

# 惩罚性赔偿 适用问题研究

于冠魁 著

The Study on the Application  
of Punitive Damages



法律出版社  
LAW PRESS · CHINA

# 惩罚性赔偿 适用问题研究

The Study on the Application  
of Punitive Damages

于冠魁 著

2015年度青岛市社会科学规划项目结项成果（项目编号QDSKL1501088）  
青岛科技大学学术著作出版基金资助出版



法律出版社  
LAW PRESS · CHINA

## 图书在版编目(CIP)数据

惩罚性赔偿适用问题研究 / 于冠魁著. — 北京:

法律出版社, 2015. 12

ISBN 978 -7 -5118 -8864 -8

I. ①惩… II. ①于… III. ①赔偿—司法制度—研究—中国 IV. ①D923.04

中国版本图书馆 CIP 数据核字 (2015) 第 306477 号

## 惩罚性赔偿适用问题研究

著 者: 于冠魁

责任编辑: 谢清平

装帧设计: 李 瞻

责任印制: 张建伟

内文制作: 凌点工作室

印 刷: 北京京华虎彩印刷有限公司

---

出 版 法律出版社/北京市丰台区莲花池西里 7 号 (100073)

<http://www.lawpress.com.cn/>

编辑统筹 法律职业教育出版分社

经 销 新华书店

总 发 行 中国法律图书有限公司 <http://www.chinalawbook.com/>

第一法律书店 (010 -63939781/9782) 西安 (029 -85388843)

重庆 (023 -65382816/2908) 上海 (021 -62071010/1636)

北京 (010 -62534456) 深圳 (0755 -83072995)

销售专线 010 -63939806/9830

数据支持 法律门 <http://www.falvmen.com.cn/>

---

开 本 A5

印 张 8.375

字 数 215 千

版 本 2016 年 1 月第 1 版

印 次 2016 年 1 月第 1 次印刷

书 号 ISBN 978 -7 -5118 -8864 -8

定 价 29.00 元

---

所有权利保留。未经许可,不得以任何方式使用。

如有缺页或倒装,中国法律图书有限公司负责退换。

## 内容提要

惩罚性赔偿制度饱受争议,至今对该制度的争议尚未尘埃落定。争议的核心问题是惩罚性赔偿制度如何恰当的适用,从而既能充分发挥惩罚性赔偿制度的功能,又能避免惩罚性赔偿制度的滥用。惩罚性赔偿制度的功能是什么?实证地考察英美国家和大陆法系国家的惩罚性赔偿制度和经典案例,进而归纳惩罚性赔偿制度的功能是惩罚和遏制负外部性行为。在司法实践中英美法系国家较为普遍地适用惩罚性赔偿制度,经历了对侮辱行为的惩罚、滥用实力的惩罚、对危害行为的有效率阻遏几个发展阶段。但是理论界和司法界对于该制度的性质,适用民事审判程序是否违宪等问题的争论从未停止过。德国和法国对于惩罚性赔偿制度拒绝接受,但在法律制度中又存在类似于惩罚性赔偿的法律制度;司法实践中法院也超出了传统的民事责任范围判决被告承担类似于惩罚性赔偿金的赔偿责任。在德国有痛苦赔偿金、歧视赔偿金、“预防性”赔偿金、民事罚金等制度;在法国的合同法律制

度和知识产权法律制度中也均有适用。我国虽然有关于惩罚性赔偿的相关规定但是惩罚性赔偿制度的基础理论尚待完善,而且司法实践中存在法院针对同样的事实做出矛盾判决的现象,因而惩罚性赔偿制度的适用方法需要理论上的进一步探讨。

适用惩罚性赔偿制度,发挥其功能的理论基础是什么?惩罚性赔偿制度是以功利主义为哲理基础,以解决社会公共危害为目的的法律制度。惩罚性赔偿制度是国家矫正侵害行为的工具,是对社会整体利益的维护。惩罚性赔偿的惩罚和阻遏功能与民法和刑法的理念是相矛盾和冲突的。为了解决这种冲突,理论界提出解决的三种路径:民事泛化论,惩罚私法化论,权利—过错—追索模式论,但是三种理论均未能有效地解决该矛盾。从惩罚性赔偿制度产生的背景、社会现实意义、运行机制、保护法益来看,惩罚性赔偿制度应当属于经济法性质。被告也从对受害人的侵害承担责任演变到对社会公众的侵害承担责任;但原告在获得惩罚性赔偿金时,也受到了不当得利的质疑。惩罚性赔偿制度经历了从补偿功能到惩罚与阻遏功能的演化,应当属于经济法律制度。经济法责任本身具有社会性、复合型、不对等和不平衡的特征,经济法责任理论可以对惩罚性赔偿制度做出合理的解释。

