

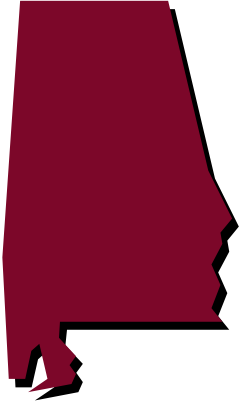


FIFTY STATE SURVEY
OF THE LAW OF
PUNITIVE DAMAGES

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ALABAMA

Standard for an Award of Punitive Damages

Wrongful Death

Alabama Code Sec. 6-5-410(a) provides that punitive damages are recoverable for the "wrongful act, omission, or negligence of any person, persons, or corporation." This section has been construed to allow for punitive damages recovery upon a showing of negligence. See, e.g. Lor, Inc. v. Cowley, 28 F.3d 19, 23 (5th Cir. 1994).

Other Cases: Alabama Code Sec. 6-11-20(a) allows for punitive damages in civil cases upon a showing that "the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice." Fraud and malice require an intentional act. See Alabama Code Sec. 6-11-20(b)(1) and (2).

In one case, a single act of misfiling a prescription was determined to be sufficiently wanton to justify an award of punitive damages. Harco Drugs, Inc. v. Holloway, 669 So.2d 878 (Ala. 1995).

Insurability of Punitive Damages

Not prohibited.

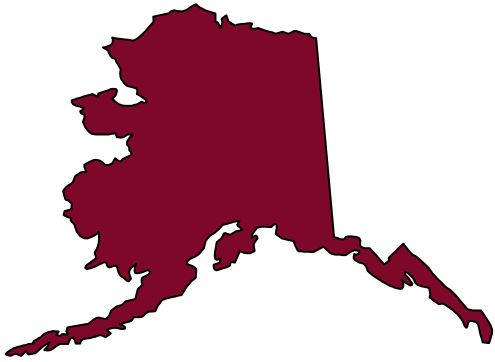
Punitive damages are generally recoverable under insurance policies. In Alabama insurers are required to cover punitive damages for wrongful death because, under Alabama law, all damages for wrongful death are considered punitive. Accordingly, to avoid a forfeiture, Alabama law requires coverage of punitives for wrongful death. See, e.g., Northwestern Nat'l Cas. Co. v. McNulty, 307 F.2d 432, 439 (5th Cir.1962) (partially superseded by statute on other grounds), see also Montgomery Health Care Facility, Inc. v. Ballard, 565 So.2d 221 (Ala. 1990) ("Alabama public policy allows liability insurance to cover punitive damages in the wrongful death context.").

Punitive damages have been held to be insurable in other contexts as well. See Employers Ins. Co. v. Alabama v. Brock, 172 So.2d 671 (Ala. 1937)(action seeking punitive damages was covered within the terms of the policy upon a showing of negligence); American Fidelity & Cas. Co. v. Werfel, 164 So.2d 383 (Ala. 1935) ("If the recovery against [the insured] included punitive damages assessed for personal injury inflicted, this was a liability imposed by law and within coverage of the policy). The Alabama Attorney General has issued an opinion which states that the State of Alabama allows indemnification against liability for both directly and vicariously assessed punitive damages. Insurance Against Liability for Punitive Damages Imposed in Civil Cases, Op. Att'y. Gen. Ala. (Feb. 1, 1978).

Alabama public policy does not prohibit an insurer, however, from excluding punitive damages from coverage through express policy provisions. See Ross Neely Sys., Inc. v. Occidental Fire & Cas. Co., 196 F.3d 1347 (11th Cir. 1999); see also Hill v. Campbell, 804 So.2d 1107 (Ala.Civ.App., 2001)("We find no public policy violated by [the insurer's] exclusion of coverage for punitive damages, when the complaint was not based on wrongful death, because [claimant] has been made whole for her injuries and punitive damages paid by [the insurer] would serve little or no purpose.") The Court in Ross specifically noted that although no Alabama cases have reached the issue, other courts have approved similar exclusions, [citations omitted] and the Alabama agency responsible for regulating insurance specifically allows insurers to file for approval of policies containing punitive damages exclusions. See Rate Bulletin No. 245, Ala. Dept. of Ins. (Dec.1991-Feb.1992).

Applicable Statutes

None.



ALASKA

Standard for an Award of Punitive Damages

Outrageous conduct, an act done with malice, bad motive, or a reckless indifference to the interests of another.

Alaska Statute, Sec. 09.17.020, in pertinent part, allows for punitive damages as follows:

(b) The fact finder may make an award of punitive damages only if the plaintiff proves by clear and convincing evidence 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.

(f) Except as provided in (g) and (h) of this section, an award of punitive damages may not exceed the greater of

- (1) three times the amount of compensatory damages awarded to the plaintiff in the action; or
- (2) the sum of \$500,000.

(g) Except as provided in (h) of this section, if the fact finder determines that the conduct proven under (b) of this section was motivated by financial gain and the adverse consequences of the conduct were actually known by the defendant or the person responsible for making policy decisions on behalf of the defendant, it may award an amount of punitive damages not to exceed the greatest of

- (1) four times the amount of compensatory damages awarded to the plaintiff in the action;
- (2) four times the aggregate amount of financial gain that the defendant received as a result of the defendant's misconduct; or
- (3) the sum of \$7,000,000.

(h) Notwithstanding any other provision of law, in an action against an employer to recover damages for an unlawful employment practice prohibited by AS 18.80.220, the amount of punitive damages awarded by the court or jury may not exceed

- (1) \$200,000 if the employer has less than 100 employees in this state;
- (2) \$300,000 if the employer has 100 or more but less than 200 employees in this state;
- (3) \$400,000 if the employer has 200 or more but less than 500 employees in this state; and
- (4) \$500,000 if the employer has 500 or more employees in this state.

(i) Subsection (h) of this section may not be construed to allow an award of punitive damages against the state or a person immune under another provision of law. In (h) of this section, "employees" means persons employed in each of 20 or more calendar weeks in the current or preceding calendar year.

(j) If a person receives an award of punitive damages, the court shall require that 50 percent of the award be deposited into the general fund of the state. This subsection does not grant the state the right to file or join a civil action to recover punitive damages.

Insurability of Punitive Damages

Not prohibited.

In Alaska, a policyholder is generally allowed to recover punitive damages from its insurer, unless the insurance policy expressly and specifically excludes coverage for punitive damages. In Providence Washington Co. of Alaska v. City of Valdez, 684 P.2d 861, 862 (Alaska 1984) the Alaska Supreme Court held that the "all sums" language found in the insuring agreement includes punitive damages. As for public policy, the court in Valdez stated that requiring coverage for punitive damages was not prohibited because the defendant was a municipal corporation and "such awards are incurred in the performance of public functions and, if uninsured, would fall on the innocent taxpayers." The Court also stated in dicta that it viewed as "sound" the public policy exception recognized by other jurisdictions for vicarious liability. Following Valdez, in LeDoux v. Continental Ins. Co., 666 F.Supp. 178, 180 (D. Alaska 1987), the Court held that Alaska public policy does not preclude an insurer from covering a punitive damages award in a case involving unintentional torts. See also Aetna Cas. & Sur. Co. v. Marion Equip. Co., 894 P.2d 664 (Alaska 1995) (stating, in dicta, that punitive damages are insurable); see also State Farm Mut. Auto. Ins. Co. v. Lawrence, 26 P.3d 1074 (Alaska 2001)(relying on Valdez to hold that "[the] liability policies do not specifically exclude coverage for punitive damages. Rather, they provide that [the insurer] will 'pay damages which an insured becomes legally liable to pay because of ... bodily injury to others.' Because a person may become legally liable for punitive damages if that person acts outrageously or with reckless indifference to the interests of another, we hold that the [insured's] liability policies provide coverage for the [insured's] own punitive damages.")

Applicable Statutes

None.



ARIZONA

Standard for an Award of Punitive Damages

An evil hand guided by an evil mind.

Under Arizona law to recover punitive damages, a plaintiff must prove by clear and convincing evidence that the defendant engaged in aggravated and outrageous conduct with an "evil mind." Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn, 907 P.2d 506 (Ariz.App. Div. 1,1995) (citing Thompson v. Better-Bilt Aluminum Prod. Co., 832 P.2d 203, 209-10 (Ariz. 1992); Rawlings v. Apodaca, 151 Ariz. 149, 162, 726 P.2d 565, 578 (Ariz. 1986); Linthicum v. Nationwide Life Ins. Co., 723 P.2d 675, 680-81 (Ariz. 1986)).

A defendant acts with the requisite evil mind when he intends to injure or defraud, or deliberately interferes with the rights of others, "consciously disregarding the unjustifiable substantial risk of significant harm to them." Linthicum, 723 P.2d at 680; Gurule v. Illinois Mut. Life & Cas. Co., 734 P.2d 85, 87 (Ariz. 1987).

The factors considered by the judge and jury in deciding whether a defendant acted with an evil mind include (1) the reprehensibility of defendant's conduct and the severity of the harm likely to result, (2) any harm that has occurred, (3) the duration of the misconduct, (4) the defendant's awareness of the harm or risk of harm, and (5) any concealment of it. Thompson, 832 P.2d at 209.

Insurability of Punitive Damages

Not prohibited.

Neither Arizona law nor public policy prohibits insurance coverage for punitive damages, whether assessed directly or vicariously. However, an insurance company is free to exclude punitive damages by express language.

In Price v. Hartford Accident & Indemnity Company, 502 P.2d 522 (Ariz. 1972) the Arizona Supreme Court held that the insurance company had a contractual obligation to pay both compensatory and punitive damages. When an insurer has agreed to pay "all sums" without limitation, the insurer may be held to have taken a premium covering all liability for damages, including punitive damages:

It is our holding that the premium has been paid and accepted and the protection has been tendered, and that under the circumstances public policy would be best served by requiring the insurance company to honor its obligation.

Subsequently, the Arizona Supreme Court clarified that an insurance company must expressly eliminate coverage for punitive damages under a general liability policy. State Farm Mut. Auto Ins. Co. v. Wilson, 782 P.2d 727, 733-34 (Ariz. 1989).

Note, however, that the mandatory, minimum insurance which an insurer must provide in a motor vehicle liability policy does not extend to punitive damage awards. Cassel v. Schacht, 683 P.2d 294 (Ariz. 1984).

Applicable Statutes

None.



ARKANSAS

Standard for an Award of Punitive Damages

Willfulness, wantonness, or conscious indifference.

To obtain an award of punitive damages in Arkansas, there must be a showing of "willfulness, wantonness, or conscious indifference." Harold McLaughlin Reliable Truck Brokers, Inc. v. Cox, 922 S.W.2d 327 (Ark. 1996) (citing Louisiana and North West R.R. Co. v. Willis, 289 Ark. 410, 415, 711 S.W.2d 805, 808 (Ark. 1986)). "Negligence alone, however severe, is not sufficient to sustain such an award." In Simpson v. Weeks, 530 F.Supp. 196 (E.D.Ark.1977), the federal district court articulated the type of conduct that will support a finding of wantonness as follows:

An act is wantonly done if done in reckless disregard or indifference to the rights of another. An act is oppressively done if done in a way or manner which violates the right of another person with unnecessary harshness or severity as by misuse or use of authority or power.

In National By-Products, Inc. v. Searcy House Moving Co., 731 S.W.2d 194 (Ark. 1987) the Arkansas Supreme Court held that gross negligence will not support an award of punitive damages.

Insurability of Punitive Damages

Prohibited for intentional conduct.

Vicariously assessed and directly assessed punitive damages based on negligent conduct appear to be insurable under Arkansas law, but directly and vicariously assessed punitive damages based on intentional conduct may not be insurable. A policy can expressly exclude punitive damages from coverage.

In Southern Farm Bureau Casualty Insurance Company v. Daniel, 440 S.W.2d 582 (Ark. 1969) the Supreme Court of Arkansas held that punitive damages assessed for unintentional conduct are insurable. The Supreme Court of Arkansas affirmed the trial court's decision and held that a comprehensive automobile liability insurance policy provided coverage for vicariously assessed punitive damages:

As we read the policy herein it agrees to pay on behalf of the insurer all sums which the insured shall become LEGALLY OBLIGATED TO PAY AS DAMAGES, because of bodily injuries sustained. When we consider that under our law, one cannot become legally obligated to pay punitive damages unless actual damages have been sustained and assessed, we find that punitive damages constitute a sum which the insured becomes legally obligated to pay as damages because of bodily injuries sustained. [Citation omitted]

The Court limited its holding to cases involving accidental conduct:

Neither can we find anything in the state's public policy that prevents an insurer from indemnifying its insured against punitive damages arising out of an accident, as distinguished from intentional torts. Since we have permitted punitive damages to be assessed against an employer under the doctrine of respondeat superior even in the absence of the employer's knowledge or authorization of the employee's acts, we can perceive of no good reason why an employer should be prohibited from insuring himself against such losses, since the losses are in effect a business loss--i.e. a calculated risk of doing business.

Because the Court does not clearly limit its holding to cases involving vicarious liability, as opposed to direct liability, punitive damages assessed for any negligent act are likely to be held insurable.

Punitive damages assessed for intentional conduct, however, are not insurable in Arkansas. In Unigard Security Ins. Co. v. Murphy Oil USA, Inc., 962 S.W.2d 735, 742 (Ark. 1998) the Arkansas Supreme Court held that "the punitive damages imposed by the Alabama jury were not "sums" that [the insured] became legally obligated to pay on account of, or because of, any accidentally caused [damage]." The Court noted in Unigard that the record clearly reflected that the jury awarded punitive damages "solely on account of [the insured's] intentional conduct, labeled 'malicious, fraudulent, or oppressive' by the Alabama jury..."

Accordingly, because the policy provided coverage for "property damage," which was not the basis of the insured's liability for punitive damages, there is no coverage for that aspect of the insured's liability.

Applicable Statutes

Section 23-70-307(8) of the Arkansas Insurance Code requires that policies containing an exclusion for punitive damages must include a definition of punitive damages substantially similar to the following:

Punitive damages are damages that may be imposed to punish a wrongdoer and to deter others from similar conduct.



CALIFORNIA

Standard for an Award of Punitive Damages:

Oppression, fraud or malice.

California Civil Code § 3294 allows for exemplary damages, in pertinent part, as follows:

(a) In an 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, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, 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.

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

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

(3) "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.

Unintentional carelessness, akin to negligence or recklessness, is not sufficient to warrant assessment of punitive damages. Ford Motor Co. v. Home Ins. Co., 172 Cal.Rptr. 59 (Cal.App. 2 Dist. 1981).

Insurability of Punitive Damages

Prohibited for intentional conduct.

Generally, California does not allow for indemnification of punitive damage awards. California might, though it has not ruled on it specifically to date, allow for indemnification of punitive awards where the damages were imposed on the insured as a result of vicarious, and not direct, liability. Where the basis for award of punitive damages against an insured corporation was the willful act of the insured, not vicarious responsibility for acts of an employee, recovery from the insurer under a general liability policy was prohibited by the California Insurance Code section 533. That section provides that an insurer is not liable for a loss caused by the willful act of the insured. City Prods. Corp. v. Globe Indem. Co., 151 Cal. Rptr. 494 (Cal Ct. App. 1979); see also Jaffe v. Cranford Ins. Co., 168 Cal. App. 3d 93 (Cal. App. 4 Dist. 1985) (fines and penalties are not "insurable damages").

Applicable Statutes

The California Insurance Code expressly prohibits an insurer from indemnifying its insured for a loss caused by a willful act:

An insurer is not liable for a loss caused by the willful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others.

Cal. Ins. Code § 533.



COLORADO

Standard for an Award of Punitive Damages

Fraud, malice or willful or wanton conduct.

Colorado Statutes § 13-21-102 provides for the recovery of punitive damages as follows:

(1)(a) In all civil actions in which damages are assessed by a jury for a wrong done to the person or to personal or real property, and the injury complained of is attended by circumstances of fraud, malice, or willful and wanton conduct, the jury, in addition to the actual damages sustained by such party, may award him reasonable exemplary damages. The amount of such reasonable exemplary damages shall not exceed an amount which is equal to the amount of the actual damages awarded to the injured party.

