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Liability Insurance and Punitive Damages: Does Texas Public Policy Detest This Union Comment.

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COMMENT

LIABILITY INSURANCE AND PUNITIVE DAMAGES: DOES TEXAS PUBLIC POLICY DETEST THIS UNION?

ANTHONY H. CASTILLO

I. INTRODUCTION

Nationwide, courts and commentators currently debate the issue of whether punitive damages should be insurable.[1] Insuring punitive damages causes courts concern over whether a wrongdoer escapes punish-

1. *See generally* Michael A. Rosenhouse, Annotation, *Liability Insurance Coverage As Extending to Liability for Punitive or Exemplary Damages*, 16 A.L.R.4TH 11 (1982 & Supp. 2006) (reporting cases nationwide that have considered the public policy considerations and construction of insurance contracts with regard to insurability of punitive damages).

ment by having the insurer pay for damages attributable to the wrongdoer's egregious conduct.[2] Thirty years ago the Fifth Circuit, in *Ridgway v. Gulf Life Insurance Co.*,[3] noted that Texas's public policy does not justify interference with private insurance contracts.[4] The court determined that Texas allows liability insurance contracts to cover punitive damages[5] and declared that "that ends the inquiry."[6] Yet, over the years since the *Ridgway* decision, Texas's appellate courts have revisited the issue of indemnifying punitive damages.[7] Many Texas appellate court decisions have contradicted the Fifth Circuit's holding[8] and disallowed punitive damages from being covered under an insurance contract on the basis of public policy.[9] In 2004, when again presented with the issue of punitive damage insurability, and noting the split among Texas's appellate courts, the Fifth Circuit certified the question to the Texas Supreme Court for a resolution.[10]

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2. *See* 7 LEE R. RUSS, COUCH ON INS. § 101:29 (2006) (describing the debate as whether to relieve a wrongdoer of punishment—by favoring non-indemnification—or have either the plaintiff under-compensated or a defendant unjustly punished in excess of fairness).

3. 578 F.2d 1026 (5th Cir. 1978) (per curiam).

4. *See* Ridgway v. Gulf Life Ins. Co., 578 F.2d 1026, 1029-30 (5th Cir. 1978) (per curiam) (adopting the opinion of United States District Court for the Northern District of Texas in appendix A) (noting that neither Texas cases nor statutes expressed the type of concern over public policy necessary to void a contract).

5. *See id.* (basing the decision on earlier Texas appellate court opinions). This Comment will use the term "punitive damages" in place of synonyms like "exemplary damages"—despite the fact that Texas law refers to extra-compensatory damages as exemplary damages. TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(5) (Vernon 1997 & Supp. 2006).

6. *Ridgway*, 578 F.2d at 1030.

7. *Compare* Gov't Employees Ins. Co. v. Lichte, 792 S.W.2d 546, 549 (Tex. App.—El Paso 1990) (finding that punitive damages should not be covered by an uninsured motorist policy), *aff'd on other grounds*, 825 S.W.2d 431 (Tex. 1992), *with* Am. Home Assurance Co. v. Safway Steel Prods. Co., 743 S.W.2d 693, 705 (Tex. App.—Austin 1987, writ denied) (allowing coverage of punitive damages under an umbrella policy).

8. *See Ridgway*, 578 F.2d at 1030 (declaring confidently that Texas courts would rule in favor of insuring punitive damages). However, because the Fifth Circuit is not a Texas court, it does not make binding Texas law. *See* Davenport v. Garcia, 834 S.W.2d 4, 20 (Tex. 1992) (orig. proceeding) (detailing the role federal law should play in state decisions: helpful precedent, but not mandatory); Westchester Fire Ins. Co. v. Admiral Ins. Co., 152 S.W.3d 172, 183 (Tex. App.—Fort Worth 2004, pet. filed) (en banc) (noting that the trial court's reliance on a federal opinion in an advisory or persuasive role was a proper usage).

9. *See, e.g.*, *Lichte*, 792 S.W.2d at 549 (failing to mention *Ridgway*, but stating that "we are not bound to follow those cases that hold that an insured's liability insurance policy provides coverage when a judgment is obtained against the insured awarding exemplary damages").

10. Fairfield Ins. Co. v. Stephens Martin Paving, L.P., 381 F.3d 435, 436 (5th Cir. 2004) (per curiam), *petition for certified question accepted*, Tex. Aug. 27, 2004.

The shifting discussion among Texas appellate courts in the time between *Ridgway* and the present is largely attributable to tort reform.[11] Tort reform created (or reaffirmed) a policy behind punitive damages of limiting damages to represent punishment.[12] With court decisions and new legislation in the mid-1990s, the Texas Supreme Court and the Texas Legislature have dragged punitive damages out of the past, where it was a common law oddity, and codified procedures, created definitions, and set

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11. *See* S. Loyd Neal, Comment, *Punitive Damages: Suggested Reform for an Insurance Problem*, 18 ST. MARY'S L.J. 1019, 1058-65 (1987) (suggesting a host of tort reforms to Texas laws designed to alleviate unpredictable punitive damage awards); *see also* David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 371-373 (1994) (commenting on the national tort reform movement and its causes which include growing awards of punitive damages). A related force, perhaps just as important as tort reform, is the expansion of liability insurance contract coverage. *See* George L. Priest, *Insurability and Punitive Damages*, 40 ALA. L. REV. 1009, 1016-17 (1989) (pointing to courts that used their power to interpret contracts as the force behind the expansion, due to increasingly broad interpretation of insurance coverage). Texas courts appear to be part of this trend. *See* Comsys Info. Tech. Servs., Inc. v. Twin City Fire Ins. Co., 130 S.W.3d 181, 193-94 (Tex. App.—Houston [14th Dist.] pet. denied, 2003) (stating that when ambiguity exists "courts employ the doctrine of *contra proferentem,* or construing a contract term against the insurer in favor of coverage"); *Am. Home Assurance Co.*, 743 S.W.2d at 702 (stating that unless a contract specifically excludes some activity from coverage, it will be presumed included under the contract's terms); *see also* Home Indem. Co. v. Tyler, 522 S.W.2d 594, 597 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.) (providing that because the insurance laws are remedial by nature, they should be read broadly in favor of the insured), *overruled on other grounds by* Milligan v. State Farm Mut. Auto. Ins. Co., 940 S.W.2d 228, 232 (Tex. App.—Houston [14th Dist.] 1997, writ denied) (overruling *Tyler* due to court's later interpretation of "the Texas Supreme Court's clear guidelines concerning the imposition of exemplary damages and the policy reasons therefor").

12. *See* Hartford Cas. Ins. Co. v. Powell, 19 F. Supp. 2d 678, 683-85, 693 (N.D. Tex. 1998) (attributing Texas's changing public policy to the Texas Supreme Court's tort reform cases and related legislative enactments); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 41.001 (Vernon 1997 & Supp. 2006) (limiting the purpose of punitive damages to punishment). Punishment is the public policy behind punitive damages. *Id.* Taken at face value, tort reform says nothing about whether to insure punitive damages; as the Neal comment notes, the answer to the issue is irrelevant, for the true solution to reducing excessive punitive damages lays in various restrictions such as overall caps on total damages. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.008 (Vernon 1997 & Supp. 2006) (capping damage awards in most circumstances); S. Loyd Neal, Comment, *Punitive Damages: Suggested Reform for an Insurance Problem*, 18 ST. MARY'S L.J. 1019, 1059-60 (suggesting a cap based on net worth). Reformation of punitive damages continues to this day and perhaps will continue into the future. *See* Phillip Morris USA v. Williams, 127 S.Ct. 1057, 1064-65 (2007) (remanding to the Oregon Supreme Court to reconsider a large award; the Court had held that the Oregon jury improperly considered how the defendant's actions hurt others in determining the size of the award). Four justices dissented. *See id.* at 1060 (proving that this issue is still controversial). Of course, harm to others is an essential part of determining the nature of wrongdoing and the opinion does not change that. *Id.* at 1064.

limits on punitive damages in Texas.[13] Exemplifying this course of action, in 1994, the Texas Supreme Court in *Transportation Insurance Co. v. Moriel*,[14] stated strongly the policy underlying punitive damages: "Punitive (or exemplary) damages are levied against a defendant to *punish* the defendant."[15]

Even though a shift has occurred in assessing punitive damages, a consensus does not exist on whether punitive damage indemnification can be contracted for in an insurance policy.[16] But this will soon change. The Fifth Circuit has decided to intervene twenty-six years after initially deciding the issue in favor of insurability[17] by certifying the question to the

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13. *See generally* J. Stephen Barrick, Comment, Moriel *and the Exemplary Damages Act: Texas Tag-Team Overhauls Punitive Damages*, 32 HOUS. L. REV. 1059, 1059 (1995) (listing the changes in punitive damages occurring during the 74th legislative session and the antecedent causes). Certainly, however, the Texas Legislature did not alter laws on punitive damage for the purpose of strengthening policy alone; the real reason was to curtail the impression lawyers and commentators had that Texas was a "plaintiff's haven." *See id.* at 1060 & n.2 (providing as an example, *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. App—Houston [1st Dist.] 1987, writ ref'd n.r.e.), where the plaintiff was awarded "three million dollars in punitive damages").

14. 879 S.W.2d 10 (Tex. 1994).

15. Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 16 (Tex. 1994) (emphasis added); *see* Milligan v. State Farm Mut. Auto. Ins. Co., 940 S.W.2d 228, 231-32 (Tex. App.—Houston [14th Dist.] 1997, writ denied) (finding that because the Texas Supreme Court and other appellate courts had recently redefined the justification for punitive damages, older precedent no longer controlled the issue). However, some earlier cases had held that punitive damages were for punishment only. *See, e.g.*, Pace v. State, 650 S.W.2d 64, 65 (Tex. 1983) (noting the non-compensatory nature of punitive damages). However, the authoritative tone of *Moriel* likely cut through the noise to deliver an especially strong statement. *See Moriel*, 879 S.W.2d at 16-17 (repeating the statement several times that punitive damages are punishment).

