



The Standards for & Insurability of Punitive Damages Awards

3rd Edition

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INTRODUCTION

Potentially huge punitive damages awards continue to be a major concern of insureds and insurers. While each state has settled law or statutes regarding the standard for awarding punitive damages, many policies are silent on whether or not punitive damages are covered. The issue is therefore often resolved based on public policy – whether by statute or common law.

Many states find that insuring against directly-imposed punitive damages is contrary to public policy because it would defeat the purpose of punitive damages: to punish and deter the reckless or intentional conduct that resulted in the award. However, many courts following this rule allow coverage for vicarious liability for punitive damages – as in those cases the principle or corporate employer did not itself participate or ratify the misconduct.

Many other states find that there is no prohibition against insuring punitive damages, reasoning that freedom of contract is a competing public policy, and that insurers should exclude punitive damages if they do not want to pay them.

A few states find that there is no coverage for punitive damages based on policy language – not public policy. That is, the agreement to “pay all sums that the insured is legally obligated to pay as damages for bodily injury or property damage” (or other types of damage or injury) does not include punitive damage, because such damages do not compensate for any injury.

There are varying and different approaches to these issues. Below is a national survey on these key issues.

STANDARD FOR AWARDING PUNITIVE DAMAGES – BY STATE

Alabama

Alabama allows punitive damages in wrongful death cases, pursuant to Alabama Code Sec. 6-5-410(a), where there is a “wrongful act, omission, or negligence of any person, persons or corporation”. Alabama Code Sec. 6-11-20(a) allows damages in a civil action only where “it is proven by clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice”.

No principal is liable for punitive actions based on the malicious or intentional wrongful conduct of an agent, unless they (a) knew of or should have known of the agent’s unfitnes; (b) authorized or ratified the wrongful conduct; or (c) benefitted from the wrongful conduct. Code of Ala. § 6-11-27.

Alaska

Alaska Statute Sec. 09.17.020 allows for punitive damages when the factfinder finds the “plaintiff proves by clear and convincing evidence that the defendant’s conduct was outrageous, including acts done with malice or bad motives; or evidenced reckless indifference to the interest of another person.” Section (f) puts a cap on the amount of punitive damages (except as provided in sections (g) and (h)) to be awarded at the greater of \$500,000 or three times the amount of compensatory damages awarded to the plaintiff. Section (g) increases the cap if it is found that the defendant’s conduct was motivated by financial gain and the consequences of the action were known by the defendant, to the greatest of four times the compensatory damages, four time the aggregate amount of financial gain the defendant received, or \$7,000,000. Finally, Section (h) states that in actions against an employer for unlawful employment practices prohibited by Alaska Stat. 18.80.0220, the punitive damages may not exceed \$200,000 if the employer has less than 100 employees in the state, \$300,000 if the employer had more than 100 but less then 200 employees in the state, \$400,000 is the employer has 200 but less then 500 employees in the state, and \$500,000 if the employer has 500 or more employees in the state.

Punitive damages are only awarded under vicarious liability if it is shown that the employer authorized the act or omission or ratified or approved the act or omission, the employee was unfit to perform the act or avoid the omission and the employer was reckless in employing or retaining the employee, or that the employee was employed in a managerial capacity and was acting within the scope of employment. Alaska Stat. § 09.17.020(k).

Arizona

Arizona case law states that to “recover punitive damages something more is required over and above the ‘mere commission of a tort.’” *Linthicum v. Nationwide Life Ins. Co.*, 723 P.2d 675, 679 (Ariz. 1986). A plaintiff must prove by clear and convincing evidence that the defendant engages in aggravated and outrageous

conduct with an “evil mind.” *Hyatt Regency Hotel Co. v. Winston & Strawn*, 907 P.2d 506 (Ariz. App. Div. 1 1995). When deciding whether the defendant acted with an evil mind, the court looks to (1) the reprehensibility of defendant’s conduct and the severity of the harm likely to result, (2) any harm that has occurred, (3) the duration of the misconduct, (4) the defendant’s awareness of the harm or risk of harm, and (5) any concealment of it. *Thompson v. Better-Bilt Aluminum Prod. Co.*, 832 P.2d 203, 209 (Ariz. 1992).

An employee may recover punitive damages from his or her employer for claim not arising from a contract, if the employer was consciously aware of the harmfulness of its conduct and continues to act. *Thompson*, 832 P.2d 203. However, if not punitive damages are awarded against the employee, none may be awarded against the employer by vicarious liability. *Wiper v. Downtown Dev. Corp. of Tucson*, 732 P.2d 200, 202 (1987).

Arkansas

Arkansas case law states that punitive damages are awarded upon a showing of “willfulness, wantonness, or conscious indifference.” *Harold McLaughlin Reliable Truck brothers, Inc. v. Cox*, 922 S.W.2d 327 (Ark. 1996). Negligence or even gross negligence alone will not allow for an award of punitive damages. *See id.*; *National By-Products, Inc. v. Searcy House Moving Co.*, 731 S.W.2d 194 (Ark. 1987).

There can be vicarious liability for punitive damages. Courts in Arkansas have historically cited the 58 Am. Jur. 2d § 458 and the Restatement of Torts, 2d §245 in holding that an award for punitive damages may be justified against a principal if the tortious act was committed in the course of the employment or scope of the agency. *Olson v. Riddle*, 280 Ark. 535, 541 (Ark. 1983); *Porter v. Harshfield*, 329 Ark. 130, 137 (Ark. 1997).

California

California Civil Code § 3294 allows for exemplary damages:

- a. In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.
- b. An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.
- c. As used in this section, the following definitions shall apply:
 1. “Malice” means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

2. "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.
3. "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

Employers will only be liable for punitive damages under California Civil Code § 3294 if they (1) had advance knowledge of the employee's unfitness and employed him or her with a conscious disregard of the right or safety of others; (2) authorized or ratified the wrongful conduct for which the damages are awarded; or (3) was personally guilty of oppression, fraud or malice. *White v. Ultramar, Inc.*, 981 P.2d 944, 948 (Cal. 1999).

Colorado

Colorado Statute § 13-21-102 allows for exemplary damages:

1. a. In all civil actions in which damages are assessed by a jury for a wrong done to the person or to personal or real property, and the injury complained of is attended by circumstances of fraud, malice, or willful and wanton conduct, the jury, in addition to the actual damages sustained by such party, may award him reasonable exemplary damages. The amount of such reasonable exemplary damages shall not exceed an amount which is equal to the amount of the actual damages awarded to the injured party.
 - b. As used in this section, "willful and wanton conduct" means conduct purposefully committed which the actor must have realized as dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights and safety of others, particularly the plaintiff.
- (1.5) a. A claim for exemplary damages in an action governed by this section may not be included in any initial claim for relief. A claim for exemplary damages in an action governed by this section may be allowed by amendment to the pleadings only after the exchange of initial disclosures pursuant to rule 26 of the Colorado rules of civil procedure and the plaintiff establishes prima facie proof of a triable issue. After the plaintiff establishes the existence of a triable issue of exemplary damages, the court may, in its discretion, allow additional discovery on the issue of exemplary damages as the court deems appropriate. The provisions of paragraph (a) of this subsection (1.5) shall not apply to any civil action or arbitration proceeding described in section 13-21-203 (3) (c) or 13-64-302.5 (3).
2. Notwithstanding the provisions of subsection (1) of this section, the court may reduce or disallow the award of exemplary damages to the extent that:
 - a. The deterrent effect of the damages has been accomplished; or
 - b. The conduct which resulted in the award has ceased; or
 - c. The purpose of such damages has otherwise been served.
3. Notwithstanding the provisions of subsection (1) of this section, the court may increase any award of exemplary damages, to a sum not to exceed three times the amount of actual damages, if it is shown that:
 - a. The defendant has continued the behavior or repeated the action which is the subject of the claim against the defendant in a willful and wanton manner, either against the plaintiff or another person or persons, during the pendency of the case; or

- b. The defendant has acted in a willful and wanton manner during the pendency of the action in a manner which has further aggravated the damages of the plaintiff when the defendant knew or should have known such action would produce aggravation.

A principal cannot be held liable in exemplary damages for the act of an agent, unless it is shown that it authorized or approved the act for which exemplary damages are claimed, that it approved of or participated in the wrong of its agent, or that it failed to exercise proper care

Connecticut

The rule is well established in Connecticut that “punitive damages are awarded when the evidence shows a reckless indifference to the rights of others or an intentional and wanton violation of those rights. . . . If awarded, they are restricted to cost of litigation less taxable costs of the action being tried and not that of any former trial.” *Harty v. Cantor Fitzgerald & Co.*, 275 Conn. 72, 93 (Conn. 2005). Connecticut thus limits punitive damages to the party’s litigation costs, attorney’s fees and expenses. To be awarded punitive damages there needs to be more than negligence, more than gross negligence, there has to be something more than a failure to exercise reasonable care. *Craig v. Driscoll*, 781 A.2d 440 (Conn. Ct. App. 2001).

Vicarious liability for punitive damages is imposed on lawyer by common law only in actions of tort “founded upon the malicious or wanton misconduct of the defendant” or upon “such culpable neglect of the defendant as is tantamount to malicious or wanton misconduct.” *Rosado v. Choiniere, et al.*, 1998 Conn. Super. Lexis 438, at *2-3 (Super. Ct. 1998).

Delaware

Delaware follows the Restatement (Second) of Torts, which state that punitive damages may be awarded when it is determined that the defendant’s conduct is “outrageous” because of “evil motive” or “reckless indifference to the rights of others.” *Jardel Co. v. Hughes*, 523 A.2d 518, 529 (Del. 1987). Mere negligence is not enough to sustain an award. *Id.* In medical malpractice cases, Delaware Statute § 6855 permits punitive damages if the injury was “maliciously intended or was the result of willful or wanton misconduct by the health care provider”.

Delaware also follows the Restatement (Second) of Torts § 909 with regard to vicarious liability for punitive damages, which states: Punitive damages can properly be awarded against a principal because of an act by an agent if, but only if, (a) the principal authorized the doing and the manner of the act, or (b) the agent was unfit and the principal was reckless in employing or retaining him, or (c) the agent was employed in a managerial capacity and was acting in the scope of the employment, or (d) the principal ratified or approved the act. *Ramada Inns v. Dow Jones & Co.*, Civil Action No. 83C-Au-56, 1988 Del. Super. LEXIS 29, at *4 (Super. Ct. Feb. 9, 1988). The court pointed out that the comments to § 909 explain that it is necessary for the principal himself to be at fault before punitive damages can be awarded. *Id.*

District of Columbia

Punitive damages are awarded in D.C. when the defendant's conduct is willful and outrageous, constitutes gross fraud or is aggravated by evil motive, active malice, deliberate violence or oppression. *Spar v. Obwoya*, 369 A.2d 173, 180 (D.C. App. 1977); *Price v. Griffin*, 359 A.2d 582, 589 (D.C. App. 1976).

A principal may be held liable for punitive damages based upon the wrongful acts of his agent only where he participated in the wrongful doing of the act or had preciously authorized or subsequently ratified the wrongful act. *Dart Drug, Inc. v. Linthicum*, 300 A.2d 442, 444 (D.C. Ct. App. 1973).

Florida

Exemplary damages are awarded under Florida law when the defendant acts with "fraud, actual malice, or deliberate violence or oppression, or when the defendant acts willfully, or with such negligence as to indicate a wanton disregard of the rights of others." *Winn & Lovett Gorvery Co. v. Archer*, 171 So. 2d 214, 221 (Fla. 1936). Florida Statute § 768.73 puts a cap on punitive damages awards:

(1)

- (a) Except as provided in paragraphs (b) and (c), an award of punitive damages may not exceed the greater of:
 - 1. Three times the amount of compensatory damages awarded to each claimant entitled thereto, consistent with the remaining provisions of this section; or
 - 2. The sum of \$500,000.
- (b) Where the fact finder determines that the wrongful conduct proven under this section was motivated solely by unreasonable financial gain and determines that the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was actually known by the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant, it may award an amount of punitive damages not to exceed the greater of:
 - 1. Four times the amount of compensatory damages awarded to each claimant entitled thereto, consistent with the remaining provisions of this section; or
 - 2. The sum of \$2 million.
- (c) Where the fact finder determines that at the time of injury the defendant had a specific intent to harm the claimant and determines that the defendant's conduct did in fact harm the claimant, there shall be no cap on punitive damages.

Punitive damages may be imposed for the intentional misconduct or gross negligence of an employee if (a) the employer or principal actively and knowingly participated in such conduct, (b) the officers, directors or managers of the employer or principal ratified or consented to such conduct or (c) the employer or principal engaged in conduct that constituted gross negligence and that contributed to the loss, damages or injury suffered by the claimant. Fla. Stat. Ann. §768.72 (voided in part by *Cohen v. Office Depot, Inc.*, 184 F.3d 1292 (11th Cir. 1999)).

Georgia

Georgia Statute § 51-12-5(a) permits a jury to give additional damages in a tort action when there are aggravating circumstances, such as willful misconduct, malice, fraud, wantonness, oppression, or a conscious indifference on the part of the defendant. *Salsbury Laboratories, Inc. v. Merieux Laboratories, Inc.*, 735 F. Supp. 1555 (D. Ga. 1989). Punitive damages cannot be awarded for mere negligence. *Kicklighter v. Nails by Janee, Inc.*, 616 F.2d 734 (11th Cir. 1980).

