or. Dec. 2001). Punitive damages, by definition, are not part of a plaintiff's compensation for what he or she has lost; they are a penalty for conduct that is culpable by reason

of motive, intent, or extraordinary disregard of or indifference to known or highly probable risks to others. *Andor v. United Air Lines, Inc.*, 739 P.2d 18 (Or. 1987).

Standard of Proof. The standard of proof required in Oregon for the recovery of punitive damages is clear and convincing evidence. See OR. REV. STAT. § 31.730 (2010).

Actions Against State. Punitive damages are not recoverable. Or. Rev. Stat. § 30.270.

Breach of Contract. Generally, there is no recovery of punitive damages for breach of contract. See *Farris v. U.S. Fidelity and Guaranty Co.*, 284 Ore. 453, 587 P.2d 1015 (Or. 1978). Where the activity complained of is essentially tortious conduct, punitive damages may be warranted despite a contractual agreement between the parties. *Adams v. Crater Well Drilling, Inc.*, 556 P.2d 679 (Or. 1976). See also *Georgetown Realty, Inc. v. The Home Ins. Co.*, 313 Ore. 97, 831 P.2d 7 (Or. 1992) (if relationship carries a standard of care that exists independent of the terms of the contract, the injured party may bring a claim for negligence independent of the terms of the contract).

Employer Liability for Employee Conduct. Under Oregon law, an employer may be held vicariously liable for punitive damages related to the wrongful conduct of an employee. *Stroud v. Denny's Restaurant, Inc.*, 532 P.2d 790 (Or. 1975). "[W]hen an employee commits a wrongful act which would subject him personally to punitive damages, the essential inquiry must be whether the act was committed while the employee was acting within the scope of his employment, that is: 'whether the servant at the time of the commission of the injury was performing a service for the master in furtherance of the master's business, not whether it was done in exact observance of detail prescribed by his employer.'" *Id.* at 793 (quoting *Tyler v. Moore et al.*, 111 Or. 499, 509, 226 P.433, 446 (1924)). If the employee was acting within the scope of his employment, the employer will be liable for punitive damages regardless of whether that employee may be classified as "menial" or "managerial." *Id.*

Environmental Liability. Punitive damages may be imposed on any person liable under OR. REV. STAT. § 465.260 (2010) who fails without sufficient cause to conduct a removal or remedial action as required by an order of the director of the Department of Environmental Quality, not to exceed three times the amount of the state's remedial action costs. See OR. REV. STAT. § 465.260 (2010).

Insurer's Bad Faith. Where an insurer made a bad faith denial of liability coverage, insureds were not entitled to punitive damages because a failure to undertake representation of an insured is strictly breach of contract where punitive damages are not recoverable, and the legislature imposed civil penalties for such wrongful acts by insurers, but did not authorize punitive damages as a civil penalty. *Farris v. U.S. Fid. & Guar. Co.*, 587 P.2d 1015 (Or. 1978); OR. REV. STAT. § 731.988 (2010). *But see Green v. State Farm Fire and Cas. Co.*, 667 F.2d 22 (Ninth Cir. 1982) (where action was brought in tort for outrageous conduct by an insurer, statute did not prohibit award of punitive damages). If an insurer fails to settle a claim within policy without justification, the insurer may be liable in tort to the insured for breach of fiduciary

duty, where punitive damages may be recoverable. *Georgetown Realty, Inc. v. The Home Ins. Co.*, 831 P.2d 7 (Or. 1992); OR. REV. STAT. § 746.230 (2010) (fair claims settlement practices).

Product Liability. In a product liability civil action, punitive damages shall be determined and awarded based on the following criteria: (a) the likelihood at the time that serious harm would arise from the defendant's misconduct; (b) the degree of the defendant's awareness of that likelihood; (c) the profitability of the defendant's misconduct; (d) the duration of the misconduct and any concealment of it; (e) the attitude and conduct of the defendant upon discovery of the misconduct; (f) the financial condition of the defendant; and (g) the total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damages awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected. See OR. REV. STAT. § 30.925 (2010); *Lakin v. Senco Prods., Inc.*, 987 P.2d 463 (Or. 1999). See also OR. REV. STAT. § 30.927 (2010) (criterion for award of punitive damages against drug manufacturer).

Professional Liability. Punitive damages may be justified by failure to perform a special duty of attention and care arising out of a professional or fiduciary relationship that would not apply between strangers. *Noe v. Kaiser Found. Hosps.*, 435 P.2d 306 (Or. 1967). See OR. REV. STAT. § 31.740 (2010) (punitive damages shall not be awarded against a health care practitioner if the health care practitioner was engaged in conduct regulated by the license, registration or certificate issued by the appropriate governing body and was acting within the scope of practice for which the license, registration or certificate was issued and without malice).

Wrongful Death. Punitive damages may be awarded in an amount that the decedent would have been entitled to recover from the wrongdoer if the decedent had lived. OR. REV. STAT. § 30.020(2)(e) (2010).

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

Yes. See *Harrell v. Travelers Indem. Co.*, 567 P.2d 1013 (Or. 1977) (insurance contracts providing protection against liability for punitive damages do not violate public policy of Oregon). Insuring oneself against the purposeful infliction of injury upon another, however, appears to be against the public policy of

Oregon. See *A-1 Sandblasting & Steamcleaning Co., Inc. v. Baiden*, 643 P.2d 1260 (Or. 1982); *Isenhardt v. Gen. Cas. Co.*, 377 P.2d 26 (Or. 1962).

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B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

See II. A. above.

C. What is the relationship of punitive to compensatory damages?

An award of punitive damages is not proper in the absence of proof that the plaintiff is entitled to an award of actual damages. *Belleville v. Davis*, 498 P.2d 744 (Or. 1972). See *Klinicki v. Lundgren*, 695 P.2d 906 (Or. 1985) (except in cases involving a breach of public trust, or presumed damages, a plaintiff may recover punitive damages only if the plaintiff “was somehow actually hurt and damaged by the Defendant’s conduct”).

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

Yes. The court shall review an award of punitive damages made by a jury to determine whether the award is within the range of damages that a rational juror would be entitled to award based on the record as a whole. OR. REV. STAT. § 31.730 (2010). Where the harm is purely economic and not physical, a four-to-one ratio (punitive damages to compensatory damages) is the relevant constitutional limit on punitive damages awards. *Goddard v. Farmers Ins. Co. of Or.*, 179 P.3d 645 (Or. 2008) (citing extensively to *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996)). Factors pertinent to determining the range a rational juror would be entitled to award include (1) the statutory and common-law factors that allow an award of punitive damages for the specific kind of claim at issue; (2) the state interests that a punitive damages award is designed to serve; (3) the degree

of reprehensibility of the defendant’s conduct; (4) the disparity between the punitive damages award and the actual or potential harm inflicted; and (5) the civil and criminal sanctions provided for comparable misconduct. *Parrott v. Carr Chevrolet, Inc.*, 17 P.3d 473 (Or. 2001).

Various limitations on the award of punitive damages also arise pursuant to statute. OR. REV. STAT. § 646.465 (2010) (punitive damages for a willful or malicious misappropriation of a trade secret may be awarded in an amount not to exceed twice any award for compensation for misappropriation, the actual loss caused by the misappropriation and the unjust enrichment caused by the misappropriation). Compare OR. REV. STAT. § 31.710 (\$500,000 cap on non-economic, but not punitive, damages in civil cases involving statutorily created claims for relief). But see *Lakin v. Senco Prods., Inc.*, 987 P.2d 463 (Or. 1999) (holding “statutory cap limiting non-economic damages in civil actions to \$500,000 interferes with resolution of factual issues which is committed to jury by State Constitution, under which right to trial in civil cases is inviolate and thus unconstitutional”).

E. To whom are punitive damages payable?

Upon entry of a judgment for punitive damages, 40 percent shall be paid to the prevailing party and 60 percent shall be paid to the Criminal Injuries Compensation Account of the Oregon Department of Justice Crime Victim’s Assistance Section, unless the prevailing party is a public entity, in which case the 60 percent shall be paid to the general fund of the public entity. In no event may more than 20 percent of the amount awarded as punitive damages be paid to the attorney for the prevailing party. OR. REV. STAT. § 31.735 (2010).

Pennsylvania

I. PUNITIVE DAMAGES

A. May they be awarded?

Yes. See *Hutchison ex rel. Hutchison v. Luddy*, 870 A.2d 766 (Pa. 2005); *SHV Coal, Inc. v. Cont’l Grain Co.*, 587 A.2d 702 (Pa. 1991); *Bannar v. Miller*, 701 A.2d 232 (Pa. Super. Ct. 1997). See also, *Came v. Micou*, 2005 WL 1500978 (M.D. Pa. June 23, 2005); *Riba v. Staar Surgical*, 2003 WL 21961395 (E.D. Pa. June 25, 2003). Pennsylvania does not allow punitive damages in wrongful death actions (see 43 Pa. Cons. Stat. § 8301 (2010)), but does

allow for them in survival actions (see 43 Pa. CONS. STAT. § 8301 (2010)) brought by the estate. *Walsh v. Strenz*, 63 F. Supp. 2d 548 (M.D. Pa. 1999); *Becchetti v. PennDOT*, 51 Pa. D.&C.4th 300 (2001).

B. If so, in what circumstances?

Standard of Conduct. Punitive damages may be awarded for “conduct that is outrageous, because of the defendant’s evil

motive or his reckless indifference to the rights of others.” See *Feld v. Merriam*, 485 A.2d 742 (Pa. 1984) (adopting Restatement of Torts (Second) §908(2)); see also *Hutchison supra*. Punitive damages are an extreme remedy, available only in the “most exceptional matters.” *Phillips v. Cricket Lighters*, 883 A.2d 439, 445 (Pa. 2005). They are only proper in cases where the conduct of the defendant is so outrageous so as to demonstrate malicious, wanton, reckless, willful or oppressive conduct. *Feld, supra*; *Hutchison, supra*. The nature of the tortfeasor’s act itself, together with his motive, the relationship between the parties, and all other attendant circumstances are taken into account. *Chambers v. Montgomery*, 192 A.2d 355 (Pa. 1963). Allegations that a defendant “acted willfully, wantonly, and with reckless disregard for the consequences of his conduct, acts and omissions” have been held to be sufficient to state a claim for punitive damages. See, e.g. *Fields v. Graff*, 784 F.Supp. 224, 226 (E.D.Pa.1992); See also *McDaniel v. Merck, Sharp & Dohme*, 367 Pa.Super. 600, 622-23, 533 A.2d 436, 447 (1987), *app. denied*, 520 Pa. 589, 551 A.2d 215 (1988). Punitive damages will not be awarded where the defendant’s mental state arises to no more than negligence, or even gross negligence. *SHV Coal, Inc. v. Cont’l Grain Co.*, 587 A.2d 702 (Pa. 1991).

Standard of Proof. The applicable standard jury instruction imposes a clear and convincing burden of proof in determining whether punitive damages will be assessed. Pennsylvania Selected Standard Jury Instruction (Civil) § 14.00 – Punitive Damages (1984). However, punitive damages awarded under “preponderance of the evidence” have been upheld. *Martin v. Johns-Manville Corp.*, 494 A.2d 1088 (Pa. 1985), *abrogated on other grounds*, *Kirkbride v. Lisbon Contractors, Inc.*, 555 A.2d 800 (Pa.1989); *Sprague v. Walter*, 656 A.2d 890 (Pa. Super. 1995); *McDermott v. Party City Corp.*, 11 F. Supp. 2d 612 (E.D. Pa. 1998). Other cases upheld on appeal have correctly applied the “clear and convincing evidence” burden of proof. See, e.g., *Hepps v. Phila. Newspapers, Inc.*, 485 A.2d 374 (Pa. 1984) (clear and convincing standard for defamation actions), *reversed on other grounds*, 475 U.S. 767 (1986); *Rutkowski v. Allstate Ins. Co.*, 69 Pa. D. & C.4th 10 (2004) (under insurer bad faith statute, plaintiff must prove bad faith on part of insurer by clear and convincing evidence).

Actions Against State. The commonwealth and its agents are generally immune from punitive damages. See *Feingold v. Se. Pa. Transp. Auth.*, 488 A.2d 284 (Pa. Super. Ct. 1985); *Bonenberger v. Plymouth Twp.*, 1998 U.S. Dist. (LexisNexis 8632) (E.D. Pa. 1998). Cf. 42 Pa. Cons. Stat. § 8528 (2010) (statute providing for damages against municipality does not mention punitive damages).

Breach of Contract. Generally, punitive damages are not recoverable in an action for breach of contract. See *Hess v. Hess*, 397 Pa. Super. 395 (1990); *Thorsen v. Iron & Glass Bank*, 476 A.2d 928 (Pa. Super. Ct. 1984); *Factory Mkt. v. Schuller Int’l*, 987 F. Supp. 387 (E.D. Pa. 1997). Note, however, that a party can in some instances maintain an action for fraud or negligence, which would allow for punitive damages, in conjunction with a breach of contract claim. See *Hess, supra* (allowing fraud and breach of contract claims); *MacGregor v. Mediq, Inc.*, 576 A.2d 1123 (Pa. Super. Ct. 1990) (allowing negligence and breach of contract claims). Punitive damages may also be allowed where the breach violates a duty imposed by society. See *Mellon Bank v. Aetna Bus. Credit, Inc.*, 500 F. Supp. 1312 (W.D. Pa. 1980).

Employer Liability for Employee Conduct. In actions against employers for injuries received through the negligence of their servants, exemplary damages may be recovered under Pennsylvania law when the injuries are wanton and malicious, or are inflicted in a gross or outrageous manner, whether the act was previously authorized or subsequently ratified by the employer or not. *Philad. Traction Co. v. Orbann*, 12 A. 816, 818 (Pa. 1888).

Environmental Liability. A person who willfully fails to comply with an order of the Pennsylvania Department of Environmental Protection requiring a response action is liable for punitive damages in an amount up to three times the state’s actual damages. 35 Pa. Cons. Stat. § 6020.507.

