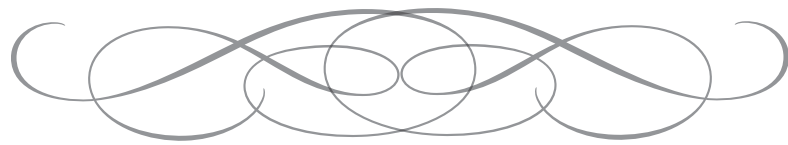


# House Workgroup on Punitive Damages



FINAL REPORT



Annapolis, Maryland  
February 2017

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THE MARYLAND GENERAL ASSEMBLY  
ANNAPOLIS, MARYLAND 21401-1991

February 24, 2017

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

Ladies and Gentlemen:

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

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

Sincerely,

A handwritten signature in blue ink that reads "Kathleen M. Dumais".

Kathleen M. Dumais  
Chair

cc: Mr. Warren G. Deschenaux



# House Workgroup on Punitive Damages 2016 Interim Membership Roster

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# Introduction

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## 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

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## 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

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## 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.

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### 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

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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.<sup>1</sup>

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<sup>1</sup> 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.

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**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

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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.<sup>2</sup> Seven other states apply a more flexible implied malice standard, including:

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

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<sup>2</sup> 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.

<sup>3</sup> 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.”

<sup>4</sup> 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.”

<sup>5</sup> 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)<sup>6</sup>;
- Nevada (NEV. REV. STAT. § 42.005);<sup>7</sup>
- Ohio (OHIO REV. CODE ANN. § 2315.21); and<sup>8</sup>
- Virginia (*Lee v. Southland Corp.*, 244 S.E.2d 756 (Va. 1978)).<sup>9</sup>

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);

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<sup>6</sup> 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.

<sup>7</sup> 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.

<sup>8</sup> 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).

<sup>9</sup> 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

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## 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.

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**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

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## **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.

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**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

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## 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**

**Availability of Punitive Damages**    **Number of States**

**Products Liability**

Available	43
Not available	3
No information	1

**Medical Malpractice**

Available	39
Not available	6
No information	2

**Wrongful Death**

Available	10
Not available	5
No information	32

Sources: Wilson Elser; Congressional Research Service

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# Insurability of Punitive Damages

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## 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 <sup>2</sup>	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 <sup>3</sup>	Insurable*	Not Applicable
Washington	Insurable	Insurable
West Virginia	Insurable	Insurable
Wisconsin	Insurable	Insurable
Wyoming	Insurable	Insurable

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

<sup>2</sup>Nebraska does not recognize punitive damages in any form.

<sup>3</sup>Virginia 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

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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.



# Appendix I.

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## **Maryland Statutes Authorizing Punitive or Exemplary Damages**

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The following is a brief description of each statute that authorizes an award of punitive or exemplary damages:

**Charitable Solicitations:** A person who willfully fails to comply with a requirement concerning charitable solicitations is liable to the donor of the charitable contribution for punitive damages not exceeding three times the actual damages. (BR, § 6-509(b)(2))

**Returnable Containers and Returnable Textiles:** In an action brought by the owner of a returnable container or returnable textile, the owner may recover up to three times the value of the actual damages for a violation of this subtitle. (BR, § 19-302(b)(2))

**Defamation by Television or Radio Station or Network:** An owner, licensee, or operator of a television or radio station or network and an agent or employee is liable for punitive damages for a defamatory statement published or uttered with actual malice over the facilities of the station or network by a candidate for public office as to a person other than the candidate's opponent. (CJ, § 3-504(b))

**Unlawful Wiretapping and Electronic Surveillance:** A person whose communication is intercepted, disclosed, or used in violation of this subtitle may recover punitive damages. (CJ, § 10-410(a)(2))

**Foreign Discriminatory Boycotts Act:** A person who is injured by a violation of this Act may recover three times the amount of actual damages which result from the violation. (CL, § 11-109(b)(4))

**Bad Faith Assertion of Patent Infringement:** A target of a bad faith assertion of patent infringement may be awarded exemplary damages not exceeding the greater of \$50,000 or three times the total of actual damages, costs, and fees. (CL, § 11-605(b)(2))

**Hulls of Vessels:** A person who is injured in the person's business by virtue of a violation of this subtitle may recover three times the amount of the damages incurred. (CL, § 11-1001(d)(1))

