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PUNITIVE DAMAGES IN AVIATION CASES:
SOLVING THE INSURANCE COVERAGE DILEMMA

STEPHEN C. KENNEY*

Are Insurers Obligated to indemnify their insureds for punitive damage awards? The answer to this question has plagued the courts and legal commentators for years. The issue has significant implications for the aviation industry. It involves fundamental questions concerning the purposes behind punitive damage awards, public policy considerations, and judicial interpretation of aviation liability insurance contracts. As of this writing, twenty-two states have held that punitive damages rendered directly against an insured are insurable, while twenty states prohibit such insur-

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1 See, e.g., Comment, Insurance for Punitive Damages: A Reevaluation, 28 Hastings L.J. 431 (1976).

ance coverage for a variety of reasons. The remaining eight states are undecided. The lack of uniformity between the states is apparent.

This article will examine the legal reasoning which has resulted in this disparity as well as the difficulties confronting insurers who are faced with defending and evaluating punitive damage claims against their insureds. The aviation industry’s concerns will be given specific attention when appropriate.

The following four courts do not recognize actions for punitive damages at common law, thereby negating the question of insurability: Baggett v. Richardson, 473 F.2d 863 (5th Cir. 1973) (applying Louisiana law); Caperci v. Huntoon, 397 F.2d 799 (1st Cir. 1968), cert. denied, 393 U.S. 940 (1969) (applying Massachusetts law); Winkler v. Roeder, 23 Neb. 706, 37 N.W. 607 (1888); Walker v. Gilman, 25 Wash. 2d 557, 171 P.2d 797 (1946).


The eight undecided states are Alaska, Hawaii, Montana, Nevada, North Dakota, South Dakota, Utah, and Wyoming.
recommended solution to the punitive damage coverage issue will also be considered. In particular, it finally may be necessary for aviation insurers to incorporate express exclusions for punitive damage awards into aviation liability policies as a solution to the divergent attitudes of the various state courts toward the punitive damage coverage issue. Any proposed solution to the problem usually is greeted by skepticism, at best, within the insurance industry. Therefore, some of the potential consequences associated with adoption of this punitive damage exclusion proposal also will be explored. It is the intent of this article to highlight at least one viable solution to the dilemma of whether aviation insurers should provide insurance coverage for punitive damage awards.

I. HISTORICAL OVERVIEW

A. Punitive Damages Defined

Punitive or exemplary damages "are given to the plaintiff over and above the full compensation for his injuries, for the purposes of punishing the defendant, teaching him not to do it again, and deterring others from following his example." As indicated below, certain egregious conduct may serve as the basis for a punitive damage award. Any attempt, however, to classify the specific types of conduct necessary to justify such awards invites imprecision. Professor Prosser best described the punitive damage concept in the following manner:

Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or ‘malice,’ or a fraudulent or evil motive on the part of the defendant, or such a conscious disregard of the interests of others that his conduct may be called wilful or wanton. Lacking this element, there is general agreement that mere negligence is not enough . . .

The nature of the evidence necessary to sustain a punitive

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6 This proposal has been advanced before. For a background discussion, see infra Section III and note 108.
7 Id. at 9-10.
damage award is uniquely within the province of each individual jurisdiction. Most states require the presence of oppressive, fraudulent, or malicious conduct\(^8\) to justify punitive damages. Some jurisdictions hold that gross negligence is sufficient.\(^9\) Irrespective of the basis for a punitive damage recovery, all but four of the fifty states allow punitive damage recoveries in certain specific situations.\(^10\) Cases and statutes

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\(^8\) See, e.g., CAL. CIV. CODE § 3294 (West 1970), which provides in pertinent part: "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages may recover damages for the sake of example and by way of punishing the defendant."


using the terms “wilful”, “wanton” or “reckless” conduct are common, as are the terms “gross” or “aggravated” negligence. These descriptive words are used, sometimes synonymously, to connote conduct of a nature so egregious as to warrant additional damages, not for the sake of compensating the plaintiff, but for the purpose of punishing the defendant and deterring similar conduct in the future.

One of the problems with such broad terms is that they


have been applied differently by various state courts. These semantic distinctions can cause considerable confusion. From the insurer's point of view, it is essential that a particular state's position be identifiable in order to accurately ascertain whether, and to what extent, there is exposure for payment of a punitive damage award which may ultimately be rendered against the insured.

