

A Review of the U.S. Punitive Damages Liability Landscape

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Punitive Damages in Employment Practices Liability

The 2017 whitepaper, A Review of the U.S. Punitive Damages Liability Landscape (the “Punitive Landscape” paper), gave a general overview of punitive damages and addressed the questions: When are punitive damages available? Are they insurable? And what insurance products can provide coverage? This paper addresses similar questions but focuses on the punitive damage landscape in respect of Employment Practices Liability (“EPL”). Like the Punitive Landscape, this paper analyzes the EPL questions in following parts:

Prevalence:

Punitive damages are often awarded at higher rates in EPL cases than in other civil cases. And, according to the data, the median award in EPL cases (punitive and compensatory) is several times higher than the quantum of median awards of other civil cases.

Insurability:

As discussed in Part 2 of the Punitive Landscape, most of the punitive damage awards and most of the U.S. economic activity occur in jurisdictions where insurability of punitive liability is restricted or unsettled. Hence, any EPL tower should consider the regulatory landscape applicable to the program that is intended to respond to punitive damage liability.

Insurance Products for EPL Punitive Damages:

The insurance products for EPL punitive damages are mostly the same as those arising out of standard casualty covers: most favored jurisdiction clauses and Bermuda punitive damage wraps. The conclusions in respect of EPL punitive products are the same as those reached for casualty products and discussed in the Punitive Landscape.

The last year has seen an unprecedented amount of publicity surrounding sexual harassment and misconduct claims. The ripple effects of the Hollywood driven #MeToo Movement have left few industries untouched and have led to many high-profile figures facing troubling accusations. Whilst it may take time for this increased attention to sexual harassment in the workplace to translate into data showing a parallel increase in litigation, the newfound awareness of what is considered inappropriate conduct in the workplace will likely cause an increase in the willingness and likelihood of reports among employees, with an increase in litigation logically following. Finding preventative solutions, such as comprehensive EPL insurance and punitive damages wraps can help protect employers facing a rising tide of claims and increased costs associated with defending these matters.

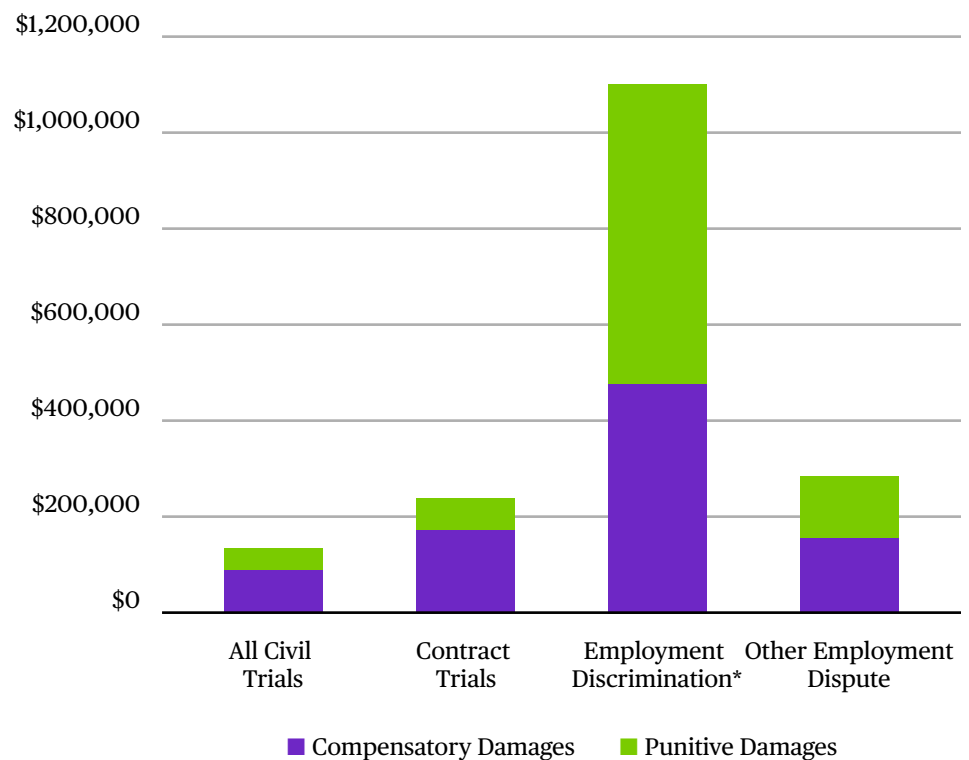
Prevalence

Table Aⁱ shows data analyzing the largest counties in the U.S., which found that the median award for Employment Discrimination* is 8.45 times greater than the median award for “all civil trials” and 4.5 times greater than the award for “contract trials.” Also, the punitive damage component for Employment Discrimination cases is greater than the compensatory component. In other words, this dataset shows that for every \$1 awarded in Employment Discrimination cases, 55¢ is comprised of punitive damages.

* “Employment Discrimination” is defined as “Firing, failure to promote, or failure to hire, due to age, race, gender, or religion.”

** “Employment Other” is defined as “Any other dispute between employer and employee not based on an allegation of discrimination.” Bureau of Justice Statistics. 2005. Civil Justice Survey of State Courts, 2001: Punitive Damage Awards in Large Counties, 2001. Washington, D.C.: Department of Justice.

Table A: Median Compensatory and Punitive Awards 75 Largest USA Counties



And although Table A shows that Employment Discrimination awards are higher in relative terms than other civil categories, Table A does not show the headline, record-breaking awards that certain EPL cases have generated in recent years, including:

Note: some of the following awards may be reduced due to damages caps or other relevant factors.

