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# **WG8 ROLE OF STATE/AG's**

## **SUMMARY OF DELIBERATIONS**

The sub-group on the role of the various State's Attorney's General consisting of Michael Gordon, Mark Lilie, Allan Kanner, Bill Ohlmeyer and Rick Meadow have communicated at various times by phone and e-mail to address a potential position and recommendation on the issue of the appropriate role of the State Attorney General (hereinafter "AG") with respect to claims for punitive damages.

## **APPROACHES DISCUSSED**

It was first determined that an additional survey should be conducted on a sampling of States to determine the answers to the following questions:

1. Do the "AG's" have a written policy on pursuing, collecting or dispensing punitive damage awards?
2. From 1999 until the present what information was readily available to the public as to the types of cases where punitive damages were sought, the number of these cases filed, the outcome of these matters and if monies were obtained what was the disposition of the funds obtained?
3. Does the "AG's" have the sole authority to institute litigation seeking punitive damages?
4. Is the "AG" elected or appointed?
5. The statutory structure for punitive damages within the State.

## **STATES SURVEYED**

The group of States surveyed were Virginia, Florida, Missouri, Oregon, Texas, New York, Illinois and Ohio. (The results of the State surveys follows the results and recommendation section).

## **RESULTS AND RECOMMENDATION**

The survey revealed that the experiences of the individual State “AG’s” was dramatically shaped by the diverse statutory schemes of the particular State guiding the filing and collection of punitive damages by the individual “AG’s”.

There was a consensus amongst the group that there was an absence of a clearly articulated written policy by each of the “AG’s” available to the public on why, how, and when the “AG’s” would seek punitive damages in a particular matter. In addition, there was a general absence of a centralized location for information concerning the particular experience of the “AG’s” office concerning number of cases filed, types of cases, results and disbursement of funds obtained from punitive damage claims.

The follow up discussion indicated the group was not ready to recommend that all “AG’s” issue publically available written policies on their punitive damage practice. However, there was a consensus on a recommendation for information gathering and disclosure within each “AG’s” office that should carefully track the “AGs” experience and be made available to the public.

In the various states surveyed, the group’s collective findings regarding the experiences of the respective “AG” with regard to punitive damages is that this basic information is not readily available. While proposed legislation explicitly requiring the “AG” to disclose the

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specifics is not contemplated here, the group suggests that prior to making a specific proposal for the purpose of guiding the respective “AG’s” work with punitive damages, that data must be developed, tracked, and disclosed to the public over the next several years regarding the AG’s specific experience with cases involving punitive damages.

Nationwide, it is recommended that all of the respective “AG’s” adopt a policy disclosing the following information to the public: the types of cases where punitive damages are sought, the results of those cases and whether punitive damages were obtained through settlement or verdict, if monies were recovered and if so, how the funds were disbursed. This approach would accomplish four important objectives: (1) apprise the public of fraudulent and offending corporate practices ongoing in the various states; (2) disclosure of the respective AGs’ experiences and dealings with offenders, including the standard of conduct that may warrant a punitive damage award and the burden of proof required; (3) determine the frequency of punitive damage awards and whether such awards serve as a credible threat to offenders; and (4) determine how the respective states are disbursing the amount realized as a result of punitive damages awards.

## I. Common Qualities of the Attorneys-General of Virginia, Florida, Missouri and Oregon

- The attorneys-general are each elected by popular vote.
- None of the attorneys-general have a written policy on pursuing, collecting or dispensing punitive damage awards.<sup>1</sup>
- It appears that each state's grant of authority to the Attorney General provides it with the exclusive authority to bring an action for punitive damages on behalf of the state; we found no evidence of any government official in any of the four states bringing an action to recover punitive damages.

## II. State-by-State Analysis of the Authority of the Attorney-General

### A. Virginia

The Attorney-General of Virginia has exclusive authority over all civil litigation involving public officials and/or the Commonwealth of Virginia except for litigation concerning a justice or judge initiated by the Judicial Inquiry and Review Commission.<sup>2</sup> The Attorney-General also has the discretion to employ special counsel for any case within his statutory authority if he believes it is impracticable or uneconomical for the services to be performed by his office.<sup>3</sup>

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<sup>1</sup> For the states with statutes that give a percentage of the award to the state, *see infra* Section IV (detailing each state's laws for punitive damages).

<sup>2</sup> All legal service in civil matters for the Commonwealth, the Governor, and every state department, institution, division, commission, board, bureau, agency, entity, official, court, or judge, including the conduct of all civil litigation in which any of them are interested, **shall be rendered and performed by the Attorney-General**, except as provided in this chapter and except for any litigation concerning a justice or judge initiated by the Judicial Inquiry and Review Commission. No regular counsel shall be employed for or by the Governor or any state department, institution, division, commission, board, bureau, agency, entity, or official. The Attorney-General may represent personally or through one or more of his assistants any number of state departments, institutions, divisions, commissions, boards, bureaus, agencies, entities, officials, courts, or judges that are parties to the same transaction or that are parties in the same civil or administrative proceeding and may represent multiple interests within the same department, institution, division, commission, board, bureau, agency, or entity. The soil and water conservation district directors or districts may request legal advice from local, public, or private sources; however, upon request of the soil and water conservation district directors or districts, the Attorney-General shall provide legal service in civil matters for such district directors or districts. *See* Va. Code Ann. § 2.2-507(A) (2011) (emphasis added).

<sup>3</sup> *See id.* at § 2.2-507(C).

## B. Florida

Under Florida law, the Attorney-General must exercise duties including “appear in and attend to, in behalf of the state, all suits or prosecutions, civil or criminal or in equity, in which the state may be a party, or in anywise interested, in the Supreme Court and district courts of appeal of this state” and “in any courts of any other state or of the United States.”<sup>4</sup> While it is arguable that the use of “all” precludes any other from bringing suit, the Tobacco Suit in 1995 was brought by the Governor of Florida, in both his individual and official capacity. Therefore, in Florida, the Attorney-General may not have exclusive authority.

## C. Missouri

Under Missouri law, “The Attorney-General shall institute, in the name and on the behalf of the state, all civil suits and other proceedings at law or in equity requisite or necessary to protect the rights and interests of the state, and enforce any and all rights, interests or claims against any and all persons, firms or corporations in whatever court or jurisdiction such action may be necessary; and he may also appear and interplead, answer or defend, in any proceeding or tribunal in which the state's interests are involved.”<sup>5</sup> Like the Virginia statute, Missouri explicitly vests all authority in the Attorney-General.

## D. Oregon

Under Oregon law, the Attorney-General is the designated representative of the state in all civil and criminal actions in which the state is a party or is directly interested.<sup>6</sup> The

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<sup>4</sup> Fla. Stat. § 16.01(4)-(5) (2011).

<sup>5</sup> Mo. Rev. Stat. § 27.060 (2011).

<sup>6</sup> (1) The Attorney-General shall:

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Attorney-General is also designated to *commence* all proceedings in which the state is a party or is interested, indicating that he/she has exclusive authority.<sup>7</sup>

### **III. Experiences of State Attorneys-General With Punitive Damages Since 1990**

#### **A. Virginia**

Despite thorough research, it does not appear that a Virginia Attorney-General has brought a suit for punitive damages. The current Attorney-General, Ken Cuccinelli, is likely to continue the trend of no suits for punitive damages, as exemplified by his position on tort reform.

#### **My Position**

Businesses are loathe to locate in hostile litigation climates for fear of getting financially crushed by frivolous law suits. It is vital that we keep Virginia an inviting state in which to do business by reigning in excessive litigation and capping punitive damages. In addition, maintaining a restrained legal climate helps keep health care costs from skyrocketing.

#### **My Record**

I have a strong legislative history of working to streamline litigation, restrain punitive damages, limit non-economic damages, and eliminate the abuse of non-suits.

#### **As Attorney General**

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(a) Appear for the state in the trial of all civil and criminal causes in the Supreme Court or the Court of Appeals in which the state may be directly or indirectly interested.

(b) Appear for the state, when required by the Governor or the legislature, in any court or tribunal in any cause in which the state is a party or in which the state is directly interested.

*See* Or. Rev. Stat. § 180.060(a)-(b) (2011).

<sup>7</sup> (1) The Attorney-General shall...

(c) Appear, commence, prosecute or defend for the state all causes or proceedings in the Supreme Court or the Court of Appeals in which the state is a party or interested.

(d) Appear, commence, prosecute or defend any action, suit, matter, cause or proceeding in any court when requested by any state officer, board or commission when, in the discretion of the Attorney-General, the same may be necessary or advisable to protect the interests of the state. *See id.* § 180.060(c)-(d).

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I will continue to strive to make Virginia business-friendly by limiting excessive litigation and maintaining a restrained legal climate.<sup>8</sup>

B. Florida

Since 1990, the Florida Attorneys-General has initiated a few suits for punitive damages but they have all settled; none have gone to trial:

**1993:** The Florida Attorney-General's Office “accused the multimillionaire and the Charles J. Givens Organization of fraud and deceptive trade practices in a civil lawsuit filed in state Circuit Court in Sanford. The complaint, seeking punitive damages and an estimated \$500,000 in penaltie, is the first regulatory lawsuit on behalf of consumers against Givens.”<sup>9</sup>

- **Settled 1995:** Financial guru Charles J. Givens Jr. has agreed to refund \$175,000 to 135 disgruntled customers in Florida and to pay \$75,000 in investigative costs to the state. His Altamonte Springs company, the Charles J. Givens Jr. Organization, also will modify its business practices. The agreement, announced Thursday, settles a lawsuit filed two years ago by the Florida Attorney General's Office against Givens.<sup>10</sup>

**1995:** The Governor of Florida, in his capacity as a taxpayer and in his official capacity as Governor, brought suit against the tobacco industry. Interestingly, the State did not seek punitive damages.<sup>11</sup>

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<sup>8</sup> Ken Cuccinelli, *Tort Reform*, KEN CUCCINELLI ATTORNEY GENERAL, <http://www.cuccinelli.com/index.php/component/content/article/51-content/123-tort-reform>.

