

Should punitive damages be insurable?

Arguments for Insurers and Insureds

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The continuing national debate over whether punitive damages should be insurable is far from over. Although some jurisdictions have addressed the issue, many have not. In the middle are jurisdictions, like Texas, that continue to avoid the issue or suggest that punitive damages may be insurable in some cases, but not others. This article examines the arguments that have been made by insurers and insureds.

The determination of whether there is coverage for punitive damages is a two step process. An insurer or insured must consider: (1) whether the policy terms are broad enough to include coverage for punitive damages, and if so; (2) whether it is against the public policy of the state for the insurer to provide that coverage. This article primarily addresses the second prong, but it is important to not forget this vital first step, so it is briefly addressed first.

I. Does the policy provide coverage for punitive damages?

In some jurisdictions, if a policy does not expressly exclude coverage for punitive damages, the court will find that punitive damages are part of the “all sums” the insurer contractually agreed to pay on behalf of the insured if the insured is “legally obligated to pay” the punitive damages.¹ In other jurisdictions, however, the same or similar language has been found to not provide coverage for punitive damages on the grounds that “damages” does not include damages that are not compensatory and imposed solely for punishment.² But arguments for and against contractual coverage for punitive damages is not limited to “all sums” insuring clauses. A frequently litigated issue is whether the punitive

damages are covered because they do not arise from bodily injury or property damage. And other cases address whether the insured's conduct was intentional or willful, which is often expressly excluded from coverage, or merely grossly negligent, which most often is not.

For example, in *Herrera v. C.A. Segurus Catatumbo*,³ the successful plaintiffs in a personal suit against a Venezuelan airline brought a declaratory judgment action against the airline's insurer seeking to recover a judgment for compensatory and punitive damages. The plaintiffs were allegedly subjected to a strip/cavity search as a result of a verbal altercation with airline personnel and brought suit against the airline asserting claims for intentional infliction of emotional distress, negligence and false imprisonment.⁴ The jury returned a general verdict in favor of the plaintiffs on all three claims, but did not allocate a dollar amount to any particular claim.⁵ The trial court held that there was no coverage for the claims and the plaintiffs appealed.

The court of appeals first dismissed the airline's contention that the plaintiffs were not covered third parties who had suffered bodily injuries under the insuring clause of the airline's policy.⁶ It then addressed the airline's contention that both the compensatory and punitive damages were not covered because the policy excluded malicious acts and malice was an element of all three of the plaintiffs' claims and a necessary element for an award of punitive damages.⁷ The court of appeals rejected both arguments, finding that there was no specific finding of malice by the jury and malice was not a necessary element of all the

plaintiffs' negligence claims.⁸ Moreover, because state law allowed the jury to award punitive damages based on intentional actions or gross negligence, the policy's exclusion for intentional acts did not apply because the plaintiffs did not have to plead or prove malice to recover punitive damages.⁹

This case aptly illustrates how the interplay of a policy's terms and the underlying state law must be carefully examined to determine if there is contractual coverage for punitive damages. The determination of whether punitive damages are covered under a particular policy will vary from case to case and state to state.¹⁰ For this reason, choice of law issues can also play a critical part in any dispute over the insurability of punitive damages.¹¹

If the insurer or insured determines there is a basis to argue that there is coverage for punitive damages under the policy's terms, the next step is to determine the applicable arguments relating to whether providing that coverage is, or is not, against the public policy of the state that governs the contract at issue.

II. Does providing coverage for punitive damages violate public policy?

The debate surrounding the insurability of punitive damages began in the 1960s with two automobile insurance cases, *Northwestern National Casualty Co. v. McNulty*¹² and *Lazenby v. Universal Underwriters Insurance Co.*,¹³ which both addressed whether intoxicated drivers should be insured for damages caused by more than their mere negligence.

Most courts that examine the public policy issues surrounding the insurability of punitive damages begin with an analysis of the arguments in these competing cases. As a result, they are still relevant today.¹⁴

A. Arguments against coverage: the *McNulty* philosophy.

In *McNulty*, an intoxicated driver hit the plaintiff and fled the scene, resulting in significant and permanent brain damage to the other driver.¹⁵ The jury awarded the plaintiff compensatory and punitive damages and the plaintiff brought a successful separate action to recover all the damages from the driver's insurer.¹⁶ The insurer appealed and asserted that the punitive damages were not insurable because it would be contrary to public policy.¹⁷ The Fifth Circuit agreed, finding that the principle purpose of punitive damages is to punish and deter, neither of which is served by allowing punitive damages to be insured, which "shifts the burden" to the insurer:

The policy considerations in a state where, as in Florida and Virginia, punitive damages are awarded for punishment and deterrence, would seem to require that the damages rest ultimately as well 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. 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. In actual fact, of course, and considering the extent to which the public is insured, the burden would ultimately come to rest not on the insurance companies but on the public, since the added liability to the insurance companies would be passed along to the premium payers. Society would then be punishing itself for the wrong committed by the insured.¹⁸

According to this public policy philosophy, insuring against punitive damages not only eliminates the core principles justifying the imposition of punitive damages—punishment and deterrence—it would negatively affect all members of society that purchased insurance as the costs were passed on to insureds.

There are few jurisdictions, however, that have embraced this philosophy. Moreover, those jurisdictions that have adopted *McNulty* have also adopted exceptions to the prohibition against the insurability of punitive damages or have only applied it to certain types of policies.¹⁹ Indeed, many of the cases that purport to adopt the *McNulty* position have exceptions for punitive damages imposed because of vicarious liability or are severely limited to their facts.²⁰ As a result, even if the cases seem to indicate a state has adopted *McNulty*, insurers and insureds should not assume the precedent applies to the policy at issue, that it is not limited to its facts, or that exceptions to the general rule do not exist.

Moreover, many of the fundamental principles of *McNulty* are arguably subject to challenge, especially under a more “modern view” of the insurance industry. If the insurer received an additional premium to insure against the loss, is the insurer really punished? If the state’s regulatory scheme actually results in insurers who provide coverage for punitive damages being prohibited from passing such losses onto other premium payers, is there still ample justification against not insuring for such a loss? If the plaintiff will never recover the punitive

damages without coverage, should the public policy favor coverage? In sum, many of the principles that are the foundation of *McNulty* and its progeny are potentially subject to attack, because the opinion and its progeny rely upon a number of assumptions. On the opposite side of the debate is the *Lazenby* philosophy.

B. Arguments supporting coverage: the *Lazenby* philosophy.

Lazenby was one of the first cases to consider, but reject, the *McNulty* philosophy, holding that allowing insurance coverage for punitive damages does not violate public policy.²¹ In that case, a judgment for compensatory and punitive damages was entered against the insured for personal injuries sustained by a plaintiff in an auto accident when the insured was intoxicated.²² The insurer advocated the court adopt the *McNulty* opinion and find that it was against the public policy of the state to insure punitive damages.²³ In rejecting the *McNulty* rationale, the court recognized that the purpose of punitive damages in Tennessee was to punish the wrongdoer and deter similar conduct by the wrongdoer or others. But the court reasoned that insuring against punitive damage awards would not undercut these policies because it would be speculative to assume that eliminating coverage for punitive damages would deter persons who were not already deterred by potential criminal actions, injury or death.²⁴ The *Lazenby* court also weighed the importance of the freedom to contract and the expectations of the insured, noting there is “often a fine line between simple negligence and negligence upon which an award of punitive damages can be

made.”²⁵ Some courts following *Lazenby* have subsequently argued that there is still a deterrent effect when punitive damages are insurable because the insured could later face higher insurance premiums or an inability to obtain insurance.²⁶

The expectations of the insured, the public policy favoring the right of parties to contract, and the difference between acts that are grossly negligent, but not intentional, are consistent themes in those jurisdictions that hold coverage for punitive damages is not against public policy. The Supreme Court of New Mexico succinctly articulated the reasons why the majority of jurisdictions have adopted the *Lazenby* line of cases:

Citizens and their insurers should have the right to contract for insurance against the possibility of a judicial decision finding that a person's conduct rises above ordinary negligence and justifies punitive damages. If insurance companies market policies which consumers reasonably expect cover all damages, then the insurer should honor that contract. Contracts should be held invalid against public policy only if there is an evil tendency connected with the contract itself, and insurance coverage of punitive damages has not been related in any substantial way to the commission of wrongful acts.²⁷

In these jurisdictions, the courts stress that insurers are able to charge additional premiums for punitive damages and that they are free to exclude punitive damages altogether.²⁸ A significant factor in this line of cases is also the assumed expectations of the insureds, who assume they are covered for all claims that were not the result of intentional acts.²⁹

In addition to the emphasis of the freedom to contract, courts have also been unwilling to find insurance contracts that include coverage for punitive

damage as contrary to the public policy of the state when the policies were written under the state's insurance code or approved by the state's insurance board.³⁰ Today, the *Lazenby* philosophy has been codified as the public policy of a few states.³¹

But the generalization that the majority of jurisdictions follow *Lazenby* has its limits. Many of the cases that have held that insuring against punitive damages is not against the public policy of the state primarily based the decision on the underlying facts of the case or a particular type of policy.³² For example, many of the cases that have held it is not against public policy to provide insurance for punitive damages only considered the public policies underlying uninsured/underinsured motorist claims.³³ An insurer or insured should not assume the same public policy analysis applies to all cases or all policies.

