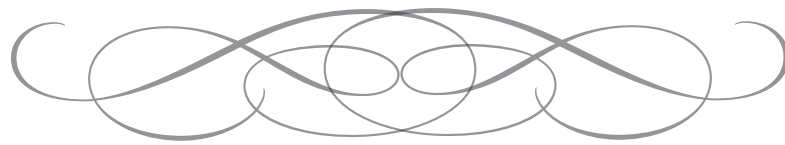


House Workgroup on Punitive Damages



FINAL REPORT



Annapolis, Maryland
February 2017

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THE MARYLAND GENERAL ASSEMBLY
ANNAPOLIS, MARYLAND 21401-1991

February 24, 2017


The Honorable Thomas V. Mike Miller, Jr., President of the Senate
The Honorable Michael E. Busch, Speaker of the House of Delegates
Members of the Maryland General Assembly

Ladies and Gentlemen:

The House Workgroup on Punitive Damages respectfully submits its final report. The workgroup met three times during the 2016 interim to review the current structure for awarding punitive damages under Maryland law, examine other states' punitive damages schemes, and consider the possible implications of expanding or contracting the use of punitive damages in Maryland – including the likely impact on insurance consumers in the State. Because of the complexity of the issues, there was no consensus as to a recommendation. Nevertheless, we hope that the information in this report will be of assistance to the General Assembly as it considers future bills on the subject of punitive damages.

On behalf of the workgroup, I wish to thank the many individuals who contributed their time and expertise during this process; the information and perspectives they provided were invaluable. I also wish to thank the Department of Legislative Services and committee staff for their continued support.

Sincerely,


Kathleen M. Dumais
Chair

cc: Mr. Warren G. Deschenaux

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Introduction

Introduction

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. Under Maryland law, punitive damages are available only in a narrow category of cases – either where explicitly authorized by statute, or where the defendant’s conduct rises to the level of “actual malice.”

In recent years, the General Assembly has considered several bills that would have expanded the use of punitive damages in Maryland, particularly in cases involving drunk driving. House leadership created the House Workgroup on Punitive Damages in response to these bills and to the perceived need to take a broader, more holistic look at punitive damages in the State. The workgroup included members of the Economic Matters, Health and Government Operations, and Judiciary committees, as well as private individuals from the plaintiff and defense bar and the insurance and health care worlds. The workgroup’s mandate was to (1) review the current structure of awarding punitive damages under Maryland tort law and determine whether the array of covered actions should be expanded or limited; (2) examine other states’ punitive damages schemes to determine whether there are best practices that Maryland should adopt; (3) review the opportunities for treble damages and compensatory damages under Maryland law; and (4) determine what impact any expansion or contraction of punitive damages and treble damages would have on insurance consumers in the State.

The workgroup met three times during the 2016 interim, on November 10, December 6, and December 20. The first meeting focused on the evolution of Maryland case law on punitive damages, Maryland statutes authorizing punitive and treble damages, and how Maryland law compares with other states on this issue of punitive damages. The second meeting focused on insurance issues, including questions relating to the insurability of punitive damage awards and the possible impact that expanding the use of punitive damages in Maryland would have on the affordability and availability of insurance in the State. At the third and final meeting, members of the workgroup discussed their perspectives and considered recommendations.

Ultimately, the workgroup unanimously agreed that there was no consensus because of the complexity of the issues. The workgroup instead decided to issue this report summarizing the

information it had gathered over the course of its meetings. The following sections provide an overview of punitive damages in Maryland, punitive damages in other states, and the insurability of punitive damages. Additional materials submitted to the workgroup have been included as appendixes.

Punitive Damages in Maryland

Maryland Case Law

In the 1940s, the Maryland Court of Appeals set a high bar for the recovery of punitive damages in negligence actions:

The basic rule for the entitlement of punitive or exemplary damages is that there must be actual malice. That is, there must be an element of fraud, or malice, or evil intent, or oppression entering into and forming part of the wrongful act. *Philadelphia, W.&B. R.R. Co. v. Hoeflich*, 62 Md. 300, 307, quoted in *Davis v. Gordon*, 183 Md. 129, 133 (1944).