(b) As used in this section, "willful and wanton conduct" means conduct purposefully committed which the actor must have realized as dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights and safety of others, particularly the plaintiff.

(2) Notwithstanding the provisions of subsection (1) of this section, the court may reduce or disallow the award of exemplary damages to the extent that:

(a) The deterrent effect of the damages has been accomplished; or

(b) The conduct which resulted in the award has ceased; or

(c) The purpose of such damages has otherwise been served.

(3) Notwithstanding the provisions of subsection (1) of this section, the court may increase any award of exemplary damages, to a sum not to exceed three times the amount of actual damages, if it is shown that:

(a) The defendant has continued the behavior or repeated the action which is the subject of the claim against the defendant in a willful and wanton manner, either against the plaintiff or another person or persons, during the pendency of the case; or

(b) The defendant has acted in a willful and wanton manner during the pendency of the action in a manner which has further aggravated the damages of the plaintiff when the defendant knew or should have known such action would produce aggravation.

In Colorado, punitive damages are available only pursuant to statute, Gruntmeir v. Mayrath Industries, Inc., 841 F.2d 1037, 1040 (10th Cir.1988); Kaitz v. District Court, 650 P.2d 553, 556 (Colo.1982), and are not recoverable in ordinary breach of contract cases. Mortgage Finance, Inc. v. Podleski, 742 P.2d 900 (Colo.1987); Williams v. Speedster, Inc., 485 P.2d 728 (Colo. 1971).

Insurability of Punitive Damages

Prohibited.

Colorado public policy prohibits an insurer from providing insurance coverage for punitive damages. Universal Indemnity Ins. Co. v. Tenery, 17, 39 P.2d 776, 779 (Colo. 1934); Lira v. Shelter Ins. Co., 913 P.2d 514 (Colo. 1996)¹; Gleason v. Fryer, 491 P.2d 85, 86 (Colo. 1971). The prohibition extends to the obligation to indemnify the insured for post-judgment interest on punitive damages. Bohrer v. Church Mut. Ins. Co., 12 P.3d 854 (Colo.App. 2000).

¹ Note that the insurance contract at issue in Lira specifically excluded punitive damages from coverage.

In Tenery, supra, the Colorado Supreme Court found that public policy prohibited the recovery of punitive damages even when they are imposed vicariously. 39 P.2d at 779 (denying recovery to policyholder, a rental car business, where the driver of the car was operating it pursuant to agreement...stating "the insurance company did not participate in this wrong, and was under no contract to indemnify against such. In this particular matter the policy indemnifies against damages for bodily injuries, and nothing in addition is contracted for, and there is no further liability. The injured will not be allowed to collect from a nonparticipating party for a wrong against the public.")

Applicable Statutes

None.



CONNECTICUT

Standard for an Award of Punitive Damages

Reckless indifference to or an intentional and wanton violation of rights.

In order to justify an award punitive damages, the evidence must show a reckless indifference to the rights of others or an intentional and wanton violation of those rights. West Haven v. Hartford Ins. Co., 160, 602 A.2d 988 (Conn. 1992). "Recklessness is a state of consciousness with reference to the consequences of one's acts.... It is more than negligence, more than gross negligence.... The state of mind amounting to recklessness may be inferred from conduct. But, in order to infer it, there must be something more than a failure to exercise a reasonable degree of watchfulness to avoid danger to others or to take reasonable precautions to avoid injury to them.... Wanton misconduct is reckless misconduct.... It is such conduct as indicates a reckless disregard of the just rights or safety of others or of the consequences of the action." Craig v. Driscoll, Conn. Ct. App. 781 A.2d 440, cert. granted on other grounds, 258 Conn. 931, 785 A.2d 228 (2001).

Importantly, the liability for punitive damages is considerably limited in light of Connecticut's longstanding rule limiting common law punitive damages to a party's litigation costs; attorney's fees; and expenses. Berry v. Loiseau, 614 A.2d 414, 435 (Conn. 1992); but see Wolf v. Yamin, 295 F.3d 303 (2nd Cir. July 2002) (noting recent ambiguity in Connecticut law on punitive damages, especially in light of the various concurrences in Berry and requesting certification of a question on punitive damages to the Connecticut Supreme Court.)

Insurability of Punitive Damages

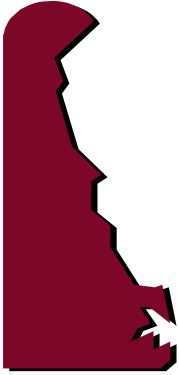
Prohibited for direct liability only.

Connecticut appears to distinguish between situations of direct and vicarious liability for purposes of determining whether punitive damages are insurable. When the insured's direct conduct forms the basis for punitive damages, Connecticut law bars recovery from the insurer. Bodner v. United Svcs. Auto Ass'n, 610 A.2d 1212, 1221-22 (Conn. 1982); see also Caulfield v. Amica Mut. Ins. Co., 627 A.2d 466, 466-69 (Conn. Ct. App. 1993) (denying recovery of statutory multiple damages under uninsured motorist provision in insurance contract on the grounds of public policy).

In Avis Rent A Car System, Inc. v. Liberty Mutual Ins. Co., 526 A.2d 522 (Conn. 1987) the Connecticut Supreme Court allowed recovery of a punitive damages award from an insurer when the damages were a result of the conduct of an agent of the policyholder. The Court referring to a specific statute relating to auto insurance, that the policyholder "having been assigned liability by statutory fiat rather than as punishment for his own wrongdoing, had suffered an insurable risk."

Applicable Statutes:

None.



DELAWARE

Standard for an Award of Punitive Damages

Outrageous conduct with an evil motive or reckless indifference to the rights of others.

Punitive damages may be imposed only after a finding that the defendant's conduct is "outrageous," because of "evil motive" or "reckless indifference to the rights of others." Jardel Co., Inc. v. Hughes, 523 A.2d 518 (Del. 1987) (citing Restatement (Second) of Torts § 908, comment b (1979)). Mere inadvertence, mistake or errors of judgment which constitute mere negligence will not suffice. Id.

Although punitive damage awards are permitted in medical malpractice cases, by statute in any action for medical malpractice, punitive damages may be awarded only if the injury "was maliciously intended, or was the result of willful or wanton misconduct by the health care provider":

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, and may be awarded only if separately awarded by the trier of fact in a separate finding from any finding of compensatory damages which separate finding shall also state the amounts being awarded for each such category of damages. Injuries shall not be considered maliciously intended in instances in which unforeseen damage or injury results from intended medication, manipulation, surgery, treatment or the intended omission thereof, administered or omitted without actual malice or if the intended treatment is applied or omitted by mistake to or for the wrong patient or wrong organ.

Del. Stat. § 6855.

Delaware Courts have held that by statute punitive damages are not allowed in a wrongful death case. Sterner v. Wesley College, Inc., 747 F.Supp. 263 (D.Del. 1990)(the plain language and legislative history of the Delaware wrongful death statute, 10 Del.C. § 3724, do not permit the imposition of punitive damages.)

Insurability of Punitive Damages

Not prohibited.

Directly assessed punitive damages are insurable in Delaware. Whalen v. On-Deck, Inc., 514 A.2d 1072, 1074 (Del. 1986). The Supreme Court of Delaware has made no distinction between directly and vicariously assessed punitive damages. Accordingly, it is likely that vicariously assessed punitive damages are insurable under Delaware law as well.

Policy provisions excluding coverage for punitive damages, however will probably be enforced. See Whalen, supra, (the Court will not void an insurance policy provision absent "clear indicia" of a contrary public policy "in light of the importance of the right of parties to contract as they wish").

Applicable Statutes

None.

DISTRICT OF COLUMBIA

Standard for an Award of Punitive Damages

Willful and outrageous; gross fraud; or evil motive, active malice and deliberate violence or oppression.

In order for an award of punitive damages to be sustained, the conduct complained of must be:

- "willful and outrageous," (Spar v. Obwoya, 369 A.2d 173, 180 (D.C.App.1977); Harris v. Wagshal, 343 A.2d 283, 288 (D.C.App.1975));
- constitute "gross fraud," (Spar v. Obwoya, *supra* at 180; Franklin Inv. Co. v. Homburg, 252 A.2d 95, 98 (D.C.App.1969)).
- or be "aggravated by 'evil motive, active malice, deliberate violence or oppression.'" (Price v. Griffin, 359 A.2d 582, 589 (D.C.App.1976)).

Insurability of Punitive Damages

Prohibited for intentional conduct.

While the law of the District of Columbia is not settled on this point, based on existing case law, it appears that punitive damages assessed for negligent acts are insurable, while punitive damages assessed for intentional conduct may not be insurable.

In Hartford Life Insurance Company v. Title Guarantee Company, the United States Court of Appeals for the District of Columbia held that punitive damages assessed for negligent, rather than intentional acts, are insurable. 520 F.2d 1170, 1175 (D.C.Cir.1975). The Court of Appeals for the District of Columbia specifically stated that:

...Assuming that the title insurance policy covered the loss, enforcement of the [insurance] policy would not contravene public policy. It is only for the knowledgeable and intentional wrongdoer that the practice of voiding insurance contracts as being contrary to public policy is reserved. [Citations omitted] It is settled law that a person may insure himself against the results of his own negligent violations of law. [Citations omitted]

In Salus v. Continental Cas. Co., 478 A.2d 1067, 1070-72 (D.C.1984), however, the Court suggested that indemnification for punitive damages may be contrary to public policy. See also In re Estate of Corriea, 719 A.2d 1234 (D.C. 1998) (noting that the insurability of punitive damages was left open in Salus Corp.).

Applicable Statutes

None.



FLORIDA

Standard for an Award of Punitive Damages

Fraud, actual malice, or deliberate violence or oppression; or conduct that is willful or grossly negligent as to indicate a wanton disregard for the rights of others.

Under Florida law:

Exemplary damages are given solely as a punishment where torts are committed with fraud, actual malice, or deliberate violence or oppression, or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others. Exemplary or punitive damages are therefore damages ultra compensation, and are authorized to be inflicted when the wrong done partakes of a criminal character, though not punishable as an offense against the state, or consists of aggravated misconduct or a lawless act resulting in injury to plaintiff when sought to be redressed by a civil action for the tort.

Winn & Lovett Grocery Co. v. Archer, 171 So.2d 214, 221 (Fla. 1936); Perdue Farms Inc. v. Hook, 777 So.2d 1047 (Fla.App. 2 Dist. 2001).

The conduct required to sustain an award of punitive damages must be of a:

gross and flagrant character, evincing reckless disregard of human life, or the safety of persons exposed to its dangerous effects, or there is that entire want of care which would raise the presumption of a conscious indifference to consequences, or which shows wantonness or recklessness or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them [equivalent to manslaughter].

Carraway v. Revell, 116 So.2d 16 (Fla. 1959); White Construction Co. v. Dupont, 455 So.2d 1026 (Fla. 1984).

Manslaughter is defined by § 782.07 of the Florida Statutes as "... the killing of a human being by the act, procurement, or culpable negligence of another..." Culpable negligence is defined as:

[M]ore than a failure to use ordinary care for others. In order for negligence to be culpable, it must be gross and flagrant. Culpable negligence is a course of conduct showing reckless disregard of human life, or for the safety of persons exposed to its dangerous effects, or such an entire want of care as to raise a presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or such an indifference to the rights of others as is equivalent to an intentional violation of such rights.

Villafana v. State, 728 So.2d 260, 260-61 (Fla. 5th DCA 1999).

Florida Statutes provide a cause of action for nursing home residents for violations of their rights to receive adequate and appropriate health care and rehabilitative services. This claim is available in addition to a medical malpractice claim. The statute expressly allows for a punitive damage award, and adopts the common law punitive damages standard:

Fla. Stat. Sec. 400.023. **Civil enforcement**

(1) Any resident whose rights as specified in this part are violated shall have a cause of action. The action may be brought by the resident or his or her guardian, by a person or organization acting on behalf of a resident with the consent of the resident or his or her guardian, or by the personal representative of the estate of a deceased resident regardless of the cause of death. If the action alleges a claim for the resident's rights or for negligence that caused the death of the resident, the claimant shall be required to elect either survival damages pursuant to s. 46.021 or wrongful death damages pursuant to s. 768.21. If the action alleges a claim for the resident's rights or for negligence that did not cause the death of the resident, the personal representative of the estate may recover damages for the negligence that caused injury to the resident. The action may be brought in any court of competent jurisdiction to enforce such rights and to recover actual and punitive damages for any violation of the rights of a resident or for negligence. Any resident who prevails in seeking injunctive relief or a claim for an administrative remedy is entitled to recover the costs of the action,

and a reasonable attorney's fee assessed against the defendant not to exceed \$25,000. Fees shall be awarded solely for the injunctive or administrative relief and not for any claim or action for damages whether such claim or action is brought together with a request for an injunction or administrative relief or as a separate action, except as provided under s. 768.79 or the Florida Rules of Civil Procedure. Sections 400.023-400.0238 provide the exclusive remedy for a cause of action for recovery of damages for the personal injury or death of a nursing home resident arising out of negligence or a violation of rights specified in s. 400.022. This section does not preclude theories of recovery not arising out of negligence or s. 400.022 which are available to a resident or to the agency. The provisions of chapter 766 do not apply to any cause of action brought under ss. 400.023-400.0238.

(2) In any claim brought pursuant to this part alleging a violation of resident's rights or negligence causing injury to or the death of a resident, the claimant shall have the burden of proving, by a preponderance of the evidence, that:

- (a) The defendant owed a duty to the resident;
- (b) The defendant breached the duty to the resident;
- (c) The breach of the duty is a legal cause of loss, injury, death, or damage to the resident; and
- (d) The resident sustained loss, injury, death, or damage as a result of the breach.

Cap on Punitive Damages

Florida Statutes expressly limit punitive damages awards, in part, as follows:

(1)(a) Except as provided in paragraphs (b) and (c), an award of punitive damages may not exceed the greater of:

1. Three times the amount of compensatory damages awarded to each claimant entitled thereto, consistent with the remaining provisions of this section; or
2. The sum of \$500,000.

(b) Where the fact finder determines that the wrongful conduct proven under this section 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, was actually known by the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant, it may award an amount of punitive damages not to exceed the greater of:

1. Four times the amount of compensatory damages awarded to each claimant entitled thereto, consistent with the remaining provisions of this section; or
2. The sum of \$2 million.

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

Fla. Stat. Sec. 768.73. The amount of the award cannot bankrupt the insured. Wransky v. Dalfo, 801 So.2d 239 (Fla.App. 4 Dist. 2001).

Insurability of Punitive Damages

Prohibited for intentional conduct.

Florida law prohibits insurance coverage for punitive damages awarded against a person because of the insured's own wrongful conduct. Northwestern Nat'l Cas. Co. v. McNulty, 307 F.2d 432, 440-41 (5th Cir. 1962); see also U.S. Concrete Pipe Co. v. Bould, 437 So.2d 1061 (Fla.1983); Morgan International Realty, Inc. v. Dade Underwriters Ins. Agency, Inc., 617 So.2d 455 (Fla. 3d DCA 1993); Country Manors Ass'n, Inc. v. Master Antenna Systems, Inc., 534 So.2d 1187 (Fla. 4th DCA 1988); Travelers Ins. Co. v. Wilson, 261 So.2d 545 (Fla. 4th DCA 1972); Nicholson v. American Fire and Cas. Ins. Co., 177 So.2d 52 (Fla. 2d DCA 1965). Courts have expressly held that the reason there is no coverage for intentional acts is not because of an exclusion in the policy, but because Florida case law holds that to provide insurance against an intentional act is against public policy. Nicholson, *supra*; McNulty, *supra*.

