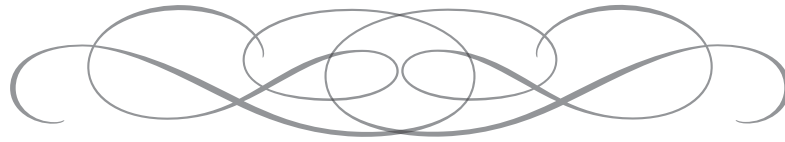


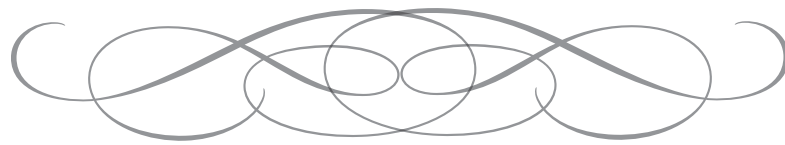
2017 House Workgroup Report.pdf

Uploaded by: George Tolley

Position: FWA



House Workgroup on Punitive Damages



FINAL REPORT



Annapolis, Maryland
February 2017

Contributing Staff

Writers/Reviewers

April M. Morton
Douglas R. Nestor
Robert K. Smith

Other Staff Who Contributed to This Report

Nichol A. Conley
Kelly M. Seely

For further information concerning this document contact:

Library and Information Services
Office of Policy Analysis
Department of Legislative Services
90 State Circle
Annapolis, Maryland 21401

Baltimore Area: 410-946-5400 • Washington Area: 301-970-5400

Other Areas: 1-800-492-7122, Extension 5400

TTY: 410-946-5401 • 301-970-5401

Maryland Relay Service: 1-800-735-2258

E-mail: libr@mlis.state.md.us

Home Page: <http://mgaleg.maryland.gov>

The Department of Legislative Services does not discriminate on the basis of age, ancestry, color, creed, marital status, national origin, race, religion, gender, gender identity, sexual orientation, or disability in the admission or access to its programs, services, or activities. The Department's Information Officer has been designated to coordinate compliance with the nondiscrimination requirements contained in Section 35.107 of the Department of Justice Regulations. Requests for assistance should be directed to the Information Officer at the telephone numbers shown above.



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

House Workgroup on Punitive Damages 2016 Interim Membership Roster

Delegate Kathleen M. Dumais, Chair

Members

Delegate C. William Frick
Delegate Joseline A. Pena-Melnyk
Delegate Charles E. Sydnor, III
Delegate Christopher R. West
Delegate Brett R. Wilson
Beth A. Atwell
Jill Reid Cummins
Eric M. Goldberg
Susan Durbin Kinter
K. Nichole Nesbitt
Larry L. Smith
George S. Tolley, III
Robert J. Zarbin

Staff

April M. Morton
Douglas R. Nestor
Robert K. Smith

Contents

Transmittal Letter.....	iii
Introduction	1
Punitive Damages in Maryland.....	3
Punitive Damages in Other States.....	5
Insurability of Punitive Damages.....	15
Conclusion	19
Appendix I. Maryland Statutes Authorizing Punitive or Exemplary Damages.....	21
Appendix II. Why Expanding Punitive Damages Liability Will Not Effectively Deter or Punish Drunk Driving, But Raise Auto Insurance Costs in Maryland	29
Appendix III. Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice	39
Appendix IV. Presentation to the House of Delegates Workgroup on Punitive Damages.....	77

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.

HB 1099 FWA.pdf

Uploaded by: George Tolley

Position: FWA



Henry E. Dugan, Jr.

Retired

Bruce J. Babij*++▲

bbabij@medicalneg.com

George S. Tolley, III*+§

gtolley@medicalneg.com

Alison D. Kohler*

akohler@medicalneg.com

* Admitted in MD

+ Admitted in WV

‡ Admitted in DC

+ Admitted in PA

§ Admitted in NC

▲ Admitted in OH

March 3, 2025

The Hon. Luke Clippinger
Chair, House Judiciary Committee
101 Taylor House Office Building
6 Bladen Street
Annapolis, Maryland 21401

**HB 1099 – Civil Actions – Punitive Damage Awards – Surcharge
FAVORABLE WITH AMENDMENTS**

Dear Chair Clippinger and Distinguished Members of the House Judiciary Committee:

I write to support House Bill 1099, which allows the recovery of “punitive damages” in civil actions where a jury finds by clear and convincing evidence that the defendant’s wrongful conduct rose to the level of “gross negligence,” defined as conduct characterized, *e.g.*, by willful, wanton, or outrageous misconduct, or by conduct that demonstrates an indifference to legal obligations or to the rights and safety of others.

House Bill 1099 further assesses a surcharge equal to 50% of any award of punitive damages and directs that the surcharge be paid directly to the State of Maryland. I would ask for an amendment to HB 1099, replacing the surcharge with a tax on awards of punitive damages. This is consistent with the practice in other jurisdictions, in which punitive damages are shared by the State and the plaintiff whose action resulted in the award.

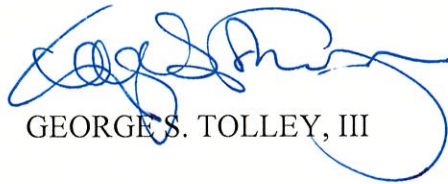
Throughout history, a critical function of the civil justice system has been to deter unsafe practices by imposing financial liability on wrongdoers. Punitive damages are an effective tool, allowing juries to punish bad actors and to deter others from engaging in similarly reprehensible conduct in the future.

Punitive damages are different from actual damages. Actual damages (or 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 economic damages and noneconomic damages. In contrast to actual damages, punitive damages do not compensate the plaintiff. Rather, punitive damages are designed to punish and deter behavior that is particularly egregious and dangerous.

In 2016, the House of Delegates assembled a Workgroup to study the issue of punitive damages in Maryland. The Workgroup noted that Maryland and North Dakota are the only States requiring proof of “express malice” – the narrowest standard in the country – to support an award of punitive damages. *See* Workgroup Report, at 6. House Bill 1099 brings Maryland law into line with the majority of States that allow punitive damages under a standard broader than “express malice.”

I respectfully ask for an **FAVORABLE** report on **House Bill 1099** with an amendment to remove the 50% surcharge.

Sincerely,



GEORGE S. TOLLEY, III

Medical Mutual Testimony in Opposition to House Bi

Uploaded by: Alexis Braun

Position: UNF

MEDICAL MUTUAL

Liability Insurance Society of Maryland

Bill: House Bill 1099 – Civil Actions – Punitive Damage Awards – Surcharge

Date: March 5, 2025

Position: *Oppose*

Medical Mutual opposes House Bill 1099. House Bill 1099 would allow punitive damages to be awarded in a civil action if the plaintiff proves by clear and convincing evidence that the defendant acted with “gross negligence.” Gross negligence includes, among other things, a “failure to exercise even slight care,” a “pattern of repeated misconduct,” and “acts or omissions that create a high degree of risk or harm to others.” This drastic relaxation of the standard for an award of punitive damages could transform practically every medical liability action into one in which punitive damages are sought, increasing the complexity of medical liability litigation and the cost of defending claims, and leading to higher MPL insurance rates.