**Maryland Uniform Trade Secrets Act:** A complainant may be awarded exemplary damages not exceeding twice the damages caused by the misappropriation of a trade secret. (CL, § 11-1203(d))

**Interest and Usury:** A person who willfully requires a borrower to make a false or misleading statement that a loan is a commercial loan shall forfeit to the borrower three times the amount of interest and charges contracted for or collected in excess of that permitted by law. (CL § 12-106.1 (b)). A person who violates the usury provisions of this subtitle shall forfeit to the

borrower the greater of three times the amount of interest and charges collected in excess of that authorized by this subtitle or \$500. (CL, § 12-114(a))

Maryland Consumer Loan Law: A lender is liable to the borrower for an amount equal to three times the excess amount. (CL, § 12-313(b))

Secondary Mortgage Loans – Credit Provisions: A lender who knowingly violates any provision of this subtitle shall forfeit to the borrower three times the amount of interest and charges collected in excess of that authorized by law. (CL, § 12-413)

Equal Credit Opportunity Act: A creditor who fails to comply with the Act is liable for punitive damages not exceeding \$10,000 to an individual applicant and not exceeding the lesser of \$100,000 or 1 percent of the net worth of the creditor in a class action. (CL, § 12-707(b) and (c))

Loans – Finder’s Fees: A mortgage broker who violates any provision of this subtitle shall forfeit to the borrower the greater of \$500 or three times the amount of the finder’s fee collected. (CL, § 12-807)

Creditor Grantor Revolving Credit Provisions: A credit grantor who knowingly violates any provision of this subtitle shall forfeit to the borrower three times the amount of interest, fees, and charges collected in excess of that authorized by this subtitle. (CL, § 12-918(b))

Creditor Grantor Closed End Credit Provisions: A credit grantor that knowingly violates any provision of this subtitle shall forfeit to the borrower three times the amount of interest, fees, and charges collected in excess of that authorized by this subtitle. (CL, § 12-1018(b))

Consumer Credit Reporting Agencies: A consumer reporting agency or user of information which willfully fails to comply with a statutory requirement with respect to a consumer is liable for punitive damages allowed by the court. (CL, § 14-213(a)(2))

Fine Prints: A person who sells a fine print in willful violation of this subtitle is liable to the purchaser for an amount equal to three times the sum of the purchase price and interest. (CL, § 14-505(b))

Layaway Sales Act: A seller who makes a layaway sale in willful violation of this Act is liable to the buyer for an amount equal to three times the amount paid by the buyer under the layaway agreement. (CL, § 14-1109(b))

Maryland Credit Services Businesses Act: A credit services business which willfully fails to comply with a requirement of this subtitle with respect to a consumer is liable to that consumer for a monetary award in an amount equal to three times the total amount collected from the consumer and such amount of punitive damages as the court may allow. (CL, § 14-1912(a))

Consumer Motor Vehicle Leasing Contracts: A lessor who knowingly violates any provision of this subtitle shall be liable to the lessee for three times the amount of fees and charges collected in excess of that authorized by this subtitle. (CL, § 14-2007(f)(4))

Maryland Immigration Consultant Act: An immigration consultant who violates this subtitle is liable for an award equal to three times the amount of the damages. (CL, § 14-3306(c))

Dishonored Checks and Other Instruments: If a check or other instrument has not been paid within 30 days after the holder has sent notice of dishonor, the maker or drawer of the check or other instrument shall be liable for the amount of the check or other instrument, a collection fee of \$35, and an amount up to two times the amount of the check or instrument, but not more than \$1,000. (CL, § 15-802(b))

Unlawful Picketing and Assembly: A court may award punitive damages if a person intentionally assembles with another in a manner that disrupts a person's right to tranquility in the person's home. (CR, § 3-904(e)(2))

Controlled Hazardous Substances: A responsible person who fails without sufficient cause to comply with a final order issued under the Controlled Hazardous Substances Act is subject to punitive damages not exceeding three times the amount of the costs incurred by the State. (EN, § 7-266.1(a))

Check Cashing Services: A court may award a prevailing plaintiff who is injured by a violation of this subtitle up to three times the amount of actual damages. (FI, § 127(b)(1))