An employer can be vicariously liable for punitive damages based on employee's conduct, provided such wrongful acts were conducted within the scope of employment and would have subjected the employee to punitive damages. *Sightler v. Transus, Inc.*, 430 S.E.2d 81 (Ga. Ct. App. 1993)

Hawaii

Hawaii law states that punitive damages may be recovered when a wrongful act is done willfully, wantonly or maliciously or is characterized by some aggravating circumstances. *Howell v. Associated Hotels, Ltd.*, 40 Haw. 492 (Haw. 1954). Unlike many states, Hawaii allows punitive damages in tort actions based on negligence, where the defendant "has acted wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations . . . [or where there has been] some willful misconduct". *Bright v. Quinn*, 20 Haw. 504, 512 (Haw. 1911)

The principal is only liable for punitive damages if the principal participates in the wrongful act of his agent or expressly or impliedly by his conduct, authorized or approved it, before or after it was committed. *Kealoha v. Halawa Plantation*, 24 Haw. 579 (Haw. 1918); *Lauer v. YMCA*, 557 P.2d 1334, 1341 (Haw. 1976)

Idaho

Idaho Statute § 6-1604 states:

1. In any action seeking recovery of punitive damages, the claimant must prove, by clear and convincing evidence, oppressive, fraudulent, malicious or outrageous conduct by the party against whom the claim for punitive damages is asserted.
2. In all civil actions in which punitive damages are permitted, no claim for damages shall be filed containing a prayer for relief seeking punitive damages. However, a party may, pursuant to a pretrial motion and after hearing before the court, amend the pleadings to include a prayer for relief seeking punitive damages. The court shall allow the motion to amend the pleadings if, after weighing the evidence presented, the court concludes that, the moving party has established at such hearing a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages. A prayer for relief added pursuant to this section shall not be barred by lapse of time under any applicable limitation on the time in which an action may be brought or claim asserted, if the time prescribed or limited had not expired when the original pleading was filed.

3. No judgment for punitive damages shall exceed the greater of two hundred fifty thousand dollars (\$ 250,000) or an amount which is three (3) times the compensatory damages contained in such judgment. If a case is tried to a jury, the jury shall not be informed of this limitation. The limitations on noneconomic damages contained in section 6-1603, Idaho Code, are not applicable to punitive damages.
4. Nothing in this section is intended to change the rules of evidence used by a trier of fact in finding punitive damages.

Idaho also allows for punitive damages in breach of contract and breach of warranty actions where fraud, malice or oppression is shown. *Yacht Club Sales and Service, Inc. v. First National Bank of North Idaho*, 623 P.2d 464 (Idaho 1980); *Jensen v. Seigel Mobile Homes Group*, 668 P.2d 65, 68 (Idaho 1983).

A principal cannot be held vicariously liable for punitive damages against an agent unless the principal's conduct was itself wrongful in relation to the agent's conduct, or participated in or authorized or ratified the agent's acts. *Openshaw v. Oregon Auto. Ins.*, 487 P.2d 929, 932 (Idaho 1971); *Barlow v. Int'l Harvester Co.*, 522 P.2d 1102 (Idaho 1974).

Illinois

Illinois law allows for punitive damages "when torts are committed with fraud, actual malice, deliberate violence or oppression, or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others." *Kelsay v. Motorola, Inc.*, 384 N.E.2d 353 (Ill. 1978).

Where an employer's liability is predicated solely upon a vicarious liability theory, the employer is not liable for punitive damages resulting from the willful and wanton misconduct of the employee unless the employer approved, authorized or ratified the act. *Mattysovszky v. West Towns Bus Co.*, 330 N.E.2d 509, 512 (Ill. 1975). Illinois follows the Restatement (Second) of Agency which states, Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if: (a) the principal authorized the doing and the manner of the act, or (b) the agent was unfit and the principal was reckless in employing him, or (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or (d) the principal or a managerial agent of the principal ratified or approved the act. *Id.*

Indiana

Punitive damages may be awarded in Indiana when there is a clear showing that the defendant "subjected other persons to probable injury, with an awareness of such impending danger and with heedless indifference of the consequences." *Bud Wolf Chevrolet, Inc. v. Robertson*, 519 N.E.2d 135, 137 (Ind. 1988). They will be awarded upon a showing of defendant's willful and wanton misconduct, even absent malice, ill will or intent to injure. *Picadilly, Inc. v. Colvin*, 519 N.E.2d 1217, 1221 (Ind. 1988). Mere negligence is not enough.

Principals are responsible for the act of their employees when the wrongful act was committed within the scope of their employment and can be liable for compensatory and punitive damages. Ind. Code Ann. § 35-41-2-3; see *Hibschman Pontiac, Inc. v. Batchelor*, 362 N.E.2d 845, 847-48 (Ind. 1977)

Iowa

Iowa Code § 668A.1 allows for punitive damages:

1. In a trial of a claim involving the request for punitive or exemplary damages, the court shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating all of the following:
 - a. Whether, by a preponderance of clear, convincing, and satisfactory evidence, the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another.
 - b. Whether the conduct of the defendant was directed specifically at the claimant, or at the person from which the claimant's claim is derived.

Mere negligence is not enough. *McClure v. Walgreen Co.*, 613 N.W.2d 225 (Iowa 2000).

Iowa follows the Restatement (Second) of Torts §909, expressing the view that the principal cannot be held liable in exemplary damages for the wanton acts of the agent, unless it participated, either expressly or impliedly, or by conduct authorizing or approving the act, whether it was before or after. *Briner v. Hyslop*, 337 N.W.2d 858, 861 (Iowa 1983).

Kansas

Kansas Annotated Statute § 60-3701 states that:

- a. In any civil action in which exemplary or punitive damages are recoverable, the trier of fact shall determine, concurrent with all other issues presented, whether such damages shall be allowed. If such damages are allowed, a separate proceeding shall be conducted by the court to determine the amount of such damages to be awarded.
- b. At a proceeding to determine the amount of exemplary or punitive damages to be awarded under this section, the court may consider:
 1. the likelihood at the time of the alleged misconduct that serious harm would arise from the defendant's misconduct;
 2. the degree of the defendant's awareness of that likelihood;
 3. the profitability of the defendant's misconduct;
 4. the duration of the misconduct and any intentional concealment of it;
 5. the attitude and conduct of the defendant upon discovery of the misconduct;
 6. the financial condition of the defendant; and

7. the total deterrent effect of other damages and punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, compensatory, exemplary and punitive damage awards to persons in situations similar to those of the claimant and the severity of the criminal penalties to which the defendant has been or may be subjected.
At the conclusion of the proceeding, the court shall determine the amount of exemplary or punitive damages to be awarded and shall enter judgment for that amount.
- c. In any civil action where claims for exemplary or punitive damages are included, the plaintiff shall have the burden of proving, by clear and convincing evidence in the initial phase of the trial, that the defendant acted toward the plaintiff with willful conduct, wanton conduct, fraud or malice.
- d. In no case shall exemplary or punitive damages be assessed pursuant to this section against:
 1. A principal or employer for the acts of an agent or employee unless the questioned conduct was authorized or ratified by a person expressly empowered to do so on behalf of the principal or employer; or
 2. an association, partnership or corporation for the acts of a member, partner or shareholder unless such association, partnership or corporation authorized or ratified the questioned conduct.
- e. Except as provided by subsection (f), no award of exemplary or punitive damages pursuant to this section shall exceed the lesser of:
 1. The annual gross income earned by the defendant, as determined by the court based upon the defendant's highest gross annual income earned for any one of the five years immediately before the act for which such damages are awarded; or
 2. \$ 5 million.
- f. In lieu of the limitation provided by subsection (e), if the court finds that the profitability of the defendant's misconduct exceeds or is expected to exceed the limitation of subsection (e), the limitation on the amount of exemplary or punitive damages which the court may award shall be an amount equal to 1 1/2 times the amount of profit which the defendant gained or is expected to gain as a result of the defendant's misconduct.

Punitive damages may not be assessed against:

1. A principal or employer for the acts of an agent or employee unless the questioned conduct was authorized or ratified by a person expressly empowered to do so on behalf of the principal or employer; or
2. an association, partnership or corporation for the acts of a member, partner or shareholder unless such association, partnership or corporation authorized or ratified the questioned conduct. Kan. Stat. Ann. §60-3701.

Kentucky

Kentucky Revised Statute § 411.184 defines the standard for punitive damages as:

1. As used in this section and KRS 411.186, unless the context requires otherwise:
 - a. "Oppression" means conduct which is specifically intended by the defendant to subject the plaintiff to cruel and unjust hardship.
 - b. "Fraud" means an intentional misrepresentation, deceit, or concealment of material fact known to the defendant and made with the intention of causing injury to the plaintiff.

- c. "Malice" means either conduct which is specifically intended by the defendant to cause tangible or intangible injury to the plaintiff or conduct that is carried out by the defendant both with a flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct will result in human death or bodily harm.

(This section has been ruled unconstitutional by the Kentucky Supreme Court in *Williams v. Wilson*, 972 S.W.2d 260 (Ky. 1998)).

- d. "Plaintiff" means any party claiming punitive damages.
 - e. "Defendant" means any party against whom punitive damages are sought.
 - f. "Punitive damages" includes exemplary damages and means damages, other than compensatory and nominal damages, awarded against a person to punish and to discourage him and others from similar conduct in the future.
2. A plaintiff shall recover punitive damages only upon proving, by clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud or malice.
 3. In no case shall punitive damages be assessed against a principal or employer for the act of an agent or employee unless such principal or employer authorized or ratified or should have anticipated the conduct in question.
 4. In no case shall punitive damages be awarded for breach of contract.
 5. This statute is applicable to all cases in which punitive damages are sought and supersedes any and all existing statutory or judicial law insofar as such law is inconsistent with the provisions of this statute.

Williams found that the statutory punitive damages standard, which required "subjective awareness" that conduct would result in human death or bodily harm violated constitutionally protected rights. Gross negligence is thus likely to result in an award for punitive damages.

In no case shall punitive damages be assessed against a principal or employer for the act of an agent or employee unless such principal or employer authorized or ratified or should have anticipated the conduct in question. Ken. Rev. Stat. § 411.184(3) (§ 411.184(1)(c) unconstitutional by *Williams, supra*).

Louisiana

Punitive damages are awarded in Louisiana only when specifically authorized by a statute. *Ricard v. State of Louisiana*, 30 So. 2d 882 (La. 1980). The language of the applicable statute will state the standard for awarding damages, if any can be awarded.

Maine

The leading case in Maine is *Tuttle v. Raymond*, 494 A.2d 1353 (Me. 1985), which states that punitive damages may be awarded when the defendant acts with actual malice. Malice exists where the defendant acts with ill will toward the plaintiff. Punitive damages may also be awarded where "deliberate conduct by the defendant . . . is so outrageous that malice . . . can be implied." *Id.*

The principal will be liable for punitive damages if the agent was acting with the scope of his employment or contract. *See Goddard v. Grand Trunk Ry.*, 57 Me. 202, 214 (Me. 1869).

Maryland

Maryland law requires evidence that “the defendant’s conduct was characterized by evil motive, intent to injure, ill will, or fraud, i.e. ‘actual malice.’” *Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633 (Md. 1992).

Maryland allows the principal to be vicariously liable for the acts of its agent, if the agent was acting within the scope of his employment. *See Embrey v. Holly*, A.2d 966, 973 (Md. 1982).

Massachusetts

Similar to Louisiana, punitive damages are not allowed in Massachusetts except when authorized by statute. *Lowell v. Massachusetts Bonding & Ins. Co.*, 47 N.E.2d 265 (Mass. 1943). *See e.g.* ALM GL ch. 229, § 2; ALM GL ch. 231, § 60F.

Michigan

Michigan generally does not allow for the recovery of punitive damages, but will allow for the recovery of exemplary damages which can be characterized as compensatory in nature. *Peisner v. Detroit Free Press*, 304 N.W.2d 814 (Mich. App. 1981). Conduct sufficient to justify these awards has occurred in the context of the intentional torts, slander, libel, deceit and other intentional, malicious acts. *Veselenak v. Smith*, 327 N.W.2d 261 (Mich. 1982). The act resulting from this conduct must inspire feeling of humiliation, outrage and indignity and the conduct must be malicious or as willful and wanton as to demonstrate a reckless disregard of the plaintiff’s rights. *Id.*

While they do not allow for the recovery of punitive damages, a principal is liable for its agent’s wanton action within the scope of his employment, and must make compensation for the whole injury suffered. *Lucas v. Michigan C. R. Co.*, 56 N.W. 1039, 1040-41 (Mich. 1893)

Minnesota

Minnesota Statute § 549.20 authorizes punitive damages when:
Subdivision 1. Standard.

- a. Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others.

- b. A defendant has acted with deliberate disregard for the rights or safety of others if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others and:
 - 1. deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others; or
 - 2. deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.

Subd. 2. Master and principal. — Punitive damages can properly be awarded against a master or principal because of an act done by an agent only if:

- a. the principal authorized the doing and the manner of the act;
- b. the agent was unfit and the principal deliberately disregarded a high probability that the agent was unfit;
- c. the agent was employed in a managerial capacity with authority to establish policy and make planning level decisions for the principal and was acting in the scope of that employment; or
- d. the principal or a managerial agent of the principal, described in clause (c), ratified or approved the act while knowing of its character and probable consequences.

Subd. 3. Factors. — Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public arising from the defendant's misconduct, the profitability of the misconduct to the defendant, the duration of the misconduct and any concealment of it, the degree of the defendant's awareness of the hazard and of its excessiveness, the attitude and conduct of the defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of the defendant, and the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the defendant may be subject.

