Punitive Damages Review

2011 Edition
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<td>Alabama</td>
<td>Yes</td>
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<tr>
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<td>Yes</td>
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<td>Arkansas</td>
<td>Yes</td>
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<td>California</td>
<td>Yes</td>
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<td>Colorado</td>
<td>Yes</td>
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<td>Yes</td>
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<td>Delaware</td>
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<td>District of Columbia</td>
<td>Yes</td>
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<td>Florida</td>
<td>Yes</td>
</tr>
<tr>
<td>Georgia</td>
<td>Yes</td>
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<tr>
<td>Hawaii</td>
<td>Yes</td>
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<tr>
<td>Idaho</td>
<td>Yes</td>
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<tr>
<td>Illinois</td>
<td>Yes</td>
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<tr>
<td>Indiana</td>
<td>Yes</td>
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<tr>
<td>Iowa</td>
<td>Yes</td>
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<tr>
<td>Kansas</td>
<td>Yes</td>
</tr>
<tr>
<td>Kentucky</td>
<td>Yes</td>
</tr>
<tr>
<td>Louisiana</td>
<td>Yes, but only by statute</td>
</tr>
<tr>
<td>Maine</td>
<td>Yes</td>
</tr>
<tr>
<td>Maryland</td>
<td>Yes</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>Yes</td>
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<tr>
<td>Michigan</td>
<td>No</td>
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<tr>
<td>Minnesota</td>
<td>Yes</td>
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<tr>
<td>Mississippi</td>
<td>Yes</td>
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<td>Yes</td>
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<td>Yes</td>
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<tr>
<td>Nebraska</td>
<td>No</td>
</tr>
<tr>
<td>Nevada</td>
<td>Yes</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>No, except by statute in limited circumstances</td>
</tr>
<tr>
<td>New Jersey</td>
<td>Yes</td>
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<td>New Mexico</td>
<td>Yes</td>
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<td>New York</td>
<td>Yes</td>
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<td>Rhode Island</td>
<td>Yes</td>
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<tr>
<td>South Carolina</td>
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<tr>
<td>South Dakota</td>
<td>Yes, by statute</td>
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<td>Tennessee</td>
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<tr>
<td>Texas</td>
<td>Yes</td>
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<tr>
<td>Utah</td>
<td>Yes</td>
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<tr>
<td>Vermont</td>
<td>Yes</td>
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<td>Virginia</td>
<td>Yes</td>
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<tr>
<td>Washington</td>
<td>No</td>
</tr>
<tr>
<td>West Virginia</td>
<td>Yes</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>Yes</td>
</tr>
<tr>
<td>Wyoming</td>
<td>Yes</td>
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</table>
Punitive Damages Overview

As the name suggests, “punitive damages” are a form of punishment. Generally, for punitive damages to be awarded, the defendant’s conduct would have to be found to be malicious, wanton, intentional, outrageous or reckless. The award of punitive damages is specifically not to benefit the plaintiff or plaintiffs, nor in the vast majority of jurisdictions, to compensate them. Instead, the focus of a punitive award is to deter the defendant’s future conduct, or the future conduct of others, by applying an extra level of damages.

Punitive damages in the United States developed through the common law. While most states allow punitive damages to be awarded, a majority of states have, by statute, placed some limitation on the imposition of punitive damages. The availability of punitive damages in each state will be examined herein.

Obtaining a Punitive Damages Award

Any private defendant in a civil litigation is exposed to the risk of a punitive damage award. In a civil trial seeking money damages, the plaintiff will seek to prove the defendant’s negligent, reckless and/or intentional conduct to establish the defendant’s liability. In most civil matters, the plaintiff will have to prove the defendant’s liability by a preponderance of the evidence. The plaintiff will also submit evidence of the damages that were sustained.

There may be areas of damages (i.e., pain and suffering) where a jury has wide discretion in the amount that it can award. This, however, has no impact upon a jury’s ability to award punitive damages in addition to the compensatory damages awarded by the jury.

Unlike the damages phase of a civil liability trial, which focuses on the damages sustained by the plaintiff, the main focus on whether to award punitive damages and the amount of punitive damages awarded is the defendant’s conduct. While the burden of proof varies from state to state, the majority of states impose a higher burden of proof on a plaintiff to prove that punitive damages should be awarded against a defendant. In this regard, most states require the plaintiff to prove by clear and convincing evidence that the defendant acted in a willful, intentional, malicious, wanton and/or reckless manner before allowing an award of punitive damages.

As discussed in greater detail herein, each state has numerous (and often different) pleading and evidentiary requirements that must be met before the question of punitive damages reaches a jury. Some jurisdictions permit the submission of evidence of the defendant’s net worth prior to arriving at the amount of punitive damages to be awarded. Some argue that an analysis of a defendant’s net worth allows a jury to award an amount that would have a meaningful deterrence effect on that defendant and would also guard against a jury awarding a punitive award that would force a defendant into bankruptcy. At least one jurisdiction (Alabama) places a statutory limitation on punitive damages that is directly tied to the defendant’s net worth.

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

In most U.S. jurisdictions, the awarded punitive damage amount is paid to the plaintiff, notwithstanding that a jury has already fully compensated the plaintiff through the jury's compensatory damage award. Some believe that this represents an undeserved windfall to a plaintiff, as the plaintiff has already received a compensatory award.

As punitive damages are not considered compensatory damages, most states, as well as the federal government, will consider punitive damages as part of the plaintiff's taxable income. Through taxation, the state and federal governments share in a plaintiff's punitive damage recovery. In addition, some states, by statute, directly share in a jury's punitive damage award by requiring a percentage of the award be paid directly to a state agency.

Toward this end, the following states are de facto partners with plaintiffs that obtain punitive damages recovery:

<table>
<thead>
<tr>
<th>State</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alaska</td>
<td>75%</td>
</tr>
<tr>
<td>Georgia</td>
<td>75%</td>
</tr>
<tr>
<td>Illinois</td>
<td>In the Court's Discretion</td>
</tr>
<tr>
<td>Indiana</td>
<td>75%</td>
</tr>
<tr>
<td>Iowa</td>
<td>50% in Certain Circumstances</td>
</tr>
<tr>
<td>Missouri</td>
<td>50%</td>
</tr>
<tr>
<td>Oregon</td>
<td>60%</td>
</tr>
<tr>
<td>Utah</td>
<td>50% after Attorney Fee Payment</td>
</tr>
</tbody>
</table>

As reflected above, of the eight states that can share in a plaintiff’s award, four states provide themselves with more than 50 percent of the jury’s award. Illinois is the only state where it is in the trial judge’s sole discretion as to the percentage of punitive damages that will be retained by the plaintiff.

State Statutory Limitations on Punitive Damage Awards

Prior to the 1960s, punitive damage awards were rare. In the last five decades, punitive damage awards have become more common, with a number of punitive damage awards grabbing headlines due to their significant size. Some of these awards, such as the millions awarded against O.J. Simpson in the civil trial against him, will never be collected. The publicity generated by outsized punitive awards, however, becomes part of the general consciousness of jury pools that may be called upon in the future to determine appropriate punitive damage awards.

As a result of outsized punitive damage awards, most state legislatures have enacted statutes that limit the imposition of punitive damage awards. Many states only allow punitive awards to be considered in certain types of cases, impose stricter pleading requirements, and/or require a higher burden of proof. A majority of states do not allow punitive damages to be awarded at all, unless compensatory damages are awarded.

In addition, a growing number of jurisdictions have enacted 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.

As discussed more fully within each state's review herein, the states that contain punitive damage caps are as follows:

Footnotes for table on page 5:

1 If the defendant is a small business (defined as having a net worth of two million dollars or less), no award of punitive damages may exceed $50,000, or 10 percent of the business's net worth, whichever is greater. This section does not apply to class actions for wrongful death, or actions for intentional infliction of physical injury.
2 In certain circumstances, may allow a recovery not exceeding $7 million.
3 Punitive damages can also be capped at three times the amount expended by the state to take proper action, including abatement or remediation that should have been taken by the party.
4 Only applies with respect to awards against municipalities, state student loan authority and state home mortgage finance authority.
5 No cap applies if the defendant's conduct resulted in a felony conviction and/or if the defendant was under the influence of alcohol or drugs.
6 Whichever is less.
7 These specific limitations do not apply to a manufacturer, distributor or seller of a defective product; to an insurer who acts in bad faith; to a person violating certain discriminatory housing laws; to a person responsible for certain types of pollution; and to a person for defamation.
8 Does not apply to biased acts, discrimination, AIDS testing disclosure, sexual abuse or drunken driving.
9 Does not apply to actions under the “Driving While Impaired” statutes.
10 Caps do not apply to actions resulting from an intentional tort, malice or when criminal conduct is proven.
<table>
<thead>
<tr>
<th>State</th>
<th>Dollar Cap</th>
<th>Multiple of Compensatory</th>
<th>Type of Case/Other Limitation</th>
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<tbody>
<tr>
<td>Alabama</td>
<td>$500,000</td>
<td>3 x compensatory</td>
<td>Nonphysical injury.</td>
</tr>
<tr>
<td></td>
<td>$1,500,000</td>
<td>3 x compensatory</td>
<td>Physical injury.</td>
</tr>
<tr>
<td>Alaska</td>
<td>$500,000</td>
<td>3 x compensatory</td>
<td>Several limitations.</td>
</tr>
<tr>
<td>Arkansas</td>
<td>$250,000</td>
<td>3 x compensatory</td>
<td>Not to exceed $1 million.</td>
</tr>
<tr>
<td>Colorado</td>
<td>n/a</td>
<td>1 x compensatory</td>
<td>Can increase to 3 x compensatory.</td>
</tr>
<tr>
<td>Connecticut</td>
<td>n/a</td>
<td>n/a</td>
<td>Limited to litigation expenses, with certain exceptions.</td>
</tr>
<tr>
<td>Florida</td>
<td>$500,000</td>
<td>3 x compensatory</td>
<td></td>
</tr>
<tr>
<td></td>
<td>$2 million</td>
<td>n/a</td>
<td>If unreasonable financial gain or if likelihood of injury was known.</td>
</tr>
<tr>
<td>Georgia</td>
<td>$250,000</td>
<td>n/a</td>
<td>Does not apply to product liability cases or if intent to harm is proved.</td>
</tr>
<tr>
<td>Idaho</td>
<td>$250,000</td>
<td>3 x compensatory</td>
<td></td>
</tr>
<tr>
<td>Indiana</td>
<td>$50,000</td>
<td>3 x compensatory</td>
<td></td>
</tr>
<tr>
<td>Iowa</td>
<td>n/a</td>
<td>3 x clean-up costs</td>
<td>Applies only to environmental cases.</td>
</tr>
<tr>
<td>Kansas</td>
<td>$5 million</td>
<td>n/a</td>
<td>3 x defendant's annual gross income or 1.5 times profit.</td>
</tr>
<tr>
<td>Maine</td>
<td>$75,000</td>
<td>n/a</td>
<td>Wrongful death actions.</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>$100,000</td>
<td>n/a</td>
<td>3 x clean-up costs Environmental cases.</td>
</tr>
<tr>
<td>Mississippi</td>
<td>2% of defendant’s net worth to $20 million depending on net worth.</td>
<td>Only applies to certain actions.</td>
<td></td>
</tr>
<tr>
<td>Montana</td>
<td>$10 million</td>
<td>3% of net worth</td>
<td>Does not apply to class actions.</td>
</tr>
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<td>Nevada</td>
<td>$300,000 if compensatory is less than $100,000</td>
<td>3 x compensatory damages if compensatory is in excess of $100,000.</td>
<td></td>
</tr>
<tr>
<td>New Jersey</td>
<td>$350,000</td>
<td>5 x compensatory</td>
<td></td>
</tr>
<tr>
<td>North Carolina</td>
<td>$250,000</td>
<td>3 x compensatory</td>
<td></td>
</tr>
<tr>
<td>North Dakota</td>
<td>$250,000</td>
<td>2 x compensatory</td>
<td></td>
</tr>
<tr>
<td>Ohio</td>
<td>$350,000</td>
<td>2 x compensatory</td>
<td>10% of defendant’s net worth.</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>$100,000</td>
<td>1 x compensatory</td>
<td>Different caps or no caps apply depending on acts committed.</td>
</tr>
<tr>
<td></td>
<td>$500,000</td>
<td>2 x compensatory</td>
<td></td>
</tr>
<tr>
<td>Oregon</td>
<td>n/a</td>
<td>4 x compensatory</td>
<td>Cap applies only to cases in which harm is purely economic.</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>n/a</td>
<td>2 x compensatory</td>
<td>Willful and malicious misappropriation cases.</td>
</tr>
<tr>
<td>Texas</td>
<td>$200,000</td>
<td>2 x economic damages up to $750,000</td>
<td></td>
</tr>
<tr>
<td>Utah</td>
<td>n/a</td>
<td>3 x compensatory</td>
<td></td>
</tr>
<tr>
<td>Virginia</td>
<td>$350,000</td>
<td>n/a</td>
<td></td>
</tr>
</tbody>
</table>

