1994

Liability Insurance Coverage for Punitive Damages - Discerning Answers to the Conundrum Created by Disputes Involving Conflicting Public Policies, Pragmatic Considerations and Political Actions

Alan I. Widiss

Follow this and additional works at: http://digitalcommons.law.villanova.edu/vlr
Part of the Legal Remedies Commons

Recommended Citation
Available at: http://digitalcommons.law.villanova.edu/vlr/vol39/iss2/6

This Symposia is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository. For more information, please contact Benjamin.Carlson@law.villanova.edu.
LIABILITY INSURANCE COVERAGE FOR PUNITIVE DAMAGES? DISCERNING ANSWERS TO THE CONUNDRUM CREATED BY DISPUTES INVOLVING CONFLICTING PUBLIC POLICIES, PRAGMATIC CONSIDERATIONS AND POLITICAL ACTIONS

ALAN I. WIDISS*

TABLE OF CONTENTS

I. INTRODUCTION ........................................ 456
II. LIMITATIONS ON COVERAGE FOR PUNITIVE DAMAGES .... 460
   A. Express and Implied Restrictions on Coverage for Intentional Acts ................................. 460
   2. Implied Exceptions Excluding Liability Insurance Coverage for Intentional Acts .................... 463
   B. Insurance Policy Provisions That Preclude Coverage for Punitive Damages ............................. 464
   C. Legislatively Imposed Restrictions on Coverage for Punitive Damages ................................ 465
   D. Judicially Implied Restrictions on Coverage for Punitive Damages ..................................... 465
III. COVERAGE FOR PUNITIVE DAMAGES ..................... 469
   A. Judicial Precedent Sustaining Coverage for Punitive Damages ........................................... 469
       1. Interpreting the Coverage Terms ........................................... 474
       2. Construing Ambiguity Against the Insurer ......... 475
       3. Protecting the Insured's Reasonable Expectations 476
       4. Maximizing Indemnification for the Injured Person ......................................................... 477
       5. Coverage for Punitive Damages Awarded When the Tortious Conduct Was Wanton or Reckless 478
       6. Extending Coverage to Insureds Who Are Vicariously Liable for Punitive Damages 480

* Josephine Witte Distinguished Professor of Law, University of Iowa College of Law. T.J. Pattermann, Alan Porter and Marcy O'Brien contributed very significantly to the research for this article. Kimball Smith, as he has in the past, made an absolutely essential contribution in transforming the drafts of material into the manuscript.

(455)
During the twentieth century, acquisition of liability insurance expanded rapidly so that today it is one of the most common

1. Agreements that transfer risks incident to various types of tort claims by third parties are a relatively new form of insurance contract. For example, liability insurance for business firms was introduced in the United States around 1890. At that time, employers sought to arrange indemnification for tort claims asserted by injured employees. See S.S. Huebner et al., Property and Liability Insurance 353 (3d ed. 1982) (discussing introduction of liability insurance in United States); see also Albert H. Mowbray et al., Insurance 232-34 (6th ed. 1969) (discussing introduction of liability insurance in England). Liability insurance for motorists became available as use of automobiles rapidly expanded in the early years of the twentieth century. In general, the acquisition of various types of liability coverage has accompanied urbanization and increasing levels of commercial activity in the United States.

2. Liability insurance is a contractual arrangement obligating an insurer to provide indemnification for sums that an insured may become legally obligated to pay to a third party as damages resulting from a type of occurrence that is among the risks identified in the terms of the contract. In liability insurance policies, an
forms of coverage in the United States. Billions of dollars are spent by businesses and individuals to purchase coverage for risks incident to the use or ownership of property, the operation of motor vehicles, and the pursuit of various business and professional activities. Similarly, enterprises throughout the country acquire liability insurance to transfer at least some portion of the risks associated with the fabrication, distribution and use of manufactured or processed products in order to secure protection for insureds in the event tort claims are asserted as a result of defective products that have caused injuries.

Every year, thousands of legal actions for damages are initiated against entities or individuals covered by liability insurance. Sometimes law suits asserting tort claims against insureds result in awards of punitive damages, as well as compensatory damages. Such "occurrence" is typically described or defined as an accident that causes injury to the person or property of a third party. In some insurance policies, the term "occurrence" is characterized as "an act or an omission."

3. The breadth and diversity of various types of liability insurance are indicated by an abridged list of coverage types currently available, which include: (1) accountants' liability; (2) advertising liability; (3) architects' liability; (4) comprehensive general liability; (5) contractors' liability; (6) contractual liability exposure; (7) dentists' professional liability; (8) fiduciary liability; (9) hospital liability; (10) homeowners' liability; (11) lawyers' professional liability; (12) liquor liability; (13) physicians' and surgeons' professional liability; (14) pollution liability; (15) store keepers' liability; and (16) products liability.

4. Punitive damages are also frequently referred to as exemplary damages. In the United States, courts may award punitive damages when the tortious conduct was intentional, malicious, reckless, wanton or particularly oppressive. Judges use phrases such as a "wanton disregard of the consequences," "outrageous behavior" and "wilful neglect" to describe the types of circumstances that justify an award of punitive damages. See 7 JOHN A. APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE § 4312 (Buckley ed. 1979) (discussing appropriateness of punitive damages when tortfeasor is guilty of wilful and wanton conduct); JAMES D. GHARDI & JOHN J. KIRCHER, PUNITIVE DAMAGES: LAW AND PRACTICE § 1.01 (1985) (discussing cases where courts have awarded punitive damages).

Ancient legal codes provided for punitive damages. For example, section 107 of the Code of Hammurabi states:

If the principal has overcharged the agent and the agent has really returned to his principal whatever his principal gave him, and if the principal has disputed what the agent has given him, that agent shall put his principal on oath before the elders, and the merchant, because he has defrauded the agent, shall pay to the agent sixfold what he misappropriated.


5. In 1882, the Florida Supreme Court distinguished between compensatory and punitive damages:

Compensatory damages are as such as arise from actual and indirect pecuniary loss, mental suffering, value of time, actual expenses, and to those may be added bodily pain and suffering. Exemplary, vindictive, or punitive damages are such as blend together the interests of society and of the
awards have produced disputes concerning whether liability insurance indemnifies insureds for such damages.\textsuperscript{6}

There are hundreds of judicial decisions each year resolving disagreements between insurers and insureds concerning the scope of coverage provided by insurance arrangements involving many different types of insurance policies and coverage issues. Frequently, courts decide questions about an insurer’s obligation in accordance with doctrines or rules that result in interpreting policy terms to extend coverage.\textsuperscript{7} However, when coverage issues involve punitive damages, there are conflicting public interests involved,\textsuperscript{8} including some that offset the general disposition of courts to apply an approach that sustains an insured’s claim.\textsuperscript{9}

aggrieved individual, and are not only a recompense to the sufferer but a punishment to the offender and an example to the community. Smith v. Bagwell, 19 Fla. 117, 121 (1882); see also Kress & Co. v. Powell, 180 So. 757, 763 (Fla. 1938) (quoting with approval, Smith v. Bagwell, 19 Fla. 117, 121 (1882)).


Medical Mutual, in advancing its “public policy” argument, seems to ignore the proposition that the concept of “public policy” involves not one simplistic rule, but various competing doctrines. \textit{In this case, the law of contracts and the “public policy” doctrines encompassing that body of law, compete with the defendant’s tort related “public policy” argument.}

\textit{Id.} (emphasis added). Similarly, in Stonewall Surplus Lines Ins. Co. v. Johnson Controls, Inc., the court, after noting that “the Wisconsin Supreme Court found that public policy did not prevent indemnity for punitive damages,” observed:

This state has more than one public policy. Another and countervailing public policy favors freedom of contract, in the absence of overriding reasons for depriving the parties of that freedom. Still another public policy favors the enforcement of insurance contracts according to their terms, where the insurance company accepts the premium and reasonably represents or implies that coverage is provided.

17 Cal. Rptr. 2d 713, 717 (Ct. App. 1993).

9. For example, the authors of one of the encyclopedias on insurance law set forth the view: “The better position is that, absent specific language in the policy
Litigation about the insurability of punitive damages has occurred for most of this century so that there is now a substantial body of judicial precedents. More recently, several states have adopted legislation that addresses this issue.\(^{10}\) In addition, some insurers include provisions in liability insurance policies that explicitly specify whether coverage is or is not provided for punitive damages. Therefore, today, in determining an insured’s right to indemnification when punitive damages are awarded to a claimant, it is essential to consider:

1. whether coverage afforded by an otherwise applicable liability insurance policy is precluded because the award is the result of injuries that were caused by an insured’s \textit{intentional tortious act} and the insured’s right to indemnification is excluded by either an explicit provision in the insurance policy or an implied exception that has been recognized by the courts;

2. whether there is a provision in the otherwise applicable insurance policy which explicitly excludes coverage for punitive damages;

3. whether a court will impose a coverage restriction based on public policy that precludes coverage for punitive damages either generally or for some specific situations;

4. whether state legislation imposes a restriction on coverage for punitive damages generally or for specific situations;

5. the type of conduct (an intentional act, gross negligence, reckless/wanton, or outrageous conduct, etc.) that provided the basis for an award of punitive damages; and

6. whether liability resulted from an action of the insured that directly caused the injuries or is derivative extending coverage for punitive damages, no coverage exists for such damages as it is against public policy to allow the insured wrongdoer to shift the burden of payment of punitives to its insurer." \footnote{GEORGE J. COUCH, COUCH CYCLOPEDIA OF INSURANCE LAW \S 56:9 (Mark S. Rhodes ed., 2d ed. 1985).}

\(^{10}\) Consequently, issues concerning whether insurance companies may provide coverage for punitive damages may be determined by: (1) legislation that enunciates the state’s public policy, establishing prohibitions or prescribing restrictive parameters; (2) judicial opinions concerning the relative importance of various public interests or (3) provisions in the applicable insurance policy. For a discussion of legislation and cases that specify the public policies of various states, see \textit{infra} notes 29-32 and accompanying text.
(as, for example, when a claim against the insured is based on vicarious liability).

Each of these possibilities is examined in Part II or Part III of this Article, which surveys judicial and legislative responses to disputes about whether punitive damages are insurable. In Part IV, the focus shifts to an analysis of actions by some state legislators and insurers to exclude coverage for punitive damages. The material in Parts II and III also provides the framework for an Addendum that analyzes the justifications for allowing liability insurance to provide coverage for punitive damages when a claimant's injuries result from defective products.

II. LIMITATIONS ON COVERAGE FOR PUNITIVE DAMAGES

A. Express and Implied Restrictions on Coverage for Intentional Acts

Insurance contracts generally do not provide indemnification when an occurrence is not fortuitous. This proposition is widely viewed as a fundamental principle of insurance. Even though it is not an immutable rule that liability insurance does not

11. Virtually all insurance arrangements are subject to some restrictions on the risks that are transferred from the insured to the insurer. Insurance policies often specify limitations in qualifying phrases or clauses included in the basic coverage statements. In addition, insurance policies often contain restrictions that appear under headings such as "conditions," "definitions," "exclusions" or "exceptions." Further, other restrictions commonly apply to insurance coverage as a result of legislative actions or judicial decisions. For a discussion of restrictions on insurance coverage imposed by legislative and judicial action, see infra notes 27-32 and accompanying text.

12. Insurance coverage terms and conditions are usually set forth in a document referred to as an "insurance policy."

13. Fortuity, or the lack thereof, is primarily a matter of intent. Accordingly, it is important to remember that in insurance law, as in tort law, questions about intent generally focus on consequences, not acts. Keeton & Widiss, supra note 7, § 5.3(a), at 116.

14. The principle that insurance should only be employed to transfer risks associated with fortuitous occurrences means that in most circumstances liability coverage does not apply when injuries are the result of an intentional tortious act.
LIABILITY INSURANCE COVERAGE

afford indemnification when damages result from an intentional tortious act,\(^{15}\) in most circumstances it is contrary to public policy for a liability insurance contract to provide coverage when losses are not fortuitous.\(^{16}\) Accordingly, coverage for punitive damages awarded against insureds who have intentionally caused injuries may be foreclosed by either express provisions in the insurance contract\(^{17}\) or implied\(^{18}\) restrictions that are imposed by courts.

1. **Express Provisions Excluding Coverage for Intentional Acts of an Insured**

Insurance policies usually set forth terms specifying that coverage is not provided for intentionally caused harms in one or more of several types of provisions that are included in such contract forms. Frequently, there is a clause in the basic description of the coverage stating that the insurer will only pay damages for which an insured (or, in many of the newer forms, a "covered person") becomes legally responsible because of an accident.\(^{19}\) Insurers also em-

---

15. The proposition that insurance arrangements should be limited to the transfer of economic detriments that are fortuitous is commonly regarded as a basic principle of insurance law. However, there are situations in which insurance companies pay benefits even though the loss resulted from an intentional act. KEE- TON & WIDISS, supra note 7, § 5.4(d)(7), at 116 (discussing professional liability coverage for intentional acts).

16. See, e.g., Ranger Ins. Co. v. Bal Harbor Club, 549 So. 2d 1005, 1007 (Fla. 1989) ("It is axiomatic in the insurance industry that one should not be able to insure against one's own intentional misconduct."); see also RICHARDS ON THE LAW OF INSURANCE § 1.13 (Warren Freedman ed., 6th ed. 1990) ("It is universally recognized that an implied exception to coverage under any form of insurance is an intentional or expected injury, damage or loss. Insurance, by its very definition, covers injury, damage or loss which is fortuitous and not within the control of the insurer or the insured."); COUCH, supra note 9, § 39.15 ("It is generally held to be contrary to public policy to insure against liability arising directly against the insured form his wilful wrong. Any insurance which purports to protect the insured against any loss which he may purposely and willfully cause, or which may arise from his immoral, fraudulent, or felonious conduct, is void as against public policy.").