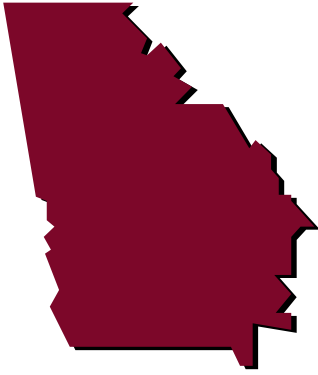
Florida does allow coverage of punitive damages when they are imposed as a result of vicarious liability on the insured. Morrison v. Hugger, 369 So.2d 614 (Fla.App., 1979); Sterling Ins. Co. Hughes, 187 So.2d 898 (Fla. 3d DCA 1966); Highlands Ins. Co. v. McCutchen, 486 So.2d 4 (Fla. 3d DCA 1986); Crabtree v. Aetna Cas. & Sur. Co., 438 So.2d 102 (Fla. 1st DCA 1983); Aetna Cas. & Sur. Co. v. Wackenhut Corp., 418 So.2d 1013 (Fla. 3d DCA 1982)

Note that in Country Manors, *supra*, the Court declined to find coverage for a treble damage award because the policy excluded coverage for "fines or penalties imposed by law:"

[w]e consider treble damages to be in the nature of a fine or a penalty, similar to punitive damages, which are not covered by insurance by reason of public policy...Thus, we hold that treble damages are 'fines or penalties imposed by law...'

Applicable Statutes

None.



GEORGIA

Standard for an Award of Punitive Damages

Willful misconduct, malice, fraud, wantonness, oppression or conscious indifference.

Under Georgia law, recovery of punitive damages is allowed if the evidence reveals willful misconduct, malice, fraud, wantonness, oppression, or a conscious indifference on part of defendant. O.C.G.A. § 51-12-5(a). Salsbury Laboratories, Inc. v. Merieux Laboratories, Inc., 735 F.Supp. 1555 (D. Ga. 1989); Kicklighter v. Nails by Jannee, Inc., 616 F.2d 734 (11th Cir. 1980). Punitive damages cannot be awarded for mere negligence. Kicklighter, supra.

Punitive damages are not available under Georgia's wrongful death statute. O.C.G.A. §§ 51-4-2, 51-4-3, 51-4-5(a). Childs v. U.S., 1996, 923 F.Supp. 1570.

Insurability of Punitive Damages

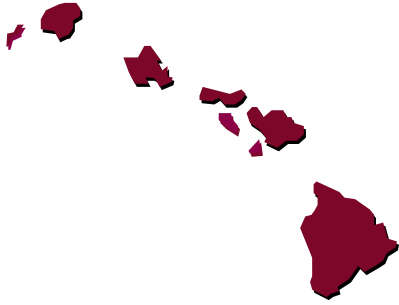
Not prohibited.

Punitive damages are insurable in Georgia. In Greenwood Cemetery v. Travelers Indemnity Company, the Supreme Court of Georgia held that a comprehensive general liability insurance policy which required the insurer to pay "all sums which the insured was legally obligated to pay as damages" covered punitive damages directly assessed against a cemetery because of its wrongful removal of a grave marker. 232 S.E.2d 671 (Ga. App. 1992). The Court did not distinguish between direct or vicarious liability for purposes of insurability of punitive damages.

Applicable Statutes

The Georgia Insurance Code authorizes the issuance of liability insurance. Code Ann. § 56-408(1) provides, "Liability insurance, which is insurance against legal liability for ... damage to property ..."

Pursuant to this statute, the Georgia Supreme Court held in Greenwood, supra, that an award of punitive damages is a legal liability and, accordingly, insurance against such damages is expressly authorized.



HAWAII

Standard for an Award of Punitive Damages

Willful, wanton, or malicious act.

In Hawaii, punitive damages may be recovered when a wrongful act is done willfully, wantonly or maliciously or is characterized by some aggravating circumstances. Howell v. Associated Hotels, Ltd, 40 Haw. 492 (Haw.Terr. 1954.)

Punitive damages are recoverable in a tort action based on negligence: Such damages may be awarded in cases where the defendant:

"has acted wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations"; [or where there has been] "some willful misconduct or that entire want of care which would raise the presumption of a conscious indifference to consequences."

Bright v. Quinn, 20 Haw. 504, 512 (1911).

Insurability of Punitive Damages

Not prohibited.

Punitive damages in Hawaii are not uninsurable, but only recoverable, by statute, if the policy expressly states that the policy covers punitive damages. CIM Ins. Corp. v. Midpac Auto Center, Inc., 108 F.Supp.2d 1092 (D.Hawaii 2000); Allstate Ins. Co. v. Takeda, 2003 WL 255717 (D.Hawaii 2003), Federal Ins. Co. v. Hawaiian Electric Industries, Inc., Not Reported in F.Supp. (D.Hawaii'i 1995).

Applicable Statutes

Hawaii Statute § 431:10-240 **Insurance contracts; punitive damages.**

Coverage under any policy of insurance issued in this State shall not be construed to provide coverage for punitive or exemplary damages unless specifically included.



IDAHO

Standard for an Award of Punitive Damages

Oppressive, fraudulent, wanton, malicious or outrageous conduct.

Idaho Statute Sec. 6-1604 provides: **Limitation on punitive damages.**

(1) In any action seeking recovery of punitive damages, the claimant must prove, by a preponderance of the evidence, oppressive, fraudulent, wanton, malicious or outrageous conduct by the party against whom the claim for punitive damages is asserted.

(2) In all civil actions in which punitive damages are permitted, no claim for damages shall be filed containing a prayer for relief seeking punitive damages. However, a party may, pursuant to a pretrial motion and after hearing before the court, amend the pleadings to include a prayer for relief seeking punitive damages. The court shall allow the motion to amend the pleadings if the moving party establishes at such hearing a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages. A prayer for relief added pursuant to this section shall not be barred by lapse of time under any applicable limitation on the time in which an action may be brought or claim asserted, if the time prescribed or limited had not expired when the original pleading was filed.

(3) The limitations on noneconomic damages contained in this act are not applicable to punitive damages.

(4) Nothing in this section is intended to change the rules of evidence or standards of proof used by a trier of fact in finding punitive damages.

See also Yacht Club Sales and Service, Inc. v. First National Bank of North Idaho, 623 P.2d 464 (Idaho 1980) (award of punitive damages available in breach of contract actions upon clear showing of fraud, malice or oppression); Jensen v. Seigel Mobile Homes Group, 668 P.2d 65, 68 (Idaho 1983) (punitive damages are available in breach of warranty actions if fraud, malice or oppression is shown).

Insurability of Punitive Damages

Not prohibited.

Idaho allows coverage of punitive damages when there is no express policy exclusion precluding coverage for punitive damages. In Abbie Uriguen Oldsmobile Buick, Inc. v. U.S. Fire Ins. Co., the Supreme Court of Idaho held:

We point out that the policy provisions herein make no distinction as between actual and punitive damages. Punitive damages are not specifically excluded from the policy language. Under the provision of the policy, the company promises to pay on behalf of the insured all sums which the insured shall be legally obligated to pay as damages caused by the use of any automobile. The law is clear in Idaho that insurance policies are to be construed most liberally in favor of recovery. [Citations omitted] Since policies are written by companies without any arms length bargaining between the parties all ambiguities is resolved in favor of the insured. [Citations omitted] Clearly absent any public policy to the contrary, this controversy must be resolved in favor of the insured.

511 P.2d 783 (Idaho 1973). The Court found that Idaho public policy did not preclude insurance coverage of punitive damages. Id. at 788 (quoting Lazenby v. Universal Underwriters Ins. Co., 383 S.W.2d 1, 5 (Tenn. 1964).

Applicable Statutes

None.



ILLINOIS

Standard for an Award of Punitive Damages

Fraud, actual malice, deliberate violence or oppression, or willful or grossly negligent conduct.

Punitive damages may be awarded in Illinois "when torts are committed with fraud, actual malice, deliberate violence or oppression, or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others." Kelsay v. Motorola, Inc., 384 N.E.2d 353 (Ill. 1978).

Insurability of Punitive Damages

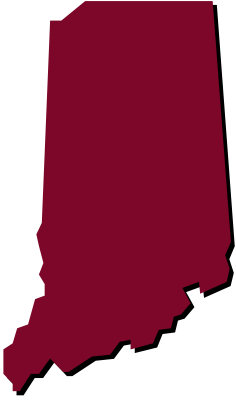
Prohibited for intentional conduct and direct liability.

Illinois law precludes coverage for punitive damages that arise out of the insured's own misconduct. Beaver v. Country Mut. Ins. Co., 420 N.E.2d 1058, 1061 (Ill. App. 1981). This limitation is consistent with the principle that one cannot insure against intentional acts. Davis v. Commonwealth Edison, 336 N.E.2d 881, 885 (Ill. 1975).

Illinois allows an exception to the general rule for punitive awards based on vicarious liability. Illinois Courts have made this distinction when construing the "all sums" language. See Scott v. Instant Parking, Inc., 245 N.E.2d 124 (Ill. 1969)(an employer may insure himself against vicarious liability for punitive damages assessed against him in consequence of the wrongful conduct of his employee..."[t]his case * * * involves only the right of a corporation to insure against liability caused by its agents and servants. There is no reasonable basis to declare the latter type insurance is against public policy.")

Applicable Statutes

None.



INDIANA

Standard for an Award of Punitive Damages

Willful or wanton misconduct.

Punitive damages may be awarded only upon a showing by clear and convincing evidence that the defendants "subjected other persons to probable injury, with an awareness of such impending danger and with heedless indifference of the consequences." Bud Wolf Chevrolet, Inc. v. Robertson, 519 N.E.2d 135, 137 (Ind.1988); Austin v. Disney Tire Co., 815 F.Supp. 285, 287-288 (S.D. Ind. 1993).

Punitive damages may be awarded upon a showing of defendants' willful and wanton misconduct, even absent malice, ill will, or intent to injure. Picadilly, Inc. v. Colvin, 519 N.E.2d 1217, 1221 (Ind.1988).

Mere negligence will not support an award of punitive damages in actions arising in tort; failing to act as a reasonable person would have acted does not constitute the kind of conduct punishable by punitive damages under Indiana law. Austin v. Disney Tire Co., 815 F.Supp. 285, 287 (S.D.Ind.1993).

Insurability of Punitive Damages

Prohibited for direct liability.

While the Indiana Supreme Court has not addressed the insurability of punitive damages, a federal district court has concluded that it is contrary to Indiana public policy to allow an insured to avoid liability for a punitive damage award by means of insurance where the insured is held directly liable for the acts giving rise to the punitive damage award. Executive Builders, Inc. v. Motorists Ins. Co., 2001 WL 548391 (S.D. Ind. 2001) (citing Grant v. N. River Ins. Co., 453 F.Supp. 1361, 1370- 71 (N .D. Ind.1978); Norfolk & W. Ry. Co. v. Hartford Acc. & Indem. Co., 420 F.Supp. 92, 94-95 (N.D. Ind.1976); see also Commercial Union Ins. Co. v. Ramada Hotel Operating Co., 852 F.2d 298, 306 (7th Cir.1988) (noting that it is against Indiana public policy for misconduct which serves as the basis for punitive damages to be covered under insurance).

In Norfolk the court found that it is not inconsistent with public policy to allow a policyholder to shift liability for punitive damages to the insurer when the award is imposed as a matter of vicarious liability.

Applicable Statutes

None.



IOWA

Standard for an Award of Punitive Damages

Willful and wanton disregard for the rights or safety of another.

Iowa Statute Sec. 668A.1. Punitive or exemplary damages

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.

"Willful and wanton" means that the "defendant has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which is usually accompanied by a conscious indifference to the consequences." Webner v. Titan Distribution, Inc., 267 F.3d 828 (8th Cir. 2001).

Mere negligent conduct is not sufficient to support a claim for punitive damages. McClure v. Walgreen Co., 613 N.W.2d 225 (Iowa 2000).

Insurability of Punitive Damages

Prohibited for certain criminal acts.

Punitive damages are insurable in Iowa, unless the conduct which caused the damage amounts to a criminal act, or they are expressly excluded by contract. The Iowa Supreme Court has said that "[i]f the parties wish to contract for coverage of punitive damages, they may. If the insurance companies do not wish to provide such coverage, then they must exclude coverage of punitive damages specifically." Skyline Harvestore Systems, Inc. v. Centennial Ins. Co., 331 N.W.2d 106 (Iowa 1983). Recently, the Iowa Supreme Court reaffirmed its decision in Skyline by holding that punitive damages awarded as a result of fraudulent conduct by the insured were insurable based on the following insuring clause:

We will pay on behalf of the insured person for loss in excess of the applicable underlying limits or retained limit which is from personal injury or property damage occurring during the policy period.

Grinnell Mut. Reinsurance Co. v. Jungling, 654 N.W.2d 530 (Iowa 2002). The policy did not incorporate an intentional acts exclusion and the Court determined that, absent an express exclusion, public policy does not preclude an insurer from providing coverage for intentional acts or punitive damages.

The Iowa Supreme Court has held that public policy does prohibit the insurability of liability arising out of certain criminal acts. See Altena v. United Fire and Cas. Co., 422 N.W.2d 485, 490 (Iowa 1988). In Altena, the Court held that public policy precluded the insurability of punitive damages awarded for claims arising out of sexual abuse. The Court specifically noted, however, that its "holding [in Altena]...should not be interpreted to mean that we condemn insurance coverage for all forms of intentional misconduct," and, in particular, punitive damages. Id. at 491 (citing Skyline).

Applicable Statutes

None.



KANSAS

Standard for an Award of Punitive Damages

Willful or wanton conduct, fraud or malice.

K.S.A. Sec. 60-3701. **Punitive and exemplary damages; separate proceeding**

for determination of amount; considerations; limitations; maximum amount of award; application limited.

(a) In any civil action in which exemplary or punitive damages are recoverable, the trier of fact shall determine, concurrent with all other issues presented, whether such damages shall be allowed. If such damages are allowed, a separate proceeding shall be conducted by the court to determine the amount of such damages to be awarded.

(b) At a proceeding to determine the amount of exemplary or punitive 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 damage 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.

At the conclusion of the proceeding, the court shall determine the amount of exemplary or punitive damages to be awarded and shall enter judgment for that amount.

(c) In any civil action where claims for exemplary or punitive damages are included, the plaintiff shall have the burden of proving, by clear and convincing evidence in the initial phase of the trial, that the defendant acted toward the plaintiff with willful conduct, wanton conduct, fraud or malice.

(d) In no case shall exemplary or punitive damages be assessed pursuant to this section against:

- (1) 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
- (2) 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.

(e) Except as provided by subsection (f), no award of exemplary or punitive damages pursuant to this section shall exceed 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 before the act for which such damages are awarded; or
- (2) \$5 million.

(f) In lieu of the limitation provided by subsection (e), if the court finds that the profitability of the defendant's misconduct exceeds or is expected to exceed the limitation of subsection (e), the limitation on the amount of exemplary or punitive damages which the court may award shall be an amount equal to 1 1/2 times the amount of profit which the defendant gained or is expected to gain as a result of the defendant's misconduct.

Punitive damages; may not exceed the lesser of the annual gross income of the defendant or \$5 million, or 1 1/2 times the profitability of the conduct.

Insurability of Punitive Damages

Prohibited for direct liability.

In Kansas an insurer may cover punitive damages assessed for vicarious, but not direct, liability. It is against the public policy of Kansas to allow a wrongdoer to purchase insurance to cover punitive damages. Guarantee Abstract and Title Co., Inc. v. Interstate Fire and Cas., 618 P.2d 1195 (Kan. 1980); Koch v. Merchants Mutual Bonding Co., 507 P.2d 189 (Kan. 1973); see also St. Paul Surplus Lines Ins. Co. v. International Playtex, Inc., 777 P.2d 1259 (Kan. 1989) (refusing to allow insurance for punitive damages assessed against a corporate insured where the jury expressly found strong indicia of direct corporate misconduct).