The above cited rule held fast in Maryland until the Court of Appeals' decision in *Smith v. Gray Concrete Pipe Co.*, 267 Md. 149 (1972). In *Smith*, the court, for the first time, fashioned a gross negligence standard for the award of punitive damages in a motor vehicle case. Defining "gross negligence" as a "wanton or reckless disregard for human life" (*Id.* at 167), the Court stated, "We regard 'a wanton or reckless disregard for human life' in the operation of a motor vehicle, with the known dangers and risks attendant to such conduct, as the legal equivalent of malice." *Id.* at 168.

In *Nast v. Lockett*, 312 Md. 343 (1988), the Court of Appeals considered the application of the *Smith* decision to automobile tort cases involving intoxication. The Court held that evidence that the defendant was driving while intoxicated could support the conclusion that the defendant had a wanton or reckless disregard for human life. Therefore, such evidence could be weighed by the trier of fact on the issue of punitive damages.

After the gradual expansion of the use of punitive damages in negligence actions in the 1970s and 80s, the Court of Appeals reversed course. In *Owens-Illinois v. Zenobia*, 325 Md. 420 (1992), the Court expressly overruled the *Smith* and *Nast* decisions, holding 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. The Court expanded on this decision in *Komornik v. Sparks*, 331, Md. 720 (1993), specifically holding that evidence of the defendant's driving while intoxicated was insufficient to support a finding of actual malice.

Maryland Statutes

Punitive damages are also available under more than 40 Maryland statutes. These statutes generally apply to legislatively created causes of action based on intentional misconduct. Nearly

half of the statutes are intended to protect consumers. Usually, the statutes place a limit on the amount of the punitive damages that may be recovered in the form of a multiple of the actual damages. **Appendix 1** contains a list of Maryland statutes that authorize punitive damage awards.

Punitive Damages in Other States

Introduction

In the United States, 47 states, including Maryland, authorize the award of punitive damages in at least some cases. Of these 47, 4 states (Louisiana, Massachusetts, New Hampshire, and South Dakota) award punitive damages only where expressly authorized by statute. Three states (Michigan, Nebraska, and Washington) prohibit the award of punitive damages outright. **Exhibit 1** summarizes the availability of punitive damages across the country.

Exhibit 1 Punitive Damages Across the Country

<u>Availability of Punitive Damages</u>	<u>Number of States</u>
Generally available	43
Available only when expressly authorized by statute	4
Prohibited	3

Source: Wilson Elser

This section provides a broad overview of the treatment of punitive damages in the states that allow them.

Standards of Conduct

Punitive damages are intended to punish conduct that is particularly culpable or egregious. In general, it is not enough that a defendant acted negligently. Rather, the defendant must have acted with a specific state of mind, such as (1) “actual malice”; (2) “conscious disregard” of the likely consequences of his or her actions; (3) “reckless indifference” to the likely consequence of his or her actions; or (4) “gross negligence.” **Exhibit 2** summarizes the standards of conduct in the 43 states where punitive damages are generally available.¹

¹ In Louisiana, Massachusetts, New Hampshire, and South Dakota, the conduct required to obtain an award of punitive damages is set for each cause of action by the statute authorizing the award of punitive damages. This report does not address the standards of conduct in these states.

Exhibit 2
Standard of Conduct Where Punitive Damages are Available

<u>Standard of Conduct</u>	<u>Number of States</u>
Actual malice (express or implied)	9
Conscious disregard	7
Reckless indifference	13
Gross negligence	5
Other	9

Source: Wilson Elser

In general, a defendant acts with “actual malice” if he or she actually intends to cause harm. However, some jurisdictions 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.² Seven other states apply a more flexible implied malice standard, including:

- California (CAL. CIVIL CODE § 3294)³ ;
- Kentucky (KY. REV. STAT. § 411.184)⁴;
- Maine (*St. Francis De Sales Fed. Credit Union v. Sun Ins. Co. of N.Y.*, 818 A.2d 995 (Me. 2003))⁵;

² There is a possible exception to the express malice requirement in Maryland. In product liability cases, Maryland courts have found that the “actual malice” necessary to support an award of punitive damages is actual knowledge of a defect and deliberate disregard of the consequences. (*AC and S v. Godwin*, 667 A.2d 116 (Md. 1995)). This is essentially an implied malice standard.

³ In California, punitive damages may be awarded only if the defendant is guilty of “oppression, fraud, or malice.” “Malice” is defined to include both conduct that is intended to cause harm and “despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.”

⁴ In Kentucky, punitive damages may be awarded only where the defendant acted towards the plaintiff with “oppression, fraud, or malice.” “Malice” is defined as “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.”

