KEEP PUNITIVE DAMAGES ON THE TABLE

By || **Taylor Sandella**

The defense will likely mount pretrial challenges to your client's punitive damages claim. Here's how to get these damages before the jury.

In high-stakes products liability cases, the availability of punitive damages can significantly increase the size of a potential verdict. Given that fact, you will invariably face pretrial challenges from the defense to your client's punitive damages claim. Here's how to get that claim to the jury.

Generally, to prove your client is entitled to punitive damages you must demonstrate that a defendant's conduct was reckless, willful, wanton, fraudulent, oppressive, or malicious.[1] A strict products liability case attempts to hold a defendant liable for injuries, regardless of the defendant's intentions or state of mind. As such, you will have to put in extra legwork to support your client's punitive damages claim.

The key to keeping punitive damages on the table is to examine each word in the various standards for punitive damages in isolation. Think of "recklessness" and "malice" as two ends of the spectrum with recklessness requiring the lowest showing of evidence and malice requiring the highest. There is a qualitative difference between recklessness and malice, with varying degrees that courts apply in between them. As you go across the spectrum, proving the requirements for punitive damages becomes more challenging.

Evidence Needed to Demonstrate Punitive Damages

Because the availability of punitive damages varies across jurisdictions, be sure to check your jurisdiction's statutes and jury instructions to ensure you are pleading and arguing under the correct punitive damages standard. Generally, proving a defendant had evil motive or intent is not required for every mental state. Further, you need to prove only one mental state to keep a punitive damages claim alive long enough to get it to the jury.[2] At a minimum, you need to show that the defendant intended to do the act and had some baseline awareness of the surrounding circumstances or potential consequences, especially in a products liability case.

Recklessness. Courts define "recklessness" as acting intentionally with utter indifference to the consequences or the rights and safety of others.[3] Kansas, for example, does not require a showing of a "formal and direct intention to injure any particular person"; it is enough that the defendant knew the risks to a plaintiff's rights and safety and was indifferent to them.[4]

The Kentucky Court of Appeals considered recklessness in *Sufix, U.S.A., Inc. v. Cook*, in which a defective weed trimmer "disintegrated" during its first use and parts of the trimmer head, including its blades, sliced the plaintiff's leg, damaging muscles, tendons, and nerves.[5] The appellate court affirmed the trial court's denial of Sufix's motion for a directed verdict on the issue of punitive damages and sustained the punitive damages that the jury had imposed.[6]

The court found compelling evidence of the manufacturer's lack of testing. It also found that Sufix distributed a stronger, metal-capped trimmer head in Italy, "where the plastic version was rejected."[7] The court determined that Italy's rejection of the plastic trimmer head "should have put Sufix on notice that the plastic version was unsound."[8]

The court also held that the "reprehensibility" of a tortfeasor's conduct was related to its "consciousness of wrongdoing and to the extent to which that wrongdoing expose[d] others to serious injury."[9] It found that Sufix acted recklessly, "that is, with conscious disregard of a substantial risk that its inadequately tested product would cause serious bodily injury."[10]

Willful or wanton. When a defendant knows, or should know, that its conduct will likely result in injury, its misconduct is considered willful or wanton.[11] North Carolina, for example, defines by statute willful or wanton conduct as the "conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm," and that is "more than gross negligence."[12]

Illinois, meanwhile, has an interesting body of case law that recognizes that even constructive knowledge is sufficient for a finding of willful or wanton misconduct.[13] The Supreme Court of Illinois found that, when faced with conflicting evidence, "the question of whether a defendant's conduct was sufficiently willful or wanton to justify the imposition of punitive damages is for the jury to decide."[14] As such, evidence of the defendant's knowledge is extremely important, especially in a products liability case.

Fraud. Regardless of the defendant's motive, courts consider intentional misrepresentation, deceit, or concealment of a material fact fraud.[15] In *Whalen v. Stryker Corp.*, the Eastern District of Kentucky denied the defendant's motion to dismiss the plaintiff's punitive damages claim, finding the plaintiff had alleged sufficient facts under Kentucky's fraud standard for punitive damages.[16]

Whalen brought suit against Stryker Corp., alleging that her surgeon placed a Stryker pain pump in her shoulder during arthroscopic surgery, putting her at risk of developing glenohumeral chondrolysis, a condition that can cause loss of shoulder mobility and range of motion and loss of use of the shoulder.[17]

The court found that Whalen made sufficient allegations that "Stryker's fraudulent conduct was intentional and made for the purpose of marketing a product known to be dangerous and defective . . . [and] that these intentional misrepresentations were made for the purpose of convincing the public that their pain pumps were fit and safe for use in shoulder joints."[18]

The court stated that these allegations "could give rise to an inference that Stryker's actions amount to 'an intentional misrepresentation, deceit, or concealment of material fact'" known to Stryker and that Stryker's actions were "'made with the intention of causing injury.'"[19]