In most jurisdictions, an insurer is not required to indemnify the insured for criminal acts or intentional torts, such as assault and battery. Regardless of whether the damages awarded are deemed to be compensatory or punitive, the courts have generally held for public policy reasons that an insurer should not be in a position of insuring against its insured's own conscious wrongdoing. Other types of seemingly intentional conduct, however, generally have been found to be within broad coverage afforded by liability insurance policies. Many liability policies, however, contain an express exclusion prohibiting coverage for damages arising from injuries intentionally inflicted by the insured.

Insurers have consistently argued that these express provisions preclude coverage for injuries caused by wilful, wanton or reckless misconduct, or gross negligence, on the premise that such misconduct is tantamount to intentionally causing the injury. This argument has met with little success in the courts. Numerous opinions addressing the issue have concluded, as did the court in Crull v. Gleb, that the terms "intentional" and "wanton and reckless" are not synonymous for purposes of determining insurance coverage for punitive damages. The Crull court reasoned that "wanton or reckless" acts denoted indifference to the rights of others by the doing of intentional acts without regard for their consequences.

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18 Id. at 40-41, 151 Cal. Rptr. at 499-500.
14 See Northwestern Nat'l Casualty Co. v. McNulty, 307 F.2d 432, 440 (5th Cir. 1962).
34 See infra notes 37-43 and accompanying text.
17 See id. at 1245.
18 382 S.W.2d 17 (Mo. Ct. App. 1964).
19 Id. at 21-22.
“Wanton or reckless” acts must be distinguished from acts undertaken with the express intention of causing injury to others. While intentional acts of the insured should not be covered, the Crull opinion pointed out that damages arising out of mere “wanton or reckless” acts such as reckless operation of an automobile, may still fall far short of the traditional concept of intentional wrongdoing, such as assault and battery, as illustrated in Pennsylvania Threshermen & Farmers Mutual Casualty Insurance Co. v. Thornton. The courts have consistently held that injuries resulting from gross or wanton negligence, such as an accident caused by an intoxicated driver, can be distinguished from those which result from intentional conduct. These courts repeatedly have rejected the contention that the insured’s acts had to have been willful, rather than negligent, simply because punitive damages were awarded. One court stated that acceptance of such a contention would result in the illogical holding that the more outrageous the reckless conduct, the more likely it would be that the insurer would escape liability. The court felt that this result would be contrary to one of the fundamental purposes of liability insurance, which is to protect innocent third party victims.

Further, the courts have generally distinguished between “intentional acts” and “intentional injuries” when construing liability insurance policies to provide broad coverage. In Travelers Indemnity Co. v. Hood, two insurance policies were involved, one of which insured against liability for bodily injury “caused by accident and arising out of the ownership, maintenance or use” of the vehicle. The plaintiff had obtained a judgment for her husband’s wrongful death resulting from the wilful and wanton misconduct of the insured in unlawfully

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24 244 F.2d 833 (4th Cir. 1957).
25 See, e.g., General Casualty Co. v. Woodby 238 F.2d 452, 458 (6th Cir. 1956).
27 Thornton, 244 F.2d at 827.
28 See 244 F.2d at 827.
30 Id. at 70.
drag-racing on a public highway. The insurers argued that the policies did not cover liability for the insured’s wilful and wanton misconduct because it is contrary to public policy to indemnify a person against such misconduct. The *Travelers Indemnity Co.* court disagreed, holding that injuries “caused by accident,” as the term was used in the insurance policy, would include injuries caused without the intent or design to injure. Only injuries caused with the intent or design to injure would shield the insurer from ultimate liability. Thus, even though the insured may have intended his acts (to drag-race), he did not intend to injure his victim. Therefore, such conduct was “accidental” within the terms of the coverage. The *Travelers Indemnity Co.* court recognized that for purposes of criminal or tort law, such conduct might be constructively intentional. However, for purposes of interpreting an insurance contract, intentional acts (i.e., unlawful drag-racing) must be distinguished from intentional injuries (i.e., conscious assault and battery with an automobile or dangerous instrumentality).

The concept of awarding damages over and above compensation to the injured party for purposes of punishment, example and deterrence is by no means new. It dates back at least to the early English common law. As early as 1851, the United States Supreme Court stated that recovery of punitive damages “is a well-established principle of the common law,” recognized in repeated judicial decisions for more than a century.