Subd. 4. Separate proceeding. — In a civil action in which punitive damages are sought, the trier of fact shall, if requested by any of the parties, first determine whether compensatory damages are to be awarded. Evidence of the financial condition of the defendant and other evidence relevant only to punitive damages is not admissible in that proceeding. After a determination has been made, the trier of fact shall, in a separate proceeding, determine whether and in what amount punitive damages will be awarded.

Negligent conduct will not be enough to award punitive damages. *Cobb v. Midwest Recovery Bureau Co.*, 295 N.W.2d 232, 237 (Minn. 1980).

Punitive damages may be awarded against a principal because of an act done by an agent only if the principal authorized the act, the agent was unfit and the principal deliberately disregarded the agent's unfitness, the agent was employed in a managerial capacity with decision-making authority, or the principal ratified the act. Minn. Stat. § 549.20(2) (invalidated in part).

Mississippi

Mississippi Code Annotated § 11-1-65 states:

1. In any action in which punitive damages are sought:
 - a. Punitive damages may not be awarded if the claimant does not prove by clear and convincing evidence that the defendant against whom punitive damages are sought acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud.
 - b. In any action in which the claimant seeks an award of punitive damages, the trier of fact shall first determine whether compensatory damages are to be awarded and in what amount, before addressing any issues related to punitive damages.
 - c. If, but only if, an award of compensatory damages has been made against a party, the court shall promptly commence an evidentiary hearing to determine whether punitive damages may be considered by the same trier of fact.
 - d. The court shall determine whether the issue of punitive damages may be submitted to the trier of fact; and, if so, the trier of fact shall determine whether to award punitive damages and in what amount.
 - e. In all cases involving an award of punitive damages, the fact finder, in determining the amount of punitive damages, shall consider, to the extent relevant, the following: the defendant's financial condition and net worth; the nature and reprehensibility of the defendant's wrongdoing, for example, the impact of the defendant's conduct on the plaintiff, or the relationship of the defendant to the plaintiff; the defendant's awareness of the amount of harm being caused and the defendant's motivation in causing such harm; the duration of the defendant's misconduct and whether the defendant attempted to conceal such misconduct; and any other circumstances shown by the evidence that bear on determining a proper amount of punitive damages. The trier of fact shall be instructed that the primary purpose of punitive damages is to punish the wrongdoer and deter similar misconduct in the future by the defendant and others while the purpose of compensatory damages is to make the plaintiff whole.
 - f.
 - i. Before entering judgment for an award of punitive damages the trial court shall ascertain that the award is reasonable in its amount and rationally related to the purpose to punish what occurred giving rise to the award and to deter its repetition by the defendant and others.
 - ii. In determining whether the award is excessive, the court shall take into consideration the following factors:
 1. Whether there is a reasonable relationship between the punitive damage award and the harm likely to result from the defendant's conduct as well as the harm that actually occurred;
 2. The degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct;
 3. The financial condition and net worth of the defendant; and
 4. In mitigation, the imposition of criminal sanctions on the defendant for its conduct and the existence of other civil awards against the defendant for the same conduct.

2. The seller of a product other than the manufacturer shall not be liable for punitive damages unless the seller exercised substantial control over that aspect of the design, testing, manufacture, packaging or labeling of the product that caused the harm for which recovery of damages is sought; the seller altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought; the seller had actual knowledge of the defective condition of the product at the time he supplied same.
3. a. In any civil action where an entitlement to punitive damages shall have been established under applicable laws, no award of punitive damages shall exceed the following:
 - i. Twenty Million Dollars (\$ 20,000,000.00) for a defendant with a net worth of more than One Billion Dollars (\$ 1,000,000,000.00);
 - ii. Fifteen Million Dollars (\$ 15,000,000.00) for a defendant with a net worth of more than Seven Hundred Fifty Million Dollars (\$ 750,000,000.00) but not more than One Billion Dollars (\$ 1,000,000,000.00);
 - iii. Five Million Dollars (\$ 5,000,000.00) for a defendant with a net worth of more than Five Hundred Million Dollars (\$ 500,000,000.00) but not more than Seven Hundred Fifty Million Dollars (\$ 750,000,000.00);
 - iv. Three Million Seven Hundred Fifty Thousand Dollars (\$ 3,750,000.00) for a defendant with a net worth of more than One Hundred Million Dollars (\$ 100,000,000.00) but not more than Five Hundred Million Dollars (\$ 500,000,000.00);
 - v. Two Million Five Hundred Thousand Dollars (\$ 2,500,000.00) for a defendant with a net worth of more than Fifty Million Dollars (\$ 50,000,000.00) but not more than One Hundred Million Dollars (\$ 100,000,000.00); or
 - vi. Two percent (2%) of the defendant's net worth for a defendant with a net worth of Fifty Million Dollars (\$ 50,000,000.00) or less.
- b. For the purposes of determining the defendant's net worth in paragraph (a), the amount of the net worth shall be determined in accordance with Generally Accepted Accounting Principles.
- c. The limitation on the amount of punitive damages imposed by this subsection (3) shall not be disclosed to the trier of fact, but shall be applied by the court to any punitive damages verdict.
- d. The limitation on the amount of punitive damages imposed by this subsection (3) shall not apply to actions brought for damages or an injury resulting from an act or failure to act by the defendant:
 - i. if the defendant was convicted of a felony under the laws of this state or under federal law which caused the damages or injury; or
 - ii. While the defendant was under the influence of alcohol or under the influence of drugs other than lawfully prescribed drugs administered in accordance with a prescription.

Mississippi does not allow for punitive damages against an employer where there is no proof that the employer had knowledge of prior acts committed by the employee and the employee acted on his own initiative. *Gamble v. Dollar Gen. Corp.*, 852 So. 2d 5 (Miss. 2003).

Missouri

Missouri law states that the purpose of punitive damages is punishment to the offender and a deterrent to similar conduct by others. *Cull v. Gleb*, 382 S.W.2d 17, 23 (Mo. App. 1964). It is appropriate only upon a showing of willful, wanton, malicious conduct or conduct as reckless as to be in utter disregard of consequences; there must be some element of wantonness or bad motive. *See McCellan v. Highland Sales & Inv. Co.*, 484 S.W.2d 239 (Mo. 1972). Missouri Annotated Statute § 510.265 puts limitation on punitive damages in certain cases, stating:

1. No award of punitive damages against any defendant shall exceed the greater of:
 - i. Five hundred thousand dollars; or
 - ii. Five times the net amount of the judgment awarded to the plaintiff against the defendant. Such limitations shall not apply if the state of Missouri is the plaintiff requesting the award of punitive damages, or the defendant pleads guilty to or is convicted of a felony arising out of the acts or omissions pled by the plaintiff.
2. The provisions of this section shall not apply to civil actions brought under section 213.111 that allege a violation of section 213.040, 213.045, 213.050, or 213.070, to the extent that the alleged violation of section 213.070 relates to or involves a violation of section 213.040, 213.045, or 213.050, or subdivision (3) of section 213.070 as it relates to housing.

For limitations on punitive in actions against health care providers see Missouri Annotated Statute § 538.210.

Employers are held liable for punitive damages for the tort committed by their employees within the scope and course of their employment and in furtherance of the employer's business. *Johnson v. Allen*, 448 S.W.2d 265, 269-70 (Mo. Ct. App. 1969)

Montana

Montana Code Annotated § 27-1-220 allows punitive damages when:

1. Except as otherwise expressly provided by statute and subject to subsection (3), a judge or jury may award, in addition to compensatory damages, punitive damages for the sake of example and for the purpose of punishing a defendant.
2.
 - a. Unless otherwise expressly provided by statute, punitive damages may not be recovered in any action arising from:
 - i. contract; or
 - ii. breach of contract.
 - b. Subsection (2)(a) does not prohibit recovery of punitive damages in a products liability action or an action arising under 33-18-201.
3. An award for punitive damages may not exceed \$10 million or 3% of a defendant's net worth, whichever is less. This subsection does not limit punitive damages that may be awarded in class action lawsuits.

While § 27-1-221 states:

1. Subject to the provisions of 27-1-220 and this section, reasonable punitive damages may be awarded when the defendant has been found guilty of actual fraud or actual malice.
2. A defendant is guilty of actual malice if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the plaintiff and:
 - a. deliberately proceeds to act in conscious or intentional disregard of the high probability of injury to the plaintiff; or
 - b. deliberately proceeds to act with indifference to the high probability of injury to the plaintiff.
3. A defendant is guilty of actual fraud if the defendant:
 - a. makes a representation with knowledge of its falsity; or
 - b. conceals a material fact with the purpose of depriving the plaintiff of property or legal rights or otherwise causing injury.
4. Actual fraud exists only when the plaintiff has a right to rely upon the representation of the defendant and suffers injury as a result of that reliance. The contract definitions of fraud expressed in Title 28, chapter 2, do not apply to proof of actual fraud under this section.
5. All elements of the claim for punitive damages must be proved by clear and convincing evidence. Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. It is more than a preponderance of evidence but less than beyond a reasonable doubt.
6. Liability for punitive damages must be determined by the trier of fact, whether judge or jury.
7.
 - a. Evidence regarding a defendant's financial affairs, financial condition, and net worth is not admissible in a trial to determine whether a defendant is liable for punitive damages. When the jury returns a verdict finding a defendant liable for punitive damages, the amount of punitive damages must then be determined by the jury in an immediate, separate proceeding and be submitted to the judge for review as provided in subsection (7)(c). In the separate proceeding to determine the amount of punitive damages to be awarded, the defendant's financial affairs, financial condition, and net worth must be considered.
 - b. When an award of punitive damages is made by the judge, the judge shall clearly state the reasons for making the award in findings of fact and conclusions of law, demonstrating consideration of each of the following matters:
 - i. the nature and reprehensibility of the defendant's wrongdoing;
 - ii. the extent of the defendant's wrongdoing;
 - iii. the intent of the defendant in committing the wrong;
 - iv. the profitability of the defendant's wrongdoing, if applicable;
 - v. the amount of actual damages awarded by the jury;
 - vi. the defendant's net worth;
 - vii. previous awards of punitive or exemplary damages against the defendant based upon the same wrongful act;
 - viii. potential or prior criminal sanctions against the defendant based upon the same wrongful act; and
 - ix. any other circumstances that may operate to increase or reduce, without wholly defeating, punitive damages.

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- c. The judge shall review a jury award of punitive damages, giving consideration to each of the matters listed in subsection (7)(b). If after review the judge determines that the jury award of punitive damages should be increased or decreased, the judge may do so. The judge shall clearly state the reasons for increasing, decreasing, or not increasing or decreasing the punitive damages award of the jury in findings of fact and conclusions of law, demonstrating consideration of each of the factors listed in subsection (7)(b).
 8. This section is not intended to alter the Montana Rules of Civil Procedure governing discovery of a defendant's financial affairs, financial condition, and net worth.

Unless it's a corporations, the acts of another will not be imputed to the principal unless he directly or indirectly authorized or subsequently ratified the wrongful act. *Rickman v. Safeway Stores*, 227 P.2d 607, 613 (Mont. 1951). In the case of a corporation, the corporation will be held liable in punitive damages for the willful and malicious acts of its agents. *Id.*

Nebraska

Punitive damages are not allowed in Nebraska. *See Abel v. Conover*, 104 N.W.2d 684 (Neb. 1960).

Nevada

Nevada Revised Statutes Annotated § 42.005:

1. Except as otherwise provided in NRS 42.007, in an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied, the plaintiff, in addition to the compensatory damages, may recover damages for the sake of example and by way of punishing the defendant. Except as otherwise provided in this section or by specific statute, an award of exemplary or punitive damages made pursuant to this section may not exceed:
 - a. Three times the amount of compensatory damages awarded to the plaintiff if the amount of compensatory damages is \$100,000 or more; or
 - b. Three hundred thousand dollars if the amount of compensatory damages awarded to the plaintiff is less than \$100,000.
2. The limitations on the amount of an award of exemplary or punitive damages prescribed in subsection 1 do not apply to an action brought against:
 - a. A manufacturer, distributor or seller of a defective product;
 - b. An insurer who acts in bad faith regarding its obligations to provide insurance coverage;
 - c. A person for violating a state or federal law prohibiting discriminatory housing practices, if the law provides for a remedy of exemplary or punitive damages in excess of the limitations prescribed in subsection 1;
 - d. A person for damages or an injury caused by the emission, disposal or spilling of a toxic, radioactive or hazardous material or waste; or
 - e. A person for defamation

§ 42.100 defines fraud, malice and oppression as:

As used in this chapter, unless the context otherwise requires and except as otherwise provided in subsection 5 of NRS 42.005:

1. “Conscious disregard” means the knowledge of the probable harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid those consequences.
2. “Fraud” means an intentional misrepresentation, deception or concealment of a material fact known to the person with the intent to deprive another person of his or her rights or property or to otherwise injure another person.
3. “Malice, express or implied” means conduct which is intended to injure a person or despicable conduct which is engaged in with a conscious disregard of the rights or safety of others.
4. “Oppression” means despicable conduct that subjects a person to cruel and unjust hardship with conscious disregard of the rights of the person.