⁵ In Maine, punitive damages may be awarded in cases involving implied malice. Implied malice arises 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.” *Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985).

- Montana (MONT. CODE ANN. § 27-1-221)⁶;
- Nevada (NEV. REV. STAT. § 42.005);⁷
- Ohio (OHIO REV. CODE ANN. § 2315.21); and⁸
- Virginia (*Lee v. Southland Corp.*, 244 S.E.2d 756 (Va. 1978)).⁹

A defendant acts with “conscious disregard” if he or she is consciously aware that his or her actions will probably injure another. The defendant does not necessarily intend to injure the plaintiff, but he or she has actual knowledge of the likely consequences of his or her actions and deliberately proceeds despite this knowledge. States that require proof of conscious disregard before awarding punitive damages include:

- Arizona (*Rawlings v. Apodaca*, 726 P.2d 565 (Ariz. 1986));
- Georgia (GA. CODE ANN. § 51-12-5.1);
- Iowa (IOWA CODE § 668A.1);
- Minnesota (MINN. STAT. § 549.20);
- New Jersey (N.J.S.A. § 2A:15-5.12);
- Utah (UTAH CODE ANN. § 78B-8-201); and
- Wisconsin (WIS. STAT. ANN. § 895.043).

A defendant acts with “reckless indifference” if he or she knows or should know that his or her actions will probably injure another. The defendant does not intend to cause injury, but he or she acts without concern for the likely consequences of his or her actions. States that authorize punitive damage awards based on a finding of reckless indifference include:

- Alabama (ALA. CODE ANN. § 6-11-20);
- Alaska (ALASKA STAT. § 09.17.020);
- Arkansas (ARK. CODE ANN. § 16-55-206);

⁶ In Montana, punitive damages may be awarded only if the defendant is guilty of “actual fraud or actual malice.” 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.” MONT. CODE ANN. § 27-1-221.

⁷ In Nevada, punitive damages are available where the defendant is guilty of oppression, fraud, or malice, express or implied.” NEV. REV. STAT. § 42.005. “Malice, express or implied” is defined as “conduct which is intended to injure a person or despicable conduct which is engaged in with a conscious disregard of the rights or safety of others.” NEV. REV. STAT. § 42.001.

⁸ Although Ohio’s punitive damages statute requires proof of “malice, aggravated or egregious fraud, oppression or insult,” Ohio courts have defined malice to include a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm. *Malone v. Courtyard by Marriott P’ship*, 659 N.E.2d 1242, 1259 (Ohio, 1996).

⁹ In Virginia, actual malice may be shown where the defendant’s action exhibit “ill will, violence, grudge, spite, wicked intention or a conscious disregard of the rights of another.” *Lee v. Southland Corp.*, 244 S.E.2d 756 (Va. 1978).

- Colorado (COLO. REV. STAT. § 13-21-102);
- Connecticut (*Chapman Lumber, Inc. v. Clifford L. Tager*, Conn. Super. 2005);
- Delaware (*Eby v. Thompson*, 2005 Del. Super. LEXIS 63 (Feb. 8 2005));
- Florida (FLA. STAT. ANN. § 768.72);
- Mississippi (MISS. CODE ANN. § 11-1-65);
- New Mexico (*Gonzalez v. Surgidev. Corp.*, 899 P.2d 594 (N.M. 1995));
- New York (*Martin v. Group Health Inc.*, 767 N.Y.S. 2d 803 (N.Y. App. Div. 2003));
- Oklahoma (OKLA. STAT. ANN. tit. 23, § 9.1);
- Pennsylvania (*Feld v. Merriam*, 485 A.2d 742 (Pa. 1984)); and
- South Carolina (*Nesbitt v. Lewis*, 517 S.E.2d 11 (S.C. 1999)).

Several states allow imposition of punitive damages if the plaintiff proves that the defendant acted in a grossly negligent manner. West's Encyclopedia of American Law defines "gross negligence" as "a conscious and voluntary disregard of the need to use reasonable care, which is likely to cause foreseeable grave injury or harm to persons, property, or both." States that allow imposition of punitive damages for gross negligence include:

- Idaho (*Curtis v. Firth*, 850 P.2d 749 (Idaho 1993));
- Illinois (*Ainsworth v. Century Supply Co.*, 693 N.E.2d 510 (Ill. App. Ct. 1998));
- Indiana (*Erie Ins. Co. v. Hickman by Smith*, 622 N.E.2d 515 (Ind. Ct. App. 1993));
- Missouri (*Letz v. Turbomeca Engine Corp.*, 975 S.W.2d 155 (Mo. Ct. App. 1998)); and
- Texas (TEX. CIV. PRAC. & REM. CODE § 41.003).