17. Liability insurance policies usually include explicit coverage limitations in the insurance contract specifying that losses that are intentionally caused by an insured are not covered. See COUCH, supra note 9, § 39.15 ("Any insurance which purports to protect the insured against any loss which he may purposely and willfully cause, or which may arise from his immoral, fraudulent, or felonious conduct, is void as against public policy."). For a complete discussion of these provisions, see infra notes 19-22 and accompanying text.

18. Even when there is no express provision, coverage may be excluded by a judicially recognized implied exception when an insured commits an intentional tort. For a complete discussion of this issue, see infra notes 23-26 and accompanying text.

ploy provisions defining various terms in insurance policies to specify that coverage is not provided for intentional torts. For example, many contemporary liability insurance policies state that coverage is provided for an “occurrence” that “results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.”20 Furthermore, liability insurance policies frequently include exclusions that explicitly preclude coverage for an “injury . . . caused intentionally.”21 Such provisions are in accord with the doctrine, frequently reiterated by judges, that public policy prohibits the use of insurance to provide indemnification for civil tort liability that results from an insured’s intentional wrongdoing. If an insured’s intentional tortious conduct warrants a denial of coverage on the basis of explicit provisions in liability insurance policies, it follows that coverage for punitive damages awarded as a consequence of such acts also is not within the scope of the protection afforded by liability insurance.22

20. Many contemporary insurance policies provide coverage that is neither expected nor “intended from the standpoint of the insured.” The insurance industry began using this phrase in policies providing general liability coverage for liability in 1966, after completing revisions to insurance forms that the industry had used since 1940. See Millard Warehouse, Inc. v. Hartford Fire Ins. Co., 283 N.W.2d 56, 61 (Neb. 1979) (interpreting insurance policy that limited coverage to accidents “neither expected nor intended from the standpoint of the insured”); see also Donald F. FARBSTEIN & Francis J. SILLMAN, INSURANCE FOR THE COMMISSION OF INTENTIONAL TORTS, 20 HASTINGS L.J. 1219, 1222-28 (1969) (discussing “intentional injury exclusion”); Linda J. Kibler, Note, INTENTIONAL INJURY EXCLUSIONARY CLAUSES: THE QUESTION OF AMBIGUITY, 21 VAL. U. L. REV. 361, 377 (1987) (noting that “the purpose of the intentional injury exclusion clause is to prevent extending to the insured a license to commit wanton and malicious acts”). Prior to 1966, most insurance contracts used similar language that provided an “exclusion” for “bodily injury or property damage caused intentionally by or at the direction of the insured.” PATRONS-OXFORD MUT. INS. CO. v. DODGE 426 A.2d 888, 890 (Me. 1988) (interpreting pre-1966 insurance policy).

21. Cf. Crull v. Gleb, 382 S.W.2d 17, 23 (Mo. Ct. App. 1964) (“[I]t seems only just that the burden of paying punitive damages should rest ultimately, as well as nominally, on the party who actually committed the wrong. If the defendant . . . was permitted to shift . . . the burden of the punitive damage award, then the award would have served no purpose.”).
2. **Implied Exceptions Excluding Liability Insurance Coverage for Intentional Acts**

Even if there is no provision in a liability insurance policy that expressly excludes coverage for damages resulting from an insured's intentional act, an implied exception may exclude such coverage. The phrase "implied exception" describes the situation in which an insurer's denial of insurance coverage is not based on any specific language in the insurance contract. The public interest in discouraging intentional misconduct is sufficiently important that some courts have implied coverage restrictions when a tort is committed.

23. Examples of other implied exceptions that are widely recognized for insurance coverage include the rules that sustain denials of recovery under fire insurance for losses caused by "friendly fires" and under marine insurance for losses caused by ordinary deterioration of goods. See Keeton & Widiss, supra note 7, § 5.3, at 115. The concept of fortuity that is relevant to an application of an implied exception—when there is no express limitation set forth in the applicable insurance policy—almost always involves an analysis of whether an individual intended the consequences that resulted in a claim for insurance coverage.

24. A survey of selected states provides insights into such coverage restrictions:

- **Alabama**: St. Paul Ins. Co. v. Talladega Nursing Home, Inc., 606 F.2d 631, 632 (5th Cir. 1979) (following Alabama law and holding that "all contracts insuring against loss from intentional wrongs are void as against public policy").

- **California**: Section 533 of the California Insurance Code provides: "An insurer is not liable for a loss caused by the wilful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others." CAL. INS. CODE § 533 (West 1993). Courts have interpreted this section as precluding insurance coverage for punitive damages and finding an implied exclusionary clause that should be read into all insurance policies. See, e.g., United States Fidelity & Guar. v. American Employers' Ins. Co., 205 Cal. Rptr. 460, 464 (Ct. App. 1984) (noting that California Insurance Code section 533 reflects "longstanding public policy ... which disapproves of contracts which directly or indirectly exempt anyone from personal responsibility for his [or her] own wilful injury to another") (quotations omitted); City Prod. Corp. v. Globe Indem. Co., 151 Cal. Rptr. 494, 496-501 (Ct. App. 1979) (concluding that recovery of punitive damages under a general liability policy for malicious act of corporate official was prohibited by California Insurance Code section 533). The court in City Products Corp. v. Globe Indemnity Co. stated that the policy of the State of California is "that punitive damages may be recovered only 'for the sake of example and by way of punishing the defendant' and thereby precluding passing them on to an insurer." City Products, 151 Cal. Rptr. at 496 (quotations omitted).

- **District of Columbia**: Hartford Life Ins. Co. v. Title Guar. Co., 520 F.2d 1170, 1175 (D.C. Cir. 1975) (stating that it is against public policy for "knowledgeable and intentional wrongdoer" to insure against his or her actions).

- **Florida**: Ranger Ins. Co. v. Bal Harbor Club, Inc., 549 So. 2d 1005, 1007 (Fla. 1989) (stating that it is "axiomatic" within insurance industry that one should not be able to insure against one's intentional misconduct).

- **Kansas**: American Sur. Co. v. Gold, 375 F.2d 523, 525-27 (10th Cir. 1966) (predicting that insurance coverage for punitive damages under Kansas law would be against public policy because such coverage would permit individuals to insure themselves against wanton and willful acts).

- **North Dakota**: Haser v. Maryland Casualty Co., 53 N.W.2d 508, 512 (N.D. 1952)
tious act is not fortuitous from the point of view of the insured.25 The fact that an intentional tort usually involves one or more acts that also constitute transgressions of the criminal laws provides substantial additional support for the proposition that the protection afforded by liability insurance is appropriately subject to a judicially imposed restriction even when no exclusion is specified in the coverage terms.26 In circumstance in which judicial evaluations of the public interest would result in an implied coverage limitation for damages resulting from an intentional tort, it follows that courts would also conclude that no liability insurance coverage exists for punitive, as well as compensatory, damages.

B. Insurance Policy Provisions That Preclude Coverage for Punitive Damages

The policy forms used by some insurers for liability insurance include clauses specifying that no coverage exists for punitive damages. The applicable provisions limiting coverage are often unmistakably clear and unambiguous: "This insurance does not apply under Coverage A to . . . [p]unitive or exemplary damages or any fine, penalty or claim for return of fees."27 Courts have sustained ("[T]o indemnify insured against his own violation of the law is void against public policy.").

Ohio: Wedge Prod. v. Hartford Equity Sales Co., 509 N.E.2d 74, 76 (Ohio 1987) ("[P]ublic policy is contrary to insurance against intentional torts.").

Oregon: Isenhart v. General Casualty Co. of Am., 377 P.2d 26, 27 (Or. 1962) (noting that it is contrary to Oregon public policy to permit insurance coverage for intentional acts); see also Cunningham & Walsh, Inc. v. Atlantic Mut. Ins. Co., 744 P.2d 1317, 1318-20 (Or. Ct. App. 1987) ("[T]o provide coverage for fraud would violate public policy.").

Only a few cases have permitted an implied exception for intentional acts, in part, because of the fact that liability policies almost uniformly include express requirements that coverage is provided for injuries "caused by accident" only. In addition, the general rule that insurance coverage for intentional acts violates public policy is so firmly established that it would ordinarily go unchallenged even if there were no insurance policy clause directly in point.

25. For a discussion of the appropriate point of view for considering whether loss is fortuitous, see KEETON & WIDISS, supra note 7, § 5.4(c), at 116. Note that when a state's financial responsibility statute is viewed as mandating liability coverage for accident victims, courts have sometimes concluded that even in cases of intentional torts by motorists, the public interest is served by allowing an innocent victim of an intentional tortfeasor to recover from the tortfeasor's liability insurance. Id. § 5.4(d)(3).

26. As the New Jersey Supreme Court stated, "[w]ere a person able to insure himself against the economic consequences of wrongdoing, the deterrence attributable to financial responsibility would be missing," Ambassador Ins. Co. v. Montes, 388 A.2d 603, 606 (N.J. 1978).

27. See Continental Casualty Co. v. Kinsey, 499 N.W.2d 574, 577 (N.D. 1993) (discussing potential ambiguity of coverage provision concerning punitive damages). In other insurance policies, the terms that describe, limit or restrict the
LIABILITY INSURANCE COVERAGE

the enforceability of such provisions.28

C. Legislatively Imposed Restrictions on Coverage for Punitive Damages

One or two states have resolved some of the issues concerning whether insurance coverage extends to punitive damages by adopting legislation that prohibits such coverage. For example, in Ohio the Insurance Code provisions regulating motor vehicle insurance state: "No policy of automobile or motor vehicle insurance . . . shall provide coverage for judgments or claims against an insured for punitive or exemplary damages."29

D. Judicially Implied Restrictions on Coverage for Punitive Damages

Sometimes punitive damages are awarded in a judgment against an insured and liability coverage is not precluded by any restriction, express or implied, for intentional tortious acts nor by an explicit provision in the insurance policy excluding coverage for punitive damages. In such instances, courts have been called upon to decide whether public interest warrants the application of an implied exception eliminating coverage for punitive damages. There coverage of punitive damages often are not as explicit and unequivocal. For example, in a South Dakota case the insurance policy stated that it "promise[d] to pay damages for bodily injury or property damage for which the law holds [the insured] responsible." Dairyland Ins. Co. v. Wyant, 474 N.W.2d 514, 515 (S.D. 1991); accord Cavin's, Inc. v. Atlantic Mut. Ins. Co., 220 S.E.2d 403, 406 (N.C. Ct. App. 1975) (noting that policy provided protection for all "sums" insured was legally obligated to pay as damages).

28. See, e.g., International Ins. Co. v. Guaranty Nat'l Ins. Co., 780 F. Supp. 546, 552-53 (N.D. Ill. 1991), vacated, 994 F.2d 1280 (7th Cir. 1993). In International Insurance Co. v. Guaranty National Insurance Co., the court stated that punitive damages "are not compensation for injury." Id. The court noted instead that punitive damages are "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." Id.; see also International Bhd. of Elec. Workers v. Foust, 442 U.S. 42, 48 (1979) (noting that punitive damages are punishment, not compensation); Hartford Accident & Indem. Co. v. Hempstead, 397 N.E.2d 737, 741 (N.Y. 1979) (holding that liability insurance coverage for punitive damages awards that might be made pursuant to the Civil Rights Act of 1871 would be against public policy). Accordingly, punitive damages are not covered when a policy excludes fines. See Northwestern Nat'l Casualty Co. v. McNulty, 307 F.2d 432, 436 (5th Cir. 1962) (discussing Florida and Virginia public policy concerning coverage for punitive damages); American Home Assurance Co. v. Fish, 451 A.2d 358, 360 (N.H. 1982) (discussing whether insurance policy covered punitive damages resulting from intentional torts); see also RESTATEMENT (SECOND) OF TORTS § 908 (1977) (discussing, generally, punitive damages and criticisms of punitive damages).

is a clear split among judicial precedents about whether an otherwise applicable liability insurance policy does (or should) provide coverage for punitive damages. Arguments in support of the view that liability insurance should not provide such coverage emphasize that an award of punitive damages is primarily intended either to punish the wrongdoer or to deter similar conduct by the wrongdoer and others in the future. Therefore, to allow an insured to shift the responsibility for punitive damages to an insurer would thwart the public interests in attaining punishment and deterrence.\textsuperscript{30} Courts in many states agree with the view that persons should not be permitted to insure against harms they “intentionally and unlawfully cause others, and thereby acquire a license to engage in such activity.”\textsuperscript{31} Thus, there are numerous judicial precedents stating that liability insurance may not provide coverage for punitive damages because such coverage violates public policy.\textsuperscript{32}

\begin{enumerate}
\item[] 30. See American Sur. Co. v. Gold, 375 F.2d 523, 525-27 (10th Cir. 1965) (predicting that Kansas public policy prohibits insurance coverage for wanton, intentional acts). Some courts and commentators have stated that punitive damages should not be covered by liability insurance because the public would bear the ultimate burden through subsequent premium increases. See Northwestern, 307 F.2d at 440-41 (observing that added liability would be passed along to the premium payers and that ultimately society would be “punishing itself for the wrong committed by the insured”); see also Charles M. Lauderback, Note, The Exclusion Clause: A Simple and Genuine Solution to the Insurance for Punitive Damages Controversy, 12 U.S.F. L. Rev. 743, 748 (1978) (discussing various public policy reasons against allowing insurance coverage for punitive damages).
\item[] 32. A review of selected jurisdictions provides support for the position that insurance coverage for punitive damages violates public policy:
\begin{itemize}
\end{itemize}
\end{enumerate}
LIABILITY INSURANCE COVERAGE

P.2d 776, 779 (Colo. 1934) (stating that insurer is not liable for insured’s “wrong against the public”).