Many argue that the various caps and restrictions placed on punitive damage awards have not gone far enough.
Federal Statutory Limitations on Punitive Damage Awards

There is no federal statute that prohibits or limits the imposition of punitive damages that a jury could award based upon the state’s common law or violation of state statute. There are numerous federal statutes that specifically allow punitive awards and/or specifically limit or prohibit the imposition of punitive damages. Otherwise, the courts have had to interpret whether punitive awards are available with respect to federal statutes that are silent as to whether such damages can be awarded.

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 USC §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 can also 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.

Constitutional Limitations on Punitive Damage Awards

The federal courts have taken an active role in attempting to address whether the imposition of significant punitive damages against a defendant is a violation of the U.S. Constitution. The main constitutional argument against excessive punitive damage awards is that such awards violate the Constitution’s Fourteenth Amendment, which prohibited the taking of property without due process. The U.S. Supreme Court in TXO Productions Corp. v. Alliance Res. Corp., 509 U.S. 443 (1993) stated that the due process clause of the Fourteenth Amendment to the U.S. Constitution prohibits a state from imposing a “grossly excessive” punishment on a person held liable in tort. According to the court, whether a verdict is grossly excessive must be based on an identification of the state interests that a punitive award is designed to serve. If the award is disproportionate to the interests served, it violates due process.

The Supreme Court has not set a bright line test as to a maximum punitive damage award that would be sustainable under the Constitution. The court, however, set forth several factors in BMW of North America, Inc. v. Gore, 517 U.S. 559; 116 S. Ct. 1589; 134 L. Ed 2d 809 (1996) that have been reiterated in the court’s subsequent decisions. The factors that a reviewing court will look at include:

1) The level of the defendant’s conduct; and
2) The ratio of punitive damages to the plaintiff’s damages; and
3) The difference between the punitive award and the civil/criminal penalty that could be imposed for similar misconduct.


In BMW, the defendant allegedly failed to disclose that a new car purchased by the plaintiff had been repainted. The Supreme Court in BMW suggested that it would be unconstitutional for there to be a punitive award that was more than nine times the compensatory award. The court found a $4 million punitive damage award (reduced to $2 million by the Alabama Supreme Court) “grossly excessive” when compared to the $4,000 compensatory damage award.

The Supreme Court, however, indicated in Campbell 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 were egregious acts, but only a small amount of compensatory damages were awarded. In Campbell, the Supreme Court suggested that a lesser ratio, perhaps a 1-to-1 ratio, 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 damage award (which was previously reduced in 2000 to $2.5 billion by the 9th Circuit Court of Appeals). The Exxon case concerned an Exxon oil tanker’s collision with a reef and 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 that were injured by the oil spill. It was claimed that the collision with the reef was the result of Exxon allowing its vessel (the Valdez) to be operated by a known alcoholic, who, unknown to Exxon at the time, was intoxicated while operating the vessel.

4 Courts 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.
5 On remand, the Alabama court reduced the award to $50,000; which was technically outside the Supreme Court’s suggested maximum ratio of nine times the compensatory award ($4,000 x 9 = $36,000).
Valdez. At trial, the jury awarded $507.5 million of compensatory damages as well as $5 billion in punitive damages.

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-to-1 ratio that was allowed by the 9th Circuit Court of Appeals), but instead applied federal maritime law as to the amount of punitive damages that would be allowed. In doing so, 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 limited to maritime matters. Proponents of limiting the size of punitive damage awards, however, opine that the decision in Exxon will be given greater weight in nonmaritime matters.

The Supreme Court in Exxon appears to have followed its precedent from BMW and subsequent cases in limiting punitive damage awards. In this regard, the Supreme Court in Exxon appears to have followed its own suggestion in Campbell to use a 1-to-1 ratio with compensatory damages, where compensatory damages are substantial.

Other key constitutional arguments also are available, including challenges based on the Commerce Clause of the U.S. Constitution. These arguments provide meaningful traction for favorable settlement before and during trial, increase a defendant’s chance of prevailing at trial, and provide a strong basis for relief on appeal if needed.

It is of the utmost importance that defendants facing punitive damages present evidence at trial that creates a strong record on constitutional issues. Both fact and expert testimony on key constitutional points needs to be developed and presented to protect a punitive damages defendant from an unfair and unconstitutional punitive damage verdict.

Unprepared defendants can be subjected to bankrupting punitive damage awards. In most jurisdictions, a bond is required to secure the verdict amount as a condition for staying execution of the judgment while the verdict is appealed. In other words, to keep the plaintiff from requiring the defendant to pay the judgment immediately, an appeal bond must be obtained and posted with the court. Appeal bonds are typically for the amount of the judgment or as much as 1.5 times the amount of the judgment. As a result, the more excessive and unfair the punitive damage award, the more difficult it will be for a defendant to afford an appeal bond. When this issue is identified quickly, challenges to the bond for the punitive damage award can and should be made.

**Insurability of Punitive Damages**

As indicated in our state-by-state punitive damage analysis herein, the states are almost evenly split as to whether punitive damages are insurable. Of the jurisdictions that allow punitive damage awards to be insured, many will only allow an insurer to pay a punitive damage award when the defendant is responsible for such an award as a result of vicarious liability.

There are several arguments against allowing the insurability of punitive damage awards. For example, allowing punitive damages to be insured, arguably, frustrates the purpose of punishing the wrongdoer for its bad conduct and deterring such conduct by that entity, and by others, in the future. Some states, even where punitive damages are insurable, will limit punitive damage awards to a percentage of the defendant’s net worth (i.e., Montana).

Corporations understandably concerned with the unpredictability of a punitive damage award, particularly an outsized punitive damage award, have often sought to obtain punitive damages coverage from their insurers. When such coverage is sought, care must be taken to assure compliance with various states’ regulations impacting insurance coverage for punitive damages.

For many corporations operating in various jurisdictions in the United States, policies will contain provisions that specifically apply only one state’s law to the interpretation of an insured’s policy, including the coverage available for punitive damage awards. These choice-of-law provisions allow an insurer and insured to apply the law of one state in interpreting the insured’s coverage, regardless of the jurisdiction in which the insured is a defendant. Not uniformly applying one state’s law would possibly subject one insurance policy to more than 50 different interpretations. For policies that include coverage for punitive damages, these choice-of-law provisions will usually designate a state’s law that allows the insurability of punitive damages.

**Taxation of Punitive Damages**

Generally, punitive damages are taxable. See O’Gilvie v. U.S., 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); Hawkins v. U.S., 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); Brabson v. U.S., 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C § 104(a)(2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C § 104 (2010).
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 Cnty. 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).

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 Agreements. A predispute 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 So2d 401 (Ala. 1996).

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 only be awarded in a civil action for tort 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, 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).

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).

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 law 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 two million dollars 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 one million five hundred thousand dollars ($1,500,000), whichever is greater. § 6-11-2 (d).

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

E. Are punitive damages taxable?

Yes. O’Gilvie v. U.S., 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); Hawkins v. U.S., 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); Brabson v. U.S., 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C. § 104(a) (2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).

F. To whom are punitive damages payable?

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?


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., 177 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, there shall be no jury instruction on punitive damages. Hancock v. Northcut, 808 P.2d 251, 259 (Alaska 1991).


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


Employment Liability. Punitive damages are available in actions against the employer for employment practices prohibited by Alaska Statutes, section 18.80.220. ALASKA STAT. § 09.17.020(h) (2010). Punitive damages may not be awarded against the employer under principles of vicarious liability unless (1) the employer (A) authorized the act or omission or (B) ratified or approved the act or omission or (2) the employee (A) was unfit to perform the act or avoid the omission and the employer recklessly in employing or retaining the employee; or (B) was employed in a managerial capacity and was acting within the scope of employment. § 09.17.020(k).


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 insurer 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.


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. The public policy in imposing punitive damages was not strong enough to justify voiding the contractual rights of the insured. This does not apply where punitive damages were 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?

Not applicable. See Sec. II.A., above.

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 called for. 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 damage 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 (9th Cir. 1998). Relevant factors include the compensatory damage 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 ratio of punitive-to-compensatory damages, 130-to-1, is far beyond any approved by Alaska courts. Id.

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.).

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 (9th 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: (a) four times the amount of compensatory damages awarded to the plaintiff; or (b) four times the aggregate amount of financial gain that the defendant received as a result of the defendant’s misconduct; or (c) $7,000,000. 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: (a) $200,000 if the employer has fewer than 100 employees in the state; (b) $300,000 if the employer has 100 or more, but fewer than 200 employees in the state; (c) $400,000 if the employer has 200 or more, but fewer than 500 employees in the state; and (d) $500,000 if the employer has 500 or more employees in the state. See ALASKA STAT. § 09.17.020 (h) (2010).

E. Are punitive damages taxable?

Yes. O’Gilvie v. U.S., 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); Hawkins v. U.S., 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); Brabson v. U.S., 73 F.3d 1040 (10th Cir. 1996) (punitive damages are taxable).
damages are included in gross income). See also I.R.C. § 104(a)(2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).

F. To whom are punitive damages payable?

Fifty percent to claimant and 50 percent to 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).

I. PUNITIVE DAMAGES

A. May they be awarded?


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).


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).


Environmental Liability. Punitive damages may be awarded. 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 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 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).

II. IF PUNITIVE DAMAGES MAY BE AWARDED

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


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?


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

No.

E. Are punitive damages taxable?

Yes. O’Gilvie v. U.S., 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); Hawkins v. U.S., 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); Brabson v. U.S., 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C. § 104(a)(2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).

F. To whom are punitive damages payable?

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

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; and

(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).


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


Employment Liability. A corporation may be held liable in punitive damages for acts done by its agents or servants acting within the scope of their employment at the time of the incident. J.B. Hunt Transport v. Doss, 320 Ark. 660, 669 (Ark. 1995); see also Porter v. Harshfield, 329 Ark. 130, 137 (ARK. CODE ANN. § 21-9-203 (2010)).

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. 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 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.
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 502, 504 (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.”).

II. IF PUNITIVE DAMAGES MAY BE AWARDED

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


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. v. Cannon, 669 S.W.2d 447 (Ark. 1985) (there can be no recovery of punitive damages without actual damages). See ARK. CODE ANN. § 16-55-208 (2010).