<sup>9</sup> Suzy Hagstrom, *State Files Suit Against Givens – The Lawsuit Alleges Givens’ Financial Company Used False Advertising and Failed to Make Refunds*, Orlando Sent., Dec. 10, 1993, at B1.

<sup>10</sup> Suzy Hagstrom, *Givens Settles Florida Suit For \$175,000* (Nov. 17, 1995), [http://articles.orlandosentinel.com/1995-11-17/business/9511170812\\_1\\_refunds-givens-florida-attorney-general](http://articles.orlandosentinel.com/1995-11-17/business/9511170812_1_refunds-givens-florida-attorney-general)

<sup>11</sup> See *The State of Florida v. The American Tobacco Company*, 1996 WL 33578706 (Cir. Ct. Aug. 7, 1996)



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- **Settled 1997:** The State of Florida entered into a settlement in which the industry agreed to pay \$11 billion, including \$200 earmarked for an anti-tobacco advertising campaign.<sup>12</sup>

**1998:** The Florida Attorney-General sued sweepstakes publications for misrepresentation: “Florida lawsuits include the complaint filed by Attorney-General Robert Butterworth of Florida against American Family Publishers, Time Customer Services, which processes the subscriptions, and the company's two celebrity pitch men, Ed McMahon and Dick Clark. The suit seeks punitive damages of up to \$15,000 a mailing, making American Family Publishers liable for as much as \$300 billion in Florida alone, according to estimates by Mr. Betz, who is an assistant Attorney-General.”<sup>13</sup>

- **Settled in 2000:** Time Inc., among the nation's largest sweepstakes promoters, announced an \$8.2 million settlement yesterday with 48 states and the District of Columbia over direct marketing that attorneys general charged were deceptive. Consumers who bought more than \$500 in subscriptions, audio or video collections, or Time-Life books while entering the contest will share part of the payment. The rest of the settlement will be used to cover states' legal fees, Attorney-General Sheldon Whitehouse said. As part of the deal, Time will include a disclaimer in its mailings clarifying that consumers haven't yet won and don't have to buy anything to enter the sweepstakes. Odds of winning also will be included.<sup>14</sup>

**1999:** “Attorney-General Bob Butterworth has charged a Largo-based water and air treatment company with using scare tactics and other deceptive practices to sell its products door- to-door. A civil complaint filed in Pinellas County Circuit Court against Community Water Works seeks punitive damages, consumer restitution and civil penalties of up to \$15,000 for each violation of the state's Deceptive and Unfair

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<sup>12</sup> See *Tobacco Settlement Nets Florida \$11.3B*, USA TODAY, <http://www.usatoday.com/news/smoke/smoke44.htm>

<sup>13</sup> *For Sweepstakes 'Winners,' Millions are a Mirage*, N.Y. Times, Mar. 8, 1998, at 1.

<sup>14</sup> *AMS is Ordered to Pay \$474.5 Million in Suit*, Richmond Times Dispatch, Aug. 25, 2000.

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Trade Practices Act. Butterworth says the company's sales practices routinely involved telling consumers their health was at risk but could be saved if they bought the firm's water- and air-treatment equipment.”<sup>15</sup>

- **Settled 1999**: The 1999 lawsuit ended months after it was filed with a settlement that required Blanken to pay \$5,000 for investigative costs, make restitution to customers, stop doing business for eight years, and never use misleading statements or scare tactics to sell water treatment devices.<sup>16</sup>

**2002**: The Florida Attorney-General filed suit against Service Corp. International, the conglomerate that owns two cemeteries, seeking punitive damages, compensation for relatives of the cemeteries' customers and fines of \$15,000 for each violation.<sup>17</sup>

- **Settled in 2004**: SCI had faced a civil lawsuit filed by the Florida Attorney-General's Office, but settled that case in May by agreeing to pay up to \$14 million in fines and restitution. The company and its Florida subsidiary also have been criminally charged with misconduct and negligence at the two cemeteries. The criminal cases are pending.

### C. Missouri

**1997**: On May 12, 1997, the State of Missouri filed suit against several manufacturers of tobacco products seeking to obtain damages, restitution, civil penalties, punitive damages, declaratory and injunctive relief, and various other forms

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<sup>15</sup> *Company Charged with Scare Tactics*, May 27, 1999, Sinocast (UPI).

<sup>16</sup> Mark Douglas, *Woman, 88, lost \$37,000 in water-treatment scam, detectives say* (Dec. 8, 2010), <http://www2.tbo.com/news/news/2010/dec/08/woman-88-lost-37000-in-water-treatment-scam-detect-ar-25469/>

<sup>17</sup> *Day Four in a 4-Day Series -- Dying in Florida* *FLORIDA TODAY* (Brevard County, FL) May 1, 2002

of relief in connection with the tobacco defendants' marketing and sales of products in Missouri.<sup>18</sup>

- **Settled 1998:** On November 23, 1998, Attorney General Nixon signed the Master Settlement Agreement (MSA) which resolved the dispute between the State of Missouri and the tobacco defendants. In addition to annual payments which may total some \$6.7 billion over a 25-year period, the tobacco defendants are enjoined from utilizing some marketing methods that target minors and face restrictions regarding advertisement and sponsorship of sporting events, concerts and similar activities. They further agreed to quit advertising on traditional outdoor and transit billboards and refrain from distributing merchandise with their logos.<sup>19</sup>

**2002:** State brought action against development and marketing vice-president of consulting services organization for breach of state merchandising practices act in the sale of invention development services to state customers.<sup>20</sup>

- **Jury Trial:** In a jury trial, the jury awarded the plaintiff actual damages in the amount of \$5,300 against some of the defendants, \$2,535 against all the defendants for several concealed defects to the vehicle, and punitive damages against all defendants in different sums totaling \$210,000.<sup>21</sup>

**2006:** Attorney General Jay Nixon today filed a lawsuit against Ameren UE, asking that the state's largest utility company be ordered to pay compensation and punitive damages for its alleged actions and negligence that resulted in the Dec. 14, 2005 breach of the Taum Sauk reservoir in Reynolds County. The release of more than a billion gallons of water from the ruptured mountain-top reservoir caused extensive

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<sup>18</sup> *State ex rel. Nixon v. American Tobacco Co.*, 34 S.W.3d 122, 125 (Mo. 2000).

<sup>19</sup> *See id.*

<sup>20</sup> *See State ex rel. Nixon v. Continental Ventures Inc.*, 284 S.W.3d 114, 119 (Mo. Ct. App. 2002).

<sup>21</sup> *See id.*

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damage to the nearby east fork of the Black River and Johnson Shut-ins State Park, including the destruction of the park superintendent's home.<sup>22</sup>

- **Settled 2008:**

o Breakdown of Settlement:

- \$84,156,000.00 to plaintiff for natural resource damages
- \$2,000,000.00 to plaintiff for compensatory damages
- \$52,000,000.00 to plaintiff for restoration and remediation
- \$2,000,000.00 to plaintiff for monitoring payments
- \$2,400,000.00 to plaintiff for tax base support
- \$7,000,000.00 to plaintiff to fund the formation of a Taum Sauk Tourism and Economic Development Non-profit entity
- \$18,000,000.00 to plaintiff to be deposited into State of Missouri
- Parks Earnings Fund
- \$2,000,000.00 to plaintiff for payment to the State of Missouri Reynolds County School Fund
- \$3,000,000.00 to plaintiff for payment to Reynolds County Educational Enrichment Fund<sup>23</sup>

**2006:** This petition alleges that defendants misrepresented their respective average wholesale prices (AWP) and wholesale acquisition costs (WAC) in connection with their reporting of their product pricing information to First Data Bank, Inc., a consolidator and publisher of prescription drug pricing information. According to the petition, the alleged drug pricing scheme defrauded the Missouri Medicaid Program, causing it to pay excessive reimbursement to Medicaid providers. The petition contains three counts: Count I alleges violation of the Missouri Health Care Payment Fraud and Abuse Act, Section 191.900, et seq.; Count II is a common law fraud claim; Count III alleges violation of the Missouri Merchandising Practices Act, Section 407.010, et seq. Plaintiffs seek injunctive relief, restitution to the State of Missouri,

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<sup>22</sup> *Nixon sues Ameren, seeks compensation and punitive damages for state for Taum Sauk disaster*, Attorney General News Releases, OFFICE OF THE ATTORNEY GENERAL, <http://ago.mo.gov/newsreleases/2006/121306b.htm>.

<sup>23</sup> *State of Missouri v. Union Elec.Co.*, 2008 WL 2009670 (Mo.Cir. January 09, 2008).