Connecticut: See Tedesco v. Maryland Casualty Co., 18 A.2d 357, 359 (Conn. 1941) (stating that “a policy which expressly covered an obligation of an insured to pay a sum of money in no way representing injuries or losses suffered by the plaintiff but imposed as a penalty because of a public wrong” would “certainly be against public policy”); see also American Ins. Co. v. Saulnier, 242 F. Supp. 257, 261-62 (D. Conn. 1965) (discussing Connecticut public policy against allowing coverage for punitive damages).

Florida: See U.S. Concrete Pipe Co. v. Bould, 437 So. 2d 1061, 1064 (Fla. 1983) (noting that although Florida public policy prohibits liability insurance coverage for punitive damages assessed against person for his or her own wrongful acts, it does not preclude insurance coverage for punitive damages when the insured is vicariously liable for another’s wrong); Sterling Ins. Co. v. Hughes, 187 So. 2d 898, 900 (Fla. Dist. Ct. App.) (holding that assault and battery by employee was accident within meaning of insurance contract and therefore policy covered resulting punitive damages), cert. denied, 194 So. 2d 622 (1966); Nicholson v. American Fire & Casualty Ins. Co., 177 So. 2d 52, 53 (Fla. Dist. Ct. App. 1965) (agreeing with view, set forth in McNulty by Fifth Circuit, that in Florida “as a matter of public policy punitive damages . . . are based on a theory inconsistent with their coverage by liability insurance”) (citation omitted); see also Dorsey v. Honda Motor Co., Ltd., 655 F.2d 650, 659 (5th Cir. 1981) (“The basic rule of Florida law is that public policy forbids insurance coverage of punitive damages in order that the punitive and deterrent purposes of these damages will not be thwarted. Florida’s intermediate appellate courts, however, have permitted insurance coverage of punitive damages where the insured party was not itself at fault but was merely vicariously liable for punitive damages based on the reckless conduct of another.”) (citations omitted), cert. denied, 459 U.S. 880 (1982).


Kansas: Guarantee Abstract & Title Co. v. Interstate Fire & Casualty Co., 618 P.2d 1195, 1198 (Kan. 1980) (stating that public policy demands that payment of punitive damage awards rests on party who committed the wrong, rather than insurer); see also Gold, 375 F.2d at 535-37 (holding that Kansas public policy prohibits insurance coverage for punitive damages). Effective in 1984, section 40-2,115 of Kansas statutory code stated that it is not against public policy for a person to obtain insurance covering punitive damages resulting from intentional acts. KAN. STAT. ANN. § 40-2,115 (1993); see also Golf Course Superintendents Ass’n v. Underwriters at Lloyd’s of London, 761 F. Supp. 1485, 1491 (D. Kan. 1991) (noting that section 40-2,115 states that insurance coverage for punitive damages is not against public policy).


Missouri: Heartland Stores, Inc. v. Royal Ins. Co., 815 S.W.2d 39, 42-43 (Mo. Ct. App. 1991) (concluding that business comprehensive insurance policy did not cover punitive damages because such damages are not within definition of “personal injury”); Crull v. Gleb, 382 S.W.2d 17, 23 (Mo. Ct. App. 1964) (holding that “to allow a motorist to insure himself against judgments imposed against him for punitive damages, which were assessed against him for his wanton, reckless or willful acts, would be contrary to public policy”).

Published by Villanova University Charles Widger School of Law Digital Repository, 1994
Nevada: New Hampshire Ins. Co. v. Gruhn, 670 P.2d 941, 943 (Nev. 1983) (per curiam) (“[I]t is incumbent upon the party whose conduct was so outrageous as to merit punishment by means of punitive damages to bear the burden of paying the award. Only then will the goal of punishment and deterrence be effectuated. This policy would be thwarted if the tortfeasor is able to skirt the award by passing the liability on to a surety.”).


New York: Hartford, 397 N.E.2d at 744 (“[W]e conclude that the rule to be applied with respect to a punitive damage award made in a Civil Rights Act action is that coverage is proscribed as a matter of public policy . . . because to allow insurance coverage is totally to defeat the purpose of punitive damages, but a number of other reasons are also involved.”); see also Home Ins. Co. v. American Home Prod. Corp., 550 N.E.2d 930, 932 (N.Y.) (considering nature of plaintiff’s claim, including degree of wrongfulness for which damages were awarded, state’s law and public policy on punitive damages and prohibiting insurance of punitive damages through second-level excess insurer in out-of-state products liability case), aff’d in part, rev’d in part, 902 F.2d 1111 (2d Cir. 1990); Public Serv. Mut. Ins. Co. v. Goldfarb, 425 N.E.2d 810, 814-15 (N.Y. 1981) (determining that even though professional liability policy provided coverage for punitive damages and that insurer charged premiums for such coverage, if trier of fact found that the insured “intentionally caused injuries complained of, and therefore awarded punitive damages,” dentist could not look to insurer for indemnification).

North Dakota: Yesel v. Watson, 226 N.W. 624, 625 (N.D. 1929) (“The authorities abundantly support the ruling of the trial court . . . that one who is liable for the act of another by reason of being surety upon his official bond is not answerable for punitive damages that might be recoverable against the wrongdoer.”).


South Dakota: City of Fort Pierre v. United Fire & Casualty Co., 463 N.W.2d 845, 849 (S.D. 1990) (“[B]ecause we have determined that the civil penalties prayed for by the federal government were punitive in nature and that in this instance the award of punitive damages would violate public policy, we hold that United had no duty to defend City under the policy.”).

Virginia: Northwestern Nat’l Casualty Co. v. McNulty, 307 F.2d 432, 434-42 (5th Cir. 1962) (discussing Florida and Virginia public policy, which prohibits coverage for punitive damages).
III. COVERAGE FOR PUNITIVE DAMAGES

A. Judicial Precedent Sustaining Coverage for Punitive Damages

In many states, as a result of either judicial precedents or legislative provisions, there are circumstances in which insurers have not been precluded from providing coverage for punitive damages. Millions of liability insurance policies do not explicitly specify whether coverage "is" or "is not" provided for punitive damages. Consequently, when an insurer that has issued such a policy rejects an insured's request for indemnification, courts usually resolve the coverage dispute by deciding whether to imply an exception to coverage on the basis of public policy.33 Judicial decisions sustaining claims of insureds in such coverage disputes hold, either explicitly or in effect, that it is not contrary to public policy for an insured to acquire liability insurance that provides indemnification for punitive damages.34 In these decisions judges have articulated a variety

33. When insurers reject indemnification claims thereby creating disputes for the courts to resolve, they often urge courts to imply an exception or exclusion that eliminates coverage for punitive damages. For a complete discussion of this issue, see supra notes 12-32 and accompanying text.

34. A survey of selected jurisdictions provides support for the position that indemnification for punitive damages is not contrary to public policy:

- **Alabama:** American Fidelity & Casualty Co. v. Werfel, 162 So. 103, 106 (Ala. 1935). The court in *American Fidelity & Casualty Co. v. Werfel* stated:
  
  The [insurance] policy, being broad enough to cover personal injury or death as the result of an accident occurring while the policy was in force, was therefore broad enough to cover liability for death, and recovery under the homicide statute (section 5696, Code) for wrongful death. This recovery would have been for punitive damages purely. It may not be successfully contended that the [insurance] policy did not protect against punitive damages for bodily injuries so inflicted.

  *Id.; see also* Employers Ins. Co. of Ala. v. Brock, 172 So. 671, 673-74 (Ala. 1937) (holding that award of punitive damages was within coverage of policy that insured "bodily injury or death").

- **Arizona:** Price v. Hartford Accident & Indem. Co., 502 P.2d 522, 525 (Ariz. 1972) (sustaining coverage for exemplary damages and commenting that "[i]t is our holding that the premium has been paid and accepted and the protection has been tendered, and that under the circumstances public policy would be best served by requiring the insurance company to honor its obligation"); State v. Sanchez, 579 P.2d 568, 571 (Ariz. Ct. App. 1978) (noting that *Price* court held that insurance company must honor its obligation to cover punitive damages, and discussing reasons against coverage for punitive damages).

- **Arkansas:** Southern Farm Bureau Casualty Ins. Co. v. Daniel, 440 S.W.2d 582, 584 (Ark. 1969) ("As we read the [insurance] policy herein it agrees to pay . . . all sums which the insured shall become legally obligated to pay as damages, because of bodily injury . . . [and we do not] find anything in the state's public policy that prevents an insurer from indemnifying its insured against punitive damages.").

- **Georgia:** Greenwood Cemetery, Inc. v. Travelers Indem. Co., 232 S.E.2d 910, 914 (Ga. 1977) ("The Georgia Insurance Code, Code Ann. § 56-101 et seq. authorizes the issuance of liability insurance. Code Ann. § 56-408(1) provides, 'Liability insurance, which is insurance against legal liability for . . . damage to property . . .'")
Punitive damages is a legal liability and accordingly insurance against such damages is expressly authorized. (emphasis added). Idaho: Abbie Uriguen Oldsmobile Buick, Inc. v. United States Fire Ins. Co., 511 P.2d 783, 789 (Idaho 1973) ("Insofar as public policy is concerned we reject McNulty and adopt the Lazenby approach.").


[W]e hold that these words ['caused by accident'] include injuries cause by willful and wanton misconduct, and since punitive damages may be allowed in such a case, they are part of 'all sums' which the insured became liable to pay, and thus are covered by express wording of the policy.

Ida: Norfolk & W. Ry. Co. v. Hartford Accident & Indem. Co., 420 F. Supp. 92, 98 (N.D. Ind. 1976) ([U]nder Indiana law it is not contrary to public policy for Norfold & Western to shift the punitive damage award to its liability insurer, and under the terms of the insurance contract between Norfolk & Western and Hartford, these damages were within the scope of coverage.).

Iowa: Skyline Harvestore Sys. Inc. v. Centennial Ins. Co., 331 N.W.2d 106, 109 (Iowa 1983) ("We hold that Skyline's [insurance] policy includes coverage of punitive damages, and the public policy purposes of punitive damages do not preclude such a construction.").

Kansas: Southern Am. Ins. Co. v. Gabbert-Jones Inc., 769 P.2d 1194, 1197-99 (Kan. Ct. App. 1989). In Southern American Insurance Co. v. Gabbert Jones the court concluded that the insurer is not responsible for the payment of punitive damage awards even though the insurer is bound by an enforceable obligation under certain excess liability insurance policies. Id. at 1198. However, the court noted that section 40-2,115 of the Kansas statutory code now provides:

(a) It is not against the public policy of this state for a person or entity to obtain insurance covering liability for punitive or exemplary damages assessed against such insured as the result of acts or omissions, intentional or otherwise, of such insured's employees, agents or servants, or of any other person or entity for whose acts such insured shall be vicariously liable, without the actual prior knowledge of such insured.

Id. at 1198 (quoting KAN. STAT. ANN. § 40-2, 115(a) (1988)).

Kentucky: See Continental Ins. Co. v. Hancock, 507 S.W.2d 146, 151-52 (Ky. 1973). In Continental Insurance Co. v. Hancock, the court stated:

Even though punitive damages are allowed solely as punishment and as deterrent, we do not deem it against public policy to allow liability therefore to be insured against when the punitive damages are imposed for a grossly negligent act of the insured rather than an intentional wrong of the insured.

Id.; see also Maryland Casualty Co. v. Baker, 200 S.W.2d 757, 760-62 (Ky. 1947) (holding that Kentucky statute required insurer of taxicab company to cover punitive damages resulting from employee's assault on passenger).

Louisiana: Creech v. Aetna Casualty & Sur. Co., 516 So. 2d 1168, 1174 (La. Ct. App. 1987) The court in Creech v. Aetna Casualty & Surety Co. stated: "Public policy is better served by giving effect to the insurance contract rather than by creating an exclusion based on a judicial perception of public policy not expressed by the legislature. We hold that public policy does not preclude insurance coverage of exemplary damage awards under LSA-C.C. Art. 2315.4." Id.; see also Fagot v. Ciravola, 445 F. Supp. 342, 344 (E.D. La. 1978) (applying Louisiana law in civil rights action for wrongful arrest and stating that [t]he wording of the professional liability policy that covered the City of Kenner Police Department and its paid employees at the time of Mr. Fagot's arrest would be highly misleading if the policy did not cover jury awards of punitive damages" and, as matter of law, "the policy in question covers punitive damages").

It is well settled that such broad provisions in automobile liability policies unmistakably include both compensatory and punitive damages.

Maryland: First Nat'l Bank of St. Mary's v. Fidelity & Deposit Co., 389 A.2d 359, 367 (Md. 1978) ("[A]pplying the utmost circumspection, we find that the common sense of the entire community would [not] pronounce it against public policy for the Bank's insurance company to pay the judgment for exemplary damages assessed against the Bank here.") (quotations omitted).

Michigan: See New Amsterdam Casualty Co. v. Jones, 135 F.2d 191, 193-95 (6th Cir. 1943) (holding that Michigan public policy did not prohibit ordinary accident policy from covering damages when injury was intentionally caused).

Mississippi: Anthony v. Frith, 394 So. 2d 867, 868 (Miss. 1981) ("As to there being any public policy in this state against allowing recovery for punitive damages in a case as this under the terms of an insurance contract as set forth herein, . . . it was not against public policy to require the carrier to pay punitive damages.").

Missouri: Colson v. Lloyd's of London, 435 S.W.2d 42 (Mo. Ct. App. 1968). In Colson v. Lloyd's of London, the court considered "whether it would be against public policy to permit an association of law enforcement officers to insure themselves against alleged willful and intentional acts." Id. at 47. The court concluded that "it would tend to discourage them from entering into that public service" if "they were told by the courts that they could not enter into a contract which would afford them protection against financial loss arising from claims for punitive damages." Id; see also Ohio Casualty Ins. Co. v. Welfare Fin. Co., 75 F.2d 58, 60 (8th Cir. 1934) (affirming decision of District Court for Eastern District of Missouri and stating "[w]e hold that the punitive damages under the facts here must be held to be within the meaning and protection of this [insurance] policy; that there is no public policy, under the circumstances of this case, requiring such provision to be held invalid"); cert. denied, 295 U.S. 734 (1935).