Standards of conduct do not always fit neatly into the categories described above. The following states have formulated various standards requiring behavior that amounts to less than express malice but more than gross negligence for the imposition of punitive damages:

- Hawaii (*Kang v. Harrington*, 587 P.2d 285 (Haw. 1978));
- Kansas (KAN. STAT. ANN. § 60-3702; *Reeves v. Carlson*, 969 P.2d 252 (Kan. 1988));
- North Carolina (N.C. GEN. STAT. § 1D-15);
- Oregon (OR. REV. STAT. § 31.730);
- Rhode Island (*Johnson v. Johnson*, 654 A.2d 1212 (R.I. 1995));
- Tennessee (*Hodges v. S.C. Tool & Co.*, 833 S.W.2d 896 (Tenn. 1992));
- Vermont (*McCormick v. McCormick*, 621 A.2d 238 (Vt. 1993));
- West Virginia (*Mayer v. Frobe*, 22 S.E. 58 (W. Va. 1895)); and
- Wyoming (*Alexander v. Meduna*, 47 P.3d. 206 (Wyo. 2002)).

Standards of Proof

Because punitive damages are intended to punish quasi-criminal behavior, a vast majority of jurisdictions, including Maryland, require punitive damages to be proved by “clear and convincing” evidence. One state (Colorado) has established an even higher “beyond a reasonable doubt” standard for punitive damages. Eight states (Connecticut, Illinois, Louisiana, Massachusetts, New Mexico, Vermont, Virginia, and West Virginia) apply the preponderance of the evidence standard generally applicable to civil cases. There is no clear standard in New Hampshire, New York, or Wyoming. **Exhibit 3** summarizes standards of proof across the country.

Exhibit 3 Standards of Proof

<u>Standard of Proof</u>	<u>Number of States</u>
Preponderance of the evidence	8
Clear and convincing	35
Beyond a reasonable doubt	1
Undetermined/no clear standard	3

Source: Wilson Elser

Caps and Limitations

In *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), the Supreme Court held that “grossly excessive” punitive damage awards violate the due process clause of the Fourteenth Amendment of the U.S. Constitution. Additionally, 27 states (not including Maryland) have enacted specific statutory limitations on the amount of punitive damages that may be awarded. **Exhibit 4** summarizes these statutory caps and limitations.

Exhibit 4
Limitations on Punitive Damages

<u>State</u>	<u>Limitation</u>	<u>Notes</u>
Alabama	\$500,000 or 3 x compensatory damages	Nonphysical injury only.
	\$1,500,000 or 3 x compensatory damages	Physical injury only.
Alaska	\$500,000 or 3 x compensatory damages	Subject to exceptions – under certain circumstances, recovery up to \$7 million may be allowed.
Arkansas	\$250,000 or 3 x compensatory damages	Punitive award may not exceed \$1 million.
Colorado	1x compensatory damages	May be increased to 3x compensatory damages under certain circumstances.
Connecticut	Costs of litigation less taxable costs	Subject to statutory exceptions.
Florida	\$500,000 or 3 x compensatory damages	General cap.
	\$2,000,000 or 4 x compensatory damages	Wrongful conduct motivated by unreasonable financial gain or defendant knew likelihood of harm.
Georgia	\$250,000	Does not apply in product liability cases.
Idaho	\$250,000 or 3 x compensatory damages	General cap.
Indiana	\$50,000 or 3 x compensatory damages	General cap.
Iowa	3 x clean-up costs	Applies only in environmental cases.
Kansas	\$5,000,000	Award may not exceed defendant's annual gross income or 1.5x the profit that the defendant gained or is expected to gain as a result of the misconduct.
Maine	\$75,000	Applies only in wrongful death actions.
Massachusetts	\$100,000 or as otherwise specified in statute	Caps appear in statutes authorizing punitive damage awards.
Mississippi	\$20,000,000	In general, cap is tied to the defendant's net worth; cap does not apply in certain cases.