惩罚性赔偿制度如何发挥作用,为什么有其他法律制度不能比拟的优势?法律制度具有社会调控功能,现实社会中存在若干危害公共利益的行为,对于该部分危害行为市场无法有效解决,而必须通过国家干预、通过制度解决。惩罚性赔偿制度相对于刑法、民法和行政法而言,更有效率。对于公共危害的解决,主要有两种路径:其一,通过刑法、行政法而产生遏制、威慑的“公共产品”;其二,将对侵害人提起诉讼而获得赔偿作为一种权利赋予受害人。哪种路径更有效率?因为公共产品具有非竞争性,由国家机关提供,公共产品能否有效提供受制于国家机关的财力、人力等因素,以及国家机关能否尽职尽责。民法的优势在于信息获取便宜,程序简单,追责高效,如果涉及的侵害行为具有公共危害性,受害人众多,通过民事诉讼程序解决,诉讼成本高昂,因而

不具有效率。惩罚性赔偿制度机制作用下,受害人受到高额惩罚性赔偿金的激励,会积极搜集相关信息,委托律师,尽快有效地对侵害人提起诉讼;而受害人之间甚至会产生竞争,从而进一步提高惩罚性赔偿制度的效率。因而具有公共危害性的侵害行为会被尽早发现,并由个人尽早地提起诉讼,进而予以阻遏。受害人提起的诉讼可以产生正的外部性,也就是说侵害人因为被起诉,而不得不对相关的侵害行为予以收敛,乃至停止从事某些侵害行为,因而社会公众可以节省大量的预防成本。惩罚性赔偿制度功能发挥都受到哪些因素的影响或者限制?鉴于法律具有分配资源、调控社会的功能,因此以经济学的方法来分析,更容易发现其内在机制。经济学语境下法律活动以实现效率最大化为目标。从经济学角度分析,惩罚性赔偿发挥作用的主要影响因素有法律介入的时机、预期惩罚的严厉性、行为信息的充分性、行为人对于自身行为危险性的认知程度以及制度执行成本等。法律责任效用的发挥还受到归责原则的影响。严格责任原则下,法律适用的最佳状态是赔偿责任即惩罚性赔偿金与民事赔偿金之和等于损害,因为赔偿责任大于损害时,潜在的侵害人才有适当的动机采取预防措施,但是如果法律责任过大就会造成预防过度。在过错责任原则下,行为人通常会倾向于采取防御措施达到“通常注意”的行为标准,但这通常会造成防御不足,因而惩罚性赔偿可以加大责任,促使行为人进一步采取防御措施而避免损害的发生。不同法律体系的“土壤”对于惩罚性赔偿制度的适用也会产生影响。英美法系奉行司法能动主义,以有效地解决案件实际问题为目标,因而惩罚性赔偿制度适用的环境较为宽松,但有适用过度的倾向;大陆法系已有的严谨的法律制度体系很难为工具性很强的惩罚性赔偿制度找到一席之地,因而即便遇到“法律漏洞”时,大陆法系更倾向于通过对现有制度的扩张解释等方法解决,而不是创设缺乏部门法特征的制度。司法实践中,因为惩罚性赔偿制度具有惩罚的性质,所以惩罚性赔偿制度的适用应当有合理的限度,应当受到必要性的约束;而且惩罚性赔偿制度应当符合公平与效率的法律基本的价值要

