



CHUBB®

Punitive
Damages in
Employment
Practices
Liability

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

Richard Porter and Stephen Jones

Chubb Bermuda



Punitive Damages in Employment Practices Liability

The 2017 whitepaper, *A Review of the U.S. Punitive Damages Liability Landscape* (the “Punitive Landscape” paper), gave a general overview of punitive damages and addressed the questions: When are punitive damages available? Are they insurable? And what insurance products can provide coverage? This paper addresses similar questions but focuses on the punitive damage landscape in respect of Employment Practices Liability (“EPL”).



Like the Punitive Landscape, this paper analyzes the EPL questions in the following parts:

Prevalence

Punitive damages are often awarded at higher rates in EPL cases than in other civil cases. And, according to the data, the median award in EPL cases (punitive and compensatory) is several times higher than the quantum of median awards of other civil cases.

Insurability

As discussed in Part 2 of the Punitive Landscape, most of the punitive damage awards and most U.S. economic activity occur in jurisdictions where insurability of punitive liability is restricted or unsettled. Hence, any EPL tower should consider the regulatory landscape applicable to the program that is intended to respond to punitive damage liability.

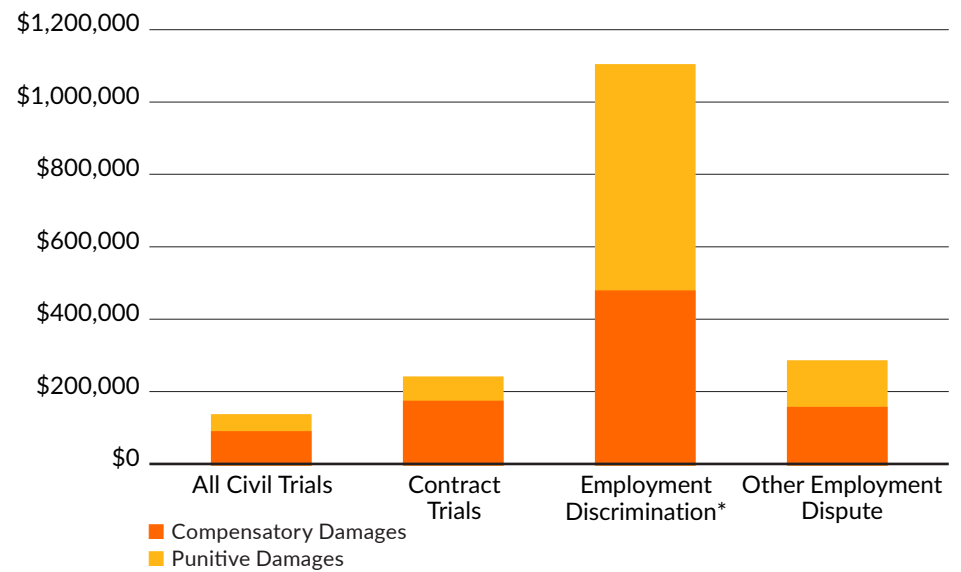
Insurance Products for EPL Punitive Damages

The insurance products for EPL punitive damages are mostly the same as those arising out of standard casualty covers: most favored jurisdiction clauses and Bermuda punitive damage wraps. The conclusions in respect of EPL punitive products are the same as those reached for casualty products and discussed in the Punitive Landscape.

Recent years have seen an unprecedented amount of publicity surrounding sexual harassment and misconduct claims. The ripple effects of the Hollywood-driven #MeToo Movement have left few industries untouched and have led to many high-profile figures facing troubling accusations. While it may take time for this increased attention to sexual harassment in the workplace to translate into data showing a parallel increase in litigation, the newfound awareness of what is considered inappropriate conduct in the workplace will likely cause an increase in the willingness and likelihood of reports among employees, with an increase in litigation logically following. Finding preventative solutions, such as comprehensive EPL insurance and punitive damages wraps can help protect employers facing a rising tide of claims and increased costs associated with defending these matters.



Table A: Median Compensatory and Punitive Awards, 75 Largest U.S. Counties



Prevalence

Table Aⁱ shows data analyzing the largest counties in the U.S., which found that the median award for Employment Discrimination* is 8.45 times greater than the median award for “all civil trials” and 4.5 times greater than the award for “contract trials.” Also, the punitive damage component for Employment Discrimination cases is greater than the compensatory component. In other words, this dataset shows that for every \$1 awarded in Employment Discrimination cases, 55¢ comprises punitive damages.

And although Table A shows that Employment Discrimination awards are higher in relative terms than other civil categories, Table A does not show the headline, record-breaking awards that certain EPL cases have generated in recent years, including:

- \$185 million punitive damages award along with \$872,000 in compensatory damages in California’s *Juarez v. AutoZone Stores, Inc.*, Case No. 08-CV-00417-WVG (S.D. Cal. Nov 17, 2014). Juarez is believed to be the largest punitive award to a single plaintiff in an EPL case.
- \$50 million punitive damages award with over \$1 million in back pay and other damages for pain and suffering in New Jersey’s *Braden v. Lockheed Martin Corp.*, No. 1:14CV04215 (D.N.J. 2017). The plaintiff alleged that the decision to eliminate his position during a reduction in force was motivated by his age.
- \$16.2 million award confirmed by California Appellate court in *Nickel vs. Staples Contract and Commercial, Inc.*, No. BL262664 (Court of Appeal, 2nd District 2016) for age discrimination. \$13M of this award was in punitive damages.

- A Missouri female plaintiff sued for age and sex discrimination and retaliation after she lost her management position as part of a corporate restructuring. The jury awarded the plaintiff \$450,000 in compensatory damages and \$20 million in punitive damages. *DA Miller v. American Family*, Case No. 1416-CV02573 (Mo. Dec. 9, 2016).
- A Florida jury awarded \$20.8 million, including \$10 million in punitive damages, in a case of discrimination based on gender. *EEOC v. Four Amigos Travel, Inc.*, No. 8:11-cv-01163-RAL-MAP (M.D. Fla. 2013).
- A Colorado award where \$14 million of the total \$14.9 million award was for punitive damages upon a showing that plaintiffs were discriminated against based on their race and national origin. *Camara v. Matheson Trucking, Inc.*, No. 1:12-cv-03040-CMA-CBS (D. Colo. 2013).