Montana: First Bank (N.A.)-Billings v. Transamerica Ins. Co., 679 P.2d 1217, 1223 (Mont. 1984) ("We find that providing insurance coverage of punitive damages is not contrary to public policy."). The court in First Bank (N.A.)-Billings v. Transamerica Insurance Co. also stated:

Until such time that the law of punitive damages is more certain and predictable, or until the legislature alters the law of punitive damages or expressly declares a policy against coverage in all cases, we leave the decision of whether coverage will be permitted to the insurance carriers and their customers.

Id.; see also Fitzgerald v. W. Fire Ins. Co., 679 P.2d 790, 792 (Mont. 1984) (noting that "[i]n the instant case, appellant [the insurer] creates an ambiguity in the language by contending that we must read into the language the distinction between punitive and compensatory damages" and stating "[w]e therefore hold that the language of the insurance contract provides for coverage of punitive damages and that no public policy in Montana precludes payment of these damages by an insurance carrier").

North Carolina: Mazza v. Medical Mut. Ins. Co., 319 S.E.2d 217, 220 (N.C. 1984) ("We know of no public policy of this State that precludes liability insurance coverage for punitive damages in medical malpractice cases. North Carolina General Statute § 58-72 appears to authorize insurers to provide coverage for punitive damages."); Collins & Alkman Corp. v. Hartford Accident & Indem. Co., 416 S.E.2d 591, 594 (N.C. Ct. App. 1992) (holding that definition of damages did not operate to exclude punitive damages from coverage and if Hartford "intended to eliminate coverage for punitive damages it could and should have inserted a single provision stating the policy does not include recovery for punitive damages"), aff'd, 436 S.E.2d 243 (N.C. 1993).


[A]s long as insurance companies are willing, for a price, to contract for insurance to provide protection against liability for punitive damages to
of justifications for this result.

persons or corporations deemed by them to be 'good risks' for such coverage, and as long as liability for punitive damages continues to be extended to 'gross negligence,' 'recklessness,' and for other conduct, 'contrary to societal interests,' we are in agreement with those authorities which hold that insurance contracts providing protection against such liability should not be held by courts to be void as against public policy.

Id.

Rhode Island: Morrell v. Lalonde, 120 A. 435, 438 (R.I. 1923), error dismissed per curiam, 264 U.S. 572 (1924). The court in Morrell v. Lalonde stated:

The defendant insurance company by the terms of its liability policy agreed to indemnify defendant to the amount stipulated therein against loss from the liability imposed by law upon the assured for damages on account of bodily injuries or death suffered by any person or persons in consequence of any malpractice, error or mistake of the assured in the practice of his profession. The defendant company was liable to the amount insured to pay any lawful damages which in a case, such as the case at bar, includes punitive as well as compensatory damages.

Id.

South Carolina: South Carolina State Budget & Control Bd. v. Prince, 403 S.E.2d 643, 648 (S.C. 1991) ("The policy provides that: 'The Fund will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages.' ... [U]nder the rules of construction and interpretation of insurance policies ... [this] ... must be read as encompassing punitive damages ... "); Carroway v. Johnson, 139 S.E.2d 908, 910 (S.C. 1965). In Carroway v. Johnson, the court stated:

The policy under consideration did not limit recovery to actual or compensatory damages. The language of the policy here is sufficiently broad enough to cover liability for punitive damages as such damages are included in the "sums" which the insured is legally obligated to pay as damages because of bodily injury within the meaning of the policy.

Carroway, 139 S.E.2d at 910.


The insurance contract in the case at bar is a private contract between defendant and their assured,...., which when construed as written would be held to protect him against claims for both compensatory and punitive damages. Then to hold assured, as a matter of public policy, is not protected by the [insurance] policy on a claim for punitive damages would have the effect to partially void the contract. We do not think such should be done except in a clear case, and the reasons advanced do not make such a clear case.

Id.

Texas: American Home Assurance Co. v. Safeway Steel Prod. Co., 743 S.W.2d 693, 705 (Tex. Ct. App. 1987) (holding that "under Texas law it was not contrary to public policy for Rawlings and Safeway to shift the punitive damages awards to their liability insurance carriers, and that, under the terms of the insurance contracts between the parties, punitive damages were within the scope of coverage"); Dairyland County Mut. Ins. Co. v. Wallgren, 477 S.W.2d 341, 342 (Tex. Ct. App. 1972) ("[A] policy of automobile liability insurance affords indemnity applicable to exemplary damages as well as compensatory damages.").


The language 'all sums as damages' means the whole amount due a plaintiff as damages pursuant to a legal judgment or settlement regardless of how characterized. ... The insurer drafts the contract and can easily include exclusions for punitive damages, or can bargain a higher pre-
In some of the judicial precedents that sustain coverage for punitive damages, the courts' comments about the insurability of punitive damages are very expansive. However, the disputes in many of these cases involved instances in which either: (1) the injured person's claim against the insured, who sought coverage for an award of punitive damages, was based on vicarious liability; or (2) the conduct of the insured that gave rise to the tort claim was reckless or wanton, rather than an intentional tortious act. Courts in many states have held that one or both of these situations justify the recognition of an exception to the general rule that prohibits shifting liability for punitive damages to an insurer. Accordingly,

...
the significance of these precedents may be more limited than dicta in the opinions suggests. Subsequent decisions may hold that courts will only sustain exceptions to a general prohibition rather than adopting the view that there is no public policy that precludes insuring against punitive damages.

1. Interpreting the Coverage Terms

Some judicial precedents sustaining an insured's right to indemnification are based on interpretations of coverage terms in liability insurance policies stating that the insurer will pay "on behalf of the insured all sums which the insured shall become legally obligated to pay."38 In these decisions judges reason that punitive damages are a "sum" that an insured is "legally obligated to pay" and, therefore, the insurance covers punitive damages, as well as compensatory damages, in the absence of explicit policy provisions to the contrary.39

38. For example, the insurance agreement in the 1989 Insurance Services Office (ISO) form for comprehensive general liability policies states: "We [the insurer] will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." (emphasis added). FIRE, CASUALTY AND SURETY FORMS, supra note 19.

39. A survey of selected states provides support for the position that, in the absence of explicit policy to the contrary, courts will permit insurance coverage for punitive damages:


Iowa: Skyline Harvestore Sys., Inc. v. Centennial Ins. Co., 331 N.W.2d 106, 109 (Iowa 1983) (holding that insurance policy covering "all sums" insured included coverage for punitive damages, unless contract language expressly excluded such coverage).

Kansas: Southern Am. Ins. Co. v. Gabbbert-Jones, Inc., 769 P.2d 1194, 1197 (Kan. Ct. App. 1989). The Gabbbert-Jones court stated: We find the 'all sums' language in the policy before us to be unambiguous and unqualified. The policy does not say that all sums awarded as compensatory damages will be paid nor that all sums awarded except punitive damages will be paid. As we view it, upon issuance of the policy Southern bound itself to pay all sums Gabbert might be required to pay as damages, both compensatory and punitive, because of bodily injury caused by an accident. We find this is a matter of plain policy language. Id.

Id.

Missouri: Colson v. Lloyd's of London, 435 S.W.2d 42, 47 (Mo. Ct. App. 1968). In Colson, the court considered "whether it would be against public policy to permit an association of law enforcement officers to insure themselves against alleged willful and intentional acts." Id. The court concluded that "it would tend to discourage them from entering into that public service" if "they were told by the courts that they could not enter into a contract which would afford them protection against financial loss arising from claims for punitive damages." Id.

2. **Construing Ambiguity Against the Insurer**

The proposition that an ambiguity is construed against the party responsible for drafting the document is a well-recognized principle of contract interpretation. There are thousands of judicial opinions resolving insurance coverage disputes in favor of insureds on the basis that a provision of the applicable insurance policy is ambiguous and, therefore, should be construed against the insurer. Among such precedents, there are several decisions holding that because the insurance policy terms were ambiguous, punitive damages were covered by liability insurance policies. For example, Judge Whiting, writing on behalf of the Virginia Supreme Court, stated:

"Hence, the policy provision—"for all sums which the insured might become legally obligated to pay"—is sufficiently broad to include liability for punitive damages." (citation omitted).

South Carolina: South Carolina State Budget & Control Bd. v. Prince, 403 S.E.2d 643, 640 (S.C. 1991) (observing that insurance policy at issue used "broader language which, under the rules of construction and interpretation of insurance policies, must be read as encompassing punitive damages").

Wisconsin: Brown v. Maxey, 369 N.W.2d 677, 686 (Wis. 1985). The court in Brown v. Maxey stated:

"We do not find that the language in this policy is ambiguous. First, the punitive damage award in this case was a "sum" that Maxey [became] legally obligated to pay as damages." The term "damages" is sufficiently broad to cover liability for both compensatory and punitive damages. Punitive damages are not specifically excluded from the policy language. Second, it is clear that these punitive damages were awarded "because of bodily injury."

Id.


40. See Appleman & Appleman, supra note 4, § 7401 (compiling cases that interpret ambiguous insurance policy terms to cover punitive damages); Couch, supra note 9, § 15:14 (same); Keeton & Widiss, supra note 7, § 6.3, at 116 (discussing same).


"We hold that [the insurance policy] provisions were ambiguous, at the least, so as to require the resolution of any reasonable doubts against the insurance company; that upon reading the policy provisions as set forth above, and in the absence of any express exclusion of liability for punitive damages, a person insured by such a policy would have reason to suppose that he would be protected against liability for "all sums" which the insured might become "legally obligated to pay" and that the term "damages" would include all damages, including punitive damages which became, by judgment, a "sum" that he became "legally obligated" to pay."

Id.
Court, concluded: "We agree with those decisions that have found that language similar to the language at issue is ambiguous, and that the ambiguity should be construed against the insurer which drafted the policy."

Controversies about whether liability insurance provides indemnification for punitive damages have occurred for several decades. Many insurance forms include express restrictions, often set forth as exclusions. Obviously, insurance policy forms could expressly exclude coverage for punitive damages. The decisions of individual insurers, as well as the insurance industry, to omit terms that would clearly address whether coverage is provided for punitive damages provides considerable support for arguments that the very absence of such provisions creates an ambiguity in the coverage terms that some courts appropriately construe against insurers.

3. Protecting the Insured's Reasonable Expectations

In some instances, judicial precedents holding that insureds are entitled to coverage for punitive damages have been premised, at least in part, on protecting the insured's reasonable expectations about the scope of coverage. For example, in a Tennessee Supreme Court decision, Justice Dyer wrote:

The language in the insurance policy in the case at bar, which is similar to many types of liability policies, has been construed by most courts, as a matter of interpretation of the language of a policy, to cover both compensatory and punitive damages. Since most courts have so construed this language in the policy, we think the average policy holder reading this language would expect to be protected against all

42. Webb, 369 S.E.2d at 198 (interpreting ambiguity in insurance policy against insurance company and in favor of insured).

43. For example, in Taylor v. Lumar, the insurance policy provided the following definition of "damages" in the "definitions" section: "Damages means the cost of compensating those who suffer bodily injury or property damage from a car accident. It does not include amounts awarded as a punishment or deterrent, or for punitive damages." 612 So. 2d 798, 800 (La. Ct. App. 1992) (emphasis added).

44. For a discussion of the 1978 proposal by the ISO to include a provision in insurance policies excluding coverage for punitive damages, see infra notes 74-75 and accompanying text.


http://digitalcommons.law.villanova.edu/vlr/vol39/iss2/6
When an insurance company broadly defines the scope of coverage by using the term "all sums" in a liability insurance policy, it is reasonable for an insured, particularly those who lack expertise about insurance arrangements, to expect that the coverage applies (subject to the policy's limit of liability) to all amounts that may be awarded by a court against the insured, including punitive damages.

4. Maximizing Indemnification for the Injured Person

In England, courts began to award punitive damages during the middle of the eighteenth century in order to provide injured persons with compensation for non-physical injuries, as well as to punish wrongdoers. At the beginning of the nineteenth century, courts in the United States recognized the right of injured persons to recover compensation for pain, suffering and mental anguish in tort actions. Thereafter, most American courts focused the justification for punitive damages awards exclusively on the goals of punishment and deterrence. Nevertheless, some American courts have continued to hold that awards of punitive damages are compensatory. In those states, it is arguable that courts should interpret liability insurance to provide coverage for punitive damages in or-
der to provide more complete indemnification for injured individuals.

5. **Coverage for Punitive Damages Awarded When the Tortious Conduct Was Wanton or Reckless**

The type of conduct that justifies an award of punitive damages varies substantially among the states. In several jurisdictions, punitive damages may be awarded for conduct that falls far short of involving a clear intent to cause injury. In assessing whether insurance provides coverage for an amount awarded as punitive damages, courts in some states distinguish between negligent and intentional conduct. This approach was succinctly described by Chief Judge Thelton Henderson:

Jurisdictions which allow punitive damage insurance have a much lower threshold for awarding punitive damages, allowing them for "gross negligence or reckless or

---

**Michigan:** Ray v. City of Detroit, 242 N.W.2d 494, 496 (Mich. Ct. App. 1976). In Ray v. City of Detroit, the court stated:

We find that the award of the trial judge was entirely proper. The "exemplary" damages were compensatory in nature and constituted an appropriate enlargement of actual damages. They were not punitive nor were they given for the purpose of making an example of the defendant. ... We see no reason why the municipal corporation, if found to be liable to the plaintiff, should be excused from compensating her for the injury to her feelings and for the sense of indignity and outrage when these are part of the totality of the injury she actually suffered.


No damages are to be awarded as a punishment to the defendant or as a warning and example to deter him and others from committing like offenses in the future. In other words, no damages other than compensatory are to be awarded. However, when the act involved is wanton, malicious, or oppressive, the compensatory damages awarded may reflect the aggravating circumstances.