Oppression. Courts consider a defendant subjecting a plaintiff to "cruel and unjust hardship" while consciously disregarding their rights "oppression."[20] In a California case, *Bullock v. Philip Morris USA, Inc.*, the jury imposed punitive damages for "malice, fraud, or oppression" against cigarette manufacturer Philip Morris for advertising cigarettes before such advertisements were banned in 1970.[21]

Malice. Personal ill will toward a plaintiff that drives a defendant to act or do harm is "malice."[22] In *Leichtamer v. American Motors Corp.*, the Ohio Supreme Court held that although "simple negligence" was not sufficient, punitive damages could be imposed when "the manufacturer's testing and examination procedures [were] so inadequate as to manifest a flagrant indifference to the possibility that the product might expose consumers to

unreasonable risks of harm."[23]

The manufacturer defendant had done no testing on the safety of its 1969 Jeep CJ-7 roll bar but had encouraged off-road use of the vehicle through its advertising.[24] The Jeep flipped over while negotiating a slope and landed upside down, killing the driver and front-seat passenger.[25] One rear passenger suffered a skull fracture, and the other was trapped under the Jeep, causing injuries that left her with paraplegia.[26] The court found that the advertisements encouraging off-roading were sufficient evidence of malice to support punitive damages.[27]

Set Up Your Case

Priming your client's case for punitive damages success starts with gathering the evidence courts look for when assessing these damages. Courts often look at the danger of surrounding conditions.[28] They need not always find that a defendant knew its actions would *imminently* cause injury. It may be enough if the defendant knew of the existing conditions, danger, or risks, and was aware that its conduct "would *likely or probably* result in the injury or other known risk or complication."[29]

Additionally, look for evidence that financial gain motivated the defendant. Financial gain is considered among "the most egregious conduct" that a court weighs,[30] as is repeated misconduct.[31] When it comes to the individual acts of employees, for instance, New Mexico recognizes the cumulative conduct theory, which suggests that when determining whether punitive damages should be assessed against a corporation, the court should focus on the collective actions of the defendant company's employees.[32]

Instead of evaluating individual misconduct in isolation, the Supreme Court of New Mexico considers employees' overall pattern of behavior to determine whether the corporation's conduct as a whole was sufficiently egregious to warrant punitive damages.[33]

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Courts are split on whether evidence of a defendant's post-action efforts to cover up misconduct or obstruct an investigation is sufficient to support punitive damages.[34]

Pleadings and preparing for motions to dismiss. Although you won't know all the facts to support a punitive damages claim when you first file the complaint, it's important to plead the factual allegations in the body of the complaint—not in the punitive damages prayer—with as much specificity as possible.

There's also one important thing to note on motions to dismiss. Some state laws dictate that a claim for punitive damages is not an independent cause of action, but rather that it is merely incidental and cannot survive if the case is dismissed.[35] The Southern District of New York addressed this issue head-on in a case where a defendant brought a Rule 12(b)(6) motion to dismiss several of the plaintiffs' claims, including their "fourth and final claim [ ] for punitive damages."[36] The court denied the motion, finding that "punitive damages are a form of relief rather than a separate cause of action, and motions to dismiss are properly directed to claims, not to forms of relief."[37]

Getting discovery. To prove your client's punitive damages claim, you need to demonstrate the defendant's intent. In that vein, its financial information can often be relevant for proving the defendant's mental state, particularly when you are alleging profit motive. If you must make a motion to compel discovery, keep in mind that courts want to ensure that a punitive damages claim is not "spurious."[38] A claim is not spurious if you support it with sufficient facts.

Discovery under the federal rules is broad, and a party may obtain any discovery that is relevant, proportional, and nonprivileged.[39] Fortunately, courts are not limited to the four corners of the complaint when deciding under the "not spurious" standard.[40] So, in your motion to compel discovery, be sure to detail the entire factual basis you've elicited to date, which will allow the court to compel the financial discovery you are requesting. Further, if the financial discovery is relevant to another issue in your case, highlight this fact for the court so you're not foreclosed from obtaining the discovery because of a punitive damages challenge.

Finally, even if the court compels disclosure of financial information, it may opt to limit the time period the discovery covers.[41] Some courts have

required disclosure of only a party's present financial position, when a more comprehensive picture of annual revenue spanning several years is needed.[42] Depending on the case, you may want to taper the financial discovery you request to give yourself a better chance of the court granting your motion, or argue for that limited production of financial information in the alternative.

Surviving summary judgment. By the time you reach the summary judgment phase, you're likely hurtling quickly toward trial. If you have a voluminous factual record and several motions to contend with, you may not have the time or resources to comb through an entire record in the two weeks it typically takes to oppose a motion. Look in the places you haven't already looked. Oftentimes your case boils down to a handful of exhibits and statements in otherwise hours-long depositions, and when you've been living with a case for months and even years, you can get hyper-fixated and miss helpful evidence.