求;惩罚性赔偿金也应当具有合理性。

我国如何适用惩罚性赔偿制度?首先,在我国法律制度不完善、社会管理过于倚重行政机关、道德失范的情况下,惩罚性赔偿制度在我国的建立和运行有着特殊的、积极的现实意义。其次,根据经济法理论惩罚性赔偿适用的范围应当限定在市场失灵且具有社会危害性,而民法和刑法等其他法律制度不足以发挥功能的情形。再次,我国的惩罚性赔偿制度应当进一步完善,现有法律制度中以商品价格作为惩罚性赔偿金计算基数的规定等无效率的规范应当修改;应当规定惩罚性赔偿的“一般条款”,以规范惩罚性赔偿法律规范的适用范围;应当借鉴分割式惩罚性赔偿金制度,建立惩罚性赔偿基金制度,使惩罚性赔偿金既对公共危害行为予以遏制,也可以激励受害人提起诉讼,还可以惠及社会公众。最后,司法实践中,惩罚性规范的适用方法主要涉及法律解释和证明标准两方面的问题。我国在惩罚性赔偿法律规范适用的实践中,存在因法律规范解释方法不同而导致判决结果不同的问题。为了更为有效地适用惩罚性赔偿制度,法律解释方法应当予以统一,目的解释具有优先性。司法审判适用惩罚性赔偿案件中,以法官的自由心证作为认定事实的证明标准更符合我国国情,也更具有效率。

## Abstract

Punitive damage is most controversial till today. The core of the controversy is the proper application of the institution to ensure full play of this system and to avoid abusive application of this system. Practical investigations into the continental law system countries' punitive damages institution reveal that its function is to solve public externalities. In juridical practice of common law system countries, the popularly applicable punitive damages system has experienced several development stages, punishment for insulting actions, punishment for abuse of force and effective repression to dangerous actions. But controversies have never ceased in theoretical and judicial circles about the compliance of applicable judicial procedure to the constitution. Germany and France refuse to accept punitive damages system, but their legal systems include legal systems similar to punitive damages system and their judicial practice also exceeds traditional civil liability



and involves charging the defendant with punitive damages liabilities which are similar to punitive damages, such as suffering compensation, prejudice compensation, “preventive” compensation and civil compensation in Germany and such similar applications in contract law system and intellectual property right law system of France. In China, there are related regulations about punitive damages but its basic theory is still awaiting completion and perfection, and in addition, in judicial practice, different courts might make contradictory judgments on the same fact. Therefore, the applicability of punitive damages system is still awaiting further researches. What are the theoretical bases for the function of punitive damages system? This system is philosophically based on utilitarianism and is a law system for the solution to public hazards. This system is a state tool for correcting injurious acts and a maintenance of the benefit of the entire society. The punishment and repression functions in punishment compensation are contradictory and conflicting to the idea of civil law and criminal law. To solve such conflict, the theoretical circle has put forward three approaches: civil law generalization, punishment privatization and right – error – tracing mode, but none of them has proved an effective solution to the contradiction. In terms of its background, its social significance, its operation mechanism and its protective function, this system should be classified in the scope of economic law. The defendant liability scope has evolved from infringement of the victim to the liability scope for infringement of the social public. While the accuser gets benefited from the punitive damages, it also gets questioned about its lawfulness of benefit. As the punitive damages system has experienced an evolution from its compensation function to a punishment – repression function, it should be classified in the scope of economic law system. The economic law liability is featured for its sociality, complexity, unevenness and unbalance and the economic law liability theory is able to present a reasona-

ble interpretation to the punitive damages system. How does punitive damages system perform its function and why is it superior to other law systems? A law system performs a function of social control and adjustment, as acts that hazard the public exist in society, which is beyond the function of the market mechanism, they must be solved through official intervention and law. Punitive damages system is more effective than criminal law, civil law and administrative law. There are two approaches to the solution of hazards to the public; First; Repression and depression by "public derivation" from criminal law and administrative law; Second; Paying the victim with the compensation from the infringer. Which approach is more effective? As public products are noncompetitive and are supplied by state organs, their effective supply is restricted by state organs' financial and human resources and also by the efficiency and commitment of state organs. Civil law has its advantage in its easier access to information, its simple procedure and its higher efficiency in liability definition. In case infringement involves public hazard and numerous victims, civil law procedure is fairly costly and less efficient. The punitive damages system encourages the victims to compete for a solution and victims, encouraged by the high rate of punitive damages, would be active in gaining related information, in entrusting lawyers and in timely and effectively submitting lawsuit to the court. As public infringement can be discovered earlier, lawsuits can be submitted to the court earlier and can be repressed earlier, victim – submitted lawsuits have better externality, infringers have to refrain or from or stop their infringement so that the social public may save much preventive cost. What factors influence or restrict the performance of the function of punitive damages system? Legislation, jurisdiction and law enforcement all play a part in distributing rare resources, so all legal activities could be analyzed by economic methods. Legal activities should also be reasonably allocated according to re-