ⁱ“Employment Discrimination” is defined as “Firing, failure to promote, or failure to hire, due to age, race, gender, or religion.”ⁱⁱ

Note: some of the preceding awards may be reduced due to damages caps or other relevant factors.



Table B: Prevalence of Punitive Damage Awards by Cause of Action

By type of claim	All Trials		Plaintiff Won Trial		Plaintiff Won and Puni Sought	
	% Puni Sought	Number	% Puni Sought	Number	% with Puni Award	Number
Employment Discrimination	32.8%	131	41.3%	63	25.0%	24
Employment Other	25.7%	183	26.0%	100	38.5%	6
Contract Trials	14.9%	2,723	5.8%	1,175	33.5%	272
All Civil Trials	9.0%	8,701	10.2%	4,546	35.5%	448

Table Bⁱ shows in the studied cases, punitive damages were sought in 32.8% of all Employment Discrimination cases and 41.3% of Employment Discrimination cases where the plaintiff won at trial. And of those cases where the plaintiff sought punitive damages and won at trial, punitive damages were awarded 25% of the time in Employment Discrimination cases. Not surprisingly, in the Employment Other** category, (which would appear to encompass sexual misconduct allegations like #MeToo) punitive damages were awarded in 38.5% of the cases where the plaintiff sought them and won at trial. This data shows a demonstrative threat of punitive damage liability for those defendants willing to resolve their EPL litigation via trial.

Table Cⁱⁱⁱ shows that while the overall number of contract cases in the 75 most populous counties declined from 9,477 in 1992 to 3,474 in 2005, the number of employment cases increased dramatically in the same period. In 1992, employment cases constituted about 5% of the total studied cases whereas, in 2004, employment cases made up 12% of the studied cases.^{iv}

***"Employment Other" is defined as "Any other dispute between employer and employee not based on an allegation of discrimination." Bureau of Justice Statistics. 2005. Civil Justice Survey of State Courts, 2001: Punitive Damage Awards in Large Counties, 2001. Washington, D.C.: Department of Justice.

Table C: Civil Trials in State Courts in the 75 Most Populous U.S. Counties by Case Type

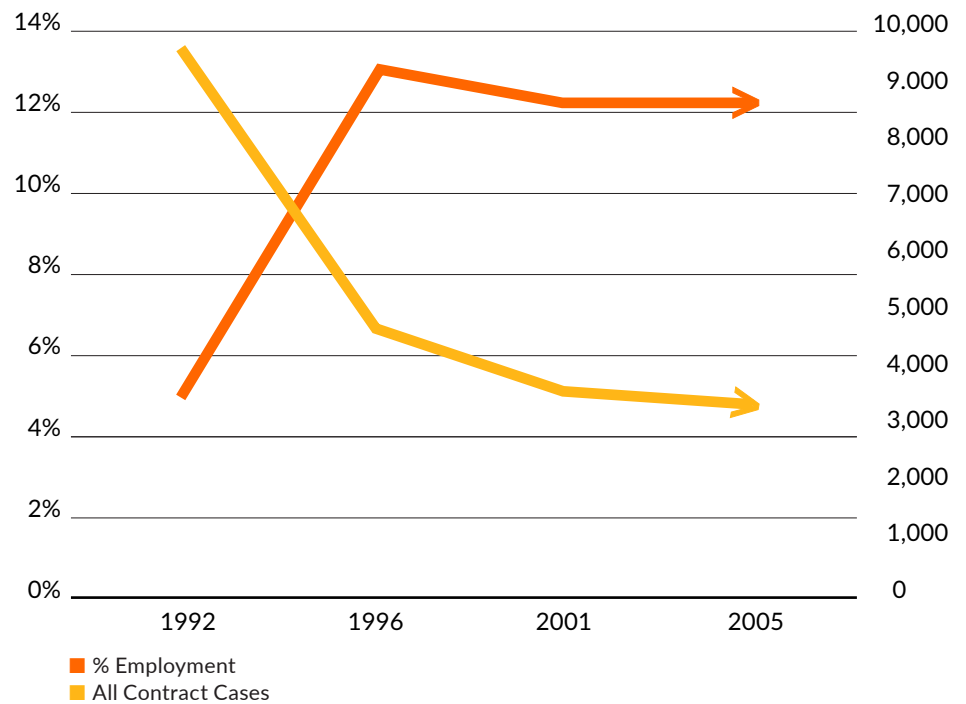
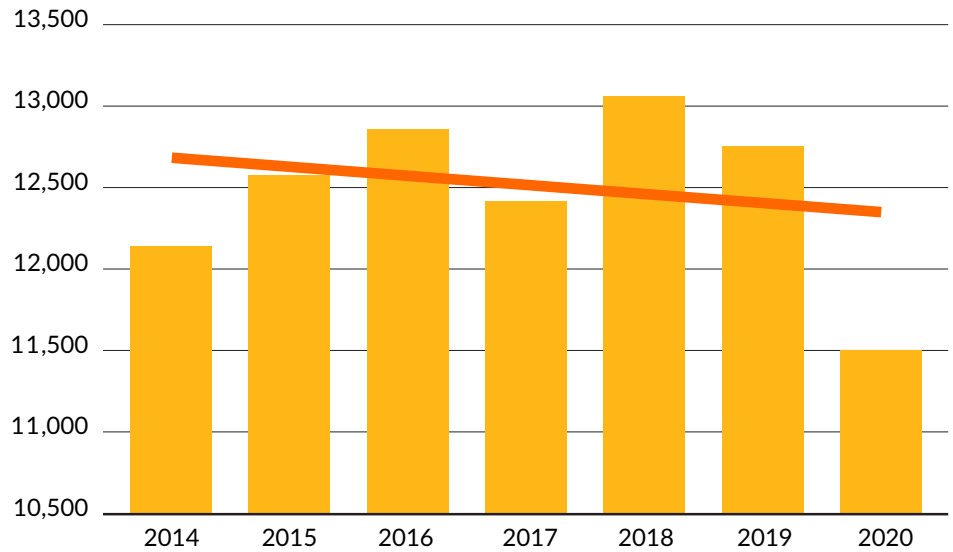