---

Secondary sources also discuss cases that hold that punitive damages are compensatory in nature. See, e.g., William P. Zuger, Insurance Coverage of Punitive Damages, 53 N.D. L. Rev. 299, 257-58 (1976) (discussing whether and to what extent liability insurance policies may provide coverage for punitive damages).

51. See, e.g., Hensley v. Erie Ins. Co., 283 S.E.2d 227, 229 (W. Va. 1981) (stating that public policy does not preclude insurance coverage for punitive damages arising from gross, reckless or wanton negligence); Continental Ins. Co. v. Hancock, 507 S.W.2d 146, 151-52 (Ky. 1973). The Hancock court stated:

Even though punitive damages are allowed solely as punishment and as a deterrent, we do not deem it against public policy to allow liability therefor to be insured against when the punitive damages are imposed for a grossly negligent act of the insured rather than an intentional wrong of the insured.

---

http://digitalcommons.law.villanova.edu/vlr/vol39/iss2/6
wanton conduct." The *City Products* court noted that courts in such jurisdictions have recognized the unfairness to a person "who might well be ruined financially by a judgment for punitive damages as the result of conduct of no more flagrancy than an act of 'gross negligence,' a monetary 'reckless' act, or conduct 'contrary to societal interest.' "52

Similarly, the Montana Supreme Court reasoned:

A consistent theme running through cases holding that public policy does not forbid insurance coverage is that juries and judges typically award punitives for a broad range of conduct not often described as willful or wanton, but as merely reckless or unjustifiable. When combined with the possibility that different fact finders in similar fact situations may reach differing conclusions as to the availability of punitive damages, the argument for denial of coverage becomes difficult to sustain.53

Further, a Texas appellate court observed: "As long as insurance companies are willing, for a price, to provide protection against liability for punitive damages to corporations they deem 'good risks,' and as long as punitive damage liability continues to extend to 'gross negligence,' we see no reason why these contracts should not be enforced."54 In effect, such decisions recognize an exception to the general prohibition on liability coverage for punitive damages. In these states, courts have decided it is not against public policy for liability insurance to provide coverage for punitive damages that result from grossly negligent, reckless or wanton acts.


The *City Products* court recognized a sharp split among jurisdictions as to the insurability of punitive damages. The Court noted that the jurisdictions which prohibit insurance for punitive damages are those in which punitive damages are allowed for only exceptionally egregious conduct, defined as "fraud, oppression or malice." In such jurisdictions, punitive damages have as their only purpose punishment and deterrence. This purpose would be undermined by insurance. *Id.* at 1371 (citation omitted).


6. Extending Coverage to Insureds Who Are Vicariously Liable for Punitive Damages

There are various types of situations in which insureds—including corporations and other enterprises—are vicariously liable for the tortious conduct of third persons. For example, when an employee commits a tort, liability may be imposed on the individual's employer. Courts have adopted several approaches to assess whether an employer is responsible for an employee's actions. These approaches include vicarious liability based on: (1) the scope of employment; (2) approval or ratification of an employee's act; (3) recklessness in either employing or retaining an individual; (4) specific authorization of the employer for an act causing injury; or (5) some degree of participation in actions causing injury.

55. See generally 19 C.J.S. Corporations § 1285 (1940) (discussing scope of employment rule). Corporations may be liable for punitive damages arising from the acts of its agents or employees committed within the scope of employment. Id. In many jurisdictions, courts will impute the conduct of employees acting within the scope of their employment without regard to whether the employer authorized or ratified the acts. Id. In effect, when an employer vests an agent with authority to act, courts will treat actions that are within the scope of employment as acts of the employer. See, e.g., Western Coach Corp. v. Vaughn, 452 P.2d 117, 119-20 (Ariz. 1969) (holding corporate employer liable for punitive damages resulting from conduct of servant acting with reckless indifference to rights of others); Life Ins. Co. v. Del Aguila, 389 So. 2d 303, 305-06 (Fla. Dist. Ct. App. 1980) (holding that jury could assess punitive damages against employer for insurance fraud of its employees, although employer did not authorize or ratify fraud).

56. In many states, courts have adopted the authorization/ratification rule as a basis for employers' liability. In states that adopted this approach, courts often hold that authorization can be inferred from an employer's conduct. Note that in few cases does an employer expressly ratify the wrongful act of an employee. Most of the cases applying the authorization/ratification rule imply ratification because the employer retained the benefits of an employee's wrongful act. Usually the intent element of ratification involves an employer's act from which the court can infer ratification. See, e.g., Kilpatrick v. Haley, 66 F. 133, 140 (8th Cir. 1895) (holding that jury may award punitive damages where agent carrying out instructions of principal commits trespass and principal later accepts benefits of trespass). In some cases, courts base ratification on an employer's retention of an employee after the employer discovers the wrongful act. See, e.g., Coats v. Construction Gen. Laborers Local 185, 93 Cal. Rptr. 639, 643 (Ct. App. 1971) (holding that retaining employee in service of employer indicates employer's approval of employee's course of action and, with other acts, may make employer liable for punitive damages).

57. See, e.g., Cleveland Ry. Co. v. Wiesenberger, 15 Ohio App. 437, 443 (Ct. App. 1922) (holding corporation liable for punitive damages resulting from employee's willful assault on another only if corporation knew employee had bad character).

58. In several jurisdictions, courts premise employers' liability on the fact that the employer did something that, in effect, involves the employer in the act of the employee. For example, in one of the landmark cases in this area the plaintiff sought punitive damages against a railroad for the "wanton and oppressive" acts of
When an individual or an entity, such as a corporation, is vicariously liable for compensatory damages, some courts have concluded that punitive damages may also be awarded against such a defendant, reasoning that: (1) an award of punitive damages is a penalty for the defendant's failure to supervise; (2) such an award will influence the supervision of persons in the future; or (3) the corporation's past conduct in regard to the events was particularly reprehensible. Section 909 of the Restatement (Second) of Torts sets forth the view that punitive damages may be warranted when:

(a) the principal or a managerial agent authorized the doing and the manner of the act, or
(b) the agent was unfit and the principal or a managerial agent was 
\textit{reckless in employing or retaining} him, or,
(c) the agent was employed in a managerial capacity and was acting in the 
\textit{scope of employment}, or
(d) the principal or a managerial agent of the principal 
\textit{ratified} or 
\textit{approved} the act.  

In other words, members of the Institute that adopted the Restatement employees in wrongfully arresting the plaintiff for allegedly using an improper railroad ticket. Lake Shore & Mich. S. Ry. v. Prentice, 147 U.S. 101 (1893). In 
\textit{Lake Shore & Michigan Southern Railway v. Prentice}, the Supreme Court stated that "punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender and as a warning to others, can only be against one who has participated in the offense." \textit{Id.} at 107.

59. Courts have defined "managerial capacity" as a function of the employee's or agent's business judgment in which he or she may ultimately shape corporate policy.

60. \textsc{Restatement (Second) of Torts} § 909 (1979) (emphasis added); \textit{accord} \textsc{Restatement (Second) of Agency} § 217C (1958) (containing essentially same rule except that phrase "or retaining" is not included in part (b)). The authors of the \textit{Restatement of Torts} stated that the \textit{Restatement} approach is consonant with vicarious liability for both compensatory and punitive damages:

When managers could not have prevented an agent's misconduct, even with the utmost managerial care and responsibility, the Restatement rule would not impose punitive damages upon the management, under the theory that in order to maximize deterrence and punishment, one should require participation in the wrongful action by those in control of the business.

\textit{Restatement (Second) of Torts} § 909, cmt. b.

Some commentators have criticized the distinction that the \textit{Restatement} draws between the acts of managerial and menial employees. For example, Chief Justice Rose dissented in a case in which the Wyoming Supreme Court adopted the \textit{Restatement} approach. \textit{See} Campen \textit{v. Stone}, 635 P.2d 1121, 1133 (Wyo. 1981) (Rose, C.J., dissenting) (arguing that entity can act willfully and wantonly through all of its employees, not just managerial employees). Chief Justice Rose saw no logical distinction between the acts of menial and managerial employees when "[t]he act of any corporate employee done in the furtherance of the corporation's business is the act of the corporation." \textit{Id.} at 1134.
ment approved the use of punitive damages to affect the conduct of managers, directors, and officers of a business who are responsible for, as well as being in a position to influence, the conduct of employees.61

Courts in many states have concluded that the general rule that prohibits an insured from obtaining coverage for punitive damages does not apply when a judgment against the insured is predicated on vicarious liability. In these decisions, a distinction is drawn between punitive damages that are imposed on the person whose actions directly caused injuries and punitive damages that are assessed on the basis of vicarious liability.62 In effect, such cases

61. Several states have adopted the Restatement approach:
Idaho: Openshaw v. Oregon Auto. Ins. Co., 487 P.2d 929, 932 (Ill. 1971) (stating that “[t]o be entitled to an award of punitive damages against a corporation the complaining party must show that the principal (or when the principal is a corporation, its directors and managing officers) participated in or authorized or ratified the agent’s acts”).
Illinois Tolle v. Interstate Sys. Truck Lines, 356 N.E.2d 625, 627 (Ill. 1976). In Tolle v. Interstate System Truck Lines, the court stated:
The complicity rule, on the other hand, seems consistent with the rationale behind the concept of punitive damages. Either as a basis for punishment or for deterrence of wrongdoers, some deliberate corporate participation should be shown before this sanction is applied. The complicity analysis will allow punitive damages where the institutional conscience of the corporate master should be aroused while protecting the corporate master from liability for punitive damages when a properly supervised employee acts with requisite circumstances of aggravation.
Id. (citation omitted).
Punitive damages may be recovered against an employer because of the malicious act of his employee only if it is shown (a) that the malicious act was authorized or ratified by the defendant; (b) that the act was that of an unfit employee who had been employed or retained by the defendant with knowledge of his unfitness; or (c) that the act was that of a managerial agent or employee whose willfulness or maliciousness was chargeable to the defendant.
Id. (citing RESTATEMENT (SECOND) OF TORTS § 909 (1979)).
Texas: King v. McGulf, 234 S.W.2d 403, 405 (Tex. 1950) (stating that “the general rule prevailing in Texas may, for the purposes of this suit, be stated the same as in the Restatement, Torts, § 909”).
We likewise believe that the Restatement’s approach is the best. It is consistent with the purpose behind punitive damages. Further, it is relatively straightforward and easy to apply. Accordingly, we adopt the test as set forth in the Restatement as the one to be used in determining when an employer may be held liable for punitive damages as a result of the misconduct of the employee.
Id.

62. A review of selected jurisdictions will clarify this distinction:
Arkansas: Southern Farm Bureau Casualty Ins. Co. v. Daniel, 440 S.W.2d 582, 584 (Ark. 1969). In Southern Farm Bureau Casualty Insurance Co. v. Daniel, the court stated:

[W]e [cannot] find anything in the state's public policy that prevents an insurer from indemnifying its insured against punitive damages arising out of an accident, as distinguished from intentional torts. Since we have permitted punitive damages to be assessed against an employer under the doctrine of respondeat superior or even in the absence of the employer's knowledge or authorization of the employee's acts, we can perceive of no good reason why an employer should be prohibited from insuring himself against such losses, since the losses are in effect a business loss—i.e., a calculated risk of doing business.

Id.

California: Allstate Ins. Co. v. Harris, 445 F. Supp. 847, 849 (N.D. Cal. 1978) ("California law has long held that an insured who becomes liable for the intentional act of another insured is entitled to a defense and to indemnity pursuant to the terms of a contract of personal liability insurance notwithstanding policy language barring coverage for intentional acts."); Arenson v. National Auto. & Casualty Ins. Co., 286 P.2d 816, 818 (Cal. 1955) (holding that insurance provided coverage for punitive damages assessed against parent for child's wrongful act).

Florida: United States Concrete Pipe Co. v. Bould, 437 So. 2d 1061, 1064 (Fla. 1983) ("Florida public policy does not preclude insurance coverage of punitive damages when the insured himself is not personally at fault, but is merely vicariously liable for another's wrong.").

Illinois: Beaver v. Country Mut. Ins. Co., 420 N.E.2d 1058, 1061 (Ill. App. Ct. 1981) (stating that while it is against public policy to insure against punitive damages that arise out of one's own misconduct, an employer may insure itself against punitive damages for vicarious liability assessed against it in consequence of employees' wrongful conduct).


[T]o the extent, if any, which an insured in this cause is held vicariously liable for such acts or conduct, public policy does not prevent the shifting of liability for the punitive damages to an insurer, where, as here, the insurers have contractually agreed to provide coverage for such liability.

Id.; Norfolk & W. Ry. Co. v. Hartford Accident & Indem. Co., 420 F. Supp. 92, 95 (N.D. Ind. 1976) ("The rule against shifting the impact of a punitive damage award has an exception [under Indiana law], however. An employer may be held liable for a punitive damage award against his agent when the agent acted within the scope of his employment.").

Missouri: Ohio Casualty Ins. Co. v. Welfare Fin. Co., 75 F.2d 58, 60 (8th Cir. 1934) (applying Missouri law to motor vehicle accident and stating that "[i]n this situation where there was no direct or indirect volition upon the part of the master in the commission of the act, no public policy is violated by protecting him from the unauthorized and unnatural act of his servant"), cert. denied, 295 U.S. 734 (1935).

