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THE PUBLICLY HELD CORPORATION AND THE INSURABILITY OF PUNITIVE DAMAGES

INTRODUCTION

In recent years, punitive damages1 have been assessed against corporations with increasing frequency2 and in increased amounts.3 Punitive


damages are being awarded for causes of action for which they were formerly rare or non-existent. What is more, it is possible that conduct leading to a punitive damage award against a corporation has injured not only the plaintiff, but hundreds and perhaps hundreds of thousands of others. Whether these damages should be insurable, however, has seldom been considered within the context of their effect on a corporation.

In most jurisdictions, punitive damages are awarded to punish the defendant and to deter him and others from engaging in the disapproved conduct. Almost all courts agree that insurance cannot protect a de-

Rptr. 237, 243, 247 (1980) (court vacated $10 million award for fraud and breach of contract and ordered new trial on issue of damages unless plaintiff consented to a reduction to $2.5 million), appeal dismissed, 450 U.S. 1051 (1981); Jury Awards Surgeon's Kin Over $8 Million From Insurer, N.Y. Times, Feb. 19, 1984, § 1, at 68, col. 1 ($8 million awarded against insurance company for failure to honor policy terms).

4. Skyline Harvestore Sys. v. Centennial Ins. Co., 331 N.W.2d 106, 109 (Iowa 1983); see, e.g., Wills v. Trans World Airlines, 200 F. Supp. 360, 367 (S.D. Cal. 1961) (allowing punitive damages under Civil Aeronautics Act for passenger bumped from overbooked flight); Vernon Fire & Casualty Ins. Co. v. Sharp, 264 Ind. 599, 607-09, 349 N.E.2d 173, 179-80 (1976) (allowing punitive damages for breach of contract if "the public interest will be served by the deterrent effect punitive damages will have," without traditional requirement of independent tort) (emphasis omitted); Priest, supra note 2, at 124 (increase in success of private antitrust suits); Riders Win Suit Against Conrail in Westchester, N.Y. Times, June 16, 1984, § 1, at 27, col. 6. (commuters awarded punitive damages for bad service).


fendant from punitive damages arising out of intentional wrongdoing, but whether public policy should prohibit him from shifting his burden to the insurance company when punitive damages are assessed for reckless or grossly negligent actions has been a source of controversy for both courts and commentators.

The cases that oppose insurability, of which Northwestern National Casualty Company v. McNulty is the bellwether, argue that insurance vitiates the goals of punitive damages and that no individual should be able to insulate himself from the consequences of his actions. Public

v. Hoefer, 2 Wash. 45, 52-53, 25 P. 1072, 1074 (1891) ("There is nothing stinted in the rule of compensation. . . . [I]t enters the domain of feeling, tenderly inquires into [the plaintiff's] mental sufferings, and pays him for any anguish of mind that he may have experienced. Indignities received, insults borne, sense of shame or humiliation endured, laborations of feelings, disfigurement, loss of reputation or social position, loss of honor, impairment of credit, and every actual loss, and some which frequently border on the imaginary, are paid for under the rule of compensatory damages.")


9. 307 F.2d 432 (5th Cir. 1962).


policy "would seem to require that the damages rest ultimately as well [as] nominally on the party actually responsible for the wrong. If that person were permitted to shift the burden to an insurance company, punitive damages would serve no useful purpose." Some courts further assert that if punitive damage awards were covered by insurance, the insurance company would pass on its liability to the public by raising its premiums. Just as it is pointless to punish the insurance company for the insured's wrongdoing, it is wrong that the fine should pass to the public for whose benefit it is imposed.

derwriters Insurance Co.\textsuperscript{18} Some of the courts that support insurability are reluctant to decide issues on the basis of public policy,\textsuperscript{19} and prefer to leave the issue to be decided by the legislature.\textsuperscript{20} Others assert that insurance is not contrary to public policy, because it does not tend to make undesirable conduct more likely.\textsuperscript{21} Many courts argue that there is no evidence that prohibiting insurance has a deterrent effect.\textsuperscript{22}

This Note argues that insurance of punitive damages assessed against publicly held corporations should be allowed, because the arguments opposing insurance are largely irrelevant in that context. Whatever punitive and deterrent value there is will be largely unaffected by allowing insurance; what diminished efficacy results is counterbalanced by the need to protect corporations and their shareholders from the effect of possibly arbitrary and excessive punitive damage awards.

Part I examines the dangers that arise from allowing punitive damage awards against corporations. It concludes that the difficulties posed by their imposition are alleviated by allowing insurance. Part II examines the policies against insurance in the context of the publicly-owned corporation and concludes that the main goals of prohibiting insurance—deterring wrongdoing and preventing the wrongdoer from passing on his punishment—are not enhanced by prohibiting the insurance of punitive damages assessed against corporations, because other factors unique to the corporation accomplish these goals.

\textsuperscript{18} 214 Tenn. 639, 383 S.W.2d 1 (1964).
\textsuperscript{19} See First Nat'l Bank v. Fidelity & Deposit Co., 283 Md. 228, 238, 389 A.2d 359, 364 (1978); Mazza v. Medical Mut. Ins. Co., 311 N.C. 621, — 319 S.E.2d 217, 221 (1984); Sinclair Oil Corp. v. Columbia Casualty Co., 682 P.2d 975, 979 (Wyo. 1984); see also Patton v. United States, 281 U.S. 276, 306 (1930) ("[Public policy . . . should be accepted as the basis of a judicial determination, if at all, only with the utmost circumspection. The public policy of one generation may not, under changed conditions, be the public policy of another."); Lazenby, 214 Tenn. at 648, 383 S.W.2d at 5 ("Public policy is the present concept of public welfare or general good.").
\textsuperscript{20} See First Nat'l Bank v. Fidelity & Deposit Co., 283 Md. 228, 239, 389 A.2d 359, 365 (1978); see also Lerner v. General Ins. Co. of Am., 219 Va. 101, 103, 245 S.E.2d 249, 251 (1978) (leaving the issue to be decided by the legislature).
I. THE DANGERS OF PUNITIVE DAMAGES ASSESSED AGAINST CORPORATIONS

Punitive damages have always been a source of controversy for both courts and commentators. Four states prohibit punitive damages. Some judges have acknowledged the criticisms but have nevertheless felt bound to impose them. One court noted that "the doctrine is too deeply implanted in the law to be uprooted for no better reason than that it is illogical." There are many arguments against punitive damages, but it is the practical difficulties that are of concern to the corporation. The major problems are the uncertainty of the imposition of punitive damages and the difficulty of controlling the size of the awards, because whether punitive damages are awarded at all, and the amount of the award are matters left almost entirely to the discretion—some might say whim—of the jury. This is of particular significance to corpora-