For the standard used in cases against an employer see § 42.007. Except as otherwise provided in subsection 2, in an action for the breach of an obligation in which exemplary or punitive damages are sought pursuant to subsection 1 of NRS 42.005 from an employer for the wrongful act of his or her employee, the employer is not liable for the exemplary or punitive damages unless:

- a. The employer had advance knowledge that the employee was unfit for the purposes of the employment and employed the employee with a conscious disregard of the rights or safety of others;
- b. The employer expressly authorized or ratified the wrongful act of the employee for which the damages are awarded; or
- c. The employer is personally guilty of oppression, fraud or malice, express or implied.

If the employer is a corporation, the employer is not liable for exemplary or punitive damages unless the elements of paragraph (a), (b) or (c) are met by an officer, director or managing agent of the corporation who was expressly authorized to direct or ratify the employee’s conduct on behalf of the corporation.

New Hampshire

Punitive or exemplary damages have been rejected in New Hampshire. *Vratsenes v. N.H. Auto*, 112 N.H. 71, 72 (N.H. 1972). However, “in cases where the acts complained on were wanton, malicious, or oppressive, the compensatory damages for the resulting actual material loss can be increased to compensate for the vexation and distress caused the plaintiff by the character of defendant’s conduct.” *Id.*; *Munson v. Raudonis*, 387 A.2d 1174 (N.H. 1978).

New Jersey

New Jersey Annotated Statute § 2A:15-5.12 states:

- a. Punitive damages may be awarded to the plaintiff only if the plaintiff proves, by clear and convincing evidence, that the harm suffered was the result of the defendant’s acts or omissions, and such acts or omissions were actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions. This burden of proof may not be satisfied by proof of any degree of negligence including gross negligence.

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- b. In determining whether punitive damages are to be awarded, the trier of fact shall consider all relevant evidence, including but not limited to, the following:
 - 1. The likelihood, at the relevant time, that serious harm would arise from the defendant's conduct;
 - 2. The defendant's awareness of reckless disregard of the likelihood that the serious harm at issue would arise from the defendant's conduct;
 - 3. The conduct of the defendant upon learning that its initial conduct would likely cause harm; and
 - 4. The duration of the conduct or any concealment of it by the defendant.
 - c. If the trier of fact determines that punitive damages should be awarded, the trier of fact shall then determine the amount of those damages. In making that determination, the trier of fact shall consider all relevant evidence, including, but not limited to, the following:
 - 1. All relevant evidence relating to the factors set forth in subsection b. of this section;
 - 2. The profitability of the misconduct to the defendant;
 - 3. When the misconduct was terminated; and
 - 4. The financial condition of the defendant.

§ 2A:15-5.14 limits punitive damages:

- b. No defendant shall be liable for punitive damages in any action in an amount in excess of five times the liability of that defendant for compensatory damages or \$350,000, whichever is greater.

Negligence or gross negligence is not enough to support an award for punitive damages. *Edwards v. Our Lady of Lourdes Hosp.*, 526 A.2d 242, 248 (Super Ct. App. Div. 1987).

Punitive damages may only be recovered against an employer who specifically authorizes, participates in, or ratifies a wrongful act of his employee. See *Sec. Aluminum Window Mfg. Corp. v. Lehman Assocs., Inc.*, 260 A.2d 248 (N.J. Super. Ct. App. Div. 1970).

New Mexico

New Mexico law allows recovery of punitive damages if the defendant's conduct is willful, wanton, malicious, reckless, oppressive, grossly negligent or fraudulent and in bad faith. *Sanchez v. Clayton*, 877 P.2d 567 (N.M. 1994).

Employers may be held liable in punitive damages when they have in some way authorized, ratified or participated in the wanton, oppressive, malicious, fraudulent or criminal acts of its employee. *Albuquerque Concrete Coring Co. Inc. v. Pan Am World Servs., Inc.*, 879 P.2d 772 (N.M. 1994).

New York

To recover punitive damages in New York, there must be a showing of conscious disregard of the rights of other or conduct so reckless as to amount to such disregard, more than gross negligence. *Welch v. Mr Christmas Inc.*, 400 N.E.2d 1317 (N.Y. 1982).

A principal will be liable in punitive damages for the wrongful acts of his agent only if the employer authorized, participated in, consented to or ratified the conduct giving rise to the damages or deliberately retained the unfit employee. *Loughry v. Lincoln First Bank*, 494 N.E.2d 70, 74 (N.Y. 1986).

North Carolina

The law in North Carolina states that to recover punitive damages, “the tortious conduct must be accompanied by or partake of some element of aggravation”. *Paris v. Michael Kreitz, Jr., P.A.*, 331 S.E.2d 234, 241 (Ct. App. 1985). The aggravated conduct in an intentional tort usually consists of insult, indignity, malice, oppression or bad motive in addition to the tort. *Id.* If the act is grounded in negligence, it must be gross or wanton. *Id.*

General Statutes of North Carolina § 1D-25(b) puts a cap on punitive damages:

- a. In all actions seeking an award of punitive damages, the trier of fact shall determine the amount of punitive damages separately from the amount of compensation for all other damages.
- b. Punitive damages awarded against a defendant shall not exceed three times the amount of compensatory damages or two hundred fifty thousand dollars (\$ 250,000), whichever is greater. If a trier of fact returns a verdict for punitive damages in excess of the maximum amount specified under this subsection, the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount.
- c. The provisions of subsection (b) of this section shall not be made known to the trier of fact through any means, including voir dire, the introduction into evidence, argument, or instructions to the jury.

Punitive damages will not be awarded against a person solely on the basis of vicarious liability for the acts of another. *Phillips v. Rest. Mgmt. of Carolina, L.P.*, 552 S.E.2d 686, 694 (N.C. Ct. App. 2001). They may only be awarded if the principal participated in the conduct giving rise to the punitive damages, or if they condones the conduct. *Id.*

North Dakota

After a finding of oppression, fraud, or malice (*Continental Cas. Co. v. Kinsey*, 499 N.W.2d 574, 579 (N.D. 1993)), North Dakota Century Code Annotated § 32-03.2-11 that a court or jury may give exemplary damages:

1. In any action for the breach of an obligation not arising from contract, when the defendant has been guilty by clear and convincing evidence of oppression, fraud, or actual malice, the court or jury, in addition to the actual damages, may give damages for the sake of example and by way of punishing the defendant. Upon commencement of the action, the complaint may not seek exemplary damages. After filing the suit, a party may make a motion to amend the pleadings to claim exemplary damages. The motion must allege an applicable legal basis for awarding exemplary damages and must be accompanied by one or more affidavits or deposition testimony showing the factual basis for the claim. The party opposing the motion may respond with affidavit or deposition testimony. If the court finds, after considering all submitted evidence, that there is sufficient evidence to support a finding by the trier of fact that a preponderance of the evidence proves oppression, fraud, or actual malice, the court shall grant the moving party permission to amend the pleadings to claim exemplary damages. For purposes of tolling the statute of limitations, pleadings amended under this section relate back to the time the action was commenced.
2. If either party so elects, the trier of fact shall first determine whether compensatory damages are to be awarded before addressing any issues related to exemplary damages. Evidence relevant only to the claim for exemplary damages is not admissible in the proceeding on liability for compensatory damages. If an award of compensatory damages has been made, the trier of fact shall determine whether exemplary damages are to be awarded.
3. Evidence of a defendant's financial condition or net worth is not admissible in the proceeding on exemplary damages.
4. If the trier of fact determines that exemplary damages are to be awarded, the amount of exemplary damages may not exceed two times the amount of compensatory damages or two hundred fifty thousand dollars, whichever is greater; provided, however, that no award of exemplary damages may be made if the claimant is not entitled to compensatory damages. In a jury trial, the jury may not be informed of the limit on damages contained in this subsection. Any jury award in excess of this limit must be reduced by the court.
5. In order for a party to recover exemplary damages, the finder of fact shall find by clear and convincing evidence that the amount of exemplary damages awarded is consistent with the following principles and factors:
 - a. Whether there is a reasonable relationship between the exemplary damage award claimed and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred;
 - b. The degree of reprehensibility of the defendant's conduct and the duration of that conduct; and
 - c. Any of the following factors as to which evidence is presented:
 1. The defendant's awareness of and any concealment of the conduct;
 2. The profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; and
 3. Criminal sanctions imposed on the defendant for the same conduct that is the basis for the exemplary damage claim, these to be taken into account if offered in mitigation of the exemplary damage award.
6. Exemplary damages may not be awarded against a manufacturer or seller if the product's manufacture, design, formulation, inspection, testing, packaging, labeling, and warning complied with:
 - a. Federal statutes existing at the time the product was produced;
 - b. Administrative regulations existing at the time the product was produced that were adopted by an agency of the federal government which had responsibility to regulate the safety of the product or to establish safety standards for the product pursuant to a federal statute; or
 - c. Premarket approval or certification by an agency of the federal government.

7. The defense in subsection 6 does not apply if the plaintiff proves by clear and convincing evidence that the product manufacturer or product seller:
 - a. Knowingly and in violation of applicable agency regulations withheld or misrepresented information required to be submitted to the agency, which information was material and relevant to the harm in question; or
 - b. Made an illegal payment to an official of the federal agency for the purpose of securing approval of the product.
8. Exemplary damages may be awarded against a principal because of an act by an agent only if at least one of the following is proved by clear and convincing evidence to be true:
 - a. The principal or a managerial agent authorized the doing and manner of the act;
 - b. The agent was unfit and the principal or a managerial agent was reckless in employing or retaining the agent;
 - c. The agent was employed in a managerial capacity and was acting in the scope of employment; or
 - d. The principal or managerial agent ratified or approved the doing and manner of the act.
9. In a civil action involving a motor vehicle accident resulting in bodily injury, it is sufficient for the trier of fact to consider an award of exemplary damages against the driver under the motion procedures provided in subsection 1 if clear and convincing evidence indicates that the accident was caused by a driver who, within the five years immediately preceding the accident has been convicted for violation of section 39-08-01 and who was operating or in physical control of a motor vehicle:
 - a. With an alcohol concentration of at least eight one-hundredths of one percent by weight;
 - b. Under the influence of a controlled substance unless a drug that predominantly caused impairment was used only as directed or cautioned by a practitioner who legally prescribed or dispensed the drug to the driver;
 - c. Under the influence of alcohol and refused to take a test required under chapter 39-20; or
 - d. Under the influence of a volatile chemical as listed in section 19-03.1-22.1.

At the trial in an action in which the trier of fact will consider an award of exemplary damages, evidence that the driver has been convicted of violating section 39-08-01 or an equivalent statute or ordinance is admissible into evidence.

An employer may also be liable for punitive damages for the wrongful act of an employee. *John Deere Co. v. Nygard Equip.*, 225 N.W.2d 80, 95 (N.D. 1974). However the employer must have participated in, approved, or ratified the wrongful act. *Id.*

Ohio

Ohio Revised Code Annotated 2315.21 states that punitive or exemplary damages may be awarded:

- C. Subject to division (E) of this section, punitive or exemplary damages are not recoverable from a defendant in question in a tort action unless both of the following apply:
 1. The actions or omissions of that defendant demonstrate malice or aggravated or egregious fraud, or that defendant as principal or master knowingly authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate.

2. The trier of fact has returned a verdict or has made a determination pursuant to division (B)(2) or (3) of this section of the total compensatory damages recoverable by the plaintiff from that defendant.

D.

1. In a tort action, the trier of fact shall determine the liability of any defendant for punitive or exemplary damages and the amount of those damages.
2. Except as provided in division (D)(6) of this section, all of the following apply regarding any award of punitive or exemplary damages in a tort action:
 - a. The court shall not enter judgment for punitive or exemplary damages in excess of two times the amount of the compensatory damages awarded to the plaintiff from that defendant, as determined pursuant to division (B)(2) or (3) of this section.
 - b. If the defendant is a small employer or individual, the court shall not enter judgment for punitive or exemplary damages in excess of the lesser of two times the amount of the compensatory damages awarded to the plaintiff from the defendant or ten percent of the employer's or individual's net worth when the tort was committed up to a maximum of three hundred fifty thousand dollars, as determined pursuant to division (B)(2) or (3) of this section.
 - c. Any attorneys fees awarded as a result of a claim for punitive or exemplary damages shall not be considered for purposes of determining the cap on punitive damages.

A jury may award punitive damages only if there was actual malice, defined as "that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, or [] a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." *Lucarell v. Nationwide Mut. Ins. Co.*, 44 N.E.2d 319, 342 (Ohio Ct. App. 2015).

An employer will only be liable in punitive damages for the wrongful act if he ratified, authorized, or participated in the wrongdoing. *Tracy v. Athens & Pomeroy Coal & Land Co.*, 152 N.E. 641, 642 (Ohio 1926)

Oklahoma

Title 23 of the Oklahoma Statutes § 9.1 states:

- A. In an action for the breach of an obligation not arising from contract, the jury, in addition to actual damages, may, subject to the provisions and limitations in subsections B, C and D of this section, award punitive damages for the sake of example and by way of punishing the defendant based upon the following factors:
 1. The seriousness of the hazard to the public arising from the defendant's misconduct;
 2. The profitability of the misconduct to the defendant;
 3. The duration of the misconduct and any concealment of it;
 4. The degree of the defendant's awareness of the hazard and of its excessiveness;
 5. The attitude and conduct of the defendant upon discovery of the misconduct or hazard;
 6. In the case of a defendant which is a corporation or other entity, the number and level of employees involved in causing or concealing the misconduct; and
 7. The financial condition of the defendant.