False Claims against State or County – Prohibitions: A person who violates the prohibitions against false claims is liable to the governmental entity for not more than three times the amount of damages sustained. (GP, § 8-102(c))

False Claims against State or County – Retaliatory Action: An employee, a contractor, or a grantee may be awarded punitive damages if a person takes a retaliatory action against the employee, contractor, or grantee. (GP, § 8-107(b)(2)(vi))

False Claims against State Health Plans and State Health Programs – Prohibitions: A person who violates the prohibitions against false claims is liable to the governmental entity for not more than three times the damages sustained. (HG, § 2-602(b))

False Claims against State Health Plans and State Health Programs – Retaliatory Action: An employee, a contractor, or a grantee may be awarded punitive damages if a person takes a retaliatory action against the employee, contractor, or grantee. (HG, § 2-607(b)(2)(vi))

Developmental Disabilities Law – Disclosure of Records: A custodian of a record who unlawfully discloses the record is liable to the individual whose record is disclosed for punitive damages not exceeding \$500. (HG, § 7-1103(b))

Rescission of Continuing Care Agreement: A subscriber is entitled to treble damages for extensive injuries arising from a violation of the subscriber's right to rescind a continuing care agreement. (HS, § 10-446(d))

**Wage Payment and Collection:** If a court finds that an employer withheld the wage of an employee in violation of this subtitle and not as a result of a bona fide dispute, the court may award the employee an amount not exceeding three times the wage. (LE, §§ 3-507(b) and 3-507.2(b))

**Wholesale Sales Representatives:** A sales representative may bring an action against the principal to recover up to three times the amount of all commissions that the principal owes. (LE, § 3-605(a)(1))

**Healthy Retail Employee Act:** If an employer fails to comply with an order issued for a subsequent violation against the same employee within three years, the employee may be entitled to three times the value of the employee's hourly wage for each shift break violation. (LE, § 3-710(d)(8))

**Workplace Fraud:** A court or administrative agency may order an employer who knowingly fails to properly classify an employee to pay the employee up to three times the amount of restitution to which the employee is entitled. (LE, § 3-909(c)) An employee is entitled to up to three times the amount of any economic damages awarded in a civil action. (LE, § 3-911(c)(2))

**Aquaculture-Liability for Trespass:** A person who willfully, negligently, wrongfully, or maliciously enters an area leased to another person to harvest, damage, or transfer shellfish or to alter, damage, or remove any markings or equipment is liable to the leaseholder for damages up to three times the value of the shellfish harvested, damaged, or transferred. (NR, § 4-11A-16.1(a)(1))

**Protection of Homeowners in Foreclosure Act:** If a court finds that the defendant willfully or knowingly violated this Act, the court may award the homeowner damages equal to three times the amount of actual damages. (RP, § 7-320(c))

**Maryland Mortgage Fraud Protection Act:** If a court finds that the defendant violated this Act, the court may award damages equal to three times the amount of actual damages. (RP, § 7-406(c))

**Maryland Mortgage Assistance Relief Services Act:** If a court finds that the defendant violated this Act, the court may award damages equal to three times the amount of actual damages. (RP, § 7-507(c)).

**Security Deposits for Residential Leases:** If a landlord, without a reasonable basis, fails to return any part of a security deposit, within 45 days after termination of a tenancy, the tenant has an action of up to three times the withheld amount. (RP, § 8-203(e)(4))

**Procurement – Defrauding the State:** A person who, for the purpose of defrauding the State, acts in collusion with another person in connection with the procurement process is liable for damages up to three times the value of the loss to the State. (SF, § 11-205(b))

**Violation of Prevailing Wage Rates – Public Works Contracts:** An employer who withheld wages or fringe benefits willfully and knowingly or with deliberate ignorance or reckless disregard of the employer's obligations is liable for double or treble damages. (SF, § 17-224(d)(3)) A

contractor or subcontractor who retaliates or discriminates against an employee may be ordered to pay the employee three times the amount of back wages. (SF, § 17-224(h)(3)(ii))

**Unlawful Employment Practices:** A complainant is entitled to punitive damages, subject to specified monetary limits, if the respondent engaged in an unlawful employment practice with actual malice. (SG, § 20-1013(e))

**Discriminatory Housing Practices:** A person who is subjected to a discriminatory housing practice may be awarded punitive damages. (SG, § 20-1035(e)(1)(i))