16. *See* Westchester Fire Ins. Co. v. Admiral Ins. Co., 152 S.W.3d 172, 183 (Tex. App.—Fort Worth 2004, pet. filed) (en banc) (questioning whether punitive damages are insurable "[b]ecause neither the legislature nor the supreme court has addressed the public policy implications"). Additionally, the Texas Supreme Court passed on the issue in reviewing the El Paso Court of Appeals's decision in *Government Employees Insurance Co. v. Lichte*, 792 S.W.2d 546 (Tex. App.—El Paso 1990), *aff'd on other grounds*, 825 S.W.2d 431 (Tex. 1991). The Texas Legislature has spoken on the issue, albeit limited to the highly specific business of hospitals and not-for-profit nursing homes. *See* Commercial Underwriters Ins. Co. v. Royal Surplus Lines Ins. Co., 345 F. Supp. 2d 652, 664 (S.D. Tex. 2004) (finding that the Texas Insurance Code prohibited punitive damages coverage in not-for-profit nursing home insurance policies); *Westchester Fire Ins. Co.*, 152 S.W.3d at 187-88 (looking to the Texas Insurance Code for guidance in a case concerning a for-profit nursing home). However, these statutes should not be taken as direct statements on public policy; like the 1995 legislative actions, the insurance code provisions were enacted to benefit insurance providers, in this case by excluding punitive damages from insurance policies. *Id.*

17. *See* Ridgway v. Gulf Life Ins. Co., 578 F.2d 1026, 1030 (5th Cir. 1978) (per curiam) (allowing coverage of punitive damages in an insurance contract).

Texas Supreme Court.[18] *Fairfield Insurance Co. v. Stephens Martin Paving, L.P.*,[19] the case that hopefully will settle whether punitive damages can be insured, avoids potential distractions by arriving as a narrow certified question.[20] The original lawsuit, filed in state court,[21] generated a declaratory action in federal district court on the duty to indemnify punitive damages.[22] Fairfield Insurance lost at summary judgment,[23] and its appeal generated the certified question.[24] The exact question certified is the following: "Does Texas public policy prohibit a liability insurance provider from indemnifying an award of punitive damages imposed on an insured because of gross negligence?"[25] The Texas Supreme Court can resolve this question only by announcing a clear rule to guide future courts.[26]

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18. Fairfield Ins. Co. v. Stephens Martin Paving, L.P., 381 F.3d 435, 437 (5th Cir. 2004), *petition for certified question accepted*, Tex. Aug. 27, 2004. The Texas Supreme Court does not take certified questions for unimportant matters; thus, its acceptance of this issue represents positive proof of its importance to Texas law. *See* James W. Paulsen & Gregory S. Coleman, *Civil Procedure*, 25 TEX. TECH L. REV. 509, 538-41 (1994) (discussing the history of certified questions by Fifth Circuit and Texas's reluctance to use them).

19. 381 F.3d 435 (5th Cir. 2004), *petition for certified question accepted*, Tex. Aug. 27, 2004.

20. The original lawsuit, filed in January 2003, based the cause of action on gross negligence. Fairfield Ins. Co. v. Stephens Martin Paving, L.P., No. Civ.A. 1:03-CV-037-C, 2003 WL 22005877, at *1 (N.D. Tex. Aug. 25, 2003). More precisely, a machine, operated by the deceased, overturned. *Id.* Because workers' compensation applied, Texas workers' compensation laws decided the compensatory damages, and as a result, the suitors prayed solely for punitive damages against the employer of the deceased. *Id.* at *1-2; *see* TEX. LAB. CODE ANN. § 408.001(b) (Vernon 2006) (allowing recovery of punitive damages outside the workers' compensation procedures when "death was caused by an intentional act or omission of the employer or by the employer's gross negligence").

21. The case was located in the Forty-Second Judicial District Court in Taylor County. *Fairfield Ins. Co.*, 2003 WL 22005877, at *1.

22. *Id.* at *1-2. In 1985 the Texas Legislature gave Texas courts the power to enter declaratory opinions on the duty to indemnify. Farmers Tex. County Mut. Ins. Co. v. Griffin, 955 S.W.2d 81, 84 (Tex. 1997) (allowing advisory opinions in cases where the facts and allegations have been sufficiently introduced and evidenced; if not, indemnification questions must wait until liability is fully resolved).

23. *Fairfield Ins. Co.*, 2003 WL 22005877, at *2. Fairfield Insurance lost arguments on both the duty to indemnify for punitive damages and the duty to defend the underlying action. *Id.* It appears from the appellate opinion that Fairfield Insurance chose not to appeal the duty to defend. *Fairfield Ins. Co.*, 381 F.3d at 435.

24. *Id.*

25. *Id.* at 435, 437-38.

26. *See, e.g.*, Westchester Fire Ins. Co. v. Admiral Ins. Co., 152 S.W.3d 172, 183 (Tex. App.—Fort Worth 2004, pet. filed) (en banc) (stating that without a strong statement on public policy, Texas appellate courts are limited to making guesses just like federal courts in diversity cases). The Fifth Circuit, noting the importance of the ruling, implicitly suggested the Texas Supreme Court not limit itself. *See Fairfield Ins. Co.*, 381 F.3d at 437 (asking the court not to confine itself "to the precise form or scope of the" issue).

The Texas Supreme Court, however, has contributed to the current controversy by permitting recovery of punitive damages based on a finding of gross negligence but failing to provide a workable definition of gross negligence.[27] Gross negligence plays an important part in the debate; because although fraud and malice can support punitive damage awards, insurance contracts universally exclude intentional acts based on—moral hazard,[28] public policy,[29] and business considerations[30]—leav-

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27. *See* Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 19-23 (Tex. 1994) (reviewing the previous definition of gross negligence and discussing the problems courts had with its interpretation). *American Home Assurance Co. v. Safway Steel Products Co.* shows how differing definitions of gross negligence can impact a case; subtle differences between the Texas and New York definitions of gross negligence allowed the court to distinguish New York's courts' contrary position. Am. Home Assurance Co. v. Safway Steel Prods. Co., 743 S.W.2d 693, 700 n.6 (Tex. App.—Austin 1987, writ denied). If judges and lawyers struggle with defining gross negligence, then it should be no surprise that juries struggle as well. *See* Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 38 (1982) (noting that jury members usually have no legal training prior to deciding a case). Uneven awards by juries cause individuals, partnerships, and corporations to take uneconomically safe precautions. *See id.* at 39-44 (using charts to demonstrate that uncertainty increases the chances of error, leading to over-deterrence and inappropriate punishment in excess of what is deserved).

28. *See* George L. Priest, *Insurability and Punitive Damages*, 40 ALA. L. REV. 1009, 1023-26 (1989) (noting that when costs of accidents decrease, the level of activity will rise). This phenomenon is called "moral hazard." *Id.* at 1023-24. Insurance, in general, increases moral hazard in every instance, inasmuch as the insured can discount the costs of their own negligence while retaining the benefits by not expending energy maintaining the appropriate standard of care. *Id.* Insurance contracts can control the worst effects of moral hazard by excluding activities most affected by it, particularly activities that lack social benefit or have high external costs that the public must bear. *Id.* at 1024; *see* TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (Vernon 1997 & Supp. 2006) (providing punitive damages for actions of fraud, malice, and gross negligence). Only a slim subset of punitive damages may be covered—those actions that were not intended or expected—for intentional actions are universally excluded from insurance contracts. *See* Tom Baker, *Reconsidering Insurance for Punitive Damages*, 1998 WIS. L. REV. 101, 119-21 (describing intentional act exclusions as a tool for managing risks). Policymakers also make such a distinction, even in jurisdictions where insurability of punitive damages has been allowed. Catherine M. Sharkey, *Revisiting the Noninsurable Costs of Accidents*, 64 MD. L. REV. 409, 432-34 (2005). An intentional harmful act is per se against public policy, and thus, it is always excluded, while negligence may in most circumstances be insured. *Id.*

29. *See* Catherine M. Sharkey, *Revisiting the Noninsurable Costs of Accidents*, 64 MD. L. REV. 409, 432-37 (2005) (finding that intentional act exclusions make good sense from both public policy and insurance business health standpoints).

30. *See* Employers Reinsurance Corp. v. Threlkeld & Co. Ins. Agency, 152 S.W.3d 595, 598 (Tex. App.—Tyler 2003, pet. denied) (describing risk pooling as an "essential characteristic of insurance"); *cf.* Perez *ex rel.* Perez v. Blue Cross Blue Shield of Tex., Inc., 127 S.W.3d 826, 835-37 (Tex. App.—Austin 2003, pet. denied) (allowing an insurance company rightfully to exclude a high-risk applicant from health insurance coverage). Because intentional acts cause damage by design, they deserve greater punishment and should receive greater damage judgments. *See* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 15-16 (1991)

ing gross negligence as the only tort action where insurability would be an issue.[31] Therefore, cases that face the issue of insuring punitive damages feature underlying facts egregious enough to merit punitive damages—an increasingly heightened requirement thanks to tort reform—[32] but with a mental state that escapes entanglement with the universal exclusion of intentional harm in liability insurance contracts.[33]

This Comment looks behind Texas's policy on punitive damages. Although legislative and judicial reform has apparently settled the doctrinal underpinnings of punitive damages in Texas, the issue of insurability remains. This Comment begins by examining national and Texas law concerning punitive damages. Then, an analysis is provided giving a definition of "punishment," an explanation of how punitive damages serve the purpose of punishment, and a determination of the Texas Legislature's intent in altering Texas's policy on punitive damages. Finally, although the question certified in *Fairfield* only concerns liability insurance and a Texas Supreme Court opinion will be forthcoming on the issue, this Comment's evaluation of the certified question strives to be of use in analyzing other types of insurance contracts under which punitive damages might be included.