B. Category I. Where the jury finds by clear and convincing evidence that:

1. The defendant has been guilty of reckless disregard for the rights of others; or
2. An insurer has recklessly disregarded its duty to deal fairly and act in good faith with its insured; the jury, in a separate proceeding conducted after the jury has made such finding and awarded actual damages, may award punitive damages in an amount not to exceed the greater of:
 - a. One Hundred Thousand Dollars (\$ 100,000.00), or
 - b. the amount of the actual damages awarded.

Any award of punitive damages under this subsection awarded in any manner other than as required in this subsection shall be void and reversible error.

C. Category II. Where the jury finds by clear and convincing evidence that:

1. The defendant has acted intentionally and with malice towards others; or
2. An insurer has intentionally and with malice breached its duty to deal fairly and act in good faith with its insured; the jury, in a separate proceeding conducted after the jury has made such finding and awarded actual damages, may award punitive damages in an amount not to exceed the greatest of:
 - a. Five Hundred Thousand Dollars (\$ 500,000.00),
 - b. twice the amount of actual damages awarded, or
 - c. the increased financial benefit derived by the defendant or insurer as a direct result of the conduct causing the injury to the plaintiff and other persons or entities.

The trial court shall reduce any award for punitive damages awarded pursuant to the provisions of subparagraph c of this paragraph by the amount it finds the defendant or insurer has previously paid as a result of all punitive damage verdicts entered in any court of this state for the same conduct by the defendant or insurer. Any award of punitive damages under this subsection awarded in any manner other than as required in this subsection shall be void and reversible error.

D. Category III. Where the jury finds by clear and convincing evidence that:

1. The defendant has acted intentionally and with malice towards others; or
2. An insurer has intentionally and with malice breached its duty to deal fairly and act in good faith with its insured; and the court finds, on the record and out of the presence of the jury, that there is evidence beyond a reasonable doubt that the defendant or insurer acted intentionally and with malice and engaged in conduct life-threatening to humans, the jury, in a separate proceeding conducted after the jury has made such finding and awarded actual damages, may award punitive damages in any amount the jury deems appropriate, without regard to the limitations set forth in subsections B and C of this section. Any award of punitive damages under this subsection awarded in any manner other than as required in this subsection shall be void and reversible error.

E. In determining the amount, if any, of punitive damages to be awarded under either subsection B, C or D of this section, the jury shall make the award based upon the factors set forth in subsection A of this section.

F. The provisions of this section are severable, and if any part or provision thereof shall be held void, the decision of the court shall not affect or impair any of the remaining parts or provisions thereof.

An employer may be held vicariously liable for the punitive damages arising out of an employee's act if a master/servant relationship existed between the employer and employee and the act was committed within the scope of the employee's employment. *Bierman v. Aramark Refreshment Servs. Inc.*, 198 P.3d 877 (Okla. 2008). There is no requirement that employers participate in or ratify the conduct of an employee to be liable. *Id.* at 880.

Oregon

Oregon Annotated Statute § 31.730 set the standard for punitive damages as:

1. Punitive damages are not recoverable in a civil action unless it is proven by clear and convincing evidence that the party against whom punitive damages are sought has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others.
2. If an award of punitive damages is made by a jury, the court shall review the award to determine whether the award is within the range of damages that a rational juror would be entitled to award based on the record as a whole, viewing the statutory and common-law factors that allow an award of punitive damages for the specific type of claim at issue in the proceeding.
3. In addition to any reduction that may be made under subsection (2) of this section, upon the motion of a defendant the court may reduce the amount of any judgment requiring the payment of punitive damages entered against the defendant if the defendant establishes that the defendant has taken remedial measures that are reasonable under the circumstances to prevent reoccurrence of the conduct that gave rise to the claim for punitive damages. In reducing awards of punitive damages under the provisions of this subsection, the court shall consider the amount of any previous judgment for punitive damages entered against the same defendant for the same conduct giving rise to a claim for punitive damages.

Oregon follows the Restatement of Agency (Second) which states:

"Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if:

- a. the principal authorized the doing and the manner of the act, or
- b. the agent was unfit and the principal was reckless in employing him, or
- c. the agent was employed in a managerial capacity and was acting in the scope of employment, or
- d. the principal or a managerial agent of the principal ratified or approved the act."

See Stroud v. Denny's Restaurant, Inc., 532 P.2d 790, 791 (1975).

Pennsylvania

The standard governing punitive damages in Pennsylvania requires conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the right of others. *Daniel v. Wyeth Pharms., Inc.*, 15 A.3d 909, 929 (Pa. Super. 2011). They are only proper in cases where the defendant's action demonstrate willful, wanton, or reckless conduct. *Id.* They may not be awarded for misconduct that amounts to ordinary negligence. *Hall v. Jackson*, 788 A.2d 390 (Pa. Super. 2001).

For punitive damages to be awarded on the basis of vicarious liability in Pennsylvania, there is no requirement that the agent commit a tortious act at the direction of the principal nor must the principal ratify the act. *Shiner v. Moriarty*, 706 A.2d 1228, 1240 (Pa. Super. Ct. 1998). The agent must have been acting in the scope of his employment, however. *Id.*

Rhode Island

Punitive damages are considered an “extraordinary sanction” in Rhode Island and are awarded “upon evidence of such willfulness, recklessness or wickedness, on the part of the party at fault, as amounted to criminality” and when the “defendant has acted maliciously or in bad faith.” *Williams v. Stoddard*, 2015 R.I. Super. LEXIS 58, *81-81 (R.I. Super. 2015).

Unless an employer participated in, authorized or ratified the tortious act of its employee, punitive damages cannot be awarded against the employer. *Shoucair v. Brown Univ.*, 917 A.2d 418, 434 (R.I. 2007).

South Carolina

In South Carolina, punitive damages are awarded upon a clear and convincing showing of reckless, willful, wanton, or malicious conduct, showing a conscious indifference to the rights of others or a reckless disregard thereof. *Solley v. Navy Fed. Credit Union, Inc.*, 723 S.E.2d 597, 607 (Ct. App. 2012); *King v. Allstate Ins. Co.*, 251 S.E.2d 762 (S.C. 1979); S.C. Code Ann. § 15-33-135.

An employer is liable for the tort of his employee if the tort was committed within the scope of the employee’s employment. South Carolina courts will use a “motive” or “purpose” test to determine if the employee’s motive/purpose was to benefit the employer at the time of the tort. *Wade v. Berkley County*, 498 S.E.2d 684 (S.C. Ct. App. 1998).

South Dakota

South Dakota Codified Laws § 21-3-2 allows punitive damages:

In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, or in any case of wrongful injury to animals, being subjects of property, committed intentionally or by willful and wanton misconduct, in disregard of humanity, the jury, in addition to the actual damage, may give damages for the sake of example, and by way of punishing the defendant.

South Dakota follows the Restatement of Agency (Second) §217 which states:

Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if:

- a. the principal authorized the doing and the manner of the act, or
- b. the agent was unfit and the principal was reckless in employing him, or
- c. the agent was employed in a managerial capacity and was acting in the scope of employment, or
- d. the principal or a managerial agent of the principal ratified or approved the act

Olson v. Tri-County State Bank, 456 N.W.2d 132, 134 n.3 (S.D. 1990).

Tennessee

Courts in Tennessee will award punitive damages if they find a defendant as acted either intentionally, fraudulently, maliciously or recklessly. *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992).

A principal may be held vicariously liable for punitive damages assessed against an agent so long as the agent was acting within the scope of his or her employment. *Odom v. Gray*, 508 S.W.2d 526 (Tenn. 1974).

Texas

Texas Civil Practice and Remedies Code § 41.003 states:

- a. Except as provided by Subsection (c), exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from:
 - 1. fraud;
 - 2. malice; or
 - 3. gross negligence.
- b. The claimant must prove by clear and convincing evidence the elements of exemplary damages as provided by this section. This burden of proof may not be shifted to the defendant or satisfied by evidence of ordinary negligence, bad faith, or a deceptive trade practice.
- c. If the claimant relies on a statute establishing a cause of action and authorizing exemplary damages in specified circumstances or in conjunction with a specified culpable mental state, exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the damages result from the specified circumstances or culpable mental state.
- d. Exemplary damages may be awarded only if the jury was unanimous in regard to finding liability for and the amount of exemplary damages.
- e. In all cases where the issue of exemplary damages is submitted to the jury, the following instruction shall be included in the charge of the court:
"You are instructed that, in order for you to find exemplary damages, your answer to the question regarding the amount of such damages must be unanimous."

While § 41.008 places limitations on recovery;

- a. In an action in which a claimant seeks recovery of damages, the trier of fact shall determine the amount of economic damages separately from the amount of other compensatory damages.
- b. Exemplary damages awarded against a defendant may not exceed an amount equal to the greater of:
 1. (A) two times the amount of economic damages; plus
(B) an amount equal to any noneconomic damages found by the jury, not to exceed \$750,000; or
 2. \$200,000.
- c. This section does not apply to a cause of action against a defendant from whom a plaintiff seeks recovery of exemplary damages based on conduct described as a felony in the following sections of the Penal Code if, except for Sections 49.07 and 49.08, the conduct was committed knowingly or intentionally:
 1. Section 19.02 (murder);
 2. Section 19.03 (capital murder);
 3. Section 20.04 (aggravated kidnapping);
 4. Section 22.02 (aggravated assault);
 5. Section 22.011 (sexual assault);
 6. Section 22.021 (aggravated sexual assault);
 7. Section 22.04 (injury to a child, elderly individual, or disabled individual, but not if the conduct occurred while providing health care as defined by Section 74.001);
 8. Section 32.21 (forgery);
 9. Section 32.43 (commercial bribery);
 10. Section 32.45 (misapplication of fiduciary property or property of financial institution);
 11. Section 32.46 (securing execution of document by deception);
 12. Section 32.47 (fraudulent destruction, removal, or concealment of writing);
 13. Chapter 31 (theft) the punishment level for which is a felony of the third degree or higher;
 14. Section 49.07 (intoxication assault);
 15. Section 49.08 (intoxication manslaughter);
 16. Section 21.02 (continuous sexual abuse of young child or children); or
 17. Chapter 20A (trafficking of persons).
- d. In this section, “intentionally” and “knowingly” have the same meanings assigned those terms in Sections 6.03(a) and (b), Penal Code.
- e. The provisions of this section may not be made known to a jury by any means, including voir dire, introduction into evidence, argument, or instruction.
- f. This section does not apply to a cause of action for damages arising from the manufacture of methamphetamine as described by Chapter 99.

Definitions are set forth in § 41.001

1. "Claimant" means a party, including a plaintiff, counterclaimant, cross-claimant, or third-party plaintiff, seeking recovery of damages. In a cause of action in which a party seeks recovery of damages related to injury to another person, damage to the property of another person, death of another person, or other harm to another person, "claimant" includes both that other person and the party seeking recovery of damages.
2. "Clear and convincing" means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.
3. "Defendant" means a party, including a counter defendant, cross-defendant, or third-party defendant, from whom a claimant seeks relief.
4. "Economic damages" means compensatory damages intended to compensate a claimant for actual economic or pecuniary loss; the term does not include exemplary damages or noneconomic damages.
5. "Exemplary damages" means any damages awarded as a penalty or by way of punishment but not for compensatory purposes. Exemplary damages are neither economic nor noneconomic damages. 'Exemplary damages' includes punitive damages.
6. "Fraud" means fraud other than constructive fraud.
7. "Malice" means a specific intent by the defendant to cause substantial injury or harm to the claimant.
 - 7-a. "Net worth" means the total assets of a person minus the total liabilities of the person on a date determined appropriate by the trial court.
8. "Compensatory damages" means economic and noneconomic damages. The term does not include exemplary damages.
9. "Future damages" means damages that are incurred after the date of the judgment. Future damages do not include exemplary damages.
10. "Future loss of earnings" means a pecuniary loss incurred after the date of the judgment, including:
 - A. loss of income, wages, or earning capacity; and
 - B. loss of inheritance.
11. "Gross negligence" means an act or omission:
 - A. which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
 - B. of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.
12. "Noneconomic damages" means damages awarded for the purpose of compensating a claimant for physical pain and suffering, mental or emotional pain or anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society, inconvenience, loss of enjoyment of life, injury to reputation, and all other nonpecuniary losses of any kind other than exemplary damages.
13. "Periodic payments" means the payment of money or its equivalent to the recipient of future damages at defined intervals.

An employer may be held liable for exemplary damages because of acts of an employee or agent, where the employer authorizes or ratifies the agent's gross negligence, or in its own right if the employer is grossly negligent in hiring an unfit agent. *Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387, 389 (Texas 1997).