Moreover, the principles underlying *Lazenby* may no longer be applicable in all cases. Does the assumption that the availability of insurance will not deter grossly negligent behavior apply to large corporations and to product liability cases? Are the expectations of consumers and sophisticated companies with risk departments as to the scope of their insurance the same? Like the principles underlying the *McNulty* philosophy, the *Lazenby* philosophy is not necessarily impenetrable to attack even in those jurisdictions that have adopted its general holding. As a result, it is only in the rare case that an insurer or insured should conclude without significant analysis that the public policy of the state allows coverage for punitive damages.

C. Coverage for vicarious punitive damages.

In addition to the *McNulty* and *Lazenby* philosophies, a number of jurisdictions have adopted a vicarious liability exception that allows the insured to insure against punitive damages when the insured is merely vicariously liable for the acts of another.³⁴ In these jurisdictions, however, an insured may still be denied coverage if there is any finding that the insured, such as the officers of a corporation, also participated in the wrongful act.³⁵

The determination of coverage in these cases is necessarily fact specific and will often turn on the law governing the imputation of punitive damages to the insured. The Texas Supreme Court's recent decision in *Fairfield Insurance Co. v. Stephens Martin Paving, LP*³⁶ addresses the rationale underlying this vicarious exception and aptly illustrates the numerous issues it can raise.³⁷

Many commentators asserted that the *Fairfield* decision was the long awaited answer on whether punitive damages were insurable in Texas, but the Texas Supreme Court's holding was limited to the determination of whether the state's public policy prohibited an insurer from indemnifying an employer whose gross negligence resulted in the death of an employee when the Texas Department of Insurance mandated coverage for claims against employers for gross negligence. The broader issue of whether insuring against an award of exemplary damages is against the public policy of the state outside of Texas' workers' compensation scheme was not decided.

Nevertheless, the Court in dicta discussed some “considerations” that may be relevant in the absence of a “clear legislative policy decision” to the determination of whether punitive damages are insurable.³⁸

Although historically punitive damage awards in Texas served the purpose of punishment and deterrence, the Texas Supreme Court noted that the most recent statutes governing punitive damage awards eliminated the element of deterrence and now focus solely upon punishment, “[e]xemplary damages means any damages awarded as a penalty or by way of punishment but not for compensatory purposes.”³⁹

In Texas, an employer is not vicariously liable for exemplary damages awarded for an act committed by an employee unless: (a) the employer authorized the doing and the manner of the act; (b) the employee was unfit and the employer acted with malice or recklessness in employing or retaining him; (c) the employee was employed in a managerial capacity and was acting in the scope of his employment; or (d) the employer or the manager of the employee ratified or approved the act.⁴⁰ Thus, there is not true vicarious liability for the malicious, fraudulent or grossly negligent acts of an employee unless the employee is also a manager. By statute, the fact finder must also consider certain additional factors, such as the net worth of the defendant,⁴¹ to determine what is necessary to punish a particular defendant.⁴²

In *Fairfield*, the Texas Supreme Court considered the applicable underlying law, but then cited with approval the reasoning of a recent opinion from a Texas

court of appeal that held an insurance agreement that allows corporations to insure against punitive damages awarded because of the acts of their employees “serves the public good because, its CEO, its officers, and its shareholders did not commit the wrongful acts and should be allowed to have their insurance policy, for which they paid, indemnify them for the punitive damages.”⁴³ The Court stressed that insurability for punitive damages in such cases may benefit the public because businesses and corporations will avoid punitive damages awarded solely for the conduct of “one or more of its employees” and avoid penalizing many “for the wrongful act of one.”⁴⁴ This analysis suggests that the balance between public policy and the freedom to contract may favor some insureds over others. Should the freedom to contract for insurance for punitive damages be greater for companies?