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actual damages, punitive damages, pre-judgment interest, treble civil penalties, costs, and attorneys' fees.<sup>24</sup>

- **Settled 2009:** Missouri gets \$2.5 million in Medicaid fraud settlement. Four pharmaceutical companies will be making payments to the state of Missouri as part of a nationwide settlement. The companies will pay a total of \$124 million to settle accusations that they violated the False Claims Act. Missouri's share of the settlement will be \$2.5 million, according to a statement issued Monday by the office of Missouri Attorney General Chris Koster.<sup>25</sup>

#### D. Oregon

**1991:** Attorney-General filed suit against Adult Student Housing, Inc., a non-profit corporation, alleging, *inter alia*, misapplication/diversion of charitable assets and breach of fiduciary duties. The Attorney-General sought punitive damages in the amount of \$1 million.

**1999:** Attorney General Hardy Myers today disbursed to Mt. Hood Community College (MHCC) \$2.01 million in settlement monies obtained from two developers who unlawfully transferred property constructed and managed by charitable corporation to various for-profit corporations they owned and controlled.<sup>26</sup>

**2009:** Under pressure from Portland business and political leaders, Oregon Attorney-General John Kroger dropped a lawsuit to recover \$220 million in punitive damages from a large Portland employer. As part of the deal with Kroger, Portland-based Daimler Trucks North America agreed to pay \$150,000 into a fund for Oregon crime victims and up to an additional \$300,000 should the company pull its headquarters out of Portland within three years.

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<sup>24</sup> *State ex rel. Nixon v. Mylan Labs.*, 2006 U.S. Dist. LEXIS 32570 (E.D. Mo. May 23, 2006).

<sup>25</sup> *Missouri Gets \$2.5 Million in Medicaid Fraud Settlement* (Oct. 20, 2009), <http://sbj.net/Main.asp?SectionID=18&SubSectionID=23&ArticleID=85624>.

<sup>26</sup> *Mt. Hood Community College Receives \$2.01 Million in Settlement Monies*, OREGON DEPARTMENT OF JUSTICE (Oct. 11, 1999), <http://www.doj.state.or.us/releases/1999/re1101199.shtml>

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**2009:** Adidas Case - Oregon Assistant Attorney-General Frederick Ruby said in court filings that state law requires that 60 percent of the case's \$137 million punitive damages award be deposited in a state crime victim's assistance program. The state sought to intervene to collect its share of the award.<sup>27</sup> Subsequently, the district court drastically reduced the amount of punitive damages to \$15 million.<sup>28</sup> There is no record available of whether the State was able to collect its punitive damage award, however, subsequent developments make it somewhat of a moot point.

- In *Patton v. Target*, decided in 2009, the Oregon Court of Appeals recognized the state's right to intervene in a case with a large punitive damages award. In that case, the parties had reached a settlement that did not involve the state. The state, a non-party, appealed the judgment of dismissal, arguing that the parties could not bargain away the state's share of the award. Most importantly, despite allowing the state to intervene, the Oregon Court of Appeals subsequently held that when the parties reached a settlement before final judgment, the state has no right to collect any portion of a punitive damages verdict before judgment has been entered.<sup>29</sup> Accordingly, the parties are free to reach a settlement without the state's consent, even after a jury verdict including punitive damages, and without giving the state any share of the settlement.<sup>30</sup>

#### **IV. Summary and Copy of Each State's Punitive Damages Laws**

##### **A. Virginia**

**Summary** - Under Virginia law, punitive damages generally are recoverable. The Virginia legislature has imposed a statutory \$350,000 cap on punitive damage awards. The

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<sup>27</sup> See Motion to Intervene, *Adidas America v. Payless Shoesource, Inc.*, 2008 WL 2259973 (D. Or. May 2008).

<sup>28</sup> See *Adidas America v. Payless Shoesource, Inc.*, 2008 WL 4279812 (D. Or. Sep. 12, 2008).

<sup>29</sup> See *Patton v. Target v. State of Oregon*, 242 P.3d 611 (Or. 2010).

<sup>30</sup> See *Patton v. Target Corp.*, 242 P.3d 611, 619 (Or. 2010).

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conduct required to obtain an award of punitive damages in Virginia is malice. Virginia courts apply the clear and convincing evidence standard as the burden of proof for punitive damages.<sup>31</sup> There is no definitional language indicating that the term “any action” in the punitive damages statute is limited to unintentional tort actions.<sup>32</sup> The plain meaning of the statute dictates that the cap on punitive damage awards applies to the action as a whole and not to each defendant.<sup>33</sup>

**Statute – Va. Code Ann. § 8.01-38.1. Limitation on recovery of punitive damages**

In any action accruing on or after July 1, 1988, including an action for medical malpractice under Chapter 21.1 (§ 8.01-581.1 et seq.), the total amount awarded for punitive damages against all defendants found to be liable shall be determined by the trier of fact. In no event shall the total amount awarded for punitive damages exceed \$ 350,000. The jury shall not be advised of the limitation prescribed by this section. However, if a jury returns a verdict for punitive damages in excess of the maximum amount specified in this section, the judge shall reduce the award and enter judgment for such damages in the maximum amount provided by this section.<sup>34</sup>

**B. Florida**

**Summary** - Under Florida law, punitive damages generally are recoverable. However, a percentage of any punitive damage award (35%) must be returned to the state. The conduct required to obtain an award of punitive damages in Florida is gross negligence. The conduct required for recovery of punitive damages must be proved by clear and convincing evidence.

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<sup>31</sup> *Flippo v. CSC Associates III, L.L.C.*, 547 S.E.2d 216 (2001).

<sup>32</sup> *Wackenhut Applied Technologies Ctr., Inc. v. Sygnatron Protection Sys.*, 979 F.2d 980 (4th Cir. 1992).

<sup>33</sup> *Al-Abood v. El-Shamari*, 217 F.3d 225, 2000 U.S. App. LEXIS 15437 (4th Cir. 2000).

<sup>34</sup> See Va. Code Ann. § 8.01-38.1. (2011).

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**Statutes - § 768.72. Pleading in civil actions; claim for punitive damages**

(1) In any civil action, no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages. The claimant may move to amend her or his complaint to assert a claim for punitive damages as allowed by the rules of civil procedure. The rules of civil procedure shall be liberally construed so as to allow the claimant discovery of evidence which appears reasonably calculated to lead to admissible evidence on the issue of punitive damages. No discovery of financial worth shall proceed until after the pleading concerning punitive damages is permitted

(2) A defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence. As used in this section, the term:

(a) "Intentional misconduct" means that the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage.

(b) "Gross negligence" means that the defendant's conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.

(3) In the case of an employer, principal, corporation, or other legal entity, punitive damages may be imposed for the conduct of an employee or agent only if the conduct of the employee or agent meets the criteria specified in subsection (2) and:

(a) The employer, principal, corporation, or other legal entity actively and knowingly participated in such conduct;



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(b) The officers, directors, or managers of the employer, principal, corporation, or other legal entity knowingly condoned, ratified, or consented to such conduct; or

(c) The employer, principal, corporation, or other legal entity engaged in conduct that constituted gross negligence and that contributed to the loss, damages, or injury suffered by the claimant.

(4) The provisions of this section shall be applied to all causes of action arising after the effective date of this act.

#### **§ 768.725. Punitive damages; burden of proof**

In all civil actions, the plaintiff must establish at trial, by clear and convincing evidence, its entitlement to an award of punitive damages. The "greater weight of the evidence" burden of proof applies to a determination of the amount of damages.

#### **§ 768.73. Punitive damages; limitation**

(1) (a) Except as provided in paragraphs (b) and (c), an award of punitive damages may not exceed the greater of:

1. Three times the amount of compensatory damages awarded to each claimant entitled thereto, consistent with the remaining provisions of this section; or

2. The sum of \$ 500,000.

(b) Where the fact finder determines that the wrongful conduct proven under this section was motivated solely by unreasonable financial gain and determines that the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was actually known by the managing agent, director, officer, or other person responsible for making

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policy decisions on behalf of the defendant, it may award an amount of punitive damages not to exceed the greater of:

1. Four times the amount of compensatory damages awarded to each claimant entitled thereto, consistent with the remaining provisions of this section; or

2. The sum of \$ 2 million.

(c) Where the fact finder determines that at the time of injury the defendant had a specific intent to harm the claimant and determines that the defendant's conduct did in fact harm the claimant, there shall be no cap on punitive damages.

(d) This subsection is not intended to prohibit an appropriate court from exercising its jurisdiction under s. 768.74 in determining the reasonableness of an award of punitive damages that is less than three times the amount of compensatory damages.

(2) (a) Except as provided in paragraph (b), punitive damages may not be awarded against a defendant in a civil action if that defendant establishes, before trial, that punitive damages have previously been awarded against that defendant in any state or federal court in any action alleging harm from the same act or single course of conduct for which the claimant seeks compensatory damages. For purposes of a civil action, the term "the same act or single course of conduct" includes acts resulting in the same manufacturing defects, acts resulting in the same defects in design, or failure to warn of the same hazards, with respect to similar units of a product.

(b) In subsequent civil actions involving the same act or single course of conduct for which punitive damages have already been awarded, if the court determines by clear and convincing evidence that the amount of prior punitive damages awarded was insufficient to punish that defendant's behavior, the court may permit a jury to consider an award of subsequent punitive damages. In permitting a jury to consider awarding subsequent punitive damages, the court shall make specific findings of fact in the record to support its conclusion. In addition, the court may consider whether the defendant's act or course of conduct has ceased. Any subsequent punitive damage awards must be reduced

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by the amount of any earlier punitive damage awards rendered in state or federal court.