Although punitive damages have been a viable concept for years, insurers, the courts, and modern practitioners are now becoming increasingly aware of their prevalence in contemporary litigation. It is an unusual complaint that fails to seek punitive damages, particularly when wealthy defendants can be found. This situation has raised serious concern within

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*Id.*

*Id.*


Levit, *supra* note 30, at 259.
the legal profession and has been the subject of considerable comment. One of the practical concerns is the concept that when punitive damages are an issue, evidence of the defendant's wealth is admissible on the theory that proper punishment can only be rendered if the culpable defendant feels a financial pinch from the award. Such financial evidence can be very prejudicial to the insured defendant because it may have a tendency to influence the jury to increase the compensatory damage award on the theory that a wealthy defendant can afford it even if punitive damages are ultimately denied. In addition, evidence of the defendant's significant net worth conceivably could cause the jury to find liability in a doubtful case in spite of cautionary instructions to the contrary from the court. Accordingly, insurers understandably have been attempting to deal with the many problems raised by punitive damage allegations against their insureds, including the inevitable coverage questions as set forth below.

B. Nature of the Controversy

Various courts apparently maintain very divergent views on the issue of whether liability insurance provides coverage when punitive damages are awarded against an insured. On this issue, there are several disparate positions which are followed in the various forums. One prevalent position is that punitive damages are not insurable for public policy reasons. States that adopt this position follow the leading and frequently cited opinion in Northwestern National Casualty Co. v. McNulty. The McNulty court reasoned that because punitive damages are imposed to punish the wrongdoer and to deter similar conduct, this purpose could not be achieved if

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5 Levits, supra note 30, at 261.

6 See Annot., 20 A.L.R.3d 353 (1968), for a collection of representative cases from various jurisdictions indicating the lack of uniformity on the issue of the insurability of punitive damages.

7 307 F.2d 432 (5th Cir. 1962).
the culpable party were allowed to shift the designated personal punishment to an innocent insurer. The McNulty case involved an intoxicated driver who crashed into another vehicle and left the accident scene. The jury awarded the plaintiff $37,500 in compensatory damages and $20,000 in punitive damage award. On appeal, the insurer argued that the language of the policy did not cover punitive damage awards. The McNulty court never even addressed the insurer's argument, stating: "We find it unnecessary to construe the contract; we hold that should a policy specifically provide for such coverage, it would contravene public policy." The opinion noted that punishment and deterrence were the most widely accepted justifications for the imposition of punitive damages. Accordingly, the McNulty court reasoned:

Where a person is able to insure himself against punishment he gains a freedom inconsistent with the establishment of sanctions against such misconduct. It is not disputed that insurance against criminal fines or penalties would be void as violative of public policy. The same public policy should invalidate any contract of insurance against the civil punishment that punitive damages represent.

The McNulty court was convinced that,

[if a] person were permitted to shift the burden to an insurance company, punitive damages would serve no useful purpose. Such damages do not compensate the plaintiff for his injury, since compensatory damages already have made the plaintiff whole. And there is no point in punishing the insurance company; it has done no wrong.

The Court astutely recognized that if insurers were held to cover punitive damages, the liability would actually be passed along to all policyholders through increased premiums. "Society would then be punishing itself for the wrong committed

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58 Id. at 440.
59 Id. at 443.
60 Id. at 434.
61 Id. at 440.
62 Id.

by the insured."\(^4\)

In states that preclude insurance coverage for punitive damages, the McNulty "public policy" reasoning strongly supports the desired result. If punitive damages are truly imposed to punish and deter, coverage for the insured would neither punish the culpable party, nor give credibility to the deterrent purpose.\(^4\)

On the other side of the insurability issue are the courts that justify coverage for punitive damages. The leading decision allowing coverage is Lazenby v. Universal Underwriters Insurance Co.,\(^4\) a case which also involved an intoxicated driver. The Lazenby court recognized the serious consequences associated with traffic injuries and death caused by socially irresponsible drivers, but was not persuaded that prohibiting insureds from being reimbursed by their insurers for punitive damages would accomplish the result of deterring the misconduct.\(^4\) The Lazenby opinion noted that even the numerous criminal sanctions attached to such wrongful acts had produced little deterrent effect.\(^4\) The Lazenby court found that the insurance policy language provided for punitive damage coverage. It was concluded that public policy equates with public good. According to the Lazenby rationale, the public good is not harmed by a private contract between an insurer and its insured.\(^4\)

Numerous decisions have followed the Lazenby pro-coverage position.\(^4\) Some courts simply stress that particular insur-
ance policy language actually provides coverage for punitive damages under a strict construction of the contractual terms. Other courts have recognized that competing "public policy" considerations permit coverage for punitive damage awards. For example, on the theory that the court could not adopt a "new rule of public policy that would invalidate both existing and future contracts," the Oregon Supreme Court held that it is not against public policy to insure against punitive damages.