- \$185 million punitive damages award along with \$872,000 in compensatory damages in California’s *Juarez v AutoZone Stores, Inc.*, Case No. 08-CV-00417-WVG (S.D. Cal. Nov 17, 2014). Juarez is believed to be the largest punitive award to a single plaintiff in an EPL case.
- \$50 million punitive damages award with over \$1 million in back pay and other damages for pain and suffering in New Jersey’s *Braden v. Lockheed Martin Corp.*, No. 1:14CV04215 (D.N.J. 2017). The plaintiff alleged that the decision to eliminate his position during a reduction in force was motivated by his age.
- \$16.2 million award confirmed by California Appellate court in *Nickel vs. Staples Contract and Commercial, Inc.*, No. BL262664 (Court of Appeal, 2nd District 2016) for age discrimination. \$13M of this award was in punitive damages.
- A Missouri female plaintiff sued for age and sex discrimination and retaliation after she lost her management position as part of a corporate restructuring. The jury awarded the plaintiff \$450,000 in compensatory damages and \$20 million in punitive damages. *DA Miller v. American Family*, Case No. 1416-CV02573 (Mo. Dec. 9, 2016).
- A Florida jury awarded \$20.8 million, including \$10 million in punitive damages, in a case of discrimination based on gender. *EEOC v. Four Amigos Travel, Inc.*, No. 8:11-cv-01163-RAL-MAP (M.D. Fla. 2013).
- A Colorado award where \$14 million of the total \$14.9 million award was for punitive damages upon a showing that plaintiffs were discriminated against based on their race and national origin. *Camara v. Matheson Trucking, Inc.*, No. 1:12-cv-03040-CMA-CBS (D. Colo. 2013).

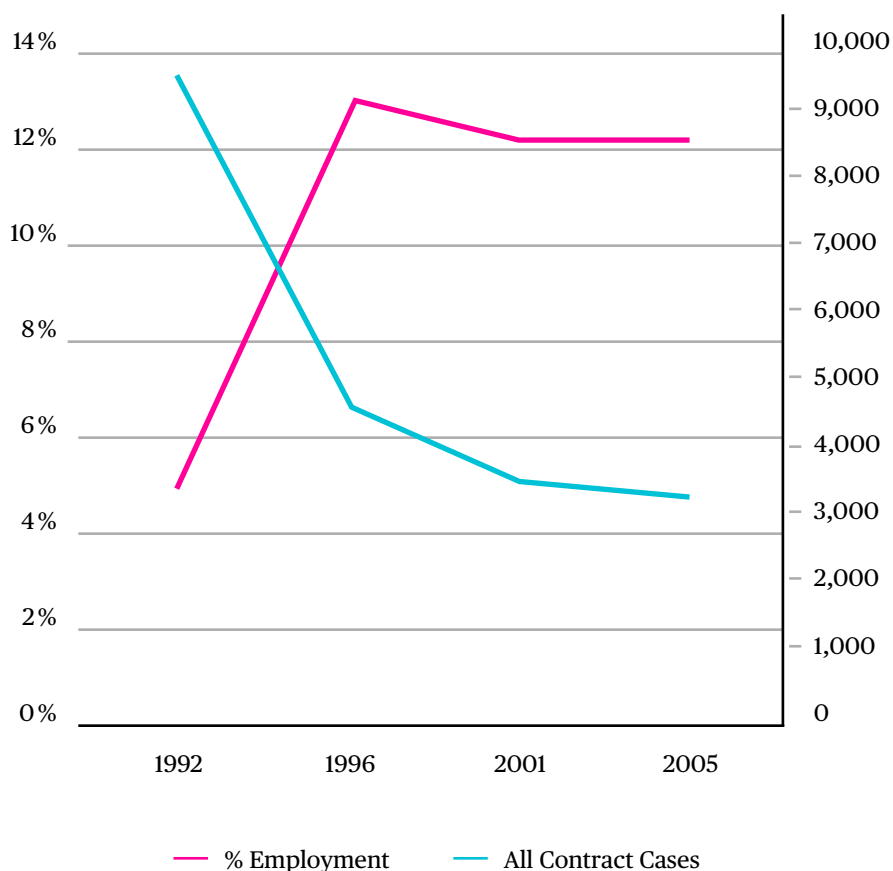
Table Bⁱⁱ shows in the studied cases punitive damages were sought in 32.8% of all Employment Discrimination cases and 41.3% of Employment Discrimination cases where the plaintiff won at trial. And of those cases where the plaintiff sought punitive damages and won at trial, punitive damages were awarded 25% of the time in Employment Discrimination cases. Not surprisingly, in the Employment Other** category, (which would appear to encompass sexual misconduct allegations like #MeToo) punitive damages were awarded in 38.5% of the cases where the plaintiff sought them and won at trial. This data shows a demonstrative threat of punitive damage liability for those defendants willing to resolve their EPL litigation via trial.