(endorsing the common law position that the amount of punitive damage should adequately match the quality of the wrongdoing); Robert D. Cooter, *Economic Analysis of Punitive Damages*, 56 S. CAL. L. REV. 79, 79-80 (1982) (noting that wrongdoers who commit wrongs intentionally will often inflict far more harm than an ordinary person who negligently misjudges the level of care in a situation). Insurer underwriters will exclude intentional acts in order to manage risk and group similar claims. C.J.S. *Insurance* § 2 (2007) (defining of the purpose of underwriting and its aim).

31. *See* George L. Priest, *Insurability and Punitive Damages*, 40 ALA. L. REV. 1009, 1016 (1989) (examining the gap between intentional act exclusions and courts' interpretation of mental states such as gross negligence).

32. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (Vernon 1997 & Supp. 2006) (requiring clear and convincing evidence and listing mental states allowing a punitive damage award).

33. *See* George L. Priest, *Insurability and Punitive Damages*, 40 ALA. L. REV. 1009, 1017 (1989) (showing how the varying definitions of gross negligence do not correspond to the language of an insurance contract). Insurance contracts deviate little from the standard-form contract commonly produced by the insurance trade. Tom Baker, *Reconsidering Insurance for Punitive Damages*, 1998 WIS. L. REV. 101, 114. The basic agreement of the insurance contract, that the insurance company will pay all sums arising from the accident, suggests universal inclusion of punitive damages. *Id.* at 115. On the other hand, insurance providers will exclude coverage for certain activities if they are inherently dangerous or likely to involve punitive damages. *See id.* at 122-23 (listing areas such as asbestos liability, sexual harassment, and pollution, which are often excluded from liability insurance contracts because of the likelihood of high punitive damage awards in a jury trial).

II. BACKGROUND

A. *The National Debate on Indemnifying Punitive Damages*

Sixteen years before the Fifth Circuit deciphered Texas policy in *Ridgway*, a different panel of the Fifth Circuit considered another state's policy and came up with a very different conclusion. In *Northwestern National Casualty Co. v. McNulty*,[34] Judge Wisdom authored an opinion providing an in-depth discussion of policy concerns regarding Virginia and Florida law[35] that became a standard for future cases holding that public policy forbids indemnification of punitive damages.[36] The *McNulty* opinion examined whether an insurance company would be liable to indemnify punitive damages assessed against its policyholder arising from an egregious drunk driving accident.[37] The opinion began by reviewing nationwide opinions on the issue[38]—an inquiry which revealed a mixed landscape, with a divergence of views on both the main issue and on punitive damage use in general.[39] *McNulty* focused on how insurability would disturb the deterrent effect of punitive damages, the increasing need for deterrence in the area of drunken driving accidents, and possible conflicts of interest between insurer and insured.[40] The court summa-

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34. 307 F.2d 432 (5th Cir. 1962), *superseded in part by statute*, VA. CODE ANN. § 38.2-277 (2002).

35. *See* Nw. Nat'l Cas. Co. v. McNulty, 307 F.2d 432, 439-43 (5th Cir. 1962), *superseded in part by statute*, VA. CODE ANN. § 38.2-277 (2002) (discussing Virginia policy).

36. *E.g.*, Am. Sur. Co. of N.Y. v. Gold, 375 F.2d 523, 528 (10th Cir. 1966) (relying on *McNulty* for policy arguments disallowing an insurance contract to cover punitive damages); *see also* George L. Priest, *Insurability and Punitive Damages*, 40 ALA. L. REV. 1009, 1012-13 (1989) (describing the impact of the *McNulty* opinion).

37. *McNulty*, 307 F.2d at 433.

38. *See id.* at 436-39 (looking at cases beginning in 1934).

39. *See id.* (contrasting the approaches of various decisions). Thus, Judge Wisdom declared that no case presented contrary precedent to this position, distinguishing those arguments that suggested insurability of punitive damages was permissible. *See id.* at 439 (noting that in these other cases the jury awarded a lump sum, without a clear distinction between compensatory and punitive damages, and that under Alabama law a court does not need to find gross negligence to award punitive damages). Judge Wisdom went so far as to call the use of certain of these negative precedents "fanciful." *Id.* at 438. The court in *McNulty* did not extend its policy arguments to cover cases of respondeat superior and suits against an executor for a decedent's actions, two areas in which the deterrence effect of punitive damages is weak to begin with. *McNulty*, 307 F.2d at 440 (citing the leading precedent in those respective fields).

40. *Id.* at 440-41 (holding that under both Virginia and Florida law, insurance coverage for punitive damages should not be permitted because it disrupts the deterrent purpose of punitive damages and may cause conflicts of interest); *see* Saint Paul Fire & Marine Ins. Co. v. Convalescent Servs., Inc., 193 F.3d 340, 341 (5th Cir. 1999) (presenting an example of how punitive damages coverage can influence insurance company wrongdoing). This case dealt with a negligent failure to settle a claim in which non-coverage of punitive dam-

rized its position by expressing that "[i]f the defendant acted willfully, intentionally, maliciously or fraudulently, coverage should be denied; because in such circumstances, he should not be able to avoid punishment by shifting the penalty to an insurance carrier."[41]

On the other side of the debate, many courts dismiss the deterrent effect of insurability.[42] These courts follow the lead of *Lazenby v. Universal Underwriters Insurance Co.*,[43] a case from the Supreme Court of Tennessee. Like *McNulty*, the *Lazenby* case involved a drunken driving accident in which the insured defendant's insurance company "failed and refused, under their insurance contract, to pay the amount awarded as punitive damages."[44] However, the *Lazenby* opinion found public policy did not interfere with indemnification of punitive damages pursuant to an insurance policy, and the policy's terms covered all actions not "intentionally inflicted."[45] Speaking to the policy argument, the court analogized the deterrent effect of excluding punitive damages from coverage to the fruitless deterrence of traffic laws, declaring that "[t]his State, in regard to the proper operation of motor vehicles, has a great many detailed criminal sanctions, which apparently have not deterred this slaughter on our highways and streets."[46] Because the public policy argument was overcome, the court then used the insurance contract's "all sums"[47] language to conclude that indemnification should follow as "the average policy holder reading this language would expect to be protected against all claims" except those caused intentionally.[48]

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ages resulted in the defendant being responsible for $380,000 in punitive damages despite the plaintiff's previous offer to settle the case within the policy limits. *Id.* The case turned on whether the duty to settle a case, when a reasonable demand is offered, applied to aspects of a case the insurer is not obligated to cover. *Id.* at 342 n.2. The court ruled that no duty is created to settle non-covered claims competently. *Id.* at 343. The ruling dodges the insurance company's argument—that because of Texas public policy, they cannot indemnify the insured for punitive damage awards. *Id.* at 345 n.13.

41. *Convalescent Servs. Inc.*, 193 F.3d at 345.

42. *See, e.g.*, Sinclair Oil Corp. v. Columbia Cas. Co., 682 P.2d 975, 979-80 (Wyo. 1984) (deciding "to adopt a different philosophy" than the one advanced in *McNulty*; the court disagreed that "the payment of punitive damages[ ] would act to deter guilty drivers" because such a belief "contain[ed] some element of speculation").

43. *See* Lazenby v. Universal Underwriters Ins. Co., 383 S.W.2d 1, 2-5 (Tenn. 1964) (devoting a significant amount of space to rebut *McNulty* and its reasoning, before laying out the case opposing it).

44. *Id.* at 2.

45. *Id.* at 5.

46. *Id.*

47. *Id.* at 2.

48. *Lazenby*, 383 S.W.2d at 5.

Modern cases continue to represent the respective, diverging positions of *McNulty* and *Lazenby*.[49] More specifically, forty states have ruled on the issue.[50] While a substantial majority allows insurance coverage for punitive damages,[51] a few states have used statutes or case law to prohibit, allow, or limit insurability of punitive damages.[52] Because the Texas Supreme Court, Texas Legislature, and Texas appellate courts have not uniformly supported either the *McNulty* or *Lazenby* position, Texas is left among at least ten states that have yet to definitively rule on the issue.[53]

B. *Texas Civil Jurisprudence: Punitive Damages and Gross Negligence*

Punitive damages are nothing new to Texas jurisprudence;[54] the Texas Supreme Court firmly endorsed the use of punitive damages in the 1849

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49. *See* Catherine M. Sharkey, *Revisiting the Noninsurable Costs of Accidents*, 64 MD. L. REV. 409, 426-27 (2005) (stating that courts continue to follow *McNulty* and *Lazenby* despite changes in general tort jurisprudence).

50. *See id.* app. at 456-59.

51. *See id.* (concluding that there is almost a two to one ratio in favor of finding that punitive damages may be insured). The following states allow punitive damages to be insured: Alabama, Alaska, Arizona, Arkansas, Delaware, Georgia, Hawaii, Idaho, Iowa, Kentucky, Maryland, Michigan, Mississippi, Montana, Nevada, New Mexico, North Carolina, Oregon, South Carolina, Tennessee, Vermont, Virginia, Washington, Wisconsin, West Virginia, Wyoming. *Id.* The list for states that do not allow punitive damage coverage is as follows: California, Colorado, Florida, Illinois, Indiana, Kansas, Minnesota, Missouri, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, Utah. *Id.*; *see also* Michael A. Rosenhouse, Annotation, *Liability Insurance Coverage As Extending to Liability for Punitive or Exemplary Damages*, 16 A.L.R.4TH 11, 20-21 (1982) (looking state-by-state at how courts have analyzed the issue).