24. See Miller Pipeline Corp. v. Broeker, — Ind. App. —, 460 N.E.2d 177, 185 (1984); Continental Ins. Cos. v. Hancock, 507 S.W.2d 146, 152 (Ky. 1973); Goddard v. Grand Trunk Ry., 57 Me. 202, 220-21 (1869); see also Long, Punitive Damages: An Unsettled Doctrine, 25 Drake L. Rev. 870, 888-89 (1976) (punitive damages should be, but will not be, eliminated) [hereinafter cited as Reappraisal]. In addition, the defendant in a punitive damages action does not have the safeguards of a criminal trial. Spokane Truck & Dray Co. v. Hoefer, 2 Wash. 45, 49, 25 P. 1072, 1074 (1891); Dobbs, supra note 1, § 77, at 276; Brandwen, Punitive-Exemplary Damages in Labor Relations Litigation, 29 U. Chi. L. Rev. 460, 468 (1962); Reappraisal, supra, at 1180. Further, the plaintiff receives a windfall. Spokane Truck & Dray Co. v. Hoefer, 2 Wash. 45, 53, 25 P. 1072, 1074 (1891); Hensley v. Erie Ins. Co., 283 S.E.2d 227, 233 (W. Va. 1981). Because he pockets the award, it is in his best interest to ensure that the defendant is given the heaviest penalty possible, not necessarily the exact amount necessary to punish and deter. DuBois, supra note 2, at 350; Morris, Punitive Damages in Tort Cases, 44 Harv. L. Rev. 1173, 1178 (1931).

25. See Ellis, supra note 8, at 38-39. See infra notes 77-91 and accompanying text.

tions: It is feared that a jury is more likely to award large damages against a corporation in favor of an individual than to award them against one individual in favor of another.\(^{30}\)

**A. The Rise of Enterprise Liability and the Possibility of Excessive Punishment**

One commentator, George Priest, has stated that the increased tendency of juries to award punitive damages against corporations is in part a result of the rise of the theory of enterprise liability—the idea that a "corporate enterprise ought to be responsible for injuries caused by products that it places in commerce or for losses suffered from the pursuit of its commercial interests."\(^{31}\) Priest suggests that enterprise liability theory explains the increase in punitive damage judgments for business practices as well as for products liability, and that it also underlies the doctrine of strict liability.\(^{32}\) With this trend comes the risk of deterring certain actions more than is economically efficient.\(^{33}\)

" 'Efficiency' means exploiting economic resources in such a way that 'value'—human satisfaction as measured by aggregate consumer willingness to pay for goods and services—is maximized."\(^{34}\) If a product's price accurately reflects the investment in safeguards, consumers will buy it as long as the price is less than or equal to its value to them. " 'If we make a product too expensive . . . people will just switch to a more hazardous product.' "\(^{35}\) Thus, because it can be argued that corporate misconduct should be deterred only to the point at which the damages assessed are equal to the injury caused, so that the price of a product or service accurately reflects the cost of injury, punitive damages can be considered to be economically inefficient.\(^{36}\) When behavior is discouraged through the

\(^{15}\) 427 N.E.2d 608, 617 (1981); Spokane Truck & Dray Co. v. Hoefer, 2 Wash. 45, 54-55, 25 P. 1072, 1074 (1891); C. McCormick, supra note 1, § 77, at 276; Brandwen, supra note 26, at 466-68; Long I, supra note 24, at 885.


\(^{31}\) Priest, supra note 2, at 124. The idea behind enterprise liability is that "it may seem fairer to make the enterprise bear the burden in preference to either the outsider who has been harmed or to the particular agents whose acts were most closely linked with the injury, but which were performed under the direction, and for the benefit, of the corporation." Stone, The Place of Enterprise Liability in the Control of Corporate Conduct, 90 Yale L.J. 1, 13 (1980) (footnotes omitted); see Calabresi, Some Thoughts on Risk Distribution and the Law of Torts, 70 Yale L.J. 499, 500-01 (1961).

\(^{32}\) See Priest, supra note 2, at 124 & n.9.


\(^{36}\) See Gold v. Johns-Manville Sales Corp., 553 F. Supp. 482, 484 (D.N.J. 1982); C. Stone, supra note 33, at 31-32; Calabresi, supra note 31, at 533-34.
imposition of punitive damages, there exists the risk of deterring certain actions beyond the point of economic efficiency.

B. The Inadequacy of Controls Over Awards

The danger that excessive damages will be imposed is increased by the importance of the jury's role in determining whether punitive damages will be assessed. Juries may tend to award large damages against a corporation because many people have a certain mistrust of companies,\textsuperscript{37} and juries tend to be unsympathetic to a corporate defendant accused of injuring an individual.\textsuperscript{38} Also, a punitive damage claim enables the plaintiff to introduce evidence of the company's worth.\textsuperscript{39} Once that evidence is introduced, it may become more likely that the jury will award punitive damages: A jury may feel that any entity with such wealth deserves to pay more than mere compensation for injuries it causes.\textsuperscript{40}

Even if a jury is not swayed by the sheer wealth of a corporation, it is very difficult for a jury to understand the relevant financial factors.\textsuperscript{41} A juror is unlikely to have extensive experience with corporate finance and will probably be unaccustomed to thinking in terms of the enormous sums involved.\textsuperscript{42} "[A] typical juror may well be receptive to an argu-
ment that anything less than $1 million would be but a drop in the bucket. ... 43 A jury may assume that the numbers on a balance sheet reflect liquid assets. Faced with a corporate balance sheet, it is unlikely to understand fully that a substantial part of a corporation's net worth will consist of inventory and other assets, rather than cash that can be made readily available to satisfy a judgment.44 Accordingly, a jury is likely to find it very difficult to evaluate even expert testimony, and determine how much money will sting, but not cripple, the company.

The tendency of the jury to disfavor corporations is particularly dangerous given its considerable discretion over the amount of punitive damages.45 Many states do not require any relationship between punitive and compensatory damages,46 and even in those that do47 the standards are applied flexibly.48 Although awards are subject to judicial review, courts frequently are reluctant to tamper with jury decisions.49 In addition, there is no reason to believe that the judge is more expert than the jury at understanding balance sheets and determining the proper award to be

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43. Owen II, supra note 37, at 20.


45. See supra note 29 and accompanying text.


48. Owen II, supra note 37, at 9. Some awards that have been upheld in these jurisdictions include: Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265, 1270, 1279 (3d Cir. 1979) (en banc) ($10,000 compensatory, $60,590.96 punitive); Oakes v. McCarthy, 267 Cal. App. 2d 231, 262-64, 73 Cal. Rptr. 127, 144-47 (1968) ($14,285 compensatory, $59,300 punitive).

C. The Problem of Mass Liability

Some courts and commentators fear that the litigating of thousands of suits across the country and the attendant multiple punitive damage awards may lead to the bankruptcy of corporations. The leading case supporting this viewpoint is Roginsky v. Richardson-Merrell, Inc. Plaintiff developed cataracts from taking MER/29, a drug developed to reduce blood cholesterol, and sued the drug's manufacturer. The Second Circuit suggested that punitive damages should not be awarded in cases in which the danger of multiple liability exists, primarily because of the danger of bankruptcy. This argument has spawned much disagreement. A number of courts have asserted that the fear of bankruptcy is

50. Owen II, supra note 37, at 19-20.
51. 378 F.2d 832 (2d Cir. 1967).
52. Id. at 834.
53. See id. at 839-41 (dictum). Judge Friendly also argued that punitive damages were unnecessary, as pharmaceutical companies have other forces operating to deter them from wrongful conduct, such as regulatory agencies, see Roginsky, 378 F.2d at 840, the possibility of criminal fines, see id. at 841, and the possibility of significant compensatory damages, see id. at 841.