<u>State</u>	<u>Limitation</u>	<u>Notes</u>
Missouri	\$500,000 or 5 x compensatory damages	General cap.
Montana	\$10,000,000	Generally, cap may not exceed 3% of the defendant's net worth; cap does not apply in certain cases.
Nevada	\$300,000 or 3 x compensatory damages	Does not apply to insurer bad faith claims or certain other cases.
New Jersey	\$350,000 or 5 x compensatory damages	Does not apply in certain cases.
North Carolina	\$250,000 or 3 x compensatory damages	Does not apply to actions under "driving while impaired" statute.
North Dakota	\$250,000 or 2 x compensatory	General cap.
Ohio	10% or defendant's net worth or 2 x compensatory damages	Award may not exceed \$350,000.
Oklahoma	\$100,000 or 1 x compensatory damages	"Category I" cases.
	\$500,000 or 2 x compensatory damages	"Category II" cases.
	No cap	"Category III" cases.
Oregon	4 x compensatory damages	Applies only in cases where harm is purely economic.
Rhode Island	2 x compensatory damages	Applies only in willful and malicious misappropriation of trade secrets cases.
Texas	\$200,000 or 2 x (economic damages + noneconomic damages up to \$750,000)	General cap.
Utah	3 x compensatory damages	General cap.
Virginia	\$350,000	General cap.

Source: Wilson Elser

Awards Against the State

In a vast majority of jurisdictions, including Maryland, punitive damages may not be awarded against the state. However, in some jurisdictions this prohibition is subject to certain exceptions. For example, Colorado allows public entities to defend, pay, or otherwise settle punitive damage claims against a public employee, but only after adoption of a general resolution at an open, public meeting.

Louisiana, South Dakota, and Vermont allow punitive damages to be awarded against the state, subject to certain conditions and restrictions such as damage caps and insurance requirements. Kentucky appears to be the only state that places no limitations on punitive damage awards against the state. **Exhibit 5** summarizes the availability of punitive damage awards in actions against state governments.

Exhibit 5
Availability of Punitive Damages Against States

<u>Availability of Punitive Damages in Actions Against State</u>	<u>Number of States</u>
Generally not available	42
Available subject to damage caps or other limitations	3
Generally available	1
Unclear / no information	1

Source: Wilson Elser

Payment of Awards

In general, punitive damages are paid to the plaintiff. However, because punitive damages are not intended to compensate the plaintiff for his or her losses, some jurisdictions require a certain percentage of every punitive damages award to be paid to the state. **Exhibit 6** summarizes the allocation of punitive damages in these jurisdictions.

Exhibit 6 Allocation of Punitive Damages

<u>State</u>	<u>Allocation of Punitive Damages</u>
Alaska	50% paid to state, deposited into general fund.
Georgia	75% paid to state, deposited into general fund.
Illinois	Trial court has discretion (rarely used in practice) to apportion punitive damages among the plaintiff, the plaintiff's attorney, and the State of Illinois Department of Human Services.
Indiana	75% paid to state, deposited into the Violent Crime Victims' Compensation Fund.
Iowa	Where conduct was not directed specifically at the plaintiff, at least 75% paid to state, deposited into a civil reparations trust fund administered by the State Court Administrator.
Missouri	50% paid to state, deposited into the Tort Victims' Compensation Fund.
Oregon	60% paid to state, deposited into the Criminal Injuries Compensation Account.
Pennsylvania	In medical malpractice cases only, 25% paid to state, deposited into the Medical Care Availability and Reduction of Error (MCARE) Fund.
Utah	50% of punitive damages in excess of \$20,000 (after attorney's fees and costs) paid to state, deposited into general fund.

Source: Wilson Elser

Categories of Cases

The availability of punitive damages in different types of cases varies widely from state to state. These variations have their basis in both case law and statute. **Exhibit 7** summarizes the availability of punitive damages in three types of cases: (1) products liability; (2) medical malpractice; and (3) wrongful death. In Maryland, punitive damages are available in products liability and medical malpractice cases, but not in wrongful death cases.