Utah

Utah Code Annotated § 78B-8-201 sets the basis for punitive damages as:

1.
 - a. Except as otherwise provided by statute, punitive damages may be awarded only if compensatory or general damages are awarded and it is established by clear and convincing evidence that the acts or omissions of the tortfeasor are the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others.
 - b. The limitations, standards of evidence, and standards of conduct of Subsection (1)(a) do not apply to any claim for punitive damages arising out of the tortfeasor's:
 - i. operation of a motor vehicle or motorboat while voluntarily intoxicated or under the influence of any drug or combination of alcohol and drugs as prohibited by Section 41-6a-502;
 - ii. causing death of another person by providing or administering an illegal controlled substance to the person under Section 78B-3-801; or
 - iii. providing an illegal controlled substance to any person in the chain of transfer that connects directly to a person who subsequently provided or administered the substance to a person whose death was caused in whole or in part by the substance.
 - c. The award of a penalty under Section 78B-3-108 regarding shoplifting is not subject to the prior award of compensatory or general damages under Subsection (1)(a) whether or not restitution has been paid to the merchant prior to or as a part of a civil action under Section 78B-3-108.
2. Evidence of a party's wealth or financial condition shall be admissible only after a finding of liability for punitive damages has been made.
 - a. Discovery concerning a party's wealth or financial condition may only be allowed after the party seeking punitive damages has established a prima facie case on the record that an award of punitive damages is reasonably likely against the party about whom discovery is sought and, if disputed, the court is satisfied that the discovery is not sought for the purpose of harassment.
 - b. Subsection (2)(a) does not apply to any claim for punitive damages arising out of the tortfeasor's:
 - i. operation of a motor vehicle or motorboat while voluntarily intoxicated or under the influence of any drug or combination of alcohol and drugs as prohibited by Section 41-6a-502;
 - ii. causing death of another person or causing a person to be addicted by providing or administering an illegal controlled substance to the person under Section 78B-3-801; or
 - iii. providing an illegal controlled substance to any person in the chain of transfer that connects directly to a person who subsequently provided or administered the substance to a person whose death was caused in whole or in part by the substance.
3.
 - a. In any case where punitive damages are awarded, the court shall enter judgment as follows:
 - i. for the first \$50,000, judgment shall be in favor of the injured party; and
 - ii. any amount in excess of \$50,000 shall be divided equally between the state and the injured party, and judgment to each entered accordingly.

- b.
 - i. The actual and bona fide attorney fees and costs incurred in obtaining and collecting the judgment for punitive damages shall be considered to have been incurred by the state and the injured party in proportion to the judgment entered in each party's behalf.
 - A. The state and injured party shall be responsible for each one's proportionate share only.
 - B. The state is liable to pay its proportionate share only to the extent it receives payment toward its judgment.
 - ii. If the court awards attorney fees and costs to the injured party as a direct result of the punitive damage award, the state shall have a corresponding credit in a proportionate amount based on the amounts of the party's respective punitive damage judgments. This credit may be applied as an offset against the amount of attorney fees and costs charged to the state for obtaining the punitive damage judgment.

Utah "limits vicarious punitive damages to those situations where wrongful acts were committed or specifically authorized by a managerial agent or were committed by an unfit employee who was recklessly employed or retained." *Johnson v. Rogers*, 763 P.2d 771, 778 (Utah 1988).

Vermont

Under Vermont law, a high bar is set to recover punitive damages, and is only available to punish defendants who acted with actual malice. *Monahan v. GMAC Mort. Corp.*, 898 A.2d 298, 317 (Vt. 1921). Actual malice is shown by conduct "manifesting personal ill will or carried under circumstances evidencing insult or oppression, or even by conduct showing a reckless or wanton disregard of one's rights." *Id.* Intentional, wrongful and even illegal conduct will not justify punitive damages unless there is an inference of bad motive. *Id.*

If the defendant is a corporation or employer, it must be shown that the malicious act of the agent was one that the employer directed, participated in or subsequently ratified. *Shortle v. Central Vt. Pub. Serv. Corp.*, 399 A.2d 517, 518 (Vt. 1979)

Virginia

Virginia awards punitive damages when a defendant has acted with actual malice or such willful or wanton recklessness as to demonstrate a conscious disregard for the rights of others. *Flippo v. Csc Assocs.*, 547 S.E.2d 216, 224 (Va. 1981).

An employer may be liable for punitive damages for the wrongful acts of his or her employee only where the employer participates in, authorizes, or ratifies the wrongful act. *Freeman v. Sproles*, 131 S.E.2d 410 (Va. 1963).

Washington

Punitive damages are generally not recoverable.

West Virginia

West Virginia allows punitive damages in tort action where there is "gross fraud, malice, oppression, or wanton, willful or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative enactment authorizes it. *Smith v. Penney*, 359 S.E.2d 624 (W. Va. 1987); *In re Asbestos Pers. Injury Litig.*, 2013 W.V. Cir. LEXIS 604, *11 (W. Va. Cir. Ct. 2013).

An employer can be liable for punitive damages for the acts of its employee if the employee was acting within the scope of his or her employment when the injury to the plaintiff occurred. *Jarvis v. Modern Woodmen of Am.*, 406 S.E.2d 736 (W. Va. 1991).

Wisconsin

Wisconsin Annotated Statute § 895.403 establishes:

1. DEFINITIONS. In this section:
 - a. "Defendant" means the party against whom punitive damages are sought.
 - b. "Double damages" means those court awards made under a statute providing for twice, 2 times or double the amount of damages suffered by the injured party.
 - c. "Plaintiff" means the party seeking to recover punitive damages.
 - d. "Treble damages" means those court awards made under a statute providing for 3 times or treble the amount of damages suffered by the injured party.
2. SCOPE. This section does not apply to awards of double damages or treble damages, or to the award of exemplary damages under ss. 46.90 (9) (a) and (b), 51.30 (9), 51.61 (7), 55.043 (9m) (a) and (b), 103.96 (2), 134.93 (5), 146.84 (1) (b) and (bm), 153.76, 252.14 (4), 252.15 (8) (a), 610.70 (7) (b), 943.245 (2) and (3) and 943.51 (2) and (3).
3. STANDARD OF CONDUCT. The plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff.
4. PROCEDURE. If the plaintiff establishes a prima facie case for the allowance of punitive damages:
 - a. The plaintiff may introduce evidence of the wealth of a defendant; and
 - b. The judge shall submit to the jury a special verdict as to punitive damages or, if the case is tried to the court, the judge shall issue a special verdict as to punitive damages.

5. APPLICATION OF JOINT AND SEVERAL LIABILITY. The rule of joint and several liability does not apply to punitive damages.
6. LIMITATION ON DAMAGES. Punitive damages received by the plaintiff may not exceed twice the amount of any compensatory damages recovered by the plaintiff or 200,000, whichever is greater. This subsection does not apply to a plaintiff seeking punitive damages from a defendant whose actions under sub. (3) included the operation of a vehicle, including a motor vehicle as defined under s. 340.01 (35), a snowmobile as defined under s. 340.01 (58a), an all-terrain vehicle as defined under s. 340.01 (2g), a utility terrain vehicle as defined under s. 23.33 (1) (ng), and a boat as defined under s. 30.50 (2), while under the influence of an intoxicant to a degree that rendered the defendant incapable of safe operation of the vehicle. In this subsection, "intoxicant" has the meaning given in s. 30.50 (4e).

Recovery of punitive damages against the employer for the tortious acts of the employee is not permitted without proof that the employer authorized or ratified the alleged tortious act. *Jeffers v. Nysse*, 297 N.W.2d 495, 499 n.3 (Wis. 1980)

Wyoming

Courts in Wyoming will approve punitive damages in "circumstances involving outrageous conduct, such as intentional torts, torts involving malice and torts involving willful and wanton misconduct." *Weaver v. Mitchell*, 715 P.2d 1631, 1370 (Wy. 1986). Punitive damages are not awarded in cases that involve inattention, inadvertence, thoughtlessness, mistake, or even gross negligence. *Id.* "Willful and wanton misconduct is the intentional doing of an act, or an intentional failure to do an act, in reckless disregard of the consequences and under circumstances and conditions that a reasonable person would know, or have reason to know that such conduct would, in a high degree of probability, result in harm to another." *Id.*; *Danculovich v. brown*, 593 P.2d 187 (Wy. 1979).

In order for the award of punitive damages to be awarded against a principal, one of four circumstances must be present. First, the principal must have authorized the doing and the manner of the act. Or second, the agent was unfit and the principal was reckless in employing or retaining him. Or third, the agent was employed in a managerial capacity and was acting in the scope of employment. Or finally, the principal or one of its managerial agents ratified or approved the act. *Campen v. Stone*, 635 P.2d 1121, 1125-26 (Wy. 1981).

NATIONAL SURVEY

WHETHER PUNITIVE DAMAGES ARE INSURABLE

State	Not Insurable	Insurable	Where Liability is Vicarious	Cite and Applicable Statutes
Alabama		Insurable		<p><i>American Fidel. & Cas. Co. v. Werfel</i>, 164 So. 383 (Ala. 1935) (If injury was covered by policy, punitive damages were within coverage of policy indemnifying against loss from liability imposed by law of bodily injuries).</p> <p>No applicable statutes.</p>
Alaska		Insurable	Insurable	<p><i>Aetna Cas. & Sur. Co. v. Marion Equipment Co.</i>, 894 P.2d 664 (Alaska 1995) (Court held a company can insure itself against punitive damages).</p> <p>No applicable statutes.</p>
Arizona		Insurable		<p><i>Price v. Hartford Accident & Indem. Co.</i>, 502 P.2d 522 (Ariz. 1972) (Under liability policies, public policy did not prohibit punitive damages to be insurable by insurance policies when there is no explicit exclusion in the policy).</p> <p>No applicable statutes.</p>
Arkansas		Insurable	Insurable	<p><i>Southern Farm Bureau Cas. Ins. Co. v. Daniel</i>, 440 S.W.2d 582 (Ark. 1969) (Court found nothing in state's public policy to prevent an insurer from indemnifying the insured against punitive damages; court looked at auto policy and analogized to employers being covered in respondeat superior; court mentioned it was distinguishing auto and respondeat superior cases from intentional tort cases).</p> <p>Arkansas Insurance Code § 23-79-307(8)</p>

State	Not Insurable	Insurable	Where Liability is Vicarious	Cite and Applicable Statutes
California	Not Insurable		Insurable	<p><i>J.B. Aguerre, Inc. v. American Guarantee & Liability Ins. Co.</i>, 59 Cal. App. 4th 6, 15 (Cal App. 2d Cir 1997) (California public policy prohibits indemnification against punitive damage awards, but insurer still has duty to “reasonably assist and cooperate with the insured in defending and settling punitive damage claims”).</p> <p><i>Certain Underwriters at Lloyd’s of London v. Pacific Southwest Airlines</i>, 786 F. Supp. 867 (C.D. Cal. 1992); <i>Arenson v. Nat’l Auto. & Cas. Ins. Co.</i>, 286 P.2d 816 (Cal. 1955). (Section 533 of the California Insurance Code generally prohibits indemnification of punitive and intentional tort damages; however, exception is made in cases where an employer is required to pay punitive damages as a result of actions of one of his or her employees).</p> <p>California Insurance Code § 533</p>
Colorado	Not Insurable			<p><i>Brown v. Western Cas. & Sur Co.</i>, 484 P.2d 1252 (Colo. Ct. App. 1971) (Since punitive damages are not compensatory in nature, they cannot be insurable under insurance policies).</p> <p>No applicable statutes.</p>
Connecticut	Generally Not Insurable	May be Insurable – if serve compensatory function	Insurable	<p><i>St. Paul Fire & Marine Ins. Co. v. Shernow</i>, 610 A.2s 1218, 1285 (Conn. 1992) (stating it is against public policy to insure against punitive damages arising from intentional wrongdoing)</p> <p>Some courts have noted that in Connecticut certain punitive damages serve a compensatory function and therefore, it is possible a court may find coverage for such damages. See <i>Lanese v. Carlson</i>, 344 A.2d 361, 364 (Conn. Super. Ct. 1975); <i>LaBlanc c. Spector</i>, 378 F. Supp. 301, 305 (D. Conn. 1973).</p> <p><i>Avis Rent A Car Sys., Inc. v. Liberty Mut. Ins. Co.</i>, 526 A.2d 522 (Conn. 1987). (The Connecticut Supreme Court held that vicariously assessed multiple damages awarded pursuant to statute was an insurable risk).</p> <p>No applicable statutes.</p>

State	Not Insurable	Insurable	Where Liability is Vicarious	Cite and Applicable Statutes
Delaware		Insurable		<p><i>Whalen v. On-Deck, Inc.</i>, 514 A.2d 1072, 1074 (Del. 1986) (“[P]ublic policy in this state does not prohibit the issuance of an insurance contract that covers punitive damages”).</p> <p>No applicable statutes.</p>
District of Columbia				<p>Directly assessed punitive damages are likely not insurable. <i>See Pray v. Lockheed Aircraft Corp.</i>, 644 F. Supp. 1289 (D.D.C. 1986) (Finding that insurance for punitive damages may be against public policy, although the issue is not clearly decided).</p> <p>No applicable statutes.</p>
Florida	Not Insurable		Insurable	<p><i>Northwestern Nat’l Cas. Co. v. McNulty</i>, 307 F.2d 432 (5th Cir. 1962) (Applying Florida and Virginia law) (Public policy prohibited construction in insurance policy as covering punitive damages).</p> <p><i>Morgan Int’l Realty v. Dade Underwriters Ins. Agency</i>, 617 So. 2d 455 (Fla. Ct. App., 3d Dist. 1993) (Policy insured punitive damage award against employer arising out of vicarious liability).</p> <p>No applicable statutes.</p>
Georgia		Insurable		<p><i>Lunceford v. Peachtree Cas. Ins. Co.</i>, 495 S.E.2d 88 (Ga. Ct. App. 1997) (Not against Georgia public policy for insurance companies to cover punitive damage awards).</p> <p><i>Greenwood Cemetery, Inc. v. Travelers Indem. Co.</i>, 232 S.E.2d 910 (Ga. 1977) (Cemetery’s E&O policy insured punitive damages).</p>
Hawaii		Insurable		<p>Haw. Rev. Stat. § 431:10-240 (2015) (Insurance policies do not cover punitive damages unless specifically included).</p> <p>Hawaii Revised Statutes Annotated § 431:10-240.</p>

