

# You Get What You Pay For. Or, Do You?

## Availability of Insurance Coverage for Punitive Damages in Ohio

BY GABRIELLE KELLY

When clients are sued, they contact their lawyers not only to defend the suit but also to guide the company on whether insurance coverage exists for payment of any damages. The answer to that question depends largely on the type of damages that could be imposed on the insured. Even if the policy language states, “We will pay any and all sums the Insured shall become legally obligated to pay,” there are other considerations that affect the availability of coverage. On its face, it would appear that any amount of compensatory and punitive damages is covered. In many states, however, punitive damages are not covered because it is against public policy to insure them.

Ohio has taken a similar approach to many other states. Under Ohio law, it is against public policy to provide insurance coverage for an insured’s malicious conduct. This prohibition generally includes any damages stemming from the action. R.C. 3937.182; *Wedge Prods., Inc. v. Hartford Equity Sales Co.*, 31 Ohio St.3d 65, 67 (1987). Because the purpose of punitive damages is “to punish an offender for the wanton, reckless, malicious or oppressive character of the

act committed and to deter others from committing similar acts,” there is a public policy interest against allowing offenders to transfer responsibility to its insurance company. *Casey v. Calhoun*, 40 Ohio App.3d 83, 84 (8th Dist. 1987). Contrary to compensatory damages that compensate a victim for his or her loss, punitive damages are meant to punish certain conduct. *See Stephens v. Grange Mut. Ins. Co.*, No. 2011 CA 102, 2012 WL 5296019, \*6 (2nd Dist. Oct. 26, 2012). Compensatory and punitive damages each serve a different purpose, which is highlighted by their different treatment by courts and legislatures. However, when the rationale behind punitive damages does not fit the facts of a case, Ohio courts have allowed insureds to shift liability for punitive damages to an insurer.

### Possible Exceptions to Ohio’s Prohibition on Coverage for Punitive Damages

A number of Ohio courts have held that one must look beyond the breakdown of damages to the reason punitive damages were imposed to determine its insurability. Despite a general understanding that punitive damages are not insurable, in cases where punitive damages were imposed by statute, the insured did not commit malice or ill will, or the insured was ordered to pay attorney fees as part

of a punitive damage award, the court may not disclaim insurance coverage. For example, in *The Corinthian v. Hartford Fire Insurance Company*, 143 Ohio App.3d 392 (8th Dist. 2001), the Eighth District Court of Appeals analyzed the insurability of punitive damages in a personal injury and wrongful death suit arising from a violation of a patient’s statutory rights. In that case, the policyholder sought insurance coverage for a jury verdict for compensatory and punitive damages arising from allegations of negligent care to the deceased during three weeks she was in the policyholder’s nursing center. In addition to common law tort claims, the estate filed a claim for a violation of R.C. 3721, commonly referred to as the Nursing Home Patients’ Bill of Rights.

The court analyzed the language of R.C. 3721 and noted that under the relevant version of the statute, punitive damages could be awarded without a showing of intent, malice, willfulness, or recklessness. *Id.* at 396. The court rejected many of the cases relied on by the insurer as limited to the issue of uninsured motorist coverage and not applicable “within the context of any other liability policy.” *Id.* at 399. Moreover, the court contrasted the current case with *Casey v. Calhoun*, *supra*, and held that although Ohio public policy precludes coverage when an individual seeks to insure “against his own intentional or malicious acts,” indemnification is permitted when there is a statute at issue, and no actual malice. *Id.* *See Empire Fire & Marine Ins. Co. v. Parkview Manor, Inc.*, No. CA-6453, 1985 WL 7176 (5th Dist. Feb. 4, 1985) (Punitive damages under Ohio Patients’ Bill of Rights covered by policy).