Exhibit 7
Availability of Punitive Damages

<u>Availability of Punitive Damages</u>	<u>Number of States</u>
--	--------------------------------

<u>Products Liability</u>	
----------------------------------	--

Available	43
Not available	3
No information	1

<u>Medical Malpractice</u>	
-----------------------------------	--

Available	39
Not available	6
No information	2

<u>Wrongful Death</u>	
------------------------------	--

Available	10
Not available	5
No information	32

Sources: Wilson Elser; Congressional Research Service

Insurability of Punitive Damages

Overview

As a mechanism to manage risk of loss, insurance is generally available to anticipate and manage the effects of losses that are foreseeable and capable of estimation, such as compensatory damages for losses in tort or contract. Punitive damages are another variety of damage assessed as the result of loss, principally to punish the person for inflicting the loss, or to make the person an example to others. As noted earlier in this report, punitive damages are widely but not universally available in the United States, they are generally available in 43 states, available only by statute in 4, and entirely prohibited in 3. In addition, punitive damages may be authorized, or prohibited, under a federal statute for an action that also gives rise to potential punitive damages under state law.

Where available, punitive damages may be assessed against a tortfeasor or other violator for a variety of reasons, often to punish the violator beyond merely making the injured party whole, either because compensatory damages are nominal or because they are inadequate to address nonmonetary aspects of the injury sustained. Another principal purpose of punitive damages is to make the violator an example, so that others who might otherwise risk an action will think twice, based on the level of punitive damages assessed. When assessed against the violator for the violator's own intended or negligent action, the damages are "directly assessed." In the case of a violator in the employ or under the control of a third party, punitive damages may be assessed against the third party as "vicariously assessed" punitive damages.

Where punitive damages may be awarded, they may or may not be insurable. Factors vary considerably from state to state, such as whether the underlying injury arises purely out of contract or whether some tortious conduct is required to make the damages insurable. In some jurisdictions, directly assessed punitive damages for intentional or willful conduct are not insurable, even if such damages are insurable when arising from gross negligence. In a number of jurisdictions, public policy prohibits the insurability of directly assessed punitive damages, but allows vicariously assessed damages to be insured.

An overview of the insurability of directly assessed and vicariously assessed in domestic jurisdictions is shown below in **Exhibit 8**, as prepared by McCullough, Campbell and Lane, Chicago. In general, where directly assessed are insurable, vicariously assessed damages are assumed to be so as well. According to the chart, 31 jurisdictions allow the insurability of directly assessed punitive damages. Of these, 9 disallow insurability of punitive damages assessed for intentional conduct. In 16 jurisdictions, directly assessed punitive damages are not insurable. Out of these 16, 10 allow for insurability of vicariously assessed punitive damages, and 2 further prohibit insurability of vicarious liability. In the remaining jurisdictions, the insurability of either directly or vicariously assessed punitive damages is undecided.

The chart is only a guide, however, and must be reviewed in light of state-specific interpretation of statutes and case law. Comparing the chart to a similar listing in Wilson Elser's *Punitive Damages Review, 50-State Survey* (2014 Edition) shows minor discrepancies arising from nuances in interpreting state-specific matters. In addition, the insurance law of the various states may allow an insurer to specifically exclude coverage for punitive damages even if the insurer does provide coverage for compensatory damages arising from the same situation.

Exhibit 8 Punitive Damages by State

<u>Jurisdiction</u>	<u>Directly Assessed Punitive Damages</u>	<u>Vicariously Assessed Punitive Damages</u>
Alabama	Insurable	Insurable
Alaska	Insurable	Insurable
Arizona	Insurable	Insurable
Arkansas	Insurable*	Insurable
California	Not Insurable	Insurable
Colorado	Not Insurable	Undecided
Connecticut	Not Insurable	Insurable
Delaware	Insurable	Insurable
District of Columbia	Undecided	Undecided
Florida	Not Insurable	Insurable
Georgia	Insurable	Insurable
Hawaii	Insurable	Insurable
Idaho	Insurable	Insurable
Illinois	Not Insurable	Insurable
Indiana	Not Insurable	Insurable
Iowa	Insurable	Insurable
Kansas	Not Insurable	Insurable
Kentucky	Insurable*	Insurable
Louisiana	Insurable*	Insurable
Maine	Not Insurable	Undecided
Maryland	Insurable	Insurable
Massachusetts	Not Insurable	Undecided
Michigan	Insurable	Insurable
Minnesota	Not Insurable	Insurable
Mississippi	Insurable	Insurable
Missouri	Insurable	Insurable
Montana	Insurable*	Insurable
Nebraska ²	Not Applicable	Not Applicable
Nevada	Insurable*	Insurable
New Hampshire	Insurable	Insurable
New Jersey	Not Insurable	Insurable
New Mexico	Insurable	Insurable
New York	Not Insurable	Not Insurable
North Carolina	Insurable	Insurable