Table Cⁱⁱⁱ shows that while the overall number of contract cases in the 75 most populous counties declined from 9,477 in 1992 to 3,474 in 2005, the number of employment cases increased dramatically in the same period. In 1992, employment cases constituted about 5% of the total studied cases whereas, in 2004, employment cases made up 12% of the studied cases.^{iv}

Table B:

By Type of Claim	All Trials		Plaintiff Won Trial		Plaintiff Won and Puni Sought	
	% Puni Sought	Number	% Puni Sought	Number	% with Puni Award	Number
Employment Discrimination	32.8%	131	41.3%	63	25.0%	24
Employment Other	25.7%	183	26.0%	100	38.5%	26
Contract Trials	14.9%	2,723	15.8%	1,754	33.5%	272
All Civil Trials	9.0%	8,701	10.2%	4,546	35.5%	448

Table C: Civil trials in state courts in the USA's 75 most populous counties by case type



The 2018 U.S. Supreme Court decision in *Epic Systems v. Lewis* held that class-action waivers in certain employment arbitration agreements are enforceable. The *Epic* decision will likely have a chilling effect on EPL cases brought as federal class actions. However, *Epic* does not impact state laws like California’s Private Attorneys General Act, agency-initiated actions (suits led by the DOL and EEOC) or claims by applicants or other non-employees. Seemingly as a means to protect their citizens’ rights to class action, many states have introduced legislation that could dampen the impact of *Epic*.^v

Data from state courts are not readily available, and thus additional research will need to be undertaken before we can

see what if any impact *Epic* will have on the prevalence of EPL cases being brought in state versus federal courts (or as arbitrations, where the statutory remedies are available). However, the data we do have (see Table C) shows that EPL cases make up a sizeable part of state court dockets and it’s possible *Epic* could incentivize plaintiffs to bring more litigation in state court seeking to evade the Supreme Court decision.

It appears that the #MeToo movement has increased federal regulatory scrutiny. 2018 EEOC data^{vi} shows an overall increase in charges and litigation particularly for cases involving sexual harassment.

- The EEOC filed 66 harassment lawsuits, including 41 that included allegations of sexual harassment. That reflects more than a 50% increase in suits challenging sexual harassment over the fiscal year 2017.
- Also, charges filed with the EEOC alleging sexual harassment increased by more than 13% from the fiscal year 2017. Sex-based harassment allegations (including gender bias) are also on the rise.
- Meritorious charges (reasonable cause findings) increased 19% over FY2017.
- Overall, the EEOC recovered nearly \$70 million for the victims of sexual harassment through litigation and administrative enforcement in FY 2018, up from \$47.5 million in FY 2017.

Table D shows an increase in charges alleging sex-based harassment charges filed with the EEOC.^{vii} It is a commonly held belief that the #MeToo movement has sparked rapid changes toward attitudes of sexual misconduct, but the data here show how that change has also manifested in increased regulatory oversight. This is particularly relevant to punitive damages awards because sexual harassment/#MeToo allegations are more likely to result in punitive liability (see Table 2 on page 4).

Table D:

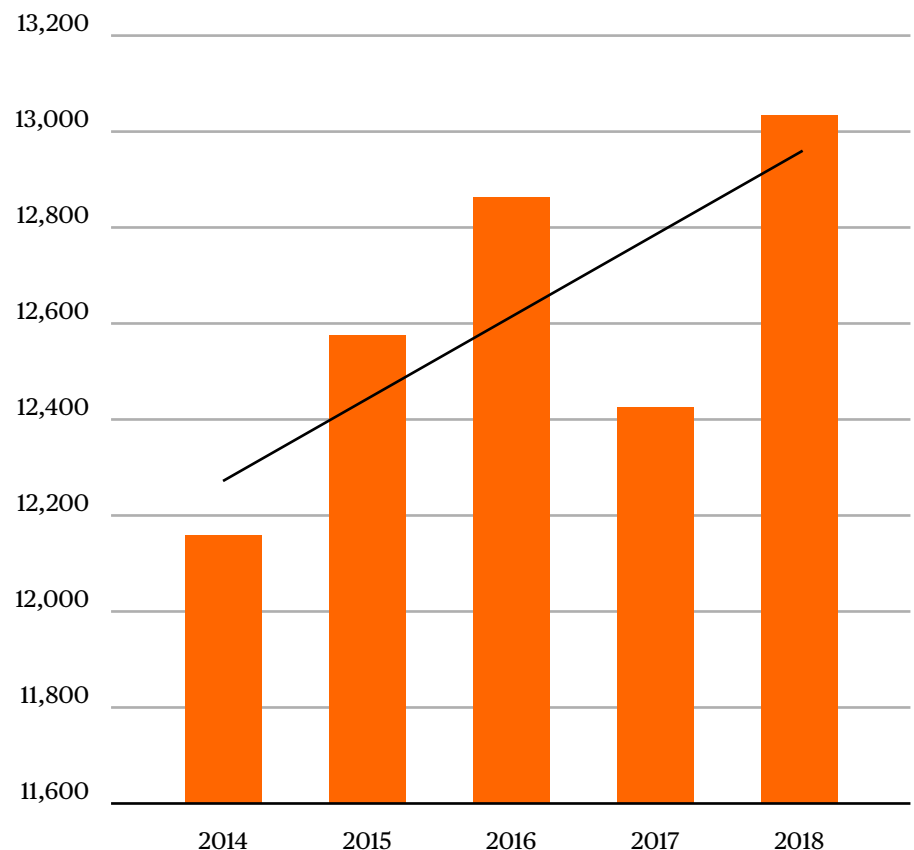
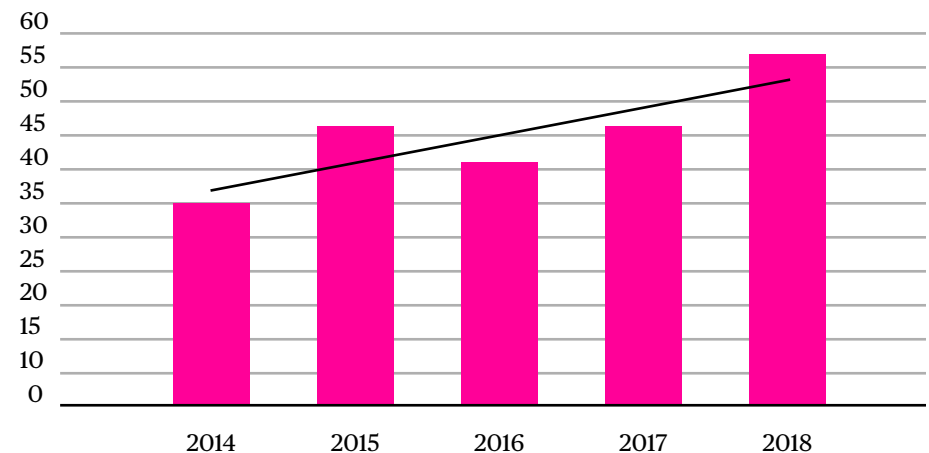