(3) The claimant attorney's fees, if payable from the judgment, are, to the extent that the fees are based on the punitive damages, calculated based on the final judgment for punitive damages. This subsection does not limit the payment of attorney's fees based upon an award of damages other than punitive damages.

(4) The jury may neither be instructed nor informed as to the provisions of this section.

(5) The provisions of this section shall be applied to all causes of action arising after the effective date of this act.

**§ 768.735. Punitive damages; exceptions; limitation**

(1) Sections 768.72(2)-(4), 768.725, and 768.73 do not apply to any civil action based upon child abuse, abuse of the elderly under chapter 415, or abuse of the developmentally disabled. Such actions are governed by applicable statutes and controlling judicial precedent. This section does not apply to claims brought pursuant to s. 400.023 or s. 429.29.

(2) (a) In any civil action based upon child abuse, abuse of the elderly under chapter 415, or abuse of the developmentally disabled, and involving the award of punitive damages, the judgment for the total amount of punitive damages awarded to a claimant may not exceed three times the amount of compensatory damages awarded to each person entitled thereto by the trier of fact, except as provided in paragraph (b). This subsection does not apply to any class action.

(b) If any award for punitive damages exceeds the limitation specified in paragraph (a), the award is presumed to be excessive and the defendant is entitled to remittitur of the amount in excess of the limitation unless the claimant demonstrates to the court by clear and convincing evidence that the award is not excessive in

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light of the facts and circumstances that were presented to the trier of fact.

(c) This subsection is not intended to prohibit an appropriate court from exercising its jurisdiction under [s. 768.74](#) in determining the reasonableness of an award of punitive damages which is less than three times the amount of compensatory damages.

(d) The jury may not be instructed or informed as to the provisions of this section.

(3) This section is remedial in nature and shall take effect upon becoming a law.

#### **§ 768.736. Punitive damages; exceptions for intoxication**

Sections 768.725 and 768.73 do not apply to any defendant who, at the time of the act or omission for which punitive damages are sought, was under the influence of any alcoholic beverage or drug to the extent that the defendant's normal faculties were impaired, or who had a blood or breath alcohol level of 0.08 percent or higher.

#### **§ 768.737. Punitive damages; application in arbitration**

Where punitive damages are available as a remedy in an arbitration proceeding, ss. 768.72, 768.725, and 768.73 apply. When an award of punitive damages is made in an arbitration proceeding, the arbitrator who renders the award must issue a written opinion setting forth the conduct which gave rise to the award and how the arbitrator applied the standards in s. 768.72 to such conduct.

**TITLE 69 DEPARTMENT OF FINANCIAL SERVICES  
DIVISION 69I DIVISION OF ACCOUNTING AND  
AUDITING, CHAPTER 69I-52 PUNITIVE DAMAGES**

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### **69I-52.001 Applicability and Purpose.**

The purpose of this chapter is to provide uniform procedures for reporting, calculating, and paying the state's statutory share of punitive damage awards. The rules apply to any person or entity who is a party in a civil suit when punitive damages are awarded. These rules shall apply to civil actions in which a verdict or judgment are entered on or after April 8, 1992

### **69I-52.002 Definitions.**

For the purposes of this chapter:

- (1) "Best interests of the state" means the best financial interests of the state.
- (2) "Claimant" means a non-state litigant to whom punitive damages are payable.
- (3) "Costs" means pre-judgment litigation costs awarded in a final judgment but does not include attorneys fees.
- (4) "Department" means the Department of Financial Services.
- (5) "Final Judgment" shall have that meaning and form as provided by Chapter 55, Florida Statutes.
- (6) "Obligor" means a litigant from whom punitive damages are payable.
- (7) "Parties" means collectively, all claimants and all obligors.
- (8) "State" means the Public Medical Assistance Trust Fund or the State of Florida, General Revenue Fund.

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### **69I-52.003 Department Address for Document Delivery.**

(1) Unless otherwise provided, documents sent to the Department should be addressed to the Clerk, Division of Accounting and Auditing, Department of Financial Services, 200 East Gaines Street, Tallahassee, Florida 32399-0354. Facsimile transmissions should be sent to (850) 414-6034.

(2) If the Department has intervened or otherwise made a formal appearance in a case, all documents to be served on the Department should be addressed to the named Department attorney, Office of General Counsel, Department of Financial Services, 200 East Gaines Street, Tallahassee, Florida 32399-0333. Facsimile transmissions should be sent to (850) 488-0697.

(3) All jury verdicts received by the Division of Treasury should be transmitted within five (5) business days to the Clerk, Division of Accounting and Auditing.

### **69I-52.004 Collection of Statutory Share.**

(1) The calculation of monies due the state for its statutory share of punitive damage awards is a one (1) step process: Multiply the punitive damages awarded in the verdict by .35, the resulting product is the amount of monies due the state.

(2) Nothing herein shall be construed to limit the stat's right to pre and post judgment interest computed at the statutory rate through the date of remittance of monies to the state.

(3) The Department will utilize all legal means to enforce the right of the state to its statutory share of punitive damage awards and nothing herein shall be construed as precluding the Department from pursuing any civil action for collection or from assignment of collections to state attorneys, other state agencies, subdivisions or private collection agents.

### **69I-52.005 Final Judgments Awarding Punitive Damages.**

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(1) The claimant and the obligor shall, and the Department may, cause the state's statutory share to be reflected in all proposed final judgments awarding punitive damages.

(2) Each proposed final judgment shall include the statement "for which let execution issue, " after the specific provision awarding the state's statutory share of punitive damages.

(3) The claimant shall, and the Department may, cause a final judgment awarding punitive damages to be recorded in the county wherein the cause of action arose or where the obligor resides.

(4) After a final judgment has been entered awarding punitive damages, the clerk of the court should, within five (5) business days, transmit a copy of the final judgment to the Clerk, Division of Accounting and Auditing.

#### **69I-52.006 Settlements by the Parties.**

(1) After a verdict has been rendered awarding punitive damages, the Department shall be apprised of any settlement negotiations. The Department will not interfere with the original parties reaching settlement of their dispute, but the Department does not and will not delegate authority to the original parties to negotiate, to settle or to otherwise compromise the state's proportionate share. A valid settlement document must include the statutory formula for calculation of the state's proportionate share. Once the original parties reach a tentative settlement agreement the Department shall be notified in writing within two (2) business days, of the settlement terms.

(2) When the Department deems it to be in the best interests of the state, costs may be recouped by the claimant prior to calculation of the state's proportionate share. No recoupment of costs by the Claimant will be authorized when the full amount of awarded damages is made or is expected to be made. Unless the parties have entered into a valid settlement agreement to the contrary, it will be presumed that the claimant will collect the entire verdict

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award.

(3) If the original parties enter into a valid settlement agreement for payment of less than the total monies awarded in the jury verdict, calculation of monies due to the state for its proportionate share of punitive damage awards is a four (4) step process:

(a) From the total monies to be collected subtract costs if the Department has determined the deduction of costs to be in the best interests of the state, to determine net collections;

(b) Divide the verdict punitive damages awarded by the verdict total compensatory and punitive damages awarded to determine the ratio;

(c) Multiply the ratio by .35 to determine the multiplier; and,

(d) Multiply net collections by the multiplier to determine the amount of monies due the state.

#### **69I-52.007 Payments to the Department.**

(1) All payments of the state's statutory share shall be made by cashier's check, money order or attorney's trust account check unless other prior satisfactory arrangements have been made with the Department.

(2) All payments of the state's statutory share shall be sent to the Department by U.S. Certified Mail, Return Receipt Requested or Express Mail on the same day funds are disbursed between the parties or within five (5) days after monies are obtained by collection efforts by execution on the final judgment.

(3) The Department will execute all satisfactions on behalf of the state regardless of the payee. The original parties should include the Department as the state signatory for any satisfaction that is intended to be recorded or presented to the court.

### C. Missouri



**Summary** - Under Missouri law, punitive damages generally are recoverable except in wrongful death actions. For most actions, punitive damages are capped at five hundred thousand dollars or five times the net amount of the judgment awarded to the plaintiff against the defendant. Additionally, **fifty percent** of all punitive damage awards go to a Tort Victims Compensation Fund managed by the state. The conduct required to obtain an award of punitive damages in Missouri is more egregious than gross negligence, but malice need not be proved. The burden of proof required for recovery of punitive damages in Missouri courts is a preponderance of the evidence.

**Statutes - Mo. Rev. Stat. § 510.263. Bifurcated trial may be requested by any party if punitive damages involved, procedure -- post-trial motion for credit on punitive damages, procedure -- credit not allowed, when -- doctrine of remittitur and additur applied to awards**

1. All actions tried before a jury involving punitive damages, including tort actions based upon improper health care, shall be conducted in a bifurcated trial before the same jury if requested by any party.
2. In the first stage of a bifurcated trial, in which the issue of punitive damages is submissible, the jury shall determine liability for compensatory damages, the amount of compensatory damages, including nominal damages, and the liability of a defendant for punitive damages. Evidence of defendant's financial condition shall not be admissible in the first stage of such trial unless admissible for a proper purpose other than the amount of punitive damages.
3. If during the first stage of a bifurcated trial the jury determines that a defendant is liable for punitive damages, that jury shall determine, in a second stage of trial, the amount of punitive damages to be awarded against such defendant. Evidence of such defendant's net worth shall be admissible during the second stage of such trial.