Unlike compensatory damages, which are intended to compensate injured parties for their injuries or losses to make the injured person whole, punitive damages are aimed at the different purposes of deterrence and retribution.¹ House Bill 1099 would overturn the current standard of liability for an award of punitive damages as established in *Owens-Illinois v. Zenobia*, 325 Md. 420 (1992). In *Zenobia*, the Supreme Court of Maryland held that punitive damages may be awarded if the defendant’s conduct rose to the level of actual malice (evil motive or intent to do harm, or knowing that its actions would be harmful) as opposed to implied malice (gross negligence, recklessness, or should have known of the harm). As a result of the *Zenobia* decision, Maryland citizens and businesses have had a very clear standard of liability that has been consistently applied by the courts over the past 33 years.

As the largest provider of medical professional liability (MPL) insurance to private practice physicians in Maryland,² Medical Mutual is concerned that substantially weakening the high bar required for an award of punitive damages will put pressure on a precarious balance in the civil liability system that allows plaintiffs to recover damages for an injury while maintaining continued access to quality health care across the State. Making it much easier for plaintiffs to obtain virtually unlimited punitive damages, in addition to economic and non-economic damages, would tip the

¹ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003).

² Medical Mutual was created in 1975 by an act of the General Assembly at a time when other MPL insurers withdrew from the State, leaving most physicians without insurance protection. Thanks to the wisdom of the General Assembly, the Governor, and others who were involved in Medical Mutual’s creation, we are celebrating our 50th year as a physician-owned and directed mutual insurer, providing comprehensive MPL insurance to Maryland Physicians.

balance and upend the current stability in the MPL insurance market.

The purpose of punitive damages is not to compensate a person for an injury, but to punish a defendant for misconduct and to deter others contemplating similar conduct. Medical Mutual believes a change is not needed as the *Zenobia* standard adequately meets the purpose of punitive damages while providing appropriate and predictable relief to injured plaintiffs.

For these reasons, Medical Mutual respectfully requests an UNFAVORABLE report on House Bill 1099.

For more information contact:

Alexis Braun / abraun@weinsuredocs.com
(443) 689-0208

HB 1099_MAMIC_UNF.pdf

Uploaded by: Bryson Popham

Position: UNF

Bryson F. Popham, P.A.

Bryson F. Popham, Esq.

191 Main Street
Suite 310
Annapolis, MD 21401
www.papalaw.com

410-268-6871 (Telephone)
443-458-0444 (Facsimile)

March 3, 2025

The Honorable Luke Clippinger
Chair, House Judiciary Committee
101 Taylor House Office Building
Annapolis, MD 21401

RE: House Bill 1099 - Civil Actions - Punitive Damage Awards – Surcharge - UNFAVORABLE

Dear Chairman Clippinger and Members of the Committee,

On behalf of the Maryland Association of Mutual Insurance Companies (MAMIC), we respectfully oppose House Bill 1099.

As you may recall, MAMIC is comprised of 12 mutual insurance companies that are headquartered in Maryland and neighboring states. Approximately one-half of our members are domiciled in Maryland, and are key contributors and employers in our local communities. Together, MAMIC members offer a wide variety of insurance products and services and provide coverage for thousands of Maryland citizens.

House Bill 1099 would make a very significant change in Maryland law with respect to the award of punitive damages. The State has a long history of case law on this subject, which operates to ensure that all damage awards, including those of punitive damages, are fairly administered. Furthermore, this bill introduces the concept of an assessment imposed by the State Court Administrator of 50% on a punitive damage award. The real purpose for this assessment is found on page 2, lines 25 and 26 of the bill, which require that the surcharge be deposited into a State fund intended to support education.

Should the General Assembly wish to examine the subject of punitive damages awards in connection with civil liability judgments, MAMIC believes the better approach is to convene a legislative study for that purpose. Respectfully, therefore, we urge an unfavorable report on House Bill 1099.

Thank you for your consideration.

A handwritten signature in black ink that reads "Bryson Popham". The signature is fluid and cursive, with the first name "Bryson" and last name "Popham" clearly legible.

Bryson Popham

55118061-v1-Opposes HB 1099.pdf

Uploaded by: Carville Collins

Position: UNF

MARYLAND EMPLOYERS FOR CIVIL JUSTICE REFORM COALITION

OPPOSES HB 1099

Civil Actions – Punitive Damage Awards - Surcharge

Maryland Employers for Civil Justice Reform Coalition, comprised of many of the largest employers, businesses, and health care providers in Maryland, opposes HB 1099. For the apparent purpose of addressing the State's fiscal challenges, the bill calls for a substantial relaxation of Maryland's long-standing standard for the award of punitive damages. Under the bill, the standard would be profoundly reduced to a contrived gross negligence standard, under which practically every tort claim in Maryland would qualify for punitive damages, an unjustified policy.

It is long settled law that the standard for the award of punitive damages in Maryland is actual malice. This means that the trier of fact may not award punitive damages unless the plaintiff has established by clear and convincing evidence that the defendant's conduct was characterized by evil motive, intent to injure, ill will, or fraud. This current standard is appropriate - - it is an extraordinary standard because punitive damages, which are unlimited in Maryland, are an extraordinary remedy.

The Supreme Court of Maryland explained why the lower standard of implied malice (i.e., gross negligence), which had been the standard for a short time in 1972-1992, was a mistake that needed to be overruled:

The implied malice test adopted in *Smith v. Gray Concrete Pipe Co.* has been overbroad in its application and has resulted in inconsistent jury verdicts involving similar facts. It provides little guidance for individuals and companies to enable them to predict behavior that will either trigger or avoid punitive damages liability, and it undermines the deterrent effect of these awards.

Maryland's high court went on to emphasize the penal nature and serious consequences of punitive damages, noting that such awards are to be made *judiciously and only in the most egregious cases*. By requiring actual knowledge and deliberate disregard, the court aligned the punitive damages standard with the underlying objectives of punishment and deterrence. The court's 1992 decision -- to abandon the implied malice (gross negligence) standard and return to the prior standard of actual malice -- clarified and tightened the criteria for awarding punitive damages, aiming to avoid inconsistent and unpredictable application. The return to actual malice was also based on the

court's finding of "a literal explosion of punitive damage awards and practice" under the lesser implied malice standard.¹

Significantly, HB 1099 does not stop at the previously-abandoned standard of implied malice. It goes even lower, and lower than any interpretation by a Maryland court, so as allow punitive damages for such minimal and arbitrary infractions as "a failure to exercise even slight care," "a pattern of repeated conduct," or "indifference to legal obligations." Such low and arbitrary standards would expose practically every claim of negligence, including simple negligence claims, to a punitive damage award. Moreover, HB 113 contains six of these low and arbitrary standards, and under the bill meeting any of them triggers a punitive damage award, an absurdly low bar to such a high and extraordinary remedy.

HB 1099 requires that a plaintiff meet an evidentiary standard, clear and convincing evidence, to prove implied malice (gross negligence). This standard is already the evidentiary standard for the award of punitive damages. Any notion by the proponents that HB 1099 establishes a high threshold or a similar safeguard for the award of punitive damages because of this high evidentiary standard is patently false, as this provision in the bill is already enacted law in Maryland.