<u>Jurisdiction</u>	<u>Directly Assessed Punitive Damages</u>	<u>Vicariously Assessed Punitive Damages</u>
North Dakota	Insurable*	Insurable
Ohio	Insurable	Insurable
Oklahoma	Not Insurable	Insurable
Oregon	Insurable*	Insurable
Pennsylvania	Not Insurable	Insurable
Rhode Island	Not Insurable	Undecided
South Carolina	Insurable	Insurable
South Dakota	Undecided	Undecided
Tennessee	Insurable*	Insurable
Texas	Undecided	Insurable
Utah	Not Insurable	Not Insurable
Vermont	Insurable	Insurable
Virginia ³	Insurable*	Not Applicable
Washington	Insurable	Insurable
West Virginia	Insurable	Insurable
Wisconsin	Insurable	Insurable
Wyoming	Insurable	Insurable

¹In states without specific authority, the table assumes that vicariously assessed punitive damages are insurable if directly assessed punitive damages are insurable.

²Nebraska does not recognize punitive damages in any form.

³Virginia does not recognize the vicarious imposition of punitive damages.

*Punitive damages are insurable unless awarded for intentional conduct.

Source: McCullough, Campbell & Lane LLP

Insurability of Punitive Damages in Maryland

In Maryland, the situation is fairly straightforward. Public policy does not preclude insurance against the risk of enhanced damages in most instances. The damages may be termed punitive or exemplary, without distinction. When these damages are directly assessed, they are generally insurable. *First Nat'l Bank v. Fid. & Deposit Co.*, 283 Md. 228, 389 A.2d 359 (1978); *accord Medical Mut. Liability Ins. Society of Maryland v. Miller*, 52 Md. App. 602, 451 A.2d 930 (1982); *Alcolac, Inc. v. St. Paul Fire & Marine Ins. Co.*, 716 F. Supp. 1541 (D. Md. 1989). However, punitive damages are not generally available in the State for *pure* breach of contract. *Food Fair Stores, Inc. v. Hevey*, 275 Md. 50, 338 A.2d 43 (1975); *Siegman v. Equitable Trust Co.*, 267 Md. 309, 297 A.2d 758 (1972); *but see, Carter v. Aramark Sports & Ent't Svcs*, 153 Md.App. 210, 835 A.2d 262 (2003)(actual malice). But this does not preclude such damages for a tort action arising out of contract, or from those damages being insurable.

There is no reason to assume that vicariously imposed punitive damages may not be insured in the State.

Conclusion

At the conclusion of the workgroup, several important questions remained unanswered.

- **What deterrent effect do punitive damages have on bad actors?** Some workgroup members argued that expanding the use of punitive damages could help to discourage harmful behavior such as drunk driving or medical malpractice. Additionally, some workgroup members saw punitive damages as an important tool for combating corporate misconduct, noting that criminal prosecutions of corporate officers are rare. However, other workgroup members raised questions about the value of punitive damages as a deterrent, noting that the State already has strong laws and regulations to prohibit and punish bad behavior. Moreover, the workgroup received no data to suggest that misconduct is less common in states where punitive damages are applied more broadly.
- **How might changing the standard of conduct for punitive damage awards affect the affordability and availability of insurance in Maryland?** Some workgroup members, particularly those involved in the insurance and health care industries, worried that expanding the use of punitive damages would result in less predictability and larger settlements, causing insurance rates to rise (*e.g.*, **Appendix 2** for one version of this argument). However, it is difficult to predict the exact impact such a change would have. Comparisons between states with different punitive damage standards are unhelpful because insurance rates are affected by so many variables.
- **If the General Assembly were to change the standard of conduct for punitive damages in Maryland, what should the new standard be?** Some workgroup members argued for a standard that more broadly encompasses “reprehensible behavior” and that takes into account factors like the probable ill effects of a defendant’s behavior and the defendant’s ability to prevent those ill effects (*e.g.*, **Appendix 3** for the American College of Trial Lawyers’ suggestions on how punitive damages should be applied). Others argued that such a standard would be inherently vague and subjective, leading to more costly litigation and inconsistent results.

Because of the complexity of these issues, the workgroup unanimously agreed that there was no consensus on a recommendation.

