

Department of Legislative Services  
Maryland General Assembly  
2017 Session

FISCAL AND POLICY NOTE  
First Reader

Senate Bill 836

(Senators Norman and Smith)

Judicial Proceedings

---

Civil Actions - Punitive Damage Awards

---

This bill (1) establishes that punitive damages may be awarded in a civil action only if the plaintiff proves by clear and convincing evidence that the defendant acted with wantonness, fraud, or malice; (2) requires a trier of fact to consider specified factors to determine the amount of punitive damages awarded; and (3) prohibits a jury from awarding punitive damages unless the jury reaches a unanimous decision regarding the defendant's liability and the amount of punitive damages to be awarded.

The bill applies prospectively to actions for punitive damages filed on or after the bill's October 1, 2017 effective date.

---

Fiscal Summary

**State Effect:** None. Punitive damages may not be awarded against the State. The State does not waive its sovereign immunity under the Maryland Tort Claims Act for punitive damages.

**Local Effect:** None. Under the Local Government Tort Claims Act, a local government is not liable for punitive damages but, subject to specified restrictions, may indemnify an employee for a judgment for punitive damages entered against the employee.

**Small Business Effect:** Potential meaningful impact on small businesses that have to pay or receive punitive damages as a result of the bill. Potential meaningful impact on small business law firms that recover punitive damages for their clients as a result of the bill.

---

## Analysis

**Bill Summary:** The bill defines “wantonness” as “conduct that is carried out with a reckless indifference for the rights and safety of others.” The bill defines “malice” as “conduct, without just cause or excuse, that is carried out (1) with intent to injure the person or property of another; (2) with a want of care that raises a presumption of conscious indifference to the likely consequences of the conduct; or (3) under circumstances that imply evil motive or intent.” The trier of fact must consider a defendant’s liability for punitive damages concurrently with all other issues presented in the action.

If the trier of fact determines that punitive damages are supportable by the facts, the following factors must be considered to determine the amount of punitive damages to be awarded: (1) the likelihood at the time of the alleged misconduct that serious harm would arise; (2) the degree of the defendant’s awareness that serious harm would be likely to arise from the defendant’s misconduct; (3) the profitability of the misconduct to the defendant; (4) the duration and concealment of the defendant’s misconduct; (5) the attitude and conduct of the defendant on discovery of the misconduct; and (6) the defendant’s financial means.

In a jury trial, punitive damages may be awarded only if the jury reaches a unanimous decision regarding the defendant’s liability and the amount of punitive damages.

In any action for punitive damages, evidence of the defendant’s financial means is not admissible until there has been a finding of liability and that punitive damages are supportable under the facts. The rules of civil procedure must be construed liberally to allow a plaintiff discovery of any information or material reasonably calculated to lead to admissible evidence on the issue of punitive damages.

**Current Law:** Actual damages, also known as compensatory damages, are intended to make a plaintiff whole by returning the plaintiff to the position he or she was in prior to the alleged harm caused by the defendant. Actual damages include both economic damages – compensation for things like lost wages, medical expenses, and costs to repair or replace property – and noneconomic damages – compensation for things like pain, suffering, inconvenience, physical impairment, loss of consortium, or other nonpecuniary injury.

In contrast to actual damages, punitive damages do not compensate plaintiffs for their losses. Rather, punitive damages are designed to punish and deter blameworthy behavior. In *Owens-Illinois v. Zenobia*, 325 Md. 420 (1992), the Maryland Court of Appeals held that, in a nonintentional tort action, the trier of fact may not award punitive damages unless the plaintiff establishes that the defendant’s conduct was characterized by “actual malice” – meaning evil motive, intent to injure, ill will, or fraud.

Maryland’s actual malice standard is one of the strictest in the country. According to a survey by the national law firm Wilson Elser, of the 43 states where punitive damages are generally available, it appears that only nine (California, Kentucky, Maine, Maryland, Montana, Nevada, North Dakota, Ohio, and Virginia) require proof of actual malice. Other states authorize punitive damage awards based on evidence that the defendant acted with “conscious disregard” of the likely consequences of his or her actions, “reckless indifference” to the likely consequences of his or her actions, or “gross negligence.” Moreover, most states that require proof of actual malice further distinguish between “express malice” and “implied malice.” Express malice exists where the defendant’s tortious conduct is motivated by ill will (*i.e.*, hatred, spite, or similar motive toward the plaintiff). Implied malice exists where the defendant’s conduct, although not necessarily motivated by ill will, is so outrageous that the court may infer malice on the part of the defendant. Maryland and North Dakota appear to be the only states to require proof of express malice to obtain punitive damages. In Maryland, the requirement for actual malice is somewhat modified in the common law regarding product liability. Maryland courts have found that the actual malice standard necessary to support an award of punitive damages is actual knowledge of a defect and a deliberate disregard of the consequences, which is essentially an implied malice standard. (See *AC and S v. Goodwin*, 340 Md. 334 (1995).)

---

### **Additional Information**

**Prior Introductions:** None.

**Cross File:** None.

**Information Source(s):** Judiciary (Administrative Office of the Courts); Wilson Elser Moskowitz, Edelman and Dicker, LLP; Department of Legislative Services

**Fiscal Note History:** First Reader - February 22, 2017  
mm/kdm

---

Analysis by: Amy A. Devadas

Direct Inquiries to:  
(410) 946-5510  
(301) 970-5510