

PROFESSIONAL LIABILITY UPDATE

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LEGAL MALPRACTICE DAMAGES

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By William L. Jacobson

California Supreme Court hears oral argument on whether attorneys can be liable for "lost" punitive damages.

Ferguson v. Lieff, Cabraser, Heimann & Bernstein LLP (Cal. Supreme Ct. No. S104444)

The California Supreme Court heard oral argument Wednesday, March 12th, on whether class counsel in a mass tort case can be liable to dissenting plaintiffs for alleged negligence in waiving class members' punitive damages claims. California authority has been split on whether attorneys can be liable for loss of their clients' punitive damages claims. *Merenda v. Superior Court* (1992) 3 Cal.App.4th 1, reiterated that legal malpractice plaintiffs are entitled to recover the value of their lost claims. In that context, the *Merenda* court held lost punitive damages can be recovered as a component of compensatory damages.

More recently, *Piscitelli v. Friedenber* (2001) 87 Cal.App.4th 953, held that as a matter of law, "lost" punitive damages are not recoverable in legal malpractice actions. *Piscitelli* observed that punitive damages are not compensation for injury, but a windfall to a plaintiff to punish a defendant. As a result, the court held it would be unjust to impose on a merely negligent party an economic burden designed to punish one culpable

of outrageous misconduct. The First District Court of Appeal, Division Four, adopted *Piscitelli's* reasoning in holding that the *Ferguson* plaintiffs could not seek lost punitive damages from their class counsel. (See *Ferguson v. Lieff, Cabraser, Heimann & Bernstein, LLP* (2002) 95 Cal.App.4th 154 [115 Cal.Rptr.2d 342], review granted May 1, 2002.)

The comments of the justices during oral argument strongly indicated that the Supreme Court would affirm the judgment of the Court of Appeal in *Ferguson*. However, the Supreme Court appears to be divided over the scope of the rule the case will establish. The comments by Chief Justice George and Justices Baxter, Chin and Brown indicated they may be favoring a bright-line rule that bars recovery of lost punitive damages in legal malpractice actions. The comments by Justices Kennard, Werdegar and Moreno suggest that they may be considering a more incremental approach by holding that public policy concerns preclude a claim

601 Montgomery Street, Suite 900
San Francisco, California 94111
Telephone (415) 397-2222
Facsimile (415) 397-6392
www.longlevit.com

3130 Wilshire Boulevard, 2nd Floor
Santa Monica, California 90403-2300
Telephone (310) 829-0977
Facsimile (310) 829-0991
www.longlevit.com

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for “lost” punitive damages when such damages are waived in settlement of a class action or mass tort action. Both approaches were based on the public policy aspect of the proximate cause analysis articulated in *PPG Industries Inc. v. Transamerica Insurance Co.* (1999) 20 Cal.4th 310, 315-316, which held that insurers’ liability for bad faith failure to settle does not include punitive damages awarded against insureds.

Significantly, Justices Kennard and Moreno voiced concerns about the effect on professional liability insurance availability if punitive damages were recoverable as compensatory damages in legal malpractice actions. Justice Kennard inquired whether public policy was implicated if insurance concerns made attorneys reluctant to represent injured consumers. Justice Baxter noted the incongruity of a liability insurer’s having to indemnify a lost punitive award when the original wrongdoer’s insurer is not responsible for paying a punitive award. He and Justice Chin both noted the practical problems of proving a collectible punitive award in the case-within-a-case malpractice action, and several justices wondered whether a “lost” punitive damages claim was an inherently speculative matter.

The court’s opinion resolving these issues can be expected in the next 60 to 90 days.

Comment: The Supreme Court also has pending *O’Connor Agency, Inc. v. Brodtkin* (2002) 99 Cal.App.4th 488 [120 Cal.Rptr.2d 336 (review granted Aug. 14, 2002) (PL Update No. 125)]. There, the Fourth District Court of Appeal, Division Three, decided that lost punitive damages could be recovered as

compensatory damages without offending public policy. The court noted that most jurisdictions that have decided the issue allow recovery of such damages.

The plaintiff’s claim in that case concerned the reversal of a punitive damage award on appeal because the plaintiff’s attorney failed to present evidence of the defendants’ financial worth. Thus, if the Supreme Court does not adopt a bright-line rule in *Ferguson*, it may have to consider whether its new incremental rule should be extended to the *O’Connor Agency* fact pattern.