52. *See* MONT. CODE ANN. § 33-15-317 (2005) (limiting the award of punitive damages to contracts that expressly provide for them); N.H. REV. STAT. ANN. § 507:16 (1997) (prohibiting punitive damages from being awarded unless otherwise authorized by statute); OHIO REV. CODE ANN. § 3937.182 (2002) (disallowing punitive or exemplary damages from being covered by insurance policies for automobile, casualty, or liability insurance); *see also* Catherine M. Sharkey, *Revisiting the Noninsurable Costs of Accidents*, 64 MD. L. REV. 409, app. at 456-60 (2005) (providing an appendix detailing statutes or case law which defines the issue of insurability of punitive damages in each jurisdiction). With respect to Virginia law, *McNulty* no longer governs the area; the Virginia Legislature created a statute to overturn it in 1986. *See* VA. CODE ANN. § 38.2-227 (2002) (declaring that Virginia public policy is to allow punitive damages to be covered under an insurance contract, provided it excludes intentional acts).

53. *See* Catherine M. Sharkey, *Revisiting the Noninsurable Costs of Accidents*, 64 MD. L. REV. 409 app. at 456-59 (2005) (noting that of the forty states that have supposedly ruled on the issue, only thirty-four states have had the issue considered by their highest court or legislature).

54. *See* Patricia F. Miller, Comment, *2003 Texas House Bill 4: Unanimous Exemplary Damage Awards and Texas Civil Jury Instructions*, 37 ST. MARY'S L.J. 515, 528-29 (2006)

case of *Graham v. Roder*.[55] In that case the court limited punitive damages to punishing intentional acts by using terms such as "malice" and "willful negligence."[56] Since then, much has changed in the world of tort liability, such as the expanding liability insurance market for persons and corporations;[57] automobile, drunken driving, and uninsured motorist insurance; and the growth of multimillion-dollar punitive damage awards.[58] Subsequently, the Texas Legislature and the Texas Supreme Court have run through many different interpretations of gross negligence,[59] culminating in 1994 with *Transportation Insurance Co. v. Moriel*.[60] The follow-

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(discussing the early years of Texas's civil jurisprudence and the expansion of punitive damage availability during the second half of the nineteenth century).

55. 5 Tex. 141, 149-50 (1849). The Texas Supreme Court recognized that extra-compensatory damages based on punishment was well "settled in England and the general jurisprudence of this country." *Id. Graham v. Roder* highlighted the availability of punitive damages for fraud and deceit arising out of a contract. *See id.* at 148-49 (pointing out that ordinary breaches of contract should not warrant punitive damages, but fraud and malice do). About twenty years after *Graham*, the Texas Constitution specifically allowed the recovery of punitive damages for intentional homicides independent of criminal proceedings, and in 1876 the constitution expanded the availability further to cover gross negligence. *See* Burk Royalty Co. v. Walls, 616 S.W.2d 911, 916 (Tex. 1981) (citing article twelve, section thirty of the 1869 constitution and article sixteen, section twenty-six of the 1876 constitution). Of course, when looking through old Texas cases and statutes, one should remember post-civil war reconstruction's effect on Texas law. *See generally* John Walker Mauer, *State Constitutions in a Time of Crisis: The Case of the Texas Constitution of 1876*, 68 TEX. L. REV. 1615 (1990) (delving into the historical effects of changes and politics in post-civil war Texas).

56. Graham v. Roder, 5 Tex. 141, 149 (1849). According to the *Safway* court, Texas courts of the late nineteenth century applying the *Graham* standard would have excluded insurance coverage based on public policy because the law at that time resembled that of New York more than that of modern Texas. *See* Am. Home Assurance Co. v. Safway Steel Prods. Co., 743 S.W.2d 693, 700 n.6 (Tex. App.—Austin 1987, writ denied) (noting that New York law limited punitive damages "to cases of fraud, oppression, or malice"). Further, intentional torts are neither specifically excluded by express mention of excluded acts nor are they generally excluded based on mental state. *See* Tom Baker, *Reconsidering Insurance for Punitive Damages*, 1998 WIS. L. REV. 101, 119-23 (outlining insurance policy practices designed to discriminate against high risk individuals).

57. *See, e.g.*, Kent D. Syverud, *The Logic of Liability Insurance Purchases: On the Demand for Liability Insurance*, 72 TEX. L. REV. 1629, 1629-31 (1994) (discussing the growing trends of liability insurance as well as the motives behind them and their effects on tort law and consumer well being).

58. *See* David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 372 (1994) (admitting an increase in punitive damage judgments in the preceding years and the existence of excessive awards among them).

59. *See Burk Royalty Co.*, 616 S.W.2d at 916-20 (describing in detail over one-hundred years of changes in the definition of gross negligence in Texas).

60. Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 19-23 (1994) (discussing Texas's history and problems with the previous standards of gross negligence).

ing discussion provides a brief overview of Texas case law and statutory changes concerning both punitive damages and gross negligence.

1. Texas Case Law on Punitive Damages

Ridgway, the Fifth Circuit's 1978 opinion, based its holding on Texas appellate decisions decided earlier in that decade. The court in *Ridgway* held that the defendant's insurance company was "legally obligated [to indemnify] for punitive damages within the limits of its policy."[61] So when the *Ridgway* Court claimed that Texas did not subscribe to the same public policy concerns as *McNulty* reached when examining Florida or Virginia law,[62] there was support for the position that Texas policy allows insurability of punitive damages.[63] Like *Lazenby* and the Texas court decisions of the early 1970s,[64] the *Ridgway* Court relied on the contract's "all sums" language in making its judgment.[65]

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61. Ridgway v. Gulf Ins. Co., 578 F.2d 1026, 1029 (5th Cir. 1978) (per curiam) (adopting the opinion of United States District Court for the Northern District of Texas in appendix A). The controversy in *Ridgway* arose out of a diversity action brought on behalf of David and Mary Ellen Ridgway, Pennsylvania residents, for fatal injuries sustained on a Texas highway. *Id.* at 1028 (main opinion). The district court awarded actual and punitive damages in favor of the Ridgways and against the defendants, a trucking company and its employee. *Id.* The defendant's insurance carrier appealed claiming that because the truck involved in the business was registered to the trucking company's employee, the insurance policy did not cover the accident. *Id.* at 1029 (app. A). However, the court found the employee was "covered as an 'insured' under" the company's policy, and thus, the insurance company must indemnify according to that policy. *Id.*

62. *See Ridgway*, 578 F.2d at 1029-30 (discussing *Dairyland County Mutual Insurance Co. v. Wallgren*, 477 S.W.2d 341, 342 (Tex. Civ. App.—Fort Worth 1972, writ ref'd n.r.e.) and *Home Indemnity Co. v. Tyler*, 522 S.W.2d 594, 597 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.), *overruled by* Milligan v. State Farm Mut. Auto. Ins. Co., 940 S.W.2d 228 (Tex. App.—Houston [14th Dist.] 1997, writ denied) to reach the conclusion that Texas public policy does not preclude an insurance company from promising to pay an amount entitled because of a third party).

63. *See Ridgway*, 578 F.2d at 1029 (stating that the public policy of Texas differed from Florida and Virginia's public policy, which was addressed by the previous Fifth Circuit opinion of *McNulty*).

64. *Id.* at 1026 (citing *Dairyland County*, 477 S.W.2d at 343) (emphasizing the contractual language that included the term "all sums"); *see also* Home Indem. Co. v. Tyler, 522 S.W.2d 594, 597 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.) (pointing out that the contract language involved in the case is almost identical to that of *Dairyland County* and both contracts contain the term "all sums"), *overruled by* Milligan v. State Farm Mut. Auto. Ins. Co., 940 S.W.2d 228 (Tex. App.—Houston [14th Dist.] 1997, writ denied).

65. *See Ridgway*, 578 F.2d at 1029-30 (stating that "[t]his unqualified and comprehensive wording necessarily includes both actual and punitive damages. Any other construction would twist the language of the policy"). Noting that the contract language mirrored that of the contract in *Dairyland County*, the Fifth Circuit deferred to the Forth Worth Court of Appeals's position. *See id.* (pointing out that the contractual language in the

One of the cases relied upon by *Ridgway*[66] was the 1972 Fort Worth Court of Appeals opinion, *Dairyland County Mutual Insurance Co. v. Wallgren*.[67] *Dairyland County* presented the court of appeals with the question of whether "a policy of automobile liability insurance affords indemnity applicable to exemplary damages."[68] The opinion began by noting that Texas public policy concerning insurance contracts controls particularly when administrative law governs the terms of the contract.[69] However, *Dairyland County* also hinted that in the absence of legislative authority granting administrative control, the court could follow the approach suggested by the Restatement of Contracts: upholding contracts which condition performance on an actor's negligence if that negligence is not excessive.[70] The other case examined by *Ridgway* was *Home Indemnity Co. v. Tyler*,[71] which similarly relied on Texas's policy of enforcing insurance contracts.[72]

Thirteen years after *Ridgway*, a Texas state court began the trend of examining the public policy relating to the insurability of punitive damages in tort actions. In 1987, the Austin Court of Appeals held in *American Home Assurance Co. v. Safway Steel Products Co.*[73] that punitive

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insurance policy was similar to the policy discussed in *Dairyland County* and that both cases involved drunken drivers as well).

66. *See id.* at 1029 (declaring that *Dairyland County* foreclosed the issue of whether Texas's public policy allowed insurance contracts to cover punitive damages in the affirmative).