State	Not Insurable	Insurable	Where Liability is Vicarious	Cite and Applicable Statutes
Idaho		Insurable		<p><i>Abbie Uriguen Oldsmobile Buick v. U.S. Fire Ins. Co.</i>, 511 P.2d 783 (Idaho 1973) (Although purpose of punitive damages is to punish and deter, if ambiguity exists in insurance policy as to whether punitive damages are excluded or not, the ambiguity will be found in favor of the insured and the insurer will be required to pay punitive damages under the policy).</p> <p>No applicable statutes.</p>
Illinois	Not Insurable		Insurable	<p><i>Beaver v. Country Mut. Ins. Co.</i>, 420 N.E.2d 1058 (Ill. App. Ct., 5th Dist. 1981) (Public policy prohibits insurance against liability for punitive damages that arise out of one's own misconduct).</p> <p><i>Scott v. Instant Parking, Inc.</i>, 245 N.E.2d 124 (Ill. App. Ct., 1st Dist. 1969) (Employer may insure itself against vicarious liability for punitive damages as a consequence of wrongful conduct on behalf of an employee).</p> <p>No applicable statutes.</p>
Indiana	Not Insurable		Insurable	<p><i>Stevenson by Freeman v. Hamilton Mut. Ins. Co.</i>, 672 N.E.2d 467 (Ind. Ct. App. 1996) (Mortuary's deliberate and willful conduct was not considered "vicarious liability" and thus, punitive damages were not insurable by liability insurer).</p> <p><i>Norfolk & Western Railway Co. v. Hartford Acc. And Indemnity Co.</i>, 420 F. Supp. 92 (N.D. Ind. 1976) (Corporate auto liability policy insured punitive damages award for vicarious liability against corporation).</p> <p>No applicable statutes.</p>

State	Not Insurable	Insurable	Where Liability is Vicarious	Cite and Applicable Statutes
Iowa		Insurable		<p><i>Skyline Harvestore Systems, Inc. v. Centennial Ins. Co.</i>, 331 N.W.2d 106 (Iowa 1983) (Insurance coverage for punitive damages does not contravene public policy purpose of punitive damages; if insurance policy does not contain explicit exclusion for punitive damages, these damages will be insured under the policy).</p> <p>No applicable statutes.</p>
Kansas	Not Insurable		Insurable	<p><i>Flint Hills Rural Elec. Coop Ass'n v. Fed. Rural Elec. Ins. Corp.</i>, 941 P.2d 374, 381 (Kan. 1997) ("the public policy of the state prohibits insurance coverage for any entity directly liable for punitive damages").</p> <p><i>Hartford Acc. & Indem. Co. v. American Red Ball Transit Co., Inc.</i>, 938 P.2d 1281 (Kan. 1997) (Kansas public policy states no coverage exists for punitive damages; however, Kan. Stat. Ann. 40-2, 115(a) provides that it is not against public policy to obtain insurance coverage for punitive damages awarded against an employer based upon corporate vicarious liability).</p> <p>Kansas Annotated Statutes § 40-2,115.</p>
Kentucky		Insurable – if not intentional	Insurable	<p><i>Cont'l Ins. Co. v. Hancock</i>, 507 S.W.2d 146 (Ky. 1973)(Punitive damage award will be insurable for insured found guilty of being grossly negligent as opposed to being found guilty of committing an intentional wrong).</p> <p>No applicable statutes.</p>
Louisiana		Insurable	Insurable	<p><i>Swindle v. Haughton Wood Co., Inc.</i>, 458 So. 2d 992, 995 (La. Ct. App. 1984) (holding that "public policy does not forbid one to insure against the intentional acts of another for which he may be vicariously liable"), <i>internal citations omitted</i>.</p> <p>LA. Rev. Stat. Ann. §22:680 (stating the coverage provided under this [UIM] Subsection may exclude coverage for punitive or exemplary damages by the terms of the policy or contract).</p>

State	Not Insurable	Insurable	Where Liability is Vicarious	Cite and Applicable Statutes
Maine	Not Insurable		Insurable	<p><i>Brale v. Berkshire Mut. Ins. Co.</i>, 440 A.2d 359, 361-62 (Me. 1982) (Punitive damages are not compensatory in nature; thus, insurance companies who provide coverage under uninsured motorist statute "should not be charged with liability for punitive damages").</p> <p><i>But see Tuttle v. Raymond</i>, 494 A.2d 1353, 1360 (Me. 1985) (noting that "many issues concerning the availability of punitive damages, which are not raised by this case, remain for future consideration and resolution...[including issues such as] whether one can insure against the assessment of punitive damages").</p> <p><i>See also Concord Gen. Mut. Ins. Co. v. Hills</i>, 345 F. Supp. 1090 (D. Me. 1972) (Provisions in automobile policy issued to insured and who covered driver permitted to use vehicle include both compensatory and punitive damages).</p> <p>No applicable statutes.</p>
Maryland		Insurable		<p><i>First Nat'l Bank of St. Mary's v. Fidelity and Deposit Co.</i>, 389 A.2d 359 (Md. 1978) (It was not against the public policy of Maryland to allow insurance coverage of punitive damages).</p> <p>No applicable statutes.</p>
Massachusetts	Not Insurable			<p><i>Santos v. Lumbermen's Mut. Casualty Co.</i>, 556 N.E.2d 983 (Mass. 1990) (Court held that an award of punitive damages under the Massachusetts underinsured motorist statute are not insurable because it would not punish or deter the wrongdoer but instead would punish the insurance company).</p> <p>No applicable statutes.</p>

State	Not Insurable	Insurable	Where Liability is Vicarious	Cite and Applicable Statutes
Michigan		Insurable		<p><i>Meijer, Inc. v. General Star Indem. Co.</i>, 826 F. Supp. 241, 247 (W.D. Mich. 1993) (“To hold that punitive damages are not recoverable would create, in effect, an exclusion for which the parties did not negotiate and allow insurance companies to collect premiums for coverage of a risk that they voluntarily assumed and then escape their obligations to pay on a claim by a mere judicial declaration that the contract is void by reason of public policy”).</p> <p>No applicable statutes.</p>
Minnesota	Not Insurable		Insurable	<p><i>U.S. Fire Ins. Co. v. Goodyear Tire & Rubber Co.</i>, 920 F.2d 487 (8th Cir. 1990) (Applying Minnesota law) (Looking at state precedent, the Eighth Circuit Court of Appeals held that the district court did not err in holding that Minnesota law prohibits insurance coverage for punitive damages).</p> <p><i>Perl v. St. Paul Fire & Marine Ins. Co.</i>, 345 N.W. 2d 209, 216 (Minn. 1984) (“While the law firm, quire properly, is held liable to the client for the misconduct of one of its partners or members, we see no reason why the law firm should not be free to acquire insurance, if it can, protecting itself from vicarious liability for the misconduct”).</p> <p>Minnesota Statutes § 60A.06.</p>
Mississippi		Insurable – but can be excluded in certain policies		<p><i>Anthony v. Frith</i>, 394 So.2d 867 (Miss. 1981) (It would not be against the public policy of Mississippi to allow recovery of punitive damages from an insurer); <i>James W. Sessums Timber Co., Inc. v. McDaniel</i>, 635 So. 2d 875, 883 (Miss. 1994) (noting directly assessed punitive damages are insurable).</p> <p><i>Shelter Mut. Ins. Co. v. Dale</i>, 914 So.2d 698, 703 (Miss. 2005) (stating Mississippi law does not prevent insurers from excluding punitive damage coverage in auto liability policies).</p> <p>No applicable statutes.</p>

State	Not Insurable	Insurable	Where Liability is Vicarious	Cite and Applicable Statutes
Missouri	Not Insurable – where policies only intended to cover bodily injury and did not explicitly cover punitive damage	Insurable – where policy specifically provides for coverage of directly assessed punitive damages	Insurable	<p><i>Crull v. Gleb</i>, 382 S.W.2d 17, 23 (Mo. Ct. App. 1964) (Court held, under motorist policy, that “it 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”).</p> <p><i>Colson v. Lloyd’s of London</i>, 435 S.W.2d 42 (Mo. Ct. App. 1986) (The court held that a policy insuring police officers against all losses imposed by law covered punitive damages. The court concluded that insuring against punitive damages did not violate Missouri’s public policy).</p> <p><i>Ohio Cs. Ins. Co. v. Welfare Finance Corp.</i>, 75 F.2d 58 (8th Cir. 1934), <i>cert denied</i>, 295 U.S. 734 (1935) (It was not against public policy to insure punitive damages incurred against corporation’s truck, where insured did not authorize or participate in the acts of the driver).</p> <p>No applicable statutes.</p>
Montana		Insurable – where policy specifically states punitive damages are covered		<p><i>Fitzgerald v. Western Fire. Ins. Co.</i>, 679 P.2d 790 (Mont. 1984) (Auto policy ambiguous as to whether policy covered punitive damages; thus, Supreme Court held the ambiguity must be held against the insurer and policy insured punitive damages).</p> <p>Mont. Cod. Ann. §§ 33-15-317 (Insurance does not cover punitive damages unless expressly included in the contract).</p>
Nebraska (Punitive Damages Not Recognized)				<p><i>Miller v. Kingsley</i>, 230 N.W.2d 472 (Neb. 1975) (Punitive damages are not allowed in civil cases; the only measure of recovery is compensation for the injury sustained).</p> <p>No applicable statutes.</p>

State	Not Insurable	Insurable	Where Liability is Vicarious	Cite and Applicable Statutes
Nevada	Not Insurable – when damages arise from a wrongful act committed with the intent to injure	Insurable – unless imposed for wrongful act committed with intent to injure		Nev. Rev. Stat. Ann. § 681A.095 (“[a]n insurer may insure against legal liability for exemplary or punitive damages that do not arise from a wrongful act of the insured committed with the intent to cause injury to another”).
New Hampshire		Insurable		<i>Munson v. Raudonis</i> , 387 A.2d 1174 (N.H. 1978) (Punitive damages are considered an element of compensatory damages). No applicable statutes.
New Jersey	Not Insurable		Insurable	<i>Johnson & Johnson v. Aetna Cas. & Sur. Co.</i> , 667 A.2d 1087, 1088 (N.J. App. Ct. 1995) (“Affording coverage on these facts would run counter to the underlying theory of punitive damages: to punish the wrongdoer and deter aggravated misconduct in the future”). <i>Malanga v. Mfers Cas. Ins. Co.</i> , 146 A.2d 105 (N.J. 1958) (Unless the insurer can prove the acts of one partner were at the direction of or committed by the partnership, the policy will cover acts of one partner acting in the ordinary course of the partnership business, including the punitive damage award). No applicable statutes.
New Mexico		Insurable		<i>Baker v. Armstrong</i> , 744 P.2d 170 (N.M. 1987) (Auto policy insured punitive damages; was not against public policy and there was no explicit exclusion in policy for punitive damages). No applicable statutes.

State	Not Insurable	Insurable	Where Liability is Vicarious	Cite and Applicable Statutes
New York	Not Insurable		Not Insurable	<p><i>Zurich Ins. Co. v. Shearson Lehman Hutton, Inc.</i>, 642 N.E.2d 1065 (N.Y. 1994) (Court held New York public policy precludes insurance coverage for punitive damages even when it is determined that the liability is vicarious).</p> <p>No applicable statutes.</p>
North Carolina		Insurable	Insurable	<p><i>Boyd v. Nationwide Mut. Ins. Co.</i>, 424 S.E.2d 168 (N.C. Ct. App. 1993) (North Carolina public policy and automobile insurance policies did not preclude coverage for punitive damages).</p> <p>North Carolina General Statute § 58-41-50(a) (“With respect to liability insurance policy forms, an insurer may exclude or limit coverage for punitive damages awarded against its insured”).</p>
North Dakota		Insurable – unless damages caused by intentional acts of insured		<p><i>Continental Cas. Co. v. Kinsey</i>, 499 N.W.2d 574 (N.D. 1993) (Insurer obliged to pay punitive damages awarded against insured, but insurer may seek indemnity from insured if injury was caused by insured’s own fraud or deceit).</p> <p><i>Nodak Mut. Ins. Co. v. Heim</i>, 559 N.W.2d 846 (N.D. 1997) (Affirmed <i>Kinsey</i> but held public policy prohibits insurance coverage for intentional acts of insured).</p> <p>North Dakota Century Code § 26.1-32-04.</p>
Ohio	Not Insurable			<p><i>Lumbermens Mut. Cas. Co. v. S-W Industries, Inc.</i>, 39 F.3d 1324, 1329 (6th Cir. 1994) (Applying Ohio law) (“Ohio law prohibits the indemnification of monies paid pursuant to an award of punitive damages arising out of the insured’s own conduct.” However, the court did not directly address whether an exception would be carved if the insured was vicariously liable).</p> <p>Ohio Revised Code Annotated § 3937.182 (stating no policy of motor vehicle insurance may provide coverage for punitive or exemplary damages).</p>