This vicarious liability philosophy, however, seems contrary to Texas law, which does not hold corporations vicariously liable for punitive damages awarded against their employees unless they fall within a statutory exception that places some responsibility on the corporation.⁴⁵ In such a case, there is arguably no coverage under the vicariously liable exception because the exception does not allow a corporation to insure against its own wrongful acts.⁴⁶

Similarly, the Texas Supreme Court’s discussion recognizes that the jury must consider the defendant’s net worth in order to determine what is necessary to punish a particular defendant, but then fails to address whether the availability of insurance would frustrate this mandatory statutory determination, much less

the very purpose of exemplary damages. The Court's discussion merely notes that the availability of insurance for these damages may render such individual factors less relevant.⁴⁷

The *Fairfield* opinion, therefore, exemplifies the issues raised by jurisdictions that seem to make an exception for "vicarious" punitive damages. Insurers and insureds should closely analyze the underlying law to determine if an argument can be raised that a "vicarious" punitive award should, or should not be insurable, and if any portion of the liability is arguably attributable to the act of the insured under the applicable state law.

D. Are there extreme circumstances that should never be insured?

The underlying facts in *McNulty* and *Lazenby* were both egregious, but the courts ruled differently on whether insuring against punitive damage awards in those cases was contrary to public policy. In the *Fairfield* opinion, the Texas Supreme Court recognized that the majority of jurisdictions have held that coverage for punitive damages for gross negligence is not against the public policy of the state, but then stated that "extreme circumstances may prompt a different analysis" if the purpose behind punitive damages would be destroyed by the availability of insurance.⁴⁸

In the recent case of *American International Specialty Lines*, the Fifth Circuit seized upon the "extreme circumstances" exception from the *Fairfield* opinion as a basis to deny the corporate insured coverage. The case arose from the death of a woman with cerebral palsy and mental disabilities who suffered

severe chemical burns while in the care of a group home. She was left in bleach for hours and then never received proper medical care.⁴⁹ After the parties settled, the district court tried the allocation of the settlement between covered and uncovered claims. The home argued that the harm fell squarely within the *Fairfield* scenario where “other employees and management were not involved.”⁵⁰ According to the record, only a handful of employees were involved in the actual incident.⁵¹

The Fifth Circuit, however, held that coverage was not available because the case involved “extreme circumstances.”⁵² Relying on the underlying complaint, the Fifth Circuit noted that plaintiffs’ complaint alleged that both the employees and the home were directly liable for the incident for failing to prevent the chemical burns and that the home failed to hire and train its employees.⁵³ The Court found the harm was an example of “avoidable conduct that causes injury” because there was evidence that prior investigations suggested the facility should have been closed.⁵⁴

The “extreme circumstances” exception, however, offers little certainty to insurers or insureds. Does it only apply in cases of wrongful death? What circumstances are sufficiently “extreme” to prohibit coverage but still egregious enough to justify the imposition of punitive damages? Its application is also highly subjective and may not lead to uniform results. Yet, it does offer a new argument for insured corporations to attempt to prove they should not be punished for the conduct of their employees and agents and insurers attempting

to avoid punitive damage coverage on the grounds the conduct is so egregious that the insured should not be allowed to shift the loss to the insurer—even if the insurability of punitive damages is not against the public policy of the state.

III. Does the underlying and excess coverage differ?

Additional issues are raised when the underlying policies and excess policies have differing coverage. In a matter of first impression, the court in *Davis v. Allied Processors, Inc.* held that when the primary coverage included coverage for punitive damages, but the excess did not, it was improper to allocate the punitive damages to the primary policy to exhaust coverage and subject the excess insurer to the entire compensatory award.⁵⁵ The insured had a primary liability policy in the amount of \$500,000 and an excess umbrella for \$2,000,000.⁵⁶

Because the underlying coverage was silent on the issue of coverage for punitive damages, the court held that punitive damages were covered under the primary policy, but it was undisputed that the excess coverage specifically excluded “any liability for punitive or exemplary damages.”⁵⁷ The underlying judgment was for \$500,000 compensatory and \$500,000 in punitive damages.⁵⁸ The court found that allocating all of the compensatory damages to the excess policy based on the underlying plaintiff’s election of which policy it wanted to use to satisfy the judgment was contrary to the contract between the excess insurer and the insured because the excess premium and the risk was based on the

exclusion of punitive damages.⁵⁹ Thus, the primary coverage had to be exhausted by the compensatory damages, not the punitive damages.⁶⁰

IV. Conclusion

With the exception of a few states that have clear statutes governing the issue, the continued debate over the insurability of punitive damages is far from over. In jurisdictions that follow the *McNulty* philosophy, new and additional arguments exist that providing coverage for punitive damages does not eliminate the punishment to the insured or their deterrent effect. The assumption that insurers in a highly regulated industry would pass on these costs to policy holders may also no longer hold true. In jurisdictions that follow the *Lazenby* philosophy, the arguments underlying the assumption that insurability does not affect deterrence or punishment may also be subject to attack depending on the insured. Moreover, additional arguments regarding the availability of coverage in “extreme circumstances” remain to be tested. A creative advocate will still be able to craft arguments in favor of the position of insurers and insureds.