By statute, however, punitive damages assessed for vicarious liability are insurable. In Flint Hills Rural Elec. Co-op. Ass'n v. Federated Rural Elec. Ins., 941 P.2d 374 (Kan. 1997), the Kansas Supreme Court found that the legislative history to K.S.A. 40-2,115 "clearly indicates that the statute was enacted as a limited exception to the public policy of Guarantee Abstract prohibiting insurance coverage for punitive damages."

Applicable Statutes

K.S.A. 40-2,115. Liability insurance coverage for punitive damages assessed against certain persons.

(a) It is not against the public policy of this state for a person or entity to obtain insurance covering liability for punitive or exemplary damages assessed against such insured as the result of acts or omissions, intentional or otherwise, of such insured's employees, agents or servants, or of any other person or entity for whose acts such insured shall be vicariously liable, without the actual prior knowledge of such insured.

(b) The type of coverage specified in subsection (a) may be provided by insurance companies doing business in this state.



KENTUCKY

Standard for an Award of Punitive Damages

Oppression, fraud, malice or grossly negligent conduct.

Ky S. A. Sec. 411.184 **DEFINITIONS; PUNITIVE DAMAGES; PROOF OF PUNITIVE DAMAGES**

(1) As used in this section and KRS 411.186, unless the context requires otherwise:

(a) "Oppression" means conduct which is specifically intended by the defendant to subject the plaintiff to cruel and unjust hardship.

(b) "Fraud" means an intentional misrepresentation, deceit, or concealment of material fact known to the defendant and made with the intention of causing injury to the plaintiff.

(c) "Malice" means either conduct which is specifically intended by the defendant to cause tangible or intangible injury to the plaintiff or conduct that is carried out by the defendant both with a flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct will result in human death or bodily harm. **[But see the discussion of Williams v. Wilson directly below.]**

(d) "Plaintiff" means any party claiming punitive damages.

(e) "Defendant" means any party against whom punitive damages are sought.

(f) "Punitive damages" includes exemplary damages and means damages, other than compensatory and nominal damages, awarded against a person to punish and to discourage him and others from similar conduct in the future.

(2) A plaintiff shall recover punitive damages only upon proving, by clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud or malice.

(3) In no case shall punitive damages be assessed against a principal or employer for the act of an agent or employee unless such principal or employer authorized or ratified or should have anticipated the conduct in question.

(4) In no case shall punitive damages be awarded for breach of contract.

(5) This statute is applicable to all cases in which punitive damages are sought and supersedes any and all existing statutory or judicial law insofar as such law is inconsistent with the provisions of this statute.

The Kentucky Supreme Court held that the punitive damages statute was unconstitutional in Williams v. Wilson, 972 S.W.2d 260 (Ky. 1998). In Williams, the Court found that the statutory punitive damages standard, which required "subjective awareness" that conduct would result in human death or bodily harm violated constitutionally protected rights. Accordingly, punitive damages are probably available for grossly negligent conduct in Kentucky.

Insurability of Punitive Damages

Prohibited for intentional direct liability.

In Kentucky punitive damages based on the grossly negligent conduct of the insured are insurable, as well as those based on negligent or intentional conduct assessed against the insured vicariously. It appears that the only instance where punitive damages are not insurable is when they are directly assessed against the policyholder for intentional conduct. Continental Ins. Companies v. Hancock, 507 S.W.2d 146 (Ky. 1974).

An insurer may exclude punitive damages, but the exclusion must be explicit. Schneider v. Mahan, 1998 WL 455628 *1 (Ky. Ct. App. 1998).

Applicable Statutes

None.



LOUISIANA

Standard for an Award of Punitive Damages

Gross negligence to actual malice.

Louisiana permits recovery of punitive damages only when punitive damages are specifically authorized by a statute. Ricard v. State of Louisiana, 390 So.2d 882 (La.1980), aff'd on other grounds, 446 So.2d 901 (La.App.1984). Breaux v. Simon, 235 La. 453, 104 So.2d 168 (La.1958); Holcombe v. Superior Oil Company, 35 So.2d 457 (La. 1948); Fassitt v. United T.V. Rentals, Inc., 297 So.2d 283 (La.App. 4th Cir.1974); Boutte v. Hargrove, 277 So.2d 757 (La.App. 4th Cir.1973), writ den., 281 So.2d 744 (La.1973).

Punitive damages can be recovered only when authorized by the Civil Code section. The standard for an award of punitive damages varies according to the conduct requirement articulated in the specific code provision. In each case, the language of the code which authorizes an award of punitive damages must be reviewed in order to determine whether or not punitive damages can be awarded.

Insurability of Punitive Damages

Most likely prohibited for intentional conduct.

The Supreme Court of Louisiana held that punitive damages are generally insurable in Louisiana. Sharp v. Daigre,² 555 So.2d 1361 (La. 1990). Some of the appellate courts that have addressed the issue, however, have determined that punitive damages assessed for the intentional conduct are not insurable. See e.g. Vallier v. Oilfield Construction Company, Inc., 483 So.2d 212 (La.App.3d 1986), writ denied, 486 So.2d 734 (La.1986); but see Louviere v. Byers, 526 So.2d 1253 (La.App.3d 1988), writ denied, 528 So.2d 153 (La.1988) (holding that liability policies cover exemplary damage awards); Falgout v. Wilson, 531 So.2d 492 (La.App.1988) (1st Circuit), writ denied, 532 So.2d 154 (La.1988) (same).

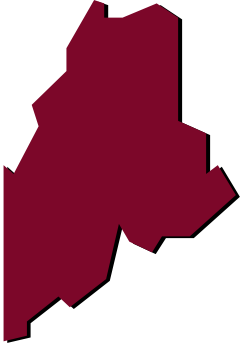
In 1988, the Court of Appeal of Louisiana, Second Circuit, reversed the trial court's decision and held that general liability policies cover punitive damage awards assessed directly for wantonly negligent conduct. Creech v. Aetna Casualty & Surety Company, 516 So.2d 1168 (La.App.2d 1987), writ denied, 519 So.2d 128 (La.1988). Accordingly, punitive damage awards assessed directly for wantonly negligent conduct such as drunken driving are covered by general liability policies according to the Court of Appeal of Louisiana, Second Circuit. See also Lafauci v. Jenkins, 2003 WL 122582 (La.App. 1 Cir. 2003) (exemplary damages insurable if included in the policy); Gaylord Container Corp. v. CNA Ins. Companies, 807 So.2d 864 (La.App. 1 Cir. 2001) (policy reformed to delete punitive damages exclusion when insured did not have prior notice of reduction in coverage)

It is clear that punitive damage awards assessed vicariously against an employer for the intentional conduct of an employee are insurable. See Swindle v. Haughton Wood Company, Inc., 458 So.2d 992 (La.App.1984).

Applicable Statutes

None.

² The decision in Sharp case's has been superceded, however, by the 1992 amendment to LSA-R.S. 22:1406(D)(1)(a)(i), which governs the issuance of uninsured motorist coverage in this state. Prior to 1992, insurers were not able to exclude punitive or exemplary damages from UM coverage. After the amendment of La.R.S. 22:1406(D)(1)(a)(i), an insurer could exclude such damages from its UM coverage by the terms of its policy or contract.



MAINE

Standard for an Award of Punitive Damages

Malice.

In Tuttle v. Raymond, 494 A.2d 1353, 1363 (Me.1985); the Supreme Judicial Court of Maine articulated the conduct required to obtain an award of punitive damages:

We therefore hold that punitive damages are available based upon tortious conduct only if the defendant acted with malice. This requirement of malice will be most obviously satisfied by showing of "express" or "actual" malice. Such malice exists where the defendant's tortious conduct is motivated by ill will toward the plaintiff. [Citations omitted]. Punitive damages will also be available, however, where 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. We emphasize that, for the purpose of assessing punitive damages, such "implied" or "legal" malice will not be established by the defendant's mere reckless disregard of the circumstances.

The federal Bankruptcy Court sitting in Maine has recently noted, however, that "[w]hile Tuttle was a marked constriction of the availability of punitive damages, its standard, though articulated in consistent terms, has slipped with time. Conduct arguably no more than reckless and not tangibly outrageous has qualified as malicious." In re Slosberg, 225 B.R. 9 (Bkrcty.D.Me. 1998) (citing Lehouillier v. East Coast Steel, Inc., 13 F.Supp.2d 109, 110 (D.Me.1998) (denying defendant's motion for summary judgment because a jury could conclude that defendant's conduct in creating an inescapable "temporary zone of danger" by transporting an unlighted 120 foot "I" beam on a tractor trailer at night without a police escort as required by the state permit was "sufficiently outrageous" to amount to clear and convincing evidence of malice under Tuttle); DiPietro v. Boynton, 628 A.2d 1019, 1024 (Me.1993) (affirming finding of malice based on defendant's conversion of plaintiff's property, stating that directing the sale of plaintiff's property without notifying them and with knowledge that it had not been abandoned supported a finding of "ill will," citing Tuttle); Pombriant v. Blue Cross/Blue Shield of Maine, 562 A.2d 656, 659-60 (Me.1989) (affirming finding of malice predicated on insurance company's intentional interference with the contractual negotiations between former broker and client, citing Tuttle standard).

Insurability of Punitive Damages

Most likely prohibited for direct liability.

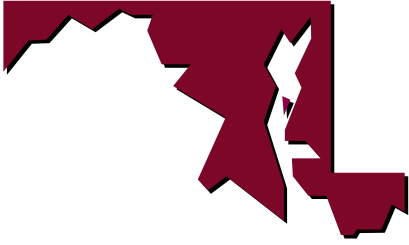
The courts in Maine have yet to address the insurability of punitive damages outside of the uninsured motorist context and have not established whether punitive damages are insurable for vicarious liability. Under Braley v. Berkshire Mut. Ins. Co., 440 A.2d 359 (Me. 1982), however, the Court noted in the uninsured motorist context that coverage for damages assessed as punishment to the tortfeasor should not be insurable. Braley leaves unresolved, however, the issue of punitive damages assessed for vicarious liability.

In Braley v. Berkshire Mut. Ins. Co., 440 A.2d 359 (Me. 1982) the Court held that because punitive damages compensate neither actual loss nor injuries which would otherwise go without redress, "insurance companies providing coverage under provisions mandated by the uninsured motorist statute should not be charged under those provisions with liability for punitive damages." The Court noted that punitive damages are not awarded as compensation 'for bodily injury,' even though proof of some injury is generally a prerequisite for an award of punitive damages. This decision was not based on any public policy prohibition but on the nature of the mandatory coverage.

In Concord General Mut. Ins. Co. v. Hills, 345 F.Supp. 1090 (D.C.Me. 1972) the federal court in Maine, relying largely on federal law, held that the broadly worded "all sums which the insured shall become legally obligated to pay as damages" language "unmistakably include both compensatory and punitive damages." Id.

Applicable Statutes

None.



MARYLAND

Standard for an Award of Punitive Damages

Actual malice.

In a non-intentional tort action, an award of punitive damages requires evidence that "the defendant's conduct was characterized by evil motive, intent to injure, ill will, or fraud, i.e., 'actual malice.'" Owens-Illinois, Inc. v. Zenobia, 601 A.2d 633 (Md. 1992).

Maryland courts have upheld punitive damages in a variety of litigation contexts, including medical malpractice. Medical Mutual Liability Insurance Society of Maryland v. Miller, 451 A.2d 930 (Md. App. 1982).

Insurability of Punitive Damages

Not prohibited.

Maryland Courts have held that punitive damages are covered under a policy that requires the insurer to indemnify the insured for "all sums" it is legally required to pay as damages. Alcolac, Inc. v. St. Paul Fire & Marine Ins. Co., 716 F.Supp. 1541, 1545 (D. Md. 1989). The Courts have not passed on the insurability of damages assessed for vicarious conduct, but have held that punitive damages assessed for direct liability are insurable. Accordingly, it is expected that damages assessed for vicarious liability are insurable.

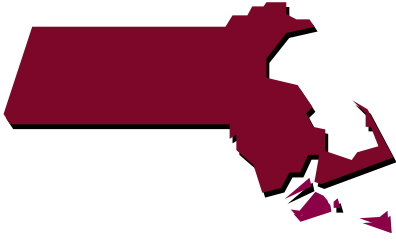
In First Nat. Bank v. Fidelity and Deposit Co., 389 A.2d 359 (Md. 1978) the Maryland Supreme Court held that it was not contrary to public policy to insure against liability for punitive damages awarded in a civil action for malicious prosecution, "even though the punitive damages in legal theory are predicated upon malice," noting that:

the common sense of the entire community would (not) pronounce it against public policy for the Bank's insurance company to pay the judgment for exemplary damages assessed against the Bank here.

The Court specifically stated that "insurance companies have not shown a reluctance in the past to write into their policies such restrictions as they deem to be in their best interest" and the contract at issue had no exclusion for punitive damages. See also Finci v. American Cas. Co. of Reading, Pennsylvania, 593 A.2d 1069 (Md. 1991) (noting continued viability of First Bank) and Bailer v. Erie Ins. Exchange, 687 A.2d 1375 (Md. 1997) (same).

Applicable Statutes

None.



MASSACHUSETTS

Standard for an Award of Punitive Damages

Gross negligence to malice.

Punitive or exemplary damages are not allowed in Massachusetts except when authorized by statute. Lowell v. Massachusetts Bonding & Ins. Co., 47 N.E.2d 265 (Mass. 1943). There is no uniform standard.

Wrongful Death

The Massachusetts wrongful death statute allows for an award of punitive damages where a decedent's death was caused by malicious, willful, or reckless conduct. Coughlin v. Titus & Bean Graphics, Inc., 767 N.E.2d 106 (Mass.App.Ct. 2002).

Massachusetts Statute 229, § 2 expressly provides, in pertinent part, for a punitive damages award against the tortfeasor (but not the employer) in wrongful death actions as follows:

A person who (1) by his negligence causes the death of a person, or (2) by willful, wanton or reckless act causes the death of a person under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted, or (3) operates a common carrier of passengers and by his negligence causes the death of a passenger, or (4) operates a common carrier of passengers and by his willful, wanton or reckless act causes the death of a passenger under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted, or (5) is responsible for a breach of warranty arising under Article 2 of chapter one hundred and six which results in injury to a person that causes death, shall be liable in damages in the amount of: (1) the fair monetary value of the decedent to the persons entitled to receive the damages recovered, as provided in section one, including but not limited to compensation for the loss of the reasonably expected net income, services, protection, care, assistance, society, companionship, comfort, guidance, counsel, and advice of the decedent to the persons entitled to the damages recovered; (2) the reasonable funeral and burial expenses of the decedent; (3) 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; except that (1) the liability of an employer to a person in his employment shall not be governed by this section...

The "malicious, willful, wanton, or reckless" and "gross negligence" standards are appreciably higher than the standards for ordinary negligence. DiGloria v. Chief of Police of Methuen, 395 N.E.2d 1297 (Mass.App.Ct. 1979); Davis v. Walent, 449 N.E.2d 382 (Mass.App.Ct. 1983).

Medical Malpractice

Punitive damages are not authorized by the medical malpractice statute and are not recoverable. See Keene v. Brigham and Women's Hosp., Inc., 2000 WL 343785 (Mass.Super. 2000) (disallowing damages for loss of enjoyment of life in a medical malpractice action because such damages are punitive in nature).

Massachusetts Statute 231 § 60F provides for an award of the following elements of damages in a medical malpractice action:

(a) In every action for malpractice, negligence, error, omission, mistake or the unauthorized rendering of professional services against a provider of health care which is tried to a jury, the court shall instruct the jury that if the jury awards damages to the plaintiff or plaintiffs it shall specify the total amount of damages, as well as the applicable elements of special and general damages upon which the award of damages is based and the amount of the total damages assigned to each element, including, but not limited to:

(1) Amounts intended to compensate the plaintiff for reasonable expenses which have been incurred, or which will be incurred, for necessary medical, surgical, X-ray, dental, or rehabilitative services, including prosthetic devices; necessary ambulance, hospital, and nursing services; drugs; and therapy;

(2) Amounts intended to compensate the plaintiff for lost wages or loss of earning capacity and other economic losses which have been incurred or will be incurred; and

(3) Amounts intended to compensate the plaintiff for pain and suffering, loss of companionship, embarrassment, and other items of general damages, which have been incurred or will be incurred in the future, and whether there is a substantial or permanent loss or impairment of a bodily function, or substantial disfigurement, or other special circumstances in the case which warrant a finding that imposition of the limitation specified in section sixty I would deprive the plaintiff of just compensation for the injuries sustained.