State	Not Insurable	Insurable	Where Liability is Vicarious	Cite and Applicable Statutes
Oklahoma	Not Insurable		Insurable	<p><i>Magnum Foods, Inc. v. Cont'l Cas. Co.</i>, 36 F.3d 1491 (10th Cir. 1994) (Applying Oklahoma law) (Court held liability insurer had burden to prove basis of punitive damage award in order to determine whether award was insurable by policy; if it is impossible to determine basis of award, punitive award will be insurable).</p> <p><i>Dayton Hudson Corp. v. Am. Mut. Liab. Ins. Co.</i>, 621 P.2d 1155 (Okla. 1980). (Public policy does not preclude punitive damage award to be covered by the insurance policy by employer when gross negligence and willfulness by employee was imputable under a respondeat superior theory).</p> <p>No applicable statutes.</p>
Oregon	Not Insurable -for intentional conduct	Insurable – for non-intentional conduct	Insurable	<p><i>Mut. Of Enumclaw Ins. Co. v. Gutman</i>, 21 P.3d 101, 106 (Or. Ct. App. 2001) (recognizing that it is against public policy to insure against intentional conduct).</p> <p><i>Harrell v. Travelers Indemnity Co.</i>, 567 P.2d 1013 (Or. 1977) (Punitive damages coverage would not violate public policy).</p> <p>No applicable statutes.</p>
Pennsylvania	Not Insurable		Insurable	<p><i>Butterfield v. Giuntoli</i>, 670 A.2d 646 (Pa. 1995) (Punitive damages will not be insurable if the insured is found guilty of outrageous and wanton misconduct, but punitive damages will be insurable when the insured is found guilty of vicarious liability).</p> <p>Title 40 Pennsylvania Statutes § 2051.</p>
Rhode Island	Not Insurable			<p><i>Allen v. Simmons</i>, 533 A.2d 541, 544 (R.I. 1987) (“[c]ommon sense demands that the burden of satisfying a punitive-damage award should remain with the wrongdoer and should not be cast upon the blameless shoulders of the other insureds”).</p> <p>No applicable statutes.</p>

State	Not Insurable	Insurable	Where Liability is Vicarious	Cite and Applicable Statutes
South Carolina		Insurable		<p><i>Carroway v. Johnson</i>, 139 S.E.2d 908 (S.C. 1965) (Policy requiring insurer to pay all sums it was legally obligated to pay as damages included the obligation of the insurer to pay punitive damages).</p> <p>No applicable statutes.</p>
South Dakota	Generally Not Insurable – but not clearly decided			<p><i>Ft. Pierre v. United Fire & Cas. Co.</i>, 463 N.W.2d 845 (S.D. 1990) (stating public policy prohibits recover of punitive damages for one’s own intentional wrongdoing under E&O policy).</p> <p><i>But see Dairyland Ins. Co. v. Wyant</i>, 474 N.W.2d 514 (S.D. 1991) (noting langue in <i>Ft. Pierre</i> could be considered <i>dicta</i>).</p>
Tennessee		Insurable	Insurable	<p><i>Lazenby v. Universal Underwriters Ins. Co.</i>, 383 S.W. 2d 1 (Tenn. 1964) (Liability policy insured both compensatory and punitive damages and coverage for punitive damages not against public policy).</p> <p><i>General Cas. Co. v. Woodby</i>, 238 F.2d 452 (6th Cir. 1956) (Applying Tennessee law) (Auto policy which covered named insured as well as anyone permitted to use the automobile covered punitive damages because damages awarded for gross negligence or wanton negligence is not the same as intentional injury).</p> <p>No applicable statutes.</p>

State	Not Insurable	Insurable	Where Liability is Vicarious	Cite and Applicable Statutes
Texas (Split in Authority)	Not Insurable	Insurable		<p><i>Ridgway v. Gulf Life Ins. Co.</i>, 578 F.2d 1026 (5th Cir. 1978) (Applying Texas law) (Court held it was public policy on Texas for insurance policies to cover punitive damage awards).</p> <p><i>Hartford Cas. Ins. Co. v. Powell</i>, 19 F. Supp. 2d 678, 696 (N.D. Tex. 1998) (Held that the 5th Circuit's holding in <i>Ridgway</i> is "clearly wrong when considered in the context with the present Texas legal environment" and predicted that the Texas Supreme Court would "hold that the public policy of Texas would be offended" if insurance were to insure punitive damage award).</p> <p>No applicable statutes.</p>
Utah	Not Insurable		Not Insurable	Utah Code Ann. § 31A-20-101 ("No insurer may insure or attempt to insure against punitive damages").
Vermont		Insurable		<p><i>State v. Glens Falls Ins. Co.</i>, 404 A.2d 101 (Vt. 1979) (General liability policy requiring insurer to pay all sums which it is legally obligated to pay includes awards of punitive damages).</p> <p>No applicable statutes.</p>
Virginia		Insurable – but not for intentional acts	Not Recognized	<p><i>U.S. Fire Ins. Co. v. Aspen Building Corp.</i>, 367 S.E.2d 478 (Va. 1988) (Not against public policy for "any person to purchase insurance providing coverage for punitive damages arising out of the death or injury of any person as the result of negligence, but excluding intentional acts").</p> <p><i>Dalton v. Johnson</i>, 129 S.E.2d 647, 650-51 (Va. 1963) ("[E]xemplary or punitive damages are awarded not by way of compensation to the sufferer but by way of punishment to the offender, such damages can only be awarded against the one who has participated in the offense").</p> <p>Code of Virginia § 38.2-227.</p>

State	Not Insurable	Insurable	Where Liability is Vicarious	Cite and Applicable Statutes
Washington (Punitive Damages Not Recognized)		Insurable – where punitive damages have already been awarded in another jurisdiction, Washington will uphold an insurance policy that covers		No applicable statutes.
West Virginia		Insurable – if arising from negligent or reckless conduct		<i>Hensley v. Erie Ins. Co.</i> , 283 S.E.2d 227 (W.Va. 1981) (Public policy does not preclude insurance coverage for punitive damages arising from gross, reckless, or wanton negligence). No applicable statutes.
Wisconsin		Insurable		<i>Brown v. Maxey</i> , 369 N.W.2d 677 (Wis. 1985) (Public policy did not preclude finding that insurance policy provided coverage for punitive damages). No applicable statutes.
Wyoming		Insurable	Insurable	<i>Sinclair Oil Corp. v. Columbia Cas. Co.</i> , 682 P.2d 975, 981 (Wyo. 1984) (It is not against public policy “to insure against either liability for punitive damages imposed vicariously based on willful and wanton misconduct or personal liability for punitive damages imposed on basis of willful and wanton misconduct”). No applicable statutes.



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Primary Practice(s)

- Insurance Law
- Insurance Coverage
- Insurance Contract Drafting
- Bad Faith Litigation
- Directors & Officers Coverage & Litigation

Additional Experience

- Commercial Litigation
- Business Practices

Admissions

- Illinois
- Florida
- Michigan
- United States Court of Appeals - all Circuits
- United States District Courts - multiple districts

For more than 25 years, Jeffrey Goldwater has been a successful advocate for insurance carriers in declaratory judgment and bad faith litigation, establishing himself as one of the preeminent insurance coverage attorneys in the nation. In addition to an extraordinary record of success, the hallmark of Jeff's practice has been its breadth, touching on every cutting edge area of insurance law. Jeff has been in the vanguard of consulting on and litigating coverage issues involving cyber liability, advertising injury, construction defects, toxic tort, environmental, professional liability (including architects and engineers, lawyers, accountants, agents and brokers), EPL, directors and officers, non profit, commercial property, public entity, and motor carrier cargo coverage. Jeff also has handled numerous excess and umbrella coverage disputes as well as reinsurance arbitration matters.

In addition to consulting on and advising on coverage, Jeff has tried multiple coverage, bad faith, commercial, and personal injury cases. He has extensive experience drafting novel and innovative insurance policy provisions, and assisting clients with insurance regulatory compliance.

As a regular part of his practice, and to further his commitment to client service, Jeff often briefs his clients on insurance coverage "hot topics." With a practice of national scope, he is well qualified to do this. Jeff's presentations and whitepapers have covered a vast spectrum of issues including general coverage law trends, state and market specific surveys and particular coverage/exposure concerns. Jeff has been a frequent speaker, and has presented at meetings and conventions, including those of the ABA, PLUS, PRIMA, and DRI. Each year, Jeff has been selected as a "Super Lawyer" in Coverage.

Associations

- Chicago Bar Association
- Illinois State Bar Association

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- American Bar Association
 - Seventh Circuit Bar Association
 - Florida Bar Association
 - Michigan Bar Association
 - Defense Research Institute
 - Professional Liability Underlying Society
 - Claims and Litigation Management Alliance

Education

- University of Illinois College of Law, *Juris Doctor, magna cum laude*, 1984
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- Insurance Law
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- United States Court of Appeals - First, Third, Seventh and Tenth Circuits
- U.S. District Court, Northern District of Illinois
- U.S. District Court, Central District of Illinois
- U.S. District Court, Southern District of Illinois
- U.S. District Court, District of Colorado

Perry Shorris is a partner in the Chicago office of Lewis Brisbois and a member of the Insurance Law, Bad Faith Litigation, Directors & Officers Coverage & Litigation, and Insurance Coverage Practices. Mr. Shorris has represented insurers in insurance coverage and bad faith litigation throughout the country with respect to a wide variety of insurance policies, including professional liability, errors and omissions, directors and officers, general liability, excess and umbrella liability, and commercial auto.

Legal Experience

Mr. Shorris has obtained numerous victories at trial and on summary judgment. In the area of professional liability insurance, Mr. Shorris was involved in a dispute which culminated with the opinion published as *Berry & Murphy, P.C. v. Carolina Cas. Ins. Co.*, 586 F.3d 803 (10th Cir. 2009), in which the Court held that the underlying claim was first made prior to the policy period of a claims-made policy. The Court applied the definition of “related wrongful acts” to find that the claim was first made in a letter sent to the insured prior to the policy period and prior to the underlying lawsuit.

Mr. Shorris also obtained summary judgment in a dispute over a Social Services Professional Liability policy. *Granite State Ins. Co. v. DeGuzman, Slip. Op.*, 08-cv-2189 (C.D.Ill. June 4, 2010). The Court held that a claim under the Illinois Nursing Home Care Act, 210 Ill. Comp. Stat. 45/1-101 et seq., could not have been stated against the medical director of a nursing home, such that the insurer had no duty to defend or indemnify the medical director.

In the areas of “personal and advertising injury” coverage, Mr. Shorris has been involved in cutting-edge and complex issues. Notably, Mr. Shorris argued and won the case of *American States Ins. Co. v. Capital Assocs. of Jackson County, Inc.*, 392 F.3d 939 (7th Cir. 2004), which was the first published decision in the country to hold that the sending of unsolicited facsimile advertisements does not constitute “personal and advertising injury”. In addition, Mr. Shorris

prevailed in *Santa's Best Craft, LLC v. Zurich American Ins. Co.*, 408 Ill.App.3d 173, 941 N.E.2d 291(1st Dist. 2010), in which the court held that the insurer had no duty to indemnify a \$3.5 million settlement arising out of an intellectual property dispute involving Christmas lights because the claim did not satisfy the "advertisement" requirement in the "personal and advertising injury" definition.

In connection with coverage for construction defects and construction injuries, Mr. Shorris' efforts have led to several victories, including:

- *Nautilus Ins. Co. v. 1452-4 N. Milwaukee Ave., LLC*, 562 F.3d 818 (7th Cir. 2009) (holding that contractor-subcontractor exclusion in CGL policy applies to owner's violation of Illinois Adjacent Landowner Excavation Protection Act because the damage arose out of the subcontractor's work, not the owner's failure to notify neighbors of impending demolition).
- *Nautilus Ins. Co. v. Raatz*, 2012 U.S. Dist. LEXIS 90174 (N.D.Ill. Jun. 29, 2012) (holding that the known injury provisions and the known loss doctrine precluded coverage for a general contractor).
- *Nautilus Ins. Co. v. Dubin & Assoc.*, 2012 U.S. Dist. LEXIS 89066 (N.D.Ill. Jun. 27, 2012) (holding that expanded definition of "employee" in employee exclusion extended to subcontractors' employees who are injured on the job).
- *Nautilus Ins. Co. v. JDL, LLC*, 2012 U.S. Dist. LEXIS 57294 (N.D.Ill. Apr. 4, 2012) (holding that damage to the structure only does not constitute an "occurrence" and that late notice precluded coverage).
- *Nautilus Ins. Co. v. 1735 W. Diversey, LLC*, 2012 U.S. Dist. LEXIS 32941 (N.D.Ill. Mar. 8, 2012) (coverage precluded by Products-Completed Operations exclusion).
- *Starnet Ins. Co. v. Southwest Indus.*, 2010 U.S. Dist. LEXIS 31501(N.D.Ill. Mar. 30, 2010) (no duty to defend indemnitee because indemnification provision in the underlying contract was void under the anti-indemnity act).

Other notable victories by Mr. Shorris include:

- *Premcor USA, Inc. v. Am. Home Assur. Co.*, 400 F.3d 523 (7th Cir. 2005) (holding that attachment point of excess liability policy was unaffected by insolvency of primary insurer despite phrase in Declarations stating that attachment point was "excess of...amount recoverable under the underlying insurance").
- *TIG Specialty Ins. Co. v. Pinkmonkey.com, Inc.*, 375 F.3d 365 (5th Cir. 2004) (holding that Personal Profit Exclusion applied to claim that directors and officers made misrepresentations in connection with sale of stock in dot-com startup).
- *Ctr. for Blood Research, Inc. v. Coregis Ins. Co.*, 305 F.3d 38 (1st Cir. 2002) (holding that coverage under nonmonetary claims endorsement in Nonprofit Organization Liability insurance policy did not apply to attorneys' fees incurred in response to investigative subpoena issued by U.S. Attorney for the District of Massachusetts).
- Mr. Shorris has also counseled and assisted insurance companies in drafting policy forms and endorsements.

Education

- University of Illinois College of Law, *Juris Doctor*, 1993
- University of Michigan, Bachelor of Arts, 1990



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