Similarly, the Arizona Supreme Court held in Price v. Hartford Accident & Indemnity Co. that punitive damages are covered under a liability policy. The court reasoned that "Arizona has more than one public policy. . . . One such public policy is that an insurance company which admittedly took a premium for covering all liability for damages, should honor its obligation." This theme is consistent with well-settled case law construing insurance contracts in favor of the policyholder in disputed coverage situations. When, as in the typical case, a liability insurance policy purports "to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages . . .," the courts generally construe such language to embrace punitive damage awards even in states where public policy is held to preclude such insurance coverage.

In Dairyland County Mutual Insurance Co. v. Wallgren, a Texas appellate court upheld a ruling requiring an insurer


Id. at 487, 502 P.2d at 524 (emphasis added).


See, e.g., Hartford Accident & Indem. Co. v. Village of Hempstead, 48 N.Y.2d 218, 397 N.E.2d 737 (1979), in which the highest court in New York held that punitive damages were uninsurable under a liability policy for public policy reasons despite the acknowledgment that the language of the typical liability policy is broad enough to cover both compensatory and punitive damages and would be so interpreted by the average policyholder. Id. at 743-44.

477 S.W.2d 341 (Tex. Civ. App.—Fort Worth 1972, writ ref'd n.r.e.).
to pay a punitive damage award on a rather unique theory. After acknowledging earlier decisions construing customary insurance policy language as providing coverage for punitive damage awards, the Dairyland County court noted that the authority for such language was the Texas State Insurance Commission. The court reasoned that because public authority had decreed the language and presumably the effect of its application, coverage for punitive damages could not be against public policy per se.

At present, the controversy remains unsettled. Punitive damage awards are covered under liability policies in some states, while other states forbid such coverage. If any trend is recognizable, it is that the pro-coverage position is receiving more support.

C. Impact Upon the Aviation Industry

"What would be slight negligence in the operation of an automobile might be gross negligence with disastrous results in the operation of an airplane." This sobering truism needs little, if any, amplification. As noted earlier, gross negligence can indeed give rise to punitive damages.

Perhaps more alarming is the rapid increase of punitive damage awards in product liability cases. Actions in which claimants have sought to recover punitive damages on product

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67 Id. at 342.
68 Id. at 342-43. See also Greenwood Cemetery, Inc. v. Travelers Indem. Co., 238 Ga. 313, 232 S.E.2d 910 (1977), in which the Georgia Supreme Court applied similar reasoning to support its holding that punitive damages are insurable under liability policy language authorized by the state legislature. Id. at 332, 232 S.E.2d at 924.
69 The authors wish to emphasize that the foregoing discussion applies specifically to punitive damages assessed directly against a wrongdoer-insured. The decisions are often quite different when punitive damages are awarded on a vicarious liability theory. The courts are much more inclined to permit insurance coverage for punitive damages when the insured is not personally responsible for the alleged misconduct. See Annot., 20 A.L.R.3d 343, 351-52 (1968).
70 See generally J.Ghiardi supra note 33.
72 See supra note 9 and accompanying text.
liability theories now involve a very broad range of products, from aircraft\(^4\) and motor vehicles\(^5\) to household items,\(^6\) drugs and cosmetics\(^7\) and various other products.\(^8\) It is now well accepted that, \"[a]n aircraft manufacturer is subject to essentially the same legal duties as is a manufacturer of any other product.\"\(^9\) It can hardly be disputed, however, that aircraft product failures due to design or manufacturing defects raise concerns of the gravest magnitude because of the potential for unparalleled disaster. Accordingly, \"[a]s is evident from the enormous jury verdicts for punitive damages returned against manufacturers in the last few years, aircraft manufacturers face very substantial financial exposure that was unheard of, in most cases, at the time the product was designed and manufactured.\"\(^10\)

While most reported decisions involving significant punitive damage awards fortunately are not aviation related,\(^11\) enough cases exist to sufficiently alert aircraft related manufacturers and insurers of the potential for these large awards. A jury award of over $20,000,000 against a general aviation manufacturer in a California products liability case is very familiar to

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\(^10\) Id. at 619.
\(^11\) See, e.g., Grimson v. Ford Motor Co., 119 Cal. App. 3d 757, 777, 174 Cal. Rptr. 348, 361 (1981), which is one of a number of cases upholding substantial punitive damages against defendant Ford Motor Company for injuries sustained as a result of rear-end Pinto collisions, in which evidence disclosed that Ford management knew of fire danger from rear-end collisions based upon crash-test data but failed to remedy the defect.
the aviation industry. In another California case, the jury rendered an award of over $10,000,000 in punitive damages against an aviation manufacturer.