Table D^{viii} shows an increase in monetary benefits (millions) obtained by the EEOC from cases alleging sex-based harassment from 2014-2018. While the EEOC recoveries do not include punitive damages, the data nonetheless shows a 38.2% increase since 2014. And, it is possible the significant increase in EEOC recoveries could translate in higher recoveries for private plaintiffs in EPL cases seeking punitive damages.

Table D:



Insurability and Insurance Products

Part 2 of the Punitive Landscape paper analyzes the question – can punitive damages be paid by a defendant’s insurance? That paper shows that while a plurality of jurisdictions does not restrict insurability of punitive damages, most of the U.S. economic activity and most of the punitive-damage-award dollars arise in states where insurability is restricted or unsettled. Insurability of punitive damages arising out of EPL cases is no different, and anyone structuring an EPL insurance program should be aware of the growing prevalence of punitive damages and the regulatory landscape affecting insurability.

Part 4 of the Punitive Landscape discusses the two basic options available to cover punitive damages – most favored jurisdiction clauses (“MFJ”) or Bermuda wraps. Those same options are available in respect of EPL coverages. Bermuda wraps are standalone contracts negotiated and issued in Bermuda which “wraparound” domestic EPL policies. For the reasons discussed in the Punitive Landscape, careful attention should be given to the regulatory landscape which can have serious consequences for insureds and insurance professionals building an EPL program intended to respond to punitive damage liability.

Footnotes (Section 1)

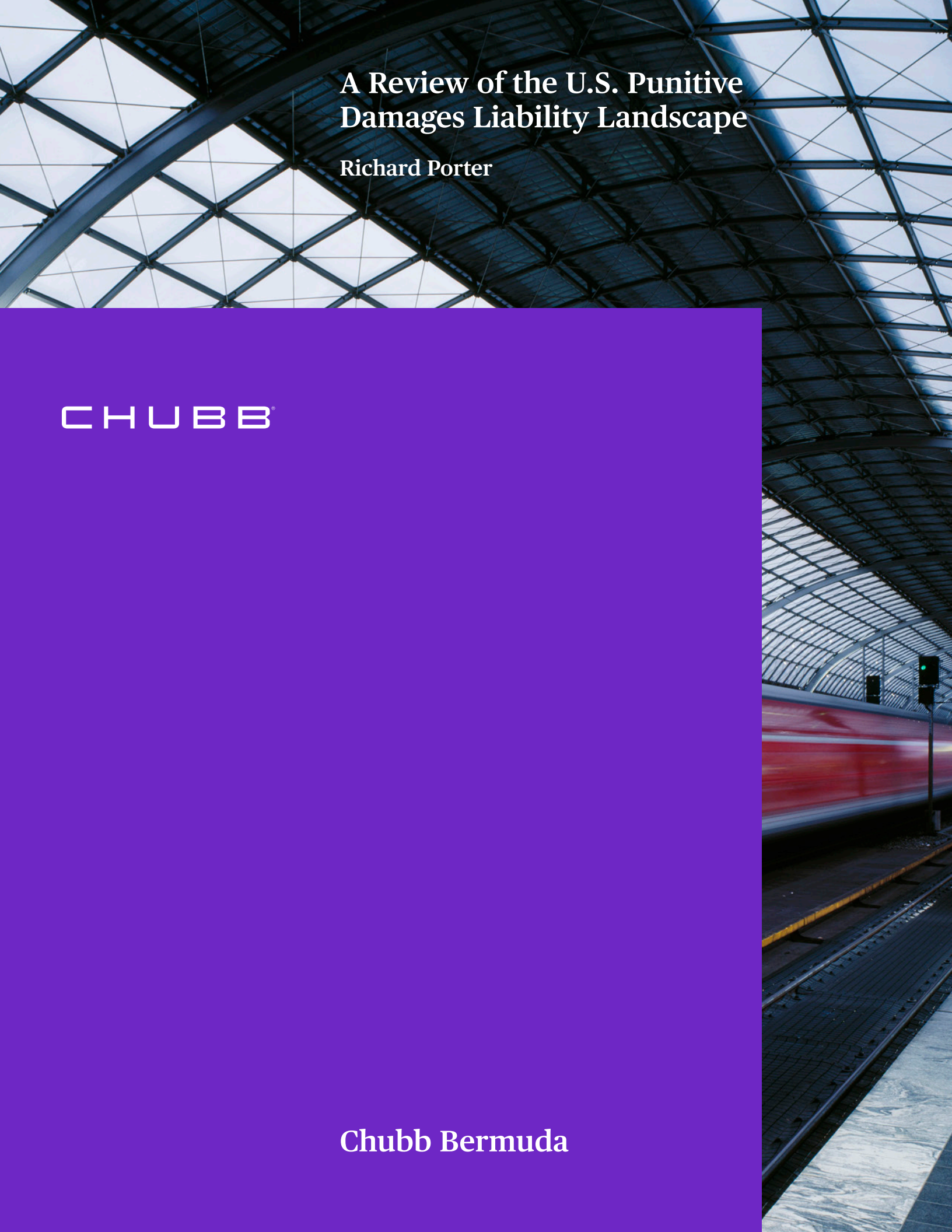
- i. Bureau of Justice Statistics. 2005. Civil Justice Survey of State Courts, 2001: Punitive Damage Awards in Large Counties, 2001. Washington, D.C.: Department of Justice.
- ii. See Table 3 of the Cornell Study (“The Decision to Award Punitive Damages: An Empirical Study” – 2010). Cornell Law Faculty Publications. Paper 185.
- iii. See Table 10 of Civil Bench and Jury Trials in State Courts, 2005. Washington, D.C.: Department of Justice (“the 2005 Study”)
- iv. 2005 Study at Table 10.
- v. For instance, after *Epic*, the New York Legislature banned employers from requiring individuals to arbitrate claims of sexual harassment by written contract entered into after July 11, 2018. Other states including Maryland, Vermont and Washington have enacted similar legislation in the form of a “waiver of rights,” with more states such as Arizona, Louisiana, Massachusetts, South Carolina, and Virginia, considering similar legislation. New Jersey most recently passed a law that voids “any provision in any employment contract that waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment.” Further, bipartisan federal legislation is being considered that would prohibit arbitration agreements regarding sexual discrimination and harassment claims.
- vi. See EEOC final FY18 data: <https://www.eeoc.gov/eeoc/newsroom/release/4-10-19.cfm>
- vii. See EEOC data: www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm
- viii. https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm

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Those states where insurability is unsettled or restricted are where the majority of U.S. economic activity occurs and where, according to some data, nearly all of the punitive damage awards are made.

Executive Summary

What are punitive damages?

How frequently are they awarded?

Where are punitive damages insurable and what types of insurance products are available?

This paper addresses these questions and finds:

1) Availability of Punitive Damage:

While the U.S. Supreme Court has suggested that the maximum allowable punitive-to-compensatory award ratio is 4:1, state courts have nonetheless applied those guidelines to uphold ratios of 16:1;

2) Insurability of Punitive Damages:

Those states where insurability is unsettled or restricted are where the majority of U.S. economic activity occurs and where, according to some data, nearly all of the punitive damage awards are made;

3) Prevalence of Punitive Damage Awards:

New data shows the increasing prevalence of punitive damage awards, and

4) Insurance Products for Punitive Damages:

There are pros and cons to the insurance products designed to cover punitive liability.

1) Availability of Punitive Damages

What Are Punitive Damages

Compensatory damages “compensate the injured party for the injury sustained, and nothing more.”¹ For example, if a defendant collides into Pedestrian Plaintiff causing \$500 in medical bills and \$500 worth of lost wages, the compensatory award would be \$1,000. Punitive damages are intended to punish the defendant (not compensate the plaintiff) and the objective measures that dictate the amount of compensatory awards (i.e. actual medical costs, lost wages, etc.) are therefore absent from any punitive damage assessment.

Availability: State Law

In three states (Michigan, Nebraska and Washington), punitive damages are not available. In 27 other states, the punitive damage dollar amount or the punitive-to-compensatory ratio is capped (typically to ratios of 2:1 or 3:1). The circumstances which trigger punitives and their quanta are issues within the authority of the judges and juries trying the cases as well as the appellate courts reviewing those trial court decisions.²

Availability: State vs. Federal Case Law

Although several U.S. federal statutes authorize damage awards beyond compensatories,³ punitive damages generally arise from common law tort litigated in state courts.

The states’ imposition of punitive damages, however, must be consistent with federal Constitutional principles of due process.

In several decisions over recent decades, the U.S. Supreme Court has given guidance as to circumstances that justify punitive awards as well as the allowable amount. Although there is no bright line rule, the Supreme Court's decisions suggest an upper limit for punitive damages based on a 4:1 punitive-to-compensatory ratio. In cases where compensatory damages were substantial, the ratio should be closer to 1:1.⁴

Despite this upper limit 4:1 ratio guidance, there are nonetheless examples of state Supreme Courts affirming punitive awards far in excess of a 4:1 ratio. For instance, in *Johnson v. Ford Motor Co.*, 35 Cal.4th 1191 (2005), the California Supreme Court concluded that it was wrong for the mid-level appellate court to reduce a \$10 million punitive damage award issued alongside a \$17,811 compensatory award.

California's highest court concluded that the circumstances (a multinational manufacturer making millions of dollars in profit for alleged wrongful conduct) might justify a disproportionately large punitive award according to the factors established by the U.S. Supreme Court. And in 2011, the California Supreme Court applied the Supreme Court's factors to uphold a 16:1 punitive damage award in *Bullock v. Phillip Morris*, 198 Cal.App 4th, 543 (2011) (reprehensibility of cigarette company's conduct warranted a \$16 million punitive award alongside a \$850,000 compensatory award.).

To remain abreast of the U.S. legal landscape around punitive damages, it is important to continue to watch the decisions from the various states.

