

## Punitive Damages A Hot Topic on the North American Legal Front

As seen in the US headlines:

*"Novartis – U.S. federal court orders them to pay \$250 million in punitive damages - gender bias lawsuit<sup>1</sup>."*

*"Shell - \$50million settlement for failure to disclose material information<sup>2</sup>."*

And there are yet other U.S. suits, some still in appeal, where the punitive damages awarded are in the billions. One can wonder what will be the magnitude of potential punitive damages with regards to BP Petroleum.

In comparison, Canada is considered to be less litigious in nature; however, there have been some punitive damages awarded which have been upheld by the Supreme Court of Canada. Although still rare in frequency, punitive damages have continued to be awarded in certain cases:

Hill v. Scientology<sup>3</sup>; 1995, \$800,000  
Whiten v. Pilot Insurance Co. <sup>4</sup>; 2002, reached \$1million

From a risk management perspective, the issue of punitive damages is a complex one, you must consider:

- ✓ Punitive damages that can be awarded vary from one jurisdiction to another.
- ✓ Lawsuits can originate from any jurisdiction.
- ✓ The insurability of punitive damages is questionable:
  - Most insurance policies do not address the issue of punitive damages directly – they remain silent;
  - Even if punitive damages are not specifically excluded, it does not mean you carry coverage;
  - If a casualty policy refers to compensatory damages, punitive would not be included unless by endorsement.

Disallowing indemnity payments from an insurance policy for punitive damages is supported by many courts. Since the intent of punitive damages is to punish gross negligence, allowing insurance companies to pay for punitive damages lets a negligent party avoid paying for the consequences of its gross negligence.

1 - NY Times, May 2010  
[<http://www.nytimes.com/2010/05/20/business/20drug.html>]  
2 - Business Wire, March 2010  
[<http://www.businesswire.com/news/home/20100312005768/en/Jury-Awards-50-Million-Punitive-Damages-Shell>]  
3 - TORRYS LLP, No. 2002-2T, February 28, 2002. [www.torrys.com](http://www.torrys.com)  
4 - [www.cyberlibel.com/damage.html](http://www.cyberlibel.com/damage.html)



In the absence of clear and concise coverage language in insurance contracts, companies are looking for solutions to mitigate this exposure. At GPL we can assist you by auditing your current program to identify whether or not punitive damages are covered.

Together, we can help you review the different policies available for punitive damages coverage and weigh the options of policy amendments. You also need to consider:

- ✓ That no form is created equal making the difference between being paid or not;
- ✓ Drop-down provisions;
- ✓ Follow form wordings;
- ✓ Form on occurrence basis or claims-made;
- ✓ Erosion of limits;
- ✓ Jurisdictions;
- ✓ Claims settlements;
- ✓ Taxes, off-shore placements;
- ✓ Etc.

Through some of GPL's partner markets, we are able to structure solutions for our clients wishing to add this coverage to their insurance program with little delay.

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