Many other industries are also regulated. Brokerage firms, for example, are regulated by the Securities Exchange Commission, see Globus v. Law Research Serv. Inc., 418 F.2d 1276, 1285 (2d Cir. 1969) (1933 Securities Act has punitive sections), cert. denied, 397 U.S. 913 (1970), chemical companies by the Environmental Protection Agency (EPA), see N.Y. Times, March 2, 1985, at A9, col. 5 (EPA fined Union Carbide Company $3.9 million for delay in reporting testing of harmful chemical), commodities firms by the Commodities Futures Trading Commission, see Nash, Large Fine Levied on Donaldson, N.Y. Times, March 12, 1985, at D1, col. 6 (firm fined for violating reporting requirements), and product manufacturers by the Consumer Products Safety Commission, see 15 U.S.C. §§ 2051, 2070 (1982) (provides for civil and criminal penalties for violation of the Consumer Products Safety Act). But see deHaas v. Empire Petroleum Co., 435 F.2d 1223, 1230 (10th Cir. 1970) (resources of Securities Exchange Commission are limited; private action is necessary); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 287, 294 N.W.2d 437, 451-52 (1980) (no evidence that administrative sanctions are being pursued).

It is thought that regulatory agencies exert a considerable influence on corporate decisionmaking. Marsh, If it Ain't Broke, Don't Fix It, in Commentaries on Corporate Structure and Governance 295 (D. Schwartz ed. 1979) [hereinafter cited as Commentaries]. Regulation is resented and resisted by corporate management. Braithwaite, The Limits of Economism in Controlling Harmful Corporate Conduct, 16 L. & Soc'y Rev. 481, 483 (1981-82); Stevenson, The Corporation As Political Institution, 8 Hofstra L. Rev. 39, 50-51 (1979). Thus, fear of incurring regulation may curtail abuses by management.

In addition, criminal fines are being imposed against corporations and corporate officers with increasing frequency. Lewin, Criminal Onus on Executives, N.Y. Times, March 5, 1985, at D2, col. 1; cf. United States v. Park, 421 U.S. 658, 660, 668 (1975) (affirming conviction of president of market chain); Toole v. Richardson-Merrell, 251 Cal. App. 2d 689, 716 n.4, 60 Cal. Rptr. 398, 417 n.4 (1967) (corporation fined, officers placed on probation). The possibility of criminal liability is likely to have a deterrent effect on corporate managers. Crane, supra note 1, at 44. But see Abramson, punitive damages in aircraft accident cases—a debate, 11 Forum 50, 52 (1975) (corporate officers seldom prosecuted).
Some of them cite David Owen’s influential article *Punitive Damages in Products Liability Litigation* for this proposition. Even Owen, however, has reassessed his argument. Although he suggested in 1976 that the fear of bankruptcy seemed mistaken, he wrote in 1982 that “the increasing number and size of such awards may fairly raise concern for the future stability of American industry.”

A corporation might either choose or be forced to file for reorganization rather than negotiate individually with a large number of plaintiffs.


55. See Owen I, supra note 1.


57. See Owen I, supra note 1, at 1324-25. Owen did not dismiss the possible dangers inherent in awarding punitive damages in mass liability situations. See id. at 1314. He argued that current case law did not support the concern that awards could lead to bankruptcy. See id., at 1324-25.

58. Owen II, supra note 37, at 6; see also Seltzer, supra note 2, at 54 (recent rise in awards gives Roginsky renewed credibility).

59. The reorganizations chapter [11 U.S.C. 38 1101-1174 (1982)] is a way to help a financially distressed business return to a viable state. The goal is ‘to restructure a business’s finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders.’ The rationale for providing an alternative to liquidation is that reorganization ‘is more economically efficient . . . because it preserves jobs and assets.’ Note, *Relief From Tort Liability Through Reorganization*, 131 U. Pa. L. Rev. 1227, 1232 (1983) (footnotes omitted) (ellipsis in original) (quoting H.R. Rep. No. 595, 95th Cong., 2d Sess. 220, reprinted in 1978 U.S. Code Cong. & Ad. News at 5963, 6179) [hereinafter
who have won awards which, if paid, might bankrupt the company.\textsuperscript{60} It is also possible that a corporation might prefer to file for reorganization\textsuperscript{61} rather than negotiate with present claimants without knowing how many other plaintiffs might later file suit.\textsuperscript{62} Bankruptcy proceedings allow the corporation to consolidate the claims against it.\textsuperscript{63} It is also possible that an award, even if paid over time, could be so large that although it was not necessary for the company to declare bankruptcy, the owners would have no beneficial return from their investment and so might choose reorganization or even liquidation.\textsuperscript{64} Some courts argue that the judicial system offers safeguards against the danger of bankruptcy. First, the jury can be instructed about the company's possible future liability and about those awards already assessed against the corporation.\textsuperscript{65} It is impossible, however, for the jury to predict the extent of the company's future liability.\textsuperscript{66} In addition, the jury, cited as \textit{Relief From Tort Liability}]; see \textit{In re Johns-Manville Corp.}, 36 Bankr. 743, 746-47 (Bankr. S.D.N.Y.), \textit{appeal denied}, 39 Bankr. 234 (Bankr. S.D.N.Y. 1984). Even successful reorganization has serious consequences, particularly for management, which is likely to lose control of the company's operation. \textit{Relief From Tort Liability, supra}, at 1241. Fear of reorganization should therefore deter management from committing acts that it has reason to believe may lead to a punitive damages award.\textsuperscript{60} \textit{See In re UNR Indus.}, 29 Bankr. 741, 743 (Bankr. N.D. Ill. 1983) (asbestos manufacturer filed for reorganization to avoid overwhelming future litigation), \textit{appeal dismissed}, 725 F.2d 1111 (7th Cir. 1984); \textit{In re Johns-Manville Corp.}, 36 Bankr. 743, 745 (Bankr. S.D.N.Y.) (same), \textit{appeal denied}, 39 Bankr. 234 (Bankr. S.D.N.Y. 1984); \textit{In re Amatex Corp.}, 37 Bankr. 613, 613 (Bankr. E.D. Pa. 1983) (same), \textit{rev'd}, 755 F.2d 1034 (3d Cir. 1985).\textsuperscript{61} The issue of discharge of tort liability in bankruptcy has not yet been resolved. It is possible that courts will not permit a corporate defendant to discharge liability as to future claimants through reorganization. \textit{See In re UNR Indus.}, 29 Bankr. 741, 745 (Bankr. N.D. Ill. 1983). In \textit{In re Johns-Manville Corp.}, 36 Bankr. 743 (Bankr. S.D.N.Y.), \textit{appeal denied}, 39 Bankr. 234 (Bankr. S.D.N.Y. 1984), the court recognized that "resolution of the interests of future claimants is a central focus of these reorganization proceedings." \textit{Id.} at 746. The court did not, however, decide the issue of dischargeability. \textit{See id. at 754-55; see also In re Amatex Corp.}, 755 F.2d 1034, 1041 (3d Cir. 1985) (future claimants should be represented in reorganization whether or not their claims can be affected by reorganization plan).\textsuperscript{62} \textit{See Kreindler, Punitive Damages in Aviation Litigation—An Essay}, 8 Cum. L. Rev. 607, 615 (1978).\textsuperscript{63} \textit{Relief From Tort Liability, supra} note 59, at 1240; see 28 U.S.C. §§ 1471, 1478 (1982).\textsuperscript{64} \textit{Cf. Comment, Will Financially Sound Corporate Debtors Succeed in Using Chapter 11 of the Bankruptcy Act as a Shield Against Massive Tort Liability?,} 56 Temp. L.Q. 539, 541 (1983) (Unarco Industries filed for reorganization "primarily to prevent the diminution of its assets.").\textsuperscript{65} Unified School Dist. No. 490 v. Celotex Corp., 6 Kan. App. 2d 346, 355, 629 P.2d 196, 206 (1981); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 304, 294 N.W.2d 437, 459-60 (1980). Courts have exhibited a reluctance to issue such instructions. In Neal v. Carey Can. Mines, Ltd., 548 F. Supp. 357 (E.D. Pa. 1982), the court refused to allow an asbestos manufacturer to introduce evidence of pending lawsuits, \textit{see id.} at 387-88, deeming the evidence "too speculative and vague," \textit{id.} at 388. The court did allow the company to introduce an accountant's report discussing the possible impact of the litigation. \textit{See id. at 388.} \textsuperscript{66} Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967); Schul-
influenced by the revelation that another jury has already found the corporation's conduct worthy of punitive damages, might award them even though the jury might otherwise have awarded only compensatory damages or no damages at all. The danger also exists that the jury may punish the company not only for the injury to the plaintiff presently before it, but on behalf of all the other people that the jurors think the company may have injured. The judge's power of review is of only limited use in this situation, because he knows nothing more about possible future awards than does the jury and so cannot determine whether the jury is abusing its discretion.