Table D: Charges Alleging Sex-based Harassment Charges Filed with EEOC



The 2018 U.S. Supreme Court decision in *Epic Systems v. Lewis* held that class-action waivers in certain employment arbitration agreements are enforceable. The *Epic* decision will likely have a chilling effect on EPL cases brought as federal class actions. However, *Epic* does not impact state laws like California’s Private Attorneys General Act, agency- initiated actions (suits led by the DOL and EEOC) or claims by applicants or other non-employees. Seemingly as a means to protect their citizens’ rights to class action, many states have introduced legislation that could dampen the impact of *Epic*.^v

Data from state courts are not readily available, and thus additional research will need to be undertaken before we can see what if any impact *Epic* will have on the prevalence of EPL cases being brought in state versus federal courts (or as arbitrations, where the statutory remedies are available). However, the data we do have (see Table C) shows that EPL cases make up a sizeable part of state court dockets and it’s possible *Epic* could incentivize plaintiffs to bring more litigation in state court seeking to evade the Supreme Court decision.

It appears that the #MeToo movement has increased federal regulatory scrutiny. 2018 EEOC data^{vi} shows an overall increase in charges and litigation particularly for cases involving sexual harassment.

- The EEOC filed 66 harassment lawsuits, including 41 that included allegations of sexual harassment. That reflects more than a 50% increase in suits challenging sexual harassment over the fiscal year 2017.
- Also, charges filed with the EEO alleging sexual harassment increased by more than 13% from fiscal year 2017 (FY2017). Sex-based harassment allegations (including gender bias) are also on the rise.
- Meritorious charges (reasonable cause findings) increased 19% over FY2017.
- Overall, the EEOC recovered nearly \$70 million for the victims of sexual harassment through litigation and administrative enforcement in FY2018, up from \$47.5 million in FY2017.

Table D shows an increase in charges alleging sex-based harassment charges filed with the EEOC through 2020.^{vii} It is a commonly held belief that the #MeToo movement sparked rapid changes toward attitudes of sexual misconduct, but the data here show how that change also manifested in increased regulatory oversight. This is particularly relevant to punitive damages awards because sexual harassment/#MeToo allegations are more likely to result in punitive liability (see Table B). However, charges alleging sex-based harassment filed with the EEOC decreased in 2020, potentially due to the Covid-19 pandemic causing businesses to close or institute work-from-home policies.



Table E: Monetary Benefits (in millions of dollars) Obtained by EEOC

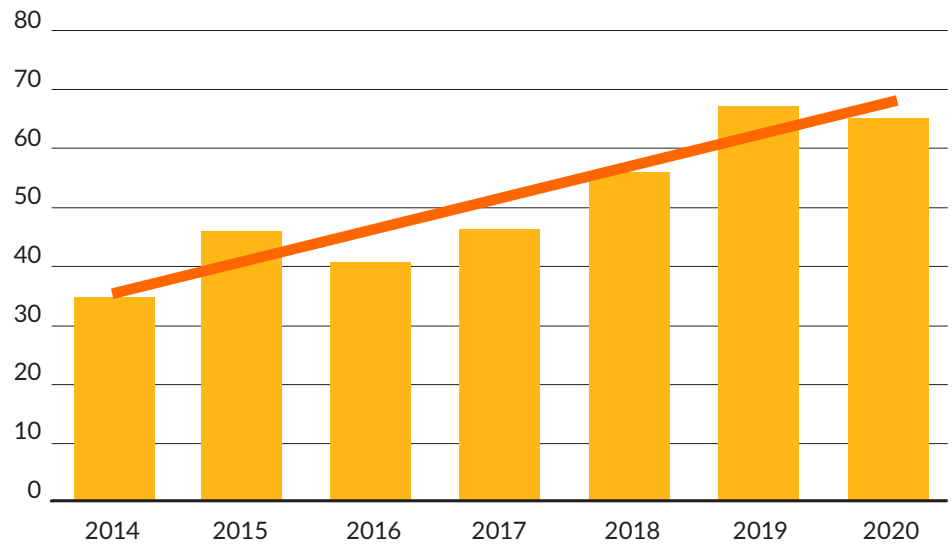


Table E^{viii} shows an increase in monetary benefits (millions) obtained by the EEOC from cases alleging sex-based harassment from 2014-2020. While the EEOC recoveries do not include punitive damages, the data nonetheless shows a 86.5% increase since 2014. And, it is possible the significant increase in EEOC recoveries could translate into higher recoveries for private plaintiffs in EPL cases seeking punitive damages.

Insurability and Insurance Products

Part 2 of the Punitive Landscape paper analyzes the question — can punitive damages be paid by a defendant's insurance? That paper shows that while a plurality of jurisdictions do not restrict insurability of punitive damages, most of the U.S. economic activity and most of the punitive-damage-award dollars arise in states where insurability is restricted or unsettled. Insurability of punitive damages arising out of EPL cases is no different, and anyone structuring an EPL insurance program should be aware of the growing prevalence of punitive damages and the regulatory landscape affecting insurability.

Part 4 of the Punitive Landscape discusses the two basic options available to cover punitive damages — most favored jurisdiction clauses ("MFJ") or Bermuda wraps. Those same options are available in respect of EPL coverages. Bermuda wraps are standalone contracts negotiated and issued in Bermuda which "wraparound" domestic EPL policies. For the reasons discussed in the Punitive Landscape, careful attention should be given to the regulatory landscape, which can have serious consequences for insureds and insurance professionals building an EPL program intended to respond to punitive damage liability.