New Hampshire: Commercial Union Assurance Cos. v. Derry, 387 A.2d 1171, 1173-74 (N.H. 1978). In Commercial Union Assurance Companies v. Derry, the insurer urged the court to impute the police officer's alleged tortious intent to the town. The court stated that although an employer can be liable for the acts of its employees, no public policy precludes "insuring against the consequences of an unauthorized willful wrong allegedly committed by another insured." Id. Accordingly, the court held that the insurer was obligated to both defend and indemnify the insured town in a suit arising from the alleged intentionally tortious conduct of a town police officer.

hold both that (1) the provisions commonly used in liability insurance policies do not preclude coverage for damages awarded for an intentional tort when the insured is vicariously liable, and (2) it would be inappropriate to imply a limitation that restricts coverage in such situations.63

When punitive damages awarded against an insured are paid by an insurance company, the punishment intended for the insured and battery committed by or at the direction of an insured is that it would be contrary to public policy to indemnify a person for a loss incurred as a result of his own willful wrongdoing").

New York: Morgan v. Greater N.Y. Taxpayers Mut. Ins. Ass'n, 112 N.E.2d 273, 275 (N.Y. 1953). In Morgan v. Greater New York Taxpayers Mutual Insurance Association, the victim of an assault by one member of a partnership obtained a judgment against the partner individually and the partnership. In a proceeding to recover the judgment from the partnership's public liability insurer, the court held in the victim's favor. Id. The Morgan court stated that a second partner, who was jointly and severally liable for judgment against the partnership, was a named insured in the applicable insurance policy. Id. Further, the court held that the "assault and battery" clause of the policy did not exclude coverage for his liability because the assault was neither by him nor at his direction. Id. The Morgan court stated:

[T]he defendant [insurer] has undertaken separate and distinct obligations to the various assureds, named and additional, and where liability is imposed upon one of the assureds for assault by another assured in which he took no part, the result should be no different for that which would obtain where the assault was committed by a person who is not an insured.

Id.


We are in accord with this view and hold that public policy against insurance protection for punitive damages does not preclude recovery of indemnity from "the insurer by an employer to whom either willfulness or gross negligence of his harm-dealing employee became imputable for imposition of liability under the Oklahoma application of the respondeat superior doctrine.

Id. at 1160 (footnote omitted).

South Carolina: Employers Mut. Liab. Ins. Co. v. Hendrix, 199 F.2d 53, 55 (4th Cir. 1952) (applying South Carolina law and stating that insurance policy may provide coverage for punitive damages assessed against vicariously liable employer for tortious acts of employee at his or her initiative).

Wyoming: Sinclair Oil Corp. v. Columbia Casualty Co., 682 P.2d 975, 981 (Wyo. 1984) (holding that "it is not against the public policy of the State of Wyoming to insure against either liability for punitive damages imposed vicariously based on willful and wanton misconduct or personal liability for punitive damages imposed on the basis of willful and wanton misconduct").

63. From the point of view of the insured, as well as of the victim, the harm for which an insured is vicariously liable is often appropriately viewed as a fortuitous occurrence. For example, courts have concluded that the intentional torts of children, such as battery or acts of vandalism, are fortuitous as to parents who are liable for negligently failing to supervise their children to prevent their children from causing harm. See e.g., Unigard Mut. Ins. Co. v. Argonaut Ins. Co., 579 P.2d 1015, 1019 (Wash. Ct. App. 1978) (permitting insurance coverage for punitive damages assessed against parent for child's wrongful act).
is obviously mitigated and any deterrent effect is substantially di-
minished. Judicial precedents sustaining coverage when an insured
is vicariously liable generally have not involved the type of con-
duct—instances in which corporate managements were extremely
reckless or grossly irresponsible in employing an individual, in su-
ervising an employee, or in approving some action of an em-
ployee—section 909 of the Restatement (Second) of Torts
identifies as warranting an award of punitive damages against a
"principal or managerial agent." Consequently, there may still be
some additional problems to be considered by courts in those states
in regard to whether liability insurance coverage will be afforded
for employers in such circumstances.

B. Legislation Providing That Liability Insurance May Be Afforded
for Punitive Damages

Legislation in several states specifies that—at least for some
types of situations—public policy does not preclude coverage for
punitive damages. For example, the Kansas Insurance Code
provides:

*It is not against the public policy of this state for a person or
entity to obtain insurance covering liability for punitive or
exemplary damages assessed against such insured as the
result of acts or omissions, intentional or otherwise, of
such insured's employees, agents or servants, or of any
other person or entity for whose acts such insured shall be
vicariously liable, without the actual prior knowledge of such
insured.*

In Virginia, legislation distinguishes between instances involving in-
tentional acts and wanton or willful negligence:

*It is not against the public policy of the Commonwealth for any
person to purchase insurance providing coverage for pu-
titive damages arising out of the death or injury of any
person as the result of negligence, including willful and
wanton negligence, but excluding intentional acts. This sec-

65. For a discussion of whether insurance should provide coverage for puni-
tive damages assessed against corporations vicariously liable for defective products,
see infra note 107 and accompanying text.
North Carolina Insurance Code provides that "[w]ith respect to liability insurance
policy forms, an insurer may exclude or limit coverage for punitive damages
Further, in Pennsylvania the legislature has made a special provision for operators of skiing areas: “(b) Insurability. —It is not against the public policy of this Commonwealth for an insurance company to insure the operator of a downhill skiing area against punitive damages, other than those punitive damages arising from an intentional tort committed by such operator.”68 Finally, the Hawaiian Insurance Code states: “Coverage under any policy of insurance issued in this State shall not be construed to provide coverage for punitive or exemplary damages unless specifically included.”69 The Hawaiian legislation conveys a somewhat ambiguous message. On the one hand, because the right of some insureds to be indemnified is affirmed, such legislative provisions might be viewed as favoring the interests of insureds. However, the effect of the Hawaii statute is probably to eliminate coverage in many instances.

In over a dozen other states legislation creating guaranty associations or funds that provide indemnification for insureds when an insurer has become insolvent or bankrupt excludes coverage for punitive damages. For example, the Arkansas Insurance Code states that “[c]overed claims shall not include any amount awarded as punitive or exemplary damages.”70 If public policy in these states clearly precluded liability insurance from providing coverage for punitive damages, such statutory prohibitions would be both unnecessary and redundant. Thus, legislation prohibiting indemnification for punitive damages awards from such funds or guaranty associations indicates that the legislature did not recognize any

69. Haw. Rev. Stat. § 431:10-240 (1988); cf. N.J. Rev. Stat. § 17:22-6.72 (1987) (providing that “‘covered claim’ shall also not include amounts for interest on unliquidated claims, punitive damages unless covered by the policy, counsel fees for prosecuting suits for claims against the fund, and assessments or charges for failure by an insolvent insurer to have expeditiously settled claim”).
clear public policy that would preclude liability insurance coverage for punitive damages.

IV. Resolving Questions About Whether Coverage Is Provided for Punitive Damages: Legislative and Contractual Provisions

A. Legislation

For most of this century, questions about whether liability insurance policies provided coverage for punitive damages were resolved in the nation's courtrooms. During the past two decades, however, some legislatures have directly addressed this issue. 71 States have adopted several distinctive types of legislation. First, in one or two states, insurers are statutorily prohibited from providing coverage for punitive damages. 72

Second, there are a few states in which legislation—addressing concerns of a specific group—specifies some circumstances in which it is not against public policy for liability insurance to provide coverage for punitive damages. These statutes afford insurers and insureds the freedom to contract for such coverage. However, by inference, such legislation indicates that it would be against public policy for insurance to provide coverage for punitive damages in circumstances other than those specified.

Third, several other states have enacted statutes providing "coverage under any policy of insurance ... shall not be construed to provide coverage for punitive or exemplary damages unless specifically included." 73 The form of the legislation in these states presents the intriguing question of whose interests are served by such provisions. On initial consideration, it appears that this type

71. In many states, legislation now addresses at least some aspects of the insurance coverage questions created by punitive damage awards. For a discussion of state legislation that addresses this issue, see supra notes 66-70 and infra notes 72-73 and accompanying text.

72. For examples of state legislation that prohibit insurance coverage for punitive damages, see supra note 70 and accompanying text. The legislation in these states clarifies the coverage issue, and in a few instances, effectively reverses precedent established by courts.

73. See, e.g., HAW. REV. STAT. § 431:10-240 (1987) (providing that "[c]overage under any policy of insurance issued in this state shall not be construed to provide coverage for punitive or exemplary damages unless specifically included") (emphasis added); MONT. CODE ANN. § 33-15-317 (1987) (same); cf. N.J. STAT. ANN., § 17:22-6.72 (West 1987) (providing that "'[c]overed claim' shall also not include amounts for interest on unliquidated claims, punitive damages unless covered by the policy, counsel fees for prosecuting suits for claims against the fund, and assessments or charges for failure by an insolvent insurer to have expeditiously settled claim") (emphasis added).
of legislation—by authorizing the sale of insurance for punitive damages—serves the interests of purchasers who want to arrange coverage, as well as insurance companies that want to sell coverage. However, perhaps less obviously, such legislation also serves the interests of insurance companies that want to avoid providing coverage for punitive damages, but do not want to include an exclusion in the coverage terms. The importance of these legislative provisions to insurers that do not want to provide coverage for punitive damages is best understood by recalling that in the late 1970s the Insurance Services Office (ISO) proposed adding an exclusion to liability insurance policies which would have eliminated coverage for punitive damages. The proposal precipitated what was, especially in retrospect, an extraordinary debate within the industry. The proposed exclusion was vehemently attacked by some segments of the industry, particularly sales representatives. Within a few months of the original announcements, the proposed exclusion was withdrawn.

Legislation specifying that coverage for punitive damages is only provided when there is a provision expressly so stating in the insurance contract allows insurance companies that do not wish to provide coverage to do so without offending either sales representatives or purchasers by including an explicit coverage limitation or exclusion. When, as is usually the case, liability insurance policies define coverage in terms of “all sums,” without specifying any categories or characterizations, it is virtually indisputable that “punitive” or “exemplary” damages have not been “specifically” or “expressly” included. Thus, such legislation implicitly codifies an exclusion of punitive damages.

B. Explicit Contractual Provisions

Anglo-American legal doctrines, initially developed by the English common law courts, provide freedom for parties to arrange

74. The ISO, organized in 1971, is a national organization that compiles data for underwriting many types of property and liability insurance. The ISO, an association of insurance companies, also prepares standard forms for various types of insurance coverage that are used by hundreds of insurance companies in the United States. At one time, such organizations provided members with actuarial computations, including premium rates. However, this type of service has been reduced or eliminated for many types of insurance.

75. Legislation that precludes coverage for punitive damages unless a liability insurance policy expressly includes such coverage creates an exclusion of punitive damages without altering the contractual terms in insurance policy forms. This legislation presumably satisfies segments of the insurance industry—such as sales representatives—who fought the introduction of explicit exclusions for punitive damages.
their contractual relationships. The "Freedom to Contract" principle has substantial import for contractual provisions in insurance policies specifying either exclusions or inclusions. There are literally thousands of appellate court decisions sustaining the enforceability of coverage limitations on the basis that courts should enforce the parties' agreement as set forth in the applicable insurance policy.

1. Coverage Terms Excluding Insurance for Punitive Damages

Insurers may make explicit qualifications, limitations or restrictions by employing an approach that ensures the purchaser's actual expectation is the same as the insurer's or that it would be "unreasonable" for a purchaser to have a contrary expectation. Provisions in liability insurance policies excluding coverage for punitive damages undoubtedly are enforceable contracts. Even if there might be some hesitance concerning the enforceability of such exclusions in insurance policies issued to individuals, there would be little, if any, problem with ensuring that enterprises purchasing liabil-

76. Many commentators have described the importance some common law courts attach to the "freedom to contract." See, e.g., JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 5 (1987). These commentators stated:

As freedom became a rallying cry for political reforms, freedom of contract was the ideological principle for the development of the law of contract. Williston adds; "Economic writers adopted the same line of thought. Adam Smith, Ricardo Bentam, and John Stuart Mill successively insisted on freedom of bargaining as the fundamental and indispensable requisite of progress . . . ."

Id. (citations omitted).

77. Cf. RESTATEMENT (SECOND) OF CONTRACTS § 201(1) (1981) (stating that "[w]here the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning").


We hold only that where, as here, the policy limitation relied upon by the insurer to deny coverage is clearly worded and conspicuously displayed, the insured may not avoid the consequences of that limitation by proof that he failed to read the limitation or that he did not understand it.

Id. Similarly, the Illinois Supreme Court stated:

The language of the receipt issued here is clear and unambiguous; the applicant must have completed the required medical examination before temporary insurance could be in effect regardless of the company's later determination of the applicant's insurability. There is no language in the receipt reasonably inducing any belief of coverage or reliance on interim insurance prior to the time of compliance with the express conditions therein set out.


79. For a further discussion of the enforceability of express exclusions of coverage for punitive damages, see supra notes 27-28 and accompanying text.
ity insurance are, or should be, aware of the restriction. Moreover, such provisions are in accord with the widely recognized proposition that liability insurance should not immunize insureds from the consequences of intentional or wanton actions.

2. Coverage Terms Providing Insurance for Punitive Damages

In more than half of the states, either judicial decisions or legislative provisions clearly indicate that, at least in some circumstances, it is not against public policy to provide coverage for punitive damages. Nevertheless, provisions in liability insurance policies that include coverage for punitive damages raise public policy questions about whether transferring such risks to insurers for all types of tortious conduct covered by the insurance policy—which might result in an award of punitive damages—unacceptably erodes the goals of punishment and deterrence.

If punitive damage awards are insurable, insureds—especially corporations engaged in commercial activities—may begin to evaluate the costs and benefits of conduct that might justify the imposition of punitive damages. As Judge Wisdom commented in 1962:

Where a person is able to insure himself against punishment he gains a freedom of misconduct inconsistent with the establishment of sanctions against such misconduct. It is not disputed that insurance against criminal fines or penalties would be void as violative of public policy. The same public policy should invalidate any contract of insurance against the civil punishment that punitive damages represent.