The Arkansas Supreme Court 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 never expressly applied 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)). And


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.

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). However, “[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). Further, punitive damages recovery is now 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) Two hundred fifty thousand dollars ($250,000); or

(2) Three (3) times the amount of compensatory damages awarded in the action, not to exceed one million dollars ($1,000,000).

ARK. CODE ANN. § 16-55-208(a) (2010). If, however, 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 increased as of January 1, 2006, and will continue
to increase at three-year intervals thereafter 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). 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. Are punitive damages taxable?

Yes. O’Gilvie v. U.S., 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); Hawkins v. U.S., 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); Brabson v. U.S., 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C. § 104(a)(2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).

F. 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?


B. If so, in what circumstances?


California has defined 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 present proof of the defendant’s fraudulent, oppressive or malicious conduct by a standard of “clear and convincing evidence” in order to recover


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 punitive damages. 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).


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 damage liability. CAL. GOV'T. CODE §§ 818, 825 (2010).

Breach of Contract. Punitive damages are not recoverable in an action for a noninsurance 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).

Corporate Officers or Directors Liability. The advance knowledge and conscious disregard, authorization, ratification, or act of oppression, fraud or malice must be on the part of an officer, director or managing agent of the corporation. White v. Ultramar, supra, 981 P.2d at 950. 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 or she has the ability to hire and fire other employees. White v. Ultramar, supra, 981 P.2d at 952.

Employment Liability. An employer shall not be liable for punitive damages pursuant to CAL. CIVIL CODE §3294(a) based on an employee's acts, unless the employer: (1) had advance knowledge of the employee's unfitness and employed him or her with a conscious disregard of the rights or safety of others; or (2) authorized or ratified the wrongful conduct for which the damages are awarded; or (3) was personally guilty of oppression, fraud or malice. White v. Ultramar, Inc., 981 P.2d 944, 948 (Cal. 1999).

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. In an action for breach of an obligation, not arising from a contract, where the defendant has been guilty of fraud, oppression or malice, punitive damages can be awarded. 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 Professionals Liability. In a lawsuit arising out of the professional negligence of a legal or accounting professional providing litigation services, a plaintiff may recover punitive damages as a component of compensatory damages flowing from the underlying matter. To this end, the litigant must present substantial evidence, constituting clear and convincing proof that in the underlying litigation, the defendant's conduct

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).


II. IF PUNITIVE 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.” To this end, the state policy that permits the recovery of punitive damages only for the sake of example and by way of punishment, precludes passing them 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 damage 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). The state’s 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 should bear a reasonable relation to the compensatory damages. See Douglas v. Ostermeier, 2 Cal. Rptr. 2d 594 (Cal. Ct. App. 1999). See also Neal v. Farmers 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 damage awards generally are not allowed to exceed 10 percent of a defendant’s net worth).

In determining whether an award of exemplary 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 damage 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. Are punitive damages taxable?

Yes. O’Gilvie v. U.S., 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); Hawkins v. U.S., 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); Brabson v. U.S., 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C. § 104(a)(2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).

California follows the federal definition of “gross income.” CAL. REV. & TAX. CODE §§ 17073, 20503 (2010).

F. To whom are punitive damages payable?

Generally, punitive damages are recoverable by the plaintiff.

6. Colorado

I. PUNITIVE DAMAGES

A. May they be awarded?


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 [sic] 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).


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).


Employment Liability. Exemplary (punitive) damages were appropriate where employer sent supervisors to deliver employee’s notice of termination at home where the employee was recovering from a heart attack, of which the employer had knowledge of, and without prior warning to the employee. Archer v. Farmer Bros. Co., 70 P.3d 495 (Colo. App. 2002).

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).


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.


II. IF PUNITIVE DAMAGES MAY BE AWARDED

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


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?


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. Are punitive damages taxable?

Yes. *O’Gilvie v. U.S.*, 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); *Hawkins v. U.S.*, 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); *Brabson v. U.S.*, 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C. § 104(a) (2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).

F. To whom are punitive damages payable?

To the injured parties. 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.
I. PUNITIVE DAMAGES

A. May they be awarded?


B. If so, in what circumstances?

**Standard of Conduct.** In order to award punitive or exemplary damages, 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 LEXIS 863.


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).


**Action Against State.** In the overwhelming majority of jurisdictions that have considered whether a municipality is liable for punitive damages, it is now firmly established that exemplary or punitive damages are not recoverable unless expressly authorized by statute or through statutory construction. *Trimachi v. Conn. Workers Comp. Comm.*, 2000 Conn. Super. Lexis 1548.


**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, noneconomic, and punitive damages. *Murphy v. Lachapell*, 2000 Conn. Super. LEXIS 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 Lexis 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.

**Employment Liability.** The common law opposes the imposition of vicarious liability on employers for punitive damages. *Rosado v. Choiniere, et al.*, 1998 Conn. Super. Lexis 438 (Feb. 19, 1998). However, in *Rosado*, the court held that 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 Connecticut General Statutes section 14-222 because sections 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. Id.


Under CONN. GEN. STAT. § 31-290, a former employee was entitled to recover lost wages, attorney fees and punitive damages where the former employee filed a workers’ compensation claim and was terminated within days of seeking a medical leave of absence. Moore v. Consumer Credit Counseling Serv., 1996 Conn. Super. LEXIS 3419. Under CONN. GEN. STAT. § 31-290(a) (b)(1) (2010), whether to award punitive damages is an issue left to the discretion of the trial court. To support an award of punitive damages, 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. LEXIS 863 (Mar. 30, 2005).

Environmental Liability. There is no specific law in Connecticut addressing the issue of punitive damages and environmental liability. However, in civil cases, in order to award punitive or exemplary damages, 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. LEXIS 863 (Mar. 30, 2005).


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, noneconomic, and punitive damages. Murphy v. Lachapell, 2000 Conn. Super. LEXIS 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 he overcharged a homeowner, where he was unlicensed and unregistered, in violation of the Home Improvement Act, CONN. GEN. STAT. § 20-418, and where 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. Lexis 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 Super. LEXIS 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. § 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. LEXIS 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. LEXIS 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. Lexis 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. LEXIS 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. LEXIS 5347 (D. Conn 2005). CONN GEN. STAT. § 52-240(b) (2010). Connecticut permits awards of

**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. Lexis 18 (Jan. 2, 1996); CONN. GEN. STAT. § 19a-550(e).

**Trade Secret.** Plaintiff cheese manufacturer's business operations were a protectable trade secret. Therefore defendant, a former employee, was liable for punitive damages and attorney fees, as well as being enjoined from further competition. *Elm City Cheese Co., Inc. v. Federico*, 251 Conn. 59 (1999); see also CONN. GEN. STAT. § 35-51.

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 employer's trade secrets was willful and malicious. *Smith v. Snyder*, 267 Conn. 456 (2004).

II. **IF PUNITIVE DAMAGES MAY BE AWARDED**

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

No. In *Tedesco v. Md. Cas. Co.*, 18 A.2d 357 (Conn. 1941), it was held that 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. LEXIS 1750.

**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?**

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. LEXIS 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. LEXIS 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. LEXIS 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. Are punitive damages taxable?**

Yes. *O'Gilvie v. U.S.*, 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); *Hawkins v. U.S.*, 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); *Brabson v. U.S.*, 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C. § 104(a)(2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).

**F. To whom are punitive damages payable?**

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

A. May they be awarded?

Yes. 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). See also Philip Morris USA v. Williams, 549 U.S. 346 (2007) (finding that the due process clause of the U.S. Constitution forbids a state from using a punitive damages award to punish a defendant for injury inflicted on persons not parties to the lawsuit).

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. LEXIS 63 (Feb. 8, 2005); Jardel Co. v. Hughes, 523 A.2d 518 (Del. 1987).


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. LEXIS 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. 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).

Employment Liability. The Superior Court may order the payment of punitive damages in an action for employment discrimination, but not to exceed the damage awards allowable under Title VII of the Civil Rights Act of 1964. DEL. CODE ANN. tit. 19 § 715.

Environmental Liability. There is no specific law in Delaware specifically allowing or denying punitive damages in the case of 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. LEXIS 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 capable of proof under the complaint in which it was shown that an insurer withheld benefits clearly without any reasonable justification, the punitive damages claims of plaintiffs,

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 a product liability context, the 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. LEXIS 386.

**Professional Liability.** There is no outright bar against awarding punitive damages on an attorney malpractice action. *Lilquist v. Rodriguez*, 1995 Del. Super. Lexis 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)?**


**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. 


E. Are punitive damages taxable?

Yes. O’Gilvie v. U.S., 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); Hawkins v. U.S., 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); Brabson v. U.S., 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C. § 104(a) (2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).

F. To whom are they 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).

I. PUNITIVE DAMAGES

A. May they be awarded?


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.

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).


Although punitive damages generally are not recoverable for breach of contract, this rule is inapplicable if there exists an independent fiduciary relationship 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.

Employment Liability. Punitive damages are available under the
D.C. Human Rights Act of 1977, D.C. CODE § 2-1401.01 et seq.
Under the D.C. Human Rights Act, punitive damages may be
awarded when the employer acted with an “evil motive” or “actual
malice.” Arthur Young & Co. v. Sutherland, 631 A.2d 354, 371-72
(D.C. 1993).

Environmental Liability. Punitive damages are awarded where
statutorily allowed, such as pursuant to the Resource Conservation
Environmental Response Compensation and Liability Act, punitive
damages were held not consistent with statutory provision. State
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.

II. IF PUNITIVE DAMAGES MAY BE AWARDED

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

Undecided. 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?

No authority on point. 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,
A plaintiff, however, need not prove anything more than nominal

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.
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

Professional Liability. Punitive damages may be awarded in
cases for legal malpractice so long as the award is not excessive.
Recovery of punitive damages requires a showing of willful

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.
E. Are punitive damages taxable?

Yes. O’Gilvie v. U.S., 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); Hawkins v. U.S., 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); Brabson v. U.S., 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C. § 104(a)(2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).

But see D.C. CODE § 47-1803.02 (U) (LexisNexis 2010) (amount received by claimant [including punitive damages] through an employment discrimination claim excluded from District’s definition of gross income).

F. 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 damage awards were amended, with 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 are 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).


Following 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 Fiberglas 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 compensatory damages awarded, against a manufacturer of an asbestos-containing product. The court acknowledged that such a large award would be prohibited by the amended version of FLA. STATE. ANN. § 786.73, which became effective in October, 1999. However, since that statute was not yet effective at the time of its decision, the court affirmed the award.

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 (11th Cir. 1993) citing Lewis v. Guthartz, 428 So. 2d 222 (Fla. 1982).
Employment Liability. In *Mercury Motors Express, Inc. v. Smith*, 393 So. 2d 545 (Fla. Dist. Ct. App. 1985), remanded 394 So. 2d 1109 (Fla. 3d DCA 1981), the Supreme Court of Florida held that in the absence of some degree of fault on the part of a corporate employer, the employer could not be held liable for punitive damages assessed as a result of its employees’ willful and wanton misconduct. *Beverly Enterprises-Florida v. Spilman*, 661 So. 2d 867 (Fla. 5th DCA 1995) (requires some fault on the part of the employer, not necessarily willful or wanton misconduct, which foreseeably contributed to the plaintiff’s injury); *Schrapp v. Crown Eurocars*, 654 So. 2d 1158 (Fla. 1995).