In today's consumer-oriented social climate, even air carriers are subject to punitive damages. For example, denied-boarding cases have resulted in punitive damage awards where the air carrier's conduct is held sufficiently reprehensible. In any event, the concept of punitive damages in aviation cases must be regarded as providing serious potential increased economic exposure for aircraft related insureds and, in certain states, their insurers. 

There are no distinguishing qualities inherent in the aviation industry to render it immune from punitive damage awards. Nor can it ignore the potential impact of such damages. There are those who have argued fervently against the idea of punitive damages, specifically when they are sought in product liability cases. Nonetheless, the punitive damage threat remains a viable reality in contemporary tort litigation.

Of primary concern is the question of who will pay the ultimate punitive damage award: the insured or his insurer? The typical aviation liability policy promises to pay, on behalf of the insured, all sums which the insured shall become legally

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73 Pease v. Beech Aircraft Corp., 38 Cal. App. 3d 450, 113 Cal. Rptr. 416 (1974), (punitive damages awarded to decedents' heirs were precluded on statutory grounds).
76 See supra note 2.
78 Synman, The Validity of Punitive Damages in Product Liability Cases, 44 Ins. Coun. J. 402 (1977); Ghiardi & Koehn, Punitive Damages in Strict Liability Cases, 61 Marq. L. Rev. 245 (1977). These commentators argue very convincingly that punitive damages are incompatible with recovery under a strict liability theory. Under a strict liability theory it is the condition of a product introduced into the market place that determines liability, and the manufacturer's conduct is irrelevant. But if the plaintiff seeks recovery of punitive damages, then the manufacturer's conduct is relevant because recovery is predicated upon proof of malicious, oppressive, fraudulent or willful misconduct involving the design or marketing of the product.
obligated to pay as damages because of bodily injury. As previously noted, this type of language repeatedly has been held to include coverage for punitive damages in those states where public policy is not offended by such coverage. When an action seeking punitive damages against an aviation related defendant is filed, the determination of who must pay any resulting punitive damage award turns on whether the state law applicable to the particular case adopts the pro-coverage position.

A recent, very tragic, and much publicized case, In re Air Crash Disaster Near Chicago, Ill., helps to exemplify the dilemma facing aviation insurers who are confronted with punitive damage issues. On May 25, 1979, an American Airlines DC-10, designed and built by McDonnell-Douglas, crashed after takeoff from Chicago's O'Hare International Airport, killing all 271 persons aboard the aircraft as well as persons on the ground. Both American Airlines and McDonnell-Douglas were sued by multiple claimants seeking compensatory and punitive damages. The claims for punitive damages were eventually disallowed after the Court of Appeals completed a lengthy choice of law analysis. The Chicago Air Crash court determined that under the applicable Illinois law, punitive damages were not recoverable in wrongful death actions. The determination to apply Illinois law relieved the aviation defendants and their insurers from exposure to potentially significant punitive damage awards. Most importantly, this determination had nothing to do with the merits of the cases against the defendants. The choice of law determination was dispositive.

If, hypothetically, the Chicago Air Crash court had found that the laws of another state which permitted recovery of pu-

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78 See generally J.Ghiardi, supra note 33.
80 See supra notes 2 & 3.
81 644 F.2d 594 (7th Cir. 1981), cert. denied, 102 S. Ct. 358 (1982).
82 Id. at 604.
83 Id. at 630.
84 Id. at 629.
PUNITIVE DAMAGES

PUNITIVE DAMAGES in wrongful death actions, should have been applied, the result might have been different. In actuality, the laws of seven states (Illinois, Missouri, California, Oklahoma, New York, Texas and Hawaii) were potentially applicable. This type of confusing situation is not unusual in aviation cases, because the aviation industry plays an integral role in contemporary interstate commerce, and aviation products are likely to be designed, manufactured, repaired or used in every jurisdiction, including foreign countries. If punitive damages had been recoverable against American Airlines or McDonnell-Douglas (assuming, for the sake of illustration, that sufficient egregious conduct could have been alleged and proved) in the Chicago Air Crash case, the result would be enormous potential exposure, due to both the number of claims and the significant corporate wealth of the respective defendants.