Footnotes

- i. Bureau of Justice Statistics. 2005. Civil Justice Survey of State Courts, 2001: Punitive Damage Awards in Large Counties, 2001. Washington, D.C.: Department of Justice.
- ii. See Table 3 of the Cornell Study ("The Decision to Award Punitive Damages: An Empirical Study" — 2010). Cornell Law Faculty Publications. Paper 185.
- iii. See Table 10 of Civil Bench and Jury Trials in State Courts, 2005. Washington, D.C.: Department of Justice ("the 2005 Study")
- iv. 2005 Study at Table 10.

- v. For instance, after *Epic*, the New York Legislature banned employers from requiring individuals to arbitrate claims of sexual harassment by written contract entered into after July 11, 2018. Other states including Maryland, Vermont and Washington have enacted similar legislation in the form of a "wavier of rights," with more states such as Arizona, Louisiana, Massachusetts, South Carolina, and Virginia, considering similar legislation. New Jersey most recently passed a law that voids "any provision in any employment contract that waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment." Further, bipartisan federal legislation is being considered that would prohibit arbitration agreements regarding sexual discrimination and harassment claims.

- vi. See EEOC final FY18 data: <https://www.eeoc.gov/eeoc/newsroom/release/4-10-19.cfm>
- vii. See EEOC data: www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm
- viii. https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm



CHUBB®

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

Richard Porter and Sarah Champion

Chubb Bermuda

Introduction

What are punitive damages? How frequently are they awarded? Are punitive damages insurable? If so, what types of insurance products are available?

This paper addresses these questions and finds:

1. Availability of Punitive Damages

While the U.S. Supreme Court has suggested that the maximum allowable punitive-to-compensatory award ratio is 4-to-1, state courts have nonetheless applied those guidelines to uphold ratios of 16-to-1.

2. Insurability of Punitive Damages

Those states where insurability is unsettled or restricted are where the majority of U.S. economic activity occurs and where, according to some data, a significant proportion of punitive damage awards are generated.

3. Prevalence of Punitive Damage Awards

New data shows the increasing prevalence of punitive damage awards.

4. Insurance Products for Punitive Damages

There are pros and cons to insurance products designed to cover punitive liability.

Those states where insurability is unsettled or restricted are where the majority of U.S. economic activity occurs and where, according to some data, nearly all of the punitive damage awards are made.

1. Availability of Punitive Damages



What Are Punitive Damages?

Compensatory damages “compensate the injured party for the injury sustained, and nothing more.”¹ For example, if a defendant runs into a pedestrian plaintiff causing \$500 in medical bills and \$500 in lost wages, the compensatory (or actual) damages would be \$1,000. Punitive damages, however, are intended to punish the defendant for its outrageous, wanton, or willful conduct and to deter the defendant from engaging in similar behavior in the future. The objective measures that dictate the amount of compensatory awards (i.e., actual medical costs, lost wages, etc.) are therefore absent from any punitive damage assessment.

Availability: State Law

Three states – Michigan, Nebraska, and Washington – and Puerto Rico prohibit punitive damages outright. In 27 other states, the punitive damage dollar amount or punitive-to-compensatory ratio is capped (typically to ratios of 2-to-1 or 3-to-1).² The circumstances that trigger punitive damages and their quanta are issues within the authority of the judges and juries trying the cases as well as the appellate courts reviewing those trial court decisions.³

Availability: State Versus Federal Case Law

Although several U.S. federal statutes provide for the imposition of punitive damages,⁴ they generally arise from common law tort claims litigated in state courts. The state rules and regulations regarding punitive damages, however, must be consistent with federal Constitutional principles of due process. Due process is a complex subject, but it essentially means the law must be fair, reasonable, and predictable.

The U.S. Supreme Court has attempted to rein in excessive punitive damages and reduce the variability of such awards. In so doing, the Supreme Court has given guidance for circumstances that justify punitive awards and the permissible (or reasonable) amount of any such award. The Supreme Court has set forth the following factors (in order of importance) that courts should use to assess the reasonableness of a punitive damages award:

- The degree of reprehensibility of the defendant's conduct
- The difference between the actual harm suffered by the plaintiff and the amount of the punitive damages award (i.e. the ratio of punitive to compensatory damages)
- The disparity between the punitive award and punitive damages awarded in comparable cases⁵

Although there is no bright-line rule, the Supreme Court's decisions suggest that most awards should have a single-digit ratio of punitive to compensatory damages and that a ratio of 4-to-1 is "close to the line of constitutional impropriety."⁶

Despite the Supreme Court's direction, there are many examples of state appellate courts affirming punitive awards in excess of a 4-to-1 ratio.

For instance, in *Johnson v. Ford Motor Co.*, the California Supreme Court concluded that the appellate court erred when it reduced a \$10 million punitive award issued alongside a \$17,811 compensatory award (a ratio of approximately 561-to-1) as it did not give the appropriate weight to Ford's reprehensible conduct.⁷

Similarly, in *Bullock v. Phillip Morris USA*, the plaintiff – a 64-year-old woman with inoperable lung cancer – sued Phillip Morris for negligence, strict product liability, and fraud.⁸ The jury awarded \$850,000 in actual damages and \$28 billion in punitive damages, a ratio of 33,000-to-1. The Court of Appeals reversed the judgment of the punitive award only and a new trial was held in which a second jury awarded \$13.8 million in punitive damages – a ratio of more than 16-to-1. On appeal, the Court found that the award was not unconstitutionally excessive based on Phillips Morris' "extreme reprehensibility."⁹

In November 2021, the Illinois Supreme Court reinstated \$8 million in punitive damages that had been awarded alongside \$1 million in compensatory damages to a woman who had sued her ex-boyfriend for sexual assault. The appellate court had reduced the punitive award to \$1 million, ruling that an 8-to-1 ratio crossed the line of constitutional impropriety. In reinstating the award, the Illinois Supreme Court found that it was not unconstitutionally excessive in light of the defendant's "egregiously reprehensible conduct."¹⁰



In 2019, a Philadelphia jury awarded \$8 billion in punitive damages and \$680,000 in compensatory damages to a plaintiff who alleged that Johnson & Johnson failed to warn that its antipsychotic drug caused males to develop large breasts. The trial judge subsequently reduced the punitive award to \$6.8 million, a ratio of 10-to-1.¹¹ While it is likely that the verdict will be appealed, the decision by the trial judge to employ a 10-to-1 ratio highlights the unpredictability of the state court's application of the U.S. Supreme Court's guidelines concerning the reasonableness of punitive damage awards.