See also FLA. STAT. ANN. § 768.72(3)(a)(b) and (c) (preempted on other grounds by *Path v. Ogden*, supra). Punitive damages may be imposed for the intentional misconduct or gross negligence of an employee if: (a) the employer, principal, corporation or other legal entity actively and knowingly participated in such conduct; (b) the officers, directors or managers of the employer, principal, corporation or other legal entity knowingly condoned, ratified or consented to such conduct; or (c) the employer, principal, corporation or other legal entity engaged in conduct that constituted gross negligence and that contributed to the loss, damages or injury suffered by the claimant.

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. 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. 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, under 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)?


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

Generally, no. 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 punitive damages assessed against an employer under a vicarious liability theory may be insured, the insurer is relieved of the responsibility to provide coverage where the insured's 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 damage 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 (11th 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 $2,000,000, 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. Are punitive damages taxable?

Yes. O'Gilvie v. U.S., 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); *Hawkins v. U.S.*, 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); *Brabson v. U.S.*, 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C. § 104(a)(2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).

Florida does not currently have an individual state income tax. Therefore, punitive damage awards are not subject to state tax.
F. 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. 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.

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).


Employment Liability. An employer can be vicariously liable for punitive damages based on employee’s reckless conduct, provided such wrongful acts were conducted within the scope of employment and would have subjected the employee to punitive damages. Sightler v. Transus, Inc., 430 S.E.2d 81 (Ga. Ct. App. 1993) (no action against the estate of the deceased employer was available).

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
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?

Inapplicable.

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 damage 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 & remanded, 499 U.S. 914 (1991); aff’d 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 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. § 51-12-5.1(e)(1)(G) (2010). 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)).

E. Are punitive damages taxable?

Yes. O’Gilvie v. U.S., 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); Hawkins v. U.S., 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); Brabson v. U.S., 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C. § 104(a)(2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).

Although no case law exists in Georgia with respect to the state income tax liability for a punitive damages award, Georgia law is clear that punitive damages are noncompensatory. Banks v. ICI Ams., 469 S.E.2d 171, 174 (Ga. 1996). Absent contrary state authority, punitive damages should be considered presumptively taxable at the state level.
F. 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 held that it does not violate the constitutional takings clause and is not a revenue-raising measure in contravention of the Georgia Constitution. *State v. Moseley*, 463 S.E.2d 632, 633 (Ga. 1993). Jury instruction that 75 percent of punitive damages award would go to state treasury is 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).

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12 Hawai'i

I. PUNITIVE DAMAGES:

A. May they be awarded?

Yes. Where clear and convincing evidence exists, one circumstance in Hawai'i that warrants an award of punitive damages is 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).


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*.

Employment Liability. An employer is liable for the acts of his or her employee if the employee was acting within the scope of his or her employment, either expressly or by fair implication. *Duncan v. Wilder S.S. Co.*, 8 Haw. 411 (1892). However, a principal is not liable for punitive damages unless the principal participated in the wrongful act of his agent or expressly or impliedly by his conduct authorized or approved it either before or after it was committed. *Kealoha v. Halawa Plantation*, 24 Haw. 579 (1918).


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*.

I. 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 or 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. Are punitive damages taxable?

Yes, amounts received as punitive damages shall be included in gross income. Haw. Rev. Stat. Ann. §237-24; O’Gilvie v. U.S., 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); Hawkins v. U.S., 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); Brabson v. U.S., 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C. § 104(a)(2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).

F. 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?


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

**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 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 generally are not permitted. Idaho Code Ann. § 6-918 (2010). 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”).


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).

**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. Silman 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 Sec. II.A., above.

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


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. Are punitive damages taxable?

Yes. O’Gilvie v. U.S., 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); Hawkins v. U.S., 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); Brabson v. U.S., 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C. § 104(a) (2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).

To date, the Idaho courts have not specifically addressed the issue of taxability of punitive damages under state law.

F. To whom are punitive damages payable?

Generally, an award of punitive damages is payable to the plaintiff. Punitive damages are not recoverable against governmental entities and their employees (see IDAHO CODE § 6-918 (1990)), nor are they recoverable against the estate or personal representative of the wrongdoer. IDAHO CODE § 5-327 (2010).

I. PUNITIVE DAMAGES

A. May they be awarded?

No, for medical malpractice, legal malpractice, intentional infliction of emotional distress, and consortium. Yes, for all others.


Punitive damages are not available for intentional infliction of emotional distress, Frazier v. Harris, 266 F. Supp. 2d 853 (C.D.
asserted if the time prescribed or limited had not expired when limiting the time within which an action may be brought or right of discovery. A prayer for relief added pursuant to this Section shall 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. 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 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 (4th Dist. 1999) (holding that statute applied even where only part of complaint based on negligence); LaSalle Nat’l Bank v. Willis, 378 Ill.App.3d 307, 880 N.E.2d 1075 (1st Dist. 2007).


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 (7th Cir. 2005).


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 damage 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 5/2-1207 (2008); See Loitz v. Remington Arms Co., 138 Ill. 2d 404, 150 Ill. Dec. 510, 563 N.E.2d 397 (1990).


### II. IF PUNITIVE DAMAGES MAY BE AWARDED

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


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


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


#### 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. Are punitive damages taxable?

Yes. O’Gilvie v. U.S., 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); Hawkins v. U.S., 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); Brabson v. U.S., 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C. § 104(a)(2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).

#### F. 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).

I. PUNITIVE DAMAGES

A. May they be awarded?

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).


**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.


**Employment Liability.** The exclusive remedy section of the Workmen’s Compensation Act forecloses any action for punitive damages, under section 22-3-9-1, for reckless or willful violation of the duty to provide a safe place to work. *North v. U.S. Steel Corp.*, 495 F.2d 810 (7th Cir. Ind. 1974). Partners are liable for the wrongful acts committed by co-partners causing injury to another. Ind. Code Ann. § 23-4-1-13. Employers may be held liable for the torts of their employees. Ind. Code Ann. §§ 34-24-3-1 & 35-41-2-3.

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


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.** 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).


**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 on a vicarious liability theory, which was within the scope of the policy's coverage.

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


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 (3) times the amount of compensatory damages awarded in the action; or

(2) Fifty thousand dollars ($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. 1998) 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).

E. Are punitive damages taxable?

Yes. O'Gilvie v. U.S., 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); Hawkins v. U.S., 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); Brabson v. U.S., 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C. § 104(a) (2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).

F. To whom are punitive damages payable?

Twenty-five percent to plaintiff; 75 percent to the state. Pursuant to Ind. Code Ann. § 34-51-3-6:

(a) 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.

(b) When a punitive damage award is paid, the party against whom the judgment was entered shall pay the punitive damage award to the clerk of the court where the action is pending.

(c) Upon receiving the payment described in subsection (b), the clerk of the court shall:

(1) Pay the person to whom punitive damages were awarded twenty-five percent (25%) of the punitive damage award; and

(2) 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.
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 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 (2010).


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. 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”).

Employment Liability. A court found an employer discharged an employee in willful and wanton disregard for his employment rights when the employer discharged the employee for demanding back wages. Tullis v. Merrill, 584 N.W.2d 236 (Iowa 1998).

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 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 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 Sec. II.A., above.

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

A plaintiff must offer evidence of the defendant’s persistent course of conduct to show no care by the defendant, with disregard for
the consequences. 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 violative of due process).

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

Yes. In a finding of liability for environmental damage, plaintiffs may only be liable for punitive damages that are triple the cost of the state’s cleanup, if the failure to clean is willful; otherwise no punitive damages allowed. *See Iowa Code § 455B.392 (2010).*

**E. Are punitive damages taxable?**

Yes. *O’Gilvie v. U.S.*, 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); *Hawkins v. U.S.*, 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); *Brabson v. U.S.*, 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). *See also I.R.C. § 104(a) (2) (2010).* The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. *I.R.C. § 104 (2010).*

**F. 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 twenty-five 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 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?


Employment Liability. Punitive damages may not be awarded against a principal or employer for the acts of an agent or employee unless the questioned conduct was authorized or ratified by a person expressly empowered to do so on behalf of the principal or employer, or an association, partnership or corporation, for the acts of a member, partner or shareholder, unless such association, partnership or corporation authorized or ratified the questioned conduct. See Kan. Stat. Ann. § 60-3701(d); Kline v. Multimedia Cablevision, Inc., 666 P.2d 711 (Kan. 1983), superseded by statute on other grounds, Smith v. Printup, 866 P.2d 985 (Kan. 1993). Vicarious liability can be found in two circumstances: (1) when the employee is acting within the scope of employment, or (2) the employer directed or ratified the employee’s act (Complicity Rules).

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).

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?


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; and
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. KAN. STAT. ANN. § 60-3701(b) (2010).

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).

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 1½ 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. Are punitive damages taxable?

Yes. O’Gilvie v. U.S., 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); Hawkins v. U.S., 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); Brabson v. U.S., 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C. § 104(a)(2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).

F. To whom are punitive damages payable?

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

18 Kentucky

I. PUNITIVE DAMAGES

A. May they be awarded?


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. 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; and

(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).

Employment Liability. Kentucky courts are currently split as to whether punitive damages may be awarded in the context of employment liability. Some Kentucky courts have held that punitive damages may be awarded in employment liability cases under KY. REV. STAT. § 344.450. See Timmons v. Wal-Mart Stores, Inc., 33 F. Supp. 2d 577 (W.D. Ky. 1999); Barton v. United Parcel...
II. 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 Sec. 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:

a. The likelihood at the relevant 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 misconduct to the defendant;

d. The duration of the misconduct and any concealment once it became known to the defendant;

e. Any actions by the defendant to remedy the misconduct.

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

E. Are punitive damages taxable?

Yes. *O’Gilvie v. U.S.*, 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); *Hawkins v. U.S.*, 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); *Brabson v. U.S.*, 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C. § 104(a) (2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).


F. To whom are punitive damages payable?

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

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**Louisiana**

I. PUNITIVE DAMAGES

A. May they be awarded?

Yes, but only if expressly authorized by statute. *Jaufre v. Taylor*, 2004 U.S. Dist. LEXIS 11767, 8 (June 25, 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).

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 damage 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).


**Actions Against State.** There is no law specifically permitting or prohibiting punitive damages. However, there is a $500,000 cap in actions against the state.


**Employment Liability.** Punitive damages are not expressly authorized by statute.


### 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. *Malbreaugh 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 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?

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. Are punitive damages taxable?

Yes. O’Gilvie v. U.S., 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); Hawkins v. U.S., 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); Brabson v. U.S., 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C. § 104(a) (2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).

F. 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?


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)).


Employment Liability. In 1997, the Maine Legislature amended the Maine Human Rights Act to provide for punitive damages in cases of intentional employment discrimination. “[A] party may recover punitive damages under the Maine Human Rights Act if he or she ‘demonstrates that the respondent engaged in a discriminatory practice … with malice or with reckless indifference to [his or her] … rights … protected by this Act.’” Kopenga v. Davric Maine Corp., 727 A.2d 906, 911 (Me. 1999) (quoting Me. Rev. Stat. Ann. tit. 5 § 4613 (West 2010)).

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. The 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) (“We 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.”).

II. IF PUNITIVE DAMAGES MAY BE AWARDED

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


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


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 644, 652 (Me. 1993). Factors in determining 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 it is helpful to 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 “breath-taking.” 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. See 18-A Me. Rev. Stat. Ann. § 2-804(b), (which caps punitive damages at $75,000); 38 Me. Rev. Stat. Ann. § 568(4)(B) (2010), (which caps punitive damages at three times the clean-up costs); and 38 Me. Rev. Stat. Ann. § 1296, (which 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, 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. Are punitive damages taxable?

Yes. O’Gilvie v. U.S., 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); Hawkins v. U.S., 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); Brabson v. U.S., 73 F.3d 1040 (10th Cir. 1996) (punitive...
damages are included in gross income). See also I.R.C. § 104(a) (2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).