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4. Within the time for filing a motion for new trial, a defendant may file a post-trial motion requesting the amount awarded by the jury as punitive damages be credited by the court with amounts previously paid by the defendant for punitive damages arising out of the same conduct on which the imposition of punitive damages is based. At any hearing, the burden on all issues relating to such a credit shall be on the defendant and either party may introduce relevant evidence on such motion. Such a motion shall be determined by the trial court within the time and according to procedures applicable to motions for new trial. If the trial court sustains such a motion the trial court shall credit the jury award of punitive damages by the amount found by the trial court to have been previously paid by the defendant arising out of the same conduct and enter judgment accordingly. If the defendant fails to establish entitlement to a credit under the provisions of this section, or the trial court finds from the evidence that the defendant's conduct out of which the prior punitive damages award arose was not the same conduct on which the imposition of punitive damages is based in the pending action, or the trial court finds the defendant unreasonably continued the conduct after acquiring actual knowledge of the dangerous nature of such conduct, the trial court shall disallow such credit, or, if the trial court finds that the laws regarding punitive damages in the state in which the prior award of punitive damages was entered substantially and materially deviate from the law of the state of Missouri and that the nature of such deviation provides good cause for disallowance of the credit based on the public policy of Missouri, then the trial court may disallow all or any part of the credit provided by this section.

5. The credit allowable under this section shall not apply to causes of action for libel, slander, assault, battery, false imprisonment, criminal conversation, malicious prosecution or fraud.

6. The doctrines of remittitur and additur, based on the trial judge's assessment of the totality of the surrounding circumstances, shall apply to punitive damage awards.

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7. As used in this section, "punitive damage award" means an award for punitive or exemplary damages or an award for aggravating circumstances.

8. Discovery as to a defendant's assets shall be allowed only after a finding by the trial court that it is more likely than not that the plaintiff will be able to present a submissible case to the trier of fact on the plaintiff's claim of punitive damages.

**§ 510.265. Limitations on punitive damages in certain cases**

1. No award of punitive damages against any defendant shall exceed the greater of:

(1) Five hundred thousand dollars; or

(2) Five times the net amount of the judgment awarded to the plaintiff against the defendant.

Such limitations shall not apply if the state of Missouri is the plaintiff requesting the award of punitive damages, or the defendant pleads guilty to or is convicted of a felony arising out of the acts or omissions pled by the plaintiff.

2. The provisions of this section shall not apply to civil actions brought under section 213.111, that allege a violation of section 213.040, 213.045, 213.050, or 213.070, to the extent that the alleged violation of section 213.070, relates to or involves a violation of section 213.040, 213.045, or 213.050, or subdivision (3) of section 213.070, as it relates to housing.

**§ 537.675. Tort victims' compensation fund established--definitions--notification of punitive damage award to Attorney-**

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## **General, lien for deposit into fund--legal services for low-income people**

1. As used in sections 537.675 through 537.693, the following terms mean:

- (1) “Annual claims”, that period of time commencing on the first day of January of every year after December 31, 2002, and ending on the last day of that calendar year;
- (2) “Commission”, the labor and industrial relations commission;
- (3) “Division”, the division of workers' compensation;
- (4) “Punitive damage final judgment” , an award for punitive damages excluding interest that is no longer subject to review by courts of this state or of the United States;
- (5) “Uncompensated tort victim”, a person who:

- (a) Is a party in a personal injury or wrongful death lawsuit; or is a tort victim whose claim against the tort-feasor has been settled for the policy limits of insurance covering the liability of such tort-feasor and such policy limits are inadequate in light of the nature and extent of damages due to the personal injury or wrongful death;

- (b) Unless described in paragraph (a) of this subdivision:

- a. Has obtained a final monetary judgment in that lawsuit described in paragraph (a) of this subdivision against a tort-feasor for personal injuries, or wrongful death in a case in which all appeals are final;

- b. Has exercised due diligence in enforcing the judgment; and

- c. Has not collected the full amount of the judgment;

- (c) Is not a corporation, company, partnership or other incorporated or unincorporated commercial entity;

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(d) Is not any entity claiming a right of subrogation;

(e) Was not on house arrest and was not confined in any federal, state, regional, county or municipal jail, prison or other correctional facility at the time he or she sustained injury from the tort-feasor;

(f) Has not pleaded guilty to or been found guilty of two or more felonies, where such two or more felonies occurred within ten years of the occurrence of the tort in question, and where either of such felonies involved a controlled substance or an act of violence; and

(g) Is a resident of the State of Missouri or sustained personal injury or death by a tort which occurred in the state of Missouri.

2. There is created the “Tort Victims' Compensation Fund”. Unexpended moneys in the fund shall not lapse at the end of the biennium as provided in section 33.080, RSMo.

3. Any party receiving a judgment final for purposes of appeal for punitive damages in any case filed in any division of any circuit court of the state of Missouri shall notify the Attorney-General of the state of Missouri of such award, except for actions claiming improper health care pursuant to chapter 538, RSMo. The State of Missouri shall have a lien for deposit into the tort victims' compensation fund to the extent of fifty percent of the punitive damage final judgment which shall attach in any such case after deducting attorney's fees and expenses. In each case, the Attorney-General shall serve a lien notice by certified mail or registered mail upon the party or parties against whom the state has a claim for collection of its share of a punitive damage final judgment. On a petition filed by the state, the court, on written notice to all interested parties, shall adjudicate the rights of the parties and enforce the lien. The lien shall not be satisfied out of any recovery until the attorney's claim for fees and expenses is paid. The state can file its lien in all cases where punitive damages are awarded upon the entry of the judgment final for purposes of appeal. The state cannot enforce its lien until there is a punitive damage final judgment. Cases resolved by arbitration, mediation or compromise settlement prior to a punitive damage final judgment are exempt

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from the provisions of this section. Nothing in this section shall hinder or in any way affect the right or ability of the parties to any claim or lawsuit to compromise or settle such claim or litigation on any terms and at any time the parties desire.

4. The state of Missouri shall have no interest in or right to intervene at any stage of any judicial proceeding pursuant to this section, except to enforce its lien rights as provided in subsection 3 of this section.

5. Twenty-six percent of all payments deposited into the tort victims' compensation fund and all interest accruing on the principal regardless of source or designation shall be transferred to the basic civil legal services fund established in section 477.650, RSMo. Moneys in the tort victims' compensation fund shall not be used to pay any portion of a refund mandated by article X, section 18 of the constitution.

#### D. Oregon

**Summary** - Under Oregon law, punitive damages generally are recoverable except in pharmaceutical product liability actions, actions against medical practitioners and in tort actions against public entities. Additionally, **sixty percent** of punitive damage awards are go toward the Criminal Injuries Compensation Account of the Department of Justice Crime Victims' Assistance Section, managed by the State. The conduct required to obtain an award of punitive damages in Oregon is more egregious than gross negligence, but malice need not be proved. Oregon statutorily requires clear and convincing evidence to support an award of punitive damages.

**Statutes - Or. Rev. Stat. § 31.725 (2011)Pleading punitive damages; motion to amend pleading to assert claim for punitive damages; hearing.**

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(1) A pleading in a civil action may not contain a request for an award of punitive damages except as provided in this section.

(2) At the time of filing a pleading with the court, the pleading may not contain a request for an award of punitive damages. At any time after the pleading is filed, a party may move the court to allow the party to amend the pleading to assert a claim for punitive damages. The party making the motion may submit affidavits and documentation supporting the claim for punitive damages. The party or parties opposing the motion may submit opposing affidavits and documentation.

(3) The court shall deny a motion to amend a pleading made under the provisions of this section if:

(a) The court determines that the affidavits and supporting documentation submitted by the party seeking punitive damages fail to set forth specific facts supported by admissible evidence adequate to avoid the granting of a motion for a directed verdict to the party opposing the motion on the issue of punitive damages in a trial of the matter; or

(b) The party opposing the motion establishes that the timing of the motion to amend prejudices the party's ability to defend against the claim for punitive damages.

(4) The court may grant a continuance on a motion under this section to allow a party opposing the motion to conduct such discovery as is necessary to establish one of the grounds for denial of the motion specified in subsection (3) of this section. If the court grants the motion, the court may continue the action to allow such discovery as the defendant may require to defend against the claim for punitive damages.

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(5) Subject to subsection (4) of this section, the court shall conduct a hearing on a motion filed under this section not more than 30 days after the motion is filed and served. The court shall issue a decision within 10 days after the hearing. If no decision is issued within 10 days, the motion shall be considered denied.

(6) Discovery of evidence of a defendant's ability to pay shall not be allowed by a court unless and until the court grants a motion to amend a pleading under this section.

**31.730 Standards for award of punitive damages; required review of award by court; additional reduction of award for remedial measures.**

(1) Punitive damages are not recoverable in a civil action unless it is proven by clear and convincing evidence that the party against whom punitive damages are sought has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others.

(2) If an award of punitive damages is made by a jury, the court shall review the award to determine whether the award is within the range of damages that a rational juror would be entitled to award based on the record as a whole, viewing the statutory and common-law factors that allow an award of punitive damages for the specific type of claim at issue in the proceeding.

(3) In addition to any reduction that may be made under subsection (2) of this section, upon the motion of a defendant the court may reduce the amount of any judgment requiring the payment of punitive damages entered against the defendant if the defendant establishes that the defendant has taken remedial measures that are reasonable under the circumstances to prevent reoccurrence of the conduct that gave rise to the claim for punitive damages. In reducing awards of punitive damages under the provisions of this subsection, the court shall consider the amount of any previous



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judgment for punitive damages entered against the same defendant for the same conduct giving rise to a claim for punitive damages.