It is also argued that a company deserves to be bankrupted if it has behaved so egregiously that punitive damage awards sufficient to bankrupt the company are assessed. However, the jury should not be the one to say not only that the company's behavior was culpable, but also that it was egregious enough to justify bankruptcy.

Whether punitive damages are desirable or not, they are awarded. Permitting corporations to insure against punitive damages will not prevent the danger that they will be abused, but it at least allows a corporation to protect against that possibility.

II. THE VALIDITY OF THE POLICIES AGAINST INSURANCE IN THE CORPORATE SETTING

As has been discussed in the previous section, the availability of punitive damages against a corporation poses particular problems. Most courts addressing the insurability of punitive damages, however, have

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67. See Schuldin, supra note 66, at 1806-07.
69. See Globus v. Law Research Serv. Inc., 418 F.2d 1276, 1285 (2d. Cir. 1969) (no way for courts to fairly restrict punitive damage awards), cert. denied, 397 U.S. 913 (1970); Hanlon v. Johns-Manville Sales Corp., 599 F. Supp. 376, 381 (N.D. Iowa 1984) (The court refused to limit punitive damage awards because of insufficient proof that defendants "have actually been subjected to judgments for punitive damages that in fact threaten their corporate existence." The judge apparently did not choose to consider possible future awards.); Wheeler, supra note 2, at 288 (judicial review "does little to minimize the risk of erroneous results").
71. According to Coffee, even a judge should not have the power to bankrupt a company. Coffee, supra note 30, at 9.
chosen to ignore the differences between corporations and individuals, presumably clinging to the notion that because a corporation is a person in the eyes of the law there should be no distinction in the legal treatment of the two. Because insurability is determined by the judicial interpretation of state policy, however, corporations and individuals should be treated identically in this area only if the policies behind the rule apply to corporations as they do to individuals. In reality, many of the arguments against insuring punitive damages do not hold true for corporations.

A. The Effect of Insurance on Deterrence of Misconduct

The argument that insuring against punitive damages will eliminate their deterrence value is unpersuasive in the corporate setting. The deterrence value of punitive damages is uncertain, and what value there is will not be eliminated by the availability of insurance.

1. Predictability of Punitive Damage Liability

It is difficult for the corporate defendant to know what behavior might

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74. Many courts do not believe that these arguments apply to individuals. Many jurisdictions that have decided that public policy does not prohibit insurance have done so in the context of the individual. See, e.g., Price v. Hartford Accident & Indem. Co., 108 Ariz. 483, 502 P.2d 522 (1972) (en banc); Continental Ins. Cos. v. Hancock, 507 S.W.2d 146 (Ky. 1973); Vigilant Ins. Co. v. Kambly, 114 Mich. App. 683, 319 N.W.2d 382 (1982); Anthony v. Frith, 394 So.2d 867 (Miss. 1981); Lazenby v. Universal Underwriters Ins. Co., 214 Tenn. 639, 383 S.W.2d 1 (1964). Whether these policies apply to individuals, however, is beyond the scope of this Note.

75. See supra notes 11-13 and accompanying text.
warrant a punitive damage award and so should be avoided. Each jurisdiction, and sometimes it seems each judge, determines the type of behavior warranting an award. Moreover, the standards under which courts award punitive damages—for example "wanton," "gross," "outrageous," "reckless disregard"—are imprecise. As one commentator has noted, "there is always room for difference of opinion in the application of such abstract standards as 'recklessness' or 'malice.'"

In the business area it is particularly difficult to predict what actions might lead to punitive damage awards. Business decisions often allow for differing interpretations, and judges sitting on the same case can

