

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

What are Punitive Damages?

Punitive damages are intended to punish the defendant, whereas, compensatory damages are intended to compensate or make the plaintiff whole. Compensatory damages are therefore objective and typically measured by documented loss (such as medical bills or lost wages). In contrast, punitive damages are generally subjective and the law gives fewer parameters to judges and juries when awarding punitive damages.

Prevalence: Punitive Damages Are More Common Than Once Thought

A 2010 study from Cornell Law School found in cases where the plaintiff won at trial and sought punitive damages, punitives were awarded in:

- **35.5%** of all studies cases
- **38.5%** of EPL cases
- **53%** of cases where compensatory damages were between \$1M and \$10M
- **82%** of cases where compensatory damages were greater than \$10M

Newer Data Shows the Risk of Punitive Damages By State, County, and Cause of Action:

By State

The states selected for the table at the right were those in the Cornell Study with the largest number of trials in the “All Trials” column. In California, for example, punitive damages were sought in 21% of all trials and sought in 23.4% of trials won by plaintiffs. And in those trials won by the plaintiff where punitive damages were sought, punitive damages were awarded in 33.8% of the studied cases in California.

By State	All Trials		Plaintiff Won Trial		Plaintiff Won and Punitives Sought	
	% with punitive damages sought	Number	% with punitive damages sought	Number	% with punitive award	Number
California*	21%	1,263	23.4%	636	33.8%	148
Illinois*	2.9%	756	4.1%	418	47.1%	17
New Jersey*	5.2%	574	7.0%	229	20.0%	15
Ohio*	15.6%	456	12.9%	279	44.1%	34
Pennsylvania*	3.6%	853	4.4%	480	31.6%	19
Texas	6.5%	909	8.8%	444	56.4%	39

* Jurisdiction prohibits or restricts insurability

By County

The four counties selected for the table at the right are those from the Cornell Study with the largest number of trials in which the plaintiffs sought and won punitive damages. So, for example, in Franklin County, Ohio, when a plaintiff won at trial and sought punitive damages, punitive damages were awarded in 44.4% of the studied cases.

By County	All Trials		Plaintiff Won Trial		Plaintiff Won and Punitives Sought	
	% with punitive damages sought	Number	% with punitive damages sought	Number	% with punitive award	Number
Los Angeles (CA)*	27.2%	379	32.3%	186	28.8%	59
Franklin (OH)*	29.8%	131	20.4%	93	44.4%	18
Orange (CA)*	19.5%	272	24.8%	129	31.3%	32
Fairfax (VA)	20.9%	163	22.8%	101	43.5%	23

* Jurisdiction prohibits or restricts insurability

By Type of Claim

The selected data in the table at the right shows, for example, that in cases classified as “Medical/Dental Malpractice” where the plaintiff won at trial and sought punitive damages, punitive damages were awarded in 30.8% of the studied cases.

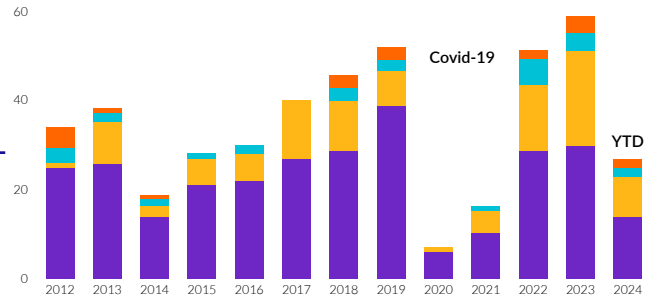
By State	All Trials		Plaintiff Won Trial		Plaintiff Won and Punitives Sought	
	% with punitive damages sought	Number	% with punitive damages sought	Number	% with punitive award	Number
Intentional Tort	23.6%	259	32%	128	65.8%	38
Negligence/ Tort Other	9.9%	202	10.6%	104	36.4%	11
Fraud	24.8%	479	30.9%	278	39.3%	84
Motor Vehicle Tort	3.3%	2,931	3.7%	1,778	20.3%	64
Medical/ Dental Malpractice	5.9%	972	7.4%	203	30.8%	13
Employment Discrimination	32.8%	131	41.3%	63	25%	24
Employment Other	25.7%	183	26%	100	38.5%	26

Nuclear Verdicts

So-called Nuclear Verdicts are affecting punitive awards. Between 2016 and 2022, the median punitive award increased from \$35 million in 2017 to more than \$87 million in 2022. (Source: U.S. Chamber of Commerce Institute for Legal Reform, October 2023). And there are more pending cases than ever before (see chart below).