67. 477 S.W.2d 341 (Tex. Civ. App.—Fort Worth 1972, writ ref'd n.r.e.).

68. Dairyland County Mut. Ins. Co. v. Wallgren, 477 S.W.2d 341, 342 (Tex. Civ. App.—Fort Worth 1972, writ ref'd n.r.e.).

69. *See id.* at 342-43 (discussing that administrative rules influence the public policy of a state). The Texas insurance commissioners regulated Texas automobile contracts. *Id.*

70. *See id.* at 342 (noting that because the insurance commission dictated the contract, it could not be called a bargain between the two parties); *see also* RESTATEMENT (FIRST) OF CONTRACTS §§ 574, 575 (1932) (addressing "*Legal Bargains for Exemption from Liability for Negligence*" and "*Illegal Bargains for Exemption from Liability for Willful or Negligent Misconduct*"). The court also noted that contracts under such doctrines are enforceable if the third party beneficiary of the contract is a member of the public class for which the policy was crafted. *Dairyland County*, 477 S.W.2d at 343.

71. 522 S.W.2d 594 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.), *overruled by* Milligan v. State Farm Mut. Auto. Ins. Co., 940 S.W.2d 228 (Tex. App.—Houston [14th Dist.] 1997, writ denied).

72. Home Indem. Co. v. Tyler, 522 S.W.2d 594 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.) (writing that "[t]here is no public policy against an insurance company's promise to pay an insured the amount which the insured party has become entitled to recover because of the recklessness of some third party"), *overruled by* Milligan v. State Farm Mut. Auto. Ins. Co., 940 S.W.2d 228 (Tex.App.—Houston [14th Dist.] 1997, writ denied).

73. 743 S.W.2d 693 (Tex. App.—Austin 1987, writ denied).

damages were insurable.[74] The *Safway* Court noted that courts were awarding punitive damages in cases arising from gross negligence more often.[75] Because insurance companies could segregate high risk policyholders (i.e., those likely to incur punitive damages) and charge them higher rates (without raising rates for ordinary policyholders) or "deny coverage of punitive damages altogether," punitive damages could be contracted for in insurance policies and still provide a meaningful deterrent effect.[76] Nonetheless, addressing public policy concerns, the court stated that if punitive damages were allowed under insurance policies, "[i]t is doubtful whether the denial of insurance coverage for liability against punitive damages actually deters culpable actors."[77]

Less than two years after *Safway*, the El Paso Court of Appeals in *Government Employees Insurance Co. v. Lichte*[78] held that an insurance policy did not cover punitive damages.[79] *Lichte* dealt with an uninsured motorist,[80] but whether the court ruled as it did because of contract language or public policy is not clear. After discussing that the term "because of bodily injury" does not include punitive damages, the court stated that the purpose of punitive damages is to punish the defendant.[81] The *Lichte* opinion used an argument based on deterrence and concluded that, in order to effectuate the purpose of punitive damages, public policy

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74. *See* Am. Home Assurance Co. v. Safway Steel Prods. Co., 743 S.W.2d 693, 704-05 (Tex. App.—Austin 1987, writ denied) (stating that "[w]e find no public policy against allowing insurance coverage against punitive damages").

75. *Id.* at 700 (noting that Texas allowed punitive damages for gross negligence while New York and other jurisdictions required a higher standard of fraud, malice, or other intentional harms).

76. *Id.* at 704.

77. *Id.* (arguing that increased insurance rates and denial of coverage are sufficient punishment of a wrongdoer). The *Safway* Court also introduced the argument that mammoth punitive damage awards could unfairly bankrupt a company for an action of its agent. *Id.* Texas juries were not allowed to inquire about a defendant's financial health in assessing damages at the time of the *Safway* decision. *Am. Home Assurance Co.*, 743 S.W.2d at 704. The Texas Supreme Court has overruled this limitation, and juries may now consider the wealth of a defendant in assessing the level of punitive damages. Lunsford v. Morris, 746 S.W.2d 471, 471 (Tex. 1988) (orig. proceeding).

78. 792 S.W.2d 546 (Tex. App.—El Paso 1990), *aff'd on other grounds*, 825 S.W.2d 431 (Tex. 1992).

79. Gov't Employees Ins. Co. v. Lichte, 792 S.W.2d 546, 549 (Tex. App.—El Paso 1990) (holding that uninsured/underinsured policies do not cover punitive damages), *aff'd on other grounds*, 825 S.W.2d 431 (Tex. 1992).

80. *See id.* at 546 (stating that the case at hand deals with an uninsured driver).

81. *See id.* at 549 (citing Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549, 555-56 (Tex. 1985) (finding that the purpose of punitive damages is to punish and set an example for others), *superseded in part by statute*, TEX. FIN. CODE ANN. §§ 304.101-.107 (Vernon 2006)).

demands that the injurer pay the damages, not the victim's insurance company.[82]

Other courts of appeals have considered the issue as well. In 1994 the Texarkana Court of Appeals considered the issue in *Vanderlinden v. United Services Automobile Ass'n Property & Casualty Insurance Co.*[83] The case involved a situation where once the other driver's insurance policy was exhausted, the plaintiff sought recovery for her car accident injuries from "her own insurance company, USAA, . . . through the underinsured motorist provision contained within her policy."[84] To decide if the plaintiff was entitled to the relief sought, the court first answered whether punitive damages could even be covered by an insurance contract.[85] The court considered both *Lichte* and *Home Indemity Co. v. Tyler*—the two other cases in Texas jurisprudence in which the insurability of punitive damages issue arose in the context of underinsured motorist clauses.[86] Greater support was found in the *Lichte* opinion based on a listing of nationwide cases,[87] and the court affirmed the trial court's striking of punitive damages from Ms. Vanderlinden's pleading because "an insurance company should not be liable for punitive damages."[88]

The same year as *Vanderlinden*, Houston's First Court of Appeals found in *State Farm Mutual Automobile Insurance Co. v. Shaffer*[89] that certain insurance contracts tended to be ambiguous on the issue of coverage and proceeded to examine the legislative intent behind the Texas Insurance Code's provisions.[90] According to the *Shaffer* Court's opinion, the legislature intended uninsured motorist coverage to compensate an

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82. *Id.* at 549 (refusing to follow prior cases and holding that the wrongdoer must pay the exemplary damages, not the insurance company). *Lichte* further stated that its ruling could be distinguished from previous cases because it dealt with an uninsured motorist. *Id.* The court never mentioned the *Tyler* case. *Lichte*, 792 S.W.2d at 546-49; *see* Home Indem. Co. v. Tyler, 522 S.W.2d 594, 597 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.) (stating that because the plaintiffs "have been adjudged to be legally entitled to recover exemplary damages from the operator of the uninsured automobile," the plaintiff's insurer is required "to pay those exemplary damages"), *overruled by* Milligan v. State Farm Mut. Auto. Ins. Co., 940 S.W.2d 228 (Tex. App.—Houston [14th Dist.] 1997, writ denied).

83. 885 S.W.2d 239 (Tex. App.—Texarkana 1994, writ denied).

84. Vanderlinden v. United Servs. Auto. Ass'n Prop. & Cas. Ins. Co., 885 S.W.2d 239, 240 (Tex. App.—Texarkana 1994, writ denied).

85. *See id.* (setting forth the question of the case and the issue).

86. *See id.* at 240 (noting that "[t]his question has only been addressed twice in Texas, and the results are diametrically opposite").

87. *See id.* at 241 (examining section 5.06 of the Texas Insurance Code, recognizing the split of authority, and finding that the majority of courts support *Lichte*).

88. *Id.* at 242.

89. 888 S.W.2d 146 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

90. State Farm Mut. Auto. Ins. Co. v. Shaffer, 888 S.W.2d 146, 148-49 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

injured plaintiff.[91] In addition, the Texas Supreme Court in *Transportation Insurance Co. v. Moriel*, which reminded Texas courts of how punitive damages should be assessed,[92] led the *Shaffer* Court to base their opinion on public policy considerations and allowed the insurance company involved to refuse indemnification.[93]

Twenty years after issuing the *Tyler* opinion, the Houston Court of Appeals for the Fourteenth District reversed its position in *Milligan v. State Farm Mutual Automobile Insurance Co.*[94] Noting the changing precedent and the increasingly clear directive that punishment and deterrence were the only public policy considerations behind punitive damages,[95] the court held that "the uninsured motorist clause in the auto policy in this case does not cover exemplary damages as a matter of law."[96] If the shift in tone was still not apparent, two federal district courts recently reached opposite *Erie* guesses on the insurability issue.[97] Further, *Westchester Fire Insurance Co. v. Admiral Insurance Co.*,[98] a 2004 Fort Worth Court

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91. *Id.* at 149.

92. *See* Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 16-17 (Tex. 1994) (distinguishing between compensatory and punitive damages: "[p]unitive (or exemplary) damages are levied against a defendant to punish the defendant for outrageous, malicious, or otherwise morally culpable conduct").

93. *See Shaffer*, 888 S.W.2d at 149 (determining that the assessment of exemplary damages in this case does not achieve deterrence of wrongful conduct nor punishment of the wrongdoer (citing *Moriel*, 879 S.W.2d at 16-17)).

94. 940 S.W.2d 228 (Tex. App.—Houston [14th Dist.] 1997, writ denied).

95. *See* Milligan v. State Farm Mut. Auto. Ins. Co., 940 S.W.2d 228, 231 (Tex. App.—Houston [14th Dist.] 1997, writ denied) (noting that policy arguments for assessing punitive damages are not served when the motorist is uninsured). In addition, the insurance company cannot negotiate with the uninsured driver; therefore, there is no bargain for the court to enforce under contract policy. *Id.* at 232.