A final provision of the bill creates a surcharge on defendants who are found liable for punitive damages, with the proceeds of the surcharge to be directed to K-12 public education. While the Coalition takes no position on how monies are directed to meet the State's funding priorities, it does note that proceeds from punitive damage awards cannot be quantified. Specifically, in the event of an appeal of a punitive damage verdict, the result could modify, overturn or delay for years an award of punitive damages, producing volatility and unpredictability in the amount of funds that the State could expect to receive. A revenue source dependent upon a surcharge on punitive damage awards affords no financial certainty, and therefore no budgeting, planning, or even estimating of revenues is possible under such a scheme. In addition, the experience in Georgia, which has a similar surcharge, is that the surcharge hardly ever is paid as parties have circumvented around punitive damages. Accordingly, the enactment of this legislation for fiscal reasons is nonsensical.

While the State's fiscal outlook will not benefit from such legislation, there is one group of beneficiaries -- plaintiffs' lawyers -- whose fees are based on a percentage of punitive damage awards. As plaintiffs' lawyers are likely the only proponents of this bill, such a nakedly self-serving attempt to enrich plaintiffs' lawyers has no place in the public policy of Maryland.

For all these reasons, the Coalition urges an unfavorable report on HB 1099.

Carville B. Collins
carville.collins@saul.com
410-847-5598

Counsel for Maryland Employers for
Civil Justice Reform Coalition

March 5, 2025

¹ *Owens-Illinois v. Zenobia*, 325 Md. 420, 456-459 (1992).

HB1099 American Tort Reform Association UNF Testim

Uploaded by: Cary Silverman

Position: UNF

Testimony Before the Maryland House Judiciary Committee
in Opposition to H.B. 1099: A Bill That Would Make
Punitive Damages Significantly More Common in Maryland
Cary Silverman
On Behalf of the American Tort Reform Association
March 5, 2025

On behalf of the American Tort Reform Association (“ATRA”), thank you for the opportunity to testify today. ATRA opposes H.B. 1099, which would reduce the standard for imposing punitive damages, exposing those who live, work, and do business in Maryland to a significantly higher risk of massive awards.

ATRA is a broad-based coalition of businesses, municipalities, associations, and professional firms that share the goal of having a fair, balanced, and predictable civil justice system. I am a Maryland resident, a member of the Maryland Bar, and a partner in the Washington, D.C. office of Shook, Hardy & Bacon L.L.P. As part of my practice, I closely study civil justice issues and have published several law review articles related to punitive damages.

The first part of H.B. 1099 abrogates longstanding Maryland Supreme Court precedent that ensures that punitive damages are reserved for punishing and deterring truly reprehensible conduct.¹ It would replace a requirement that plaintiffs show a defendant’s conduct was malicious, meaning it was “characterized by evil motive, intent to injure, fraud, or actual knowledge of the defective nature of the products coupled with a deliberate disregard of the consequences”² with what the bill calls a “gross negligence” standard. For twenty years, between 1972 and 1992, Maryland courts allowed punitive damages for gross negligence. The Maryland Supreme Court found this experience proved to be a mistake – it resulted in inconsistent results, overextended the availability of punitive damages, frustrated their objective of punishing and deterring true misconduct, and resulted in a “literal explosion” of lawyers seeking, obtaining, and appealing punitive damage awards nationwide.³ The high court overruled this case law and restored the actual malice standard. Now, H.B. 1099 proposes going back to the abandoned gross negligence standard.

In addition, the bill includes a definition of “gross negligence” that confusingly mixes high culpability levels such as willful and outrageous conduct, and malicious and fraudulent intent with far lower levels. As a practical matter, since the six different standards included in the bill as “gross negligence” are connected by an “or,” only the lowest of these culpability levels matters. As a result, the bill subjects an individual or business that operates in Maryland to punitive damages if its conduct can be portrayed as “creat[ing] a high degree of risk or [sic] harm to others” or suggesting “indifference to legal obligations.” Many cases will

¹ *Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633, 651 (Md. 1992).

² *Id.* at 648.

³ *Id.* at 651.

arguably meet that standard, including those involving no more than simple negligence.

The bill's definition of gross negligence is inconsistent with—and lower than—the Maryland Supreme Court's understanding of that standard. In a 2019 decision, the Court explained that “gross negligence” is “an intentional failure to perform a manifest duty in reckless disregard of the consequences [A] wrongdoer is guilty of gross negligence or acts wantonly and willfully only when he inflicts injury intentionally or is so utterly indifferent to the rights of others that he acts as if such rights did not exist.”⁴ Even with this definition, which sets an “objectively higher threshold” for gross negligence, the Court cautioned that, “in many cases . . . ‘gross negligence will be treated as ‘just big negligence.’”⁵ The bill's multi-prong definition of gross negligence fails to heed this warning. It is, essentially, a “big negligence” standard.

You will hear from proponents that Maryland's standard for punitive damages is higher than many other states. This assertion needs to be put into context.

- Unlike Maryland, six states generally do not authorize punitive damage awards or allow them only in certain contexts where specifically authorized by statute. These states include Louisiana, Massachusetts, Michigan, Nebraska, New Hampshire, and Washington.⁶
- Several other states have codified a high standard for punitive damages that is similar to Maryland, reserving them for malicious, fraudulent, or deliberate misconduct.⁷ In other jurisdictions, such as the District of

⁴ *Stracke v. Estate of Butler*, 214 A.3d 561, 569 (Md. 2019) (quoting *Barbre v. Pope*, 935 A.2d 699 (Md. 2007)). This decision addressed whether paramedics' failure, during an emergency call, to diagnose a heart attack subjected them to liability when a statute granted immunity in the absence of a willful or grossly negligent act).

⁵ *Id.* at 569; see also *Beall v. Holloway-Johnson*, 130 A.3d 406 (Md. 2016) (“The distinction between negligence and gross negligence, however, can be a difficult one to establish in practice”).

⁶ See La. C.C. Art. 3546; *Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391 (Mich. 2004); *Miller v. Kingsley*, 230 N.W.2d 472, 474 (Neb. 1975); N.H. Rev. Stat. § 507:16; *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 726 P.2d 8 (Wash. 1986).

⁷ See, e.g., Ala. Code § 6-11-20(a) (“consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff”); Cal. Civ. Code § 3294(a) (“oppression, fraud, or malice”); Idaho Code § 6-1604(1) (“oppressive, fraudulent, malicious or outrageous conduct”); Mont. Code Ann. § 27-1-221(1) (“actual fraud or actual malice”); Ohio Rev. Code Ann. § 2315.21(C)(1) (“malice or aggravated or egregious fraud”); N.D. Cent. Code § 32-03.2-11(1) (“oppression, fraud, or actual malice”); Wis. Stat. § 895.043(3) (when a “defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff”). After court rulings relaxed the standard for punitive damages, a state legislature recently restored a higher standard. See Mo. Rev. Stat. § 510.261(1) (amended 2020) (requiring clear and convincing evidence that a defendant “intentionally harmed the plaintiff without just cause or acted with a deliberate and flagrant disregard for the safety of others”).