Similarly, the Oregon Supreme Court observed:

Protection by insurance coverage of punitive damages will be available only to those who contract for it, that is, to those who know they need it, and are able to pay for it. The [court's] holding will therefore tend to protect people who have wealth and sophistication in legal matters. Such people will now be able to place themselves above the law of punitive damages.

80. For a discussion of whether corporations can reasonably expect insurance to provide coverage for punitive damages in the absence of express inclusions, see infra notes 96-104 and accompanying text.


Prospective assurance to purchasers that insurance coverage is provided for grossly negligent, wanton and—in at least some instances—intentional acts, creates an aura that is different and distinguishable from retrospective judicial determinations that coverage is afforded for punitive damages awarded as a consequence of those actions.

V. Conclusion

Divergent views about the insurability of punitive damages have existed for over half a century in the United States. It is clear that questions about whether liability insurance policies afford coverage for punitive damages—the issue collaterally raised by the topic that is the primary focus of this symposium—need to be analyzed jurisdiction by jurisdiction. In those states where insurance coverage for punitive damages is not foreclosed by legislative enactment or judicial decisions, coverage disputes frequently involve several questions. Judicial decisions about whether a liability insurance policy provides coverage for an insured may be based on several factors, including the type of tortious conduct, the bases of liability, the type of activity and differences in the way contract provisions are phrased.

Insurers could eliminate disputes about whether coverage is provided for punitive damages by inserting exclusions into liability insurance policies. Consequently, a persuasive case exists for the view that the absence of any explicit provisions, in effect, creates an ambiguity and, therefore, insurers ought to be held liable, as they generally are when there is an ambiguity in an insurance contract. In addition, it is also clear that the term “all sums,” which is commonly used in statements describing the scope of coverage provided by liability insurance policies, is subject to being broadly construed or understood to encompass punitive damages. However, in most situations in which either an ambiguity or a term in an insurance policy is construed against an insurer, there is no countervailing public interest that supports an interpretation of the coverage terms which would result in a denial of an insured’s right to indemnification. Punitive damages generally are premised on a significant public interest that is served by the award. However, shift-

83. The survey of cases and legislation in the preceding sections indicates that in many states the issues that need to be specifically addressed in a coverage dispute about punitive damages are probably becoming more, rather than less, complicated.

84. In some states, results may be determined by the type of tortious act that caused the injury.
ing the responsibility for paying an award from the tortfeasor to an insurance company effectively nullifies the public's interest in awarding punitive damages: punishment and deterrence.\(^{85}\)

Liability for compensatory damages in tort actions may also serve to deter or to punish, and deterrence and punishment are sometimes considered to be general goals of tort law.\(^{86}\) Although it has been argued that liability insurance is not compatible with the attainment of these objectives,\(^{87}\) neither legislatures nor courts have regarded such arguments as sufficiently compelling to restrict the use of insurance policies to transfer the risk of liability for compensatory damages. Accordingly, courts sustain insurance coverage for compensatory damages—usually, but not invariably, subject to an exception for intentional torts\(^{88}\)—even though precisely the same conduct might have been or is, in some instances, the basis for an award of punitive damages.\(^{89}\)

From the public's standpoint, the most significant consequence of allowing punitive damages to be insured is the effect that it would have in reducing or eliminating a possible deterrent to conduct creating hazards. However, because the types of outrageous or wanton conduct that are most likely to justify an award of punitive damages also involve violations of criminal laws, it is rea-

---

85. Ellis, *supra* note 6, at 3. Professor Ellis observed:

At least seven purposes for imposing punitive damages can be gleaned from judicial opinions and the writings of commentators: (1) punishing the defendant; (2) deterring the defendant from repeating the offense; (3) deterring others from committing an offense; (4) preserving the peace; (5) inducing private law enforcement; (6) compensating victims for otherwise uncompensable losses; and (7) paying the plaintiff's attorney's fees.

*Id.*

86. Professor Schwartz has observed: "In truth, there is now a rich body of academic literature supporting the view that a primary purpose of tort liability rules is to discourage inappropriate behavior on the part of accident causers." Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 132, 137 (1982) (citing GUIDO CALABRESI, THE COSTS OF ACCIDENTS 28 (1970) and RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 154-57 (2d ed. 1977)).

87. See, e.g., Breeden v. Frankford Marine, Accident & Plate Glass Ins. Co., 119 S.W. 576, 606-10 (Mo. 1909) (holding that insurance does not lessen employer's liability and that such liability is "neither directly or [sic] by implication impugned, impaired, abridged, or whittled away" by insurance coverage for punitive damages).


89. See, e.g., Crull v. Gleb, 382 S.W.2d 17, 19 (Mo. Ct. App. 1964) (operating automobile in reckless manner); cf. Northwestern Nat'l Casualty Co. v. McNulty, 307 F.2d 432, 434-42 (5th Cir. 1962) (refusing to permit insurance coverage for punitive damages and distinguishing cases that hold insurers liable for compensatory damages awarded on the basis of recklessness or willful and wanton misconduct).
reasonable to question whether liability for punitive damages is a significant consideration for individuals who are not deterred by the threat of criminal penalties. Weighing the competing considerations with regard to liability insurance policies issued to individuals, it seems to me that one should not accord great significance to the possible loss of deterrence in regard to individuals who purchase liability insurance to shift risks that do not involve commercial activities. If the potential advantages of deterrence are not significant considerations, the rationales that support extending coverage outweigh the remaining public interest in retribution or punishment.

The resolution of the coverage question for business enterprises generally, and, in particular, enterprises that may be responsible for defective products, should be analyzed separately—especially with regard to “deterrence”—because different considerations may apply. These issues are addressed in the Addendum that follows.

VI. ADDENDUM: APPRAISING THE APPLICABILITY OF RATIONALES ARTICULATED BY COURTS TO ISSUES ABOUT INSURANCE COVERAGE FOR PUNITIVE DAMAGE TO AWARDS IN PRODUCT LIABILITY CASES

Reasons have been advanced—by the authors participating in this symposium and others—for and against awarding punitive damages when tort claims are asserted against corporations for injuries resulting from defective products. Similarly, cogent argu-

90. Professor Owen has stated:

[A]t least three types of defendants stand out as possibly deserving separate treatment: (1) individual defendants; (2) professional defendants and; (3) institutional defendants. . . . Surely the forms of power and motivations of a drunk driver are different in substantial measure from those of a malpracticing doctor or a stock broker, and are different in turn from misconduct by a power company or automotive manufacturer.

David Owen, Civil Punishment and the Public Good, 56 S. Cal. L. Rev. 103, 105 (1982).

91. See Albert R. Abramson, Punitive Damages in Aircraft Accident Cases — A Debate, 11 Forum 50, 52 (1975) (explaining that dual purposes of punitive damages are punishment and deterrence); Grant P. DuBois, Punitive Damages in Personal Injury, Products Liability and Professional Malpractice Cases: Bonanza or Disaster, 43 Ins. Couns. J. 344, 345-46 (1976) (stating that punitive damages serve purpose of condemning questionable business practices); Ellis, supra note 6, at 74 (stating that insurance coverage for punitive damages conflicts with goal of efficient deterrence); Donald M. Haskell, The Aircraft Manufacturer's Liability for Design and Punitive Damages — The Insurance Policy and the Public Policy, 40 J. Air. L. & Com. 595, 635 (1974) (calling for equitable balance between consumer and manufacturer to further technological progress); David Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1257, 1285 (1976) (stating that despite difficulty in predicting punitive damages awards manufacturers' behavior will be influenced by open-ended liability); Gary T. Schwartz, Deterrence and Punishment in the Common Law of Punitive Damages: A Comment, 56 S. Cal. L. Rev. 133, 133 (1982) (stating
ments have been urged both in support of and in opposition to allowing liability insurance to provide insureds with coverage for punitive damages. In response to these considerations, courts and some state legislatures have fashioned a variety of laws, rules and doctrines that address the insurability of punitive damages.

In those states in which judicial decisions or legislative acts preclude indemnification by liability insurance for amounts imposed as punitive damages, issues about coverage in a products liability case are undoubtedly subject to the general prohibition. Thus, punitive damages awarded as a result of a defective product are not insurable. However, in many states there is no general prohibition that precludes shifting the responsibility for paying punitive damages from an insured to an insurer. Moreover, in these states the resolution of disputes about whether coverage is provided for punitive damages has been premised on at least five or six distinct rationales. The analysis in the following sections considers the significance or applicability of the rationales articulated by judges in the appellate court decisions holding that a liability insurance policy provided coverage for punitive damages to issues about the insurability of awards resulting from injuries cause by defective products.

A. Construction of the Coverage Terms

The insureds who are the defendants in many, and probably most, of the cases involving claims that result from defective prod-


92. For a complete discussion of the arguments for and against insurance coverage for punitive damages, see supra notes 11-70 and accompanying text.

93. For examples of judicial and legislative responses to the punitive damages coverage debate, see supra notes 29-32 and accompanying text.

94. For examples of judicial and legislative limitations on coverage for punitive damages, see supra notes 11-32 and accompanying text.

95. For a discussion of the varying state approaches to insurance coverage for punitive damages, see supra notes 33-70 and accompanying text.
ucts are enterprises that acquire insurance with the assistance of
individuals who have a relatively high degree of sophistication
about coverage. For example, corporations frequently employ indi-
viduals trained as risk managers who are both skilled and well-in-
formed about the scope of protection provided by liability
insurance. In thousands of instances, independent agents and
brokers can and do counsel such insureds. Moreover, the acquisi-
tion of liability insurance by such enterprises is a significant transac-
tion that also may be reviewed by legal counsel. Furthermore, a
corporation acquiring insurance to cover a large number of individ-
ual risks, such as automobile manufacturers, often has sufficient
bargaining power either to influence or, in some instances, to spec-
ify the coverage terms. Such purchasers either are or should be as
aware as the insurers of the insurance policy terms that leave the
question of coverage for punitive damages unresolved.

When businesses purchasing insurance are guided by persons
with expertise about insurance arrangements, especially when the
coverage terms are specified by the purchaser, the decision not to
address the question of coverage for punitive damages is appropri-
ately attributed to both the insurer and the insured. In such situa-
tions, there is virtually no reason to treat an insurance policy that
does not specify whether coverage is provided for punitive damages
as a contract that should be broadly interpreted or construed
against the insurer, in order to indemnify corporations for amounts
awarded as punitive damages.

96. Consider the emphasis in many printed advertisements and television
commercials—sponsored by the Independent Insurance Agents of America on the
advantages of buying insurance with the assistance and the expertise offered by
such agents.

97. In addition, during the past decade the number of insurance consultants
has increased dramatically. Today, many businesses and individuals retain the
services of consultants to provide advice when purchasing insurance coverage.
The classified telephone listings for even relatively small cities usually include sev-
eral insurance consultants. For example, the 1991 telephone book for Cedar
Rapids, Iowa, a city with a population of approximately 100,000, lists 14 consul-
tants. The Chicago telephone book lists over 200 insurance consultants. Although
many of the listings are for businesses that are also independent agents or brokers
who sell insurance, some consultants only provide advice to their clients.

98. Sometimes when a large corporate enterprise purchases insurance cover-
age, terms are drafted by or on behalf of the prospective insured in what is com-
monly described as a "manuscript" insurance policy. This is one of the services
offered by several of the large insurance brokers in the United States, such as Alex-
ander & Alexander Services, Incorporated or Marsh & McLennan Companies, In-
corporated. See Bus. Ins., July 5, 1993, at 1 (providing ranking and statistics on
world's twenty largest insurance brokers). In some instances, manuscript insur-
ance policies are sent to insurers who are invited to compete for the business by
submitting bids.
B. Responsibility for Eliminating Ambiguity in Coverage Terms

Insurance companies are, or should be, aware of the disputes that have arisen as a consequence of omitting express inclusions or exclusions of punitive damages from liability insurance forms. As such, insurers that want to preclude coverage for punitive damages can do so by including express exclusions. Moreover, because provisions excluding coverage for punitive damages have been added to some liability insurance forms, insurers should assume substantial responsibility for whether the absence of such provisions constitutes coverage for punitive damages. However, when the enterprise purchasing insurance employs individuals who are sophisticated about the coverage terms and this coverage issue, the justification for resolving the “ambiguity” against the insurer is notably different from the type of situation in which courts generally sustain coverage claims on this basis. Furthermore, when the parties have employed coverage terms that comply with specifications prepared on behalf of the purchaser, both the insured and the insurer are appropriately treated as drafters of the contract terms. Therefore, when enterprises acquire liability insurance, it is inappropriate to assume that the responsibility for ambiguity rests exclusively with the insurer.

C. Reasonable Expectations

Courts throughout the country have recognized that it is appropriate to protect the “reasonable expectations” of policyholders. Nevertheless, this doctrine should not automatically justify

99. For a discussion of judicial interpretations of ambiguous coverage terms, see supra notes 38-47 and accompanying text.
100. The coverage issue could also be resolved by regulatory action—either legislative or administrative.
101. For an example of insurance forms and provisions that exclude coverage for punitive damages, see supra notes 27-28 and accompanying text.
102. In 1947, Judge Learned Hand commented:
An underwriter might so understand the phrase, when read in its context, but the application was not to be submitted to underwriters; it was to go to persons utterly unacquainted with the niceties of life insurance, who would read it colloquially. It is the understanding of such persons that counts; and not one in a hundred would suppose that he would be covered, not “as of the date of completion of Part B,” as the defendant promised, but only as of the date of approval.
Gaunt v. John Hancock Mut. Life Ins. Co., 160 F.2d 599, 601 (2d Cir.) (emphasis added), cert. denied, 331 U.S. 849 (1947). Analyses and comments of this type by judges signaled a new effort to vest insureds with rights that conflict with the terms of insurance contracts, even when the applicable provisions in the insurance policy are unambiguous.