Since the opinion in *The Corinthian*, a few cases have dealt with the insurability of punitive damages. In *Foster v. D.B.S. Collection Agency*, Case No. 01-CV-514, 2008 WL 755082 (S.D. Ohio March 20, 2008), the Southern District of Ohio considered whether punitive damages stemming from the insured’s debt collection actions were covered. In that case, the policyholder

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was a debt collection agency that was sued for its methods of collecting debts. The plaintiff alleged fraud, violation of the Ohio Consumer Sales Practices Act, and other related claims.

The policyholder's insurance company intervened and sought a ruling that no coverage exists for any punitive damages that may be awarded. In denying the insurers' request, the court held that R.C. 3937.182 prohibited insurance coverage for punitive damages in motor vehicle and casualty insurance policies only. Relying on *The Corinthian*, supra, the court held that "Ohio law does not prohibit insurance coverage of punitive damages in all cases," particularly those pursuant to a statute and without any finding of malice. *Foster*, at \*9. Furthermore, the court noted that the policy language at issue in the case was more persuasive than in *The Corinthian*, because D.B.S Collection Agency's policy explicitly included coverage for punitive damages. *Id.*

Similarly, in *Motorists Mutual Ins. Co. v. Dandy-Jim, Inc.*, 182 Ohio App.3d 311 (8th Dist. 2009), the court held that damages for willful and knowing violations of a statute were not punitive in nature, and were covered by the insured's policy. In *Dandy-Jim*, the insured was sued for violating the Telephone Consumer Protection Act (TCPA) for many years. The plaintiffs sought treble damages for the insured's willful violation of the statute. The insurer denied coverage as against Ohio's public policy prohibiting insurance for punitive damages. *Id.* The court rejected the insurer's arguments and ruled that coverage existed since treble damages were not equivalent to punitive damages. *Id.* at 319. The court differentiated a willful act "from an intentionally malicious act that could give rise to punitive damages." *Id.* Thus, the insured was entitled to coverage for the full amount of damages awarded to the plaintiffs.

#### Coverage for Attorney Fees and Costs Stemming from Punitive Damage Award

Recently, the Supreme Court of Ohio took an interesting approach in separating damages that were covered by an insurance policy and those that are barred from coverage by public policy. In *Neal-Petit v. Lahman*, 125 Ohio St.3d 327 (2010), the Court held that punitive damages were not covered under an automobile policy, but attorney fees and costs awarded as a result of punitive damages were covered. In *Neal-Petit*, the insured was liable for compensatory and punitive damages stemming from a car accident that occurred

while the insured was driving under the influence and fleeing the scene of an earlier accident. Allstate, the insurer, paid the amount awarded as compensatory damages, but denied payment for punitive damages and attorney fees.

After determining that attorney fees are usually part of compensatory damages, the Court acknowledged that the fees awarded in the present case resulted from a punitive damage award. Despite the requirement of malice for an award of attorney fees, the Court held that allowing coverage for attorney fees would not thwart the spirit behind Ohio's public policy because insureds remain "liable for punitive damages awarded for their malicious actions." *Id.* at 331.

The case law suggests that if the court finds that punitive damages were awarded for reasons beyond an insured's intentional bad acts, the insured may be able to obtain insurance coverage for the full amount of any damages award up to the insurance policy's limits. While the courts' decisions clearly create narrow exceptions to Ohio's general rule on insurability of punitives, they also raise many questions as to how the courts will interpret various statutes and to what extent an insured may obtain coverage for its employees' actions. The limited amount of case law and fact-specific nature of the

claims, however, make it difficult to fully answer these questions.

#### Conclusion

In Ohio, the law regarding the ability to obtain insurance coverage for punitive damages is not fully developed. The widespread rule that public policy prevents coverage for punitive damages from intentional conduct remains in place. Nonetheless, courts have recently allowed indemnification in cases where the insured acted without actual intent or malice and where punitive damages are imposed by statute. The courts' rulings have focused heavily on the alleged actions by the insured in the underlying cases and the relevant policy language. As more cases are adjudicated, the rights and obligations of policyholders and insurers should become clearer.



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