¹ South Carolina State Budget & Control Bd., Div. of General Services, *Ins. Reserve Fund v. Prince*, 304 S.C. 241, 249, 403 S.E.2d 643, 648 (1991)(finding that because the policy does not limit recovery to actual damages the rules of construction and interpretation of insurance policies dictates that it encompasses punitive damages); *Harrell v. Travelers Indem. Co.*, 279 Or. 199, 567 P.2d 1013, 1015-16 (1977)(rejecting argument that the insurer's intent was to provide coverage for compensatory damages and noting that insured would expect punitive damages to be included unless specifically excluded); *United Services Auto. Ass'n v. Webb*, 235 Va. 655, 658, 369 S.E.2d 196, 198 (1988); *State Farm Mut. Auto. Ins. Co. v. Lawrence*, 26 P.3d 1074, 1080 (AK. 2001).

² *Calvin's Inc. v. Atlantic Mut. Ins. Co.*, 27 N.C. App. 698, 220 S.E.2d 403, 406 (1975); *Caspersen v. Webber*, 298 Minn. 93, 213 N.W.2d 327, 331 (1973); *Heartland Stores, Inc. v. Royal Ins. Co.*, 815 S.W.2d 39, 42 (Mo. App. 1991)(“all sums” did not include punitive damages because they were for punishment and not for bodily injury).

³ 844 So.2d 664 (Fla. 3d D.C.A. 2003).

⁴ *Id.* at 665.

⁵ *Id.* at 665.

⁶ *Id.* at 666-667 (The policy stated, "Under this coverage, the Company undertakes to take charge of any payment derived from the Insured's extra contractual Liability for bodily injury to passengers, or for their death, resulting from an accident.").

⁷ *Id.* at 668.

⁸ *Id.*

⁹ *Id.* 667-668.

¹⁰ Although there were early industry efforts to exclude coverage for punitive damages through uniform endorsements, these efforts failed and policy terms vary widely between insurers and different types of policies. See Kircher & Wiseman, *Punitive Damages: Law and Practice* § 7:10 (2d ed. 2008).

¹¹ For a comprehensive analysis of punitive damages on a state-by-state basis see Richard L. Blatt, *Punitive Damages: A State-By-State Guide to Law and Practice* (2008 ed.).

¹² 307 F.2d 432 (5th Cir. 1962).

¹³ 214 Tenn. 639, 383 S.W.2d 1 (1964).

¹⁴ See *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 661-664 (Tex. 2008).

¹⁵ *McNulty*, 307 F.2d at 433.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 441.

¹⁹ See *Fairfield Ins. Co.*, 246 S.W.3d at 661-662 n. 13 (citing Ohio, Utah, California, Colorado, Illinois, New York, Rhode Island and South Dakota as states adopting a "broad prohibition against punitive damages," but recognizing that the Ohio statute is limited to certain automobile, casualty and liability policies).

²⁰ See *Beaver v. Country Mut. Ins. Co.*, 95 Ill. App.3d 1122, 1125, 420 N.E.2d 1058, 1061 (Ill. App. 5 Dist. 1981)(emphasizing that finding that one cannot insure for damages that arise out of one's own misconduct does not affect the rule that an employer may insure himself against vicarious liability for punitive damages); see *Town of Cumberland v. Rhode Island Interlocal Risk Management Trust, Inc.*, 860 A.2d 1210, 1219 (R.I. 2004)(cited by the *Fairfield* opinion as having a broad public policy against the insurability of punitive damages but the opinion actually rejected the argument that Rhode Island's public policy bars an insured from indemnification for intentional torts when the insurance policy explicitly provides such coverage); Cf., *Allen v. Simmons*, 553 A.2d 541 (R.I. 1987).

²¹ *Lazenby*, 214 Tenn. 639, 383 S.W.2d 1 (1964).

²² *Id.* at 643.

²³ *Id.* at 647.

²⁴ *Id.*

²⁵ *Id.* at 648.