To remain abreast of the U.S. legal landscape around punitive damages, it is important to continue to watch the decisions from various states.

2. Insurability of Punitive Damages

Can punitive damages be paid by a defendant's insurance? The short (and unsatisfactory) answer: It depends.¹²

Currently, punitive damages are generally uninsurable in five states (California, Colorado, New York, Rhode Island, and Utah) under the idea that allowing for the insurability of punitive damages undermines the punishing effect that such awards are meant to have.

Only 3% of punitive damage awards occur in jurisdictions where insurability is not restricted.

Twenty-six states generally permit insurability.¹³ For the remaining states, the answer is either unclear or it is largely dependent upon whether the punitive damages are assessed against the defendant directly or vicariously.¹⁴ Eight states, including Florida, Illinois, Indiana, Kansas, Minnesota, New Jersey, Oklahoma, and Pennsylvania, preclude insurability of directly assessed punitive damages but allow coverage for punitive damages awarded for vicarious liability. Finally, the law remains uncertain in eight states (Connecticut, Maine, Massachusetts, Missouri, North Dakota, Ohio, South Dakota, and Texas) and the District of Columbia.

Insurability By GDP

The 20 states that prohibit or restrict insurability include the large industrial states, such as New York, California, Illinois, Pennsylvania, and Florida, and together, they constitute approximately 57% of the U.S. gross domestic product.¹⁵ That figure edges up to 60% if the three states that prohibit punitive damages, (Michigan, Nebraska, and Washington) are discounted from the equation. If Texas (which represents 8.6% of U.S. GDP and where insurability is not settled) were to side with the restrictive states, then over two-thirds of U.S. GDP could be said to occur in a jurisdiction that, in some way, restricts insurability.

Table 1: GDP of States That Restrict Insurability

GDP by U.S. State	% of 3rd Quarter 2021 U.S. Gross Domestic Product	Insurable
1. California	14.6	No
2. Colorado	1.8	No
3. Connecticut	1.3	Law is uncertain ¹⁶
4. Florida	5.4	No
5. Illinois	4.1	No
6. Indiana	1.8	Probably not ¹⁷
7. Kansas	.80	No
8. Maine	.30	Law is uncertain ¹⁸
9. Massachusetts	2.8	Law is uncertain ¹⁹
10. Minnesota	1.8	No
11. Missouri	1.6	Law is uncertain, but probably not ²⁰
12. New Jersey	2.9	No
13. New York	8.1	No
14. Ohio	3.2	Law is mixed ²¹
15. Oklahoma	.90	No
16. Pennsylvania	3.6	No
17. Rhode Island	.30	No
18. South Dakota	.30	Law is uncertain, but probably not ²²
19. North Dakota	.30	Law is uncertain, but probably not ²³
20. Utah	1.0	No
GDP Total	56.9	
21. Texas	8.6	Law is uncertain, but probably ²⁴
GDP Total with Texas	65.5	

Insurability by Locale of Awards

Data from a U.S. Department of Justice study that analyzed the quanta of punitive damage awards in 2001 in the nation's most populous counties suggests a large portion of the punitive damage awards occur in jurisdictions that have some restriction on insurability.²⁵

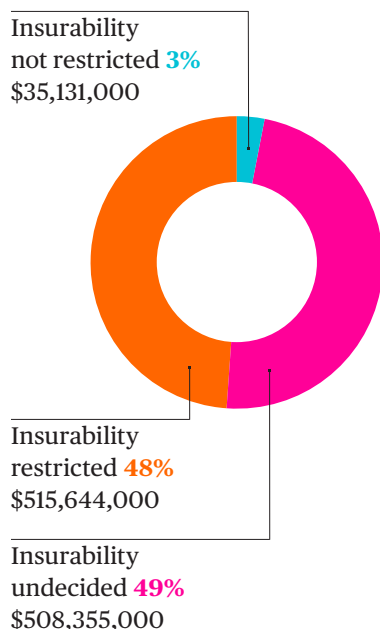
If the undecided states are not included, the study's data shows that over 93% of the dollars awarded as punitive damages were awarded in states that, in some manner, restrict insurability. If Texas were to restrict insurability, then 97% of the studied awards would be in restricted states.

Table 2: 2001 Punitive Damage Awards in 45 Counties Color-Coded for Insurability

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

Punitive Damage Awards by Insurability



Awards in Insurability Undecided Jurisdictions

State	County	Total Punitive Damage Awards
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 Awards
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 insurability undecided		\$35,131,000

Total in restriction 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

Although this particular study is only a snapshot of awards in 2001 in 45 counties within 21 states, it is nonetheless informative. The takeaway appears to be that while there is a plurality of states that do not restrict insurability, it may be of cold comfort given that the majority of economic activity and punitive damages awards occur in states that do prohibit or restrict insurability.

It is also worth mentioning that those states that prohibit or restrict insurability often include so-called “judicial hellholes,” which are more likely to award and confirm excessive punitive awards. The American Tort

Reform Foundation (“ATRF”) has identified jurisdictions and venues that systematically apply laws in an unfair and unbalanced manner to the disadvantage of defendants. In its 2020-2021 Report, the ATRF found that California was the number one judicial hellhole, followed by New York in second place, Pennsylvania in fourth place, Cook, Madison, and St. Clair Counties in Illinois in fifth place, and St. Louis, Missouri, in seventh place.²⁶ The Report also noted that Florida, Colorado, Texas, Maryland, and Minnesota are jurisdictions that bear watching due to their history of abusive litigation.