F. 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).

21 Maryland

I. PUNITIVE DAMAGES:

A. May they be awarded?


B. If so, in what circumstances?

Standard of Conduct. Punitive DAMAGES MAY BE AWARDED (a) where there is actual malice; or (b) without proof of actual malice in intentional tort cases. Owens-Ill., Inc. v. Zenobia, 601 A.2d 633 (reconsideration is denied 325 Md. 665, 602 A.2d 1182 (1992). To justify a punitive damages award in a nonintentional tort case, a plaintiff must prove that the defendant acted with actual, and not just implied, malice. Bell v. Heitkamp, Inc., 728 A.2d. 743 (Md. Ct. Spec. App.1998). See also 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”).

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. “Actual malice” 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).


Employment Liability. Punitive damages may be vicariously imposed on the master for acts of the servant committed during the course of his employment without regard to whether the master authorized, participated in, or ratified the employee’s conduct. Embrey v. Holly, 442 A.2d 966, 970 (Md. 1982); Safeway Stores v. Barrack, 122 A.2d 457 (Md. 1956).

Environmental Liability. In civil cases, 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., 841 A.2d 828.

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.


II. IF PUNITIVE DAMAGES MAY BE AWARDED

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


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 Sec. 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. CODECTS. & 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 proportionate to the compensatory damages award, and the trial judge reviews and explains the reasons for allowing the 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 nonexclusive legal principles articulated by the Court of Appeals in Bowden v. Caldor, Inc., 710 A.2d 267 (Md. 1998). The factors are not elements set in stone, but rather “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 damage 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 both with respect to 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; and (9) if separate torts are implicated, whether they grew out of the same occurrence or episode. Id.

E. Are punitive damages taxable?

Yes. O’Gilvie v. U.S., 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); Hawkins v. U.S., 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); Brabson v. U.S., 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C. § 104(a) (2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).
F. To whom are punitive damages payable?


I. PUNITIVE DAMAGES

A. May they be awarded?


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. However, 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.


General Liability. Statute addressing actions for death by negligence allows for punitive damages “in an amount of not less than five thousand dollars 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. 151B §4. *Gasior v. Mass. Gen. Hosp.*, 846 N.E.2d 1133 (Mass. 2006).

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...


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.

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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”) prohibited 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?

Given the purpose of punitive damages, there is no reason in principle to exclude them, where a defendant’s conduct warrants condemnation and deterrence, even though the plaintiff may – perhaps by virtue of his or her own hardiness or diligence – have suffered no actual damages or mitigated them to nothing. *See Robin Bain v. City of Springfield*, 678 N.E.2d 155 (Mass. 1997). See also *Gasier 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 are pursuant to each individual Massachusetts statute. 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 one hundred thousand dollars in actions against the state home mortgage finance authority.

E. Are punitive damages taxable?

Yes. *O’Gilvie v. U.S.*, 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); *Hawkins v. U.S.*, 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); *Brabson v. U.S.*, 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C. § 104(a) (2) (2010). The only exceptions provided by the Internal Revenue
Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).

F. To whom are they payable?
Where decedent has no spouse or issue, 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.

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. Burt v. Meyer, 508 N.E.2d 598 (Mass. 1987).

I. PUNITIVE DAMAGES

A. May they be awarded?
No. It is well established that generally only compensatory damages are available in Michigan and that 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). 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).

II. IF PUNITIVE DAMAGES MAY BE AWARDED

A. Are they generally insurable (to the benefit of the wrongdoer)?
Not applicable. See Sec. 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?
Probably not, for the reasons stated above in I.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. Are punitive damages taxable?

Yes. O’Gilvie v. U.S., 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); Hawkins v. U.S., 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); Brabson v. U.S., 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C § 104(a) (2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C § 104 (2010).

F. 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.

24 Minnesota

I. PUNITIVE DAMAGES

A. May they be awarded?

Yes, pursuant to MINN. Stat. § 549.20 (2010).

B. If so, in what circumstances?

Standard of Conduct.

MINN. Stat. § 549.20 provides as follows:


(a) 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.

(b) 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:

(1) 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

(2) 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:

(a) the principal authorized the doing and the manner of the act;

(b) the agent was unfit and the principal deliberately disregarded a high probability that the agent was unfit;

(c) the 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

(d) the 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 damage 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
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);


However, the Minnesota Supreme Court has held that treble damages awards for retaliatory discharge, or awards otherwise partially compensatory, may not be per se 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); 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?

The general rule is that punitive damages are not available without compensatory damages. *Meixner v. Buecksler*, 13 N.W.2d 754 (Minn. 1944). However, the emerging rule is that punitive damages are permissible without compensatory damages in an action to remedy intangible harms. 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 damage 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 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. LEXIS 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. Are punitive damages taxable?

Yes. *O’Gilvie v. U.S.*, 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); *Hawkins v. U.S.*, 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); *Brabson v. U.S.*, 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C. § 104(a) (2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).

F. To whom are punitive damages payable?


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**Mississippi**

I. PUNITIVE DAMAGES

A. May they be awarded?

Yes. 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;
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; and

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. Clear and convincing evidence that the defendant against whom punitive damages are sought acted with actual malice, gross negligence which 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 or exemplary 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, they 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, they 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. Hubb's, 700 So. 2d 283, 285-86 (Miss. 1997), rev'd 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).

Employment Liability. An employer is not liable for the actions of an employee where there is no proof that the employer had any knowledge of prior acts committed by the employee and the employer was acting on his or her own initiative. Gamble v. Dollar Gen. Corp., 852 So. 2d 5 (Miss. 2003) (citing Miss. Code Ann. § 11-1-65(1)(a)); see also Doe v. Salvation Army, 835 So. 2d 76 (Miss. 2003) (punitive damages against an employer because of an assault by employee were not proper where the employee was acting outside the scope of his employment, the employer did not benefit from the assault, and a reasonable jury could not find malice, gross neglect, or reckless disregard by the employer).


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./CAN 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(1).

Professional Liability. Punitive damages may be recovered only where the defendant acted with actual malice, gross negligence which 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. An insurance company's liability for all damages arising from bodily injury includes punitive damages. However, the extent or limit of that liability for punitive damages is governed by the agreement of the parties as reflected by the actual language in the policy of insurance. The awarding of punitive damages against a liability insurance company is not against public policy. 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. See Sec. 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; and

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:

(i) $20 million for a defendant with a net worth of more than $1 billion;

(ii) $15 million for a defendant with a net worth of more than $750 million but not more than $1 billion;

(iii) $5 million for a defendant with a net worth of more than $500 million but not more than $750 million;

(iv) $3.75 million for a defendant with a net worth of more than $100 million but not more than $500 million;

(v) $2.5 million for a defendant with a net worth of more than $50 million but not more than $100 million; or

(vi) 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 (i) convicted of a felony under the laws of the state or under federal law that caused the damages or injury; or (ii) while the defendant 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 damage 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. Are punitive damages taxable?

Yes. O'Gilvie v. U.S., 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); Hawkins v. U.S., 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); Brabson v. U.S., 73 F.3d 1040 (10th Cir. 1996) (punitive
damages are included in gross income). See also I.R.C. § 104(a) (2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).

F. To whom are punitive damages payable?

Generally, punitive damages are payable to the plaintiff.

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I. PUNITIVE DAMAGES

A. May they be awarded?

Yes. 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).

B. 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).


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).


Employment Liability. Employer acted with evil motive and reckless indifference justifying punitive damages when it intentionally engaged in a pattern of harassment by creating a false paper trail to hide its scheme to fire plaintiff. Crabtree v. Bugby, 967 S.W.2d 66, 71 (Mo. 1998).

Environmental Liability. Punitive damages may be recovered. 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 plaintiff’s properties and contaminate their wells.


Product Liability. To submit punitive damages to the jury in a strict 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)?

Maybe. 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?


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?

In certain cases, punitive damages may be awarded subject to a statutory cap. Mo. Rev. Stat. § 510.265.

E. Are punitive damages taxable?

Yes. *O’Gilvie v. U.S.*, 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); *Hawkins v. U.S.*, 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); *Brabson v. U.S.*, 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C. § 104(a)(2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).

F. To whom are punitive damages payable?

Fifty percent to claimant; 50 percent 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 damage 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).

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I. PUNITIVE DAMAGES

A. May they be awarded?

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


**Environmental Liability.** Punitive damages may be recovered. Ferguson v. Town Pump, 580 P.2d 915 (Mont. 1978), overruled on other grounds by Bohrer v. Clark, 590 P.2d 117 (Mont. 1978).


**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).

II. IF PUNITIVE DAMAGES MAY BE AWARDED

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


**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 Sec. 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 damage 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, exemplary 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: (i) the nature and reprehensibility of the defendant’s wrongdoing; (ii) the extent of the defendant’s wrongdoing; (iii) the intent of the defendant in committing the wrong; (iv) the profitability of the defendant’s wrongdoing, if applicable; (v) the amount of actual damages awarded by the jury;
(vi) the defendant’s net worth; (vii) previous awards of punitive or exemplary damages against the defendant based upon the same wrongful act; (viii) potential or prior criminal sanctions against the defendant based upon the same wrongful act; and (ix) 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 award of punitive damages. Upon review of the jury award, the judge has the authority to change the amount awarded based on clearly stated findings of fact 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. Are punitive damages taxable?

Yes. O’Gilvie v. U.S., 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); Hawkins v. U.S., 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); Brabson v. U.S., 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C. § 104(a) (2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).

Punitive damages are also generally taxable under Montana law. Montana adjusted gross income is the same as federal adjusted gross income. MONT. CODE ANN. § 15-30-111 (1) (2007). There is one exception to the rule that punitive damage awards are subject to Montana income tax. Damages recovered in lawsuits brought against manufacturers or distributors of “Agent Orange” for damages resulting from exposure are exempt from Montana state income tax, regardless of whether the damage award is compensatory or punitive. MONT. CODE ANN. § 15-30-111(2)(c) (i)(i) (2007) as amended by 2003 Montana Laws Ch. 114 (S.B. 10).

F. To whom are punitive damages payable?

The plaintiff. Cartwright, 914 P.2d 976, supra.

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 any statutory caps or other limitations on the amount of punitive damages that may be awarded?
Not applicable.

E. Are punitive damages taxable?
Not applicable.

F. To whom are punitive damages payable?
Not applicable.

I. PUNITIVE DAMAGES

A. May they be awarded?
Yes. 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 isn’t 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. Statute permits punitive damages for breach of obligations not arising from contract if the wrongdoer is guilty of expressed 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 (9th. 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 damage claims survive the aggrieved party’s death against a living tortfeasor; however punitive damage 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 has been guilty of oppression, fraud or malice. NEV. REV. STAT. § 42.005(1) (2010).


Breach of Contract. Nevada law does not permit punitive damages for tortious breach of contract. See NEV. REV. STAT. § 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).

Employment Liability. An employer is not liable for the wrongful acts of his employee unless:
(a) the employer had advance knowledge that the employee was unfit for the purposes of the employment and employed him with a conscious disregard of the rights or safety of others;
(b) the employer expressly authorized or ratified the wrongful
act of the employee for which the damages are awarded; or

(c) the employer is personally guilty of oppression, fraud or malice, express or implied.

Nev. Rev. Stat. Ann. § 42.007. Further, if the employer is a corporation, the employer is not liable unless the elements of paragraph (a), (b) or (c) 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." Nev. Rev. Stat. Ann. § 42.007.

Environmental Liability. 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 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).


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. § 42.005 (2)(b).