Number of Nuclear Verdicts Over Time:

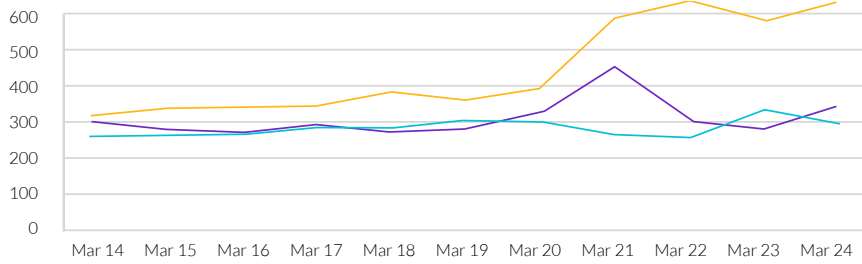
- \$10M - \$25M
- \$25M - \$50M
- \$50M - \$100M
- \$100M+



Note: 2024 data is as of July 31, 2024. Source: TranRe, Insurance Insider U.S.

Civil cases filed, terminated, and pending since 2014 (thousands)

- Filed
- Terminated
- Pending

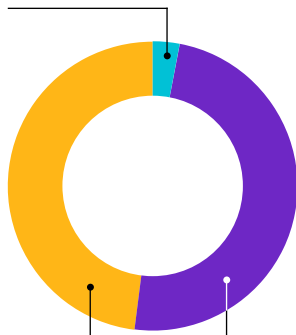


Insurability: A Plurality of States Don't Restrict Insurability but 97% of Punitive Awards Are From States Where Insurability is Restricted or Undecided

The chart below groups punitive awards from one study into three groups: jurisdictions which do not restrict insurability, those that restrict insurability in some manner, and those where the issue of insurability is undecided. The key takeaway is that the vast majority of punitive awards are from jurisdictions where insurability is not certain.

Punitive Damage Awards by Insurability

Insurability not restricted **3%**
\$35,131,000



Insurability restricted **48%**
\$515,644,000

Insurability undecided **49%**
\$508,355,000

Awards in Insurability Restricted Jurisdictions

State	County	Total Punitive Damage Award
California	Alameda	\$4,451,000
	Contra Costa	\$25,000
	Fresno	\$183,000
	Los Angeles	\$21,790,000
	Orange	\$26,149,000
	San Bernardino	\$3,032,000
	San Francisco	\$263,000
	Santa Clara	\$780,000
	Ventura	\$105,000
Florida	Dade	\$280,450,000
	Orange	\$300,000
	Palm Beach	\$5,000,000
Illinois	Cook	\$188,000
	Du Page	\$150,000
Indiana	Marion	\$510,000
Massachusetts	Essex	\$0
	Middlesex	\$25,000
	Suffolk	\$2,750,000
	Worcester	\$18,000
Missouri	St. Louis	\$203,000
New Jersey	Bergen	\$370,000
	Essex	\$2,000
	Middlesex	\$555,000
New York	New York	\$7,850,000
North Carolina	Mecklenburg	\$518,000
Ohio	Cuyahoga	\$1,772,000
	Franklin	\$4,661,000
Pennsylvania	Allegheny	\$3,051,000
	Philadelphia	\$149,141,000
Virginia	Fairfax	\$1,352,000
Total in Restricted Jurisdictions		\$515,644,000