When you're looking for evidence that best supports punitive damages, revisit expert reports and depositions that you haven't already brought to the court's attention. If your expert's opinion can support a showing of a culpable mental state, delve deeper into the references and exhibits the expert used to support that opinion.

When grappling with the reckless, willful, wanton, fraudulent, oppressive, or malicious standard, separation is key. Notice that each word in your state's punitive damages standard is separated by a comma and connected with an "or." When the legislature or court speaks, it does so with intention. The commas are suggestive and dictate that you need to prove only one mental state to support a punitive damages claim. Do not make the mistake of lumping the standards together. And remember to shore up the best evidence to increase your chances for keeping a punitive damages claim on the table for the jury.

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Notes

1. *See, e.g.*, *Stroud v. Abington Mem'l Hosp.*, 546 F. Supp. 2d 238, 257 (E.D. Pa. 2008); *Karaahmetoglu v. Res-Care, Inc.*, 480 F. Supp. 2d 183, 189 (D.D.C. 2007).
2. The standard of proof for punitive damages differs across jurisdictions: for example, some jurisdictions, like Delaware, *see* Del. Code Ann. tit. 18, §6855, and Connecticut, *see, e.g.*, *R.I. Pools, Inc. v. Paramount Concrete, Inc.*, 89 A.3d 993, 1010–11, n. 14 (Conn. App. Ct. 2014), follow the "preponderance of the evidence" standard, while other states, like Hawaii, *see, e.g.*, *Masaki v. Gen. Motors Corp.*, 780 P.2d 566, 575 (Haw. 1989), and Tennessee, *see, e.g.*, *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992), require the higher "clear and convincing evidence" standard.
3. *See, e.g.*, *Nowell v. Medtronic Inc.*, 372 F. Supp. 3d 1166, 1238 (D.N.M. 2019)(quoting *Kennedy v. Dexter Consol. Schs.*, 10 P.3d 115, 125 (N.M. 2000)) ("Recklessness requires indifference to the rights of the victim, rather than knowledge that the conduct will violate those rights."); *see also Chrysler Corp. v. Wolmer*, 499 So. 2d 823, 824 (Fla. 1986)(quoting *Carraway v. Revell*, 116 So. 2d 16, 20, n. 12 (Fla. 1959) ("The character of negligence necessary to sustain an award of punitive damages must be of 'a gross and flagrant character, evincing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects[.]'").
4. *Morgan ex rel. D.M. v. Wesley Med. Ctr., LLC*, 487 F. Supp. 3d 1071, 1078 (D. Kan. 2020).
5. 128 S.W.3d 838 (Ky. Ct. App. 2004).
6. *Id.* at 843.
7. *Id.* at 841.
8. *Id.*
9. *Id.* at 842.
10. *Id.*
11. *See, e.g.*, N.C. Gen. Stat. §1D-5(7) (willful or wanton conduct is "more than gross negligence"); *see also Phillips v. Cricket Lighters*, 883 A.2d 439, 445 (Pa. 2005) (citing *SHV Coal, Inc. v. Continental Grain Co.*, 587 A.2d 702, 705 (Pa. 1991)).
12. N.C. Gen. Stat. §1D-5(7).
13. *See, e.g.*, *Jablonski v. Ford Motor Co.*, 923 N.E.2d 347, 394 (Ill. App. Ct. 2010) (holding plaintiff's willful and wanton-conduct claim for punitive damages was properly submitted to the jury as evidence showed that the subject vehicles contained a defect that left them susceptible to post-crash fires in high-speed rear-end collisions; that Ford knew of the defect because Ford was aware of many prior similar occurrences; that before the vehicle was manufactured, a researcher and engineers at Ford had recommended a safer design; and that prior to the plaintiff's accident, Ford did nothing to warn users); *see also Modelski v. Navistar Int'l Transp. Corp.*, 707 N.E.2d 239, 246 (Ill. App. Ct. 1999) ("A manufacturer, reasonably aware of a dangerous propensity of its product has a duty to warn foreseeable users where there is unequal knowledge, actual or constructive, and it knows or should know that harm might or could occur if no warning is given.").
14. *Cirrincione v. Johnson*, 703 N.E.2d 67, 70 (Ill. 1998).
15. *See, e.g.*, *Ellerin v. Fairfax Sav., F.S.B.*, 652 A.2d 1117, 1126 (Md. 1995) ("[F]raud or deceit . . . is characterized by the defendant's . . . actual knowledge of falsity, coupled with his intent to deceive the plaintiff by means of the false statement, [which] constitutes the actual malice required to support an award of punitive damages.").
16. 783 F. Supp. 2d 977, 982–83 (E.D. Ky. 2011).
17. *Id.* at 979.
18. *Id.* at 983.
19. *Id.* (quoting Ky. Rev. Stat. §411.184(2)).
20. Cal. Civ. Code §3294(c)(2); *see also Mahaney ex rel. Kyle v. Novartis Pharms. Corp.*, 2011 WL 4103669, at *3 (W.D. Ky. Sept. 14, 2011) ("Oppression is conduct intended to subject a plaintiff to cruel and unjust hardship").
21. 21198 Cal. App. 4th 543, 555 (Cal. Ct. App. 2011).
22. *See, e.g.*, N.C. Gen. Stat. §1D-5(5); *see also Major v. W. Home Ins. Co.*, 169 Cal. App. 4th 1197, 1226 (Cal. Ct. App. 2009) ("Malice requires a finding that Western acted with both a 'conscious' and 'willful' disregard for the rights of others.").
23. 424 N.E.2d 568, 580 (Ohio 1981).
24. *Id.*
25. *Id.* at 570–71.
26. *Id.* at 571–72.
27. *Id.* at 580.
28. *See, e.g.*, *Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496, 510 (8th Cir. 1993); *Thomas*