3. Prevalence of Punitive Damage Awards

The traditional view is that only a small percentage of civil litigation goes to trial and that an even smaller percentage of those matters that do proceed to trial result in an award of punitive damages.²⁷ However, more recent analysis suggests that punitive damage awards are considerably more prevalent than previously thought.²⁸

The statistical methodology is beyond the scope of this paper, but essentially, the older research measured all cases filed in a studied jurisdiction and compared that figure to cases awarding punitive damages. Such analysis showed that only a small percentage of cases yielded a punitive award.

Recent analysis suggests that punitive damage awards are considerably more prevalent than previously thought.

However, newer research eliminates cases that are abandoned, disposed of before trial (generally via settlement), and/or never actually sought punitive damages. The results show that the success rate is quite high for those plaintiffs who win at trial and seek punitive damages. Notably, a 2010 study from Cornell Law School found:²⁹

- In all cases where the plaintiff sought punitive damages and won at trial, punitive damages were awarded in 35.5% of the studied cases.
- In EPL cases where the plaintiff sought punitive damages and won at trial, punitive damages were awarded in 38.5% of the studied cases.

- In cases where compensatory damages were between \$1 million and \$10 million and the plaintiff sought punitive damages, punitive damages were awarded in 53% of the studied cases.
- In cases where compensatory damages were greater than \$10 million and the plaintiff sought punitive damages, punitive damages were awarded in 82% of the studied cases.

The following tables show selected data from the Cornell Study.

Table 3: By State³⁰

The four states selected for Table 3 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
Table 3						
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



Table 4: By County³¹

The four counties selected for Table 4 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
Table 4						
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

Table 5: By Type of Claim³²

The selected data 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 Type of Claim	All Trials		Plaintiff Won Trial		Plaintiff Won and Punitives Sought	
	%With punitive damages sought	Number	% With punitive damages sought	Number	% With punitive award	Number
Table 5						
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

4. Insurance Products for Punitive Damages



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

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

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 (a necessity in some states that permit insurability). There is still significant risk and uncertainty, however, with this seemingly straightforward option. Most notably, 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 of a particular jurisdiction. As a result, coverage may not actually exist for a punitive award despite the insured believing that it had purchased (and perhaps paid an additional premium for) such coverage.

MFJs:

Because of the restrictions on the insurability of punitive damages and previously mentioned risks described, domestic insurers oftentimes will employ an MFJ to provide more certainty concerning punitive damages coverage. MFJ clauses are choice of law provisions triggered when the governing jurisdiction prohibits insuring punitive damages.

MFJs give an insured and/or insurer the option to choose the law of where the:

1. punitive damages were awarded,
2. underlying acts occurred,
3. insured is incorporated or has its principal place of business, or
4. where the policy was issued.

In effect, MFJs provides that if punitive liability arises in a jurisdiction that precludes insurability, the insured and the insurer (or, in some instances, the court) can choose to apply the law of a jurisdiction that allows for such insurance.

The principle is contracting 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.³³

While an MFJ clause provides more protection for an insured seeking punitive damages coverage, it only does so if one of the choice of law options allows for the insurability of punitive damages. If, however, all the options are jurisdictions in which punitive damages are not insurable, then coverage for a punitive damage award is still precluded.

In addition, it should come as no surprise that MFJs may not be enforceable because they may offend public policy. Public policy is a very powerful doctrine that can be utilized to invalidate otherwise enforceable, arms-length contracts. The conclusion that MFJs should not be enforceable seems intuitive considering the legal landscape surrounding choice of law provisions. In many instances, enforcing an MFJ would effectively nullify the very public policy that prevents the insurance from providing coverage in the first instance. Careful attention should be given to the regulatory landscape because regulatory directives have serious consequences for insureds as well as insurance professionals involved in a risk deemed to violate public policy.

While an MFJ may provide insureds with additional assurance regarding the coverage of punitive damages, it is not a guarantee.



Puni-Wrap Policies:

Puni-wrap policies are separate, stand-alone policies procured and issued entirely outside of the United States. As the name suggests, puni-wrap policies “wrap” around traditional insurance policies to provide coverage for punitive damages that are not otherwise payable under the wrapped policy. Puni-wraps are not subject to the regulatory and public policy restrictions that may hinder a domestic policy from indemnifying an insured for punitive damages via the other methods discussed above.

Payment under a puni-wrap is triggered when a punitive award is covered under the domestic policy but it cannot be paid by the domestic insurer because the applicable jurisdiction prohibits indemnification for punitive damages.

Puni-wraps are only triggered by final judgments and do not provide coverage for settlements (even if a settlement amount was arrived at by taking a potential or actual punitive damage award into account).

Puni-wraps also do not provide additional limits because they “share” a limit with the domestic policy. In other words, any payment for covered compensatory damages (or other eroding costs, such as defense costs) made under the domestic policy also erodes the limits provided by the puni-wrap.³⁴

Aside from punitive damages, choice of law, and dispute resolution, a puni-wrap policy generally follows the same terms and conditions as the domestic policy. As such, if the domestic policy does not cover a claim, then there is also no coverage for that claim under the puni-wrap.

Unlike the more traditional methods discussed above, puni-wraps provide more certainty of coverage for the insured.

References

¹ Black’s Law Dictionary 390 (6th ed. 1990).

² See Wilson Elser, Punitive Damages Review: 2018 Update.

³ Procedure will vary from court to court, but in general, punitive damages are imposed by a judge (in bench trials) or jury in the second stage of trial after liability is determined in the first stage. In other instances, the compensatory and punitive damages are determined in one stage. There can also be as many as three separate stages in a trial: one for liability, a second for compensatory damages, and a third for punitive damages. In general, however, there can be no award of punitive damages without a compensatory award.

⁴ For example, the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961 *et seq.*, authorizes treble damages, and the Civil Rights Act of 1991, 42 U.S.C. § 1981a, provides for the imposition of punitive damages under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, and the federal employment section of the Rehabilitation Act of 1973.