The potential liability of the defendants or their insurers in this situation depends upon which state law applies. If, hypothetically, the Chicago Air Crash court had determined that the laws of Texas or Missouri were alternatively applicable, additional confusion might have resulted. For example, both Texas and Missouri allow recovery of punitive damage awards in wrongful death actions. Texas also permits insurance coverage for punitive damage awards. If Texas law had been applicable, under a standard aviation liability policy the aviation insurers would have been obliged to pay any ultimate punitive damage award against American Airlines or McDonnell-Douglas. Missouri law, on the other hand, forbids insurance coverage for punitive damages as violative of public pol-

66 Indeed, the district court had refused to grant defendant McDonnell-Douglas' motion to strike the punitive damage claims because Missouri law permitted the plaintiffs to state causes of action against McDonnell-Douglas for punitive damages, and Missouri law was held to be applicable because Missouri was McDonnell-Douglas' principal place of business. In re Air Crash Disaster Near Chicago, Ill., 500 F. Supp. 1044, 1050 (D.C. Ill. 1980), aff'd, 644 F. 2d 594 (7th Cir. 1981).
67 See supra notes 2-3 and accompanying text.
68 See supra note 10.
69 See Dairyland County Mut. Ins. Co. v. Wallgren, 477 S.W.2d 341, 342 (Tex. Civ. App.—Fort Worth 1972, writ ref'd n.r.e.).
icy. If, hypothetically, the Chicago Air Crash court had decided to apply Missouri law for some choice of law reason, the aviation defendants themselves would have been liable for any eventual punitive damage award.

The hypothetical extension of the Chicago Air Crash case communicates the complexities of the punitive damage coverage issue in addition to the element of chance associated with the application of punitive damage rules in aviation cases. As noted, in the Chicago Air Crash case Illinois law was deemed controlling because Illinois was the place of injury. From the aviation defendants' viewpoint it can only be considered fortuitous that such a catastrophe, having happened at all, followed takeoff from O'Hare (Illinois) rather than from an airport in Texas or Missouri or any other jurisdiction where punitive damages potentially are recoverable in wrongful death actions. Similarly, if one person had survived the crash, the person could have asserted a claim for punitive damages against the defendants under a personal injury cause of action.

Before examining the proposed solution to this dilemma, one final point merits consideration. Under the provisions of the typical liability policy, the insurer has the duty to defend its insured against claims arising under the policy. When punitive damages are alleged, a very serious conflict of interest can materialize between the insurer and its insured. In the hypothetical extension of the Chicago Air Crash case, for illustrative purposes it was assumed that Texas or Missouri law might have been held applicable. In a situation in which recovery of punitive damages seems likely, the insured aviation defendants would undoubtedly prefer to defend the action ac-

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90 Crull v. Gieb, 382 S.W.2d 17, 23 (Mo Ct. App. 1964).
91 644 F.2d at 615-16.
92 See supra note 10 for a comprehensive list of jurisdictions where punitive damages are recoverable in wrongful death actions.
93 A crash survivor would not be precluded from asserting a personal cause of action for punitive damages as are decedents' heirs under many wrongful death statutes which limit recovery to specified compensatory damages. See, e.g., In re Paris Air Crash, 622 F.2d 1315 (9th Cir. 1980).
according to the law of a forum that permits insurance coverage for punitive damages. Because Texas permits such coverage, these insureds would have incentive to argue that Texas law should be applied.

Conversely, the aviation insurers probably would prefer to defend the action in a forum where insurance coverage for punitive damages violates public policy in order to prevent the insurer from ultimately indemnifying the insured. When this type of choice of law problem arises, a significant conflict of interest arises between the insurer and its insured. The insured's pecuniary interests are potentially susceptible of being sacrificed for those of the insurer because the insurer's duty to defend generally includes the right to conduct and to control the defense. Under these circumstances, the insurer often undertakes a defense pursuant to a reservation of rights, whereby the insurer informs its insured that it has reserved the right to deny coverage for any eventual punitive damage award and that the insured has the right to retain independent counsel, at the insured's expense, to participate in the defense of the punitive damages claims. Obviously, this conflict does not assist in promoting harmonious business relations between the insurer and its insured and should ideally be avoided if possible.

Generally, under liability policy provisions, defense counsel is selected by the insurer pursuant to its obligation to defend the insured. In Parker v. Agricultural Ins. Co., the court ruled that the insured was entitled to select defense counsel at the insurer's expense. 109 Misc. 2d 678, 681, 440 N.Y.S.2d 964, 967 (N.Y. Sup. Ct. 1981). Seven separate actions had been filed against the insured following an explosion at the insured's premises. Five of these actions charged the insured with willful and wanton misconduct and sought punitive damages in excess of $160 million. New York forbids insurance coverage for punitive damages directly assessed. Therefore, the court found that a conflict of interest existed on the part of the insurer because the insurer might seek to minimize compensatory awards at the expense of the potential punitive damage award for which it could not be held liable. Id. Noting that the insurer's duty to defend is normally accompanied by a right to control the litigation, the court held that the insured's interest was sufficiently greater than the insurer's so as to warrant the insured's selection of counsel, notwithstanding the general rule. Id.
II. The Case By Case Evaluation Under the Present System

