

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

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

## **Executive Summary**

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What are punitive damages? How frequently are they awarded? Where are punitive damages insurable and what types of insurance products are available?

This paper addresses these questions and finds:

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

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

**3) Prevalence of Punitive Damage Awards:** New data shows the increasing prevalence of punitive damage awards, and

**4) Insurance Products for Punitive Damages:** There are pros and cons to the insurance products designed to cover punitive liability.

## 1) Availability of Punitive Damages

### What Are Punitive Damages

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

### Availability: State Law

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

### Availability: State vs. Federal Case Law

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

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

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

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

punitive award according to the factors established by the U.S. Supreme Court. And in 2011, the California Supreme Court applied the Supreme Court’s factors to uphold a 16:1 punitive damage award in *Bullock v. Phillip Morris*, 198 Cal.App 4th, 543 (2011) (reprehensibility of cigarette company’s conduct warranted a \$16 million punitive award alongside a \$850,000 compensatory award.).

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



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

## 2) Insurability of Punitive Damages

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

### Insurability by GDP

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

**Table 1: GDP of states which restrict insurability**

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

### Insurability by Locale of Awards

Data from a U.S. Department of Justice study which analyzed the quanta of punitive damage awards in 2001 in the nation's most populous counties<sup>7</sup> suggests a large portion of punitive damages awards occur in jurisdictions which have some restriction on insurability.

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

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

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

Awards in Insurability Restricted Jurisdictions		
State	County	Total \$ puni award
California	Alameda	4,451,000.00
	Contra Costa	25,000.00
	Fresno	183,000.00
	LA	2,179,000.00
	Orange	26,149,000.00
	San Bernardino	3,032,000.00
	San Francisco	263,000.00
	Santa Clara	780,000.00
Connecticut	Ventura	105,000.00
	Fairfield	0
Florida	Hartford	629,000.00
	Dade	280,450,000.00
	Orange	300,000.00
Illinois	Palm Beach	5,000,000.00
	Cook	188,000.00
	Du Page	150,000.00
Indiana	Marion	510,000.00
	Essex	0
	Middlesex	25,000.00
Massachusetts	Suffolk	2,750,000.00
	Worcester	18,000.00
	St. Louis	203,000.00
Missouri	Bergen	370,000.00
	Essex	2,000.00
New Jersey	Middlesex	555,000.00
	New York	7,850,000.00
North Carolina	Mecklenburg	518,000.00
	Cuyahoga	1,772,000.00
Ohio	Franklin	4,661,000.00
	Allegheny	3,051,000.00
Pennsylvania	Philadelphia	149,141,000.00
	Fairfax	1,352,000.00
Virginia		
<b>Total in restricted jurisdictions</b>		<b>\$496,662,000.00</b>

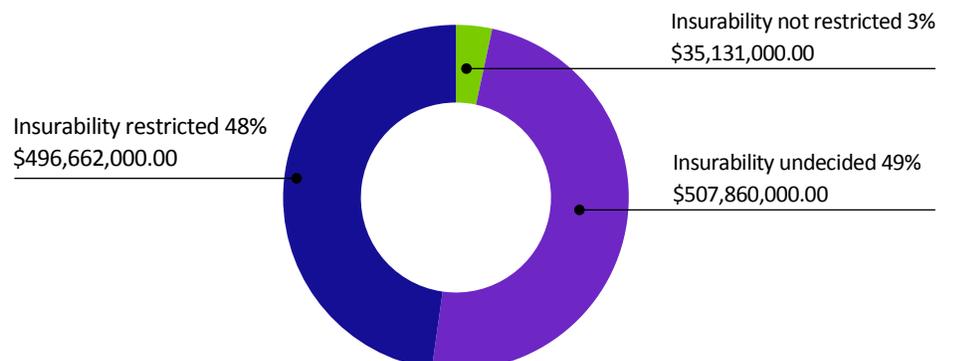
Awards in Insurability Undecided Jurisdictions		
State	County	Total \$ puni award
Michigan (punis not available)	Oakland	0
	Wayne	0
Texas	Bexar	77,062,000.00
	Dallas	393,296,000.00
	El Paso	1,667,000.00
Washington	Harris	35,701,000.00
	King	134,000.00
<b>Total in insurability undecided</b>		<b>\$507,860,000.00</b>