⁵ *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) (finding that a \$2 million punitive award alongside a \$4,000 compensatory award violated due process and establishing three “guideposts” to “identify constitutionally excessive” awards).

⁶ See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (finding that a \$145 million punitive award issued alongside a \$1 million compensatory award violated due process and that “few awards exceeding a single-digit ratio . . . will satisfy due process”). See also *Phillip Morris USA v. Williams*, 549 U.S. 346 (2007) (reversing a punitive award as the jury lacked authority to punish Phillip Morris for the total harm it allegedly caused to society in general); *Exxon Shipping Co v. Baker*, 554 U.S. 471, 512-13 (2008) (determining that, in the context of maritime law, a 1-to-1 ratio of compensatory to punitive damages is adequate to “roughly express jurors’ sense of reasonable penalties in cases with no earmarks of exceptional blameworthiness”).

⁷ 35 Cal. 4th 1191, 1196, 1213 (2005) (Ford’s fraudulent practice of concealing an automobile’s history of transmission repairs and replacements when reselling “was more reprehensible because it was part of a repeated corporate practice rather than an isolated incident.”).

⁸ *Bullock v. Phillip Morris USA*, 198 Cal. App 4th 543 (2011).

⁹ *Id.* at 573.

¹⁰ *Doe v. Parrillo*, 2021 IL 126577, ¶¶ 53, 58 (“reprehensibility concerns the enormity of the defendant’s conduct, and some torts are more enormous (or blameworthy) than others - namely those that involve violence or a threat of it”).

¹¹ Jonathan Stempel, Judge Slashes \$8 Billion Risperdal Award Against Johnson & Johnson to \$6.8 million, Reuters (Jan. 17, 2020), available at <https://www.reuters.com/article/us-johnson-johnson-risperdal/judge-slashes-8-billion-risperdal-award-against-johnson-johnson-to-6-8-million-idUSKBNIZG293>.

¹² It should be noted that categorization of the states' laws cannot always be precise and conclusions as to the law will vary from scholar to scholar.

¹³ Alabama, Alaska, Arizona, Arkansas (but not for intentional torts), Delaware, Georgia, Hawaii, Iowa, Kentucky, Louisiana, Maryland, Mississippi, Montana, Nevada, New Hampshire, New Mexico, North Carolina, Oregon, South Carolina, Tennessee, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming.

¹⁴ Direct liability is when the defendant is assessed punitive damages for its own conduct. Vicarious liability is when the defendant is assessed punitive damages based on the conduct of another, usually an employee.

¹⁵ Bureau of Economic Analysis, U.S. Dept. of State, Gross Domestic Product by State, 3rd Quarter 2021 (December 23, 2021), available at https://www.bea.gov/sites/default/files/2021-12/qgdpsstate1221_1.pdf.

¹⁶ Compare *Bodner v. United Serv. Auto Ass'n*, 222 Conn. 480, 497-98 (1992) ("[A] tortfeasor may not protect himself from liability by seeking indemnity from his insurer for [punitive damages] that were imposed on him for his own intentional or reckless wrongdoing") with *Nationwide Mutual Ins. Co. v. Pasiak*, 327 Conn. 225, 259-62 (2017) (enforcing an insurance policy that provided for coverage of intentional acts, such as false imprisonment, which gave rise to the punitive damages award).

¹⁷ Although there are no state cases directly on point, a federal district court held that Indiana public policy would be violated if a wrongdoer were permitted to insure against punitive damages arising from his own misconduct. See *Grant v. N. River Ins. Co.*, 453 F. Supp. 1361, 1370-71 (N.D. Ind. 1978). See also *Stevenson v. Hamilton Mut. Ins. Co.*, 672 N.E.2d 467, 473 (Ind. Ct. App. 1996) ("Courts have clearly and repeatedly affirmed the general proposition that public policy prohibits the use of insurance to provide indemnification for civil tort liability that results from an insured's intentional wrongdoing").

¹⁸ Compare *Braley v. Berkshire Mut. Ins. Co.*, 440 A.2d 359 (Me. 1982) (holding, in an uninsured motorist coverage case, that punitive damages for reckless conduct were not insurable because recovery for those damages would eliminate the deterrent effect against the wrongdoer) with *Concord Gen. Mut. Ins. Co. v. Hills*, 345 F. Supp. 1090, 1095 (D. Me. 1972) (holding automobile liability policy included an obligation to pay punitive damages). See also *Tuttle v. Raymond*, 494 A.2d 1353, 1360 n. 20 (Me. 1985) (noting that the question of insurability of punitive damages remains open for future consideration).

¹⁹ Compare *Williamson-Green*, 2017 WL 3080559, at 4 ("Massachusetts law does not reflect any public policy against an insurer indemnifying its insured for punitive damages awarded in a wrongful death case based on a finding that reckless or grossly negligent conduct caused bodily injury and thus death.") with *Santos*, 408 Mass. at 83 (holding that punitive damages were not recoverable under the terms of the underinsured motorist provisions of automobile policy).

²⁰ Compare *Brand v. Kansas City Gastroenterology & Hepatology LLC*, 414 S. W. 3d 546, 554 (Mo. Ct. App. 2013) ("Missouri courts have consistently held that an insured's intentional infliction of damage ... cannot be covered by liability insurance.") with *v. Colson v. Lloyd's of London*, 435 S. W. 2d 42 (Mo. Ct. App. 1968) (permitting insurance of punitive damages under an insurance policy covering false arrest).

²¹ "Ohio law does not prohibit insurance coverage of punitive damages in all cases." *Foster v. D.B.S. Collection Agency, Inc.* 01-CV-514, 2008 WL 755082, at 9 (S.D. Ohio Mar. 20, 2008); see also *The Corinthian v. Hartford Fire Ins. Co.*, 143 Ohio App. 3d 392 (2001) (holding that insurer was obligated to indemnify nursing home for punitive damages where there was no showing of intent, malice, willfulness, or recklessness). But Ohio public policy traditionally disfavors coverage for punitive damages. See *Casey v. Calhoun*, 40 Ohio App. 3d 83, 85 (1987) ("We hold that both the legislature and the judiciary have articulated a clear policy against the insurability of punitive damages and that a contract provision which contravenes that policy must be declared void.").