²⁶ *Brown v. Maxey*, 124 Wis. 2d 426, 369 N.W.2d 677 (1985).

²⁷ *Baker v. Armstrong*, 106 N.M. 395, 398-399, 744 P.2d 170, 173 - 174 (1987).

²⁸ *Harrell*, 567 P.2d at 1020.

²⁹ See *Price v. Hartford Acc. & Indem. Co.*, 108 Ariz. 485, 502 P.2d 522, 524 (1972)(stating "it is clear that the average insured contemplates protection against claims of any character caused by his operation of an automobile, not intentionally inflicted.").

³⁰ See *Dairyland County Mut. Ins. Co. v. Walgreen*, 477 S.W.2d 341 (Tex. Civ. App.—Fort Worth 1972, writ ref'd n.r.e); *Fairfield Ins. Co.*, 246 S.W.3d at 659-660 (Tex. 2008)(finding that the Texas Department of Insurance's regulatory scheme that approved standard policies and endorsements revealed the legislative intent to provide additional coverage for an employer's gross negligence because that authority was delegated to the Texas Department of Insurance by the Texas Legislature).

³¹ Haw. Rev. Stat. §431:10-240 (2008); Mont. Code Ann. §33-15-317 (2008); Va. Code Ann. §38.2-227 (2007) ("It is not against the public policy of the Commonwealth for any person to purchase insurance providing coverage for punitive damages arising out of the death or injury of any person as the result of negligence, including willful and wanton negligence, but excluding intentional acts.").

³² See *Fairfield Ins. Co.*, 246 S.W.3d at 660-661, n. 12 (listing the twenty-five states that have "established generally that their public policy does not prohibit coverage" for punitive damages, but noting that these states also include or exclude cases based on uninsured motorist or vicarious liability.).

³³ *Id.* (citing *State Farm Mut. Auto. Ins. Co. v. Lawrence*, 26 P.3d 1074, 1080 (Alaska 2001); *State Farm Mut. Auto. Ins. Co. v. Wilson*, 162 Ariz. 251, 782 P.2d 727, 729-36 (1989)).

³⁴ See *Fairfield Ins. Co.*, 246 S.W.3d at 660-661 n. 14 (citing Kan. Stat. Ann. § 40-2,115(a), "It is not against the public policy of this state for a person or entity to obtain insurance covering liability for punitive or exemplary damages assessed against such insured as the result of acts or omissions, intentional or otherwise, of such insured's employees, agents or servants, or of any other person or entity for whose acts such insured shall be vicariously liable, without the actual prior knowledge of such insured.").

³⁵ See *Morgan Intern. Realty, Inc. v. Dade Underwriters Ins. Agency, Inc.*, 617 So.2d 455, 459 (Fla. 3d D.C.A.1993)(finding that public policy in Florida prohibits liability insurance coverage for punitive damages assessed against a person because of his own wrongful conduct, does not apply when the insured himself is not personally at fault, but that a corporation acting through its officers and agents is indistinguishable from the acts of the corporation itself.).

³⁶ See *Fairfield Ins. Co.*, 246 S.W.3d at 660-662.

³⁸ *Id.* at 659-660.

³⁹ *Id.* at 666 (citing Tex. Civ. Prac. & Rem. Code §41.001(5)).

⁴⁰ *Id.* at 668 (citing Tex. Civ. Prac. & Rem. Code §41.005); see also *Fisher v. Carousel Motor Hotel, Inc.*, 424 S.W.2d 627 (Tex. 1967).

⁴¹ *Id.* at 667-668 (citing Tex. Civ. Prac. & Rem. Code §41.011(a)).

⁴² *Id.* at 668.

⁴³ *Id.*

⁴⁴ *Id.* at 670.

⁴⁵ *Id.* at 668 (citing Tex. Civ. Prac. & Rem. Code §41.005).

⁴⁶ See Morgan Intern. Realty, Inc., 617 So.2d at 459.

⁴⁷ *Id.* at 667-668.

⁴⁸ *Id.* at 670.

⁴⁹ 529 F.3d 649, 653-656 (5th Cir. 2008).

⁵⁰ *Id.* at 662.

⁵¹ *Id.* at 654-655.

⁵² *Id.* at 663.

⁵³ *Id.* at 663-664.

⁵⁴ *Id.* at 664.

⁵⁵ 214 Wis.2d 294, 571 N.W.2d 692, 693 (Ct. App. 1997).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 694-695.

⁶⁰ *Id.*