To the extent a practitioner's conduct constitutes fraud or an unfair and deceptive practice, however, double or treble damages may be available under Massachusetts Statute 93A. Actions involving fraudulent representations in knowing disregard of the truth encompass culpable, 'willful' behavior under the statute." Datacomm Interface, Inc. v. Computerworld, Inc., 489 N.E.2d 185 (Mass. 1986). Knowing and willful violations of G.L. c. 93A, § 2 entitle the plaintiff to multiple damages of not less than double nor more than treble its damages under G.L. c. 93A, § 11.

Insurability of Punitive Damages

Undecided.

Massachusetts Courts have not decided whether or not punitive damages are insurable under all types of liability policies. The Massachusetts Supreme Court held in Santos v. Lumbermens Mutual Cas. Co., 556 N.E.2d 983 (Mass.1990) that punitive damages are not recoverable under a policy providing underinsured motorist coverage because:

[T]he purpose of the uninsured motor vehicle statute is to provide the availability of compensation for bodily injury or death caused by a tortfeasor who is uninsured...Punitive damages under the wrongful death statute [citation omitted] serve different purposes...punishment and wrongdoing.

[R]equiring an insurance company to pay punitive damages to the insured would not serve to deter wrongdoing or punish the wrongdoer.

While Santos appears to indicate that allowing coverage for punitive damages assessed directly would be contrary to the purpose of punitive damages, the Court specifically stated that it was not passing on whether the insurer may be obligated to pay for punitive damages, but only that punitive damages are not available under the uninsured motor vehicle statute.

Applicable Statutes

None.



MICHIGAN

Standard for an Award of Exemplary Damages

Malice, willful or wanton conduct.

Michigan generally prohibits the recovery of punitive damages, but allows the recovery of certain exemplary damages which are "compensatory" in nature. Peisner v. Detroit Free Press, 304 N.W.2d 814 (Mich. App. 1981). For example, future damages for the loss of enjoyment of life could be characterized as exemplary damages awarded as compensation, not punishment.

Michigan Courts have found that, in practice, the conduct found sufficient to justify the award of exemplary damages has occurred in the context of the intentional torts, slander, libel, deceit, seduction, and other intentional (but malicious) acts. Veselenak v. Smith, 327 N.W.2d 261 (Mich. 1982). In Veselenak, a medical malpractice action, the Court disallowed the recovery of exemplary damages, finding they while they were compensatory, they were also duplicative of other damages awarded. The Court specifically stated negligence is not sufficient to justify an award of exemplary damages. Id. The act supporting the award must inspire feelings of humiliation, outrage and indignity and the conduct must be malicious or as willful and wanton as to demonstrate a reckless disregard of the plaintiff's rights. Id. (citing Wise v. Daniel, 190 N.W. 746 (Mich. 1922); McFadden v. Tate, 85 N.W.2d 181 (Mich. 1957); Bailey v. Graves, 309 N.W.2d 166 (Mich. 1981)).

The statute for wrongful death actions does not provide for the recovery of punitive damages. Accordingly, punitive damages are not recoverable in wrongful death actions. Currie v. Fiting, 134 N.W.2d 611 (Mich. 1965).

Insurability of Punitive Damages

Not prohibited.

Neither the Michigan Supreme Court nor the Michigan Court of Appeals has addressed the insurability of punitive damages. Based on the existing case law, it appears that a Michigan Court is likely to conclude that punitive damages are insurable for direct and vicarious liability. In Dow Corning Corp. v. Hartford Accident & Indemnity Co., No. 93-325-788-ck (Cir. Ct. Wayne Co. Aug. 11, 1995), a Michigan County Court held that under Michigan law punitive damages were insurable under "all risks" language. The case was not appealed. While Dow is not controlling, it may be used as persuasive authority in other jurisdictions.

Federal Courts sitting in Michigan have held that under Michigan law punitive damages are insurable. In Ford Motor Co v. Northbrook Ins. Co., 838 F.2d 829 (6th Cir. 1988) the Sixth Circuit held that, under Michigan law, the punitive damages the insured would be required to pay under its SIR were also covered by the umbrella excess policy. The Court noted that the punitive damage award was covered unless the policy expressly excluded such coverage.

In Meijer v. General Star Indemnity Co., 826 F.Supp. 241 (W.D. Mich. 1993), aff'd; 61 F.3d 903 (6th Cir. 1995), the Court noted that while "[n]o Michigan case has squarely addressed whether an insured should be permitted to recover punitive damages and attorneys' fees from an insurer. Nevertheless, it appears that Michigan law permits recovery." Id. citing Ford Motor Co. v. Northbrook Ins. Co.: The Court stated that:

To hold that punitive damages are not recoverable would create, in effect, an exclusion for which the parties did not negotiate and allow insurance companies to collect premiums for coverage of a risk that they voluntarily assumed and then escape their obligation to pay on a claim by a mere judicial declaration that the contract is void by reason of public policy. [citation omitted] Under Michigan law, insurers may limit the risks that they elect to assume, but they must clearly express limitations on coverage and any failure to do so is construed against the drafting insurer and in favor of finding coverage under the policy....No reason exists under Michigan law for this Court to aid an insurer that fails to exclude coverage for punitive damages.

Applicable Statutes

None.



MINNESOTA

Standard for an Award of Punitive Damages

Deliberate disregard for the rights or safety of others.

Minn. Stat. Section 549.20. Punitive damages

Subdivision 1. (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. 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, or
- (b) the agent was unfit and the principal deliberately disregarded a high probability that the agent was unfit, or
- (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. 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.

Punitive damages are not recoverable for negligent conduct. Cobb v. Midwest Recovery Bureau Co., 295 N.W.2d 232, 237 (Minn. 1980).

Insurability of Punitive Damages

Not prohibited for vicarious liability.

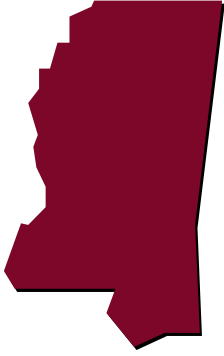
Generally, Minnesota Courts have held that public policy prohibits the insurability of punitive damages. Rosenbloom v. Flygare, 501 N.W.2d 597 (Minn. 1993). The Minnesota Supreme Court has held, however, that despite the general rule prohibiting insurance indemnification for punitive damages, an award for treble damages for a wrongful discharge claim was an exception to the general rule. Wojciak v. Northern Package

Corp., 310 N.W.2d 675, 679 (Minn. 1981). Also, punitive damages may be insured against by those who are vicariously as opposed to directly liable. Perl v. St. Paul Fire & Marine Ins. Co., 345 N.W.2d 209, 216 (Minn. 1984).

Applicable Statutes

Minn. Stat. Section 60A.06; Kinds of insurance permitted.

Subd. 4. **Vicarious liability; punitive damages.** Any insurance corporation or association may insure against vicarious liability for punitive and exemplary damages within any of the kinds of business pertaining to the issuance of liability insurance that the insurance corporation or association is authorized to transact under subdivision 1 or 2.



MISSISSIPPI

Standard for an Award of Punitive Damages

Actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or fraud.

Section 11-1-65 of the Mississippi Code provides for punitive damages as follows:

In any action in which punitive damages are sought:

(a) Punitive damages may not be awarded if the claimant does not prove by 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.

(2) 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 which caused the harm for which recovery of damages is sought.

(3)(a) In any civil action where an entitlement to punitive damages shall have been established under applicable laws, no award of punitive damages shall exceed the following:

(i) Twenty Million Dollars (\$20,000,000.00) for a defendant with a net worth of more than One Billion Dollars (\$1,000,000,000.00);

(ii) Fifteen Million Dollars (\$15,000,000.00) for a defendant with a net worth of more than Seven Hundred Fifty Million Dollars (\$750,000,000.00) but not more than One Billion Dollars (\$1,000,000,000.00);

(iii) Ten Million Dollars (\$10,000,000.00) for a defendant with a net worth of more than Five Hundred Million Dollars (\$500,000,000.00) but not more than Seven Hundred Fifty Million Dollars (\$750,000,000.00);

(iv) Seven Million Five Hundred Thousand Dollars (\$7,500,000.00) for a defendant with a net worth of more than One Hundred Million Dollars (\$100,000,000.00) but not more than Five Hundred Million Dollars (\$500,000,000.00);

(v) Five Million Dollars (\$5,000,000.00) for a defendant with a net worth of more than Fifty Million Dollars (\$50,000,000.00) but not more than One Hundred Million Dollars (\$100,000,000.00); or

(vi) Four percent (4%) of the defendant's net worth for a defendant with a net worth of Fifty Million Dollars (\$50,000,000.00) or less.

(b) For the purposes of determining the defendant's net worth in paragraph (a), the amount of the net worth shall be determined in accordance with Generally Accepted Accounting Principles.

(d) The limitation on the amount of punitive damages imposed by this subsection (3) shall not apply to actions brought for damages or an injury resulting from an act or failure to act by the defendant:

(i) If the defendant was convicted of a felony under the laws of this state or under federal law which caused the damages or injury; or

(ii) While the defendant was under the influence of alcohol or under the influence of drugs other than lawfully prescribed drugs administered in accordance with a prescription.

(e) The exceptions provided in paragraph (d) shall not apply to an employer of a person acting outside the scope of such person's employment or responsibility as an agent or employee.

(2) In any wrongful death action, there shall be no recovery for loss of enjoyment of life caused by death.

The punitive damage caps provided in subsection 3(a) were added to the statute in December, 2002.

Insurability of Punitive Damages

Generally not prohibited.

Insurance coverage for directly assessed and vicariously assessed punitive damages is permitted in Mississippi, except in the context of uninsured motorist coverage.³ In Anthony v. Frith, the Mississippi Supreme Court held that "all sums" language included coverage for an award of directly assessed punitive damages. 394 So.2d 857 (Miss. 1981). Mississippi Courts have reaffirmed Frith on several occasions. See Old Security Cas. Co. v. Clemmer, 455 So.2d 781, 783 (Miss.1984); James W. Sessums Timber Co., Inc. v. McDaniel, 635 So.2d 875 (Miss. 1994); Southwest Mississippi Regional Medical Center v. Lawrence, 684 So.2d 1257 (Miss. 1996).

Applicable Statutes

None.

³ In State Farm Mut. Auto. Ins. Co. v. Daughdrill, 474 So.2d 1048 (Miss. 1985) the Supreme Court of Mississippi held that the uninsured motor vehicle statute did not allow for the recovery of punitive damages, but specifically stated that its decision did not alter its prior holdings allowing for coverage of punitive damages under provisions of a general liability insurance policy.



MISSOURI

Standard for an Award of Punitive Damages

Willful, Wanton or Malicious

Under Missouri law, punitive damages generally are recoverable. Recovery of punitive damages is appropriate only upon a showing of willful, wanton, malicious conduct or conduct as reckless as to be in utter disregard of consequences and there must be some element of wantonness or bad motive. See McCellan v. Highland Sales & Inv. Co., 484 S.W.2d 239 (Mo. 1972).

The standard of conduct punitive damages in connection with tort actions for improper health care is established by statute.

Mo. Stat. § 538.210 - LIMITATION ON NONECONOMIC DAMAGES--JURY NOT TO BE INFORMED OF LIMIT --LIMIT, HOW SET ANNUALLY, PUBLICATION--DEFENDANT DEFINED--PUNITIVE DAMAGES, REQUIREMENTS.

1. In any action against a health care provider for damages for personal injury or death arising out of the rendering of or the failure to render health care services, no plaintiff shall recover more than three hundred fifty thousand dollars per occurrence for noneconomic damages from any one defendant as defendant is defined in subsection 2 of this section.

2. "Defendant" for purposes of sections 538.205 to 538.230 shall be defined as:

(1) A hospital as defined in chapter 197, RSMo, and its employees and physician employees who are insured under the hospital's professional liability insurance policy or the hospital's self-insurance maintained for professional liability purposes;

(2) A physician, including his nonphysician employees who are insured under the physician's professional liability insurance or under the physician's self-insurance maintained for professional liability purposes;

(3) Any other health care provider having the legal capacity to sue and be sued and who is not included in subdivisions (1) and (2) of this subsection, including employees of any health care providers who are insured under the health care provider's professional liability insurance policy or self-insurance maintained for professional liability purposes.

3. In any action against a health care provider for damages for personal injury or death arising out of the rendering of or the failure to render health care services, where the trier of fact is a jury, such jury shall not be instructed by the court with respect to the limitation on an award of noneconomic damages, nor shall counsel for any party or any person providing testimony during such proceeding in any way inform the jury or potential jurors of such limitation.

4. The limitation on awards for noneconomic damages provided for in this section shall be increased or decreased on an annual basis effective January first of each year in accordance with the Implicit Price Deflator for Personal Consumption Expenditures as published by the Bureau of Economic Analysis of the United States Department of Commerce. The current value of the limitation shall be calculated by the director of the department of insurance, who shall furnish that value to the secretary of state, who shall publish such value in the Missouri Register as soon after each January first as practicable, but it shall otherwise be exempt from the provisions of section 536.021, RSMo.

5. Any provision of law or court rule to the contrary notwithstanding, an award of punitive damages against a health care provider governed by the provisions of sections 538.205 to 538.230 shall be made only upon a showing by a plaintiff that the health care provider demonstrated willful, wanton or malicious misconduct

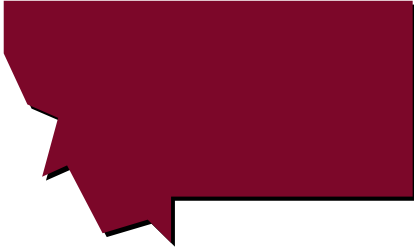
with respect to his actions which are found to have injured or caused or contributed to cause the damages claimed in the petition.

Insurability of Punitive Damages

Punitive damages are not insurable under Missouri law, because punitive damages are not compensatory. Because punitive damages are not compensatory they do not qualify as amounts that the insured is legally obligated to pay as damages. See Schnuck Mkts., Inc. v. Transamerican Ins. Co., 652 S.W.2d 209 (Mo.St. App. 1983).

Applicable Statutes

None.



MONTANA

Standard for an Award of Punitive Damages

Actual fraud or actual malice.

Under Montana law, the conduct required to justify an award of punitive damages is established by statute which provides:

Mont. Code § 27-1-221. PUNITIVE DAMAGES -- LIABILITY -- PROOF – AWARD

(1) Subject to the provisions of 27-1-220 and this section, reasonable punitive damages may be awarded when the defendant has been found guilty of actual fraud or actual malice.

(2) 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: (a) deliberately proceeds to act in conscious or intentional disregard of the high probability of injury to the plaintiff; or (b) deliberately proceeds to act with indifference to the high probability of injury to the plaintiff.

(3) A defendant is guilty of actual fraud if the defendant: (a) makes a representation with knowledge of its falsity; or (b) conceals a material fact with the purpose of depriving the plaintiff of property or legal rights or otherwise causing injury.

(4) Actual fraud exists only when the plaintiff has a right to rely upon the representation of the defendant and suffers injury as a result of that reliance. The contract definitions of fraud expressed in Title 28, chapter 2, do not apply to proof of actual fraud under this section.

(5) All elements of the claim for punitive damages must be proved by clear and convincing evidence. Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. It is more than a preponderance of evidence but less than beyond a reasonable doubt.

(6) Liability for punitive damages must be determined by the trier of fact, whether judge or jury. An award of punitive damages must be unanimous as to liability and amount.

(7) (a) 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. 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 as provided in subsection (7)(c). 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.