General Liability. Yes. See, e.g., *Focht v. Rabada*, 268 A.2d 157 (Pa. Super. Ct. 1970) (injury caused by intoxicated driver); *McClellan v. Health Maint. Org. of Pa.*, 604 A.2d 1053 (Pa. Super. Ct. 1992) (intentional fraud); *Trotman v. Mecchella*, 618 A.2d 982 (Pa. Super. Ct. 1992) (personal injury action).

Insurer’s Bad Faith. 42 Pa. Cons. Stat. § 8371 (2010) provides that punitive damages can be awarded against an insurer if, in an action arising under an insurance policy, the court finds that the insurer acted in bad faith toward the insured. See, e.g., *Hollock v. Erie Ins. Exch.*, 842 A.2d 409 (Pa. Super. Ct. 2004). Bad faith must be established by “clear and convincing evidence.” *Id.* at 23. But see *Barber v. Unum Life Ins. Co. of America*, 383 F.3d 134 (Third Cir. 2004) (42 Pa. CONS. STAT. § 8371 preempted by ERISA).

Product Liability. Yes. See, e.g., *Glodzik v. Whink Prods. Co.*, 61 Pa. D.&C.4th 241 (2003) (summary judgment on punitive damages claim denied based in part on defendant’s use of dangerous chemical in product); *Ogozaly v. Am. Honda Motor Co. Inc.*, 67 Pa. D.&C.4th 314 (2004) (plaintiff made a *prima facie* case for recovery of punitive damages on allegations of defective product and deficiencies in warnings); *Riba v. Staar Surgical, Civ. No. 03-2404*, 2003 U.S. Dist. (LexisNexis 12199) (E.D. Pa. June

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25, 2003) (motion to dismiss claim of punitive damages denied where allegations claimed manufacturer was aware of defective product and failed to warn and inform regulatory agencies). Furthermore, though the Supreme Court of Pennsylvania has not expressly so held, it appears that a plaintiff may seek punitive damages even in suits based solely on a theory of strict liability. See *Hutchinson v. Penske Truck Leasing Co.*, 876 A.2d 978 (Pa. Super. Ct. 2005).

Professional Liability. Yes. See, e.g., *Corrigan v. Methodist Hosp.*, 869 F. Supp. 1202 (E.D. Pa. 1994) (medical malpractice

punitive damage plaintiff held to have stated a claim for punitive damages based on allegation that defendant “acted willfully, wantonly, and with reckless disregard for the consequences of his conduct, acts and omissions as described more fully at length herein.”) Punitive damages for legal malpractice may be recoverable if there are claims that sound in tort, see *Rizzo v. Haines*, 555 A.2d 58 (Pa.1 989), but will not be recoverable for those sounding in contract, *Bangert v. Harris*, 553 F. Supp. 235 (M.D. Pa.1982).

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

No. *Aetna Cas. & Sur. Co. v. Roe*, 650 A.2d 94 (Pa. Super. Ct. 1994) (insurers have no duty to defend against punitive damages allegations); *Esmond v. Liscio*, 224 A.2d 793 (Pa. Super. Ct. 1966) (public policy barred coverage of punitive damages under automobile policy); *Aetna Life & Cas. Co. v. McCabe*, 556 F. Supp. 1342 (E.D. Pa. 1983) (insurance for punitive damages against public policy).

Exception: Pursuant to statute, an insurance company may insure the operator of a downhill skiing area against punitive damages other than those arising from an intentional tort of the operator. 40 Pa. Cons. Stat. § 2051 (2010).

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

Pennsylvania does not preclude recovery of punitive damages from an insurer where the insured is only vicariously liable for such damages. *Butterfield v. Giuntoli*, 670 A.2d 646 (Pa. Super. Ct. 1995); *Pennbank v. St. Paul Fire & Marine Ins. Co.*, 669 F. Supp. 122 (W.D. Pa. 1987).

C. What is the relationship of punitive to compensatory damages?

While a claim for punitive damages is not an independent cause of action and must be dismissed if the claim for compensatory damages is dismissed, it is not necessary that compensatory damages actually be awarded. *Kirkbride v. Lisbon Contractors, Inc.*, 555 A.2d 800 (Pa. 1989); *Rhoads v. Heberling*, 451 A.2d 1378 (Pa. Super. Ct. 1982).

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

Generally, no. “[P]unitive damages need bear no proportional relationship to the compensatory damages awarded in a particular case. Rather, a reasonable relationship must exist between the amount of the punitive damages award and the twin goals of punishment and deterrence, the character of the tortious act, the nature and extent of the harm suffered by the plaintiff, and the wealth of the defendant.” *Sprague*, 656 A.2d at 925. However, the court has the discretion to reduce an award if it is plainly excessive and exorbitant in a particular case. It is well settled that the large size of a verdict is in itself no evidence of excessiveness. The correct question on review is whether the award of damages falls within the uncertain limits of fair and reasonable compensation or whether the verdict so shocks the sense of justice as to suggest that the jury was influenced by partiality, prejudice, mistake or corruption. See *id.*; *Haines v. Raven Arms*, 640 A.2d 367, 369 (Pa. 1994).

E. To whom are punitive damages payable?

Generally, an award of punitive damages is payable to the plaintiff. In medical malpractice cases, 25% of punitive damages awarded must be paid into the MCARE Fund rather than to the prevailing party. Pa. Stat. Ann. tit. 40, §1303.505(e).

Puerto Rico

I. PUNITIVE DAMAGES

A. May they be awarded?

No. The law of Puerto Rico does not allow for recovery of punitive damages. *Cruz v. Molina*, 788 F. Supp. 122 (D. P.R. 1992); *Riofrio Anda v. Ralston Purina Co.*, 772 F. Supp. 46 (D. P.R. 1991), *aff'd* 959 F.2d 1149 (First Cir. 1992); *Computec Sys. Corp. v. Gen. Automation, Inc.*, 599 F. Supp. 819 (D. P.R. 1984); *Ganapolsky*

v. Park Gardens Dev. Corp., 439 F.2d 844 (First Cir. 1971); *Cooperativa de Seguros Multiples v. San Juan*, 289 F. Supp. 858 (D. P.R. 1968).

B. If so, in what circumstances?

Not applicable.

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

Not applicable.

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

Not applicable.

C. What is the relationship of punitive to compensatory damages?

Not applicable.

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

Not applicable.

E. To whom are punitive damages payable?

Not applicable.

Rhode Island

I. PUNITIVE DAMAGES

A. May they be awarded?

Yes. *Berberian v. New England Tel. & Tel. Co.*, 369 A.2d 1109 (R.I. 1977).

B. If so, in what circumstances?

Standard of Conduct. One seeking punitive damages must produce evidence of such willfulness, recklessness or wickedness on the part of the party at fault as amounts to criminality by the defendant. *Johnson v. Johnson*, 654 A.2d 1212 (R.I. 1995); *Palmisano v. Toth*, 624 A.2d 314 (R.I. 1993); *Sherman v.*

McDermott, 329 A.2d 195 (R.I. 1974); *Morin v. Aetna Cas. & Sur. Co.*, 478 A.2d 964 (R.I., 1984); see also *Greater Providence Deposit Corp. v. Jenison*, 485 A.2d 1242 (R.I. 1984). Punitive damages are allowed only when the defendant has acted maliciously or in bad faith, or when the defendant acted with the intent to cause harm. See *Peckham v. Hirschfeld*, 570 A.2d 663 (R.I. 1990). Conduct that is merely reckless does not justify punitive damages. *Wilson Auto Enter., Inc. v. Mobil Oil Corp.*, 778 F. Supp. 101, 107 (D.R.I. 1991). In Rhode Island, the issue of whether the facts are sufficient to support an award for punitive damages is a question of law for the trial court to

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decide. Once the trial court has determined that the facts are sufficient to support a punitive damages award, the award of punitive damages is left to the discretion of the trier of fact. *Sherman, supra*.

Standard of Proof. Clear and convincing evidence. *Healey v. New England Newspapers, Inc.*, 555 A.2d 321 (R.I. 1989).

Actions Against State. A municipality is immune from punitive damages under 42 U.S.C. § 1983. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). A punitive damages award against a municipality is contrary to public policy. *Graff v. Motta*, 695 A.2d 486 (R.I. 1997).

Breach of Contract. Generally, one cannot recover punitive damages for a breach of contract. *Dias v. Vieira*, 572 A.2d 877 (R.I. 1990) (upholding trial justice's decision not to award punitive damages where defendant had fraudulently created real estate agreements). However, punitive damages have been awarded in Rhode Island where the breach of contract also constituted the independent torts of fraud, conversion, intentional interference with business relationships, and breach of fiduciary duty. *Ross-Simmons of Warwick, Inc., v. Baccarat, Inc.*, 182 F.R.D. 386 (D.R.I. 1998).

Employer Liability for Employee Conduct. Under Rhode Island law, punitive or exemplary damages will not be allowed in situations in which an employer is prosecuted for the tortious act of his employee, unless there is proof implicating the employer that makes him a participant in his employee's act. *AAA Pool Serv. & Supply v. Aetna Casualty & Sur. Co.*, 479 A.2d 112, 116 (R.I. 1984). Furthermore, when the proof does not implicate the principal and when the employer neither expressly nor impliedly authorized or ratified the act, only compensatory damages will be available. *Id.* Punitive damages are not available against an employer for the acts of an employee acting only with apparent authority and without any intention of benefitting the principal. *Id.*

Environmental Liability. R.I. GEN. LAWS § 23-19.1-22 (2010) provides for treble the amount of costs, damages, losses, or injuries whenever it finds that a person has willfully and knowingly stored, disposed of, or transported hazardous wastes in violation of this chapter or the rules and regulations promulgated thereunder. However, in *Gail v. New Eng. Gas Co.* the court stated, "Although evidence that the gas companies violated R.I. GEN. LAWS § 23-19.1-22 of the Rhode Island Hazardous Waste Management Act (HWMA) may have been admissible in support of the property owners' negligence claim, there was no private right of action under the HWMA because nothing authorized a private individual to sue for a violation of the HWMA and it

seemed clear that the General Assembly contemplated that violations would be prosecuted by the State and not by private parties." *Gail v. New Eng. Gas Co.*, 460 F. Supp. 2d 314 (D.R.I. 2006). R.I. GEN. LAWS § 23-19.14-16 (2007) allows the state to commence a civil action to recover punitive damages against any responsible party who fails, without sufficient cause, to properly provide for removal or remedial action pursuant to a final order of the director of the department of environmental management. The statute further provides that the punitive damages could be up to three times the amount of any costs incurred by the state as a result of such failure to take action.

General Liability. Punitive damages may be awarded in all actions based on reckless conduct that violates the Rhode Island Liquor Liability Act, R.I. GEN. LAWS § 3-14-8 (2010). Assault, battery and false imprisonment are torts that will sustain a punitive damages award. *Sherman, supra*.

Insurer's Bad Faith. Under R.I. GEN. LAWS § 9-1-33 (2008), an insured may bring an action seeking compensatory and punitive damages and reasonable attorney fees against the insurer issuing the policy when it is alleged the insurer wrongfully and in bad faith refused to pay or settle a claim made pursuant to the provisions of the policy, or otherwise wrongfully and in bad faith refused to timely perform its obligations under the contract of insurance.

In accordance with R.I. GEN. LAWS § 9-1-50 (2004), an insurance company's failure to tender settlement payment, within 30 days from the date the claimant or his attorney sends the release, raises the presumption of willful and wanton disregard for the rights of the claimant subject to a separate cause of action for punitive damages. Additionally, interest shall be computed at the rate of 12 percent per annum from the date the cause of action giving rise to the settlement occurred until the judgment on the claim brought pursuant to this section is entered. The Supreme Court of Rhode Island held that R.I. GEN. LAWS § 9-1-50 should be construed to create a single cause of action for punitive damages with interest to be computed thereon from the date of the underlying cause of action. *LaPlante, supra*.

Product Liability. It remains unclear whether punitive damages are recoverable in Rhode Island for claims involving product liability. *LaPlante v. Honda N. Am., Inc.*, 697 A.2d 625 (R.I. 1997).

Professional Liability. It remains unclear whether punitive damages are recoverable in Rhode Island for claims involving professional liability.

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

No. Punitive damages assessed against the wrongdoer are not insurable in Rhode Island. In *Allen v. Simmons*, 533 A.2d 541 (R.I. 1987), the Supreme Court of Rhode Island held that an insurer was not required to indemnify injured parties for punitive damages assessed against its insured under an automobile insurance policy. The *Allen* court's holding that punitive damages are not insurable was based upon the view that insurance coverage would defeat the punishment and effect of the punitive damages award. The court added that "common sense demands that the burden of satisfying a punitive damages award should remain with the wrongdoer and should not be cast upon the blameless shoulders of the other insureds." *Id.* at 544.

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

Rhode Island courts have yet to determine the insurability of punitive damages assessed against a party on a vicarious liability theory.

C. What is the relationship of punitive to compensatory damages?

Rhode Island law does not require that punitive damages be directly proportional to compensatory damages. Because Rhode Island does not follow the "ratio rule," Rhode Island does not require compensatory damages as a prerequisite to punitive damages. Rather, all a plaintiff must show to obtain an award of punitive damages is a "valid legal injury"; "what matters most is whether the defendant's actions merit punishment, not whether the plaintiff is able to calculate large material damages." *Ross-Simons of Warwick, Inc. v. Baccarat*, 182 F.R.D. 386 (D. R.I. 1998).

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

A jury award may not be reviewed for inadequacy, nor may a trial justice review a jury's failure to award any punitive damages. *Dias, supra*. Since damages recoverable under the Rhode Island wrongful death statute are restricted to those involving pecuniary loss, Rhode Island courts may prohibit punitive damages in wrongful death cases. See R.I. GEN. LAWS § 10-7-1.1 (2010); *Simeone v. Charron*, 762 A.2d 442 (R.I. 2000). Additionally, Rhode Island statutes expressly prohibit recovery of exemplary damages in survival actions. See R.I. GEN. LAWS § 9-1-8 (2010) (actual damages only to be granted after death of party). Pursuant to the Uniform Trade Secrets Act, punitive damages for willful and malicious misappropriation are not permitted to exceed twice the actual loss and the unjust enrichment. R.I. GEN. LAWS § 6-41-3 (2008).