Awards in Insurability Undecided Jurisdictions

State	County	Total Punitive Damage Award
Connecticut	Fairfield	\$0
	Hartford	\$629,000
Texas	Bexar	\$77,062,000
	Dallas	\$393,296,000
	El Paso	\$1,667,000
	Harris	\$35,701,000
Total in Insurability Undecided		\$508,355,000

Awards in No Restriction Jurisdictions

State	County	Total Punitive Damage Award
Arizona	Maricopa	\$31,940,000
	Pima	\$41,000
Georgia	Fulton	\$446,000
Hawaii	Honolulu	\$2,501,000
Kentucky	Jefferson	\$100,000
Wisconsin	Milwaukee	\$103,000
Total in No Restriction Jurisdictions		\$35,131,000

Total Awards

Total in Restricted Jurisdictions	\$515,644,000
Total in Insurability Undecided	\$508,355,000
Total in No Restriction Jurisdictions	\$35,131,000
Total Awards (45 Counties)	\$1,059,130,000

Affirmative Coverage Clause/Endorsement:

This is the simplest way to obtain insurance for punitive damages and it ensures that the policy is unambiguous in its intent to cover punitive damages (an explicit requirement in some states that permit insurability). The possibility exists that a court will not enforce, or an insurer will not fulfill, the terms of the policy due to the law or public policy.

Most Favored Jurisdiction/Venue (MFJs):

Because of the restrictions on the insurability of punitive damages, domestic insurers oftentimes will employ an MFJ. An MFJ is essentially a choice of law clause. The law on choice of law generally dictates that parties are free to enforce choice of law provisions provided that:

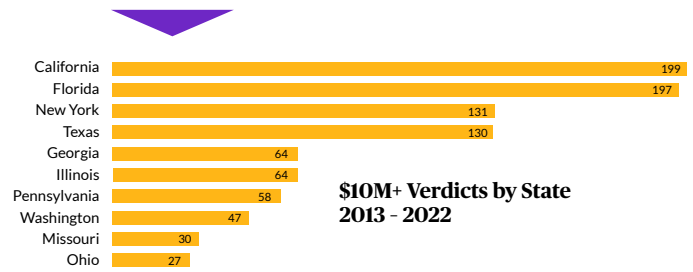
1. the parties have a connection to the selected jurisdiction and/or;
2. applying the law of the selected jurisdiction would not offend the public policy of the forum state.

MFJs may be unenforceable if they offend public policy. In such cases, enforcing the MFJ clause would offend the very public policy preventing the insurance from providing coverage in the first instance.

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It should be noted that nearly the same group of states which generate the vast majority of punitive awards as measured by dollars are generally the same states which generate the majority of nuclear awards. (Source: <https://institutelegalreform.com/wp-content/uploads/2024/05/ILR-May-2024-Nuclear-Verdicts-Study.pdf>).



Insurance Solutions

There are three basic options for those seeking punitive damages coverage:

1. A clause or endorsement to the policy that affirmatively states that punitive damages are covered;
2. A "most favorable" jurisdiction/venue (MFJ) clause or endorsement, or;
3. A punitive damage wrap policy typically issued by a Bermuda insurer (commonly referred to as a "puniwrap" policy).

Punitive Damages Wrap Policies:

Punitive damages wrap policies (puni-wraps) are procured and issued entirely outside the United States (Bermuda is a preferred jurisdiction). Consequently, a puni-wrap policy combined with a traditional insurance policy, is not restricted by regulations or public policy that could prevent a domestic policy from covering such damages. As a result, they provide coverage for punitive damages that would not be payable under domestic policies.

Notable Features of punitive wraps include:

- Maximum Limit of Liability: \$50M for Excess Casualty and \$25M for Financial Lines
- Follows the terms and conditions (including limit and attachment point) of the Chubb domestic policy
- 30 days payment terms
- Minimum premium: \$5,000 for Excess Casualty and \$0 for Financial Lines
- Issued entirely out of Bermuda, i.e., underwritten, negotiated, paid for and issued

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