

Punitive Damages

A State-By-State
Guide
To Law and Practice

Robert W. Hammesfahr

Lori S. Nugent

2012-2013
Edition

WEST'S HANDBOOK SERIES

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PUNITIVE DAMAGES

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By
Lori S. Nugent
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2012–2013 Edition

Issued in November 2012

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ISBN: 978-0-314-60205-3

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ACKNOWLEDGMENTS

The current edition of this book is the culmination of years of work on behalf of clients faced with punitive damages, as well as independent research on punitive damage issues. Every year, we analyze all reported punitive damage verdicts of \$1,000,000 or more.

The authors are grateful to the many clients who have retained us over the years on punitive damage cases. Working on these cases has provided us with a level of experience that cannot be duplicated in any other way. We appreciate our clients' support of our efforts to gain a deep understanding of the unique issues presented by punitive damages cases.

We also appreciate the support of Wilson, Elser, Moskowitz, Edelman & Dicker LLP, which sponsors our ongoing punitive damages research. In particular, the authors acknowledge the invaluable assistance of Melissa K. Ventrone and Stephanie A. Reiter, who helped considerably with the preparation of this year's edition. With a network of more than 750 lawyers and 20 offices located throughout the United States, as well as affiliate firms in France, Germany and Mexico, Wilson Elser provides a full range of legal services to clients in the United States, Latin America, Europe and Asia. Wilson Elser supports many professional efforts, including this scholarly work. We appreciate the assistance we have received from Wilson Elser lawyers, and from lawyers in other firms and corporations, who seek our advice on punitive damages issues that have arisen in their cases. By sharing their punitive damages issues with us, they have assisted us in expanding the breadth and scope of our punitive damages knowledge. Additionally, we are thankful for the assistance of many attorneys who have worked with us over the years, researching and updating various aspects of this book. Without the assistance of all of the above, as well as the support of our loved ones, this book would not have been possible.

PREFACE

Since the first edition of this book, published in 1988, punitive damages have become a significant issue in the legal reform debate. Proponents of tort reform assert that punitive damages are unfair and inefficient. Supporters of the current system of assessing punitive damages assert that meaningful punishments are needed to change inappropriate and harmful behaviors.

Attaining an appropriate balance between punishment through punitive damages, fairness and efficiency is a complex problem. Some cases merit imposition of punitive damages. However, based on our study each year of reported punitive damage verdicts of \$1,000,000 or larger, the amount of punishment assessed by juries often has little rational relationship to the wrong committed or other punishments assessed for similar conduct. Instead of encouraging juries to punish in an amount that is related to the wrong, juries often are asked to "send a message" by the size of the punitive damage award. When juries punish based on the defendant's financial condition, defendants complain that they receive unfair treatment because of juror biases against wealthy entities—particularly where the defendant primarily is located outside of the jurisdiction.

While tort reform is pursued in legislatures throughout the country, defendants continue to fight punitive damages in cases that are pending. When a runaway verdict is awarded, defendants may face bankruptcy as the amount required to secure a supersedeas bond to stay execution of the judgment while an appeal is taken may exceed the defendant's available cash flow. Constitutional and state law challenges to excessive bonds for punitive damage verdicts but must be made quickly and in a technically proper way to be effective.

Most defendants expend considerable effort to settle cases, rather than take the risk that a jury will assess a runaway punitive damage verdict. When settlement efforts fail, defendants work aggressively to present a strong case at trial. However, they often fail to present evidence on key punitive damages issues, largely because of a focus on defending against compensatory liability. Accordingly, while many defense lawyers have considerable experience in obtaining defense verdicts on liability, they often lack experience in prosecuting an effective punitive damages defense. Also, the content of an effective punitive damages defense changes frequently as courts, including the Supreme Court of the United States, wrestle with the extent of protections

to be afforded to punitive damage defendants.

We have reviewed thousands of punitive damage cases, often as “rescue” counsel retained by the defense to obtain relief from a runaway verdict. The vast majority of these verdicts suffer from an inadequate record on key punitive damages issues, including important constitutional challenges to punitive damages. For the most part, juries make good decisions when they are provided with a fair picture of a case. Unfortunately, in many punitive damage cases, because of procedural issues combined with the lack of a focused punitive damages defense, juries are provided with a skewed picture that does not fairly reflect the facts. When this happens, juries frequently assess runaway punitive damage verdicts.

To fight against runaway punitive damages, defendants, their insurers, and their reinsurers need to be certain that an aggressive punitive damages defense is prosecuted. Fact and expert testimony should be prepared before trial commences on key punitive damages issues. This testimony should either be provided on the record in the presence of the jury, or proffered on the record at trial outside of the hearing of the jury. Absent this record evidence, post-verdict and appellate efforts to reduce or reverse runaway punitive damage verdicts are more difficult than necessary. Key challenges to punitive damages must be made on the record during trial, otherwise appellate courts often rule that these issues have been waived. While we have been successful in many appeals with poor trial records, it is easier to obtain meaningful relief from a runaway punitive damage verdict when the trial record is clear and strong.

To contain punitive damages, defendants need to be certain that their lawyers are prosecuting appropriate punitive damages defenses. They need to ensure that the punitive damages defense begins before the close of discovery, rather than after a runaway verdict has been assessed. Care also must be taken after the verdict to challenge excessive supersedeas bonds on constitutional and state law grounds in appropriate circumstances.

Just as defendants can impact punitive damage outcomes, plaintiffs also are able to impact pending punitive damage cases. Punitive damage verdicts are most difficult to challenge when the trial record contains evidence on key punitive damage issues. By presenting testimony on these issues, plaintiffs increase the probability that a punitive damage verdict will survive appellate scrutiny.

This book is designed as a reference tool to assist readers in gaining an understanding of the punitive damage constructs used by each state, including jury instructions and procedures for phasing punitive damage trials. The book also provides an

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overview of the historical development of punitive damages, including summaries of key punitive damages decisions of the United States Supreme Court. These reference tools provide the building blocks for defending or prosecuting a punitive damages case. We hope that you find these tools to be useful.

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