**31.735 Distribution of punitive damages; notice to Department of Justice; order of application.**

(1) Upon the entry of a verdict including an award of punitive damages, the Department of Justice shall become a judgment creditor as to the punitive damages portion of the award to which the Criminal Injuries Compensation Account is entitled pursuant to paragraph (b) of this subsection, and the punitive damage portion of an award shall be allocated as follows:

(a) Forty percent shall be paid to the prevailing party. The attorney for the prevailing party shall be paid out of the amount allocated under this paragraph, in the amount agreed upon between the attorney and the prevailing party. However, in no event may more than 20 percent of the amount awarded as punitive damages be paid to the attorney for the prevailing party.

(b) Sixty percent shall be paid to the Criminal Injuries Compensation Account of the Department of Justice Crime Victims' Assistance Section to be used for the purposes set forth in ORS chapter 147. However, if the prevailing party is a public entity, the amount otherwise payable to the Criminal Injuries Compensation Account shall be paid to the general fund of the public entity.

(2) The party preparing the proposed judgment shall assure that the judgment identifies the judgment creditors specified in subsection (1) of this section.

(3) Upon the entry of a verdict including an award of punitive damages, the prevailing party shall provide notice of the verdict to the Department of Justice. In addition, upon entry of a judgment based on a verdict that includes an award of punitive damages, the

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prevailing party shall provide notice of the judgment to the Department of Justice. The notices required under this subsection must be in writing and must be delivered to the Department of Justice Crime Victims' Assistance Section in Salem, Oregon within five days after the entry of the verdict or judgment.

(4) Whenever a judgment includes both compensatory and punitive damages, any payment on the judgment by or on behalf of any defendant, whether voluntary or by execution or otherwise, shall be applied first to compensatory damages, costs and court-awarded attorney fees awarded against that defendant and then to punitive damages awarded against that defendant unless all affected parties, including the Department of Justice, expressly agree otherwise, or unless that application is contrary to the express terms of the judgment.

(5) Whenever any judgment creditor of a judgment which includes punitive damages governed by this section receives any payment on the judgment by or on behalf of any defendant, the judgment creditor receiving the payment shall notify the attorney for the other judgment creditors and all sums collected shall be applied as required by subsections (1) and (4) of this section, unless all affected parties, including the Department of Justice, expressly agree otherwise, or unless that application is contrary to the express terms of the judgment.

**31.740 When award of punitive damages against health practitioner prohibited.**

Punitive damages may not be awarded against a health practitioner if . . . .

## **TEXAS**

### **1) Is the Attorney General elected or appointed;**

In Texas, the attorney general is elected, not appointed.<sup>35</sup>

### **2) Is there a written policy of the Attorney General's office on pursuing, collecting and or dispersing punitive damages. If so please provide a copy of the policy;**

There is no written policy of the AG's office on pursuing, collecting or dispersing punitive damages.

### **3) Does the Attorney General have the sole authority to institute litigation and seek punitive damages. If not with whom is this authority shared to litigate;**

There appears to be shared authority to institute litigation and seek exemplary or treble damages under the Texas Deceptive Trade Practices-Consumer Protection Act (Tex Bus & Com. § 17.46). Under §17.45(4), a consumer is defined as an individual, partnership, corporation, the state, or a subdivision of an agency of the state. Section 17.50(b) allows a consumer to seek treble/exemplary damages. Since the definition of consumer encompasses both the state and person, shared authority exists under this statute.

The Attorney General's powers are governed by the Texas Constitution (Tex. Const. Art 4 sec. 22) and various statutes. *See e.g.*, Tex. Gov't Code Ann. Sec. 402.001 (West 2011). Once

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<sup>35</sup> [http://ballotpedia.org/wiki/index.php/Texas\\_Attorney\\_General\\_election,\\_2010](http://ballotpedia.org/wiki/index.php/Texas_Attorney_General_election,_2010) (last accessed June 8, 2011).

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a complaint is received, the Attorney General's office has broad discretion as to whether or not they will pursue the action.

**4) From 1990 until the present what is the actual experience of the Attorney General's office on punitive damages. Name and type of case where punitive damages were awarded. Amount awarded jury or no jury case. Amount of punitive damages collected. Amount of punitive damages distributed and to whom distributed;**

There are very few cases where the Attorney General initiated a cause of action that went to a jury. It is more common for the Attorney General to enter into settlement agreements than for a case to go to trial.<sup>36</sup> However, in 2009, the Attorney General brought a cause of action against an individual for abusing his power as a board member of a charity to “protect the public interest in the administration of charitable assets held by the Foundation.”<sup>37</sup> In this case, punitive damages of over 10 million were awarded by a jury. However, this award was subsequently overturned by the Texas Court of Appeals.<sup>38</sup>

More recently, in 2011, the AG brought a cause of action against Actavis and Purepac Pharmaceuticals for overcharging Medicaid. The verdict sheet, available online<sup>39</sup> shows how the damages were calculated. The jury gave the maximum punitive fine (\$10,000) for each instance that Actavis/Purepac overcharged the state for its drugs, permitted by §36.052 (3)(B) of the

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<sup>36</sup> See State of Texas v. Roxanne Settlement (2005) *available at*

[https://www.oag.state.tx.us/newspubs/releases/2005/112805medicaid\\_settlement.pdf](https://www.oag.state.tx.us/newspubs/releases/2005/112805medicaid_settlement.pdf); State of Texas v. Caremark (2008)

[https://www.oag.state.tx.us/newspubs/releases/2008/021408caremark\\_afj.pdf](https://www.oag.state.tx.us/newspubs/releases/2008/021408caremark_afj.pdf)

<sup>37</sup> Tex. Prop. Code Ann. §§ 123.002-005 (2008.)

<sup>38</sup> 2009 Tex. App. LEXIS 3881

<sup>39</sup> <http://www.scribd.com/doc/49365822/Texas-Ex-Rel-Ven-A-Care-v-Alpha-Verdict>

Medicaid Fraud Act. The penalty provided by this statute is punitive in nature; one of the considerations for awarding these damages is deterring future unlawful acts.<sup>40</sup>

**5) Please provide a copy of the state's statute guiding the trial and award of punitive damages.**

The Texas legislature changed the criteria allowing for a punitive damages award by passing H.B.4. This provides that the jury's decision as to both liability and damages must be unanimous. In addition to the unanimity requirement, the amendment (and now the code Texas Civ. Prac. Rem Code § 41.003(e) requires a jury instruction with respect to the amount of damages, but not liability. This caused some confusion amongst lawyers, but the Texas Supreme Court addressed this issue by amending their Rules of Civil Procedure. Currently, Tex. R. Civ. Pro. § 292(b) provides that a jury may award punitive damages if they are unanimous as to both liability and the amount of damages. The effect of this change raised the bar, making it more difficult for a jury to award punitive damages.

The statute that governs punitive damages in Texas is §41.003. Under this statute, punitive damages may only be awarded when the claimant proves by clear and convincing evidence that their harm results from fraud, malice or gross negligence.<sup>41</sup> With the exception of Section 15.21 of the Business Commerce Code and Subchapter E of the Deceptive Trade Practices-Consumer Protection Act, §41.003 applies to all punitive damage awards.

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<sup>40</sup> TX HUM RES § 41.008 (2011)

<sup>41</sup> Texas Civ. Prac. & Rem. Code §41.003 (2009).

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Exemplary damages are capped by §41.008; damages may not exceed an amount equal to the greater of: (1) (a) two times the amount of economic damages; plus (b) an amount equal to any noneconomic damages found by the jury, not to exceed \$750,000; or (2) \$200,000.<sup>42</sup>

## **NEW YORK**

### **1) Is the Attorney General elected or appointed;**

The Attorney General in New York is elected, not appointed<sup>43</sup>.

### **2) Is there a written policy of the Attorney General's office on pursuing, collecting and or dispersing punitive damages. If so please provide a copy of the policy;**

There is no written policy of the AG's office on pursuing, collecting or dispersing punitive damages. The former rule governing the award of punitive damages was CPLR 8701), but it was repealed in 1994. CPLR 8701 was a component of a 1992 revenue raising bill where 20% of a punitive damages award received by a private party in any civil action was payable to the state.<sup>44</sup> However, currently, punitive damages awards are statutorily provided and also guided by the common law.

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<sup>42</sup> Texas Civ. Prac. & Rem. Code §41.008 (2009).

<sup>43</sup> <http://www.naag.org/current-attorneys-general.php>, (last accessed June 8, 2011).

<sup>44</sup> Joseph Eric Olivia, *THE SURVEY OF NEW YORK PRACTICE: CIVIL PRACTICE LAW AND RULE*: CPLR 8701: New York Legislature adopts a statute allocating twenty percent of punitive damage awards to the state general fund, 67 St. John's L. Rev. 159 (1993).

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The AGs is empowered to bring a cause of action by New York Executive Law § 63. Specifically, sections 63(1) and (12) give the Attorney General the power to bring a cause of action for repeated fraudulent acts or persistent fraud in carrying on, conducting, or transacting business.

**3) Does the Attorney General have the sole authority to institute litigation and seek punitive damages. If not with whom is this authority shared to litigate;**

The AG has shared authority, at least under the Consumer Protection Act, § 349(h), §340, and the New York False Claims Act.