²² *Dairyland Ins. Co. v. Wyant*, 474 N.W.2d 514, 516 (S.D. 1991) (suggesting *in dicta* that punitive damages are not insurable in South Dakota).

²³ See *Cont'l Cas. Co. v. Kinsey*, 499 N.W.2d 574, 581 (N.D. 1993) (An insurer "is obligated, under the express terms of its insurance policy...to pay for the punitive damages awarded [against an insured] up to the policy limits."). However, statutory law precludes contracts that exempt one's willful, fraudulent, or negligent conduct as against the policy of the law. N.D. Cent. Code § 9-08-02. See *Tibert v. Nodak Mut. Ins. Co.*, 816 N.W.2d 31, 37 (North Dakota "statutes 'manifest a public policy precluding an insured from being indemnified for losses caused by the insured's intentional or willful conduct.'").

²⁴ Compare *Fairfield*, 246 S.W.3d 653 (holding that Texas public policy does not prohibit insurance coverage of punitive damages in a workers' compensation claim, under an employer's liability policy for punitive damages awarded for an employee's gross negligence causing employee's death) with *American Int'l Specialty Lines Ins. Co. v. Res-Care, Inc.*, 529 F.3d 649, 663-64 (5th Cir. 2008) (applying Texas law and refusing to permit coverage for punitive damages owed by a group home held liable for extreme mistreatment of a resident because "the extreme circumstances which gave pause to the *Fairfield* court" were present).

²⁵ Thomas H. Cohen, Office of Justice Programs, U.S. Dept. of Justice, *Civil Justice Survey of State Courts, 2001: Punitive Damage Awards in Large Counties, 2001*, (March 2005), available at <https://bjs.ojp.gov/content/pub/pdf/pdalc01.pdf>.

²⁶ American Tort Reform Foundation, *Judicial Hellholes 2021-2022*, available at https://www.judicialhellholes.org/wp-content/uploads/2021/12/ATRA_JH21_layout_FINAL.pdf.

²⁷ See e.g., Bureau of Justice Statistics, U.S. Dept. of Justice, *Civil Justice Survey of State Courts, 2005: Civil Bench and Jury Trials in States Courts, 2005* (October 2008), available at <https://bjs.ojp.gov/content/pub/pdf/cbjtsc05.pdf>.

²⁸ See e.g., Neil Vidmar and Mirya Holman, *The Frequency, Predictability and Proportionality of Jury Awards of Punitive Damages in State Courts, A New Audit*, 43 Suffolk U. L. Rev. 855 (2010); Thomas Cohen & Kyle Harbacek, Bureau of Justice Statistics, U.S. Dept. of Justice, *Punitive Damage Awards in State Courts, 2005* (March 2011), available at <https://bjs.ojp.gov/content/pub/pdf/pdasc05.pdf>.

²⁹ Theodore Eisenberg, et al., *The Decision to Award Punitive Damages: An Empirical Study*, (2010). Cornell Law Faculty Publications, Paper 185 [hereinafter Cornell Study].

³⁰ See Cornell Study, Table 5.

³¹ See Cornell Study, Table 4.

³² See Cornell Study, Table 3.

³³ Restatement (Second) of Conflict of Laws § 187 (1971).

³⁴ While payments under the domestic policy erode the limits of the puni-wrap, it is not clear whether payments under a puni-wrap similarly erode the limits of the domestic policy.

About the Authors

Richard Porter is the Senior Vice President, Head of Financial Lines for Chubb Bermuda. Mr. Porter's responsibilities include P&L underwriting responsibility for Chubb Bermuda's Financial Lines division. Previously, he was the Senior Vice President, General Counsel for Chubb Bermuda.

Sarah Champion is Vice President, Claims and Claims Counsel at Chubb Bermuda. She handles excess casualty claims, including punitive-wrap claims. Prior to coming to Chubb Bermuda in 2011, she was an associate at Choate, Hall & Stewart, LLP in Boston, Massachusetts.

About Chubb

Chubb is the world's largest publicly traded property and casualty insurer. With operations in 54 countries, Chubb provides commercial and personal property and casualty insurance, personal accident and supplemental health insurance, reinsurance and life insurance to a diverse group of clients.

As an underwriting company, we assess, assume and manage risk with insight and discipline. We service and pay our claims fairly and promptly. We combine the precision of craftsmanship with decades of experience to conceive, craft and deliver the very best insurance coverage and service to individuals and families, and businesses of all sizes.

Chubb's core operating insurance companies maintain financial strength ratings of AA from Standard & Poor's and A++ from A.M. Best. Chubb Limited, the parent company of Chubb, is listed on the New York Stock Exchange (NYSE: CB) and is a component of the S&P 500 index.

Contact Us

Contact your broker for more information. Chubb Bermuda's products are available only through Bermuda and non-U.S. based brokers.

Chubb Building
17 Woodbourne Avenue
Hamilton HM 08
Bermuda
O +441.295.5200
www.chubb.com/bm

Originally published 02/2017;
Supplement added 05/2019;
Supplement amended 09/2021;
Supplement amended 03/2022

Chubb. Insured.SM

Copyright © 2017, 2019, 2021, 2022 Chubb. All rights reserved. The information contained in this document is intended for general informational purposes only and is not to be relied upon for any particular purpose. Chubb has no obligation to revise or update information in this document based on future events, developments or information. Chubb shall have no responsibility and disclaims any liability to anyone relying upon the information in this document. This document shall not constitute legal or professional advice.

Chubb Bermuda Insurance Ltd. is regulated by the Bermuda Monetary Authority. It is not licensed in the U.S. as an admitted insurer nor is it an eligible excess and surplus lines insurer.