Professional Liability. Punitive damages, subject to a statutory cap, 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.

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).

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

Uncertain. 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?


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:
(a) Three times the amount of compensatory damages awarded to the plaintiff if the amount of compensatory damages is $100,000 or more; or

(b) Three hundred thousand dollars 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:

(a) A manufacturer, distributor or seller of a defective product;

(b) An insurer who acts in bad faith regarding its obligations to provide insurance coverage;

(c) 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;

(d) A person for damages or an injury caused by the emission, disposal or spilling of a toxic, radioactive or hazardous material or waste; or

(e) 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 circumstances 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. Are punitive damages taxable?

Yes. O’Gilvie v. U.S., 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); Hawkins v. U.S., 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); Brabson v. U.S., 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C. § 104(a)(2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).

Nevada has no state personal income tax and has no provisions allowing the state to tax any award of punitive damages. Consequently, punitive damages awards are not subject to state tax in Nevada.

F. 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).
**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, as set forth in statute, see below in this section.

“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.


**Breach of Contract.** Punitive damages are generally not recoverable. But see N.H. REV. STAT. ANN. § 339-E:3 (2004) (recovery of exemplary damages of up to three times the commission owing 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).

**Employment Liability.** Punitive damages are generally not recoverable. But see N.H. REV. STAT. ANN. § 147-A:12 (II) (permitting recovery of compensatory and exemplary damages to any employee who has been discharged or discriminated against for reporting violations of New Hampshire’s hazardous waste disposal statute).

**Environmental Liability.** Punitive damages are not recoverable.

**General Liability.** Punitive damages 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 anyone 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. § 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).


**Product Liability.** Punitive damages are not recoverable.

**Professional Liability.** Punitive damages are not recoverable, 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**

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

Yes, more than likely punitive damages will be found to be insurable under New Hampshire law. For example, municipalities may be insured against punitive damages assessed against them 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 or “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.
D. If not generally insurable to the benefit of the wrongdoer, would such prohibition apply as well to those whose liability is vicarious?

Undetermined. New Hampshire courts have not yet determined whether vicariously assessed punitive damages are insurable.

E. 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).

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

Yes. 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 non-compliance) (“such amount of punitive damages as the court may allow”).

G. Are punitive damages taxable?

Yes. O’Gilvie v. U.S., 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); Hawkins v. U.S., 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); Brabson v. U.S., 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C. § 104(a) (2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).

New Hampshire does not have a state income tax on an individual’s earned income, but taxes an individual’s interest and dividend income. Thus, punitive damage awards are generally not subject to state taxes. See N.H. REV. STAT. ANN. § 77:4.

H. 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).

I. PUNITIVE DAMAGES

A. May they be awarded?


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.


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. Anschelwitz, 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 its 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

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.

Breach of Contract. Punitive damages are not awarded for breach
of contract unless there are aggravating 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

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.

Employment Liability. Punitive damages may only be recovered
against an employer who specifically authorizes, participates in,
or ratifies a wrongful act of his employee. See Sec. Aluminum
Window Mfg. Corp. v. Lehman Assoccs., Inc., 260 A.2d 248 (N.J.

Environmental Liability. There is no express law in New Jersey
permitting or denying recovery of punitive damages in the case of
environmental liability. However, under New Jersey law, punitive
damages can be recovered where “the harm suffered was the
result of the defendant's acts or omissions,” and such acts “were
acted upon by actual malice or accompanied by a wanton and willful
disregard of persons who foreseeably might be harmed by those

General Liability. If the tortfeasor's wrong constitutes a criminal
act, punitive damages may effectively supplement the criminal law
in punishing the defendant. Nappe v. Anschelwitz, 477 A.2d 1224

Insurer's Bad Faith. Under New Jersey law, to recover punitive
damages for insurer's failure to pay a first-party claim, insured must
show egregious circumstances; for example, it must be shown
that the insurer's conduct was wantonly reckless or malicious. See
1996). In the highly regulated area of personal injury protection,
absent egregious circumstances, wrongful failure to pay benefits
or other violation of statute does not give rise to a claim for punitive
LEXIS 7669 (D.N.J. Apr. 1, 2004); Nestle Foods Corp. v. Aetna

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 defect required. 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
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 damage
awards assessed against it. Germanio v. Goodyear Tire & Rubber

Professional Liability. Punitive damages may be awarded for the
violation of a fiduciary duty if the violation is an intentional act. See
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
II. IF PUNITIVE DAMAGES MAY BE AWARDED

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


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

Yes, where 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).

B. 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).

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

Yes. The 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). There is no fixed ratio between compensatory and punitive damages awards in pre-Punitive Damages Act cases. Instead, the amount of punitive damages must bear some reasonable relation to the injury inflicted and the cause of the injury. Smith v. Whitaker, 713 A.2d 20 (N.J. Super. Ct. App. Div. 1998), cert. gained, 719 A.2d 642 (N.J. 1998), aff’d, 734 A.2d 243 (N.J. 1999). In Whitaker, punitive damages award of $1.25 million on survival claim in pre-Punitive Damages Act case arising from fatal intersection auto collision, which was caused by maladjusted rear brakes on the defendant oil company’s truck, was not manifestly outrageous, even though compensatory damages award on wrongful death claim was only $40,178.) The maximum punitive damages in the same case awarded under the current Punitive Damages Act would be $200,890.

An award of punitive damages must be specifically prayed for in the complaint. N.J.S.A. § 2A:15-5.11.

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

D. Are punitive damages taxable?

Yes. O’Gilvie v. U.S., 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); Hawkins v. U.S., 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); Brabson v. U.S., 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C. § 104(a) (2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).

E. To whom are punitive damages payable?

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). In actions prior to July 1, 2001, an arbitration panel acting under the Uniform Arbitration Act can recommend an award of punitive damages, but should not make the award itself. Stewart v. State Farm Mut. Auto. Ins. Co., 726 P.2d 1374 (N.M. 1986); Shaw v. Kuhnel & Assoc., 698 P.2d 880 (N.M. 1985), superseded by statute as stated in Aguilera v. Palm Harbor Homes, Inc., 54 P.3d 993 (N.M. 2002). The Uniform Arbitration Act was amended effective July 1, 2001, to permit an arbitrator to award punitive damages to the extent the award is permitted by law. (Aguilera, 54 P.3d at 994 n.1) Further, punitive damages are not recoverable under the New Mexico Human Rights Act (NMHRA). Nava v. City of Santa Fe, 103 P.3d 571 (N.M. 2004); Gandy v. Wal-Mart Stores, Inc., 872 P.2d 859 (N.M. 1994); see also Behrmann v. Phototron Corp., 795 P.2d 1015 (N.M. 1990) (construing §28-1-13 of the NMHRA damages provision: "actual damages is synonymous with compensatory damages and that compensatory damages are exclusive of punitive damages").

B. If so, in what circumstances?


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. In actions prior to July 1, 2001, an arbitration panel acting under the Uniform Arbitration Act can recommend an award of punitive damages, but should not make the award itself. Stewart v. State Farm Mut. Auto. Ins. Co., 726 P.2d 1374 (N.M. 1986); Shaw v. Kuhnel & Assoc., 698 P.2d 880 (N.M. 1985), superseded by statute as stated in Aguilera v. Palm Harbor Homes, Inc., 54 P.3d 993 (N.M. 2002). However, the Uniform Arbitration Act was amended effective July 1, 2001, to permit an arbitrator to award punitive damages to the extent the award is permitted by law. Aguilera, 54 P.3d at 994 n.1.


Employment Liability. Punitive damages may be awarded in an employment case if there is a showing of bad faith by the employer during the course of employment or in the manner used to terminate the employee. Newberry v. Allied Stores, 773 P.2d 1231 (N.M. 1989). An employer may be held liable for punitive damages when the employer has in some way authorized, ratified, or participated in the wanton, oppressive, malicious, fraudulent or criminal acts of its employee. Albuquerque Concrete Coring Co. Inc. v. Pan Am World Servs., Inc., 879 P.2d 772 (N.M. 1994).

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.

Human Rights Act. Punitive damages are not recoverable under the New Mexico Human Rights Act (NMHRA). Nava v. City of Santa Fe, 103 P.3d 571 (N.M. 2004); Gandy v. Wal-Mart Stores,
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).

Multiple Defendants. Punitive damages against two or more defendants must be separately determined. Sanchez, 117 N.M. 761, supra; Gallegos, 779 P.2d 99, supra.

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 Sec. 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?

None identified for this review.

E. Are punitive damages taxable?

Yes. O’Gilvie v. U.S., 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); Hawkins v. U.S., 30 F.3d 1077 (9th Cir. 1994).
I. PUNITIVE DAMAGES

A. May they be awarded?


B. If so, in what circumstances?


F. To whom are punitive damages payable?

Punitive damages are generally payable to the plaintiff.


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 (1st 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 (3d 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 (1st Dept. 1987); Porter v. Allstate Ins. Co., 184 A.D.2d 685 (2d Dept. 1992); Samovar of Russia Jewelry Antique Corp. v. Generali Ins. Co., 102 A.D.2d 279, 476 N.Y.S.2d 869 (1st 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 Ins. 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).


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?

No. In Loughry v. Lincoln First Bank, 494 N.E.2d 70 (N.Y. 1986), 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 Util., 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).

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


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 “acted upon 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. Are punitive damages taxable?

Yes. O’Gilvie v. U.S., 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); Hawkins v. U.S., 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); Brabson v. U.S., 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C. § 104(a) (2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).

F. To whom may 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/

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I. PUNITIVE DAMAGES

A. May they be awarded?


B. If so, in what circumstances?

Standard of Conduct.

Under N.C. GEN. STAT. § 1D-15:

Standards for recovery of punitive damages

(a) 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:

(1) Fraud.
(2) Malice.
(3) Wilful or wanton conduct.

(b) The claimant must prove the existence of an aggravating factor by clear and convincing evidence.

(c) 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.

(d) 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:

a. The reprehensibility of the defendant’s motives and conduct;
b. The likelihood, at the relevant time, of serious harm;
c. The degree of the defendant's awareness of the probable consequences of its conduct;
d. The duration of the defendant’s conduct;
e. The actual damages suffered by the claimant;
f. Any concealment by the defendant of the facts or consequences of its conduct;
g. The existence and frequency of any similar past conduct by the defendant;
h. Whether the defendant profited from the conduct; and,
i. 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...”).


Employment Liability. A punitive damages award for emotional distress, negligent retention and imputed liability for harassment of a former employee was upheld by the North Carolina Supreme Court because evidence and jury instruction were sufficient and proper. See Poole v. Copland, Inc., 498 S.E. 2d 602 (N.C. 1998).


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). Discharge of patient from hospital when insurance ran out is willful or wanton activity that supports $2 million punitive damages award against a hospital. See Muse v. Charter Hosp. of Winston-Salem Inc., 452 S.E.2d 589 (N.C. Ct. App. 1995).

Vicarious Liability. Punitive damages are statutorily prohibited in North Carolina for vicarious liability. N.C. GEN. STAT. § 1D-15(c) (2004).

II. IF PUNITIVE DAMAGES MAY BE AWARDED

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


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 Sec. 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. Guil, 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 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. Are punitive damages taxable?

Yes. O’Gilvie v. U.S., 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); Hawkins v. U.S., 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); Brabson v. U.S., 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C. § 104(a) (2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).

F. To whom are punitive damages payable?


I. PUNITIVE DAMAGES

A. May they be awarded?


B. If so, in what circumstances?


Standard of Proof. Punitive damages are only awardable when the defendant is guilty 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).

Comparative Fault Cases. Punitive or exemplary damages may be awarded in cases involving comparative fault. N.D. CENT. CODE § 32 03.2-12 (2005).