(b) When an award of punitive damages is made by the judge, the judge shall clearly state the reasons for making the award in findings of fact and conclusions of law, demonstrating consideration of each of the following matters:

- (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.

(c) The judge shall review a jury award of punitive damages, giving consideration to each of the matters listed in subsection (7)(b). If after review the judge determines that the jury award of punitive damages should be increased or decreased, the judge may do so. The judge shall clearly state the reasons for increasing, decreasing, or not increasing or decreasing the punitive damages award of the jury in findings of fact and conclusions of law, demonstrating consideration of each of the factors listed in subsection (7)(b).

(8) This section is not intended to alter the Montana Rules of Civil Procedure governing discovery of a defendant's financial affairs, financial condition, and net worth.

Insurability of Punitive Damages

Prohibited unless expressly covered.

A Montana statute prohibits insurance coverage for punitive damages unless it is expressly included for in the insurance contract. See Mont. Code § 33-15-317.

Applicable Statutes

Mont. Code § 33-15-317. INSURANCE COVERAGE OF PUNITIVE DAMAGES

(1) Insurance coverage does not extend to punitive or exemplary damages unless expressly included by the contract of insurance.

(2) Prior to renewal of any policy in effect on October 1, 1987, the insurer shall provide the insured with notice of nonrenewal of coverage of punitive or exemplary damages in the same manner as required by the commissioner of insurance for the renewal of policies with altered terms.



NEBRASKA

Punitive Damages Not Allowed

The fundamental rule of law in Nebraska is that punitive, vindictive, or exemplary damages will not be allowed, and that the measure of recovery in all civil cases is compensation for the injury sustained. Abel v. Conover, 104 N.W.2d 684 (Neb. 1960); Miller v. Kingsley, 230 N.W.2d 472 (Neb. 1975).

Applicable Statutes

None.



NEVADA

Standard for an Award of Punitive Damages

Malice, Fraud or Oppression

N.R.S. § 42.005 EXEMPLARY AND PUNITIVE DAMAGES: IN GENERAL; LIMITATIONS ON AMOUNT OF AWARD; DETERMINATION IN SUBSEQUENT PROCEEDINGS, provides the requisite standard for an award of punitive damages as well as limitations on punitive damages:

1. Except as otherwise provided in NRS 42.007, in an 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, the plaintiff, in addition to the compensatory damages, may recover damages for the sake of example and by way of punishing the defendant. Except as otherwise provided in this section, an award of exemplary or punitive damages may be pursuant to this section and 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 the compensatory damages awarded to the plaintiff is less than \$100,000.
2. The limitations on the amount of an award of exemplary or punitive damages prescribed in subsection 1 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 obligation 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;
 - (d) A person for damages or injury caused by the emission, disposal or spilling of toxic, radioactive or hazardous material or waste, or:
 - (e) A person for defamation.

N.R.S. § 42.001 provides definitions for fraud, malice and oppression as follows:

1. "Conscious disregard" means the knowledge of the probable harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid those consequences.
 2. "Fraud" means an intentional misrepresentation, deception or concealment of a material fact known to the person with the intent to deprive another person of his rights or property or to otherwise injure another person.
 3. "Malice, express or implied" means conduct which is intended to injure a person of despicable conduct which is engaged in with a conscious disregard of the rights or safety of others.
 4. "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship with conscious disregard of the rights of the person.
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N.R.S. § 42.010, eliminates the general punitive damage standards of oppressive, willful or fraudulent conduct in an action for damages for injury caused by operation of a motor vehicle after willfully consuming or using alcohol or other substance:

1. In an action for the breach of an obligation, where the defendant caused an injury by the operation of a motor vehicle, in violation of NRS 484.379 or 484.3795 after willfully consuming or using alcohol or other substance, knowing that he would thereafter operate the motor vehicle, the plaintiff, in addition to the compensatory damages, may recover for the sake of example and by way of punishing the defendant.
2. The provisions of NRS 42.005 do not apply to any cause of action brought pursuant to this section.

N.R.S. § 42.007, prescribes the standard for punitive damages against an employer for acts of the employee:

1. Except as otherwise provided in subsection 2, in an action for breach of an obligation in which exemplary or punitive damages are sought pursuant to subsection 1 of NRS 42.005 from an employer for the wrongful act of his employee, the employer is not liable for the exemplary or punitive damages 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 and safety of others;
- (b) The employer expressly authorized or ratified the wrongful act of the employee for which damages are awarded; or
- (c) The employer is personally guilty of oppression, fraud or malice, express or implied. If the employer is a corporation, the employer is not liable for any exemplary or punitive damages 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.

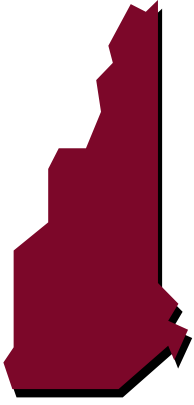
Insurability of Punitive Damages

Nevada statute allows coverage for punitive damages but only to the extent the damages stem from non-intentional conduct, i.e. a vicarious liability. N.R.S. § 681A.095; New Hampshire Ins. Co. v. Gruhn, 670 P.2d 941 (Nev. 1983).

Applicable Statutes

N.R.S. § 681A.095 INSURANCE AGAINST LEGAL LIABILITY FOR EXEMPLARY OR PUNITIVE DAMAGES

An insurer may insure against legal liability for exemplary or punitive damages that do not arise from a wrongful act of the insured committed with intent to cause injury to another.



NEW HAMPSHIRE

Standard for an Award of Enhanced Damages

Wanton, malicious or oppressive conduct characterized by ill will, hatred, hostility or evil motive.

New Hampshire does not allow a defendant to be punished by being held liable for punitive or exemplary damages. See Munson v. Raudonis, 387 A.2d 1174 (N.H. 1978). However, when the act involved is wanton, malicious or oppressive, the compensatory damages awarded may reflect the aggravating circumstances. Id. Such damages are referred to as enhanced compensatory damages. An award of enhanced compensatory damages is only allowable upon a showing of ill will, hatred, hostility or evil motive on the part of the defendant. Id.

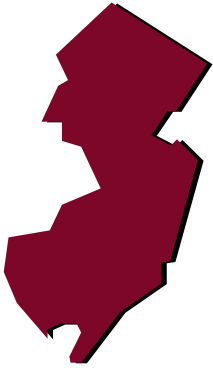
Insurability of Punitive Damages

Not prohibited.

There is no controlling authority or public policy in New Hampshire precluding insurance for punitive damages. Home Assurance Company v. Fish, 451 A.2d 358 (N.H. 1982). However, an insurance company remains free to limit its liability through clear and unambiguous policy language. See Weeks v. St. Paul Fire and Marine Ins. Co., 673 A.2d 772 (N.H. 1996).

Applicable Statutes

None.



NEW JERSEY

Standard for an Award of Punitive Damages

Actual Malice or Wanton and Willful Disregard

N.J.S. § 2A:15-5.12 provides the requisite standard for an award of punitive:

a. 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 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.

b. In determining whether punitive damages are to be awarded, the trier of fact shall consider all relevant evidence, including but not limited to, the following:

- (1) The likelihood, at the relevant time, that serious harm would result from the defendant's conduct;
- (2) The defendant's awareness of reckless disregard of the likelihood that the serious harm would arise from the defendant's conduct;
- (3) The conduct of the defendant upon learning that its initial conduct would likely cause harm; and
- (4) The duration of the conduct or any concealment of it by defendant.

c. If the trier of fact determines that punitive damages should be awarded, the trier of fact shall then determine the amount of those damages. In making that determination, the trier of fact shall consider all relevant evidence, including, but not limited to, the following:

- (1) All relevant evidence relating to those factors set forth in subsection b. of this section;
- (2) The profitability of the misconduct to the defendant;
- (3) When the misconduct was terminated; and
- (4) The financial condition of the defendant.

Mere negligent conduct, even if characterized as gross negligence is insufficient to support a punitive damages award. See State, Dept. of Environmental Protection v. Lewis, 522 A.2d 485 (N.J. 1985).

N.J.S. § 2A:15-5.14 limits the award of punitive damages as follows:

b. No defendant shall be liable for punitive damages in any action in an amount in excess of five times the liability of that defendant for compensatory damages or \$350,000, whichever is greater.

Insurability of Punitive Damages

New Jersey does not allow indemnity for punitive damages. Johnson & Johnson v. Aetna Cas. & Sur. Co., 667 A.2d 1087 (App. Div. 1995). This general rule applies to vicarious liability as well direct liability. Id.

Applicable Statutes

None.



NEW MEXICO

Standard for an Award of Punitive Damages

Willful, Wanton, Malicious, Reckless, Oppressive, Grossly Negligent or Fraudulent

New Mexico law allows recovery of punitive damages as long as the wrongdoer's conduct is willful, wanton, malicious, reckless, oppressive, grossly negligent, or fraudulent and in bad faith. Sanchez v. Clayton, 877 P.2d 567 (N.M. 1994),

Madrid v. Marquez, 33 P.3d 683 (N.M. App. 2001).

New Mexico's standard jury instruction permits punitive damages to be assessed upon proof of gross negligence:

If you find that plaintiff should recover actual damages, and if you further find clear and convincing evidence that the publication of the communication by defendant was made with knowledge of its falsity or with a reckless disregard for whether it was false or not, then you may award punitive damages.

Reckless disregard is not measured by whether a reasonably prudent person would have published or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the communication.

Clear and convincing evidence is that evidence which, when weighed against the evidence in opposition, leaves you with an abiding conviction that the evidence is true.

Such additional damages are awarded for the limited purposes of punishment and to deter others from the commission of like offenses.

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 actual damages and injury and not disproportionate to the circumstances.

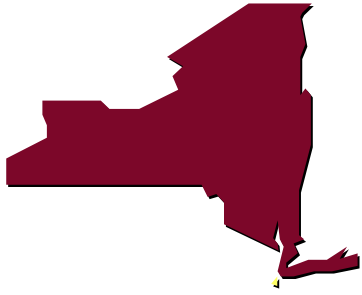
See New Mexico Uniform Jury Instructions—Civil, UJI 13-1011

Insurability of Punitive Damages

As a general rule punitive damages are insurable in New Mexico. Baker v. Armstrong, 744 P.2d 170 (N.M. 1987). Unless insurance policies contain a clear exclusion for punitive damages, New Mexico courts will enforce the language of the policy to promote the reasonable expectations of the insured. Id.

Applicable Statutes

None.



NEW YORK

Standard for an Award of Punitive Damages

Conscious or Reckless Disregard

Recovery of exemplary or punitive damages in New York requires a showing of conscious disregard of the rights of others or conduct so reckless as to amount to such disregard. Welch v. Mr Christmas Inc., 440 N.E.2d 1317 (1982).

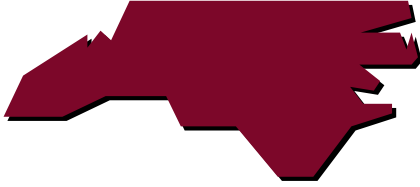
Therefore, more than gross negligence is required, but actual malice need not be proved. Id.

Insurability of Punitive Damages

New York public policy prohibits insurance indemnification for punitive damage awards. Home Ins. Co. v. American Home Products Corp., 550 Ne.2d 930 (N.Y. Ct. App. 1990). Further, New York prohibits insurance coverage for punitive damages assessed against New York insureds, even when the punitive damage award is assessed by a court outside of New York). Id.

Applicable Statutes

None.



NORTH CAROLINA

Standard for an Award of Punitive Damages

Wanton, willful, gross negligence or recklessness.

To prevail on a claim for punitive damages, the plaintiff must show a higher level than ordinary negligence; that it amounted to wantonness, willfulness, or evidenced a reckless indifference to the consequences of the act." Moose v. Nissan of Statesville, 444 S.E.2d 694, (N.C. 1994) Therefore, recovery of punitive damages in North Carolina requires tortious conduct accompanied by some element of aggravation. Newton v. Standard Fire Ins. Co., 229 S.E.2d 297 (N.C. 1976). Under this requirement, one must prove, at a minimum gross negligence. Id.

Insurability of Punitive Damages

Prohibited for intentional conduct.

North Carolina permits insurers to provide coverage for punitive damages. Mazza v. Medical Mutual Ins. Co. of North Carolina, 319 S.E.2d 217 (N.C. 1984). However, insurance coverage for punitive damages arising from intentional torts is prohibited. St. Paul Mercury Ins. Co. v. Duke Univ., 670 F.Supp 630 (M.D.N.C. 1987).

Applicable Statutes

N.C. Gen Stat. § 58-41-50. Policy form and rate filings; punitive damages, data required to support filings.

(a) With the exception of inland marine insurance that is not written according to manual rates and rating plans, all policy forms must be filed with and either approved by the Commissioner or 90 days have elapsed and he has not disapproved the form before they may be used in this State. With respect to liability insurance policy forms, an insurer may exclude or limit coverage for punitive damages awarded against its insured.



NORTH DAKOTA

Standard for an Award of Punitive Damages

Oppression, Fraud or Malice

The conduct required to obtain a punitive damage award in North Dakota is imposed by N.D. Cent. Code § 32-03.2-11 WHEN COURT OR JURY MAY GIVE EXEMPLARY DAMAGES.

1. In any action for the breach of an obligation not arising from contract, when the defendant has been guilty by clear and convincing evidence of oppression, fraud, or actual malice, the court or jury, in addition to the actual damages, may give damages for the sake of example and by way of punishing the defendant. Upon commencement of the action, the complaint may not seek exemplary damages. After filing the suit, a party may make a motion to amend the pleadings to claim exemplary damages. The motion must allege an applicable legal basis for awarding exemplary damages and must be accompanied by one or more affidavits or deposition testimony showing the factual basis for the claim. The party opposing the motion may respond with affidavit or deposition testimony. If the court finds, after considering all submitted evidence, that there is sufficient evidence to support a finding by the trier of fact that a preponderance of the evidence proves oppression, fraud, or actual malice, the court shall grant the moving party permission to amend the pleadings to claim exemplary damages. For purposes of tolling the statute of limitations, pleadings amended under this section relate back to the time the action was commenced.

2. If either party so elects, the trier of fact shall first determine whether compensatory damages are to be awarded before addressing any issues related to exemplary damages. Evidence relevant only to the claim for exemplary damages is not admissible in the proceeding on liability for compensatory damages. If an award of compensatory damages has been made, the trier of fact shall determine whether exemplary damages are to be awarded.

3. Evidence of a defendant's financial condition or net worth is not admissible in the proceeding on exemplary damages.

4. If the trier of fact determines that exemplary damages are to be awarded, the amount of exemplary damages may not exceed two times the amount of compensatory damages or hundred fifty thousand dollars, whichever is greater; provided, however, that no award of exemplary damages may be made if the claimant is not entitled to compensatory damages. In a jury trial, the jury may not be informed of the limit on damages contained in this subsection. Any jury award in excess of this limit must be reduced by the court.

5. In order for a party to recover exemplary damages, the finder of fact shall find by clear and convincing evidence that the amount of exemplary damages awarded is consistent with the following principles and factors:

- a. Whether there is a reasonable relationship between the exemplary damage award claimed and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred;
- b. The degree of reprehensibility of the defendant's conduct and the duration of that conduct; and
- c. Any of the following factors as to which evidence is presented:
 - (1) The defendant's awareness of and any concealment of the conduct;
 - (2) The profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; and
 - (3) Criminal sanctions imposed on the defendant for the same conduct that is the basis for the exemplary damage claim, these to be taken into account if offered in mitigation of the exemplary damage award.

6. Exemplary damages may not be awarded against a manufacturer or seller if the product's manufacture, design, formulation, inspection, testing, packaging, labeling, and warning complied with:

- a. Federal statutes existing at the time the product was produced;
- b. Administrative regulations existing at the time the product was produced that were adopted by an agency of the federal government which had responsibility to regulate the safety of the product or to establish safety standards for the product pursuant to a federal statute; or
- c. Premarket approval or certification by an agency of the federal government.