v. Staples, Inc., 2 F. Supp. 3d 647, 663–64 (E.D. Pa. 2014); *see also* Fla. Stat. §§768.73(1)(b); Alaska Stat. §09.17.020(g); Restatement (Second) of Torts §500 (Am. Law Inst. 1965) ("Disregard of Safety").

29. *Ramona Manor Convalescent Hosp. v. Care Enters.*, 177 Cal. App. 3d 1120, 1133 (Cal. Ct. App. 1986).

30. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 510 (2008); *see also* Alaska Stat. §09.17.020(g).

31. *See Bowden v. Caldor, Inc.*, 710 A.2d 267, 279 (Md. 1998).

32. *Clay v. Ferrellgas, Inc.*, 881 P.2d 11, 15 (N.M. 1994).

33. *Id.*

34. *See Mahoney v. iProcess Online, Inc.*, 681 F. Supp. 3d 446, 452 (D. Md. 2023) ("The Court finds that a meaningful award of punitive damages is warranted in this case. In particular, the Court finds that the gravity of iProcess's wrong and the deterrence value of punitive damages support such an award, given iProcess's misappropriation of its employees' earned wages and its failure to provide matching contributions over a period of several years; iProcess's corresponding falsification of employee records to cover up this misappropriation; and the relationship between the parties[.]"); *but see Stroud v. Abington Mem'l Hosp.*, 546 F. Supp. 2d 238, 259 (E.D. Pa. 2008) (citing *Burke v. Maassen*, 904 F.2d 178, 183 (3d Cir. 1990) ("The Third Circuit has similarly held that a defendant's falsification of relevant records and lying at a deposition to conceal his wrongdoing, while reprehensible, is insufficient to establish the culpable mental state of recklessness necessary to impose punitive damages because it does not support the conclusion that the defendant consciously appreciated the risk of the harm he caused.").

35. *See, e.g., Nix v. Temple Univ. of Com. Sys. of Higher Educ.*, 596 A.2d 1132, 1138 (Pa. 1991).

36. *Henderson v. Golden Corral Franchising Sys., Inc.*, 663 F. Supp. 3d 313, 333 (S.D.N.Y. 2023).

37. *Id.* (internal quotations omitted).

38. Fed. R. Civ. P. 26.

39. *See, e.g., Good v. Am. Water Works Co.*, 2015 WL 3540509, at *8 (S.D. W. Va. June 4, 2015); *LeBlanc v. Coastal Mech. Servs., LLC*, 2005 WL 8156070, at *2 (S.D. Fla. Aug. 24, 2005); *Blount v. Wake Elec. Membership Corp.*, 162 F.R.D. 102, 105 (E.D.N.C. 1993).

40. *See, e.g., Pedroza v. Lomas Auto Mall, Inc.*, 2008 WL 4821457, at *3 (D.N.M. July 10, 2008); *CEH, Inc. v. FV Seafarer*, 153 F.R.D. 491, 498 (D.R.I. 1994).

41. *See, e.g., Lane v. Capital Acquisitions*, 242 F.R.D. 667, 670 (S.D. Fla. 2005) (limiting discovery to two-year period); *see also Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc.*, 2007 WL 950282, at *14 (D. Kan. Mar. 26, 2007) (limiting discovery on financial information on issue of punitive damages to most recent reports and current financial statement).

42. *See, e.g., Gottwald v. Producers Grp. I, LLC*, 2013 WL 1776154, at *3 (S.D. Fla. Apr. 25, 2013); *Coachman v. Seattle Auto Mgmt. Inc.*, 2018 WL 1640893, at *4 (W.D. Wash. Apr. 5, 2018).