The cases involving insurability of punitive damages are so numerous and varied that any attempt to conclusively categorize states according to those that permit and those that forbid insurance coverage can be quite misleading. As noted previously, Missouri's public policy precludes liability insurance coverage for punitive damages assessed directly against the insured. In most cases involving liability policies, such as those for automobiles, homes, businesses and aircraft, this would be an accurate assessment of Missouri law. In Colson v. Lloyd's of London, however, the court was confronted with a liability insurance policy issued to a local law enforcement agency covering "loss by reason of liability imposed by law upon the insured by reason of any false arrest." After the court considered Missouri law in an action against the insurer, the court held that punitive damages arising out of a false arrest were covered under the policy despite the public policy of Missouri, which precluded such coverage. The Colson court reasoned that the competing public policy of encouraging efficient law enforcement controlled.

This case illustrates the importance of evaluating each case based on its own unique facts and issues, an approach which is presently being followed by the insurance industry as well as by the courts but with some inherent difficulties.

When an action is filed containing a claim for punitive damages, any evaluation must begin with a realistic appraisal of the alleged misconduct. The insurer must determine whether the alleged acts or omissions if proven, could give rise to an award of punitive damages. If the action could result in such an award, several important criteria must be considered.

At the outset, the language of the insurance policy should be thoroughly reviewed. Unless the policy expressly and in

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**See supra notes 3, 90.**

**77 435 S.W.2d 42 (Mo. 1968).**

**86 Id. at 43, 44.**

**87 Id. at 45.**

**90 Id. at 47.**
plain language excludes coverage for punitive damages, the courts are likely to construe the language to provide coverage in those states that allow such coverage.\textsuperscript{101} Two other considerations are paramount: (1) where the case is filed, and (2) the nature of the causes of action alleged. From the defendant's standpoint an ideal forum would be one where punitive damages are either forbidden entirely (which is rare) or prohibited due to the specific cause of action alleged. For example, Kansas and California are among the states that allow recovery of punitive damages in products liability actions.\textsuperscript{102} If the suit is based on wrongful death allegations, however, punitive damage awards are prohibited.\textsuperscript{103} Thus, from the limited standpoint of an insurer concerned about the possibility of indemnifying the insured for a punitive damage award, California and Kansas might be ideal forums in wrongful death product liability actions because the claimants would be limited to a recovery of compensatory damages.

Under the present system, the insurer must look for changes in the state approaches to punitive damages and coverage problems because these issues have not been resolved in many jurisdictions. For example, those jurisdictions that prohibit punitive damage awards in wrongful death actions, while allowing punitive damage awards under other theories, have come under increasing attack from the plaintiffs' bar. The creative plaintiffs' attorneys point out that in these jurisdictions the conscious or grossly negligent wrongdoer is spared the additional punishment of a punitive damage award if he or she happens to kill, rather than merely injure, the victim.\textsuperscript{104}

III. PUNITIVE DAMAGE EXCLUSION CLAUSE AS A SOLUTION

The application of diverse state laws to a "case by case" analysis of the punitive damages coverage issue has resulted in anything but uniformity among the various jurisdictions. It

\textsuperscript{101} See \textit{supra} notes 45-55 and accompanying text.
\textsuperscript{102} See \textit{supra} note 10.
\textsuperscript{103} Id.
\textsuperscript{104} Abramson, \textit{Punitive Damages in Aircraft Accident Cases—A Debate}, 11 \textit{Forum} 50, 53 (1975).
seems unlikely that the courts or the various state legislatures will reverse the historical pattern.\textsuperscript{106} Presently, insurers dealing with identical factual circumstances face exposure for punitive damages in some states while not in others,\textsuperscript{106} with the ultimate determination left in large part to chance or the whim of a local court attempting to deal with complex choice of law rules.

A practical legal solution to the problem exists. Insurers could prevent many punitive damages coverage disputes by simply excluding such coverage in plain, unequivocal and unambiguous terms under the “Exclusions” section in each policy.\textsuperscript{107} This idea is not entirely novel\textsuperscript{108} but is certainly deserving of renewed attention. Aviation insurers would be wise to consider utilizing the following unequivocal policy language to eliminate the doubt on the punitive damage coverage issue:

\textbf{Exclusions}

It is hereby agreed that coverage under this policy shall not apply to or cover:

1. Any award of punitive and/or exemplary damages.

The positive aspects of such a proposal are numerous. Since the states have failed to approach the insurability issue with a


\textsuperscript{106} See supra notes 2, 3, 10 and accompanying text.