96. *Id.*

97. *Compare* Hartford Cas. Ins. Co. v. Powell, 19 F. Supp. 2d 678, 693-95 (N.D. Tex. 1998) (noting that the Texas Supreme Court sent a strong message in *Moriel* on punitive damages which supersedes Texas's policy of enforcing contracts as written), *with* Phila. Indem. Ins. Co. v. Stebbins Five Companies, No. Civ.A. 3:02-CV-1279-M, 2004 WL 210636, at *15-16 (N.D. Tex. Jan. 27, 2004) (following the *Lazenby* approach of allowing punitive damages to be insured and declaring that *Ridgway* is still good law despite the changes in Texas jurisprudence). The *Powell* court preceded their *Erie* prediction with a thorough study of Texas cases and statutes, other states' holdings, and legal commentary on the issue, which is quite useful to those studying the insurability issue. *Powell*, 19 F. Supp. 2d at 687-93. *See generally* Nautilus Ins. Co. v. Zamora, 114 F.3d 536, 538 (5th Cir. 1997) (discussing the practice known as *Erie* guessing, in which federal courts decide state issues when the jurisdiction's courts have been silent, by predicting how the high court would act).

98. 152 S.W.3d 172 (Tex. App.—Fort Worth 2004, pet. filed) (en banc).

of Appeals decision, ruled that a for-profit nursing home could insure themselves against punitive damages.[99]

2. The Changing Definition of Gross Negligence

Perhaps one of the reasons for the varying awards of punitive damages relates to the changing definition of gross negligence.[100] To obtain punitive damages, one method is to prove the defendant acted in a grossly negligent manner.[101] Statutorily, however, the definition has changed over time. A reader who examines the earliest two cases on the issue of insurability of punitive damages, *Home Indemnity Co. v. Tyler* and *Dairyland County Mutual Insurance Co. v. Wallgren*, will find little discussion of the conduct requirements for imposing punitive damages.[102] However, according to the 1981 Texas Supreme Court opinion, *Burk Royalty Co. v. Walls*,[103] the definition and standard of review for establishing and reviewing gross negligence had been established by *Sheffield Division, Armco Steel Corp. v. Jones*[104] before the time *Dairyland County* and *Tyler* were decided.[105] The *Armco Steel* Court defined gross negligence as

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99. *See* Westchester Fire Ins. Co. v. Admiral Ins. Co., 152 S.W.3d 172, 189-90 (Tex. App.—Fort Worth 2004, pet. filed) (en banc) (holding that because the case was decided before the Texas Legislature redefined punitive damages, the award could be characterized as an exemplary award, and therefore, inquiry into deterrence and punishment is not necessary). *Westchester* is distinguishable in some respects. The case involved non-profit nursing homes, which have their own set of policy concerns that were created by statute. *Id.* at 187. Additionally, the court decided the case based on old law (prior to *Moriel* and the 1995 legislative amendments), and did not inquire whether under the current definition of punitive damages, the contract at issue would violate public policy. *Id.* at 189.

100. *See id.* (referring to the different definitions of exemplary damages before and after September 1, 1995).

101. TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (Vernon 1997 & Supp. 2006).

102. *See* Dairyland County Mut. Ins. Co. v. Wallgren, 477 S.W.2d 341 (Tex. Civ. App.—Fort Worth, 1972, writ ref'd n.r.e.) (failing to discuss the state's position on punitive damages). *But cf.* Home Indem. Co. v. Tyler, 522 S.W.2d 594 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.) (citing Gary M. Moates, Note, *Exemplary Damages—An Insurable Risk for Texas Drivers*, HOUS. L. REV. 192 (1972) (discussing the public policy arguments behind the state's position)), *overruled by* Milligan v. State Farm Mutual Auto. Ins. Co., 940 S.W.2d 228 (Tex. App.—Houston [14th Dist.] 1997, writ denied).

103. 616 S.W.2d 911 (Tex. 1981).

104. 376 S.W.2d 825 (Tex. 1964).

105. Burk Royalty Co. v. Walls, 616 S.W.2d 911, 918, 920 (Tex. 1981). The history of gross negligence began not long after the adoption of the common law in 1849. *See id.* at 916-20 (running through the history of gross negligence and noting the developments of the early twentieth century); *see also* Patricia F. Miller, Comment, *2003 Texas House Bill 4: Unanimous Exemplary Damage Awards and Texas Civil Jury Instructions*, 37 ST. MARY'S L.J. 515, 528-29 (2006) (discussing the early years of Texas's civil jurisprudence and the expansion of punitive damage availability during the second half of the nineteenth century).

"that entire want of care which would raise the presumption of a conscious indifference to consequences."[106] *Burk Royalty* and subsequent legislative actions altered this definition slightly, but a substantial change occurred in 1995 when gross negligence became a subset of malice.[107] As the Texas Supreme Court in *Transportation Insurance Co. v. Moriel* explained, the behavior must be known to the actor as inherently dangerous at the time of the action, and nonetheless, the actor must engage in the act to be grossly negligent.[108] Otherwise, even if a plaintiff "has suffered grave injury[,] . . . punitive damages are not appropriate."[109] These frequent changes can be seen as an attempt to rein in courts and juries that poorly understood the definition of gross negligence.[110]

III. ANALYSIS

When the Supreme Court of Texas examines the certified question in *Fairfield* of whether Texas allows insurability of punitive damages, it may

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106. *See* Sheffield Div., Armco Steel Corp. v. Jones, 376 S.W.2d 825, 828 (Tex. 1964) (quoting the definition set out in *Southern Cotton Press & Manufacturing Co. v. Bradley*, 52 Tex. 587 (1880), and further resisting any attempts to apply lower standards such as "so slight a care" or "heedlessness and reckless disregard for others," the latter coming from the Texas Guest Statute, art. 6701(b)); *see also* J. Stephen Barrick, Comment, Moriel *and the Exemplary Damages Act: Texas Tag-Team Overhauls Punitive Damages*, 32 HOUS. L. REV. 1059, 1064-65 (1995) (noting that the standard under *Armco Steel* allowed reversal of a gross negligence finding if some evidence of care could be found). *Burk Royalty* altered that rule so that appellate courts could examine the whole record for evidence of a mental state referred to as "conscious indifference." *Id.* at 1065.

107. *See* J. Stephen Barrick, Comment, Moriel *and the Exemplary Damages Act: Texas Tag-Team Overhauls Punitive Damages*, 32 HOUS. L. REV. 1059, 1065-66, 1076-77 (1995) (discussing the past and recent changes in gross negligence). The legislature later revised Texas Civil Practice and Remedies Code section 41.003 to reintroduce gross negligence as a separate basis for awarding punitive damages. TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (Vernon 1997 & Supp. 2006). The changes in the definition may not have had a significant effect on Texas courts; lower courts continued to use old definitions in interpreting the new ones. *See* R & R Contractors v. Torres, 88 S.W.3d 685, 707-08 (Tex. App.—Corpus Christi 2002, no pet.) (finding that the 1995 changes to chapter 41 of the Texas Civil Practice and Remedies Code, which made gross negligence a subset of malice, did not mean that a cause of action for gross negligence was now legally insufficient, nor did it mean that past cases defining gross negligence were no longer useful in interpreting the current definition of malice).

108. *See* Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 23 (Tex. 1994) (explaining when an act is grossly negligent as "[i]n addition to conscious indifference," the act must be "likely to cause serious injury").

109. *Id.*

110. *See* S. Loyd Neal, Comment, *Punitive Damages: Suggested Reform for an Insurance Problem*, 18 ST. MARY'S L.J. 1019, 1031 (1987) (implicating ill-defined and confusing jury instructions as a cause of insurance company misgivings).

find a clear trend where the Fifth Circuit did not.[111] However, unless the Texas Supreme Court delves deeper into the reasons behind such a trend there probably will not be a satisfactory resolution of the issue. Texas public policy cannot be easily pinned down, and each court draws upon different sources and ideas.[112] Additionally, the need to deter and the means to deter a defendant's actions vary among different types of defendants.[113] Finally, throughout the history of Texas's struggle with this issue, the law has changed concerning both gross negligence and punitive damages.[114] Much depends on how courts and juries construe these laws and definitions. This section first examines insurance contract language as a means to avoid the indemnification of punitive damage awards, and then it addresses public policy considerations which surface when dealing with the insurability of punitive damages.

A. *The Contract Language Standpoint*

Insurance companies often argue that the insurance policy language precludes coverage of the defendant's intentional actions.[115] Just as often, courts use the same contractual language to force insurance com-

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111. *See* Fairfield Ins. Co. v. Stephens Martin Paving, L.P., 381 F.3d 435, 437 (5th Cir. 2004) (failing to find a trend among Texas cases), *petition for certified question accepted*, Tex. Aug. 27, 2004; Catherine M. Sharkey, *Revisiting the Noninsurable Cost of Accidents*, 64 MD. L. REV. 409, app. at 456-60 (2005) (placing Texas in the pro-insurance but lacking high court guidance category); *see also* George L. Priest, *Insurability and Punitive Damages*, 40 ALA. L. REV. 1009, 1018 (1989) (reporting that the nationwide trend is to allow coverage for punitive damages).

112. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Shaffer, 888 S.W.2d 146, 149 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (looking to the Texas Insurance Code and Motor Vehicle Safety-Responsibility Act for legislative intent to decipher Texas's public policy on the insurability of punitive damages); Vanderlinden v. United Servs. Auto. Ass'n Prop. & Cas. Ins. Co., 885 S.W.2d 239, 242 (Tex. App.—Texarkana 1994, writ denied) (looking to punitive damage policy); Dairyland County Mut. Ins. Co. v. Wallgren, 477 S.W.2d 341, 342-43 (Tex. Civ. App.—Fort Worth 1972, writ ref'd n.r.e.) (looking to contract doctrines).