E. To whom are punitive damages payable?

Under R.I. GEN. LAWS § 23-19.14-17 (2008), the state can subrogate its authority to pursue cost recovery or assess punitive damages as part of a settlement action. Additionally, Rhode Island statutes expressly prohibit recovery of exemplary damages in survival actions. See R.I. GEN. LAWS § 9-1-8 (2008) (actual damages only to be granted after death of party).

A plaintiff may recover punitive damages, and a plaintiff's spouse may also recover punitive damages in the discretion of the jury. *Allen v. Simmons*, 533 A.2d 541 (R.I. 1987).



I. PUNITIVE DAMAGES

A. May they be awarded?

Yes. In *Gamble v. Stevenson*, 406 S.E.2d 350 (S.C. 1991), the Supreme Court of South Carolina held that punitive damages awards do not violate the due process clauses of the United States and South Carolina constitutions. The court also

established a three-stage process for the post-trial review of punitive damages awards. See also *South Carolina Farm Bureau Mutual Ins. Co. v. Love Chevrolet, Inc.*, 478 S.E.2d 57, 324 S.C. 149 (S.C. 1996) (holding the *Gamble* procedures to be constitutional); *Scott v. Porter*, 530 S.E.2d 389 (S.C. Ct. App. 2000).

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B. If so, in what circumstances?

Standard of Conduct. Punitive damages are awarded for willful, wanton or reckless conduct. A conscious failure to exercise due care constitutes willfulness. *McCourt v. Abernathy*, 457 S.E.2d 603 (S.C. 1995); *Wise v. Broadway*, 433 S.E.2d 857 (S.C. 1993) (misconduct giving rise to an award of punitive damages can be shown by a causative violation of statute); *Cooper v. County of Florence*, 412 S.E.2d 417 (S.C. 1991). A tort is characterized as reckless, willful or wanton if it was committed in such a manner or under such circumstances that a person of ordinary reason and prudence would have been conscious of it as an invasion of plaintiff's rights. *Nesbitt v. Lewis*, 517 S.E.2d 11 (S.C. 1999). A punitive damages award is warranted only when the defendant's conduct is shown to be willful, wanton or in reckless disregard of the rights of others. See *S.C. Farm Bur. Mut. Ins. Co. v. Love Chevrolet, Inc.*, 324 S.C. 149 (1996).

Standard of Proof. S.C. CODE ANN. § 15-33-135 provides that where punitive damages are claimed in any civil action, the plaintiff has the burden of proving such damages by clear and convincing evidence.

Actions Against State. Punitive damages are not recoverable. S.C. Code Ann. § 15-78-120 (2010).

Breach of Contract. Punitive damages for interference with contractual relations may be properly awarded under S.C. Code Ann. § 15-33-135 (2010); *Collins Entm't Corp. v. Coats & Coats Rental Amusement*, 584 S.E.2d 120 (S.C. Ct. App. 2003), *affirmed* by 629 S.E.2d 635 (S.C. 2006). The plaintiff must prove three elements: (1) a breach of contract, (2) fraudulent intent, and (3) fraudulent act accompanying the breach. The fraudulent act may be prior to, contemporaneous with, or subsequent to the breach of contract, but it must be connected with the breach itself and cannot be too remote in either time or character. *Floyd v. Country Squire Mobile Homes, Inc.*, 336 S.E.2d 502 (S.C. Ct. App. 1985). See also *Smith v. Canal Ins. Co.*, 269 S.E.2d 348 (S.C. 1980); *Edens v. Goodyear Tire & Rubber Co.*, 858 F.2d 198 (Fourth Cir. 1988) (the mere fact that party offers a false excuse for canceling a contract, without more, is not enough to establish breach of contract accompanied by a fraudulent act, such as would allow the party a punitive damages award). In *Collins*, the court awarded punitive damages after considering that the actions taken by a bingo hall provider demonstrated its culpability, awareness of the contract, and ultimate concealment of its desire to have a contract with a video poker machine provider breached, the harm that was caused, the deterrent effect of a punitive damages award, and the buyer's ability to pay. *Id.*

Employer Liability for Employee Conduct. Under South Carolina law, punitive damages may be awarded against an employer for

an employee's act even if the employer did not authorize or ratify the acts of the employee. *Hooper v. Hutto*, 160 S.C. 404, 407 (1931) (citing *Reeves v. Southern Ry.*, 68 S.C. 89, 94 (1904)).

Environmental Liability. The Department of Health and Environmental Control is authorized to recover on behalf of the state punitive damages of up to three times the state's costs incurred in responding to hazardous substance releases. S.C. Code Ann. § 44-56-200 (2010).

Insurer's Bad Faith. The Supreme Court of South Carolina has recognized a cause of action for bad faith refusal to pay a party benefits due under an insurance contract, and further, punitive damages may be awarded if the insured can demonstrate that the insurer's actions were willful or in reckless disregard of the insured's rights. *Carter v. Am. Mut. Fire Ins. Co.*, 307 S.E.2d 225 (S.C. 1983). For example, in *Orangeburg Sausage Co. v. Cincinnati Ins. Co.*, an award of \$1,630,000 in punitive damages against an insurer for refusing to pay casualty and loss coverage for contamination of frozen foods and other losses caused by a hurricane did not violate the due process clause. The jury charge properly explained the nature, purpose and basis for the award, and the award was reasonable considering the insurer's misconduct, the insurer's net worth, and the actual damage award of \$800,000, which was reduced to \$595,216 by the trial court. *Orangeburg Sausage Co. v. Cincinnati Ins. Co.*, 450 S.E.2d 66, 316 S.C. 331 (S.C. Ct. App. 1994), *cert. denied*, 516 U.S. 928, 116 S. Ct. 331, 133 L. Ed. 2d 231 (1995).

Product Liability. Punitive damages are recoverable in a negligence cause of action when the defendant's conduct rises to the level of a willful, wanton or malicious violation of the plaintiff's rights. For example, in *Scott v. Fruehauf*, the South Carolina Supreme Court awarded \$1,125,000 where a seller of used trailers was negligent in failing to inspect a wheel assembly when it was aware of the danger of mismatched parts. *Scott v. Fruehauf Corp.*, 396 S.E.2d 354 (S.C. 1990). Punitive damages are not recoverable in a cause of action based solely on a theory of strict liability. *Barnwell v. Barber-Colman Co.*, 393 S.E.2d 162 (S.C. 1989).

Professional Liability. Punitive damages may be awarded in an action for medical malpractice. In *Taylor v. Medenica, M.D.*, 479 S.E. 2d 35 (S.C. 1996), the court affirmed a punitive damages award of \$10 million, almost ten times the compensatory damages amount, against an oncologist for medical malpractice in his administering of chemotherapy to the plaintiff. The court's ruling was based on clear and convincing evidence that the defendant should not have used a particular drug in the patient's chemotherapy, failed to obtain the patient's informed consent, and ordered and billed for unnecessary and/or excessive tests through his medical laboratory.

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

Yes, South Carolina permits insurance coverage of punitive damages. *S.C. Budget & Control Bd. v. Prince*, 403 S.E.2d 643 (S.C. 1991) (allowing punitive damages coverage for a liability policy); *State Farm Mut. Auto. Ins. Co. v. Hamilton*, 326 F. Supp. 931 (D.S.C. 1971) (punitive damages are insurable under South Carolina law); *Carroway v. Johnson*, 139 S.E.2d 908 (S.C. 1965) (automobile liability policy covered punitive damages award); *Glens Falls Indem. Co. v. Atlantic Bldg. Corp.*, 199 F.2d 60 (Fourth Cir. 1952).

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

Not applicable. See II. A. above.

C. What is the relationship of punitive to compensatory damages?

Under *McGee v. Bruce Hosp. Sys.*, 545 S.E.2d 286 (S.C. 2001), there must be an award of actual or nominal damages for a verdict of punitive damages to be supported. This rule is premised on the fact that liability must be established before a plaintiff can seek punitive damages. *McGee v. Bruce Hosp. Sys.*, 344 S.C.466, 545 S.E.2d 286 (S.C. 2001) (reversed on other grounds by *McGee v. Bruce Hospital Sys.*, 545 S.E.2d 286 (S.C. 2001)). Where the jury awards only punitive damages for a willful invasion of a legal right, at least nominal damages may be assumed. See *Pilkington v. McBain*, 262 S.E.2d 916 (S.C. 1980). There is no requirement of a mathematical proportion between actual and punitive damages. See *Eddy v. Greensboro-Fayetteville Bus Lines*, 5 S.E.2d 281 (S.C. 1939); *Mylin v. Allen-White Pontiac, Inc.*, 314 S.E.2d 354 (S.C. Ct. App. 1984).

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

An award of punitive damages is left almost entirely to the discretion of the jury and the trial judge. *Jordan v. Hold*, 608 S.E.2d 129 (S.C. 2005). In South Carolina there are three stages to a trial court's review of punitive damages. First, the court must determine whether the defendant's conduct rises to the level of culpability warranting a punitive damages award. The judge may consider the degree of culpability, duration of conduct, the defendant's awareness or concealment, similar past conduct, deterrent effect of the award, whether the award is related to the harm, and the defendant's ability to pay. Second, the judge must conduct a post-trial review to ensure that the award does not deprive the defendant of due process rights. Third, the judge must decide, in the exercise of his or her discretion, whether the award is excessive or inadequate. If the judge finds the award excessive or inadequate, or the result of caprice, passion, prejudice, partiality, corruption, or other improper motives at the second or third inquiry, he may grant a new trial *nisi additur* or *remittitur*. *State Farm Mut. Auto. Ins. Co. v. Hamilton*, 326 F. Supp. 931 (D.S.C. 1971); *Cock-N-Bull Steak House v. Gen. Ins.*, 466 S.E.2d 727 (S.C. 1996); *Perry v. Green*, 437 S.E.2d 150 (S.C. 1993). Finally, an appellate court's review of the amount of punitive damages is limited to correction of errors of law. *Austin v. Specialty Transp. Servs.*, 594 S.E.2d 867 (S.C. Ct. App. 2004).

E. To whom are punitive damages payable?

Generally, punitive damages are only payable to the plaintiff directly injured as a result of the misconduct giving rise to the entitlement to the award. Neither a spouse nor parent of the injured plaintiff is entitled to punitive damages under a derivative claim against the tortfeasor(s). *Hughey v. Ausborn*, 154 S.E.2d 839 (S.C. 1967) (husband and father had no cause of action to recover punitive damages for personal injuries to wife and minor child proximately caused by willful or intentional negligence of another).

South Dakota

I. PUNITIVE DAMAGES

A. May they be awarded?

Yes. Exemplary damages may only be awarded upon express provision in statute. S.D. CODIFIED LAWS § 21-1-4 (2010); *Scherf v. Myers*, 258 N.W.2d 831 (S.D. 1977). Punitive damages are allowable in equitable actions. *Black v. Gardner*, 320 N.W.2d 153 (S.D. 1982).

B. If so, in what circumstances?

Standard of Conduct. To obtain punitive damages, a plaintiff must prove conduct marked by oppression, fraud or malice, actual or presumed, or in any case of wrongful injury to animals, being subjects of property, committed intentionally or by willful and wanton misconduct in disregard of humanity. S.D. CODIFIED LAWS § 21-3-2 (2004); *Kjerstad v. Ravellette Publ'ns, Inc.*, 517 N.W.2d 419 (S.D. 1994); *Dahl v. Sinner*, 474 N.W.2d 897 (S.D. 1991) (malice is an essential element of a claim for punitive damages); *Yankton Prod. Credit Ass'n v. Jensen*, 416 N.W.2d 860 (S.D. 1987); *Smith v. Montana-Dakota Util.*, 575 F. Supp. 265 (D. S.D. 1983).

Standard of Proof. Clear and convincing evidence is required to obtain punitive damages. S.D. CODIFIED LAWS § 21-1-4.1 (2004); *Diamond Surface, Inc. v. State Cement Plant Comm'n*, 583 N.W.2d 155 (S.D. 1998).

Procedural Requirements. In any claim alleging punitive or exemplary damages, before any discovery relating thereto may be commenced and before any such claim may be submitted to the finder of fact, the court shall find, after a hearing and based upon clear and convincing evidence, that there is a reasonable basis to believe that there has been willful, wanton or malicious conduct on the part of the party claimed against. S.D. CODIFIED LAWS § 21-1-4.1 (2004).

Actions Against State. The state waives sovereign immunity for punitive damages "to the extent such liability insurance is purchased pursuant to § 21-32-15 and to the extent coverage is afforded thereunder..." S.D. CODIFIED LAWS § 21-32-16 (2010). Further, "except as provided in § 21-32-16, any employee, officer or agent of the state, while acting within the scope of his employment or agency, whether such acts are ministerial or

discretionary, is immune from suit or liability for damages brought against him in either his individual or official capacity." S.D. CODIFIED LAWS § 21-32-17.

Breach of Contract. Punitive damages are not ordinarily recoverable for breach of contract because, as a general rule, damages for breach of contract are limited to pecuniary loss sustained. *Grynberg v. Citation Oil & Gas Corp.*, 573 N.W.2d 493 (S.D. 1997); *Hoffman v. Louis Dreyfus Corp.*, 435 N.W.2d 211 (S.D. 1989). But punitive damages can be awarded if, in a breach of contract action, an independent tort occurred. *Grynberg*, 573 N.W.2d at 500; *Hoffman*, 435 N.W.2d at 214.

Employer Liability for Employee Conduct. South Dakota courts applying South Dakota law follow the complicity rule, as defined in the Restatement (Second) of Torts § 909 (1977), which states that:

Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,

1. the principal or a managerial agent authorized the doing and the manner of the act, or
2. the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or
3. the agent was employed in a managerial capacity and was acting in the scope of employment, or
4. the principal or a managerial agent of the principal ratified or approved the act.

See *Olson v. Tri-County State Bank*, 456 N.W.2d 132, 134 n.3 (S.D. 1990).

Environmental Liability. Punitive damages may be awarded "in any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed ... for sake of example, and by way of punishing the defendant." S.D. CODIFIED LAWS § 21-3-2.