2) Insurability of Punitive Damages

Can punitive damages be paid by a defendant's insurance? The answer varies from state to state. Approximately 23 states generally permit insurability. Three states (Ohio, West Virginia and Utah) appear to prohibit insurability. For the remaining 20+ states, the answer varies and is largely dependent upon whether punitive damages were assessed against the defendant directly or vicariously. At least 20 states preclude insurability of directly assessed punitive damages.⁵

Insurability by GDP

The 20 or so states that restrict insurability are the big industrial states such as New York, California, Illinois, Pennsylvania and Florida. Those 20 states constitute approximately 56% of the U.S. gross domestic product.⁶ That figure edges up to 60% if the three states which do not award punitive damages, (Michigan, Nebraska and Washington) are discounted from the equation. If Texas (which represents 8.3% of U.S. GDP and where insurability is not settled) were to side with the 20 restrictive states, then over two-thirds of U.S. GDP could be said to occur in jurisdictions which, in some way, restrict insurability.

Only 3% of punitive damage awards occur in jurisdictions where insurability is not restricted.

GDP of states which restrict insurability		
GDP by U.S. State	% of 2010 U.S. GDP	Insurability Restricted
1. California	13.06	Yes
2. Colorado	1.77	Yes
3. Connecticut	1.63	Yes
4. Florida	5.14	Yes
5. Illinois	4.48	Yes
6. Kansas	.87	Yes
7. Maine	.35	Yes
8. Massachusetts	2.60	Yes
9. Minnesota	1.86	Yes
10. Missouri	1.68	Yes
11. New Jersey	3.35	Yes
12. New York	7.97	Yes
13. Ohio	3.28	Yes
14. Oklahoma	1.01	Yes
15. Pennsylvania	3.91	Yes
16. Rhode Island	.34	Yes
17. Utah	.79	Yes
18. South Dakota*	.27	Law is uncertain but probably yes
19. North Dakota+	.24	Law is uncertain but probably yes
20. Indiana**	1.89	Law is uncertain but probably yes
GDP Total	56.49	
Texas***	8.30	Law is uncertain
Total with Texas	64.79	



Insurability by Locale of Awards

Data from a U.S. Department of Justice study which analyzed the quanta of punitive damage awards in 2001 in the nation’s most populous counties7 suggests a large portion of punitive damages awards occur in jurisdictions which have some restriction on insurability.

If the undecided states are discounted from the equation, the study’s data shows that over 93% of the dollars awarded as punitive damages were awarded in states that, in some manner, restrict insurability. If Texas were to restrict insurability, then 97% of the studied awards were granted in restricted states.

That particular study is only a snapshot of awards in 2001 in 45 counties within 21 states but it is nonetheless informative. The takeaway appears to be that while there is a plurality of states which do not restrict insurability, that may be of cold comfort given that most of the economic activity and most of the punitive awards happen in states which restrict, in some manner, insurability.

Punitive Damage Awards by Insurability

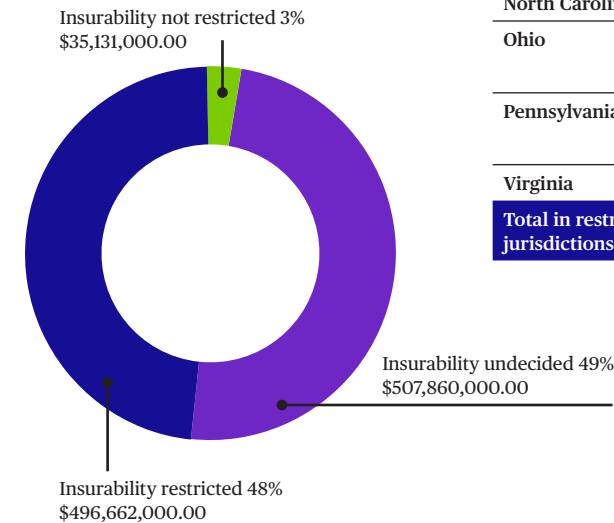


Table 2: 2001 Punitive Damage Awards in 45 Counties Colour Coded for Insurability

Awards in Insurability Restricted Jurisdictions		
State	County	Total \$ puni award
California	Alameda	4,451,000
	Contra Costa	25,000
	Fresno	183,000
	LA	2,179,0000
	Orange	26,149,000
	San Bernardino	3,032,000
	San Francisco	263,000
	Santa Clara	780,000
	Ventura	105,000
Connecticut	Fairfield	0
	Hartford	629,000
Florida	Dade	280,450,000
	Orange	300,000
	Palm Beach	5,000,000
Illinois	Cook	188,000
Indiana	Du Page	150,000
	Marion	510,000
Massachusetts	Essex	0
	Middlesex	25,000
	Suffolk	2,750,000
	Worcester	18,000
Missouri	St. Louis	203,000
New Jersey	Bergen	370,000
	Essex	2,000
	Middlesex	555,000
New York	New York	7,850,000
North Carolina	Mecklenburg	518,000
	Cuyahoga	1,772,000
Ohio	Franklin	4,661,000
	Allegheny	3,051,000
Pennsylvania	Philadelphia	149,141,000
	Fairfax	1,352,000
Virginia		
Total in restricted jurisdictions		\$496,662,000

Awards in Insurability Undecided Jurisdictions		
State	County	Total \$ puni award
Michigan (punis not available)	Oakland	0
	Wayne	0
Texas	Bexar	77,062,000
	Dallas	393,296,000
	El Paso	1,667,000
	Harris	35,701,000
	King	134,000
Total in insurability undecided		\$507,860,000

Awards in No Restriction Jurisdictions		
State	County	Total \$ puni award
Arizona	Maricopa	31,940,000
	Prima	41,0000
Georgia	Fulton	446,000
Hawaii	Honolulu	2,501,000
Kentucky	Jefferson	100,000
Wisconsin	Milwaukee	103,000
Total in insurability undecided		\$35,131,000
Total in restriction jurisdictions		\$496,662,000
Total in insurability undecided		\$507,860,000
Total in no restriction jurisdictions		\$35,131,000
Total Awards (45 counties)		\$1,039,653,000

Excluding undecideds, 93.2% of dollars were awarded in restricted jurisdictions. If Texas decides to restrict, 97% would be awarded in restricted jurisdictions

Recent analysis suggests that punitive damage awards are considerably more prevalent than previously thought.