77. See infra notes 82-89.
78. E.g., Norfolk & Western Ry. v. Hartford Accident & Indem. Co., 420 F. Supp. 92, 95 (N.D. Ind. 1976) ("[w]hensoever the elements of fraud, malice, gross negligence or oppression mingle in the controversy") (quoting Taber v. Hutson, 5 Ind. 322, 325 (1854)); Louisiana Oil Refining Corp. v. Yelton, 188 Ark. 280, 285, 65 S.W.2d 537, 539 (1933) ("willful, wanton, and malicious conduct"); Thomas v. Kent-Brown Chevrolet Co., 227 Kan. 45, 51, 605 P.2d 95, 100 (1980) ("fraud, malice, gross negligence, oppression or wanton disregard of plaintiff's rights are needed in order to recover punitive damages"); Pettengill v. Turo, 159 Me. 350, 362, 193 A.2d 367, 374 (1963) ("punitive damages are recoverable in all actions upon tortious acts that involve ingredients of malice, fraud or insult, or wanton and reckless disregard of plaintiff's rights"); Veselenak v. Smith, 414 Mich. 567, 574-75, 327 N.W.2d 261, 264 (1982) ("conduct . . . [so] malicious or so willful and wanton as to demonstrate a reckless disregard of plaintiffs' rights"); Leichtamer v. American Motors Corp., 67 Ohio St. 2d 456, 471, 424 N.E.2d 568, 579 (1981) ("punitive damages may be awarded in tort cases involving fraud, malice or insult"); Samuels v. Richmond & D.R. Co., 35 S.C. 493, 505-06, 14 S.E. 943, 946 (1892) (If an injury has been "wantonly and wilfully inflicted, or with such a gross want of care and regard for the rights of others as to justify the presumption of willfulness or wantonness, the court will instruct the jury that they are at liberty to find for the plaintiff.") (quoting H. Thompson, The Law of Negligence 1264 (1880).
79. Cooter, Economic Analysis of Punitive Damages, 56 S. Cal. L. Rev. 79, 79 (1982); Ellis, supra note 8, at 36-37. It is difficult to determine what type of action will merit a punitive damage award. Hensley v. Paul Miller Ford, Inc., 508 S.W.2d 759, 762 (Ky. 1974); Sinclair Oil Corp. v. Cormack, 682 P.2d 975, 980 (Wyo. 1984); Lentz, supra note 17, at 317; Oshins, supra note 7, at 81; Rabin, Dealing With Disasters: Some Thoughts on the Adequacy of the Legal System, 30 Stan. L. Rev. 281, 297 (1978); Comment, Factors Affecting Punitive Damages, 7 Miami L.Q. 517, 519 (1953).
80. D. Dobbs, supra note 1, § 3.9, at 206.
81. A business decision is inevitably judged at trial through hindsight. A decision that seemed correct at the time it was made can be proved drastically wrong; making the wrong choice should not necessarily be grounds for a punitive damage award. Roginsky v. Richardon-Merrell, Inc., 378 F.2d 832, 843 (2d Cir. 1967); see Joy v. North, 692 F.2d 880, 886 (2d Cir. 1982), cert. denied, 460 U.S. 1051 (1983); Johnston, Corporate Indemnification and Liability Insurance for Directors and Officers, 33 Bus. Law 1993, 2035 (1978); Owen II, supra note 37, at 13-14; Slain, Risk Distribution and Treble Damages: Insurance and Contribution, 45 N.Y.U. L. Rev. 263, 269 (1970). Additionally, because juries are often hostile to the corporate defendant, see supra notes 30, 37-40 and accompanying text, particularly if the plaintiff has been physically injured, the jury may be unfairly influenced in its interpretation of the business decision. Owen II, supra note 37, at 12 & n.61; see In re Paris Air Crash, 622 F.2d 1315, 1323 (9th Cir.), cert. denied, 449 U.S. 976 (1980). In Wackenhut Corp. v. Canty, 359 So. 2d 430 (Fla. 1978), the plaintiff wore a colostomy bag in defendant's department store. See id. at 431. Upon leaving, he was
analyze the same behavior differently. In *Brookridge Party Center, Inc. v. Fisher Foods, Inc.*, 82 for example, the majority found the water damage caused by a second-story grocery store to the shop below it merited the imposition of $215,500 in punitive damages. 83 The concurring judge thought that on the whole the grocery was merely following necessary business practices, 84 and that punitive damages of more than $25,000 would be “motivated by the popular view of socking the big corporations.” 85 Judges in different jurisdictions can also come to opposite conclusions. This is evidenced by the outcome of litigation arising out of MER/29. For example, in *Roginsky v. Richardson-Merrell, Inc.*, 86 the court denied a request for punitive damages, finding that the defendant’s conduct did not support a finding that the directors exhibited “deliberate disregard for human welfare.” 87 On the same facts, the court in *Toole v. Richardson-Merrell, Inc.* 88 found evidence that the board was aware of wrongdoing and upheld a jury award of $250,000 in punitive damages. 89

Multiple damages imposed by statute are often considered to be punitive. 90 The damages follow automatically from the violation, and in order to be subject to multiple damages, it is not even necessary for the corporation to have intended the violation. 91 Because the corporation stopped by a security guard who suspected him of shoplifting. See id. The guard, who understood English poorly, did not understand plaintiff’s explanation for the bulge in his shirt. Id. at 431-32. He pulled the bag, and the resulting injury to the plaintiff required surgery. Id. at 432. The plaintiff was awarded $180,000 in punitive damages. Id. at 432. Had the plaintiff not been injured in the exchange, it seems questionable whether a jury would have found that the store’s negligence in hiring the guard merited a punitive damage award.

82. 12 Ohio App. 3d 130, 468 N.E.2d 63 (1983).
83. See id. at 131, 468 N.E.2d at 66.
84. See id. at 138, 468 N.E.2d at 72 (Dahling, J., concurring).
85. Id. at 138, 468 N.E.2d at 73 (Dahling, J., concurring); see also Martin v. Johns-Manville Co., 322 Pa. Super. 348, 380, 469 A.2d 655, 671 (1983) (Wieand, J., dissenting in part) (objecting to punitive damage award; company’s conduct not clearly outrageous); American Motors Corp. v. Ellis, 403 So. 2d 459, 469 (Fla. Dist. Ct. App. 1981) (Cowart, J., concurring in part and dissenting in part) (disputing majority’s judgment that the evidence supported a punitive damage award; company’s actions were the result of “practical economic considerations”); Leichtamer v. American Motors Corp., 67 Ohio St. 2d 456, 482, 424 N.E.2d 568, 585 (1981) (Holmes, J., dissenting) (arguing that the jury’s punitive damage award was unsupported by the evidence).

86. 378 F.2d 832 (2d Cir. 1967).
87. Id. at 850.
88. 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967).
89. See id. at 712, 717, 60 Cal. Rptr. at 414-15, 418.
91. Note, *Insurance Coverage of Punitive Damages*, 84 Dick. L. Rev. 221, 237 (1979); see United States v. Hilton Hotels Corp., 467 F.2d 1000, 1005 (9th Cir. 1972) (intentional wrongdoing is not an element of Sherman Act violation), cert. denied, 409 U.S. 1125 (1973); United States v. Aluminum Co. of Am., 148 F.2d 416, 427 (2d Cir. 1945) (company found to have monopolized the market although its conduct was not intentional); United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 297 (D. Mass. 1953) (same), aff’d, 347 U.S. 521 (1954); cf Slain, supra note 81, at 269 (antitrust violations do
cannot know what behavior may give rise to a punitive damage award, the prospect of statutory multiple damages will have little or no deterrent effect.

2. Corporate Safeguards and Employee Deterrence

One of the rationales for allowing the award of punitive damages against corporations is that the possibility of a punitive damages award may influence a company to try to establish safeguards or improve existing ones. It is both practically and economically impossible, however, for a corporation to institute administrative procedures that will totally eliminate the type of behavior that may leave a corporation vulnerable to punitive damages. The difficulties of a corporation in instituting effective safeguards against employee misdoing are complicated by the fact that corporate employees have little or nothing to lose if the company is fined. Although corporations are persons in the eyes of the law, they still act through individuals whose goals may differ from those of the corporation. As one commentator has noted, albeit in the context of corporate crime:

[T]here is an incongruence between the aims and interests of the individual and those of the organization which employs him. Even if a penalty structure is adequate to deter the corporation as an entity, individuals within the firm would, often, still have an incentive to engage in the criminal behavior in question.