Equity. Punitive damages are allowable in equitable actions. *Black v. Gardner*, 320 N.W.2d 153 (S.D. 1982).

Insurer's Bad Faith. In any action for the breach of an obligation not arising from a contract where the defendant is guilty of oppression, fraud or malice, actual or presumed, the jury may award exemplary or punitive damages. *Harter v. Plains Ins. Co.*, 579 N.W.2d 625 (S.D. 1998); S.D. CODIFIED LAWS § 21-3-2.

Product Liability. Punitive damages may be awarded "in any action for the breach of an obligation not arising from contract,

where the defendant has been guilty of oppression, fraud, or malice, actual or presumed ... for sake of example, and by way of punishing the defendant." S.D. CODIFIED LAWS § 21-3-2.

Professional Liability. Punitive damages may be awarded "in any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed ... for sake of example, and by way of punishing the defendant." S.D. CODIFIED LAWS § 21-3-2.

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

Probably not. See *Dairyland Ins. Co. v. Nryant*, 474 N.W.2d 514 (S.D. 1991) (suggesting *in dicta* that punitive damages are not insurable in South Dakota); *Fort Pierre v. United Fire & Cas. Co.*, 463 N.W.2d 845 (S.D. 1990) (civil penalties assessed against city by federal government for intentional misconduct of city not covered for public policy reasons).

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

No statute or decision addressed the insurability of vicariously assessed punitive damages under South Dakota law.

C. What is the relationship of punitive to compensatory damages?

There must be a recovery of compensatory damages before punitive damages are allowed. *Speck v. Anderson*, 349 N.W.2d 49 (S.D. 1984); *Johnson v. Kirkwood, Inc.*, 306 N.W.2d 640 (S.D. 1981); see *Roberts v. Shaffer*, 156 N.W.67 (S.D. 1916). The amount of compensatory damages is among the factors to be considered in a punitive damages award, but there need be no precise ratio between them. *Hulstein v. Meilman Food Indus.*, 293 N.W.2d 889 (S.D. 1980); *Davis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 906 F.2d 1206 (Eighth Cir. 1990). The award may be reduced for excessiveness. *Stene v. Hillgren*, 98 N.W.2d 156 (S.D. 1959).

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

Yes, a statutory cap applies to medical malpractice actions. Although punitive damages awards were limited to \$500,000 in medical malpractice actions under S.D. CODIFIED LAWS § 21-3-11 (Michie 1996), the South Dakota Supreme Court held that the statutory limitations on punitive damages violate the South Dakota Constitution due process provisions in *Knowles ex rel. Knowles v. U.S.*, 544 N.W.2d 183, answer conformed to, remanded 91 F.3d 1147 (Eighth Cir. 2002). As a result of the decision in *Knowles*, the South Dakota Legislature amended and revived S.D. CODIFIED LAWS § 21-3-11. S.D. CODIFIED LAWS § 21-3-11 (2010).

S.D. CODIFIED LAWS § 21-3-11 (Michie 2004) now states that the total general damages that may be awarded in a medical malpractice action may not exceed the sum of \$500,000. There is no limitation, however, on the amount of special damages that may be awarded. § 21-3-11. Generally, this section only applies to causes of action resulting from injuries or death occurring after July 1, 1976, but there are two exceptions. § 21-3-11. For chiropractors, this section only applies to causes of action arising from injuries or death occurring after July 1, 1978, and for optometrists, this section only applies to causes of action arising out of injuries or death occurring after July 1, 2002. § 21-3-11.

E. To whom are punitive damages payable?

Generally, an award of punitive damages is payable to the plaintiff. The estate of a decedent may pursue a claim for punitive damages against a wrongdoer. *In re Estate of O'Keefe*, 583 N.W.2d 138 (S.D. 1998).

Tennessee

I. PUNITIVE DAMAGES

A. May they be awarded?

Yes. The Supreme Court of Tennessee has indicated that punitive damages should only be awarded in those cases involving “the most egregious of wrongs.” *Hodges v. S.C. Tool & Co.*, 833 S.W.2d 896 (Tenn. 1992). In Tennessee, defendants are entitled to a bifurcated trial in cases involving punitive damages. *Hodges*, 833 S.W.2d at 901. During the first trial phase, liability for both compensatory and punitive damages will be determined, and the amount of compensatory damages will be set. The purpose of the second trial phase is to set the amount of punitive damages.

Punitive damages cannot be awarded against the estate of a deceased tortfeasor. See *Chapman v. Jones*, 2000 Tenn. App. (LexisNexis 3), at 1 (Tenn. Ct. App. Jan. 10, 2000); see also *Hayes v. Gill*, 390 S.W.2d 213 (Tenn. 1965).

B. If so, in what circumstances?

Standard of Conduct. A court may award punitive damages in cases involving the most egregious of harms. The court must find that a defendant has acted either intentionally, fraudulently, maliciously or recklessly. *Hodges*, 833 S.W.2d at 901; see also *Vaughn v. Park Healthcare Co.*, 1994 WL 684485, 1 (Tenn. App. 1994); *Curtis v. Universal Match Corp.*, 778 F. Supp. 1421 (E.D. Tenn. 1991), *aff’d*, 966 F.2d 1451 (Sixth Cir. 1992).

Standard of Proof. Clear and convincing evidence is required to obtain punitive damages. *Hodges*, 833 S.W.2d at 901.

Actions Against State. Punitive damages are not permitted against the state. Tenn. Code Ann. § 9-8-307(d).

Breach of Contract. Generally, punitive damages are not available in breach of contract cases. *B.E. Myers & Sons, Inc. v. Evans*, 612 S.W.2d 912 (Tenn. Ct. App. 1980).

Employer Liability for Employee Conduct. Tennessee does not follow the complicity rule. See *Odom v. Gray*, 508 S.W.2d

526, 533 (Tenn. 1974) (rejecting the complicity rule). Instead, an employer may be held liable for punitive damages, when appropriate, whenever the employer is vicariously liable for the acts of the employee. See *id.* An employer is vicariously liable for the tortious acts of an employee done in the course of employment, even when the tortious acts were done in disobedience of the employer’s instructions. *Id.* at 530.

Environmental Liability. Punitive damages may be awarded in connection with environmental liability claims. *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1216-17 (Sixth Cir. 1988) (applying Tennessee law) (In a class action by persons who either lived on or owned property near a landfill where a company disposed of hazardous chemical by-products, the court held that an award for punitive damages was appropriate where the company “violated state law in establishing, utilizing, and refusing to cease disposal operations at the landfill disposal site.”).

Insurer’s Bad Faith. Tennessee law provides for a statutory “bad faith penalty” that allows up to an additional 25 percent damage award. Tenn. Code Ann. § 56-7-105 (2010). However, this provision establishes authority for recovery of additional damages caused by a breach of insurance contract above and beyond the obvious recovery of the loss directly insured against. *Rice v. Van Wagoner Cos.*, 738 F. Supp. 252 (M.D. Tenn. 1990).

Product Liability. A party filing a product liability suit as a result of exposure to asbestos may recover punitive damages. *Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565 (Sixth Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986); see also *Dykes v. Raymark Indus., Inc.*, 801 F.2d 810 (Sixth Cir. 1986).

Professional Liability. A claim for punitive damages will stand where there was clear and convincing evidence of intentional, fraudulent, malicious and/or reckless conduct on the part of an attorney, including his attempts to conceal the misconduct from his client. *Metcalfe v. Waters*, 970 S.W.2d 448 (Tenn. 1998).

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

Yes. An insurer may indemnify its insured for punitive damages so long as the underlying injury was not intentionally inflicted. *Lazenby v. Universal Underwriters Ins. Co.*, 383 S.W.2d 1 (Tenn. 1964); see also *Gen. Cas. Co. v. Woodby*, 238 F.2d 452 (Sixth Cir. 1956) (insurer liable for punitive damages assessed as consequence of driver's gross negligence). There is no legal requirement that the liability carrier must satisfy the punitive damages before satisfying compensatory damages. Once the liability carrier has paid damages to its limits, its legal obligations are fulfilled. *West v. Pratt*, 871 S.W.2d 477 (Tenn. 1994).

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

Not applicable. See II. A. above.

C. What is the relationship of punitive to compensatory damages?

A low award of compensatory damages may support a high award of punitive damages, depending on whether the action was particularly egregious. Alternatively, a high award of compensatory damages may warrant a low amount of punitive damages, depending on the seriousness of the defendant's actions. A compensatory award is never tested by its relationship to the punitive award. *Coffey v. Fayette Tubular Prods.*, 929 S.W.2d 326 (Tenn. 1996).

Actual damages must be sustained or suffered to have punitive damages awarded, although no actual monetary award is necessary and mere proof of actual loss is sufficient to support a punitive damages award. *Oakley v. Simmons*, 799 S.W.2d 669 (Tenn. Ct. App. 1990) (punitive damages awarded in an action for injunctive relief). See also *Emerson v. Garner*, 732 S.W.2d 613 (Tenn. Ct. App. 1987); *Whittington v. Grand Valley Lakes, Inc.*, 547 S.W.2d 241 (Tenn. 1977); *Hutchison v. Pyburn*, 567 S.W.2d 762 (Tenn. Ct. App. 1977) (punitive damages awarded in action to rescind contract).

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

There are no statutory caps on punitive damages. The *Hodges* decision, however, set forth a number of factors to be considered by the trier of fact in assessing the amount of punitive damages. These factors include the nature of the defendant's acts, the amount of compensatory damages awarded, and the financial condition of the particular defendant. *Hodges*, 833 S.W.2d at 901. The more reprehensible the act, the greater the appropriate award of punitive damages. *Hodges*, 833 S.W.2d at 901; see also *Coppinger Color Lab, Inc. v. Nixon*, 698 S.W.2d 72 (Tenn. 1985). After a jury has made an award of punitive damages, the trial judge must review the award and set forth all reasons for decreasing or approving it in his or her findings of fact and conclusions of law, demonstrating a consideration of all factors on which the jury was instructed. *Hodges*, 833 S.W.2d at 901; see also *Coffey v. Fayette Tubular Prods.*, 929 S.W.2d 326 (Tenn. 1996).

E. To whom are punitive damages payable?

Generally, an award of punitive damages is payable to the plaintiffs.

PUNITIVE DAMAGES REVIEW

Texas



The information contained herein is based on the 1995 version of the Texas Civil Practice and Remedies Code. Any cause that accrued before September 1, 1995, would be governed by the pre-1995 code. The prior code

sections are still available within the Texas Civil Practice and Remedies Code, but will not be discussed in this publication.

I. PUNITIVE DAMAGES

A. May they be awarded?

Yes, punitive damages are available under Texas law. See Tex. Civ. Prac. & Rem. Code § 41.001 (2010) et. seq. (Vernon 1997).

B. If so, in what circumstances?

Standard of Conduct. Punitive damages may be awarded in Texas only if the claimant proves by clear and convincing evidence that the wrong is accompanied by an aggravating circumstance, such as malice, fraud, willful conduct or gross negligence. Texas statute allows exemplary damages resulting from fraud, malice, or willful act or omission or (in wrongful death action) gross neglect.

Tex. Civ. Prac. & Rem. Code § 41.003(a); *Bennett v. Howard*, 170 S.W.2d 709, 712-13 (Tex. 1943). Proof of ordinary negligence, bad faith or deceptive trade practices will not suffice to support an award of exemplary damages or to shift the burden of proof to the defendant. See Tex. Civ. Prac. & Rem. Code § 41.003(b); *Trans. Ins. Co. v. Moriel*, 879 S.W.2d 10, 18-19 (Tex. 1994).

"Malice" is defined by statute as a specific intent by the defendant to cause substantial injury to the claimant. See Tex. Civ. Prac. & Rem. Code § 41.001(7).

"Gross negligence" is defined by statute as an act or omission which, when viewed objectively from the standpoint of the actor at the time of its occurrence, involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others and of which the actor proceeds with conscious indifference to the rights, safety or welfare of others. Tex. Civ. Prac. & Rem. Code § 41.00(11).

Standard of Proof. Clear and convincing evidence is required to obtain punitive damages. Tex. Civ. Prac. & Rem. Code § 41.003(a). Clear and convincing evidence is that measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations

sought to be established. Tex. Civ. Prac. & Rem. Code § 41.001(2) (Vernon 2007). "This intermediate standard falls between the preponderance standard of civil proceedings and the reasonable doubt standard of criminal proceedings." *W.L. Lindemann Operating Co., Inc. v. Strange*, 256 S.W.3d (Tex. Ct. App. 2008).

Actions Against State. Punitive damages are not permitted against the state. *Duhart v. State*, 610 S.W.2d 740 (Tex. 1980) (holding that the Texas Tort Claims Act did not waive governmental immunity for a suit for exemplary damages).

Breach of Contract. Exemplary damages are not recoverable in a breach of contract action. *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986); *Bellefonte Underwriters Ins. Co. v. Brown*, 704 S.W.2d 742, 745 (Tex. 1986); *Amoco Prod. Co. v. Alexander*, 622 S.W.2d 563, 571 (Tex. 1981); *Sharpe v. Kilcoyne*, 962 S.W.2d 697, 703 (Tex. Ct. App. 1998); *Boorhem-Fields, Inc. v. Burlington N. R.R.*, 884 S.W.2d 530, 540 n.5 (Tex. Ct. App. 1994). Even an intentional, malicious and oppressive breach of contract is not punishable by punitive damages. *Jim Walter Homes, Inc.*, 711 S.W.2d at 618; *Chachere v. Drake*, 941 S.W.2d 193, 197 (Tex. Ct. App. 1996). Punitive damages, however, may be allowed if the breach of contract is shown to have been accompanied by an underlying independent tort that is malicious, oppressive or fraudulent in nature. See *Sheffield v. Gibson*, 2008 WL 190049, at 5-6 (Tex. Ct. App. Jan. 22, 2008) (explaining that breach of contract cannot be pleaded as tort for more favorable damages, but fraudulent inducement may be separate tort for tort damages purposes); *Amoco*, 622 S.W.2d at 571; *Sharpe*, 962 S.W.2d at 703; *Shelton Ins. Agency v. St. Paul Mercury Ins. Co.*, 848 S.W.2d 739, 747 (Tex. Ct. App. 1993).