Employment Liability. An employer may be liable to an employee for punitive damages when an employee is subject to a “hostile” work environment. However, “[i]iability has been found only where the conduct has been so outrageous in character, and so extreme
in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” Dahlberg v. Lutheran Soc. Servs., 625 N.W.2d 241, 248 (N.D. 2001) (citing Muchow v. Lindblad, 435 N.W.2d 918, 924 (N.D. 1989)). An employer may also be liable for punitive damages for the wrongful act of an employee. John Deere Co. v. Nygard Equip., 225 N.W.2d 80, 95 (N.D. 1974). However the employer must have participated in, approved, or ratified the wrongful act. Id.

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).


Insurer's Bad Faith. Punitive damages may be recovered. Conwin 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).


Professional Liability. Any breach of an obligation “not arising from contract, the measure of damages, except when otherwise expressly provided by law, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.” N.D. Cent. Code § 32-03-20. In an action for legal malpractice, where an attorney is liable for treble damages under section 27-13-08, punitive damages may not be awarded. Olson v. Fraase, 421 N.W.2d 820 (N.D. 1988).

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. Are punitive damages taxable?
Yes. O’Gilvie v. U.S., 519 U.S. 79, 117 S.Ct. 452, 136 L.Ed. 2d 454 (1996) (punitive damages received in a tort action claiming personal injuries are subject to federal tax as gross income); Hawkins v. U.S., 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); Brabson v. U.S., 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in federal gross income). See also 26 U.S.C. § 104(a)(2) (2005).

F. To whom are punitive damages payable?

I. PUNITIVE DAMAGES

A. May they be awarded?
Yes. OHIO REV. CODE ANN. § 2315.21 (LexisNexis 2010); Springfield v. Consol. Rail Corp., 130 F.3d 241 (6th 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. LEXIS 1913 (1996). But see Schellhouse v. Norfold & 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 401 (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).


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.


Employment Liability. Sexual harassment claim was a tort action under OHIO REV. CODE ANN. § 2315.21(A)(1), requiring a clear and convincing standard of proof as to actual malice. Shelly Ridley v. Fed’l Express, 2004 Ohio App. LEXIS 2261 (Ohio Ct. App. 2004). Female employee subjected to sexual harassment over four-year period by supervisor was entitled to $50,000 award in punitive

**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 guilty of 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).


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 (6th 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. LEXIS 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 damage 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 Sec. II.A., above.

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

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 a reward for 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 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. Are punitive damages taxable?

Yes. O’Gilvie v. U.S., 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); Hawkins v. U.S., 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); Brabson v. U.S., 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C. § 104(a)(2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).

The Ohio tax code states that “gross income” is as defined by the federal government. OHIO REV. CODE ANN. § 5747.01(A) (LexisNexis 2010). The 7th Circuit, in C.I.R. v. Obear-Nester Glass Co., 217 F.3d 56 (7th Cir. 1954), held that punitive damages awarded under antitrust acts constitute gross income and are thus taxable. Id. at 58.

F. 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?


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 (10th 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.3d 342 (Okla. 1993).


II. IF PUNITIVE DAMAGES MAY BE AWARDED

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


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?

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 damage 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. Kelwood 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 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 (10th 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 (10th 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.

E. Are punitive damages taxable?

Yes. O’Gilvie v. U.S., 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); Hawkins v. U.S., 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); Brabson v. U.S., 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C. § 104(a) (2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).

F. To whom are punitive damages payable?

The plaintiff. OKL. STAT. tit. 23; § 9.1 (2010).
are a penalty for conduct that is culpable by reason of motive, intent, or extraordinary disregard of or indifference to known or highly probably 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. LEXIS 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 claim for negligence independent of the terms of the contract).

**Employment Liability.** Punitive damages may be sought for unlawful employment practices. See OR. REV. STAT. § 659A.885 (2010). But see Faro v. Highway Division, Dep’t of Transp., 951 P.2d 716 (Or. 1998) (punitive damages are not available to a successful plaintiff in a claim for unlawful employment practices when the state is the defendant).

**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 (9th 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: the likelihood at the time that serious harm would arise from the defendant’s misconduct; the degree of the defendant’s awareness of that likelihood; the profitability of the defendant’s misconduct; the duration of the misconduct and any concealment of it; the attitude and conduct of the defendant upon discovery of the misconduct; the financial condition of the defendant; and the total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage 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)?


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

See Sec. 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 noneconomic, 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. Are punitive damages taxable?

Yes. O’Gilvie v. U.S., 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); Hawkins v. U.S., 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); Brabson v. U.S., 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C. § 104(a)(2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).

F. 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).
I. PUNITIVE DAMAGES

A. May they be awarded?


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.” 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). However, 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).


Employment Liability. Punitive damages are recoverable for wrongful termination/discharge of an at-will employee, if the discharge would substantially violate public policy. See Woodson v. AMF Leisureland Ctrs., Inc., 842 F.2d 699 (E.D. Pa. 1988) (finding that though the PA courts have not yet decided the issue, punitive damages were recoverable). Punitive damages from $1,000 to $10,000 are available for violation of the statute precluding denial of employment on the basis of arrest not resulting in conviction. 18 Pa Cons. Stat. § 9183 (2010). However, punitive damages are not available under the Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. § 951, et seq. (2007), for discrimination or sexual harassment; Hoy v. Angelone, 720 A.2d 745 (Pa. 1998). Nor are punitive damages available under the whistle-blower statute for employees of a public body. See 43 Pa. Cons. Stat. § 1425; O’Rourke v. Commonwealth, et al., 778 A.2d 1194 (Pa. 2001).

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.


**Professional Liability.** Yes, subject to the above standard. See e.g., Corrigan v. Methodist Hosp., 869 F. Supp. 1202 (E.D. Pa. 1994) (medical malpractice). 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)?**


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?**


**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 damage 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. Are punitive damages taxable?**

Yes. O’Gilvie v. U.S., 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); Hawkins v. U.S., 30 F.3d 1077 (9th Cir. 1994).
(punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); Brabson v. U.S., 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C. § 104(a)(2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).

F. To whom are punitive damages payable?

Puerto Rico

I. PUNITIVE DAMAGES

A. May they be awarded?

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. Are punitive damages taxable?
Not applicable.
I. PUNITIVE DAMAGES

A. May they be awarded?


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 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 trial court. Sherman, supra.


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).

Employment Liability. Where the challenged conduct is shown to be motivated by malice or ill will or when the action involves reckless or callous indifference to the statutorily protected rights of others, the court may award punitive damages. R.I. GEN. LAWS § 28-5-29.1 (2010). Punitive damages shall not be available against the state or its political subdivisions Id. In any civil action alleging violation of the confidentiality of employer/employee assistance plans, the court may award to the prevailing plaintiff punitive damages in addition to any award of actual damages and reasonable attorney's fees and costs. R.I. GEN. LAWS § 28-6.8-2 (2010). Similar relief is also available in instances when an employer wrongly requests tax and income information from applicants (R.I. GEN. LAWS § 28-6.9-2 (2010)); imposes genetic testing as a condition for employment (R.I. GEN. LAWS § 28-6.7-3 (2010)); or requires a lie detector test as a condition of employment (R.I. GEN. LAWS § 28-6.1-3 (2010)). Punitive damages can be awarded when an employer, employment agency or licensing agency refuses to hire an applicant or discharges an applicant for seeking or obtaining a protective order for the victim of domestic abuse. R.I. GEN. LAWS § 12-28-10 (2010).

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.
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 damage award should remain with the wrongdoer and should not be cast upon the blameless shoulders of the other insureds."

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. Are punitive damages taxable?

Yes. O'Gilvie v. U.S., 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); Hawkins v. U.S., 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); Brabson v. U.S., 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C. § 104(a).
The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).

F. 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) (citation omitted).

42 South Carolina

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 damage 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 damage 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).

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 damage 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.


Breach of Contract. Punitive damages for interference with contractual relations may be properly awarded under S.C. Code Ann. § 15-33-135 (2010); Collins Ent’mt 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 (4th Cir. 1988) (mere fact that party offers false excuse for canceling contract, without more, is not enough to establish breach of contract accompanied by 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 defendant’s ability to pay. Id.

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. Barwell 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 damage 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)?


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 Sec. II.A., above.

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


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. Are punitive damages taxable?

Yes. O’Gilvie v. U.S., 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); Hawkins v. U.S., 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); Brabson v. U.S., 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C. § 104(a) (2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).

Although no case law exists in South Carolina with respect to the state income tax liability for a punitive damages award, the law is clear that punitive damages are noncompensatory. See Gamble v. Stevenson, 406 S.E.2d 350 (S.C. 1991). Absent contrary authority, punitive damages should be considered presumptively taxable as income pursuant to state law.

F. 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).

I. PUNITIVE DAMAGES

A. May they be awarded?


B. If so, in what circumstances?


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 “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.

Employment 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.

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.

II. IF PUNITIVE DAMAGES MAY BE AWARDED

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


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?

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 (8th 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. Although punitive damages awards were limited to five hundred thousand (500,000) dollars 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 (8th Cir. 2002). As a result of the decision in Knowles, the South Dakota Legislature amended and revived § 21-3-11 of the South Dakota Codified Laws. 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 five hundred thousand (500,000) dollars. 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. Are punitive damages taxable?**

Yes. *O’Gilvie v. U.S.*, 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); *Hawkins v. U.S.*, 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); *Brabson v. U.S.*, 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C. § 104(a) (2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).

South Dakota will most likely follow the federal rulings regarding the taxability of punitive damages.

**F. 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).

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**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, 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 is to set the amount of punitive damages.


**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 (6th Cir. 1992).

**Standard of Proof.** Clear and convincing evidence. *Hodges*, 833 S.W.2d at 901.

**Actions Against State.** Punitive damages are not permitted. Tenn. Code Ann. § 9-8-307(d).


**Employment Liability.** A principal may be held vicariously liable for punitive damages assessed against an agent so long as the agent was acting within the scope of his or her employment. *Odom v. Gray*, 508 S.W.2d 526 (Tenn. 1974).

**Environmental Liability.** Punitive damages may be awarded. *Sterling v Velsicol Chem. Corp.*, 855 F2d 1188, 1216-17 (6th Cir. 1988) (applying Tennessee law) (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).

Professional Liability. A claim for punitive damages will hold 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. Woody*, 238 F.2d 452 (6th 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 Sec. II.A., above.

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

Low awards of compensatory damages may support a high award of punitive damages, depending on whether the action was particularly egregious. In the alternative, 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. Gamer*, 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?

Generally, no. 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. Are punitive damages taxable?

Yes. *O'Gilvie v. U.S.*, 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); *Hawkins v. U.S.*, 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); *Brabson v. U.S.*, 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C. § 104(a) (2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).

Although no case law exists in Tennessee with respect to the state income tax liability for a punitive damages award, the law is clear that punitive damages are noncompensatory. See *Hodges*, 833 S.W.2d at 901-02. Absent contrary authority, punitive damages should be considered presumptively taxable as income pursuant to Tennessee law.

F. To whom are punitive damages payable?

Generally, an award of punitive damages is payable to the plaintiffs.
I. PUNITIVE DAMAGES

A. May they be awarded?


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:

1) Fraud;
2) Malice; or
3) Willful act or omission or (in wrongful death action) gross neglect.


“Malice” is defined by statute as:

a specific intent by the defendant to cause substantial injury to the claimant;

“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).


Actions Against State. Punitive damages are not permitted. 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).