Insurance should be available to shield the company from liability that it may not be able to prevent. The availability of insurance does not discourage a corporation from exercising care in the hiring and supervision of its employees, as this is one of the factors an insurance company


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not involve "conduct clearly ascertainable as illegal at the time the conduct [is] undertaken").


93. See Tolle v. Interstate Sys. Truck Lines, 42 Ill. App. 3d 771, 773, 356 N.E.2d 625, 627 (1976) (increased supervision may not enable employer to prevent torts that may lead to punitive damage liability); Slain, supra note 81, at 271-72 (instructions to employees will not necessarily be followed). See infra notes 99-128 and accompanying text.

94. See infra notes 100-28 and accompanying text.

95. Coffee, supra note 30, at 10-11; Fisse, supra note 92, at 1216; see C. Stone, supra note 33, at 43-44 (employee at automobile plant discovered a defect; correction was resisted by "every hierarchy of the plant" although "it would have often been in the interests of 'the corporation'" to remedy); Slain, supra note 81, at 270 (employees focus narrowly on profitability).

96. Coffee, supra note 30, at 9 (emphasis in original).

97. This is one of the primary goals of vicarious liability. Harrell v. Travelers Indem. Co., 279 Or. 199, 214, 567 P.2d 1013, 1020 (1977) (en banc); Kline v. Multi-Media
considers when determining premiums.  

3. Deterring Middle Level Managers

Most corporate misbehavior occurs at the middle managerial level. Middle level managers are under considerable pressure. If they do not achieve the goals set by the board, they risk losing their jobs or damaging their promotion prospects. One of the arguments for the insurance of punitive damages is that there is no reason to believe that tortfeasors weigh the benefits against the risks before they act. This may be less true of a corporation, in which cost/benefit analyses are commonplace, but where the misconduct occurs at the middle managerial level, if any analysis is made it is likely to be whether the risk outweighs the benefit not for the company, but only for the individual manager. If forced to balance the possibility of being fired or demoted for not meeting this year's goals against the possibility of punitive damages being assessed against the corporation in the future, the manager may choose the latter.

The middle level manager has good reason to believe that he will be unaffected even if punitive damages are assessed against the corporation. Although the corporate employee is liable for his torts, the plaintiff is unlikely to sue him, because he probably cannot pay the award if sued personally. Thus, intra-corporate discipline is all that the employee


99. Coffee, supra note 30, at 10; Owen I, supra note 1, at 1306; Slain, supra note 81, at 269.


101. C. Stone, supra note 33, at 44; Schwartz, The Paradigm of Federal Chartering, in Commentaries, supra note 53, at 330; Slain, supra note 81, at 270.


103. Coffee, supra note 30, at 10-11; see C. Stone, supra note 33, at 46 (employees are undeterred by prospect of corporation being fined).


105. 2 G. Hornstein, supra note 92, § 565, at 39. Directors and officers usually have liability insurance. H. Henn & J. Alexander, supra note 104, § 380, at 1145. In jurisdictions in which insuring punitive damages is against public policy, however, that insurance will not protect them. See Oesterle, supra note 98, at 550. Even if punitive damages are insurable, however, the language of most Director and Officer policies prohibits indemnification against fines or penalties. Johnston, supra note 81, at 2016; Oesterle, supra note 98, at 563. Assuming that “penalties” is interpreted to include civil as well as criminal penalties, Director and Officer insurance policies will be held to exclude coverage for punitive damages. Johnston, supra note 81, at 2026, 2027.
has to fear. In addition, the prospect that an employee will suffer either legal or intra-corporate sanctions as a result of his wrongdoing is made less likely by the nature of corporate decisionmaking itself. It is frequently impossible or extremely difficult to isolate one person who is responsible for the misdeed. In fact, it is likely that there is no one person responsible, but rather that the decision was the result of a series of actions taken by a chain of people, each with different information available to them and each with different priorities. Even if one employee is responsible and the corporation is able to isolate him, it is possible that he will no longer be working for the company when the damages are assessed.

4. Deterring Senior Managers and the Board

Insured punitive damages will probably deter misconduct by senior managers and the board of directors as well as do uninsured punitive damages. Because the professional reputations—and the professional ego—of corporate officers are tied to the performance of their companies, they will probably attempt to avoid any action that would adversely affect their respective companies.

Although it is argued that the deterrent value of punitive damages will not be realized if the tortfeasor is allowed to shift his liability, because he will escape responsibility for his actions, insurance is not a panacea for all the dangers posed by the possibility of punitive damages. The award of punitive damages will probably cause a company’s insurance premiums to be raised. Liability insurance is a substantial expense, and the possibility of liability leading to a rate increase is one that the corporation is likely to consider in planning corporate activities. There are indications that insurance rates can be sufficiently onerous to affect a cor-

106. Discipline “may range from ostracism and ‘passing over’ in the matter of promotions and raises, to dismissal, or even the institution of an employer’s indemnity action.” Stone, supra note 31, at 29.


108. Owen II, supra note 37, at 15.

109. See Stevenson, supra note 53, at 45.

110. See supra notes 11-16 and accompanying text.


112. See Owen I, supra note 1, at 1309 & n.247 (expense and increasing difficulty of getting insurance); Diamond, Insurance Against Pollution is Cut, N.Y. Times, March 11, 1985, at A1, col. 6, D12, col. 5 (“According to chemical executives, [a] company that paid $700,000 last year for $200 million in insurance will pay perhaps $2 million this year for a quarter the amount of coverage—if coverage can be obtained at all.”) [hereinafter cited as Insurance]; Product Liability, supra note 3, at A6, col. 2 (discussing rising insurance costs and the difficulty of obtaining insurance).
poration's way of doing business.113 In fact, at least one company has gone out of business as a result of soaring product liability insurance costs.114 Another company, one of the two American manufacturers of the vaccine against whooping cough, a potentially fatal disease, quit the market because its premiums were drastically increased; the move was expected to worsen existing shortages.115 Moreover, frequently a company may not carry insurance sufficient to withstand the damages that may result from a mass liability situation.116 Fear of exceeding coverage117 or of being unable to obtain coverage118 should have a deterrent effect, particularly given the unpredictability of punitive damage awards. Furthermore, compensatory liability alone, as well as the cost of defending lawsuits, can be onerous and sufficient to deter misdeeds.119

Moreover, other economic consequences may attend the award of punitive damages against a corporation. Stock prices, one indicator of corporate success, may fall if punitive damages are awarded against a corporation.120 A substantial part of the salary of the highest officers of a corporation is likely to be in stock options,121 and any drop in stock

113. See Acosta v. Honda Motor Co., 717 F.2d 828, 838 (3d Cir. 1983); G. Sullivan, supra note 35, at 17; Owen I, supra note 1, at 1309-10; Insurance, supra note 112, at D12, col. 6; Lewin, Pharmaceutical Companies Are the Hardest Hit, N.Y. Times, March 10, 1985, § 3, at 1, col. 3.