7. The defense in subsection 6 does not apply if the plaintiff proves by clear and convincing evidence that the product manufacturer or product seller:

- a. Knowingly and in violation of applicable agency regulations withheld or misrepresented information required to be submitted to the agency, which information was material and relevant to the harm in question; or
- b. Made an illegal payment to an official of the federal agency for the purpose of securing approval of the product.

8. Exemplary damages may be awarded against a principal because of an act by an agent only if at least one of the following is proved by clear and convincing evidence to be true:

- a. The principal or a managerial agent authorized the doing and manner of the act;
- b. The agent was unfit and the principal or a managerial agent was reckless in employing or retaining the agent;
- c. The agent was employed in a managerial capacity and was acting in the scope of employment; or
- d. The principal or managerial agent ratified or approved the doing and manner of the act.

9. In a civil action involving a motor vehicle accident resulting in bodily injury, it is sufficient for the trier of fact to consider an award of exemplary damages against the driver under the motion procedures provided in subsection 1 if clear and convincing evidence indicates that the accident was caused by a driver who, within the five years immediately preceding the accident has been convicted for violation of [section 39-08-01](#) and who was operating or in physical control of a motor vehicle:

- a. With an alcohol concentration of at least ten one-hundredths of one percent by weight;
- b. Under the influence of a controlled substance unless a drug that predominantly caused impairment was used only as directed or cautioned by a practitioner who legally prescribed or dispensed the drug to the driver;
- c. Under the influence of alcohol and refused to take a test required under chapter 39-20; or
- d. Under the influence of a volatile chemical as listed in [section 12.1- 31-06](#).

At the trial in an action in which the trier of fact will consider an award of exemplary damages, evidence that the driver has been convicted of violating [section 39-08-01](#) or an equivalent statute or ordinance is admissible into evidence.

A finding of oppression, fraud, or malice is a prerequisite to an award of punitive damages. [Continental Cas. Co. v. Kinsey](#), 499 N.W.2d 574, 579 (N.D. 1993).

Insurability of Punitive Damages

Insurance carriers are generally exempt from Liability for punitive damages or any other losses incurred by an insured because of intentionally wrongful conduct. See Continental Cas. Co. v. Kinsey, 499 N.W.2d 574 (N.D. 1993). North Dakota statute expressly prohibits insurance coverage for the willful or intentional acts of the insured. See N.D. Cent. Code § 26.1-32-04. To that end, insurance for punitive damages based upon unintentional acts or vicarious liability is most likely allowed.

Applicable Statutes

N.D. Cent. Code § 26.1-32-04 WILLFUL ACT EXONERATES INSURER, NEGLIGENCE DOES NOT.

An insurer is not liable for a loss caused by the willful act of the insured, but the insurer is not exonerated by the negligence of the insured or of the insured's agents or others.



OHIO

Standard for an Award of Punitive Damages

Malice, aggravated or egregious fraud.

OH ST. § 2315.21 provides the requisite standard for an award of punitive damages and provides in relevant part:

(B) Subject to division (D) of this section, punitive or exemplary damages are not recoverable from a defendant in question in a tort action unless both of the following apply:

(1) The actions or omissions of that defendant demonstrate malice, aggravated or egregious fraud, oppression or insult, or that defendant as principal or master, authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate.

(2) The plaintiff in question has adduced proof of actual damages that resulted from actions or omissions as described in division (B)(1) of this section.

(C)(1) In a tort action, the trier of fact shall determine the liability of any defendant for punitive or exemplary damages and the amount of those damages.

(2) In a tort action, the burden of proof shall be upon a plaintiff in question, by clear convincing evidence, to establish that the plaintiff is entitled to recover punitive or exemplary damages.

Misconduct greater than negligence is required for an award of punitive damages; this component is expressed in the language "great probability of causing substantial harm," which replaced language from earlier cases such as outrageous, flagrant and criminal. Calmes v. Goodyear Tire & Rubber Co., 470 N.E.2d 416 (Ohio 1991).

OH ST § 3345.40, prohibits an award of punitive damages against State Colleges or Universities.

Insurability of Punitive Damages

Prohibited for direct liability.

Both the Ohio legislature and judiciary have determined that insuring against punitive damages is detrimental to the welfare and morals of the public. See OH ST § 3937.182 (Ohio statute prohibiting insurance coverage for punitive damages in motor vehicle insurance policies); Owens-Corning Fiberglass Co v. American Centennial Ins. Co., 660 N.E.2d 770 (Ohio Ct. App. 1995) (public policy prohibits insurance coverage for punitive damages in liability policies).

Ohio law prohibits indemnification from an insurer for awards of punitive damages resulting from insured's own conduct. Lumbermans Mut. Cas. Co. v. S-W Indus., 23 F.3d 970 (C.A.6 1994). Because the purpose of punitive damages is to punish and deter the tortfeasor rather than to compensate the victim, there is a public policy against insurance coverage which would indemnify the tortfeasor against punitive damages. Carey v. Calhoun, 531 N.E.2d 1348 (Ohio Ct. App. 1987).

Applicable Statutes

OH. ST. § 3937.182 POLICIES NOT TO COVER CLAIMS OR JUDGMENTS FOR PUNITIVE OR EXEMPLARY DAMAGES

(A) As used in this section, "policy" includes an endorsement.

(B) No policy of automobile or motor vehicle insurance that is covered by sections 3937.01 to 3937.17 of the Revised Code, including, but not limited to, the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverage, including such a policy as authorized by section 3937.18 of the Revised Code and that is issued by an insurance company licensed to do business in this state, and no other policy of casualty or liability insurance that is covered by sections 3937.01 to 3937.17 of the Revised Code and that is so issued, shall provide coverage for judgments or claims against an insured for punitive or exemplary damages.

(C) This section applies only to policies of automobile, motor vehicle, or other casualty or liability insurance as described in division (B) of this section that are issued or renewed on or after the effective date of this section.



OKLAHOMA

Standard for an Award of Punitive Damages

Malice or reckless disregard for the rights of others.

The standard for an award for punitive damages in Oklahoma is established by statute:

OKL. STAT. § 9.1. PUNITIVE DAMAGES AWARDS BY JURY

A. In an action for the breach of an obligation not arising from contract, the jury, in addition to actual damages, may, subject to the provisions and limitations in subsections B, C and D of this section, award punitive damages for the sake of example and by way of punishing the defendant based upon the following factors:

1. The seriousness of the hazard to the public arising from the defendant's misconduct;
2. The profitability of the misconduct to the defendant;
3. The duration of the misconduct and any concealment of it;
4. The degree of the defendant's awareness of the hazard and of its excessiveness;
5. The attitude and conduct of the defendant upon discovery of the misconduct or hazard;
6. In the case of a defendant which is a corporation or other entity, the number and level of employees involved in causing or concealing the misconduct; and
7. The financial condition of the defendant.

B. Category I. Where the jury finds by clear and convincing evidence that:

1. The defendant has been guilty of reckless disregard for the rights of others; or
2. An insurer has recklessly disregarded its duty to deal fairly and act in good faith with its insured; the jury, in a separate proceeding conducted after the jury has made such finding and awarded actual damages, may award punitive damages in an amount not to exceed the greater of:
 - a. One Hundred Thousand Dollars (\$100,000.00), or
 - b. the amount of the actual damages awarded.

Any award of punitive damages under this subsection awarded in any manner other than as required in this subsection shall be void and reversible error.

C. Category II. Where the jury finds by clear and convincing evidence that:

1. The defendant has acted intentionally and with malice towards others; or
2. An insurer has intentionally and with malice breached its duty to deal fairly and act in good faith with its insured; the jury, in a separate proceeding conducted after the jury has made such finding and awarded actual damages, may award punitive damages in an amount not to exceed the greatest of:
 - a. Five Hundred Thousand Dollars (\$500,000.00),
 - b. twice the amount of actual damages awarded, or
 - c. the increased financial benefit derived by the defendant or insurer as a direct result of the conduct causing the injury to the plaintiff and other persons or entities.

The trial court shall reduce any award for punitive damages awarded pursuant to the provisions of subparagraph c of this paragraph by the amount it finds the defendant or insurer has previously paid as a result of all punitive damage verdicts entered in any court of this state for the same conduct by the defendant or insurer. Any award of punitive damages under this subsection awarded in any manner other than as required in this subsection shall be void and reversible error.

D. Category III. Where the jury finds by clear and convincing evidence that:

1. The defendant has acted intentionally and with malice towards others; or
2. An insurer has intentionally and with malice breached its duty to deal fairly and act in good faith with its insured; and the court finds, on the record and out of the presence of the jury, that there is evidence beyond a reasonable doubt that the defendant or insurer acted intentionally and with malice and engaged in conduct life-threatening to humans, the jury, in a separate proceeding conducted after the jury has made such finding and awarded actual damages, may award punitive damages in any amount the jury deems appropriate, without regard to the limitations set forth in subsections B and C of this section. Any award of punitive damages under this subsection awarded in any manner other than as required in this subsection shall be void and reversible error.

E. In determining the amount, if any, of punitive damages to be awarded under either subsection B, C or D of this section, the jury shall make the award based upon the factors set forth in subsection A of this section.

F. The provisions of this section are severable, and if any part or provision thereof shall be held void, the decision of the court shall not affect or impair any of the remaining parts or provisions thereof.

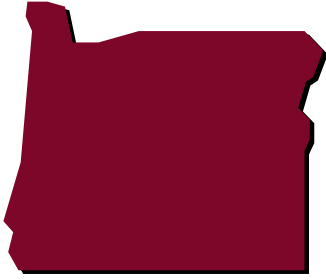
Insurability of Punitive Damages

Prohibited for direct liability.

Directly assessed punitive damages are not insurable in Oklahoma. Dayton Hudson Corp. v. American Mut. Liability Inc. Co., 621 P.2d 1155 (Okla. 1980). However, vicarious liability for punitive damages is insurable, so long as the employer is not found grossly negligent. Id.

Applicable Statute

None.



OREGON

Standard for an Award of Punitive Damages

Malice or Reckless Indifference to the Health Safety and Welfare of Others

O.R.S. § 18.537 provides the requisite standard for an award of punitive damages and provides in relevant part:

(1) Punitive damages are not recoverable in a civil action unless it is proven by clear and convincing evidence that the party against whom punitive damages are sought has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others

O.R.S. § 30.925 provides additional criteria for an award of punitive damages in a products liability action:

(1) In a product liability civil action, punitive damages shall not be recoverable except as provided in O.R.S. § 18.537.

(2) Punitive damages, if any, shall be determined and awarded based upon the following criteria:

(a) The likelihood at the time that serious harm would arise from the defendant's misconduct;

(b) The degree of the defendant's awareness of the likelihood;

(c) The profitability of the defendant's misconduct;

(d) The duration of the misconduct and any concealment of it;

(e) The attitude and conduct of the defendant upon discovery of the misconduct;

(f) The financial condition of the defendant;

(g) 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.

Insurability of Punitive Damages

Oregon allows a policyholder to recover punitive damages from its insurer, assuming that the insurance policy does not specifically exclude or exempt such coverage. Harrell v. Travelers Indemnity Company, 567 P.2d 1013 (Or. 1977).

Applicable Statutes

None.



PENNSYLVANIA

Standard for an Award of Punitive Damages

Malice, willful, wanton or reckless indifference.

An award of punitive damages in Pennsylvania requires conduct that is malicious, wanton, willful, oppressive or exhibits a reckless indifference to the rights of others. Johnson v. Hyundai Motor America, 698 A.2d 631 (Pa. Super. 1997). Reckless disregard is defined as:

the actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary

Taylor v. Albert Einstein Medical Center, 723 A.2d 1027 (Pa. Super. 1998). Conversely, punitive damages may not be awarded for misconduct which constitutes ordinary negligence such as inadvertence, mistake and errors of judgment. Hall v. Jackson, 788 A.2d 390 (Pa. Super. 2001).

Insurability of Punitive Damages

Prohibited for direct liability.

Pennsylvania public policy does not permit an insured to shift the burden of punitive damages to the insurer. Esmond v. Liscio, 224 A.2d 793 (Pa. Super. 1967). However, public policy does not prevent insurance for punitive damages that are vicariously assessed. Butterfield v. Giuntoli, 670 A.2d 646 (Pa. Super. 1995).

Applicable Statutes

Pa. Stat. § 2051. PUNITIVE DAMAGES FOR DOWNHILL SKIING ACCIDENTS

(a) Legislative statement.--The General Assembly finds that the sport of downhill skiing is practiced by a large number of citizens of this Commonwealth and also attracts to this Commonwealth large numbers of nonresidents significantly contributing to the economy of this Commonwealth. It is recognized that, as in some other sports, there are inherent risks in the sport of downhill skiing. The law of this Commonwealth being unclear with regard to the insurability against punitive damages, the operators of downhill skiing areas face uncertainty in securing insurance to indemnify against downhill skiing accidents.

(b) Insurability.--It is not against the public policy of this Commonwealth for an insurance company to insure the operator of a downhill skiing area against punitive damages, other than those punitive damages arising from an intentional tort committed by such operator.

(c) Other cases.--Nothing herein contained shall be construed to change or amend the public policy of this Commonwealth with respect to the insurability against punitive damages in cases arising other than from downhill skiing.



RHODE ISLAND

Standard for an Award of Punitive Damages

Willful, reckless or wicked.

In Rhode Island the party seeking punitive damages carries the burden of producing "evidence of such willfulness, recklessness or wickedness, on the part of the party at fault, as amount[s] to criminality" that should be punished. Greater Providence Deposit Corp. v. Jenison, 485 A.2d 1242 (R.I. 1984). Under this requirement, malice must be proved. Id.

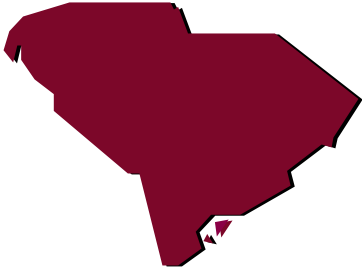
Insurability of Punitive Damages

Prohibited.

Rhode Island holds, on public policy grounds, that punitive damages are not insurable. Allen v. Simmons, 533 A.2d 541 (R.I. 1987).

Applicable Statutes

None.



SOUTH CAROLINA

Standard for an Award of Punitive Damages

Malice, ill will or reckless disregard.

South Carolina allows punitive damages, except in actions against the state or other governmental entity and in product liability actions based on strict liability. Punitive damages are allowed upon a showing by clear and convincing evidence of malice, ill will, a conscious indifference to the rights of others, or a reckless disregard thereof. King v. Allstate Ins. Co., 251 S.E.2d 762 (S.C. 1979). S.C. Code § 15-33-135.

Insurability of Punitive Damages

Not prohibited.

South Carolina public policy does not prohibit insurance coverage for punitive damages. Carraway v. Johnson, 139 S.E.2d 908 (S.C. 1965).

Applicable Statutes

None.



SOUTH DAKOTA

Standard for an Award of Punitive Damages

Malice, oppression or fraud.

Punitive damages are generally recoverable under South Dakota:

21-3-2 PUNITIVE DAMAGES IN DISCRETION OF JURY.

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, or in any case of wrongful injury to animals, being subjects of property, committed intentionally or by willful and wanton misconduct, in disregard of humanity, the jury, in addition to the actual damage, may give damages for the sake of example, and by way of punishing the defendant.

Insurability of Punitive Damages

Prohibited for intentional conduct.

South Dakota statute prohibits contracts that exempt individuals from responsibility from fraudulent or willful acts. Dairyland Ins. Co. v. Wyant, 463 N.W.2d 845 (S.D. 1990). Moreover, it is against public policy to allow insured wrongdoer to shift burden of payment of punitive damages to its insurer. See City of Fort Pierre v. United Fire and Cas. Co., 463 N.W.2d 845 (S.D. 1990)

Applicable Statutes

S.D.C.L. § 53-9-3 CONTRACTS AGAINST PUBLIC POLICY.

All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud or willful injury to the person or property of another or from violation of law whether willful or negligent, are against the policy of the law.