The doctrine of protecting reasonable expectations is appropriately summa-
an expansive reading of the general terms in liability insurance policies to encompass coverage for punitive damages when businesses produce or distribute defective products. As noted in the preceding section, corporate insureds typically employ risk managers or retain the services of sophisticated insurance brokers. In such cases, courts should consider whether both the insurer and the insured have chosen to use a contractual arrangement that omits terms addressing the question of punitive damages coverage. When an insured has been advised by one or more well-informed counselors concerning the acquisition of liability insurance for commercial activities, there is no more reason to focus on the reasonable expectations of the enterprise's officers than on those of the insurer.

104. The principle of honoring the reasonable expectations of insureds, which has been applied in hundreds of judicial decisions, recognizes the indisputable fact that when an insurance policy is purchased, both parties clearly intend to create a contract obligating the insurer to provide insurance. Such intent provides a rationale for considering whether there is a justification for, in effect, invalidating or ignoring a limitation in the terms that the insurer sought to impose on the obligation. See Robert E. Keeton, Insurance Law Rights at Variance with Policy Provisions, 85 Harv. L. Rev. 961, 967 (1970) (discussing history of doctrine of reasonable expectations). Professor Keeton states: "The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." Id.; see also Ken Abraham, Distributing Risk: Insurance, Legal Theory, and Public Policy ch. 5 (1986) (stating that courts generally honor reasonable expectations of insureds); Robert H. Jerry, II, Understanding Insurance Law § 25D (1987) (discussing, generally, doctrine of reasonable expectations); Keeton & Widiss, supra note 7, § 6.3 (same).

103. The principle of honoring the reasonable expectations of insureds, which has been applied in hundreds of judicial decisions, recognizes the indisputable fact that when an insurance policy is purchased, both parties clearly intend to create a contract obligating the insurer to provide insurance. Such intent provides a rationale for considering whether there is a justification for, in effect, invalidating or ignoring a limitation in the terms that the insurer sought to impose on the obligation. See Robert E. Keeton, Insurance Law Rights at Variance with Policy Provisions, 85 Harv. L. Rev. 961, 967 (1970) (discussing history of doctrine of reasonable expectations). Professor Keeton states: "The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." Id.; see also Ken Abraham, Distributing Risk: Insurance, Legal Theory, and Public Policy ch. 5 (1986) (stating that courts generally honor reasonable expectations of insureds); Robert H. Jerry, II, Understanding Insurance Law § 25D (1987) (discussing, generally, doctrine of reasonable expectations); Keeton & Widiss, supra note 7, § 6.3 (same).
Courts should not predicate coverage decisions in favor of corporations whose decisions about insurance are counseled by experienced individuals on rationales which have been fashioned to protect the interest of ordinary, and often poorly informed, consumers, who are the appropriate beneficiaries of the judicially conceived doctrine of protecting the reasonable expectations of insureds.

D. Maximizing Indemnification for the Injured Person

In some states courts hold that punitive damages serve to maximize the compensation for injured individuals by providing indemnification for amounts that would not otherwise be recovered. In these states, it is arguable that insurance coverage for punitive damages enhances the prospects for fully compensating injured persons. However, there are several reasons why this should not be a significant consideration in regard to resolving coverage questions when suits result from defective products.

First, corporate defendants generally have the resources to pay the judgments rendered against them. In most cases when punitive damages are awarded against corporate defendants for defective products, the injured person receives payment regardless of whether the defendant is indemnified by liability insurance. Of course, there may be a few instances when a small enterprise will be unable to pay an award. In such cases, courts can fashion an exception.

Second, no more than three or four states continue to justify awarding punitive damages in order to provide compensation for injured claimants. Therefore, it would be inappropriate for the relatively rare and unusual situation—instances in which punitive damages were awarded as compensatory damages and the amount awarded by the court can not be paid by the tortfeasor—to guide

105. For a discussion of cases that hold that punitive damages are compensatory in nature, see supra note 50 and accompanying text.

106. Undoubtedly, there will also be instances in which a punitive damage award threatens the continued existence of a large enterprise. However, for most corporations this will only occur when the award is extraordinarily large, in which case it was likely determined on the basis of retribution or deterrence. When a large amount has been awarded as punishment, there is little, if any, justification for transferring the loss to insurers in order to maximize indemnification for the injured persons. Similarly, when a punitive damage award against the manufacturer of a defective product is such that the manufacturer cannot afford to pay it, in virtually all cases, the amount was determined in order to punish the defendant or to deter similar conduct in the future. Therefore, decisions about the insurability of such awards should not rest on the rationale of maximizing indemnification for injured persons.
courts in the formulation of a general proposition in regard to the insurability of punitive damages awarded as a result of defective products.

E. The Vicarious Liability Exception

Courts in many states have recognized an exception to the general prohibition on insurance coverage for punitive damages when such damages result from vicarious liability. However, there are few, if any, cases in which the rationales for the vicarious liability exception should be applied as a justification for permitting corporations to be indemnified for amounts awarded as punitive damages in products liability litigation.

Responsibility for the design or manufacture of faulty products appropriately rests with the executives of an enterprise. Therefore, the public's interest in safe products mitigates against anything that serves to diminish the responsibilities of those charged with making executive decisions about product safety. Consequently, the substantial societal interest in assuring that defective products—especially items which pose threats to the health and safety of the public—do not enter the marketplace means that it would be very undesirable to apply the vicarious liability exception in this context.

F. Conflict of Interests Problems

When a tort claim is asserted against an individual or an entity that has acquired liability insurance for risks involved in an activity that may have caused harm to the claimant, the insurer and the insured often have the same, or at least compatible, interests concerning the possible responses to such a claim. However, when punitive damages are not covered by liability insurance as a consequence of judicial precedent, an exclusion in the insurance policy, or a legislative prohibition, there is a conflict of interests between the insurer and the insured. This conflict is sufficient to justify the imposition of restrictions on the insurer's right to select and direct the attorneys designated to defend the insured.

107. For a complete discussion of the vicarious liability exception, see supra notes 55-65 and accompanying text.


109. For example, in Nandorf, Inc. v. CNA Insurance Co., the court concluded that a conflict of interests existed when the insurer denied coverage for punitive
Although some conflict of interests problems can be avoided if liability insurance covers punitive damages, this is not a compelling consideration because a conflict of interest also exists when an injured person's claim exceeds the applicable coverage limits.\textsuperscript{110} Few insureds—even substantial enterprises—purchase liability coverage with limits that exceed the amounts now sought as punitive damages. Therefore, when there is a claim for punitive damages, in most instances causes there is a conflict that can not be avoided.

\textbf{G. Punishment and Retribution}

One of the primary rationales for awarding punitive damages is to punish the tortfeasor.\textsuperscript{111} If the rationale which supports a particular award is one of retribution or punishment, it follows that the reasons for sustaining the award also apply—with equal force—as a persuasive justification for not allowing the tortfeasor to shift responsibility for paying the judgment to a third party. As long as the reasons for awarding punitive damages remain, the justification for such damages\textsuperscript{112} militates against the insurability of punitive damages and against interpreting coverage terms to include punitive damages.

\textbf{H. Deterrence}

Deterrence is one of the principal goals of punitive damages.\textsuperscript{113} Punitive damages serve the public interest by encouraging corporations to keep defective products—especially those that are

\begin{itemize}
\item damages where a third party sought a substantial amount of punitive damages ($100,000) and a relatively small amount of compensatory damages ($5,000).\textsuperscript{110}
\item Nandorf, 479 N.E.2d at 992. The court stated that, although the insured and insurer shared a common interest in defeating the plaintiff's liability claims, if the insured were found liable, the insurer's interest would be best served by an award of minimal compensatory damages and substantial punitive damages. \textit{Id.}
\item 110. Keeton & Widiss, \textit{supra} note 7, \S 7.6, at 116.
\item 111. When a court sustains a jury's award of punitive damages, the decision effectively affirms the rationales for the award.
\item 112. Such justifications must be significant in order to warrant the imposition of penalties in a commercial society that generally does not impose such penalties.
\item 113. In considering this question, it is undoubtedly appropriate to recognize that both courts and commentators have questioned the efficacy of punitive damages as a means of affecting misconduct. For example, the Georgia Supreme Court recently reiterated the often-quoted comment by Justice Blackmun in City of Newport v. Facts Concerts, Inc., 453 U.S. 247, 269 (1981). The Georgia Supreme Court stated: "The other purpose behind punitive damages, the prevention of future misconduct, is likewise not served by allowing those damages against a governmental entity because the 'impact on the individual tortfeasor of this deterrence in the air is at best uncertain.' " Martin v. Hospital Auth., 449 S.E.2d 827, 829-30 (Ga. 1994) (quoting City of Newport v. Facts Concerts, Inc., 453 U.S. 247, 269 (1981)).
\end{itemize}
very hazardous—out of the marketplace. Therefore, in most circumstances, allowing corporations that may be responsible for defective products to avoid the effects of punitive damages through the acquisition of liability insurance is incompatible with the objective of deterring the type of conduct that justifies such an award.

In some circumstances, subjecting insurers to the liability of their insureds for punitive damages might serve the public's interest in "deterrence." The cost of insurance, as well as the availability of insurance, undoubtedly can affect the behavior of insureds, including those who are engaged in the manufacture of products. Furthermore, in some contexts insurers directly influence the business activities of insureds. For example, a significant portion of the premiums collected by insurers providing coverage for the risks associated with the operation of boilers, has been spent on activities associated with the design and inspection of boilers to ensure that they do not explode. In some circumstances, there may be reasons to anticipate both that insurers will involve themselves in the safety of consumer products and that such involvement will be a reasonably efficient way to increase the level of product safety. In those situations, a compelling argument exists that the deterrent function of punitive damages is enhanced by allowing corporations to purchase coverage for punitive damages arising from product liability claims.

114. Despite the apparent absence of empirical studies of the conduct of enterprises, some practitioners state that the possibility that courts may impose punitive damages is a significant factor that affects corporate decisions about marketing potentially dangerous products.

115. Professor David Owen observed two decades ago: "By making the flagrant disregard of the public safety costly, the punitive damages remedy converts the profit motive into a positive force for the promotion of optimal product safety." Owen, supra note 91, at 1371.

116. A leading insurance expert, Stephen A. Cozen, observed:

The older boiler and machinery carriers were therefore inspectors first and insurers second (as the name 'Hartford Steam Boiler Inspection and Insurance Company' implies), and, to this day, inspection and engineering services remain one of the most important aspects of this coverage. A greater portion of the average premium dollar is spent on risk management and loss prevention in boiler and machinery insurance than is the case with any other type of property insurance coverage. Many boiler and machinery insureds purchase a policy as much for the carriers' inspection services as for the indemnification of any loss that may occur. Indeed, the importance of the inspection services performed by the typical boiler and machinery insurer is underscored by the fact that many states allow the insurer's inspections to substitute for those required by law; certification by insurance company engineers is acceptable evidence of compliance with boiler and pressure vessel safety codes.

I. Concluding Observations

This symposium focused on the question whether punitive damages awarded in products liability cases are appropriately viewed as "poison pills" or "strong medicine." Examining questions about the insurability of punitive damages from the perspective suggested by the metaphor, the appropriate answer seems clear. On the one hand, if punitive damages are regarded as "poison pills," it is inappropriate to administer them to liability insurance companies. While there undoubtedly are some who might want to prescribe such a lethal prescription to individual insurance companies, and perhaps even to the entire insurance industry, such action—if warranted—certainly should not be done indirectly through products liability litigation. On the other hand, if punitive damages are regarded as an essential, though strong, medication in almost all circumstances administering the therapy to one or more associates of the patient—the insurance companies providing layers of liability coverage—affords no prospect for successful treatment.117

Turning from the metaphorical to the teachings provided by almost a century of judicial decisions, the justifications that have been articulated by judges in other contexts are either inapplicable or relatively unpersuasive as rationales for deciding that liability insurance policies should be interpreted by courts to provide coverage for punitive damages awarded against businesses responsible for defective products.118 The reasons articulated by courts for sustaining indemnification claims by insureds provide little, if any, support for resolving questions about whether liability insurance provides coverage for punitive damages to indemnify enterprises—typically corporations operated by persons with considerable sophistication about both business practices and insurance coverages—responsible for injuries caused by defective products.

The public's compelling interest in safe products would be well-served if the prospect of liability for punitive damages influences the conduct of even a few manufacturers. And there is substantial evidence—albeit much of it anecdotal—that the officers and directors of business enterprises are influenced by the possibility that punitive damages may be imposed.119 Moreover, this is an

117. The insurer receiving such medication is analogous to a member of a group of children who is punished despite the fact that the adult is unable to discern who among the group is at fault.

118. Nevertheless, as suggested above, continuing to hold that punitive damages are insurable could prove to be a prophylactic device in some contexts.

119. Cf. Ellis, supra note 6, at 74 ("Insurability of punitive damages also conflicts with the goal of efficient deterrence. Insurance reduces incentives to engage
area where the criminal laws are rarely, if ever, the basis for the imposition of sanctions on either corporations or on corporate officers and directors. In the absence of criminal sanctions, civil remedies—including punitive damages—can be and have become a significant means of influencing conduct. Therefore, on balance—when the question of coverage for punitive damages is left for courts to resolve—I believe enhancing the public safety is the consideration upon which courts should predicate decisions that punitive damages awarded as a result of defective products are not covered by liability insurance.

The public's interest in safe products also provides a cogent and compelling rationale for legislative actions that would preclude insurers from providing coverage in liability insurance policies for punitive damages awarded against businesses responsible for defective products. Experiences with products that have caused horrendous harms during the past two or three decades seem to clearly indicate that some enterprises have put products into the marketplace knowing that although the item could be designed so as to afford greater safety for the public, the costs of doing so were greater than the projected harms. Hopefully, future hazards will be reduced if manufacturers are forced to factor in possible liability for punitive damages that they could not shift to insurance companies.

in loss avoidance and, in the case of wrongs falling within the categories of malice and reckless conduct . . . increases moral hazard.\(^\)\).