sources to as to achieve the maximum goal. In economic view, the major factors that affect the function of punitive damages system includes the following: the time of legal intervention, the strictness of preventive punishment, adequacy of act information, the doer's awareness of his dangerous act and the cost of his act execution. The responsibility definition principle also plays a role in defining the efficiency of legal liability definition. On the principle of strict liability, the optimal condition is compensation liability, the sum of compensation liability and civil compensation are equal to the damage, as when compensation liability is more than damage, the potential infringers is properly incited to adopt preventive measures, but when legal liability is excessive, the result is excessive prevention. On the faulty reliability principle, the doer usually adopts preventive measure to realize a state of "usual caution" behavior standard, which often ends in inadequate prevention. Therefore punitive damages may be intensified to stimulate the doer to take further preventive measures and therefore damage may be avoided. The "soil" of different legal systems may also play a role in the application of punitive damages system. Common legal system follows judicial activism, aiming at solving practical problems, therefore, punitive damages system has much room for application, with a tendency to excessive application. The strict continental legal system does not provide room for the highly instrumental punitive damages system, even in case of "legal loop-hole", the continental legal system tends to expand the interpretation of the existing system for a solution instead of establishing systems with features of a department law. In legal practice, the application of punitive damages system should be relatively restricted and as it is punitive, it should be restricted by necessity. The punitive damages system should comply with the legal principle of justice and efficiency responding to evaluation requirement. The amount of punitive damages should be reasonable. How to apply

the punitive damages system in China? First of all, under the incomplete legal system, the social management bias to administrative institutions and the moral abnormality, the establishment of application of a punitive damages system in China is of special and positive realistic significance. Secondly, on the basis of economic law theory, the punitive damages system application should be confined to the following conditions; Socially hazardous market failure and civil law and criminal law are not adequate to give full play to their functions. Thirdly, China's punitive damages system should be perfected inefficient regulations should be modified, such as commodity price as punitive damages calculation basis and other such regulations. "General Terms" for punitive damages should be regulated so as to regulate define the legal definition of compensation scope and application scope. A punitive damages fund should be established in the light of partitioned punitive damages system so as to depress acts hazardous to the public, to encourage victims to submit lawsuit to the court and to benefit the social public. Fourthly, in judicial practice, punitive regulation application methods involve legal interpretation and evidence of proof. In China, different verdicts sometimes result from different interpretation of legal norms. To achieve an effective application of punitive damages system, the first interpretation method should be made in the light of purpose interpretation as the prior norm. In cases of judicial judgment applicable punitive damages, free evaluation of evidence on the part of the judge in ascertaining facts is more applicable to China and is more efficient.

# 目 录

## 引言 / 1

一、论题及研究目的 / 1

二、研究综述 / 2

三、理论意义与实践价值 / 8

四、研究方法、研究范围、创新点 / 9

## 第一章 惩罚性赔偿适用的历史考察及功能分析 / 12

### 第一节 惩罚性赔偿制度的文献与定义 / 12

一、惩罚性赔偿制度的历史文献 / 12

二、惩罚性赔偿制度的概念 / 13

### 第二节 惩罚性赔偿制度在英美国家中的适用 / 14

一、惩罚性赔偿制度在英国的适用 / 14

二、惩罚性赔偿制度在美国的适用 / 22

### 第三节 德国和法国对惩罚性赔偿制度的立场及争论 / 34

一、惩罚性赔偿制度在德国的适用 / 34

二、惩罚性赔偿制度在法国的适用 / 37

### 第四节 我国的惩罚性赔偿制度与判例 / 42

一、我国现行的惩罚性赔偿制度 / 42

二、我国适用惩罚性赔偿的判例 / 43

## 第五节 惩罚性赔偿制度对于负外部性行为的矫正 / 45

- 一、侵害行为的外部性 / 45
- 二、外部性问题解决路径的选择 / 46
- 三、惩罚性赔偿制度功能由补偿到惩罚和阻遏的演变 / 48
- 四、外部性矫正主体的演变 / 50