Columbia,⁸ New York,⁹ and Maine,¹⁰ courts have adopted this high standard.

- The vast majority of states that award punitive damages, like Maryland, require clear and convincing evidence to support an award. This aspect of the bill simply codifies existing law.¹¹
- While some states have, over time, relaxed their standards for punitive damages, making such awards highly unpredictable and increasingly commonplace, keep in mind that half of states that award punitive damages have a statutory limit.¹² Maryland does not. While lowering the standard, this bill continues to allow unlimited awards.

The second part of H.B. 1099 proposes a 50% “surcharge” on top of a jury’s punitive damage award, which the state (which is not a party to the litigation) would take and place in a “Blueprint for Maryland’s Future Fund.” This money would apparently go toward improving public education in Maryland.

No other state does this. Just seven states currently allocate a portion of a punitive damage award to the state or a state fund.¹³ A few other states – such as New York and Florida – briefly had such laws and abandoned them,¹⁴ and the

⁸ *Dist. of Columbia v. Bamidele*, 103 A.3d 516, 522 (D.C. 2014) (requiring “a state of mind evincing malice or its equivalent”); *Croley v. Republican Nat’l Comm.*, 759 A.2d 682, 695 (D.C. 2000) (requiring a showing of “evil motive or actual malice”).

⁹ *Ross v. Louise Wise Servs.*, 868 N.E.2d 189, 196 (N.Y. 2007) (“Punitive damages are permitted when the defendant’s wrongdoing is not simply intentional but evince[s] a high degree of moral turpitude and demonstrate[s] such wanton dishonesty as to imply a criminal indifference to civil obligations. . . .”); *Prozeralik v. Capital Cities Comm’n, Inc.*, 82 N.Y.2d 466, 479 (1993) (“Punitive damages are awarded in tort actions ‘where the defendant’s wrongdoing has been intentional and deliberate and has the character of outrage frequently associated with crime.’”).

¹⁰ *Kinderhaus North LLC v. Nicolas*, 314 A. 3d 300, 313 (Maine 2024) (“Under Maine law, punitive damages may be awarded for tortious conduct only if the defendant acted with malice.”); *see also Tuttle v. Raymond*, 494 A.2d 1353, 1361, 1361 (Me.1985) (rejecting gross negligence standard for punitive damages as “too broad and too vague” and having an insufficient distinction from mere negligence).

¹¹ Colorado requires proof “beyond a reasonable doubt” to support a punitive damage award. Colo. Rev. Stat. § 13-25-127(2).

¹² Ala. Code § 6-11-21; Alaska Stat. § 9.17.020(f)-(h); Colo. Rev. Stat. § 13-21-102(1)(a); Conn. Gen. Stat. Ann. § 52-240b; Fla. Stat. Ann. § 768.73; Ga. Code Ann. § 51-12-5.1(f), (g); Idaho Code Ann. § 6-1604; Ind. Code Ann. § 34-51-3-4; Kan. Stat. Ann. § 60-3702; 18-C Me. Rev. Stat. Ann. § 2-807(2) (wrongful death); Miss. Code Ann. § 11-1-65; Mont. Code Ann. § 27-1-220(3); Nev. Rev. Stat. Ann. § 42.005; N.J. Stat. Ann. § 2A:15-5.14; N.C. Gen. Stat. § 1D-25; Ohio Rev. Code Ann. § 2315.21; Okla. Stat. Ann. tit. 23, § 9.1; 40 Pa. Cons. Stat. Ann. § 1303.505 (healthcare providers); S.C. Code Ann. § 15-32-530; Tenn. Code Ann. § 29-39-104; Tex. Civ. Prac. & Rem. Code Ann. § 41.008; Va. Code Ann. § 8.01-38.1; W. Va. Code § 55-7-29(c); Wis. Stat. § 895.043(6).

¹³ Alaska Stat. § 09.17.020(j) (50% of a punitive damage award to state’s general fund); Ga. Code Ann. § 51-12-5.1(e)(2) (75% of punitive damage awards in product liability actions to the state treasury); Ind. Code Ann. § 34-51-3-6(c) (75% of punitive damage awards to a Violent Crime Victims Compensation Fund); Iowa Code Ann. § 668A.1 (75% of punitive damage awards in certain cases to the Iowa’s Civil Reparations Trust Fund); Mo. Rev. Stat. § 537.675(3) (50% of a punitive damage award, after deducting attorney’s fees and expense, to a tort victim’s compensation fund); Or. Rev. Stat. Ann. § 31.735(1) (60% of a punitive damage award to a Crime Victims’ Assistance Fund and 10% for the State Court Facilities and Security Account); Utah Code Ann. § 78B-8-201(3)(a) (first \$50,000 in punitive damages to the plaintiff and 50/50 split of the remainder); *see also* 735 Ill. Comp. Stat. Ann. 5/2-1207 (permitting a trial court, in its discretion, to apportion a punitive damage award among the plaintiff, plaintiff’s attorney, and the state’s Department of Human Services).

¹⁴ New York had a law requiring 20% of punitive damage award to go to the state’s general fund between 1992 and 1994. N.Y. C.P.L.R. § 8701 (sunset Apr. 1, 1994). Florida law required 60% of punitive damage awards in

Colorado Supreme Court struck down that state's punitive-damage sharing law as unconstitutional.¹⁵ The few states that continue to have these laws allocate a percentage of the plaintiff's punitive damage award to the state. They do not impose a state surcharge on top of the jury's award, as the bill proposes.

Giving a portion of punitive damage awards to the state or, as here, imposing a surcharge on such awards, raises a range of public policy concerns. First and foremost, like other punitive-damage sharing laws, this practice provides an incentive to misuse punitive damages. As discussed, punitive damages are intended to punish and deter wrongful conduct. They are not there to fill budget gaps or fund educational programs. The public will inevitably learn that punitive damage awards support educational programming. When they serve as jurors, this should not consciously or unconsciously factor into their consideration. Nor should Maryland rely on punitive damage awards to fund public programs or services. Such reliance could create an incentive for the state to further relax the standard for punitive damages, pass new laws providing for punitive damages, or favor plaintiffs in private disputes by intervening or filing amicus briefs to protect the state's share of massive awards.¹⁶

The surcharge approach, which will transform a jury's \$20 million punitive damage award into a \$30 million punitive damage award, is also likely to result in excessive awards. The U.S. Supreme Court decisions require punishment imposed through punitive damages to be proportional to the harm. Arbitrarily boosting punitive damage awards, which will become more common under this bill, by 50% will, in some cases, breach the constitutional line. The surcharge has no relationship to the degree of reprehensibility of the defendant's actions or the actual harm that resulted from that conduct.¹⁷ It appears geared to ensure that plaintiffs—and their lawyers through a contingency fee—receive the entire punitive damage award, even though a punitive damage award is not compensation for an injury.

For these reasons, ATRA respectfully requests an unfavorable report.

personal injury and wrongful death cases to go into a Public Medical Assistance Trust Fund and, in other actions, to the General Fund. Fla. Stat. Ann. § 768.73(2) (1986). Florida amended the percentage down to 35% in 1992 and sunset that law in 1995. A Kansas split-recovery law applicable only to medical malpractice cases expired in 1989.