Awards in No Restriction Jurisdictions		
State	County	Total \$ puni award
Arizona	Maricopa	31,940,000.00
	Pima	41,000.00
Georgia	Fulton	446,000.00
Hawaii	Honolulu	2,501,000.00
Kentucky	Jefferson	100,000.00
Wisconsin	Milwaukee	103,000.00
<b>Total in no restriction jurisdictions</b>		<b>\$35,131,000.00</b>

<b>Total in restricted jurisdictions</b>	<b>\$496,662,000.00</b>
<b>Total in insurability undecided</b>	<b>\$507,860,000.00</b>
<b>Total in no restriction jurisdictions</b>	<b>\$35,131,000.00</b>
<b>Total Awards (45 counties)</b>	<b>\$1,039,653,000.00</b>

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

### Punitive Damage Awards by Insurability



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

### **3) Prevalence of Punitive Damage Awards**

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

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

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

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

The following tables show selected data from the Cornell study.

**Table 3: By State**

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

**Table 4: By County**

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

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

**Table 5: By Type of Claim**

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

By State	All Trials		Plaintiff Won Trial		Plaintiff Won and puni sought	
	% punis sought	Number	% punis sought	Number	% w/ puni award	Number
<i>Table 3</i>						
California*	<b>21%</b>	1263	<b>23.4%</b>	636	<b>33.8%</b>	148
Illinois*	<b>2.9%</b>	756	<b>4.1%</b>	418	<b>47.1%</b>	17
Penn.*	<b>3.6%</b>	853	<b>4.4%</b>	480	<b>31.6%</b>	19
Texas	<b>6.5%</b>	909	<b>8.8%</b>	444	<b>56.4%</b>	39

\* jurisdictions which restrict insurability

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

\* jurisdictions which restrict insurability

By Type of Claim	All Trials		Plaintiff Won Trial		Plaintiff Won and puni sought	
	% punis sought	Number	% punis sought	Number	% w/ puni award	Number
<i>Table 5</i>						
Employment Discrimination	<b>32.8%</b>	131	<b>41.3%</b>	63	<b>25%</b>	24
Intentional Tort	<b>23.6%</b>	259	<b>32%</b>	128	<b>65.8%</b>	38
Negligence / Tort Other	<b>9.9%</b>	202	<b>10.6%</b>	104	<b>36.4%</b>	11
Employment Other	<b>25.7%</b>	183	<b>26%</b>	100	<b>38.5%</b>	26
Medical/Dental Malpractice	<b>5.9%</b>	972	<b>7.4%</b>	203	<b>30.8%</b>	13

#### **4) Insurance Products for Punitive Damages**

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

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

#### **MFJs:**

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

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

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

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

The general rule in U.S. jurisdictions is that contracting parties are free to enforce choice of law provisions as they desire, provided that (1) the parties have a connection to the selected jurisdiction, and/or (2) applying the

law of the selected jurisdiction would not offend the public policy of the forum state. Restatement (Second) of Conflict of Laws § 187 (1971).

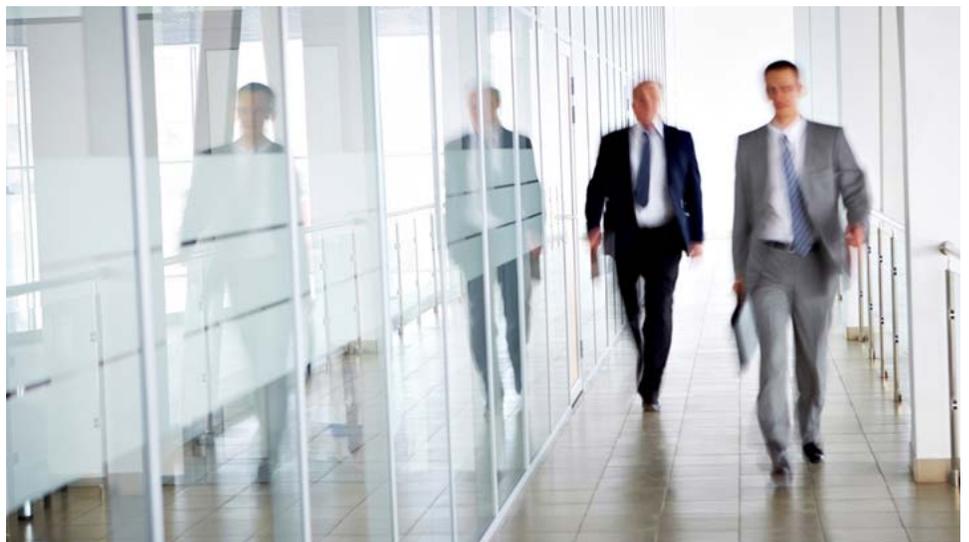
It should come as no surprise that there has been commentary and indication from regulators that MFJs are not enforceable because they offend public policy. Public policy is a very powerful doctrine. It can be applied to invalidate otherwise enforceable, arms-length contracts. The conclusion that MFJs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

#### **Wraps:**

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

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

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



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## References

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<sup>1</sup> Black's Law Dictionary, Prosser and Keeton, 1990 6th Ed.