Employer Liability for Employee Conduct. Texas courts applying Texas law follow the Restatement (Second) of Torts in cases where punitive damages are sought from an employer for acts of employees. Section 909 of the Restatement states that:

Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,

1. the principal or a managerial agent authorized the doing and the manner of the act, or
2. the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or
3. the agent was employed in a managerial capacity and was acting in the scope of employment, or
4. the principal or a managerial agent of the principal ratified or approved the act.

Restatement (Second) of Torts § 909 (1977); see *Purvis v. Prattco, Inc.*, 595 S.W.2d 103 (Tex. 1980).

Under Texas law, a corporation may be liable for punitive damages if the corporation itself – through its corporate agents – acts with gross negligence. *Hammerly Oaks, Inc. v. Edward*, 958 S.W.2d 387, 391 (Tex. 1997).

Environmental Liability. There is no law in Texas expressly addressing the issue of punitive damages and environmental liability. However, in Texas, punitive damages may be awarded only if the claimant proves by clear and convincing evidence that the wrong is accompanied by an aggravating circumstance, such as malice, fraud, willful conduct or gross negligence. Tex. Civ. Prac. & Rem. Code § 41.003(a); *Bennett v. Howard*, 170 S.W.2d 709, 712-13 (Tex. 1943).

Insurer's Bad Faith. A bad faith insurance claim may result in punitive damages only where the insurer's bad faith is accompanied by intentional, malicious, fraudulent or grossly negligent conduct. *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 18 (Tex. 1994). "Even if the insurer has 'no reasonable basis' to

deny or delay payment of the claim, the plaintiff may not recover punitive damages on that basis alone." *Id.* (citing *Arnold v. Nat'l County Mut. Fire Ins. Co.*, 725 S.W.2d 165, 168 (Tex. 1987)).

Product Liability. Texas law allows recovery of punitive damages in favor of a product liability plaintiff. *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 54 (Tex. 1998); *North American Refractory Co. v. Easter*, 988 S.W.2d 904, 919-20 (Tex. Ct. App. 1999); *Sears, Roebuck & Co. v. Kunze*, 996 S.W.2d 416, 429-30 (Tex. Ct. App. 1999); accord *Cimino v. Raymark Indus., Inc.*, 739 F. Supp. 328, 332 (E.D. Tex. 1990) (*affirmed in part, vacated in part on other grounds by Cimino v. Raymark Industries, Inc.*, 151 F.3d 297 (Fifth Cir. 1998)).

Professional Liability. In medical malpractice cases, punitive damages may be awarded if there is a finding that there was a false representation willfully made, or made recklessly without any knowledge of its truth and as a positive assertion. *Gaut v. Quast*, S.W.2d 90 (Tex. 1974). Further, punitive damages may be awarded where surgery is excessive and not generally accepted as a method to treat the patient's particular condition. See *Hood v. Phillips*, 554 S.W.2d 160 (Tex. 1977).

Tortious Interference with Contract. Punitive damages are recoverable in tortious interference with contract actions. *Texas Beef Cattle Co. v. Green*, 921 S.W.2d 203, 210 (Tex. 1996); *Juliette Fowler Homes, Inc. v. Welch Assoc., Inc.*, 793 S.W.2d 660 (Tex. 1990); *Exxon Corp. v. Allsup*, 808 S.W.2d 648, 661 (Tex. Ct. App. 1991, writ denied); *Armendariaz v. Mora*, 553 S.W.2d 400, 407 (Tex. Ct. App. 1977).

Wrongful Death. In an action for wrongful death, "when the death is caused by the willful act or omission or gross negligence of the defendant, **exemplary** as well as actual damages may be recovered." Tex. Civ. Prac. & Rem. Code § 71.009 (2010).

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

Possibly. The Texas Supreme Court decided a question certified from the United States Court of Appeals for the Fifth Circuit, holding that Texas public policy does not prohibit insurance coverage of punitive damages in the context of a workers' compensation claim, under an employer's liability policy for punitive damages awarded for an employer's gross negligence

causing an employee's death. See *Fairfield Ins. Co. v. Stephens Martin Paving, L.P.*, 246 S.W.3d 653 (Tex. 2008). The Court based its holding on Texas's strong policy favoring preservation of freedom of contract. The Court expressly declined to decide the extent to which punitive damages may or may not be insurable in other contexts. Thus, the question remains undecided.

PUNITIVE DAMAGES REVIEW

In this context, it is important to note that two Texas courts of appeals previously found that coverage for punitive damages awarded for gross negligence under liability policies did not exclude coverage for punitive damages. *Am. Home Assurance v. Safway Steel Prod. Co.*, 743 S.W.2d 693, 701-02 (Tex. Ct. App. 1987); *Dairyland County Mut. Ins. Co. v. Wallgren*, 477 S.W.2d 341, 343 (Tex. Ct. App. 1972). These courts held that it is not against public policy for an insurer to contract to pay punitive damages on behalf of the insured. *Id.*

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

Not applicable. See II. A. above.

C. What is the relationship of punitive to compensatory damages?

An award of punitive damages must bear a “reasonable relationship” to the award of compensatory damages. *Alamo Nat’l Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981); *Gen. Mills Rests., Inc. v. Clemons*, 865 S.W.2d 48 (Tex. Ct. App. 1993); *Riedell v. Hoffman Controls Corp.*, 2001 WL 832342, at 4 (Tex. Ct. App. July 25, 2001). However, there is no “mathematical bright line” between the constitutionally acceptable and unacceptable. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580 (1996). Rather, the reasonableness of the ratio should be judged on the facts of each case. *Id.* This rule is a tool to aid the courts in determining whether a punitive damages award is excessive because it is the product of passion rather than reason. *Wright v. Gifford-Hill & Co., Inc.*, 725 S.W.2d 712, 714 (Tex. 1987).

Punitive damages may not be recovered unless the plaintiff is shown to have sustained actual loss or injury as the result of an underlying tort. *Bellefonte Underwriters Ins. Co. v. Brown*, 704 S.W.2d 742, 745 (Tex. 1986); *Fed. Express Corp. v. Deutschmann*, 846 S.W.2d 282 (Tex. 1993); *City Prods. Corp. v. Berman*, 610 S.W.2d 446, 450 (Tex. 1980). A plaintiff cannot recover punitive damages if its compensatory damages claim is precluded as a matter of law. *Entergy Gulf States, Inc. v. Isom*, 143 S.W.3d 486, 494 (Tex. Ct. App. 2004). In determining the amount of punitive damages to award, the trier of fact is to consider evidence relating to the following six factors: (1) the nature of the wrong, (2) the character of the conduct involved, (3) the degree of culpability of the wrongdoer, (4) the situation and sensibilities of the parties concerned, (5) the extent to which such conduct offends a public sense of justice and propriety, and (6) the net worth of the defendant.

Tex. Civ. Prac. & Rem. Code § 41.011. (a) (2010).

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

Yes, for suits filed on or after September 1, 1995, punitive damages are capped by statute at the greater of either (1) two times the amount of economic damages, plus any non-economic damages found by the jury, not to exceed \$750,000 or (2) \$200,000. Tex. Civ. Prac. & Rem. Code § 41.008.

These limitations do not apply to actions resulting from an intentional tort or malice. *Id.* Nor do they apply when criminal conduct is proven. *Bennett v. Reynolds*, 242 S.W.3d 866, 906 (Tex. Ct. App. 2007), *rev’d on other grounds*, 315 S.W.3d 867 (Tex. 2010). The statutory caps are to be applied on a per-defendant, rather than a per-plaintiff basis. *Seminole Pipeline v. Broad Leaf Partners*, 979 S.W.2d 730, 750-52 (Tex. Ct. App. 1998).

E. To whom are punitive damages payable?

Generally, punitive damages are payable to the plaintiff. Punitive damages were also held payable to the estate’s representative. Because the basis of the damages is to deter wrongdoing, the deterrent survives the death of the injured party in areas where the Texas Constitution and statutes have not provided to the contrary. *Hofer v. Lavender*, 679 S.W.2d 470, 472 (Tex. 1984); *Pace v. McEwen*, 574 S.W.2d 792, 801 (Tex. Ct. App. 1978).

Utah

I. PUNITIVE DAMAGES

A. May they be awarded?

Yes, punitive damages are available under Utah law. UTAH CODE ANN. § 78-18-1(1)(a) (2010).

B. If so, in what circumstances?

Standard of Conduct. In order to justify an award of punitive damages, a defendant's acts must be the result of "willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others." UTAH CODE ANN. § 78-18-1(1)(a) (2010). *Orr v. Brigham Young Univ.*, 960 F. Supp. 1522 (D. Utah 1994) (notice or knowledge of a dangerous condition and failure to act, absent more, does not support a claim for punitive damages).

Standard of Proof. Proof by "clear and convincing" evidence is required to sustain a punitive damages award. UTAH CODE ANN. § 78-18-1(a) (2003).

Actions Against State. Punitive damages against the state are not permitted. *Lyon v. Burton*, 5 P.3d 616, 634 (Utah 2000).

Breach of Contract. Breach of contract, standing alone, does not give rise to a claim for punitive damages even if the breach was intentional and unjustifiable, but such damages are allowable if there is some independent tort. See *Campbell v. State Farm*, 65 P.3d 1134 (Utah 2001, writ granted); but see *State Farm Mut. Auto Ins. v. Campbell*, 123 S. Ct. 1513 (U.S. 2003) ("To the extent an award of punitive damages is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property."); and *Norman v. Arnold*, 2002 UT 81; 453 Utah Adv. Rep. 27 (Utah 2002). See, e.g., *Schurtz v. BMW*, 814 P.2d 1108 (Utah 1991); *Highland Constr. Co. v. Union Pac. R.R.*, 683 P.2d 1042 (Utah 1984); *Hal Taylor Assocs. v. Unionamerica, Inc.*, 657 P.2d 743 (Utah 1982).

Employer Liability for Employee Conduct. After extensively discussing the role of employer liability for punitive damages applying Utah law in *Johnson v. Rogers*, the Supreme Court of Utah adopted the complicity rule articulated in the Restatement of Torts as follows:

Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,

1. the principal or a managerial agent authorized the doing and the manner of the act, or
2. the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or
3. the agent was employed in a managerial capacity and was acting in the scope of employment, or
4. the principal or a managerial agent of the principal ratified or approved the act.

Restatement (Second) of Torts § 909 (1977).

The Court noted that the complicity rule "limits vicarious punitive damages to those situations where wrongful acts were committed or specifically authorized by a managerial agent or were committed by an unfit employee who was recklessly employed or retained." *Johnson v. Rogers*, 763 P.2d 771, 778 (Utah 1988).

Environmental Liability. Punitive damages may be assessed with respect to environmental torts. See, e.g., *Boyette v. L.W. Looney & Son*, supra, 932 F. Supp. 1344 (D. Utah 1995, writ granted); *Branch v. W. Petroleum, Inc.*, 657 P.2d 267, 278 (Utah 1982) (pre-statute case).

General Liability. Punitive damages are recoverable in general negligence actions. See, e.g., *Hall v. Wal-Mart, Inc.*, 959 P.2d 109, 110 (Utah 1998) (premises liability lawsuit).

Insurer's Bad Faith. Punitive damages are recoverable by an insured against an insurer in an insurance "bad faith" action. See *Campbell v. State Farm*, 65 P.3d 1134 (Utah 2001). But see *State Farm Mut. Auto Ins. v. Campbell*, 538 U.S. 408 (2003) ("To the extent an award of punitive damages is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property.").

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Product Liability. Punitive damages are recoverable in actions over allegedly defective products. See, e.g., *Slisze v. Stanley Bostitch Corp.*, 979 P.2d 317, 321 (Utah 1999).

Professional Liability. Punitive damages are recoverable in professional negligence actions. See, e.g., *C.S. v. Nielson*, 767 P.2d 504, 510 (Utah 1988) (pre-statute action for medical malpractice).

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

No. Utah law states that no insurer may insure or attempt to insure against punitive damages. UTAH CODE ANN. § 31A-20-101(4) (2010).

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

Yes. See II. A. above.

C. What is the relationship of punitive to compensatory damages?

Punitive damages may be awarded only if compensatory or general damages are awarded. UTAH CODE ANN. § 78-18-1 (1) (a) (2003); *C.T. v. Johnson*, *supra*, 977 P.2d 479, 481 (Utah 1999) (re: statutory exemption).

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

Yes. Punitive damages should be assessed in light of the ratio between punitive and actual damages. Where a punitive

damages award exceeds a 3-to-1 ratio of punitive to actual damages, the award is presumptively excessive. See *Hall v. Wal-Mart, Inc.*, 959 P.2d 109, 112 (Utah 1998).

In assessing punitive damages, the trier of fact must consider seven factors: (1) the relative wealth of the defendant; (2) the nature of the alleged conduct; (3) the facts and circumstances surrounding such conduct; (4) the effect thereof on the lives of the plaintiff and others; (5) the probability of future recurrences of the misconduct; (6) the relationship of the parties; and (7) the amount of the actual damages awarded. *Hall v. Wal-Mart Stores, Inc.*, *supra*, 959 P.2d at 111; *Campbell v. State Farm*, 65 P.3d 1134 (Utah 2001). But see *State Farm Mut. Auto Ins. v. Campbell*, 123 S. Ct. 1513 (2003).

E. To whom are punitive damages payable?

In any judgment where punitive damages have been paid, 50 percent of any amount of the 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. UTAH CODE ANN. 78-18-1(3) (2010).



I. PUNITIVE DAMAGES

A. May they be awarded?

Yes, punitive damages are available under Vermont law. *Brueckner v. Norwich Univ.*, 730 A.2d 1086 (Vt. 1999); *State Agency of Natural Res. v. Riendeau*, 603 A.2d 360 (Vt. 1991).