3) Prevalence of Punitive Damage Awards

Older research has reported that a small percentage of civil litigation is resolved by trial and even a smaller percentage of those trials award punitive damages.⁸ However, more recent analysis suggests that punitive damage awards are considerably more prevalent than previously thought.

The statistical methodology is beyond the scope of this paper, but essentially, the older research measured all cases filed in a studied jurisdiction and compared that figure to cases resulting in punitive damages. Such analyses yielded a small percentage of cases actually resulting in punitive awards.

However, the newer research eliminates cases which were abandoned, disposed of before trial and/or which never actually sought punitive damages.⁹ The results show that for those plaintiffs who win at trial and seek punitive damages, their success rate is quite high. Notably, a 2010 report from Cornell Law School found:

- In all cases where the plaintiff sought punitive damages and won at trial, punitive damages were awarded in 35.5% of the studied cases
- In EPL cases where the plaintiff sought punitive damages and won at trial, punitive damages were awarded in 38.5% of the studied cases
- In cases where compensatory damages were between \$1 million and \$10 million and plaintiff sought punitive damages, punitive damages were awarded in 53% of the studied cases
- In cases where compensatory damages were greater than \$10 million and plaintiff sought punitive damages, punitive damages were awarded in 82% of the studied cases

The following tables show selected data from the Cornell study.

Table 3: By State

The four states selected for Table 3 were those in the Cornell study with the largest number of trials in the “All Trials” column. (See Cornell study Table 5). In California, for example, punitives were sought in 21% of all trials and sought in 23.4% of trials won by plaintiffs. And in those trials won by the plaintiff and where punitives were sought, punitive damages were awarded in 33.8% of the studied cases in California.

By State	All Trials		Plaintiff Won Trial		Plaintiff Won and puni sought	
Table 3	% punis sought	Number	% punis sought	Number	% with puni award	Number
California*	21.0%	1263	23.4%	636	33.8%	148
Illinois*	2.9%	756	4.1%	418	47.1%	17
Penn.*	3.6%	853	4.4%	480	31.6%	19
Texas	6.5%	909	8.8%	444	56.4%	39
* jurisdictions which restrict insurability						

Table 4: By County

The four counties selected for Table 4 were those from the Cornell study with the largest number of trials in the far right column, 'Plaintiff Won and Punitives Sought'.

So, in Franklin County, Ohio, when a plaintiff won at trial and sought punitives, punitive damages were awarded in 44.4% of the studied cases. See Cornell study Table 4.

By County	All Trials		Plaintiff Won Trial		Plaintiff Won and puni sought	
<i>Table 4</i>	% punis sought	Number	% punis sought	Number	% with puni award	Number
L.A. (CA)*	27.2%	379	32.3%	186	28.8%	59
Franklin (OH)*	29.8%	131	20.4%	93	44.4%	18
Orange (CA).*	19.5%	272	24.8%	129	31.3%	32
Fairfax (VA)*	20.9%	163	22.8%	101	43.5%	23
* jurisdictions which restrict insurability						

Table 5: By Type of Claim

The selected data shows that in cases classified as "Medical/Dental Malpractice," where plaintiff won at trial and sought punitives, punitive damages were awarded in 30.8% of the studied cases. See Cornell study Table 3.

By Type of Claim	All Trials		Plaintiff Won Trial		Plaintiff Won and puni sought	
<i>Table 5</i>	% punis sought	Number	% punis sought	Number	% with puni award	Number
Employment Discrimination	32.8%	131	41.3%	63	25.0%	24
Intentional Tort	23.6%	259	32.0%	128	65.8%	38
Negligence/Tort Other	9.9%	202	10.6%	104	36.4%	11
Employment Other	25.7%	183	26.0%	100	38.5%	26
Medical/Dental Malpractice	5.9%	972	7.4%	203	30.8%	13



4) Insurance Products for Punitive Damages

There are two basic options for those seeking punitive damages cover:

1. A “most favored jurisdiction/venue clause (“MFJ”) (usually in the form of an endorsement to a domestic policy), or
2. A punitive damage wrap policy typically issued by a Bermuda insurer (commonly referred to as “puni wrap” or “Bermuda Wrap”).

MFJs:

Because of the restrictions on insuring punitive damages, domestic liability insurers oftentimes cannot make an affirmative coverage grant to insure punitive damages. MFJs are domestic insurers’ attempt to nonetheless provide that cover. MFJ clauses are choice of law clauses triggered when the applicable governing jurisdiction prohibits insuring punitive damages.

MFJs gives an insured-insurer option to choose the law of where:

- (1) punitive damages were awarded,
- (2) underlying acts occurred,
- (3) insured is incorporated, or
- (4) insured has principal place of business.

In effect, MFJs say that if punitive liability arises in a jurisdiction which precludes insuring punitive damages, then the insured and the insurer will try to find a way to apply the law of a jurisdiction which does allow for such insurance.