## 第二章 惩罚性赔偿制度适用的理论基础 / 53

### 第一节 惩罚性赔偿的哲理基础:功利主义 / 53

- 一、道义责任说 / 53
- 二、报应正义说 / 56
- 三、功利说 / 59

### 第二节 惩罚性赔偿制度的目的:维护社会整体利益 / 63

- 一、惩罚性赔偿制度目的的三种学说 / 64
- 二、不同视角下惩罚性赔偿制度目的的解读 / 67
- 三、惩罚性赔偿制度的终极目的:社会整体利益的维护 / 69
- 四、惩罚性赔偿实现的路径:阻遏与惩罚 / 72

### 第三节 惩罚性赔偿制度的性质 / 74

- 一、惩罚性赔偿制度性质的主要学说 / 74
- 二、惩罚性赔偿功能与民法理念和刑法理念的冲突 / 82
- 三、冲突解决的理论及评析 / 85
- 四、惩罚性赔偿制度的经济法性质 / 89

### 第四节 惩罚性赔偿的价值诉求 / 93

- 一、实质自由 / 93
- 二、社会整体秩序 / 95
- 三、实质公平 / 98
- 四、社会经济效率 / 100

## 第三章 惩罚性赔偿制度适用的法经济学分析 / 102

### 第一节 惩罚性赔偿制度的运行机制 / 102

一、法律制度的社会调控功能 / 102

二、制度的供给与需求:惩罚性赔偿产生的历史合理性 / 105

三、惩罚性赔偿运行机制的经济学阐释 / 109

## 第二节 惩罚性赔偿制度与刑罚之比较 / 117

一、相同的目的:维护社会公共利益 / 117

二、适用范围的差异:谦抑与泛化 / 118

三、实现路径的差异:公共产品与私人执法 / 120

四、界分与合作 / 121

## 第三节 惩罚性赔偿制度与民事责任之比较 / 123

一、相同的责任确定依据:造成的损害 / 123

二、制度功能的差异:补偿与惩罚 / 124

三、原告诉讼积极性的差异:自主与激励 / 127

## 第四节 惩罚性赔偿制度与行政处罚之比较 / 128

一、相同的目标:防止损害的发生 / 128

二、规则效用的差异:事前惩罚规则与事后惩罚规则 / 129

三、惩罚性赔偿制度对公共规范的替代 / 130

# 第四章 惩罚性赔偿适用的效率 / 133

## 第一节 法律效率理论 / 133

一、经济学的效率理论 / 133

二、法学的效率理论 / 135

三、经济效率与法律效率的一致性 / 137

四、效率与公平的对立与统一 / 138

## 第二节 惩罚性赔偿制度适用效率的分析 / 139

一、法律适用效率影响因素的经济学分析 / 140

二、司法政策的影响——以“知假买假”为例 / 143

三、归责原则对适用效率的影响 / 148

## 第三节 法律体系对于惩罚性赔偿制度适用的影响 / 153

一、大陆法系对法律自治体系的坚守 / 153

二、英美法系对实质正义的追求 / 155

三、两大法系在惩罚性赔偿制度适用过程中的冲突与分析 / 157

四、两大法系的不同法律思维 / 166

#### 第四节 惩罚性赔偿制度适用的限度 / 171

一、必要性的限制 / 172

二、实施效果的考量 / 178

三、合理性标准 / 185

### 第五章 我国惩罚性赔偿制度的完善与适用方法 / 192

#### 第一节 经济法对于解决中国现实问题的特殊意义 / 192

一、从两起事件透视“中国式问题” / 192

二、公权力向诉权的转化 / 195

三、惩罚性赔偿制度在我国的效用 / 197

#### 第二节 惩罚性赔偿制度的适用范围及制度完善 / 200

一、我国惩罚性赔偿制度的适用范围 / 200

二、惩罚性赔偿制度的完善 / 206

#### 第三节 适用方法(上):惩罚性赔偿法律规范的解释 / 213

一、两个判决引发的思考:文义解释抑或目的解释 / 213

二、法律规范的特殊性与解释方法的选择 / 215

三、惩罚性法律规范解释的最优路径:目的性解释 / 216

四、惩罚性法律规范目的性解释的限制 / 220

#### 第四节 适用方法(下):惩罚性赔偿制度的证明责任与证明标准 / 222

一、惩罚性赔偿诉讼证明的事实范围 / 222

二、惩罚性赔偿制度的证明标准 / 226



结 论 / 230

参考文献 / 232

后 记 / 247