B. If so, in what circumstances?

Standard of Conduct. Punitive damages may be awarded when a defendant is shown to have acted with malice, or with conduct marked by ill will, insult or oppression, or by a reckless or wanton

disregard of one's rights. See *Schnabel v. Nordic Toyota, Inc.*, 721 A.2d 114 (Vt. 1998); *Ainsworth v. Franklin County Cheese Corp.*, 592 A.2d 871 (Vt. 1991); *Shortle v. Cent. Vt. Pub. Serv. Corp.*, 399 A.2d 517 (Vt. 1979). The defendant's act(s) must not only have been wrongful or unlawful, but bad spirited and with wrongful intent. The purpose of punitive damages is to punish conduct that is "morally culpable" and to deter the wrongdoer from repeating the same or similar acts. See *Brueckner v. Norwich*

Univ., 730 A.2d 1086, 169 Vt. 118 (Vt. 1999) (citing *Coty v. Ramsey Assocs.*, 546 A.2d 196 (Vt. 1988); *State Agency of Natural Res. v. Riendeau*, 603 A.2d 360 (Vt. 1991)).

Standard of Proof. Punitive damages may be obtained based on a preponderance of evidence. *Rubin v. Sterling Enters.*, 674 A.2d 782 (Vt. 1996).

Actions Against State. Punitive damages against the state are not expressly permitted. However, the state “shall be liable for injury to persons or property or loss of life caused by the negligent or wrongful act or omission of an employee of the state while acting within the scope of employment...” VT. STAT. ANN. § tit. 12 § 5601(a). The state’s liability is subject to damage caps. VT. STAT. ANN. § tit. 10 § 5601(b) (the maximum liability of the state “shall be \$250,000 to any one person and the maximum aggregate liability shall be \$1,000,000 to all persons arising out of each occurrence”).

Breach of Contract. Generally, punitive damages may not be recovered in actions for breach of contract. However, punitive damages are available in contract actions, in certain “extraordinary cases,” in which the breach has the character of a willful and wanton or fraudulent tort. *Villeneuve v. Beane*, 933 A.2d 1139 (Vt. 2007).

Employer Liability for Employee Conduct. Under Vermont law, a claimant may recover punitive damages against an employer if the employer or governing officer of a corporation directed the act, participated in it, or subsequently ratified it. *Staruski v. Continental Tel. Co.*, 154 Vt. 568, 579-580 (1990). In addition, punitive damages may be awarded against a corporation if the unlawful act is that of a governing officer. *Id.* at 580.

Environmental Liability. Punitive damages are recoverable under Vermont’s water pollution control statute, where malice, ill will or wanton conduct is shown. See *State Agency of Natural Res. v. Riendeau*, 603 A.2d 360 (Vt. 1991) interpreting 10 VT. STAT. ANN.

§ 1274(a)(5). Additionally, punitive damages can be awarded for failure to comply with the conditions set forth in 10 VT. STAT. ANN. § 1934, resulting in the failure of aboveground storage tanks and underground facilities for the storage and handling of petroleum liquids, related sludge and other chemicals. 10 VT. STAT. ANN. § 1934 (2010).

Insurer’s Bad Faith. It remains unclear as to whether punitive damages are specifically recoverable in actions of an insurer’s bad faith.

Invasion of Privacy. Wrongful invasion of privacy has also been held to warrant an award of punitive damages. *Fletcher v. Ferry*, 917 A.2d 937, 181 Vt. 294 (Vt. 2007). *Staruski v. Continental Tel. of Vermont*, 581 A.2d 266, 154 Vt. 568 (Vt. 1990).

Libel/Defamation. Punitive damages are available in libel actions if common law malice is proven in addition to constitutional malice. *Ryan v. Herald Assoc., Inc.*, 566 A.2d 1316, 152 Vt. 275 (Vt. 1989). See also *Rubin v. Sterling Enter., Inc.*, 674 A.2d 782, 164 Vt. 582 (Vt. 1996) (holding that punitive damages may be awarded, “in the jury’s discretion,” upon a finding of “actual malice” in an action for defamation).

Product Liability. Punitive damages are recoverable in actions over allegedly defective products. See, e.g. *Slayton v. Ford Motor Co.*, 435 A.2d 946, 140 Vt. 27 (Vt. 1981)(jury instructed on punitive damages in product liability case).

Professional Liability. It remains unclear whether punitive damages are specifically recoverable in professional liability actions; however, it appears as though punitive damages would be available in the professional liability context, See *Bloomer v. Gibson*, 912 A.2d 424 (Vt. 2006) (denying punitive damages judgment to plaintiff in malpractice case against attorney, but not indicating that punitive damages are unavailable in the professional liability context).

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

Yes. Punitive damages are insurable, and there is no public policy against insurance coverage of punitive damages. See *Am. Prot. Ins. Co. v. McMahan*, 562 A.2d 462 (Vt. 1989) (citing *State v. Glens Fall Ins. Co.*, 404 A.2d 101 (Vt. 1979)).

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

Not applicable. See II. A. above.

C. What is the relationship of punitive to compensatory damages?

Punitive damages “serve a different function than compensatory damages.” *D’Arc Turcotte v. Estate of LaRose*, 569 A.2d 1086

PUNITIVE DAMAGES REVIEW

(Vt. 1989). Their purpose is to punish the tortfeasor, not to compensate the victim for losses. *Id.* Further, the amount of the punitive damages need not bear a particular relationship to the amount of compensatory damages. *Crump v. P & C Food Mkts.*, 576 A.2d 441 (Vt. 1990). Rather, an award of punitive damages may stand as long as the evidence supports the showing of malice. *Id.*

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

Some Vermont statutes specifically place caps on punitive damages. See 9 VT. STAT. ANN. § 2461 (2010) (which limits

recovery of punitive damages for fraudulent representations in contracts for goods or services to three times the value of the consideration given by the consumer). Other statutes specifically provide for treble damages. 12 VT. STAT. ANN. § 4920 (2010) (suits for forcible entry and detainer) and 10 VT. STAT. ANN. § 4709 (2010) (suits for unlawful importation of wildlife).

E. To whom are punitive damages payable?

Punitive damages are payable to the plaintiff, or Vermont state agencies where the agency prevails on its punitive damages claim. See *State Agency of Natural Res. v. Riendeau*, 603 A.2d 360 (Vt. 1991).



I. PUNITIVE DAMAGES

A. May they be awarded?

Yes. Punitive damages may be awarded, but actual malice or malice in fact must be established; simple legal malice is insufficient. *Hamilton Dev. Co. v. Broad Rock Club*, 445 S.E.2d 140 (Va. 1994); *Peacock Buick Inc. v. Durkin*, 277 S.E.2d 225 (Va. 1981); *Xspedius Mgmt. Co. of Va., L.L.C. v. Stephen*, 611 S.E.2d 385 (Va. 2005) (punitive damages may be awarded when there is misconduct or actual malice "or such recklessness or negligence as to evince a conscious disregard of the rights of others").

B. If so, in what circumstances?

Standard of Conduct. Actual malice must be proven to obtain a punitive damages award. Actual malice may be shown where the defendant's actions exhibit "ill will, violence, grudge, spite, wicked intention or a conscious disregard of the rights of another." *Lee v. Southland Corp.*, 244 S.E.2d 756 (Va. 1978); *Wright v. Castles*, 349 S.E.2d 125 (Va. 1986). See also *Wallen v. Allen*, 343 S.E.2d 73 (Va. 1986).

Standard of Proof. A preponderance of evidence, either direct or circumstantial, showing actual malice will support punitive damages. *Gov't Micro Res., Inc. v. Jackson*, 624 S.E.2d 63 (Va. 2006); *Jordan v. Sauve*, 247 S.E.2d 739 (Va. 1978). Under Virginia law, submission of a cause of action for punitive damages to the jury is not required in all cases involving torts having malice or fraud as an essential element. *Sit-Set, A.G. v. Universal Jet Exch., Inc.*, 747 F.2d 921 (Fourth Cir. 1984).

Trial Procedure. Under Virginia law, submission of a cause of action for punitive damages to the jury is not required in all cases involving torts having malice or fraud as an essential element. *Sit-Set, A.G. v. Universal Jet Exchange, Inc.*, 747 F.2d 921 (Fourth Cir. 1984).

Actions Against State. Punitive damages are not permitted against the Commonwealth of Virginia. Va. Code Ann. § 8.01-195.3 (2010).

Breach of Contract. A breach of contract does not authorize a claim for punitive damages in the absence of an independent willful tort. *Gasque v. Mooers Motor Car Co., Inc.*, 313 S.E.2d 384 (Va. 1984); *Kamlar Corp. v. Haley*, 299 S.E.2d 514 (Va. 1983); see also *Payne v. Consolidation Coal Co.*, 607 F. Supp. 378 (E.D. Va. 1985); *Wallace v. Hartford Ins. Co.*, 583 F. Supp. 1108 (W.D. Va. 1984).

Employer Liability for Employee Conduct. Under Virginia law, a plaintiff may not recover punitive damages from an employer for the act of an employee unless the employer participated in, authorized or ratified the wrongful act. *Freeman v. Sproles*, 204 Va. 353, 358 (1963).

Environmental Liability. There is no law in Virginia expressly addressing the issue of punitive damages and environmental liability. However, in any civil action, punitive damages may be awarded when there is misconduct or actual malice "or such

recklessness or negligence as to evince a conscious disregard of the rights of others.” *Xspedius Mgmt. Co. of Va., L.L.C. v. Stephen*, 611 S.E.2d 385 (Va. 2005).

Insurer’s Bad Faith. Virginia law does not permit recovery of punitive damages by a first-party insured as a result of the insurer’s bad faith refusal to settle the plaintiff’s claim. *Berryman v. Globe Life Ins. Co.*, 22 Va. Cir. 211, 213 (Va. Cir. Ct. 1990). “In a first-party Virginia insurance relationship, liability for bad faith conduct is a matter of contract rather than tort law. The obligation arises from the agreement and extends only to situations connected with the agreement.” *Id.* (citing *A & E Supply Co. v. Nationwide Mut. Fire Ins. Co.*, 798 F.2d 669 (Fourth Cir. 1986)). Therefore, Virginia law will permit the recovery of foreseeable consequential damages in excess of policy limits in the event of a bad faith breach by the insurer. *Id.* However, punitive damages are not permitted.

Product Liability. Punitive damages are available in the product liability context and may be awarded only where the defendant “made a decision that [was] wanton, willful, malicious or in

conscious disregard of the rights of others.” *Ford Motor Co. v. Bartholomew*, 297 S.E.2d 675, 683 (Va. 1982).

Professional Liability. Punitive damages are not recoverable for legal malpractice. *O’Connell v. Bean*, 263 Va. 176, 180, 556 S.E. 2d 741, 743 (2002). In medical malpractice suits, punitive damages are permitted so long as they do not exceed the statutory cap. *Bulala v. Boyd*, 389 S.E.2d 670 (Va. 1990). The total amount of recoverable medical malpractice damages, including punitive damages, for any injury to a single patient is capped at \$2,000,000. VA. CODE ANN. § 8.01-581.15. (2003). In medical malpractice actions, suits for negligence are governed by the same principles as apply in other negligence actions. *Anand v. Allison*, 55 Va. Cir. 261, 268 (2001) (citing *Allied Prods. v. Duesterdick*, 232 S.E.2d 774 (Va. 1977)), *overruled on other grounds by Shipman v. Kruck*, 593 S.E.2d 319 (Va. 2004).

Wrongful Death. In an action for wrongful death, “punitive damages may be recovered for willful or wanton conduct, or such recklessness as evinces a conscious disregard for the safety of others.” VA. Code Ann. § 8.01-52 (5).

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

Yes. It is not against the public policy of Virginia to purchase insurance providing coverage for punitive damages arising out of the death or injury of any person as the result of negligence, including willful and wanton negligence, but excluding intentional acts. VA. CODE ANN. § 38.2-227; see *United Servs. Auto. Ass’n v. Webb*, 369 S.E.2d 196 (Va. 1988); *Lerner v. Gen. Ins. Co.*, 245 S.E.2d 249 (Va. 1978); *Allstate Ins. Co. v. Dade*, 579 S.E.2d 180 (Va. 2003); but see *U.S. Fire Ins. Co. v. Aspen Bldg. Corp.*, 367 S.E.2d 478 (Va. 1988) (holding section does not extend to awards of punitive damages in property damage cases).

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

See II. A. above.

C. What is the relationship of punitive to compensatory damages?

A finding of compensatory damages is a necessary prerequisite to an award of punitive damages. See *Murray v. Hadid*, 385 S.E.2d 898 (Va. 1989); *O’Brien v. Snow*, 210 S.E.2d 165 (Va. 1974). The amount of punitive damages awarded should bear some reasonable relationship to actual damages. *Poulston v. Rock*, 467 S.E.2d 479 (Va. 1996); *Gazette, Inc. v. Harris*, 325

S.E.2d 713 (Va. 1985); see also *Johnson v. Hugo’s Skateway*, 974 F.2d 1408 (Fourth Cir. 1992) (punitive damages awards should be proportional to the award of compensatory damages given in a particular case, that do not afford double recovery to the plaintiff, and that are given only after consideration of the effect of the award on the defendant).

D. Are there any statutory caps or limitations on the amount of punitive damages that may be awarded?

The total amount awarded for punitive damages against all defendants shall not exceed \$350,000. VA. CODE ANN. § 8.01-38.1. (2010). In the medical malpractice context, the total amount of recoverable damages, including punitive damages, for any injury to a single patient is capped at \$2,000,000. VA. CODE ANN. § 8.01-581.15. (2003).

E. To whom are punitive damages payable?

Punitive damages are payable to the plaintiff. In wrongful death cases they are payable to the spouse, children, children of deceased children of decedent, or other surviving statutory beneficiaries. See *Carroll v. Sneed*, 179 S.E.2d 620 (Va. 1971).