The general rule in U.S. jurisdictions is that contracting parties are free to enforce choice of law provisions as they desire,

provided that (1) the parties have a connection to the selected jurisdiction, and/or (2) applying the law of the selected jurisdiction would not offend the public policy of the forum state. Restatement (Second) of Conflict of Laws § 187 (1971).

It should come as no surprise that there has been commentary and indication from regulators that MFJs are not enforceable because they offend public policy. Public policy is a very powerful doctrine. It can be applied to invalidate otherwise enforceable, arms-length contracts. The conclusion that MFJs should not be enforceable seems intuitive in light of the law of choice of law. Enforcing an MFJ would nullify the very public policy restriction that prevents the insurance from responding in the first instance. Careful attention should be given to the regulatory landscape because regulatory directives have serious consequences for insureds as well as insurance professionals involved in a risk deemed to violate public policy.

Wraps:

Wraps are separate, stand-alone policies procured and issued entirely outside of the United States. The wrap contract is not subject to the regulatory and public policy restrictions that may hinder a domestic policy from indemnifying an insured for punitive damages via an MFJ endorsement. Wraps provide certainty of coverage for punitive damages liability.

Puni wraps are most commonly utilized on casualty programs or employment liability programs. Payment under a wrap is triggered when loss is covered under the domestic policy and the punitive damages judgment cannot be paid because the jurisdiction prohibits indemnification for punitive damages.

Wraps are only triggered by final, trial judgements. Wraps have a “shared limit,” with payment for compensatory damage under the domestic policy eroding the limit of liability under the wrap. Wrap policies are generally indemnity only, with no coverage for defense.



References

1. Black's Law Dictionary, Prosser and Keeton, 1990 6th Ed.
2. Procedure will vary from court to court, but in general, punitive damages are imposed by judges (in bench trials) or juries (in general trials) in a mini trial after the main trial has found the defendant liable. In some instances, there can be as many as three separate mini trials: one for liability, a second for compensatory damages and a third for punitive damages.
3. For example: civil Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961 *et seq.* (RICO) authorizes treble damages, and the Civil Rights Act, 42 U.S.C. §1981a allows the imposition of punitive damages under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990 and the federal employment section of the Rehabilitation Act of 1973.
4. *BMW, Inc. v. Gore*, 517 U.S. 559 (1996) (\$4 million punitive award alongside a \$4,000 compensatory violated due process); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (\$145 million punitive award issued alongside a \$1 million compensatory award violated due process); *Phillip Morris v. Williams*, 549 U.S. 346 (2007) (reversing a punitive award because the jury lacked authority to punish Phillip Morris for harm allegedly caused to people who were not plaintiffs); *In Exxon Shipping Co v. Baker*, 128 S. Ct 2605 (2008) (punitives against Exxon for the Valdez oil spill should be limited to 1:1 according to federal maritime law).
5. Direct liability is when Defendant is assessed punitive damages for its own conduct. Vicarious liability is when Defendant is assessed punitive damages for the conduct of another, such as an employee. It should be noted that categorization of the states' laws cannot always be precise as conclusions as to the law will vary from scholar to scholar.
6. Source: Bureau of Economic Analysis, GDP by state (Current Dollars) for 2010. www.bea.gov
7. Bureau of Justice Statistics. 2005. Civil Justice Survey of State Courts, 2001: Punitive Damage Awards in Large Counties, 2001. Washington, D.C.: Department of Justice.
8. See e.g. Bureau of Justice Statistics. 2008. Special Report: Civil Justice Survey of State Courts, 2005: Civil Bench and Jury Trials in States Courts, 2005. Washington, D.C.: Department of Justice.
9. See e.g. Neil Vidmar and Mirya R. Holman, Duke University. The Frequency, Predictability and Proportionality of Jury Awards of Punitive Damages in State Courts, A New Audit. See also Eisenberg, Theodore: "The decision to Award Punitive Damages: An Empirical Study" (2010). Cornell Law Faculty Publications. Paper 185.

Table 1 References

- * *Dairyland Ins. Co. v. Nryant*, 474 N.W.2d 514 (S.D. 1991) (suggesting in dicta that punitive damages are not insurable in South Dakota). See Wilson Elser Punitive Damages Review, 2014 Edition.
- ± No specific case or statute but there is statute precludes contracts from exempting one's willful, fraudulent or negligent conduct. N.D. Cent. Code §9-08-02.
- ** According to the Wilson Elser Punitive Damages Review, 2014 Edition, the Indiana Supreme Court has not opined on insurability of punitive damages but a federal court has ruled that insuring punitive liability is against Indiana public policy. See *Executive Builders, Inc. v. Motorists Ins. Co.*, No. IP00-0018-C-T/G, 2001 WL 548391, *5 (S.D. Ind. 2001) (citing *Grant v. N. River Ins. Co.*, 453 F. Supp. 1361, 1370- 71 (N .D. Ind. 1978).
- *** According to the Wilson Elser Punitive Damages Review, 2014 Edition, the Texas Supreme Court has ruled that public policy generally does not prohibit insuring punitive damages but a prohibition may be appropriate in "extreme circumstances." See *Fairfield Ins. Co. v. Stephens Martin Paving*, 246 S.W.3d 653, 670 (Tex. 2008).

About the Author

Richard Porter is General Counsel and Corporate Secretary of Chubb Bermuda. He is responsible for the company's legal department and has oversight of all legal affairs within Chubb Bermuda's subsidiaries in Bermuda and affiliates in Dublin.

Notes



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