

PROFESSIONAL LIABILITY UPDATE

June 9, 2003

Issue No. 154

Jennifer A. Becker

David P. Borovsky

Shoshana Y. Chazan

Edward F. Donohue, III

Kathleen M. Ewins

Howard M. Garfield

Jason A. Geller

J. Michael Higginbotham

John B. Hook

William L. Jacobson

Farand C. Kan

Anna Kapetanakos

Joseph P. McMonigle

Douglas J. Melton

Jessica B. Rudin

Richard J. Sciaroni

Steven Sharafian

Jennifer W. Suzuki

Jeanette Traverso

Karen L. Uno

Seth E. Watkins

Gerald G. Weisbach

Irene K. Yesowitch

LEGAL MALPRACTICE DAMAGES

California Law

By William L. Jacobson

California Supreme Court holds that attorneys cannot be liable for "lost" punitive damages.

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

Resolving a split of authority at the appellate level, the California Supreme Court today adopted a broad, bright-line rule that precludes malpractice claims against attorneys for "lost" punitive damages. The majority opinion by Justice Brown, joined by Chief Justice George and Justices Baxter and Chin, held that "legal malpractice plaintiffs may not recover lost punitive damages as compensatory damages."

The case arose out of the settlement of class action claims for a mass tort toxic chemical release. In the settlement, counsel for the plaintiff class agreed to dismiss their clients' punitive damage claims. Two dissenting plaintiffs later sued class counsel, contending that they would have recovered substantial punitive damages but for counsel's alleged negligence.

Drawing on the "public policy" element of the proximate cause analysis used in *PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, the majority found four considerations militated against allowing recovery of lost punitive damages as compensatory

damages in a malpractice action. First, allowing such claims would not serve the public's sole interest in punitive damages as a deterrent and punishment for intentional or malicious wrongful conduct; nor would the claimed damages be related to the attorney's misconduct and wealth.

Second, because a punitive damage award constitutes a jury's moral determination, a claim for "lost" punitive damages is an inherently subjective and speculative matter.

Third, the complex standard of proof would confuse juries by asking whether a plaintiff proved *by a preponderance of the evidence* that the underlying case's jury would have found *clear and convincing evidence* of oppression, fraud or malice.

Fourth, allowing claims for lost punitive damages would hinder management and settlement of mass tort claims by discouraging use of mandatory punitive damage classes and by making plaintiffs' counsel hesitant to settle.

The Court also was concerned by the potential negative effect a rule of liability would have on the cost and availability of legal malpractice insurance in California.

The court foresaw no detriment to plaintiffs in excluding recovery of lost punitive damages. Noting that plaintiffs are made whole by compensatory damages and that there is no right to punitive damages, the court said that allowing such claims would result in plaintiffs' obtaining an undeserved windfall. The court also was not concerned that insulating plaintiffs' attorneys from such claims would foster misconduct or encourage mishandling of cases in light of the other incentives and sanctions that apply.

In conclusion, the majority agreed with *Piscitelli v. Friedenber*g (2001) 87 Cal.App.4th 953, and disapproved *Merenda v. Superior Court* (1992) 3 Cal.App.4th 1, to the extent it is inconsistent.

In a concurring and dissenting opinion, Justice Kennard, joined by Justices Werdegar and Moreno, argued for a rule limited to punitive damage claims allegedly lost in settlement of a class action. Justice Kennard sees lost punitive damages as being only compensatory damages in a malpractice case. As a result, she would not preclude recovery for a client who suffers a limited economic loss because of egregious conduct and whose lost claim's value may lie entirely in a large punitive damage award.

COMMENT: The court's preference for a broad, bright-line rule was indicated at oral argument of the case (see *Issue No. 149*), and may signal a new trend as other jurisdictions consider the issue. For the full text of the court's opinion in Microsoft Word format, see: <http://www.courtinfo.ca.gov/opinions/documents/S104444.DOC>