¹⁵ *Kirk v. Denver Publishing Co.*, 818 P.2d 262, 270-72 (Colo. 1991) (finding Colo. Rev. Stat. § 13-21-102 (1989), which sent one-third of punitive damage awards to the state general fund, an unconstitutional taking). Colorado repealed that law in 1995.

¹⁶ See generally Victor E. Schwartz, Mark A. Behrens, & Cary Silverman, *I'll Take That: Legal and Public Policy Problems Raised by Statutes That Require Punitive Damages Awards to be Shared with the State*, 68 Mo. L. Rev. 525, 538-46 (2003).

¹⁷ See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575-85 (1996) (establishing constitutional guideposts for evaluating whether punitive damages are excessive including (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of actual damages to punitive damages; and (3) the civil or criminal penalties that could be imposed for the defendant's conduct); see also *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2002) (indicating that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.").

Late testimony

Uploaded by: Christopher Jeffries

Position: UNF



MARYLAND DEFENSE COUNSEL, INC.

Promoting justice. Providing solutions.

PRESIDENT

Amy E. Askew
Kramon & Graham PA

PRESIDENT-ELECT

Zachary A. Miller
Wilson Elser

SECRETARY

Rachel L. Gebhart
Godwin Tirocchi, LLC

TREASURER

Anthony M. Conti
Conti Fenn, LLC

IMMEDIATE PAST-PRESIDENT

Sheryl A. Tirocchi
Godwin Tirocchi, LLC

EXECUTIVE DIRECTOR

Aimee Hiers

March 3, 2025

Chairman Luke Clippinger
House Judiciary Committee
100 Taylor House Office Building
Annapolis, Maryland 21401

**RE: HB 1099 - Civil Actions - Punitive Damage Awards -
Surcharge - OPPOSE**

Dear Chairman Clippinger, Vice Chair Bartlett, and Members of the House Judiciary Committee:

On behalf of Maryland Defense Counsel, Inc. ("MDC") we oppose House Bill 1099, which seeks to allow for the award of punitive damages in a civil action where the defendant acted with gross negligence, instead of actual malice, and requires the State Court Administrator to assess a certain surcharge on a defendant against whom a judgment for punitive damages is entered.

In Maryland, there is a large body of well-settled case law regarding the legal standard to allow for recovery of punitive damages in civil cases. The Supreme Court of Maryland "has imposed an onerous standard for plaintiffs seeking punitive damages." *Odyssey Travel Ctr., Inc. v. RO Cruises, Inc.*, 262 F. Supp. 2d 618, 630 (D. Md. 2003). "Under Maryland law, a plaintiff seeking punitive damages must prove 'actual malice' on the part of the defendant, justifying an award of punitive damages based upon the 'heinous nature of the defendant's tortious conduct[.]'" *Id.* (quoting *Owens-Illinois v. Zenobia*, 325 Md. 420, 454, 460 (1992)) (emphasis added). "Actual malice" has been defined as "the performance of an unlawful act, intentionally or wantonly, without legal justification or excuse but **with an evil or rancorous motive influenced by hate; the purpose being to deliberately and wilfully injure the plaintiff.**" *Darcars Motors of Silver Spring, Inc. v. Borzym*, 150 Md. App. 18, at 28 (2003) (quoting *Drug Fair of Md., Inc. v. Smith*, 263 Md. 341, 352 (1971)) (emphasis added). "The court stated in *Zenobia* that 'punitive damages are awarded in an attempt to punish a defendant whose conduct is characterized by evil motive, intent to injure, or fraud, and to warn others contemplating similar conduct of the serious risk of monetary liability.'" *Odyssey Travel*, 262 F. Supp. 2d at 630 (quoting *Zenobia*, 325 Md. at 454). "Additionally, the court stated that 'in any tort case a plaintiff must establish by clear and convincing evidence the basis for an award of punitive damages.'" *Id.* (quoting *Zenobia*, 325 Md. at 469) (emphasis in original).

HB 1099 would fundamentally change Maryland's common law on punitive damages by lowering the legal threshold for recovery of punitive damages from actual malice (*i.e.*, "evil motive, intent to injure, or fraud") to mere gross negligence. As the Supreme Court explained in *Stracke v. Estate of Butler*, "[i]ssues involving gross negligence are often more troublesome than those involving malice because a fine line exists between allegations of negligence and gross negligence." 465 Md. 407, 420 (2019) (quoting *Barbre v. Pope*, 402 Md. 157, 187 (2007)). "Ordinary, simple negligence" is "any conduct, except conduct recklessly disregarding of an interest of others, which falls below the standard established by law for protection of others against unreasonable risk of harm." *Id.* On the other hand, gross negligence is "an intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another, and also implies a thoughtless disregard of the consequences without the exertion of any effort to avoid them." *Id.* at 420-421.

From 1972 to 1992 the Maryland Supreme Court grappled with the issue of whether to require proof of actual malice before recovery of punitive damages in negligence actions, or whether, in the context of automobile negligence cases, "implied malice" should suffice. "Implied malice" was different from actual malice, and was defined as "'non-intentional conduct so reckless or wanton as to be 'grossly negligent.'" *Scott v. Jenkins*, 345 Md. 21, 29 n.3 (1997). Before 1972, the Maryland Supreme Court held fast to a standard requiring "actual malice," but then in 1972, the Court departed from that rule and held that "implied malice" would suffice in auto negligence cases. The consequence of that change was "an explosion of punitive damages litigation ..., fueled in part by two opinions which, in effect, severed punitive damage awards from their historical rationales of punishment and deterrence." *Scott*, 345 Md. at 30.¹ In 1992, the Court in *Zenobia* rejected the implied malice standard and held that "in a non-intentional tort action, the trier of fact may not award punitive damages unless the plaintiff has established that the defendant's conduct was characterized by evil motive, intent to injure, ill will, or fraud, *i.e.*, 'actual malice.'" *Scott*, 345 Md. at 31 (quoting *Zenobia*, 325 Md. at 460).

In *Scott*, the Maryland Supreme Court explained why the Court, in *Zenobia*, returned to requiring actual malice for recovery of punitive damages:

[T]he prophetic warning in *Smith v. Gray Concrete, supra*, that the "implied malice" or as there used, "gross negligence," standard "may be so flexible that it can become virtually unlimited in its application," proved true. "Despite [that] Court's [attempts to limit] the implied malice standard to torts involving the operation of motor vehicles, the standard [was] freely applied to other non-intentional torts."

Perhaps the most compelling reason for casting aside the implied malice standard was its elusive nature. Although the

¹ Since *Zenobia*, the Supreme Court of Maryland has held that the "actual malice" standard applies to both intentional and non-intentional torts. See *Scott*, 345 Md. at 33.

purported basis for assessing punitive damages is to punish and deter particularly reprehensible conduct motivated by a conscious and evil motive, the various formulations of “implied malice” reached conduct that was perhaps reprehensible, but otherwise free of the ill-will appropriately targeted by a punitive damages award. **Not only did this inconsistency expose individuals and companies alike to an ever changing legal landscape which more often concealed, rather than revealed, the conduct subject to a punitive damages award, it also “undermined the deterrent effect of [such] awards.”** Id., 601 A.2d at 652 (citing 2 L. SCHLUETER AND K. REDDEN, PUNITIVE DAMAGES, Appendix B, at 418-19 (2d ed. 1989)(suggesting that under the “implied malice” standard, potential defendants may either refrain from socially beneficial behavior out of fear, or engage in conduct harmful to society).