114. G. Sullivan, supra note 35, at 3 (Havir Manufacturing Company was dissolved in 1975 “because its product liability insurance quotes for 1976 were 50 times what it had been paying in 1975.”).


120. It is thought that a negative corporate image engendered by a punitive damage award can reduce earnings, which will reflect on stock prices. See Reich, Corporate Accountability and Regulatory Reform, 8 Hofstra L. Rev. 5, 18 (1979); Stevenson, supra note 53, at 50. Drastically raised insurance rates, see supra notes 111-19 and accompanying text, may also have an effect on corporate earnings by reducing the profit margin.

121. See Cuff, Those Well-Paid Executives, N.Y. Times, May 2, 1984, at D1, col. 3
value will hurt their portfolios. Furthermore, a fall in stock prices may, in an extreme case, lead to a takeover bid, and result in management’s loss of control over the corporation.

Finally, corporate management’s sensitivity to negative publicity provides a deterrent to corporate misconduct. One consideration of corporate managers contemplating a wrongful act will be the likelihood of its being exposed. Allowing punitive damages may encourage suits, thus increasing the likelihood that wrongful corporate behavior will be brought to light. This will also enhance the chance that the suit will receive publicity, because large awards attract the attention of journalists. The identification of upper level managers and the board with the corporation they serve will probably deter them from committing acts that they have reason to believe will impact negatively on the company. Because insurance premiums are a burden on the corporation, a burden that will in all likelihood be increased if punitive damages are assessed against the company, the prospect of even an insured punitive damage award should deter these employees from committing wrongful acts.

B. The Effect of Insurance on Punishment of the Wrongdoer

One rationale behind prohibiting the insurance of punitive damages is to ensure that the culpable party is adequately punished and is unable to pass on his liability. If the party who bears the burden of punitive damages is not the one who is actually responsible for the wrongdoing, however, there is no reason to forbid insurance. Courts recognizing this principle created the vicarious liability exception. In jurisdictions in

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(NCR Inc. chairman accumulated $12,154,000 in gains from exercising stock options accumulated over 10 years.)

122. Reich, supra note 120, at 19; see Werner, supra note 37, at 403-04. Stock values are taken into consideration in corporate management decisions. Marsh, in Commentaries, supra note 53, at 297; Werner, supra note 37, at 402-04. One undesirable result of lowered stock prices would be having to face dissatisfied shareholders at the annual meeting, which is psychologically stressful for management. See Stevenson, supra note 53, at 46. A corporate loss could also lead to a shareholder derivative suit. Slain, supra note 81, at 274. Finally, lowered share values may make it more difficult for a corporation to borrow money. DuBois, supra note 2, at 350; Werner, supra note 37, at 403.

123. Fisse, supra note 92, at 1153; see Marsh, in Commentaries, supra note 53, at 296; Note, Punitive Damages, The Common Question Class Action, and the Concept of Overkill, 13 Pac. L.J. 1273, 1295 (1982); see also Its Best Face, N.Y. Daily News, Dec. 21, 1984, at 40, col. 3 (Union Carbide hired public relations firm after Bhopal disaster; firm had been used by Johnson & Johnson after the Tylenol tamperings); Burnham, G.M. Faces Tough Challenge Over X-Car Safety, N.Y. Times, Apr. 17, 1984, at A19, col. 1 (G.M. began publicity campaign, partly in response to a negative image engendered by flawed cars).

124. See supra note 1.


126. See supra notes 11-13 and accompanying text.
which an employer can be held vicariously liable for the acts of his servants under the doctrine of respondeat superior,\(^1\) the employer can shift his liability to his insurance company.\(^2\) However, the division between vicarious liability, which can be shifted, and direct liability, which cannot, is artificial in a publicly held corporation.\(^3\) Even if managerial level employees were either responsible for or ratified the wrongful conduct, and the corporation's liability was therefore direct,\(^4\) the people who would be hurt by the award would not only be those responsible for the wrongdoing: they would also include the stockholders.

1. Injuries to the Shareholders

It is primarily the shareholders who are hurt by punitive damages awards.\(^5\) Their dividends will be cut in an attempt to recoup the loss,

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\(^{129.}\) See Fisse, supra note 92, at 1187.

\(^{130.}\) A company's liability may be direct when the agent is authorized to do the act, e.g., Jenkins v. Whittaker Corp., 551 F. Supp. 110, 112 (D. Hawaii 1982); Spahn v. Guild Indus. Corp., 94 Cal. App. 3d 143, 156, 156 Cal. Rptr. 375, 383 (1979); Holland Furnace Co. v. Robson, 157 Colo. 347, 352, 402 P.2d 628, 631 (1965); C. McCormick, supra note 1, § 80, at 283, the act is one of company policy, In re Related Asbestos Cases, 566 F. Supp. 818, 825 (N.D. Cal. 1983), the agent was employed in a managerial capacity, Ruginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 842 (2d Cir. 1967); Spahn v. Guild Indus., 94 Cal. App. 3d 143, 156, 156 Cal. Rptr. 375, 383 (1979); Restatement (Second) of Torts § 909(e) (1977), or the action is subsequently ratified, Jenkins v. Whittaker Corp., 551 F. Supp. 110, 112 (D. Hawaii 1982); Spahn v. Guild Indus. Corp., 94 Cal. App. 3d 143, 156, 156 Cal. Rptr. 375, 383 (1979); Holland Furnace Co. v. Robson, 157 Colo. 347, 352, 402 P.2d 628, 631 (1965); American Nat'l Bank & Trust Co. v. First Wis. Mortgage Trust, 577 S.W.2d 312, 318 (Tex. Civ. App. 1979). Ratification has been found when the employee was not fired subsequent to discovery of the act. Coats v. Constr. & Gen. Laborers Local No. 185, 15 Cal. App. 3d 908, 914, 93 Cal. Rptr. 639, 642 (1971); Goddard v. Grand Trunk Ry., 57 Me. 202, 227 (1869); C. McCormick, supra note 1, at 283-84. But see U.S. Concrete Pipe Co. v. Bould, 437 So. 2d 1061, 1064 (Fla. 1983) (retention of employee is insufficient to establish ratification). This presents a danger that the employer may fire an employee whose behavior has created even the possibility of a punitive damage award. Morris, supra note 26, at 1204.

\(^{131.}\) C. McCormick, supra note 1, § 80, at 283; Owen I, supra note 1, at 1299-300;
and the value of their investments will drop.\textsuperscript{132} Given the separation between ownership and management in a public corporation,\textsuperscript{133} the shareholders are not the people who actually make the decisions that lead to liability, yet they will suffer for the employee's misdeeds. In effect, the liability of the shareholders is always vicarious: they are owners responsible for the acts of their servants.