<sup>2</sup> Procedure will vary from court to court, but in general, punitive damages are imposed by judges (in bench trials) or juries (in general trials) in a mini trial after the main trial has found the defendant liable. In some instances, there can be as many as three separate mini trials: one for liability, a second for compensatory damages and a third for punitive damages.

<sup>3</sup> For example: civil Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961 *et seq.* (RICO) authorizes treble damages, and the Civil Rights Act, 42 U.S.C. §1981a allows the imposition of punitive damages under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990 and the federal employment section of the Rehabilitation Act of 1973.

<sup>4</sup> *BMW, Inc. v. Gore*, 517 U.S. 559 (1996) (\$4 million punitive award alongside a \$4,000 compensatory violated due process); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (\$145 million punitive award issued alongside a \$1 million compensatory award violated due process); *Phillip Morris v. Williams*, 549 U.S. 346 (2007) (reversing a punitive award because the jury lacked authority to punish Phillip Morris for harm allegedly caused to people who were not plaintiffs); In *Exxon Shipping Co v. Baker*, 128 S. Ct 2605 (2008) (punitives against Exxon for the Valdez oil spill should be limited to 1:1 according to federal maritime law).

<sup>5</sup> Direct liability is when Defendant is assessed punitive damages for its own conduct. Vicarious liability is when Defendant is assessed punitive damages for the conduct of another, such as an employee. It should be noted that categorization of the states' laws cannot always be precise as conclusions as to the law will vary from scholar to scholar.

<sup>6</sup> Source: Bureau of Economic Analysis, GDP by state (Current Dollars) for 2010. [www.bea.gov](http://www.bea.gov)

<sup>7</sup> Bureau of Justice Statistics. 2005. Civil Justice Survey of State Courts, 2001: Punitive Damage Awards in Large Counties, 2001. Washington, D.C.: Department of Justice.

<sup>8</sup> See e.g. Bureau of Justice Statistics. 2008. Special Report: Civil Justice Survey of State Courts, 2005: Civil Bench and Jury Trials in States Courts, 2005. Washington, D.C.: Department of Justice.

<sup>9</sup> See e.g. Neil Vidmar and Mirya R. Holman, Duke University. The Frequency, Predictability and Proportionality of Jury Awards of Punitive Damages in State Courts, A New Audit. See also Eisenberg, Theodore: "The decision to Award Punitive Damages: An Empirical Study" (2010). Cornell Law Faculty Publications. Paper 185.

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### Table 1 References

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\* *Dairyland Ins. Co. v. Nryant*, 474 N.W.2d 514 (S.D. 1991) (suggesting in dicta that punitive damages are not insurable in South Dakota). See Wilson Elser Punitive Damages Review, 2014 Edition.

± No specific case or statute but there is statute precludes contracts from exempting one's willful, fraudulent or negligent conduct. N.D. Cent. Code §9-08-02.

\*\* According to the Wilson Elser Punitive Damages Review, 2014 Edition, the Indiana Supreme Court has not opined on insurability of punitive damages but a federal court has ruled that insuring punitive liability is against Indiana public policy. See *Executive Builders, Inc. v. Motorists Ins. Co.*, No. IP00-0018-C-T/G, 2001 WL 548391, \*5 (S.D. Ind. 2001) (citing *Grant v. N. River Ins. Co.*, 453 F. Supp. 1361, 1370- 71 (N .D. Ind. 1978).

\*\*\* According to the Wilson Elser Punitive Damages Review, 2014 Edition, the Texas Supreme Court has ruled that public policy generally does not prohibit insuring punitive damages but a prohibition may be appropriate in "extreme circumstances." See *Fairfield Ins. Co. v. Stephens Martin Paving*, 246 S.W.3d 653, 670 (Tex. 2008).

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### About the Author

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



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As an underwriting company, we assess, assume and manage risk with insight and discipline. We service and pay our claims fairly and promptly. We combine the precision of craftsmanship with decades of experience to conceive, craft and deliver the very best insurance coverage and service to individuals and families, and businesses of all sizes.

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