Scott, 345 Md. at 32 (emphasis added) (internal quotations omitted).

HB 1099 would undo decades of well-settled case law in which the Supreme Court of Maryland in its wisdom decided that allowing for recovery of punitive damages based upon mere gross negligence, rather than actual malice, was ill-advised because it created what essentially was too slippery of a slope between ordinary negligence claims and gross negligence claims. As occurred between 1972 and 1992, HB 1099 will likely lead to an explosion of punitive damages litigation in Maryland. The Maryland General Assembly would be incentivizing individuals to tune up what really is a negligence claim into a gross negligence claim in seeking recovery of punitive damages, which are uncapped as damages.

For all these reasons, MDC urges an unfavorable report on HB 1099.

Sincerely,

/s/ Christopher C. Jeffries

cjeffries@kg-law.com

(410) 347-7412

on behalf of Maryland Defense Counsel, Inc.

Sheppard Pratt testimony HB1099 UNF (2).pdf

Uploaded by: Damian Lang

Position: UNF



Sheppard Pratt

Written Testimony – Damian Lang

House Bill 1099 – Civil Actions – Punitive Damages Awards - Surcharges

House Judiciary Committee

March 5, 2025

Chair Clippinger, Madam Vice Chair, and members of the House Judiciary Committee, on behalf of Sheppard Pratt, the largest private nonprofit provider of behavioral health services in the country, I submit this testimony in strong opposition to House Bill 1099. This legislation proposes a significant and unprecedented change in Maryland's civil liability system by altering the standard for punitive damages and imposing a surcharge on such awards, diverting these funds to the Blueprint for Maryland's Future.

Key Concerns:

1. HB 1099 Constitutes an Unconstitutional Tax on the Judicial Process

This bill raises serious constitutional concerns. By directing half of all punitive damages awarded by a jury to the state, the legislation effectively transforms the civil justice system into a revenue-generating mechanism for the government. This structure could be challenged as an unconstitutional tax on litigation, as it diverts private legal awards for public use in a manner that undermines the very purpose of punitive damages.

2. Undermining the Intent of Punitive Damages

Punitive damages are intended to punish egregious misconduct and deter future wrongdoing by defendants. However, by diverting 50% of the award to the state, HB 1099 reduces the deterrent impact on defendants and diminishes the compensation available to plaintiffs. The practical effect is that a jury's determination of an appropriate punitive measure is arbitrarily split, reducing the plaintiff's recovery and potentially disincentivizing valid claims. This amounts to executive overreach into the judicial process, interfering with the role of juries and judges.

3. Creating Confusion and Prioritization Issues in Collection

This legislation fails to provide clarity on how damages would be allocated when a defendant lacks the financial resources to satisfy both the punitive damages award and the surcharge. If a

defendant is only able to pay a portion of the judgment, who collects first—the plaintiff or the state? If the state claims its portion first, the plaintiff could be left with nothing, completely nullifying the jury's intent in awarding punitive damages. Conversely, if plaintiffs receive full payment first, the state may never collect, undermining the bill's stated purpose. This creates a chaotic and unfair legal landscape.

4. Harm to Healthcare Providers and the Broader Business Community

While Sheppard Pratt does not anticipate frequent exposure to punitive damages claims, we are concerned about the broader implications of lowering the threshold for punitive damages from "actual malice" to "gross negligence." This change substantially increases liability risks for healthcare providers, businesses, and nonprofit organizations that operate in complex and high-stakes environments. Such a significant departure from established legal standards exposes employers, service providers, and professionals to increased litigation and financial liability.

5. Lack of Precedent and Potential Negative Economic Consequences

This proposal is without precedent in Maryland's legal system and deviates from how punitive damages are handled in nearly every other jurisdiction. Maryland currently does not impose caps on punitive damages, meaning this bill could lead to disproportionate financial burdens on defendants, particularly small businesses and nonprofit organizations. Increased exposure to punitive damages could discourage investment, raise insurance premiums, and ultimately drive businesses and healthcare providers out of the state.

HB 1099 represents a dangerous shift in Maryland's civil liability landscape. It raises constitutional concerns, distorts the purpose of punitive damages, creates legal uncertainties, and threatens economic stability. For these reasons, we urge the committee to issue an unfavorable report on HB 1099.

2025 NAMIC Letter Opposing SB 1099-1.pdf

Uploaded by: Gina Rotunno

Position: UNF

March 3, 2025

Members of the House Judiciary
Committee

Via email

Re: NAMIC opposition to SB 1099 - Civil Actions - Punitive Damage Awards - Surcharge

Members of the Committee:

The National Association of Mutual Insurance Companies (NAMIC) is reaching out to express our concerns with Senate Bill 1099, which requires plaintiffs to prove by clear and convincing evidence that a defendant acted with gross negligence before punitive damages may be awarded, and imposes a surcharge on defendants subject to punitive damages,.

NAMIC is the largest property and casualty insurance trade association in the country, with more than 1,300 member companies. NAMIC supports regional and local mutual insurance companies as well as some of the country's largest national insurers. NAMIC member companies write \$383 billion in annual premiums nationally, and our members account for 61 percent of homeowners, 48 percent of automobile, and 25 percent of the business insurance markets.

Our members have a responsibility to protect policyholders from increased risks and unpredictable financial burdens. We believe that this bill, if enacted, could have negative consequences for both the insurance industry and the free market. While SB 1099's intent may be to address egregious behavior, the increased uncertainty surrounding the application of punitive damages and the additional surcharge could raise liability costs significantly for both insurance providers and policyholders. This may lead to higher premiums and limit access to affordable coverage.

For these reasons, NAMIC strongly opposes Senate Bill 1099 and respectfully requests that an unfavorable report be issued for the bill.

Sincerely,



Gina Rotunno
Regional Vice President
Mid-Atlantic Region

MDCC_HB 1099_UNFAV.pdf

Uploaded by: Grason Wiggins

Position: UNF



House Bill 1099

Date: March 5, 2025
Committee: Judiciary
Position: Unfavorable

Founded in 1968, the Maryland Chamber of Commerce (the Chamber) is the leading voice for business in Maryland. We are a statewide coalition of more than 7,000 members and federated partners working to develop and promote strong public policy that ensures sustained economic health and growth for Maryland businesses, employees, and families.

House Bill 1099 would reduce the standard in Maryland for imposing punitive damages, expose those who live, work, and do business in the state to a notably higher risk of extensive awards, and assess an additional 50% surcharge on punitive damages. HB 1099 would overturn longstanding Maryland Supreme Court precedent by lowering the standard for awarding punitive damages. Specifically, HB 1099 would replace the "malice" requirement with a "gross negligence" standard that was previously abandoned by the State.