**4) From 1990 until the present what is the actual experience of the Attorney General's office on punitive damages. Name and type of case where punitive damages were awarded. Amount awarded jury or no jury case. Amount of punitive damages collected. Amount of punitive damages distributed and to whom distributed;**

There are no cases from 1990 where the Attorney General brought a case that went to a jury and received a punitive damages award. Cases involving the Attorney general have settled before trial.<sup>45</sup>

**5) Please provide a copy of the state's statute guiding the trial and award of punitive damages:**

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<sup>45</sup> State of New York vs. Young Adult Institute (2011), available at [http://www.ag.ny.gov/media\\_center/2011/jan/jan18a\\_11.html](http://www.ag.ny.gov/media_center/2011/jan/jan18a_11.html); State of New York vs. Bristol-Myers Squibb, available at [http://64.106.231.10/kmslaw/gen docs/doc\\_Bristol-MyersSquibb.pdf](http://64.106.231.10/kmslaw/gen docs/doc_Bristol-MyersSquibb.pdf); New York State Medicaid Fraud Annual Report (2009), available at [http://www.ag.ny.gov/media\\_center/2010/apr/mfcu\\_2009.pdf](http://www.ag.ny.gov/media_center/2010/apr/mfcu_2009.pdf); New York State Medicaid Fraud Annual Report (2007) [http://www.ag.ny.gov/media\\_center/2008/apr/MFCU2007annualreportfinal043008\\_2.pdf](http://www.ag.ny.gov/media_center/2008/apr/MFCU2007annualreportfinal043008_2.pdf). Eli Lilly: Settles Down with State AG's (October, 2008), available at <http://www.policymed.com/2008/10/eli-lilly-settles-down-with-state-ags.html>.

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The law providing for an award of punitive, exemplary, or treble damages lies in several New York statutes as well as the common law. No single statute governs the award of these damages in New York. (*see* below statutes, common law, and model jury instructions).

### **5a) Statutes**

New York’s Consumer Protection Statute, §349(b) gives the AG the authority to “bring an action in the name and on behalf of the people of the state of New York to enjoin such unlawful acts or practices and to obtain restitution of any moneys or property obtained directly or indirectly by any such unlawful acts or practices.”<sup>46</sup> However, the punitive damages are insignificant under this section. The Court retains the discretion to increase the award of damages to an amount not to exceed three times the actual damages up to \$1,000 only if the court finds the defendant willfully or knowingly violated the act<sup>47</sup>. This amount is the ceiling unless the facts of this case involve a victim of the scheme who was a senior citizen and the scam was directed at the primary resources (home, pension, Social Security, etc.) of the senior.<sup>48</sup> In the latter case, the amount is capped at \$10,000. New York’s Consumer Protection statute has been criticized as inadequate because it only applies to deceptive practices (but not those practices that are unfair or unconscionable), there is a required showing of public impact required under existing case law, and a significant limitation on punitive damages.<sup>49</sup>

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46 McKinney Gen. Bus. Law. §349(b) (2011).

47 McKinney Gen. Bus. Law §349(h) (2011).

48 McKinney Gen. Bus. Law § 349-c(2) (2011).

49 Improving New York’s Deceptive Acts and Practices, (May 14, 2010), *available at* <http://www.empirejustice.org/issue-areas/consumer/fair-debt-collection/improving-new-yorks.html>



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Section 350 of the Consumer Protection Statute has harsher pecuniary penalties than Section 349. Section 350 prohibits false advertising in the conduct of any business, trade, or commerce or in the furnishing of any service in New York and subsection (d) authorizes the AG to seek penalties up to 5,000 for each deceptive business practice or false advertising.<sup>50</sup>

Other New York statutes provide for even greater penalties than the aforementioned statutes. For example, the New York False Claims Act, N.Y. Fin. Law §§187-194 allows the AG or any person to file suit against a person or company that obtains or withholds funds or property from the state or local government through false or fraudulent conduct. The statute provides for treble damages, civil penalties plus costs and attorneys fees.<sup>51</sup>

In addition, New York Social Services §145-B provides for treble damages if false statements are made to any Social Services program to obtain payment for items or services.

### **5b) Common Law:**

In New York, the common law has dictated the type of conduct that may give rise to a punitive damages award.<sup>52</sup> No independent cause of action exists in New York for punitive

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<sup>50</sup> McKinney Gen. Bus. Law § 350-d (2011).

<sup>51</sup> About the False Claims Act, (2008), *available at* [http://www.ag.ny.gov/bureaus/whistle\\_blowers/false\\_claims\\_act.html](http://www.ag.ny.gov/bureaus/whistle_blowers/false_claims_act.html)

<sup>52</sup> Thompson Reuters/West, Civil Laws Punitive Damages, (August 2010). NY AGRI & MKTS §378; NYJUR MECHANICS §386, NY ART & CULT AFF § 31.01; NY BANK § 619; Right of privacy violations NY CIV RTS §5; NY CIV RTS §70-a; NY EST POW &TRST § 5-4.3; NY EXEC §297; NY GEN BUS §380-I; NY GEN BUS §394-e; NY GEN BUS §397, NY GEN OBLIG § 11-101; NY GEN OBLIG § 11-103; NY LABOR §215-b; NY PUB HEALTH §2801-d; NY PUB SERV §225; NY REAL PROP §235-a; NY SOC SERV §131-o; NY TAX § 3038; N.Y. ENV. LAW § 71-1205. *See also* limitations: NY BANK §618-a; NY EST POW & TRST § 11-3.2; NY GEN MUN §50-j, 50-l, NY GEN MUN §205-g.

damages, a demand or request is “parasitic and possesses no viability absent its attachment to a substantive cause of action.”<sup>53</sup>

The case law in New York provides, “punitive damages are available when the defendant’s wrongdoing is not simply intentional but evinces a high degree of moral turpitude and demonstrates such wanton dishonesty as to imply a criminal indifference to civil obligations... punitive damages may be sought when the wrongdoing was deliberate and has the character of outrage frequently associated with crime...the misconduct must be exceptional, as when the wrongdoer has acted maliciously, wantonly, or with a reckless indifference that betokens an improper motive or vindictiveness, or has engaged in outrageous or oppressive intentional misconduct or with reckless or wanton disregard of safety or rights.” Therefore, in New York, it is not sufficient that the conduct is merely intentional, more of a deliberate or malicious act is required to justify a punitive damages award.

New York common law distinguishes between tort and contract actions when determining whether punitive damages are appropriate. In tort actions, punitive damages are allowable when moral culpability and blameworthiness is satisfied.<sup>54</sup> In contract actions, however, additional showings must be made by the party seeking punitive damages: (1) the defendant’s conduct is actionable as an independent tort; (2) the tortuous conduct is sufficiently egregious to satisfy the moral culpability and blameworthiness threshold, (3) the egregious

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<sup>53</sup> Leon D. Lazer & John R. Higgit, *Ascertaining the Burden of Proof for an Award For Punitive Damages in New York? Consult Your Local Appellate Division*, 25 Touro L. Rev. 728 (2009), citing Randi, A.J., 842 N.Y.S.2d at 564 (N.Y. 1994).

<sup>54</sup> *Ross v. Louise Wise Servs.*, 868 N.E. 2d 189, 196 (2007).

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conduct was directed at the plaintiff; and (4) the conduct was part of a pattern aimed at the public generally.<sup>55</sup>

New York Courts are split as to the burden of proof for establishing an award of punitive damages. There is a preponderance of the evidence standard followed by the Fourth Department while the clear and convincing evidence standard is endorsed by the First and Second Departments.<sup>56</sup>

### **5c) Jury Instructions on Awarding Punitive Damages (Negligence)**

The New York jury instructions on punitive damages state in part: “you may...award punitive damages if you find that the act(s) of the defendant...were wanton and reckless or malicious. Punitive damages may be awarded for conduct that represents a high degree of immorality (and shows such wanton dishonesty as to imply a criminal indifference to civil obligations). The purpose of punitive damages is not to compensate the plaintiff but to punish the defendant for (wanton and reckless, malicious) acts and thereby to discourage the defendant and other (people, companies) from acting in a similar way in the future.”<sup>57</sup> In accordance with the U.S. Supreme Court mandate in its *Philip Morris* decision, New York developed instructions to inform the jury it may not award punitive damages to punish the defendant from harm caused to

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<sup>55</sup> Leon D. Lazer and John R. Higgit, *Ascertaining the Burden of Proof for an Award For Punitive Damages in New York? Consult Your Local Appellate Division*, 25 Touro L. Rev. 728 (2009), citing *Randi*, A.J., 842 N.Y.S.2d at 564 (N.Y. 1994).

<sup>56</sup> *Id.* at 728-731.

<sup>57</sup> N.Y. Pattern Jury Instr.--Civil § 2:278 (Comm. on Pattern Jury Instr. Ass'n of Sup. Ct. Justices 2008), available at WL NY PJI 2:278.

persons other than the plaintiff.<sup>58</sup>

## **The Role of the Attorney General in Illinois and Ohio**

### **Is the Attorney General Elected or Appointed?**

#### ***Illinois***

The Illinois Attorney General is chosen by way of a general election, occurring every four years.<sup>59</sup>

#### ***Ohio***

The Ohio Attorney General is chosen by way of a general election, occurring every four years.<sup>60</sup>

### **Does the Attorney General Have a Written Policy Re: Punitive Damages?**

#### ***Illinois***

The Illinois Attorney General publishes what are called “Official Opinions,” which are both answers to complex legal questions and guideposts for the conduct of other state officials.<sup>61</sup> Opinion number 96-034 from December 3, 1996 addresses the right of municipalities to insure themselves against the threat of punitive damage lawsuits against local officers or employees, but does not speak to the Attorney General’s position on *seeking* punitive damages. Indeed, there is no readily available documentation regarding the pursuit of punitive damages at trial.