113. *See* Hofer v. Lavender, 679 S.W.2d 470, 473-74 (Tex. 1984) (discussing the ability to punish deceased wrongdoers with punitive damages); Am. Home Assurance Co. v. Safway Steel Prods. Co., 743 S.W.2d 693, 704 (Tex. App.—Austin 1987, writ denied) (ruling on the limited issue of vicarious employer-employee liability).

114. *See* J. Stephen Barrick, Comment, Moriel *and the Exemplary Damages Act: Texas Tag-Team Overhauls Punitive Damages*, 32 HOUS. L. REV. 1059, 1060-62 (1995) (going over the 1995 reform of Texas Civil Practice and Remedies Code chapter 41); Patricia F. Miller, Comment, *2003 Texas House Bill 4: Unanimous Exemplary Damage Awards and Texas Civil Jury Instructions*, 37 ST. MARY'S L.J. 515, 528-37 (2006) (discussing changes to Texas jurisprudence on punitive damages leading up to the legislative changes of 2003).

115. *See, e.g.*, Westchester Fire Ins. Co. v. Admiral Ins. Co., 152 S.W.3d 172, 181 (Tex. App.—Fort Worth 2004, pet. filed) (en banc) (holding against the insurer despite the argument that a contract exclusion restricted coverage of grossly negligent activity).

panies to pay, sometimes regardless of the public policy arguments.[116] Consider *Westchester Fire Insurance Co. v. Admiral Insurance Co.*, in which an insurance company tried to define the term "accident" in such a way as to bar grossly negligent activities.[117] The court instead focused on another part of the contract which guaranteed "those sums which the insured shall become legally obligated to pay as damages because of" the accident.[118] Similarly, *American Home Assurance Co. v. Safway Steel Products Co.* found that such language led to expectations by the policy holder that punitive damages would be covered and that under a commonsense understanding, punitive damages arise out of accidents, rather than as a result of an independent mental state of conscious indifference.[119]

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116. *See, e.g., Am. Home Assurance Co.*, 743 S.W.2d at 698 (citing the Texas policy of reading insurance contracts so as to maximize coverage). Terms in a contract are given a broad reading; consider the term "bodily injury," which one court found extends down to sub-cellular injury. *See* Ericsson, Inc. v. Saint Paul Fire & Marine Ins. Co., 423 F. Supp. 2d 587, 592-93 (N.D. Tex. 2006) (allowing a vague assertion of bodily injury to cells and general health by plaintiffs as coverable under an insurance contract based on "bodily injury").

117. *Westchester Fire Ins. Co.*, 152 S.W.3d at 181. More specifically the contract language involved centered on the word "occurrence," which was then defined as "an accident . . . neither expected nor intended from the standpoint of the [i]nsured." *Id.* The insurance company tried arguing that gross negligence was always an intentional act; however, neither the trial court nor the appellate court agreed. *See id.* (finding against the insurer).

118. *Id.* The court also relied on a letter sent by Admiral Insurance to the policyholder admitting the possibility of punitive damages and that a pre-trial settlement would therefore be desirable. *Id.* at 182.

119. *See Am. Home Assurance Co.*, 743 S.W.2d at 702 (noting that only an explicit exclusion of punitive damage coverage would suffice to counter the "all sums" policy language). The *Safway* Court also mentioned that, at best, the insurance contract language in its policies created ambiguity, which was resolved against the drafter, the insurance company. *See id.* (considering that drafting created an ambiguity to be resolved against the drafting company). *Dairyland County Mutual Insurance Co. v. Wallgren* further held that regardless of how the policy issue turns out, the insurance company must pay because the contract benefits the third party injured plaintiff who was not a party to the contract. *Compare* Dairyland County Mut. Ins. Co. v. Wallgren, 477 S.W.2d 341, 342-43 (Tex. Civ. App.—Fort Worth 1972, writ ref'd n.r.e.) (forcing the insurer to pay on the contract on a third party beneficiary theory), *with* RESTATEMENT (FIRST) OF CONTRACTS § 601 (1932) (stating that "[i]f refusal to enforce or to rescind an illegal bargain would produce a harmful effect on parties for whose protection the law making the bargain illegal exists, enforcement or rescission, whichever is appropriate, is allowed"). In *Manriquez v. Mid-Century Insurance Co. of Texas*, the court found that policyholder expectations of insurance coverage triumph, even without the term "all sums" and with the exclusion of all intentional acts from coverage. *See* Manriquez v. Mid-Century Ins. Co. of Tex., 779 S.W.2d 482, 484 (Tex. App.—El Paso 1989, writ denied) (noting that the insurance company could have prevented this interpretation with stronger contract language), *overruled on other grounds by* Trinity Universal Ins. Co. v. Cowan, 945 S.W.2d 819 (Tex. 1997).

Typically, in cases where the court finds coverage under the contract, the court will refuse to use the public policy argument to prevent coverage.[120] Courts that accept the policy argument generally rush through or skip the contract terms analysis, although some give a reasonable analysis to both arguments.[121] While most insurance contracts include a clause for the exclusion of intentional acts or for damages that do not result from an accident,[122] insurance companies have not been successful in using these clauses to exclude damages from gross negligence.[123] The majority of contracts involved in these cases are standard-form contracts.[124]

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120. *Compare Westchester Fire Ins. Co.*, 152 S.W.3d at 182-90 (analyzing at length the historical source of Texas's public policy determinations, the definition of gross negligence, and the purpose of punitive damages in general), *with Dairyland County*, 477 S.W.2d at 342-43 (noting that because the insurance contract was written pursuant to the Texas Insurance Code, it was axiomatically public policy to enforce such a contract).

121. *See* Milligan v. State Farm Mut. Auto. Ins. Co., 940 S.W.2d 228, 230 (Tex. App.—Houston [14th Dist.] 1997, writ denied) (dividing the Texas opinions on punitive damage insurability into two camps: those focusing on the insurers promise to pay and those focusing on public policy concerns); *see also* Nw. Nat'l Cas. Co. v. McNulty, 307 F.2d 432, 434 (5th Cir. 1962) (finding it unnecessary to discuss the contract terms because public policy would invalidate it if, indeed, it did cover reckless and wanton conduct), *superseded in part by statute*, VA. CODE ANN. § 38.2-277 (2002). Sometimes the public policy and contract arguments are blurred together so that it becomes difficult to determine whether the court said anything about the applicability of contract law. *See* Gov't Employees Ins. Co. v. Lichte, 792 S.W.2d 546, 549 (Tex. App.—El Paso 1990) (beginning its discussion of punitive damages recovery in an uninsured motorist case by stating the contractual policy language, but holding that the contract language does not permit recovery for punitive damages because the underlying principle for allowing punitive damages is to punish a wrongdoer), *aff'd on other grounds*, 825 S.W.2d 431 (Tex. 1992).

122. *See* Tom Baker, *Reconsidering Insurance for Punitive Damages*, 1998 WIS. L. REV. 101, 116, 119-20 (discussing the ways in which an insurance company can use their underwriting practices to decrease the chances of paying out large punitive damage judgments); *see also* Decorative Ctr. of Houston v. Employers Cas. Co., 833 S.W.2d 257, 262-63 (Tex. App.—Corpus Christi 1992, writ denied) (holding that an intentional act exclusion clause barred payment by the insurance company for such causes of actions as nuisance and trespass to property). The court in *Decorative Center* allowed the insurance company to refuse indemnification of a post-judgment settlement after the trial court found the tortfeasor had engaged in intentional acts and was assessed $400,000 in punitive damages (versus $144,000 of compensatory). *See id.* at 259 (upholding the trial court decision).

123. *See, e.g., Westchester Fire Ins. Co.*, 152 S.W.3d at 181 (repeating the trial court's findings that the insurer is liable for damages arising from gross negligence). Nationwide, each jurisdiction uses vague standards in defining the conduct warranting punitive damages, such as recklessness, gross negligence, malice, or shock to the conscience. George L. Priest, *Insurability and Punitive Damages*, 40 ALA. L. REV. 1009, 1016 (1989). The terms create much confusion, but the majority of courts still agree that recklessness and gross negligence are at least partially non-intentional in most circumstances. *Id.* at 1018.

124. Tom Baker, *Reconsidering Insurance for Punitive Damages*, 1998 WIS. L. REV. 101, 114-15; *see* Home Indem. Co. v. Tyler, 522 S.W.2d 594, 597 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.) (finding the contract provisions at issue to be almost

Because the contract language is similar, one might expect greater uniformity of opinion among courts and insurance companies. The most likely explanation for the lack of uniformity is the definition of gross negligence and the purpose and nature of punitive damages, both of which vary across time, fact patterns, and jurisdiction.[125] Arguments based solely on contract language dominated early Texas opinions[126] until 1988, when Texas courts began to note that insurability might impact the effect of punitive damages.[127]

B. *The Sources of Texas Policy?: The Purposes of Punitive Damages*

There are two lines of public policy arguments in Texas cases: pre-*Moriel* and post-*Moriel*;[128] the first in which Texas courts did not take the justifications of punitive damages seriously,[129] and the second marked by a determination to clarify and limit punitive damage assessment.[130] Currently, every punitive damage award must be based on imposing a penalty and punishment.[131]

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identical to that of the *Dairyland County* case), *overruled by* Milligan v. State Farm Mut. Auto. Ins. Co., 940 S.W.2d 228 (Tex. App.—Houston [14th Dist.] 1997, writ denied).