The bill defines "gross negligence" by combining high levels of wrongdoing, like malicious intent, with lower ones, such as simple negligence. Since the bill uses an "or" between six standards, only the lowest level applies, potentially allowing punitive damages for cases of simple negligence. This definition contradicts the Maryland Supreme Court's 2019 ruling, which set a higher bar, requiring reckless disregard or intentional harm.

House Bill 1099 proposes a 50% surcharge on punitive damage awards and allocates the surcharge funds to Maryland's public schools. The surcharge raises an exceptional concerning incentive to assess punitive damages, which are intended to punish and deter wrongful conduct, as a funding mechanism for state programs. As the public becomes aware of the surcharge, the incentive could influence jurors to award punitive damages as a funding mechanism for the State instead of in the pursuit of justice. Additionally, the surcharge could lead to excessive damage awards, potentially violating constitutional limits on proportional punishment.

HB 1099 would have negative, unintended consequences for Maryland businesses, residents, and the State's legal environment. It is critical to maintain a higher standard for punitive damages, as set by the Maryland Supreme Court, to protect the rights of all parties involved and prevent the misuse of the legal system for unintended financial gain. For these reasons, the Maryland Chamber of Commerce respectfully requests an **unfavorable report on HB 1099**.

HB 1099-Civil Actions - Punitive Damage Awards - S

Uploaded by: Jake Whitaker

Position: UNF



Maryland
Hospital Association

House Bill 1099 - Civil Actions - Punitive Damage Awards - Surcharge

Position: *Oppose*

March 5, 2025

House Judiciary Committee

MHA Position

On behalf of the Maryland Hospital Association's (MHA) member hospitals and health systems, we appreciate the opportunity to comment in opposition of House Bill 1099. HB 1099 would change the standard for awarding punitive damages from actual malice to proving by clear and convincing evidence that the defendant acted in gross negligence. Additionally, this bill would allow courts to assess an additional surcharge up to 50% of the value of the punitive damages award to be deposited in the Blueprint for Maryland's Future Fund.

In Maryland, punitive damages are reserved for the most egregious conduct, where the defendant's actions were driven by malicious intent, such as a desire to harm or fraudulent behavior. Unlike other noneconomic damages in Maryland, which have specific caps, punitive damages are unlimited. The current actual malice standard ensures that such severe penalties are reserved for only the most egregious actions.

Maryland's unique rate setting system limits hospitals' ability to cover unplanned costs. Unexpected hikes in insurance premiums could lead hospitals to allocate their limited financial resources and budgets toward insurance costs instead of patient care. As there are no caps on punitive damages, lowering the standard to prove gross negligence by clear and convincing evidence will result in more frequent and substantially larger damages awards. Maryland insurers, as a result of potentially higher and more frequent payouts, would likely raise premiums to cover these increased liabilities. As a result, Maryland hospitals would potentially face increased premiums and other insurance costs.

Since January 2020, Maryland hospitals have faced significant financial challenges, with operating expenses rising sharply. More than half of Maryland hospital systems reported negative operating margins in most quarters over the past three years. In the third quarter of 2024, Maryland hospital system operating margins averaged just 0.3%, far below the 3% margin that experts consider necessary to sustain nonprofit health care systems. Over the past 11 years, Maryland hospital system margins have averaged only 1.6%, significantly lagging behind hospitals nationwide. Increasing insurance costs places additional financial strain on hospitals.

For these reasons, we request an unfavorable report on HB 1099.

For more information, please contact:

Jake Whitaker, Assistant Vice President, Government Affairs & Policy

Jwhitaker@mhaonline.org

HB1099 - Oppose - Maryland Motor Truck Association

Uploaded by: Louis Campion

Position: UNF

Maryland Motor Truck Association



NOTHING WITHOUT
TRUCKING 

HEARING DATE: March 5, 2025

BILL NO/TITLE: HB1099: Civil Actions - Punitive Damage Awards - Surcharge

COMMITTEE: House Judiciary

POSITION: **Oppose**

Maryland Motor Truck Association (MMTA) respectfully opposes this legislation, which would lower the standard for uncapped punitive damages in the state, while also imposing a 50% surcharge on these awards.

MMTA is extremely concerned about efforts to lower the standard for punitive damages given the rise in nuclear verdicts over \$10 million that have plagued the trucking industry in recent years. The American Transportation Research Institute completed a study in 2020 to better understand the impact of rising verdicts on trucking. The research evaluated 600 cases between 2006 and 2019. In the first five years of data, there were 26 cases over \$1 million involving heavy-duty trucks. In the last five years, there were nearly 300 cases. The number of verdicts over \$10 million nearly doubled in that time. According to CaseMetrix, the average verdict against a trucking company in 2012 was about \$2.6 million. In 2017, that figure was just over \$7 million. Today it exceeds \$27 million.

The impacts on motor carriers of these nuclear verdicts have included bankruptcy filings, businesses closing, and unsustainable higher insurance premiums as fewer insurance companies are willing to provide insurance to the trucking industry. Over the past few years carriers such as Nationwide E&S and Zurich have exited the truck insurance market, making it more and more difficult for the trucking industry to deliver the products our businesses and citizens need.

Punitive damages are an extreme remedy and should remain such. According to the U.S. Chamber of Commerce, awarding these damages occurs in only about one quarter of nuclear verdicts; however, when they are given they are often for extraordinary amounts. These "send-a-message" verdicts are frequently uncollectable, particularly when imposed on a small business. "Nevertheless, a business facing litigation must consider the cost of a lengthy appeal that will follow...even if a court ultimately overturns the judgment or reduces the award to a fraction of its original size. When a mega nuclear verdict is reduced or uncollectable, plaintiffs' lawyers often still tout the award in television, social media, and website advertising to solicit clients to bring new cases."

Data shows that in about 75% of serious injury or fatal crashes involving a car and a truck, the fault of the accident was with the car driver. However, the risk of inflated verdicts has been shown not only to result in higher settlement payments, but also settlements where the liability of the trucking company itself is questionable. As a result, many trucking companies have now resorted to the added cost of installing dashboard cameras to their fleets to protect their drivers and businesses.

Should the committee elect to move forward with this legislation and lower the standard for punitive damage awards, MMTA urges the state to add caps similar to those in surrounding jurisdictions like Virginia, West Virginia, and Washington DC.

For the reasons noted above, MMTA asks for an unfavorable report.

About Maryland Motor Truck Association: Maryland Motor Truck Association is a non-profit trade association that has represented the trucking industry since 1935. In service to its 1,000 members, MMTA is committed to support, advocate and educate for a safe, efficient and profitable trucking industry in Maryland.

For further information, contact: Louis Campion, (c) 443-623-5663

HB 1099 Punitve Damages Hs Jud UNF 030525 v.1.pdf

Uploaded by: Nancy Egan

Position: UNF



Testimony of
American Property Casualty Insurance Association (APCIA)
House Judiciary Committee
House Bill 1099- Civil Actions - Punitive Damage Awards - Surcharge
March 5, 2025

Unfavorable

The American Property Casualty Insurance Association (APCIA) is the primary national trade organization representing 71.4% of the Maryland property casualty insurance market. Contrary to longstanding legal precedent in MD, HB 1099 would allow the awarding of punitive damages for much less than intentional wrongdoing. The bill's new and extremely broad standard of gross negligence would conflate punitive conduct with negligence and would likely result in jury confusion with many nuclear verdicts with punitive damage awards. In Maryland, punitive damages are designed to punish a wrongdoer for particularly egregious or heinous conduct and to deter similar conduct with a requirement that a plaintiff plead and prove "actual malice" to recover. (See *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 460 (1992). *Anne Arundel Cnty. v. Reeves*, 474 Md. 46, 66 (2021).)