PUNITIVE DAMAGES REVIEW

Washington



I. PUNITIVE DAMAGES

A. May they be awarded?

No. An award of punitive damages is not in accord with Washington law. *Dailey v. N. Coast Life Ins. Co.*, 919 P.2d 589, 590 (Wash. 1996) (*en banc*). Recovery of punitive damages is contrary to public policy and will not be allowed unless expressly authorized by state statute. *Barr v. Interbay Citizens Bank*, 635 P.2d 441 (Wash. 1981); *Dailey, supra*, 919 P.2d at 590-91. However, punitive damages may be awarded under the law of another state. See *Kammerer v. W. Gear Corp.*, 635 P.2d 708 (Wash. 1981) (a Washington state court may award punitive

damages under the law of another state). When determining whether to apply the law of the other state in connection with punitive damages, a court considers whether the other state has the most significant relationship to the occurrence and the parties. *Kammerer, supra*, 635 P.2d at 711-712; *Barr v. Interbay Citizens Bank, supra*, 635 P.2d 441 at 443, 96 Wash. 2d 692 at 697-698 (Wash. 1981).

B. If so, in what circumstances?

See I. A. above.

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

Not Applicable. See I. A. above. However, insurance coverage for punitive damages assessed under the law of another state does not violate public policy in Washington. *Fluke Corp. v. Hartford Accident & Indem. Co.*, 34 P.3d 809 at 815, 2001 WL 1472609, No. 70519-4 (November 21, 2001).

Where punitive damages have already been awarded under the law of a jurisdiction that allows them, Washington will uphold an insurance policy that provides coverage for punitive damages. *Id.* Washington's disapproval of punitive damages will not result in a finding that coverage for punitive damages contravenes public policy. *Id.*; see also *Va. Mason Med. Ctr. v. Executive Risk Indem. Inc.*, 2007 U.S. Dist. (LexisNexis 85724), *10-11 (W.D. Wash. 2007).

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

Not applicable. See II. A. above.

C. What is the relationship of punitive to compensatory damages?

Not applicable. See I. A. above.

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

Not applicable. See I. A. above.

E. To whom are punitive damages payable?

Not applicable. See I. A. above.

West Virginia



I. PUNITIVE DAMAGES

A. May they be awarded?

Yes. Punitive damages are allowed in West Virginia. See *Capper v. Gates*, 454 S.E.2d 54 (W. Va. 1994); *Goodwin v. Thomas*, 403 S.E.2d 13 (W. Va. 1991).

B. If so, in what circumstances?

Standard of Conduct. Punitive damages are warranted "if the defendant has acted wantonly or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations." *Mayer v. Frobe*, 22 S.E. 58 (W. Va. 1895); intentional or reckless misconduct will also support an award of punitive damages. See *Painter v. Raines Lincoln Mercury*, 323 S.E.2d 596 (W. Va. 1984); *Harless v. First Nat'l Bank*, 289 S.E.2d 692 (W. Va. 1982).

Standard of Proof. Proof by a preponderance of evidence will suffice to sustain a punitive damages award. See *Goodwin v. Thomas*, 184 W. Va. 611, 403 S.E.2d 13 (1991); *Wells v. Smith*, 297 S.E.2d 872 (W. Va. 1982), *overruled on other grounds by* *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W.Va. 1991); *Bond v. City of Huntington*, 276 S.E.2d 539 (W. Va. 1981).

Actions Against State. No governmental agency may be subject to an award of punitive damages in any judicial proceeding. W. Va. Code § 55-17-1 (2010). Punitive damages are not allowed in an action against a political subdivision or its employees. W. Va. Code § 29-12A-7.

Breach of Contract. Punitive damages are not recoverable in an action for breach of contract unless the breach amounts to an independent, intentional tort. *Berry v. Nationwide Mut. Fire Ins. Co.*, 381 S.E.2d 367 (W. Va. 1989); *Cotton v. Otis Elevator Co.*, 627 F. Supp. 519 (S.D. W.Va. 1986); see also *Warden v. Bank of Mingo*, 176 W. Va. 60, 341 S.E.2d 679 (1986); *Hayseeds Inc. v. State Farm Fire & Cas.*, 352 S.E.2d 73 (W. Va. 1986) (actual malice must be proven); *Shamblin v. Nationwide Mutual Ins. Co.*, 183 W. Va. 585, 396 S.E.2d 766 (1990).

Employer Liability for Employee Conduct. Under West Virginia law, punitive damages may be awarded if an employer knowingly hires an incompetent employee who commits wanton and willful or malicious acts in the scope of employment. *Addair v. Hyffman*,

156 W. Va. 592, 601 (1973). A federal trial court determined that, under long-standing West Virginia precedent, punitive damages may not be awarded under West Virginia law against the employer merely because of the existence of an employee-employer relationship. *Baker v. Wheat First Securities*, 643 F. Supp. 1420, 1427 (S.D. W. Va. 1986).

Environmental Liability. Landowners may seek punitive damages, in addition to the treble damage award available by statute, for wrongfully damaged or removed timber, trees, logs, growing plants, or products of growing plants. W. Va. Code § 61-3-48a; *Bullman v. D & R Lumber Co.*, 464 S.E.2d 771 (W. Va. 1995). There must be evidence that the defendant acted maliciously, willfully or wantonly. *Hadley v. Hathaway*, 439 S.E.2d 459 (W.Va. 1993).

General Liability. Punitive damages may be recovered when a person driving while under the influence of alcohol injures another person. *Wilt v. Buracker*, 443 S.E.2d 196 (W.Va. 1993).

Insurer's Bad Faith. Punitive damages are recoverable for an insurer's bad faith. *Poling v. Motorists Mut. Ins. Co.*, 450 S.E.2d 635 (1994).

Product Liability. Punitive damages may be awarded in an action for product liability. *Davis v. Celotex Corp.*, 420 S.E.2d 557 (W. Va. 1992).

Professional Liability. In medical malpractice cases, punitive damages are not permitted unless the plaintiff shows that the defendant acted in a wanton, willful or reckless manner, or with criminal indifference to civil obligations affecting the rights of others. *Michael v. Sabado*, 453 S.E.2d 419 (W. Va. 1994). Punitive damages are also permitted by statute against any nursing home or assisted living residence that deprives a resident of any right. W. Va. Code § 16-5C-15(c), (d) (LexisNexis 2010).

Wrongful Death. Punitive damages may be recovered in an action for wrongful death. *Bond v. City of Huntington*, 276 S.E.2d 539, 545 (W.Va. 1981).

PUNITIVE DAMAGES REVIEW

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

Yes, insurance coverage of punitive damages is permitted under West Virginia law. See *Cont'l Hensley v. Erie Ins. Co.*, 283 S.E.2d 227 (W. Va. 1981) (insurer was required to pay under policy extending coverage for punitive damages awards against its insured, where the insured's action was the result of gross, reckless or wanton conduct). See also *Perry v. Melton*, 299 S.E.2d 8 (W. Va. 1982) (the fact that punitive damages may be paid by a liability insurer is no reason to deny their recovery).

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

Not applicable. See II. A. above.

C. What is the relationship of punitive damages to compensatory damages?

A finding of compensatory damages is an indispensable predicate to a finding of punitive damages, and punitive damages must bear reasonable proportion to compensatory damages. *Garnes v. Fleming Landfill*, 413 S.E.2d 897 (W. Va. 1991). Punitive damages should be in excess of profits reaped by the defendant and should discourage future bad acts. *Copper v. Gates*, 454 S.E.2d 54 (W. Va. 1994).

D. Are there any other statutory caps or limitations on the amount of punitive damages that may be awarded?

There is no statutory cap or limitation on the amount of punitive damages that may be awarded in West Virginia.

W. VA. CODE § 55-7B-8 limits compensatory damages for non-economic loss to \$250,000 in general, but allows up to \$500,000 in death, loss of limb, or permanent incapacitation cases. These base limits have been adjusted annually for inflation per the statute since 2004.

West Virginia cases specify guidelines for review of punitive damages awards. In *Garnes v. Fleming Landfill*, *supra*, the court followed *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 111 S. Ct. 1032 (1991), and set forth an extensive system for reviewing punitive damages awards.

The factors to be considered by the jury include the following: (1) punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually occurred; (2) the reprehensibility of the defendant's conduct; (3) if the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit; (4) as a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages; and (5) the financial position of the defendant. See also *Kessel v. Leavitt*, 511 S.E.2d 720 (W. Va. 1998).

E. To whom are punitive damages payable?

Punitive damages are payable to the plaintiff alone.



I. PUNITIVE DAMAGES

A. May they be awarded?

Yes, punitive damages are available under Wisconsin law. WIS. STAT. ANN. § 895.043 (LexisNexis 2010); *Reyes v. Greatway Ins. Co.*, 582 N.W.2d 480 (Wis. 1998); *Mgmt. Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 557 N.W.2d 67 (Wis. 1996); *McWilliams v. Bragg*, 3 Wis. 424 (1854). See *Markes v. Frey-Rude & Assoc., Inc.*, 481 N.W.2d 707 (Wis. Ct. App. 1992).

B. If so, in what circumstances?

Standard of Conduct. Wisconsin's punitive damages statute requires proof of malice or an intentional disregard of the plaintiff's rights to obtain a punitive damages award. WIS. STAT. ANN. § 895.043 (3) (West 2007); see *Ervin v. Kenosha*, 464 N.W.2d 654 (Wis. 1991); *Collins v. Eli Lilly Co.*, 342 N.W.2d 37, 116 Wis. 2d 166, cert. denied, 469 U.S. 826 (1984); *Poling v. Wis.*

Physicians Serv., 357 N.W.2d 293 (Wis. 1984). However, the courts have stated that malice or vindictiveness is no longer necessary so long as it is shown that the wrongdoer acted with wanton, willful or reckless disregard of the plaintiff's rights. *Majorowicz v. Allied Mut. Ins. Co.*, 569 N.W.2d 472 (Wis. 1997); see also *Sch. Dist. of Shorewood v. Wausau Ins. Cos.*, 488 N.W.2d 82 (Wis. 1992); see also *Weiss v. United Fire & Cas. Co.*, 541 N.W.2d 753 (Wis. Ct. App. 1995); *Soderbeck v. Burnett County*, 752 F.2d 285 (Seventh Cir. 1985), cert. denied, 471 U.S. 1117 (1985) (defendant's conduct that implies punitive damages award is conspicuous and apparent to a person who engages in it). *Brown v. Maxey*, 369 N.W. 2d 677 (Wis. 1985).

Mere negligence is not enough to warrant punitive damages. *Radford v. J.J.B. Enters., Ltd.*, 472 N.W.2d 790 (Wis. 1991); *Wangen v. Ford Motor Co.*, 294 N.W.2d 437 (Wis. 1992). Yet intent is not a prerequisite to award punitive damages. *Lundin v. Shimanski*, 368 N.W.2d 676 (Wis. 1985); *Brown*, 369 N.W.2d 677, *supra*; see *Daniel J. Hartwig Assoc., Inc. v. Kanner*, 913 F.2d 1213 (7th Cir. 1990).

Standard of Proof. Clear and convincing evidence, also described as conclusion to a reasonable certainty, is required to obtain punitive damages. *Sharp v. Case Corp.*, 595 N.W.2d 380 (Wis. 1999).

Actions Against State. Claims for punitive damages are not allowed against governmental bodies, officers, agents or employees. Wis. STAT. § 893.80 (2010).

Breach of Contract. Punitive damages are not available in a breach of contract action unless the breach amounts to an independent tort. *Weiss*, 541 N.W.2d 753, *supra*; *Anderson v. Cont'l Ins. Co.*, 271 N.W.2d 368 (Wis. 1978); *White Hen Pantry, Div. Jewel Cos. v. Johnson*, 599 F. Supp. 718 (E.D. Wis. 1984); see also *N. Mech., Inc. v. Labor & Indus. Review Com.*, 460 N.W.2d 835 (Wis. 1990), *abrogated on other grounds by Brown v. Labor and Industry Review Com'n.*, 671 N.W.2d 279 (Wis. 2003).

Employer Liability for Employee Conduct. Under Wisconsin law, there is no recovery of punitive damages against a defendant employer for the act of an employee without a showing that the employer authorized or ratified the act. *Garcia v. Samson's Inc.*, 103 N.W.2d 565, 567 (Wisc. 1960). Whether the employer ratified or authorized the acts of an employee is a question for the jury. *Id.*; see also *Bass v. Chicago & N.R. Co.*, 42 Wis. 654, 666 (1877) ("[An employer] is not liable to exemplary or punitive damages, unless he directed the injurious act to be done, or subsequently confirmed it. But if the principal directed the act, or, not directing it, if he subsequently adopted or confirmed it, the rule is recognized that he is liable to punitive damages.")

Environmental Liability. There is no law in Wisconsin expressly addressing the issue of punitive damages and environmental liability. However, in any civil action, punitive damages are generally permitted for "those personal torts, which are malicious, outrageous or a wanton disregard of personal rights which require the added sanction of a punitive damages [award] to deter others from committing acts against human dignity." *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 443 (Wis. 1980).

General Liability. Punitive damages may not be awarded simply because a creditor repossessed a vehicle despite the borrower's demands to the contrary. *Hollibush v. Ford Motor Credit Co.*, 508 N.W.2d 449 (Wis. Ct. App. 1993).

Insurer's Bad Faith. Punitive damages have been repeatedly allowed in insurance bad faith actions in Wisconsin. See *Majorowicz*, 569 N.W.2d 472; *DeChant v. Monarch Life Ins. Co.*, 547 N.W.2d 592 (Wis. 1996); *Schlussler v. Am. Family Mut. Ins. Co.*, 460 N.W. 2d 756 (Wis. 1990); *Upthegrove Hardware, Inc. v. Pa. Lumbermens Mut. Ins. Co.*, 431 N.W.2d 689 (Wis. 1988). In *Upthegrove Hardware*, evidence that insurance company investigators lied and knowingly destroyed possibly crucial evidence was held to rise to the level of "malice or ill will." The insured is not required to produce expert testimony at trial to prove bad faith. *Weiss*, 541 N.W.2d 753, *supra*.

Product Liability. Punitive damages are available in product liability actions. *Wangen*, 294 N.W.2d 437, *supra*.

Professional Liability. Punitive damages against an accounting firm were reduced from \$1,000,000 to \$650,000, as \$1,000,000 was determined to be excessive and violated the due process rights of the defendant. The accounting firm allegedly willfully copied the plaintiff's software without consent and used it in competition against the plaintiff. *Hawkins*, 557 N.W.2d 67, *supra*.