\textsuperscript{108} In November 1977, the Insurance Services Office suggested a policy endorsement stating specifically that coverage for punitive damages is excluded from property and liability insurance contracts. The suggested endorsement was withdrawn in March, 1978, following substantial pressure from industry and consumer groups. Keen competition in the insurance industry does not encourage insurers to expressly exclude punitive damage coverage.

goal toward uniformity, aviation insurers could utilize the punitive damage exclusion to achieve the desired result. Litigation between insurers and insureds over coverage for punitive damages conceivably could be reduced because the nature and extent of coverage would be expressly delineated at the formation of the insurance contract. Both parties would know the precise limits of the negotiated coverage. If the insured were to insist upon coverage for punitive damages, the insurer could structure the premium to reflect its increased exposure.109 Also, corporate insureds could purchase liability policies which specifically provide coverage for vicariously assessed punitive damages arising out of the conduct of the corporation's employees. Such coverage is generally not offensive to public policy.110

Additionally, the proposed exclusion would reduce potential conflicts of interest between aviation insurers and their insureds. As noted earlier, the aviation industry is so pervasive in modern society that lawsuits against air carriers, manufacturers and aviation related insureds are likely to be filed in every jurisdiction. Certain actions properly could be brought in more than one forum. Where one available forum permits insurance coverage for punitive damages and others forbid such coverage,111 the interests of the insurer and its insured are in conflict concerning where each would prefer to have the action defended. Use of the proposed punitive damage exclusion would assist in eliminating such conflicts because both the insurer and its insured would be aware from the outset of the coverage limitation concerning punitive damages. Consequently, any choice of law questions would not be influenced by punitive damage coverage considerations. In turn, defense attorneys could concentrate their efforts on choosing optimum available forums based upon more practical considerations, such as availability of witnesses, convenience to the litigants, pretrial publicity and size of previous jury awards.

109 Note that such coverage would only apply in those states where public policy is not offended by insurance coverage for punitive damages. See supra note 2.
110 See supra notes 3 and 59.
111 See supra notes 81-94 and accompanying text.
Finally, the proposed exclusion clause would prevent aviation insurers from being exposed to potentially large and wholly speculative risks. This could result in reduced premiums that reflect only the more realistic, calculable risks associated with coverage for compensatory damages. All consumers of liability insurance should welcome such a result. In cases where punitive damages are truly warranted, the culpable party would be punished, not the insurer. This approach would seem to benefit all aviation policyholders because the insurer’s potential exposure for punitive damage awards is often reflected in increased future premiums. If the insurer is compelled to pay such an award, the punitive purpose of the award is lost. In effect, society ends up punishing itself, while the wrongdoer-insured escapes unscathed. A concise and unequivocal punitive damage exclusion could eliminate this potential unjust result.

IV. CONCLUSION

From a legal perspective, the idea of expressly excluding insurance coverage for punitive damages is appealing. Use of the proposed exclusion would serve to promote the punishment and deterrence purposes behind punitive damages because the actual wrongdoer would be punished, thereby setting an example for others inclined to such conduct. If insurers are forced to cover punitive damage awards, the deterrent function is lost. Such broad coverage might even encourage other insureds to pursue questionable courses of conduct in reliance on the availability of insurance coverage should their conduct result in a punitive damage award.

Moreover, adoption of the proposed exclusion would foster better understanding between insurers and their insureds which would result in fewer controversies and less litigation over punitive damage coverage disputes. In cases where multiple forums are available, potential conflicts between the insurer and its insured over the proper forum in which to litigate the punitive damage claims would be minimized.

As a legal solution to a difficult problem, the proposed exclusion clause offers genuine benefits. There are, however,
those who would object to its adoption for business and marketing reasons, rather than pure legal considerations. Insurance consumers usually seek to procure the broadest coverage available. Any limitations on coverage are greeted with disfavor. In the aviation industry, the consumers tend to be very sophisticated purchasers of insurance, such as aircraft manufacturers and distributors. The insurance industry itself is so highly competitive that these consumers are often able to "shop" for the best deal. Insurers do not wish to jeopardize existing or prospective business relationships by including unreasonable limitations or exclusions in their policies. If insurers, and particularly aviation insurers, maintain their reluctance to adopt the recommended exclusionary language, they can only hope that the next major punitive damage award is not assessed against one of their insureds in a forum that permits broad coverage. If such an award is ultimately rendered, insurers may lose the ability to control their potential exposure, a result which would certainly fail to qualify as a sound underwriting practice.
Commentary