The very low bar of gross negligence, which conflates punitive conduct with ordinary negligence would generate excessive and un-warranted punitive damage awards, with the jury focusing on prejudicial factors focused on the wealth of the defendant, the profitability of the conduct to the defendant, and the plaintiff's financial vulnerability in deciding the amount to award. This may bolster a "David vs. Goliath" theme by plaintiffs' attorneys at trial and lead to much larger awards against civil defendants.

This change may also increase the cost of doing business in the state and may put small businesses and non-profits out of business. Maryland residents already pay one of the highest "tort taxes" in the nation every year, at more than [\\$1,731](#) per resident due to excessive litigation costs. These costs further result in a loss of nearly 92,000 jobs per year.

The bill also mandates that when punitive damages are awarded, the defendant must pay an additional 50% surcharge to be deposited into a state education funding mechanism. Importantly, this surcharge is an extra payment that does not reduce the original punitive damages award. Juries may end up awarding punitive damages for the improper purpose of funding state education.

Moreover, unlike many states, Maryland's punitive damages are unlimited. In Virginia, the total amount awarded for punitive cannot exceed \$350,000. In the District of Columbia, punitive damages are not allowed in wrongful death cases. In West Virginia, the amount of punitive damages may not exceed the greater of four times the amount of compensatory damages or \$500,000.

APCIA opposes this legislation and urges the Committee to issue an unfavorable report. Thank you for your consideration.

Nancy J. Egan,

State Government Relations Counsel, DC, DE, MD, VA, WV

Nancy.egan@APCIA.org Cell: 443-841-4174

HB1099_UNF_MedChi, MDACEP_Civil Actions - Punitive

Uploaded by: Steve Wise

Position: UNF



The Maryland State Medical Society
1211 Cathedral Street
Baltimore, MD 21201-5516
410.539.0872
Fax: 410.547.0915
1.800.492.1056
www.medchi.org



House Judiciary Committee

March 5, 2025

House Bill 1099 – *Civil Actions – Punitive Damage Awards – Surcharge*

POSITION: OPPOSE

On behalf of MedChi, The Maryland State Medical Society and the Maryland Chapter of the American College of Emergency Physicians (MDACEP), we submit this letter of opposition for House Bill 1099.

This bill would both lower the current standard for an award of punitive damages and impose a 50% surcharge on any such award, with that surcharge being paid not to the plaintiff or plaintiffs, but to the State of Maryland. MedChi and MDACEP strongly oppose this legislation for the following reasons.

The current standard for an award of punitive damages in Maryland remains “actual malice”, as set forth by the then Maryland Court of Appeals in Owens-Illinois vs. Zenobia, 325 Md. 420 (1992). House Bill 1099 would expressly abrogate the holding in that case and lower the standard to one of “gross negligence”, which is defined as “a pattern of repeated misconduct”, or “acts or omissions that create a high degree of risk of harm to others”, among other things. Should this legislation pass, nearly every medical malpractice case would expose the defendant to punitive damages, with the plaintiff’s attorney arguing that the defendant’s act constituted an “act or omission that created a high degree of risk” to the patient. The Committee has heard testimony already this Session on the likely effects of removing or lowering the cap on non-economic damages in the State. Lowering the standard for punitive damages would have an equally if not greater impact, because the latter are currently awarded infrequently. If this legislation is adopted, punitive damages likely would be regularly awarded along with economic and non-economic damages.

The surcharge on top of the punitive damage award is rife with legal problems. Under the bill, the State of Maryland could receive a 50% surcharge on top of any punitive damage award. In short, the State would ostensibly be collecting damages on behalf of people who are “strangers to the litigation,” a practice held to be an unconstitutional taking in Philip Morris USA v. Williams, 549 U.S. 346 (2007). The surcharge is then allocated to the Blueprint for Maryland’s Future Fund, a purpose that is almost assuredly unrelated to the harm caused by the defendant in the underlying case. This strains credulity and should be rejected.

For these reasons and others, MedChi and MDACEP oppose House Bill 1099.

For more information call:

J. Steven Wise
Danna L. Kauffman
Andrew G. Vetter
Christine K. Krone
410-244-7000

hb1099.pdf

Uploaded by: Will Vormelker

Position: INFO

HON. STACY A. MAYER
CIRCUIT COURT
JUDGE
BALTIMORE COUNTY
CHAIR

HON. RICHARD SANDY
CIRCUIT COURT
JUDGE
FREDERICK COUNTY
VICE-CHAIR



KELLEY O'CONNOR
ASSISTANT STATE COURT
ADMINISTRATOR
GOVERNMENT RELATIONS
AND PUBLIC AFFAIRS
P: (410) 260-1560

SUZANNE PELZ, ESQ.
SNR. GOVT. RELATIONS AND
PUBLIC AFFAIRS OFFICER
P: (410)260-1523

MARYLAND JUDICIAL COUNCIL LEGISLATIVE COMMITTEE

MEMORANDUM

TO: House Judiciary Committee
FROM: Legislative Committee
Suzanne D. Pelz, Esq.
410-260-1523
RE: House Bill 1099
Civil Actions – Punitive Damage Awards - Surcharge
DATE: February 19, 2025
(3/5)

INFORMATIONAL COMMENT PAPER

The Judiciary respects the separation of powers doctrine and acknowledges that the legislature is the policy-making branch. As such, the Judiciary has no position on the policy aims of this legislation and defers to the legislative branch on such matters.

The Judiciary provides the following information for the Committee's consideration. As drafted, the bill seems to allow punitive damages only in cases where an individual acted with gross negligence. This language appears to eliminate the ability to award punitive damages for intentional acts or acts with malice. It is unclear if that was the intent of the legislation.

In addition, the bill requires the State Court Administrator (SCA) to assess a surcharge on punitive damages. The General Assembly has required the SCA to assess surcharges in two other contexts, but only at the time of filing. This bill differs from those instances. Under existing Courts and Judicial Proceedings § 7-102(b), the SCA is required to assess a surcharge of \$11 per case filed with the Clerk of the Supreme Court of Maryland and

the Clerk of the Appellate Court of Maryland. Also, pursuant to Courts and Judicial Proceedings § 7-202(d), the SCA is required to assess a surcharge of \$85 per civil case filed in the circuit courts. As noted, those surcharges are imposed at the time of filing and, thus, easily collectible and enforced at the outset of a case filing. This bill requires a surcharge post-judgment but does not provide a mechanism for the collection of such surcharge. It is unclear how the surcharge would be collected and what post-judgment collection method would be employed. This presents operational concerns as well as concerns about the Court operating outside of its judicial function in potentially pursuing collection actions.

cc. Hon. Luke Clippinger
Judicial Council
Legislative Committee
Kelley O'Connor