PUNITIVE DAMAGES REVIEW

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

Yes, insurance coverage of punitive damages is permitted in Wisconsin. *Brown v. Maxey*, 369 N.W.2d 677 (Wis. 1985) (policy language encompassed coverage for punitive damages; coverage did not violate public policy); *Hartland Cicero Mut. Ins. Co. v. Elmer*, 363 N.W.2d 252 (Wis. Ct. App. 1984) (punitive damages exclusion did not apply to statutory double damages); *Koehring Co. v. Am. Mut. Liab. Ins. Co.*, 564 F. Supp. 303 (E.D. Wis. 1983) (policy covered punitive damages; coverage did not violate Wisconsin public policy, as public policy in favor of enforcing contracts is at least as strong as policy underlying punitive damages award); *Harris v. Racine*, 512 F. Supp. 1273 (E.D. Wis. 1981) (county's liability policy covered punitive damages assessed against county police officer in civil rights action; coverage did not violate public policy); *Cieslewicz v. Mut. Servs. Cas. Ins. Co.*, 267 N.W.2d 595 (Wis. 1978) (homeowner's policy covered statutory treble damages assessed in dog bite case; coverage did not violate public policy).

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

Not applicable. See II. A. above.

C. What is the relationship of punitive to compensatory damages?

To support an award of punitive damages, a cause of action for compensatory damages must exist and actual damages must have been suffered. *Miller v. Wal-Mart Stores, Inc.*, 580 N.W.2d

233 (Wis. 1998); *Estate of Wells v. Mount Sinai Med. Ctr.*, 497 N.W.2d 779 (Wis. Ct. App. 1993). There is no mathematical formula for assessing punitive damages. *Fahrenberg v. Tengel*, 291 N.W.2d 516 (Wis. 1980). The plaintiff may introduce evidence of the wealth of the defendant when determining punitive damages. § 895.043 (a) (4) (a-b) (2010). Generally, there can be no award of punitive damages where the plaintiff is only entitled to nominal damages; however, a specific exception exists in an action for intentional trespass to land. *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154 (Wis. 1997).

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

There are no statutory caps on the amount punitive damages that may be awarded. An award for punitive damages, however, must not violate due process. A violation of due process occurs if the award is more than necessary to serve the purposes of punitive damages, or inflicts a penalty or burden on the defendant that is disproportionate to the wrongdoing. *Hawkins*, 557 N.W.2d 67, *supra*.

E. To whom are punitive damages payable?

Generally punitive damages are payable to the plaintiffs. See *Sharp Elecs. Corp. v. Copy Plus, Inc.*, 939 F.2d 513 (Seventh Cir. 1991). Punitive damages are recoverable by parents of injured children incidental to their action for compensatory damages. See *Estate of Wells*, 497 N.W.2d 779, *supra*; *Wangen*, 294 N.W.2d 437, *supra*.

Wyoming

I. PUNITIVE DAMAGES

A. May they be awarded?

Yes. Punitive damages may be imposed to further the state's legitimate interests in punishing unlawful conduct and deterring repetition. *Farmers Ins. Exch. v. Shirley*, 958 P.2d 1040 (Wyo. 1998); see also *Adel v. Parkhurst*, 681 P.2d 886 (Wyo. 1984).

B. If so, in what circumstances?

Standard of Conduct. Outrageous conduct, malice and willful and wanton misconduct have been found to be sufficient to warrant punitive damages. *Veschoor v. Mountain West Farm Bureau Mut. Ins. Co.*, 907 P.2d 1293 (Wyo. 1995); *Sheridan Commercial Park, Inc. v. Briggs*, 848 P.2d 811 (Wyo. 1993); *McCullough v. Golden Rule Ins. Co.*, 789 P.2d 855 (Wyo. 1990); *Alexander v. Meduna*, 47 P.3d 206, 218 (Wyo. 2002) (Such

damages are to be awarded only for conduct involving some element of outrage similar to that usually found in a crime.). Gross negligence does not amount to willful and wanton conduct, but intentional neglect of a statutory duty does rise to that level, if performed with a disregard for probable injury. See *Thunder Hawk by Jensen v. Union Pac. Ry. Co.*, 844 P.2d 1045 (Wyo. 1992); *McCullough*, 789 P.2d at 861. Award of punitive damages is not appropriate in circumstances involving inattention, inadvertence, thoughtlessness, mistake or gross negligence. *Vroman v. Town & Country Credit Corp.*, 158 P.3d 141 (Wyo. 2007). There "must be more than mere mistake resulting from inexperience, excitement or confusion, and more than mere thoughtlessness or inadvertence, or simple inattention." *Danculovich v. Brown*, 593 P.2d 187, 191 (Wyo. 1979).

Standard of Proof. There is no clear standard for proving punitive damages in Wyoming. The history of punitive damages in Wyoming demonstrates that juries are given very general instructions with respect to their determination of punitive damages. *Farmers Ins. Exch. v. Shirley*, 958 P.2d 1040, 1044-1045 (Wyo. 1998).

Actions Against State. Punitive damages are not recoverable against a governmental entity. Wyo. Stat. § 1-39-118 (2010).

Breach of Contract. An unjustified breach of contract does not entitle the opposing party to punitive damages. To obtain punitive damages in a breach of contract claim, there has to be action amounting to aggravation, outrage, malice or willful and wanton misconduct. *U.S. ex rel. Farmers Home Admin. v. Redland*, 695 P.2d 1031 (Wyo. 1985). A breach of implied covenant of good faith and fair dealing that rises to the level of independent tort may be actionable for punitive damages under limited circumstances. *State Farm Mut. Auto Ins. Co. v. Shrader*, 882 P.2d 813, 825 (Wyo. 1994); *McCullough v. Golden Rule Ins. Co.*, 789 P.2d 855, 858 (Wyo. 1990).

Employer Liability for Employee Conduct. Under Wyoming law, punitive damages may be awarded against an employer for the acts of an employee only if the plaintiff proves the following:

1. The particular act or conduct was authorized by the employer or a managerial agent; or
2. The employee was unfit, and the employer or a managerial agent acted recklessly in employing or retaining the employee; or
3. The employee was employed in a managerial capacity and was acting within the scope of employment at the time of the act; or

4. The employer or a managerial agent ratified or approved the employee's act.

Campan v. Stone, 635 P.2d 1121, 1125 (Wyo. 1981) (citing Restatement (Second) of Torts § 909 (1977) and Restatement (Second) of Agency § 217C (1958)). See also, *Condict v. Condict*, 664 P.2d 131, 136 (Wyo. 1983).

Environmental Liability. There is no law in Wyoming expressly addressing the issue of punitive damages and environmental liability. However, in any civil action, an award of punitive damages requires the wrongful conduct on the part of the defendant to be outrageous, with malice, or willful and wanton. *Veschoor v. Mountain West Farm Bureau Mut. Ins. Co.*, 907 P.2d 1293 (Wyo. 1995).

General Liability. No punitive damages were awarded against a landlord who detained leased property of a tenant from a secured creditor under a mistaken claim of right. *Sheridan Commercial Park, Inc. v. Briggs*, 848 P.2d 811 (Wyo. 1993). "If a plaintiff has failed to establish his basic cause of action, there is no separate cause of action for punitive damages alone." *Bird v. Rozier*, 948 P.2d 888 (Wyo. 1997) (plaintiff failed to claim valid cause of action against police department and the request for punitive damages was dismissed).

Insurer's Bad Faith. An insurer's breach of duty of good faith and fair dealing may entitle a plaintiff to an award for punitive damages. *State Farm Mut. Auto Ins. Co. v. Shrader*, 882 P.2d 813 (Wyo. 1994); *Cathcart v. State Farm Mut. Ins. Co.*, 123 P.3d 579 (Wyo. 2005).

Product Liability. In order to recover punitive damages, a plaintiff must make a showing that punitive damages are reasonably related to the harm that has occurred from the defendant's conduct, that there is a degree of reprehensibility in the defendant's conduct such as concealment of a hazard, or that the wrongful conduct was profitable to the defendant. *Loredo v. Solvay Am., Inc.*, 212 P.3d 614, 633 (Wyo. 2009) (citing *Alexander v. Meduna*, 47 P.3d 206, 219 (Wyo. 2002)).

Professional Liability. There is no entitlement to punitive damages for negligent misrepresentation by an insurance agent concerning coverage under a policy. *Veschoor v. Mountain W. Farm Bureau Mut. Ins. Co.*, 907 P.2d 1293, 1301 (Wyo. 1995). Punitive damages may be available if an attorney's misconduct involved more than simple negligence and was, instead, outrageous, malicious and/or willful and wanton. *Horn v. Wooster*, 165 P.3d 69 (Wyo. 2007).

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?

Yes, insurance coverage of punitive damages is permitted under Wyoming law. See *Sinclair Oil Corp. v. Columbia Cas.*, 682 P.2d 975 (Wyo. 1984) (policy covered punitive damages; coverage did not violate public policy).

B. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

Not applicable. See II. A. above.

C. What is the relationship of punitive to compensatory damages?

Actual damages are needed to support a punitive damages award, and punitive damages cannot be awarded when compensatory damages are not recoverable. *Alexander v. Meduna*, 47 P.3d 206, 218 (Wyo. 2002); *Bear v. Volunteers of Am., Wyo., Inc.*, 964 P.2d 1245, 1255 (Wyo. 1998); *Cates v. Barb*, 650 P.2d 1159, 1161 (Wyo. 1982). There is no fixed ratio between actual damages and punitive damages, but the punitive award must not be so disproportionate to the actual damages as to be the result of prejudice or passion instead of reason. *Danculovich v. Brown*, 593 P.2d 187, 191 (Wyo. 1979); *Petsch v. Florom*, 538 P.2d 1011 (Wyo. 1975).

D. Are there any statutory caps or other limitations on the amount of punitive damages that may be awarded?

Although there is no statutory cap, an award of punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct, as well as to the harm actually caused. *Farmers Ins. Exch. v. Shirley*, 958 P.2d 1040, 1044 (Wyo. 1998); see also *BMW of N. Am. v. Gore*, 517 U.S. 559 (1995).

E. To whom are punitive damages payable?

Generally, an award of punitive damages is payable to the plaintiffs. *State Farm Mut. Auto Ins. Co. v. Shrader*, 882 P.2d 813 (Wyo. 1994).

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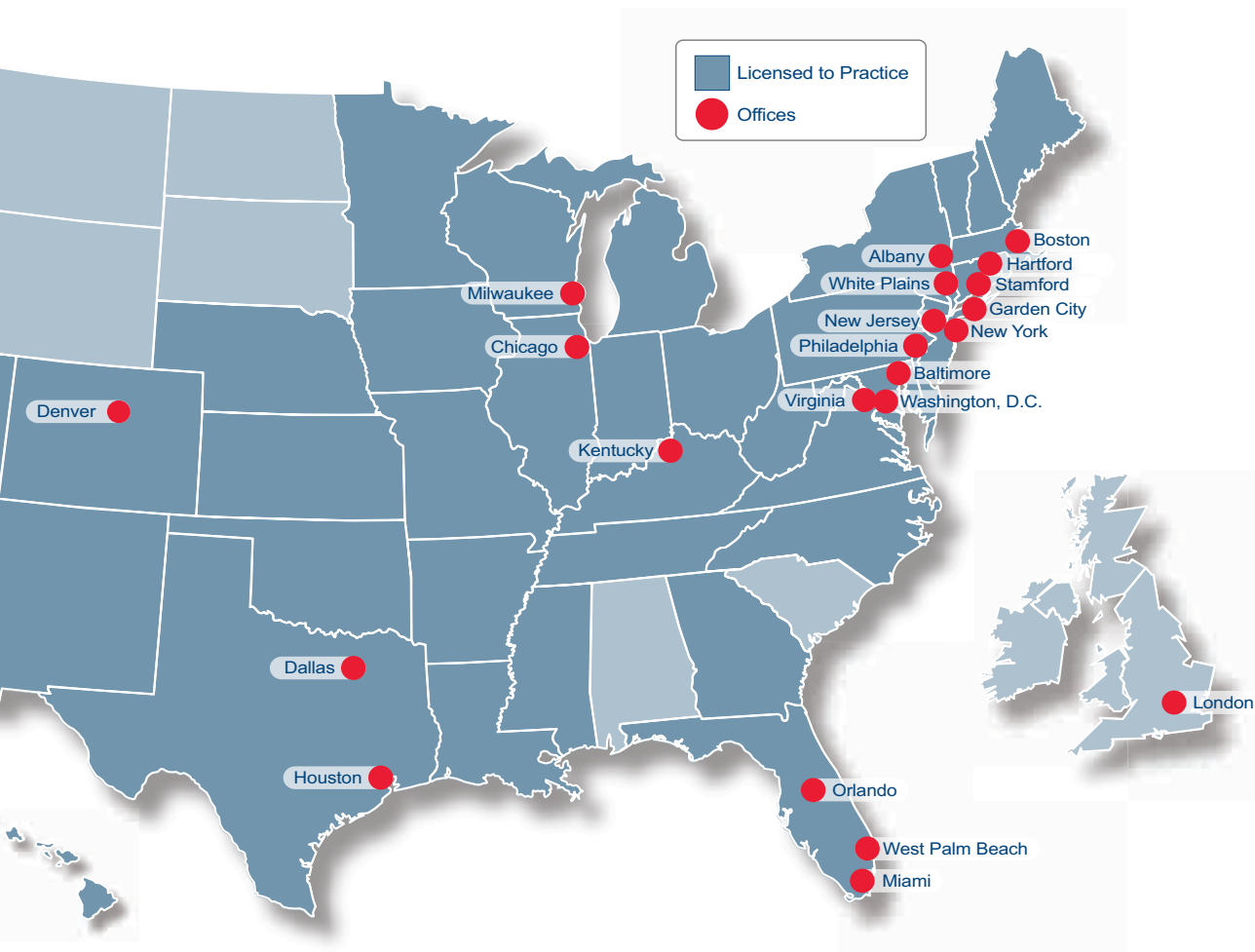
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