Employment Liability. An employer may be held liable for exemplary damages because of acts of an employee or agent, where the employer authorizes or ratifies the agent’s gross negligence, or in its own right if the employer is grossly negligent in hiring an unfit agent. See Mobil Oil Corp. v. Ellender, 968 S.W.2d 917, 921 (Tex. 1998); Hammerly Oaks, Inc. v. Edwards, 958 S.W.2d 387, 389 (Texas 1997); Purvis v. Prattco Inc., 595 S.W.2d 103, 104 (Tex. 1980); Brown & Root Inc. v. Shelton, 2003 WL 21771917,

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6 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.
A. Are they generally insurable (to the benefit of the wrongdoer)?

Possibly. The Texas Supreme Court decided a question certified from the 5th Circuit Court of Appeals holding that Texas public policy did not prohibit coverage, in the context of a workers’ compensation policy, under an employer’s liability policy for exemplary damages 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’ strong policy in preserving 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.

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 Sec. II.A., above.

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


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. Dutschmann, 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 damage 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.


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 noneconomic damages found by the jury, not to exceed $750,000; or
2) $200,000.

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. Are punitive damages taxable?

Yes. O’Gilvie v. U.S., 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); Hawkins v. U.S., 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); Brabson v. U.S., 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C. § 104(a) (2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).

F. 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).

46 Utah

I. PUNITIVE DAMAGES

A. May they be awarded?


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)
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, namely: (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 (U.S. 2003).


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.”).

Actions Against State. Punitive damages are not permitted. Lyon v. Burton, 5 P.3d 616, 634 (Utah 2000).

Standard of Proof. An award of punitive damages is contingent upon the establishment of “clear and convincing” evidence. UTAH CODE ANN. § 78-18-1 (1)(a) (2003).

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).
E. Are punitive damages taxable?

Yes. O’Gilvie v. U.S., 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); Hawkins v. U.S., 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); Brabson v. U.S., 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C. § 104(a) (2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).

Utah’s courts have not addressed the question of state income tax liability for a punitive damages award.

F. To whom are punitive damages payable?

The first $50,000 of a punitive damage award is payable to the plaintiff. Thereafter, the plaintiff and the state split equally any amount beyond $50,000. The state and the plaintiff share in the responsibility to pay attorney’s fees in proportion to the judgment entered in each party’s behalf. UTAH CODE ANN. 78B-8-201(3).

I. PUNITIVE DAMAGES

A. May they be awarded?


B. If so, in what circumstances?

Standard of Conduct. Punitive damages can 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 acts 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 Assoc., 546 A.2d 196 (Vt. 1988); State Agency of Natural Res. v. Riendeau, 603 A.2d 360 (Vt. 1991)).


Actions Against State. Punitive damages 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 $250,000.00 to any one person and the maximum aggregate liability shall be $1,000,000.00 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).

Employment Liability. Punitive damages are available when an employer takes retaliatory action against an employee because the employee filed a “good faith report” in accordance with the standards set forth by Vermont law. 33 VT. STAT. ANN. § 6909 (2010). Additionally, punitive damages are available for an employee who sustains a personal injury as a result of an accident arising out of and in the course of employment, and the worker is aggrieved by his or her employer's failure to reinstate him or her when the inability to work ceases. 21 VT. STAT. ANN. § 643b (2010). The Vermont Supreme Court also held that a former city employee should be awarded punitive damages for a breach of an employment contract and unlawful termination in violation of 42 U.S.C. § 1983. Furno v. Pignona, 522 A.2d 746 (Vt. 1986).

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 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).


**Product Liability.** The Vermont Supreme Court in *Slayton v. Ford Motor Co.* instructed the jury on the issue of product liability and punitive damages. However, the issue of punitive damages was not reached by the jury, as they found that the defendants were not guilty of a negligent act that proximately caused the plaintiff’s injury. *Slayton v. Ford Motor Co.*, 435 A.2d 946, 140 Vt. 27 (Vt. 1981).

**Professional Liability.** It remains unclear as to whether punitive damages are specifically recoverable in professional liability actions; however it appears as though they would be in such actions. See *Bloomer v. Gibson*, 912 A.2d 424 (Vt. 2006) (denying punitive damages judgment to plaintiff in malpractice case against attorney, but never indicating that such damages are unavailable if the circumstances dictate).

**II. IF PUNITIVE DAMAGES MAY BE AWARDED**

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


**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 Sec. 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 (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?**

The Eighth Amendment/Excessive Fines Clause of the Vermont Constitution does not prohibit punitive damages. However, whether or not punitive damages are subject to the constitutional excessive-fines limitation is an open question. *Browning Ferris Indus. v. Kelco Disposal*, 492 U.S. 257 (1989). 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. Are punitive damages taxable?**

Yes. *O’Gilvie v. U.S.*, 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); *Hawkins v. U.S.*, 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); *Brabson v. U.S.*, 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C. § 104(a) (2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).

Vermont relies on the federal tax laws to determine what is “taxable income.” 32 VT. STAT. ANN. § 5811 (2010).

**F. 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.
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 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).


Employment Liability. An employer may be liable for punitive damages for the wrongful acts of his or her employee only where the employer participates in, authorizes, or ratifies the wrongful act. Freeman v. Sproles, 131 S.E.2d 410 (Va. 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 (4th 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 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. 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). In both medical and attorney malpractice actions, suits for negligence are governed by the same principles as apply in other negligent 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). In a legal malpractice claim, “the Plaintiff must prove that the attorney was employed by the Plaintiff, that the attorney neglected a reasonable duty, and that such negligence resulted in and was the proximate cause of a loss to the Plaintiff.” Conant v. Ervin, 61 Va. Cir. 475, 477 (2003) (citing Duesterdick, 232 S.E.2d 774).

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.” Vir. Code Ann. §8.01-52 (5).

II. IF PUNITIVE DAMAGES MAY BE AWARDED

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


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

See Sec. 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 (4th Cir. 1992) (punitive damage 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).

E. Are punitive damages taxable?

Yes. O’Gilvie v. U.S., 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); Hawkins v. U.S., 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); Brabson v. U.S., 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C. § 104(a) (2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).

Punitive damages for personal injury are taxable under Virginia state law.

F. 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).
I. PUNITIVE DAMAGES

A. May they be awarded?


B. If so, in what circumstances?

See I.A., above. 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 as respects 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).

II. IF PUNITIVE DAMAGES MAY BE AWARDED

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


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. LEXIS 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 Sec. I.I.A., above.

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

Not applicable. See Sec. 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 Sec. I.A., above.

E. Are punitive damages taxable?

Yes. *O'Gilvie v. U.S.*, 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); *Hawkins v. U.S.*, 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); *Brabson v. U.S.*, 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C. § 104(a) (2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).

No case law exists in Washington with respect to state income tax liability for punitive damages awards. See Sec. I.A., above.

F. To whom are punitive damages payable?

Not applicable. See Sec. I.A., above.
I. PUNITIVE DAMAGES

A. May they be awarded?


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).


Employment Liability. When intentional interference with an employment relationship is alleged, the jury can properly consider the issue of punitive damages. C.W. Dev. v. Structures Inc., 408 S.E.2d 41 (W. Va. 1991). An employer can be liable for punitive damages for the acts of its employee if the employee was acting within the scope of his or her employment when the injury to the plaintiff occurred. Jarvis v. Modern Woodmen of Am., 406 S.E.2d 736 (W. Va. 1991).


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).


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 rights W. Va. Code § 16-5C-15(c),(d) (LexisNexis 2010).

II. IF PUNITIVE DAMAGES MAY BE AWARDED

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

Yes. 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) (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 Sec. II.A., above.

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


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 noneconomic 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.

However, case law sets out 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 new system for the review of punitive damages awards. The factors to be considered by the jury include:

(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;

(5) The financial position of the defendant.

See also Kessel v. Leavitt, 511 S.E.2d 720 (W. Va. 1998).

E. Are punitive damages taxable?

Yes. O’Gilvie v. U.S., 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); Hawkins v. U.S., 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); Brabson v. U.S., 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C. § 104(a) (2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).

Punitive damages are also subject to West Virginia state tax.

F. To whom are punitive damages payable?

Punitive damages are payable to the plaintiff alone.
I. PUNITIVE DAMAGES

A. May they be awarded?


B. If so, in what circumstances?

Standard of Conduct. Wisconsin’s punitive damages statute requires malice or an intentional disregard of the plaintiff’s rights. 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 (7th 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).

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).


Actions Against State. Claims for punitive damages are not allowed against governmental bodies, officers, agents or employees. WIS. STAT. § 893.80 (2010).


Employment Liability. Recovery of punitive damages against the employer for the tortious acts of the employee is not permitted without proof that the employer authorized or ratified the alleged tortuous act. Garcia v. Samson’s, Inc., 103 N.W.2d 565, 567 (Wis. 1960); Jeffers v. Nyssse, 297 N.W.2d 495, 499 n.3 (Wis. 1980).

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 damage [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, evidence that the 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 million to $650,000, since the former amount was 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.
II. IF PUNITIVE DAMAGES MAY BE AWARDED

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


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 Sec. 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 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. Are punitive damages taxable?

Yes. O’Gilvie v. U.S., 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); Hawkins v. U.S., 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); Brabson v. U.S., 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C. § 104(a) (2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).

Section 71.01 (13) of Wisconsin’s taxation statute provides that “Wisconsin adjusted gross income means federal adjusted gross income” with certain enumerated modifications. WIS. STAT. ANN. § 71.01 (13) (2010). Accordingly, punitive damages awarded under Wisconsin law would be subject to Wisconsin state tax.

F. To whom are punitive damages payable?

Generally punitive damages are payable to the aggrieved plaintiffs. See Sharp Elecs. Corp. v. Copy Plus, Inc., 939 F.2d 513 (7th 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.
I. PUNITIVE DAMAGES

A. May they be awarded?

Yes. Punititive 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). See also Philip Morris USA v. Williams, 549 U.S. 346 (2007), finding that the due process clause of the U.S. Constitution forbids a state from using a punitive damages award to punish a defendant for injury inflicted to persons not parties to the lawsuit.

B. If so, in what circumstances?

Standard of Conduct. Outrageous conduct, malice and willful and wanton misconduct have been 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).


Employment Liability. Punitive damages against an employer for the misconduct of an employee are permitted only if one of four circumstances has been met: (1) “the employer or a managerial agent thereof must have authorized the doing and the manner of the act;” (2) “the employee was unfit and the employer was reckless in employing or retaining him;” (3) “the employee was employed in a managerial capacity and was acting in the scope of employment;” or (4) “the employer or one of its managerial agents ratified or approved the act.” Campen v. Stone, 635 P.2d 1121 (Wyo. 1981).

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).


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. 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 Sec. II.A., above.

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

Actual damages are needed to support a punitive damages award, and 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. Are punitive damages taxable?**

Yes. *O'Gilvie v. U.S.*, 519 U.S. 79 (1996) (punitive damages received in a tort action for personal injuries are subject to federal tax as gross income); *Hawkins v. U.S.*, 30 F.3d 1077 (9th Cir. 1994) (punitive damages are not excluded from gross income because they are not compensation, but are intended to punish the defendant); *Brabson v. U.S.*, 73 F.3d 1040 (10th Cir. 1996) (punitive damages are included in gross income). See also I.R.C. § 104(a)(2) (2010). The only exceptions provided by the Internal Revenue Code are for punitive damage awards in wrongful death actions and actions in which an applicable state statute provides that only punitive damages may be awarded in such an action. I.R.C. § 104 (2010).

No, under state law. The state preempts for itself the field of imposing and levying income taxes. WYO. STAT. ANN. § 39-12-101 (2010). Wyoming does not subject punitive damages to state taxation.

**F. To whom are punitive damages payable?**

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