TENNESSEE

Standard for an Award of Punitive Damages

Malice, fraud or recklessness.

Punitive damages are generally recoverable under Tennessee law if a defendant has acted either intentionally, fraudulently, maliciously or recklessly. Hodges v. S.C. Toof & Co., 833 S.W.2d 896 (Tenn. 1992).

Insurability of Punitive Damages

Not prohibited.

Punitive damages are insurable in Tennessee, except when arising from intentional conduct. Lazenby v. Universal Underwriters Ins. Co., 383 S.W.2d 1 (Tenn. 1964).

Applicable Statutes

None.



TEXAS

Standard for an Award of Punitive Damages

Malice, fraud or gross negligence.

In Texas punitive damages are generally recoverable and are controlled entirely by statute.

V.T.C.A CIV. PRAC. & REM. CODE § 41.003. STANDARDS FOR RECOVERY OF EXEMPLARY DAMAGES

(a) Except as provided by Subsection (c), exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from:

(1) fraud;

(2) malice; or

(3) willful act or omission or gross neglect in wrongful death actions brought by or on behalf of a surviving spouse or heirs of the decedent's body, under a statute enacted pursuant to Section 26, Article XVI, Texas Constitution. In such cases, the definition of "gross neglect" in the instruction submitted to the jury shall be the definition stated in Section 41.001(7)(B).

(b) The claimant must prove by clear and convincing evidence the elements of exemplary damages as provided by this section. This burden of proof may not be shifted to the defendant or satisfied by evidence of ordinary negligence, bad faith, or a deceptive trade practice.

(c) If the claimant relies on a statute establishing a cause of action and authorizing exemplary damages in specified circumstances or in conjunction with a specified culpable mental state, exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the damages result from the specified circumstances or culpable mental state.

V.T.C.A CIV. PRAC. & REM. CODE § 41.001. DEFINITIONS

In this chapter:

(1) "Claimant" means a party, including a plaintiff, counterclaimant, cross-claimant, or third-party plaintiff, seeking recovery of exemplary damages. In a cause of action in which a party seeks recovery of exemplary damages related to injury to another person, damage to the property of another person, death of another person, or other harm to another person, "claimant" includes both that other person and the party seeking recovery of exemplary damages.

(2) "Clear and convincing" means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.

(3) "Defendant" means a party, including a counter-defendant, cross-defendant, or third-party defendant, from whom a claimant seeks relief with respect to exemplary damages.

(4) "Economic damages" means compensatory damages for pecuniary loss; the term does not include exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society.

(5) "Exemplary damages" means any damages awarded as a penalty or by way of punishment. "Exemplary damages" includes punitive damages.

(6) "Fraud" means fraud other than constructive fraud.

(7) "Malice" means:

(A) a specific intent by the defendant to cause substantial injury to the claimant; or

(B) an act or omission:

(i) 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

(ii) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

V.T.C.A CIV. PRAC. & REM. CODE § 41.008. LIMITATION ON AMOUNT OF RECOVERY

(a) In an action in which a claimant seeks recovery of exemplary damages, the trier of fact shall determine the amount of economic damages separately from the amount of other compensatory damages.

(b) Exemplary damages awarded against a defendant may not exceed an amount equal to the greater of:

(1)(A) two times the amount of economic damages; plus

(B) an amount equal to any noneconomic damages found by the jury, not to exceed \$750,000; or

(2) \$200,000.

(c) Subsection (b) does not apply to a cause of action against a defendant from whom a plaintiff seeks recovery of exemplary damages based on conduct described as a felony in the following sections of the Penal Code if, except for Sections 49.07 and 49.08, the conduct was committed knowingly or intentionally:

(1) Section 19.02 (murder);

(2) Section 19.03 (capital murder);

(3) Section 20.04 (aggravated kidnapping);

(4) Section 22.02 (aggravated assault);

(5) Section 22.011 (sexual assault);

(6) Section 22.021 (aggravated sexual assault);

(7) Section 22.04 (injury to a child, elderly individual, or disabled individual);

(8) Section 32.21 (forgery);

(9) Section 32.43 (commercial bribery);

(10) Section 32.45 (misapplication of fiduciary property or property of financial institution);

(11) Section 32.46 (securing execution of document by deception);

(12) Section 32.47 (fraudulent destruction, removal, or concealment of writing);

(13) Chapter 31 (theft) the punishment level for which is a felony of the third degree or higher;

(14) Section 49.07 (intoxication assault); or

(15) Section 49.08 (intoxication manslaughter).

(d) In this section, "intentionally" and "knowingly" have the same meanings assigned those terms in Sections 6.03(a) and (b), Penal Code.

(e) The provisions of Subsections (a) and (b) may not be made known to a jury by any means, including *voir*

dire, introduction into evidence, argument, or instruction.

(f) Subsection (b) does not apply to a cause of action for damages arising from the manufacture of methamphetamine as described by Chapter 99.

Insurability of Punitive Damages

Prohibited under Medical Professional Liability Insurance.

Texas law prohibits coverage for punitive damages under medical professional liability insurance policies for punitive damages assessed against a health care provider or physician. However, coverage may be obtained through endorsement approved by the State Board of Insurance.

Not prohibited in other contexts

Manriquez v. Mid-Century Ins. Co., 779 S.W.2d 482, 484 (Tex.App.-El Paso 1989, writ denied) (automobile policy), disapproved in part on other grounds, Trinity Universal Ins. Co. v. Cowan, 945 S.W.2d 819, 823 (Tex.1997); Am. Home Assurance Co. v. Safway Steel Prods. Co., 743 S.W.2d 693, 704-05 (Tex.App.-Austin 1987, writ denied) (umbrella liability policies); Home Indem. Co. v. Tyler, 522 S.W.2d 594, 597 (Tex.Civ.App.- Houston [14th Dist.] 1975, writ ref'd n.r.e.) (uninsured motorist coverage), overruled by Milligan v. State Farm Mut. Auto. Ins. Co., 940 S.W.2d 228, 232 (Tex.App.-Houston [14th Dist.] 1997, writ denied); Dairyland County Mut. Ins. Co. v. Wallgren, 477 S.W.2d 341, 342-43 (Tex.Civ.App.-Fort Worth 1972, writ ref'd n.r.e.) (automobile policy); Westchester Fire Ins. Co. v. Admiral ins. Co., 2003 WL21475423, __ S.W. 3d __ (Tex. Civ. App. Fort Worth 2003).

Applicable Statutes

TX Ins. Art. 5.15-1 Exemplary Damages Under Medical Professional Liability Insurance

Sec. 8. No policy of medical professional liability insurance issued to or renewed for a health care provider or physician in this state may include coverage for exemplary damages that may be assessed against the health care provider or physician; provided, however, that the commissioner may approve an endorsement form that provides for coverage for exemplary damages to be used on a policy of medical professional liability insurance issued to a hospital, as the term "hospital" is defined in this article, or to a for-profit or not-for-profit nursing home.

UTAH

Standard for an Award of Punitive Damages

Willful, malicious or reckless indifference.

In Utah punitive damages are generally recoverable and are controlled by statute.

UTAH CODE ANN § 78-18-1 BASIS FOR PUNITIVE DAMAGES AWARDS --
SECTION INAPPLICABLE TO DUI CASES --DIVISION OF AWARD WITH STATE.

(1) (a) Except as otherwise provided by statute, punitive damages may be awarded only if compensatory or general damages are awarded and it is established by clear and convincing evidence that the acts or omissions of the tortfeasor are 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.

(b) The limitations, standards of evidence, and standards of conduct of Subsection (1)(a) do not apply to any claim for punitive damages arising out of the tortfeasor's operation of a motor vehicle or motorboat while voluntarily intoxicated or under the influence of any drug or combination of alcohol and drugs as prohibited by Section 41-6-44.

(c) The award of a penalty under Section 78-11-15 or 78-11-16 regarding shoplifting is not subject to the prior award of compensatory or general damages under Subsection (1)(a) whether or not restitution has been paid to the merchant prior to or as a part of a civil action under Section 78-11-15 or 78-11-16.

(2) Evidence of a party's wealth or financial condition shall be admissible only after a finding of liability for punitive damages has been made.

(3) (a) In any judgment where punitive damages are awarded and paid, 50% of the amount of the punitive damages in excess of \$20,000 shall, after an allowable deduction for the payment of attorneys' fees and costs, be remitted to the state treasurer for deposit into the General Fund.

(b) For the purposes of this Subsection (3), an "allowable deduction for the payment of attorneys' fees and costs" shall equal the amount of actual and reasonable attorneys' fees and costs incurred by the judgment creditor, minus the amount of any separate judgment awarding attorneys' fees and costs to the judgment creditor.

Insurability of Punitive Damages

Prohibited.

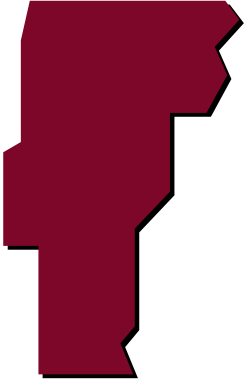
By statute, punitive damages are not insurable in Utah. Utah Code Ann. § 31A-20-101.

Applicable Statutes

Utah Code Ann. § 31A-20-101 UNDERWRITING LIMITATIONS.

No insurer may insure or attempt to insure against:

- (1) a wager or gaming risk;
- (2) loss of an election;
- (3) the penal consequences of a crime; or
- (4) punitive damages.



VERMONT

Standard for an Award of Punitive Damages

Actual malice.

In Vermont punitive damages are generally recoverable. Punitive Damages are appropriate where there is actual malice as evidenced by either one of two factual predicates: (1) where a defendant expressed personal ill will toward a plaintiff (i.e., "bad motive"), or (2) where a defendant exhibited reckless or wanton disregard of a plaintiff's rights. Sparrow v. Vermont Savings Bank, 112 A. 2d (Vt. 1921).

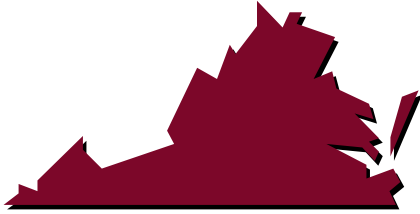
Insurability of Punitive Damages

Not prohibited.

Vermont public policy does not prevent insurance coverage for punitive damages. State v. Glen Falls Ins. Co., 404 A.2d 101 (Vt. 1979).

Applicable Statutes

None.



VIRGINIA

Standard for an Award of Punitive Damages

Malice.

In Virginia punitive damages are generally recoverable. As a general rule punitive damages are proper only when, malice, or malice in fact, has been established by the evidence. See Peacock Buick, Inc. v. Durkin, 277 S.E.2d 228 (Va. 1981).

Insurability of Punitive Damages

Prohibited for intentional conduct.

By Virginia statute, punitive damages arising out of the death or injury of any person which results from negligence, including willful and wanton negligence, are insurable and that insurance coverage for punitive damages is not against public policy. Va.. Code § 38.2-277. However, the statute does not permit insurance coverage for punitive damages arising out of intentional acts.

It is not against the public policy of the Commonwealth for any person to purchase insurance providing coverage for punitive damages arising out of the death or injury of any person as the result of negligence, including willful and wanton negligence, but excluding intentional acts. This section declares existing policy.

Applicable Statutes

Va. Code § 38.2-227. PUBLIC POLICY REGARDING PUNITIVE DAMAGES



WASHINGTON

Standard for an Award of Punitive Damages

Not allowed.

In Washington punitive damages are not generally recoverable. Spokane Truck & Dray Company v. Hoefer, 25 P.2d 1072 (1891).

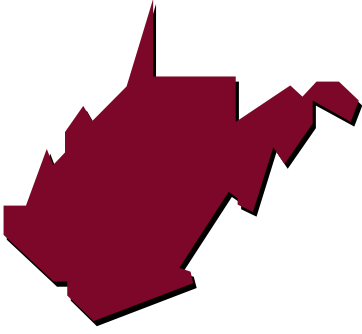
Insurability of Punitive Damages

Not Prohibited.

Liability coverage for punitive damages does not violate public policy, even though courts regard such damages as inappropriate in civil cases because they encroach upon criminal sanctions. Fluke Corp. v. Hartford Acc. & Indem. Co., 34 P.3d 809 (Wash. 2001).

Applicable Statutes

None.



WEST VIRGINIA

Standard for an Award of Punitive Damages

Gross fraud, malice, oppression, wanton, willful or reckless conduct.

Under West Virginia law, exemplary, punitive or vindictive damages in tort actions are appropriate upon a showing of gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting rights of others appear, or where legislative enactment authorizes it. Smith v. Perry, 359 S.E.2d 624 (W. Va. 1987).

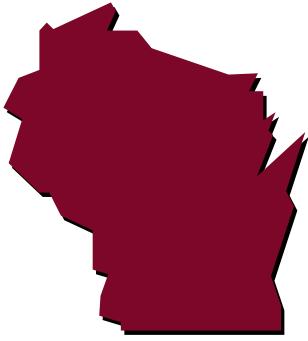
Insurability of Punitive Damages

Not Prohibited.

West Virginia public policy does not preclude insurance coverage for punitive damages arising from gross, reckless or wanton negligence. Hensely v. Erie Ins. Co., 283 S.E.2d 227 (W. Va. 1981).

Applicable Statutes

None.



WISCONSIN

Standard for an Award of Punitive Damages

Malice or Intentional Disregard

Under Wisconsin law, punitive damages generally are recoverable, except in medical malpractice and wrongful death actions, where such damages are prohibited. Lund v. Kokemoor, 537 N.W.2d 21 (Wis. App. 1995), Wangen v. Ford Motor Credit Co., 294 N.W.2d 437 (Wis. 1980).

The standard for an award for punitive damages is established by statute.

Wis. Stat. § 895.85. PUNITIVE DAMAGES

(1) Definitions. In this section:

- (a) "Defendant" means the party against whom punitive damages are sought.
- (b) "Double damages" means those court awards made under a statute providing for twice, 2 times or double the amount of damages suffered by the injured party.
- (c) "Plaintiff" means the party seeking to recover punitive damages.
- (d) "Treble damages" means those court awards made under a statute providing for 3 times or treble the amount of damages suffered by the injured party.

(2) Scope. This section does not apply to awards of double damages or treble damages, or to the award of exemplary damages under ss. 46 .90(6)(c), 51.30(9), 51.61(7), 103.96(2), 134.93(5), 146.84(1)(b) and (bm), 153.85, 252.14(4), 252.15(8)(a), 610.70(7)(b), 943.245(2) and (3) and 943.51(2) and (3).

(3) Standard of conduct. The plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff.

(4) Procedure. If the plaintiff establishes a prima facie case for the allowance of punitive damages:

- (a) The plaintiff may introduce evidence of the wealth of a defendant; and
- (b) The judge shall submit to the jury a special verdict as to punitive damages or, if the case is tried to the court, the judge shall issue a special verdict as to punitive damages.

(5) Application of joint and several liability. The rule of joint and several liability does not apply to punitive damages.

Insurability of Punitive Damages

Under Wisconsin law it is not against public policy to insure an award of punitive damages, regardless of whether they were awarded in response to direct or vicarious liability. Brown v. Maxey, 369 N.W.2d 677 (Wis. 1985).

Applicable Statutes

None.



WYOMING

Standard for an Award of Punitive Damages

Malice, Willful or Wanton Misconduct

Under Wyoming law, punitive damages generally are recoverable. Punitive damage awards are appropriate upon a showing of outrageous conduct, such as intentional torts, torts involving malice and torts involving willful and wanton misconduct. Punitive damages are not appropriate in circumstances involving inattention, inadvertence, thoughtlessness, mistake, or even gross negligence. Danculovich v. Brown, 593 P.2d 187 (Wy. 1979).

Insurability of Punitive Damages

Under Wyoming law it is not against public policy to insure an award of punitive damages, regardless of whether they were awarded in response to direct or vicarious liability. Sinclair Oil Corp. v. Columbia Casualty Co., 682 P.2d 975 (Wy. 1984).

Applicable Statutes

None.