Some commentators and courts do not find the idea of shareholder liability objectionable.\textsuperscript{134} They argue that the shareholders are not "innocent," because they had the opportunity to elect the board members or disapprove the corporation's actions.\textsuperscript{135} Most shareholders, however, do not take an active role in corporate governance or elections.\textsuperscript{136} Furthermore, shareholders' ability to participate is limited by current securities regulations,\textsuperscript{137} as well as by general corporate structure; they thus do not have an effective opportunity to monitor the board.\textsuperscript{138}

It is further argued that the shareholders have received the benefit of the corporate wrongdoing and so should also accept the liability.\textsuperscript{139} This overlooks the fact that most shareholders do not hold their stocks indefinitely,\textsuperscript{140} and that the people who own a company's stock today may not have received dividends reflecting the benefit of yesterday's wrongful cor-

\textsuperscript{132} See Wangen v. Ford Motor Co., 97 Wis. 2d 260, 288, 294 N.W.2d 437, 452 (1980) (punitive damage award may result in a lower profit margin for the company) (quoting Barager v. Ford Motor Co., No. 76 CV 215 (Sept. 15, 1977, Eau Claire County); Long I, supra note 24, at 872. See supra note 120.

\textsuperscript{133} See Hetherington, When the Sleeper Wakes: Reflections on Corporate Governance and Shareholder Rights, 8 Hofstra L. Rev. 183, 184 (1979); Marsh, in Commentaries, supra note 53, at 294; Owen I, supra note 1, at 1299-300. But see Conard, Business Corporations in American Society, in Commentaries, supra note 53, at 45 (public corporations are usually controlled by small blocks of shareholders).


\textsuperscript{136} See Garrett, The Limited Role of Corporation Statutes, in Commentaries, supra note 53, at 98; Hetherington, supra note 133, at 213.

\textsuperscript{137} See Securities Exchange Act Release No. 13482 [1977-78 Transfer Binder] Fed. Sec. L. Rep. (CCH) \S 81,130, at 87,891 (Apr. 28, 1977). Management can prevent shareholders from presenting proposals for corporate action at the annual meeting if the proposal "deals with a matter relating to the conduct of . . . ordinary business operations." 17 C.F.R. \S 240.14a-9 (1984). This is likely to include conduct that may lead to a punitive damage award.

\textsuperscript{138} H. Henn & J. Alexander, supra note 104, \S 188, at 491, n.8; Assessment of Punitive Damages, supra note 131, at 1307 & n.58.

\textsuperscript{139} See D. Dobbs, supra note 1, \S 3.9, at 214; Coffee, supra note 30, at 6; Owen I, supra note 1, at 1305. But see Crane, supra note 1, at 40 (shareholders benefit no more than bondholders or employees of corporations).

\textsuperscript{140} See Garrett, supra note 136, at 98; Williams, Corporate Accountability, in Commentaries, supra note 53, at 517.
Finally, it is argued that legal liability is one of the risks that shareholders accept when they buy stock. However, when shareholders invest they are already taking a financial gamble that management is competent. A financially sophisticated investor can read the company's annual report and study its past performance to determine whether the investment contains a degree of risk that is acceptable to him; he is unlikely to be able to determine whether a decision made by the company may lead to a punitive damage award, or whether the company is likely to make such a decision in the future. Especially given the inability of shareholders to effectively monitor corporate activities, there seems to be no goal sought by punitive damages that is attained by adding a legal gamble to shareholder risk. Additionally, many shareholders do not make their investment choices themselves, but have them made for them through mutual funds, pension funds and other investment vehicles; they would thus be penalized for someone else's decision to buy.

2. Diffusion of Liability Beyond the Owners

The shareholders are not the only non-culpable parties likely to be hurt. One of the arguments made by McNulty and its followers is that insurers will pass on their liability to the public. This is likely to occur with corporate liability regardless of insurance coverage. If the company is able to, it will pass the loss to consumers by raising prices. If it cannot do this directly due to the demand curve of the market, it will reduce output. If the manufacturer has a large enough market share, consumers will suffer indirectly, as reduced industry output will result in higher prices. Additionally, if the loss is sufficiently onerous that the corporation goes bankrupt, or even merely suffers a significant financial loss, it is likely that workers will be laid off or dismissed. If the com-

141. Ellis, supra note 8, at 67 n.288.
143. An annual report is likely to contain information on the company's past performance and future goals. It is unlikely to contain in-depth information on the day-to-day decisions that may lead to punitive damage liability.
145. See supra notes 14-17 and accompanying text.
146. Long I, supra note 24, at 871-72.
149. Id.
150. Coffee, supra note 30, at 6; DuBois, supra note 2, at 349; Slain, supra note 81, at 6; see In re Johns-Manville Corp., 36 Bankr. 743, 746 (Bankr. S.D.N.Y.) (liquidation would
pany cuts down on production, suppliers to the company will suffer reduced sales.\textsuperscript{151} If the company goes bankrupt, its creditors will be injured.\textsuperscript{152} Thus, one argument against allowing insurance of punitive damages, that the wrongdoer should not be allowed to transfer his liability to an innocent public, is not applicable in the corporate setting. The nature of the American economy is such that any significant loss suffered by a corporation will have a ripple effect. The severity of that effect will depend on the size of the company and the size of the liability, but it will be felt.

**CONCLUSION**

The issue of the insurability of punitive damages has traditionally been decided without reference to whether the defendant is a corporation or an individual. However, the policy reasons for prohibiting insurance—deterring misconduct and punishing wrongdoers—are largely inapplicable to the corporate defendant.

It is unlikely that noninsurability will deter corporate employees from misconduct. Upper level managers have other pressures operating to deter them. Because their egos are tied to the company's success and reputation, they are likely to refrain from actions that could injure the corporation. Additionally, the prospect of skyrocketing premiums or cancelled policies should serve to deter them from wrongdoing. Lower and middle level employees are unlikely to be moved by the prospect of the corporation suffering a loss. Because corporate structure and operating practices make it difficult to trace employee misconduct to the wrongdoer, employees have little reason to fear that they personally will suffer reprisals.

Given the difficulty of tracing misconduct, the second goal of punitive damages—punishment—will probably not be effectuated by prohibiting insurance. Rather, the burden will fall primarily on the company's shareholders, and will likely be spread beyond them to the corporation's employees, consumers and creditors.

Additionally, allowing the award of punitive damages against a corporation presents the danger of abuse, the impact of which can be mitigated by the ability of the company to insure. This danger has become more profound in recent years with the increase in the frequency and amounts of punitive damages awards. The danger of abuse is the result of several

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\textsuperscript{151} DuBois, *supra* note 2, at 349; Slain, *supra* note 81, at 273.

factors: the broad discretion of the jury in determining punitive damage awards, the hostility of juries to corporations, and the jury's lack of financial sophistication in determining an appropriate award. Without the protection of insurance, it is possible that the increase in punitive damage awards could lead to the bankruptcy of corporations or to the discontinuation of important products and services.

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