#### ***Ohio***

The Ohio Attorney General issues opinion papers on complex areas of law, providing guidance on these issues, and establishing office policies and standards.<sup>62</sup> To date, there is no opinion or any other readily available documentation regarding the Attorney General’s stance on pursuing punitive damages at trial.

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<sup>58</sup> George Pitcher & Rachel Robinson, *Jury Instructions in Punitive Damage Cases: Using the New Mandates from the United States Supreme Court* at 2. <http://www.williamskastner.com/uploadedFiles/Pitcher%20Robinson%20Jury%20Instructions.pdf> (last accessed June 16, 2011).

<sup>59</sup> See ILL. CONST. art. V, § 1.

<sup>60</sup> See OHIO CONST. art 3, §§ 1–2.

<sup>61</sup> *Opinions*, ILL. ATT’Y. GEN., <http://www.illinoisattorneygeneral.gov/opinions/index.html> (last visited June 20, 2011).

<sup>62</sup> *Opinions*, OHIO ATT’Y GEN., <http://www.ohioattorneygeneral.gov/Opinions.aspx> (last visited June 20, 2011).

## **Does the Attorney General Have the Sole Authority to Institute Litigation and Seek Punitive Damages?**

### ***Illinois***

The Illinois Supreme Court has held that “the Attorney General is the sole officer authorized to represent the people of this State in any litigation in which the People of this State are the real party in interest.”<sup>63</sup> Therefore, the Attorney General has sole power to litigate on behalf of the state, including decisions of when and who to sue, which litigation strategy to implement, when to reach settlement, and when to appeal.<sup>64</sup>

Illinois is one of a growing number of states that employs a Solicitor General to oversee all criminal and civil appeals of the Attorney General’s Office.<sup>65</sup> While the Solicitor General oversees roughly forty attorneys and acts as the leading advocate for the Office, his role is relegated exclusively to appeals, and there is no official legislation granting him authority to pursue any legal strategies not authorized by the Attorney General herself.

### ***Ohio***

The Ohio Attorney General is “the chief law officer of the state and all its departments.”<sup>66</sup> The Attorney General has complete authority to guide civil litigation, including the pursuit of punitive damages, at the trial court level.

In 1993, Ohio became one of a growing number of states that employs a Solicitor General to act as the chief appellate advocate for the State of Ohio. While the Solicitor General has significant authority within the Office, she still acts in accordance with the dictates of the Attorney General, and has no authority to pursue litigation strategies not authorized by the Attorney General.

## **Case Summary of Punitive Damage Cases: 1990 to Present**

### ***Illinois***

While the Illinois Attorney General is authorized to seek punitive damages, there is not enough readily available information on the practices of the Office to speculate as to when and why it chooses to do so. Pertaining to a few specific instances, Attorney General Lisa Madigan

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<sup>63</sup> People *ex rel.* Scott v. Briceland, 359 N.E.2d 149, 154 (Ill. 1976), *accord* EPA v. Pollution Control Bd., 372 N.E.2d 50 (Ill. 1977).

<sup>64</sup> See Newberg, Inc. v. Ill. State Toll Highway Auth., 456 N.E.2d 50 (Ill. 1983) (noting that the Attorney General is the chief legal officer of the State, and her common law powers to direct the legal affairs of the State cannot be reduced by the legislature).

<sup>65</sup> Peter Page, *State Solicitor General Appointments Open Doors for Appellate Practitioners*, THE NAT’L LAW J., (Aug. 18, 2008), <http://www.babc.com/files/News/3b7da1d3-2339-4b91-a396-05112905e2b1/Presentation/NewsAttachment/62efc588-5f00-44f4-b8e3-c5abbd1e27e9/State%20Solicitor%20General.pdf>.

<sup>66</sup> OHIO REV. CODE ANN. § 109.02.

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is currently seeking punitive damages in a counterclaim for a matter concerning unpaid wages.<sup>67</sup> In 2004, the Attorney General lost a suit which included a claim for punitive damages in an action to abate a public nuisance against multiple gun manufacturers who were alleged to have contributed to gun violence in the city.<sup>68</sup> The Attorney General also sought punitive damages in a 2004 suit for a violation of the Family Practice Residence Act on behalf of the Department of Public Health for a failure to comply with the terms of certain contracts.<sup>69</sup> The Office has also pursued punitive damages for claims as outlined by certain statutes, such as the Charitable Trust Act.<sup>70</sup>

## **Ohio**

While the Ohio Attorney General is authorized to seek punitive damages, there is not enough readily available information on the practices of the Office to speculate as to when and why it chooses to do so. As to specific instances, the Attorney General is currently seeking punitive damages in a pending action against GMAC Mortgage LLC and Ally Financial Inc. in a mortgage fraud action.<sup>71</sup> Another example involves a 2001 antitrust action brought by the Ohio Attorney General against AIG seeking treble damages, which ultimately resulted in a \$9 million settlement.<sup>72</sup>

## **State Statute Guiding the Award of Punitive Damages**

### **Illinois**

While the 1995 Illinois Tort Reform Act<sup>73</sup> did include provisions governing the permissibility of punitive damages at trial, that Act was later found unconstitutional in its entirety.<sup>74</sup> That decision thus eliminated the then-existing limit that punitive damages not exceed three times the award of compensatory damages, as well as the clear and convincing standard of proof at trial. While several of the main provisions outlining the State's view on punitive damages pre-dated the Tort Reform Act and were incorporated unchanged, they are no longer good law. One remaining statute prohibits the assessment of punitive damage awards in healing art and legal malpractice cases.<sup>75</sup> Another gives the Attorney General authority to seek punitive

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<sup>67</sup> *McKinley Foundation at University of Illinois v. Illinois Department of Labor*, 936 N.E.2d 708, 712 (Ill. App. 4th Dist. 2010).

<sup>68</sup> *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1105–06 (Ill. 2004).

<sup>69</sup> *People ex rel. Dept. of Public Health v. Wiley*, 810 N.E.2d 614, 617 (Ill. App. 1st Dist. 2004).

<sup>70</sup> 760 ILCS 55/16(b).

<sup>71</sup> *State of Ohio v. GMC Mortgage, LLC*, No. CI0201006984 (Ct. of Common Pleas, Lucas Cty., Oct. 6, 2010).

<sup>72</sup> Complaint at 44, *State of Ohio v. AIG*, No. CV-07-633857 (Ct. of Common Pleas, Cuyahoga Cty., Aug. 24, 2001).

<sup>73</sup> 735 ILCS 5/2-1115.05, available at <http://www.ilga.gov/legislation/ilcs/fulltext.asp?DocName=073500050K2-1115.05>; Illinois Civil Justice Reform Amendments of 1995, Pub. Act No. 89-7 (1995); Kirk W. Dillard, *The Illinois Tort Reform Act: Illinois' Landmark Tort Reform*, 27 LOY. U. CHI. L.J. 805 (1996).

<sup>74</sup> *Best v. Taylor Machine Works*, 689 N.E.2d 1057, 1106 (Ill. 1997) (holding that although many provisions, including 735 ILCS 5/2-1115.05, were not being challenged, the entire Act was deemed invalid on grounds of severability).

<sup>75</sup> 735 ILCS 5/2-1115, available at <http://www.ilga.gov/legislation/ilcs/fulltext.asp?DocName=073500050K2-1115>; *Bernier v. Burris*, 497 N.E.2d 763 (Ill. 1986) (holding the statute to be constitutional).

damages in charitable fraud cases.<sup>76</sup> Illinois judges also have discretion to order a new trial if they find the punitive damage award to be excessive, and also to direct a portion of the punitive damage award to Illinois Department of Human Services.<sup>77</sup>

## **Ohio**

Ohio law holds that punitive damages are not recoverable unless the matter is a tort action where (1) the defendant's actions demonstrate malice, aggravated or egregious fraud, or oppression or insult, and (2) that the trier of fact first find the defendant liable for compensatory damages.<sup>78</sup> The damage amount is limited to two times the compensatory award,<sup>79</sup> and the judicial standard is clear and convincing evidence.<sup>80</sup> Punitive damages are not recoverable from state colleges and universities.<sup>81</sup> Ohio judges have discretion to decide whether a portion of any punitive damages award will be directed to "a place that will achieve a societal good."<sup>82</sup>

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<sup>76</sup> 225 ILCS 460/9(g).

<sup>77</sup> 735 ILCS 5/2-1207.

<sup>78</sup> OHIO REV. CODE ANN. § 2315.21(C), available at <http://codes.ohio.gov/orc/2315.21>; *Niskanen v. Giant Eagle, Inc.*, 912 N.E.2d 595 (Ohio 2009).

<sup>79</sup> *Id.* § 2315.21(D)(2)(a).

<sup>80</sup> *Id.* § 2315.21(D)(2)(c)(4).

<sup>81</sup> *Id.* § 2315.21(E)(1).

<sup>82</sup> *Dardinger v. Anthem Blue Cross & Blue Shield*, 7881 N.E.2d 121 (Ohio 2002).