125. George L. Priest, *Insurability and Punitive Damages*, 40 ALA. L. REV. 1009, 1016 (1989).

126. *See, e.g.*, *Tyler*, 522 S.W.2d at 597 (echoing the earlier *Dairyland County* case, and upholding the duty to indemnify based solely on contract policy).

127. *See* Am. Home Assurance Co. v. Safway Steel Prods. Co., 743 S.W.2d 693, 704-05 (Tex. App.—Austin 1987, writ denied) (allowing a corporation to insure itself for the gross negligence of its agents after considering the public policy arguments).

128. *See* Hartford Cas. Ins. Co. v. Powell, 19 F. Supp. 2d 678, 693 (N.D. Tex. 1998) (declaring that *Moriel* ends any ambiguity in Texas case law on punitive damages).

129. *See* Westchester Fire Ins. Co. v. Admiral Ins. Co., 152 S.W.3d 172, 184-85 (Tex. App.—Fort Worth 2004, pet. filed) (en banc) (listing the cases that preceded *Moriel* that advocated, among other functions of punitive damages, a secondary compensatory function, the most recent being *Qualicare of East Texas, Inc. v. Runnels*, 863 S.W.2d 220 (Tex. App.—Eastland 1993, writ dism'd)).

130. *See* Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 17 (Tex. 1994) (comparing punitive damages to criminal punishment and declaring that the purpose of punitive damages is to bring the ability of the criminal justice system to punish wrongdoers to civil courts). The Texas Legislature later contributed to the Texas Supreme Court's directive to limit punitive damages to punishment by requiring such an instruction in the jury charge. TEX. CIV. PRAC. & REM. CODE ANN. §§ 41.001, 41.010 (Vernon 1997 & Supp. 2006).

131. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(5) (Vernon Supp. 2006) (providing the current definition of exemplary damages: "'Exemplary damages' means any damages awarded as a penalty or by way of punishment but not for compensatory purposes. Exemplary damages are neither economic nor noneconomic damages. 'Exemplary damages' includes punitive damages").

1. Retribution

Retribution is the direct punishment of a wrongdoer; it is the belief that certain bad acts deserve punishment.[132] Therefore, retribution is a moral creation[133]—unrelated to any economic benefit (such as deterrence or rehabilitation). The best definitions of punishment as retribution come from the United States Supreme Court in cases like *State Farm Mutual Auto Insurance Co. v. Campbell*[134] and *City of Newport v. Fact Concerns, Inc.*[135] In the latter case, the Court mentioned that retribution resembled turning the tables on the wrongdoer so that they suffer for their own acts.[136] The punishment imposed should fit the egregiousness of the conduct, and thus intentional acts merit greater punishment than mere accidents.[137]

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132. *See* 2 DAVID G. OWEN, M. STUART MADDEN & MARY J. DAVIS, MADDEN & OWEN ON PRODUCTS LIABILITY § 18:2 (3d ed. 2000) (defining retribution as restitution for the theft of intangible, social values).

133. *See* Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001) (stating that the "imposition of punitive damages is an expression of [the jury's] moral condemnation"); Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 4-5 (1982) (noting that the retribution justification for punitive damages relies on the traditional moral belief that wrongful acts deserve punishment regardless of actual harm); *see also* Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 16 n.5 (Tex. 1994) (taking from criminal law certain justifications for punishment, among which are vengeance as a public good and the moral concept of desert). Desert can be defined as "the fact of deserving reward or punishment." WEBSTER'S NEW WORLD DICTIONARY 382 (David B. Guralnik ed., The World Publishing Co. 2d ed. 1970) (1953). Retribution means "deserv[ing] punishment for evil done, or sometimes, reward for good done; merited requital." *Id.* at 1215.

134. 538 U.S. 408, 429 (2003) (directing the Utah Supreme Court to reconsider a large punitive damage award that the Court deemed excessive under the Due Process Clause of the Constitution). *Campbell* anchors a series of five (and growing) major cases that address how the Due Process Clause limits punitive damage awards. Jennifer Bruch Hogan & Richard P. Hogan, Jr., *Charging the Jury in Changing Times*, 46 S. TEX. L. REV. 973, 987 (2005).

135. 453 U.S. 247 (1981). The Texas Legislature likely considered the holding in *Campbell* when passing the 2003 amendments to chapter 41 of the Texas Civil Practice and Remedies Code. Jennifer Bruch Hogan & Richard P. Hogan, Jr., *Charging the Jury in Changing Times*, 46 S. TEX. L. REV. 973, 989-90 (2005).

136. *See* City of Newport v. Fact Concerns, Inc., 453 U.S. 247, 267-68 (1981) (stating that "[u]nder ordinary principles of retribution, it is the wrongdoer himself who is made to suffer for his unlawful conduct"); *see also Cooper Indus.*, 532 U.S. at 432 (noting punishment and moral condemnation are central purposes of punitive damage awards). Interestingly, in *City of Newport*, the Supreme Court stated that assessing punitive damages against a municipality was misguided because a city could not form the malice against which to seek revenge. *City of Newport*, 453 U.S. at 267-68.

137. Intentional acts are already excluded from most insurance contracts, so the question is whether public policy demands utmost punishment of gross negligence. *Cf.* Tom Baker, *Reconsidering Insurance for Punitive Damages*, 1998 WIS. L. REV. 101, 121 (noting

So, does Texas assess damages based on the intention of the harmful act?[138] Texas public policy withholds punitive damages except for gross negligence, fraud, and malice.[139] This supports retribution because these causes of action all require a certain mental state rather than merely an accidental breach of duty.[140] However, Texas also caps punitive damages relative to compensation, which suggests that the state's interest in assessing punitive damages comprises more than inducing proper suffering.[141]

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that the unintentional/intentional distinction present in liability insurance contracts does not mix well with tort law's two concerns—liability and damage types—leaving areas where punitive damage awards will not be excluded by the language of the standard-form contract).

138. *See* Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1432 (1993) (stating that assessment of punitive damages based on retribution should bear no relation to the amount of harm actually caused, but should be assessed by the quality of wrongdoing). This echoes the deterrence argument in which total damages must equal or surpass the wrongdoer's benefits from his action, including the irrational and perverse wrongdoers. *See* Robert D. Cooter, *Economic Analysis of Punitive Damages*, 56 S. CAL. L. REV. 79, 89 (1982) (describing the class of persons who commit wrongs for the sake of being bad, and noting the need for punitive damages to punish them).

139. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (Vernon 1997 & Supp. 2006) (requiring clear and convincing evidence of those elements listed). Ordinary negligence, deception, or bad faith will not suffice to support an award. *Id.*

140. *See id.* § 41.001 (Vernon 1997 & Supp. 2006) (defining malice, fraud, and gross negligence); Joe McKay, Comment, *Texas Public Policy on Insuring Punitive Damages: Time for a Fresh Look*, 2 TEX. WESLEYAN L. REV. 205, 208 (1995) (noting that under the 1987 amendments to chapter 41 of the Texas Civil Practice and Remedies Code, which removed the objective definition of gross negligence, the required mental state was actual awareness of the wrong). The legislature explicitly added an objective component to the definition of gross negligence. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.001 (Vernon 1997 & Supp. 2006) (allowing the jury to find knowledge of conscious indifference "viewed objectively from the standpoint of the actor at the time of [the] occurrence"). A probable reason why the legislature temporarily deleted gross negligence from the list of acceptable bases to award punitive damages was its dissatisfaction with courts' interpretation of gross negligence. *See* Burk Royalty Co. v. Walls, 616 S.W.2d 911, 920-22 (Tex. 1981) (discussing how properly to define and review gross negligence).

141. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.008 (Vernon 1997 & Supp. 2006) (limiting punitive damages to twice economic damages plus non-economic damages up to $750,000). The United States Supreme Court has not definitively set a maximum total amount or maximum multiple of compensatory damages when assessing punitive damages. *See* State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 424-25, 429 (2003) (refusing to determine a multiplier and repeating earlier cases suggesting that a four-to-one ratio might be repugnant to constitutional due process, but finally, stating a 145 to 1 ratio was excessive). The Supreme Court seemed very reluctant to establish a formal benchmark, given wide variations between the amount of damages and the quality of the wrongdoing. *See id.* at 425 (admitting a formal benchmark is insufficient); *see also* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 7 & n.2, 23 (1991) (upholding a punitive damage award in excess of one million dollars with a multiplier of around four times).

Texas case law has developed several factors concerning when punitive damages are reasonable, which incorporate elements of retribution into punishment. These factors include the following: "(1) the nature of the wrong, (2) the character of the conduct involved, (3) the degree of culpability of the wrongdoer, (4) the situation and sensibilities of the parties concerned, and (5) the extent to which such conduct offends a public sense of justice and propriety."[142]

Retribution also presents the challenge of translating a personal violation into monetary damages.[143] If the jury needs to know or feel that a defendant has actually paid monetary awards, then allowing insurance to cover a punitive damage award would counteract the goal of retribution.[144] Yet, Texas policy seems to run contrary to such a goal. Consider that the Texas Rules of Evidence limit jury members from receiving infor-

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142. *See* Alamo Nat'l Bank v. Kraus, 616 S.W.2d 908, 910 (Tex. 1981) (listing factors to determine when the amount of damages are reasonable). The *Kraus* factors have been endorsed as an instruction given to Texas juries. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.011 (Vernon 1997 & Supp. 2006) (integrating the language of *Kraus* into statute); Owens-Corning Fiberglas Corp. v. Malone, 972 S.W.2d 35, 39-40 (Tex. 1998) (noting that the Texas Supreme Court authorized the use of the *Kraus* factors in jury instructions). *See generally* J. Stephen Barrick, Comment, Moriel *and the Exemplary Damages Act: Texas Tag-Team Overhauls Punitive Damages*, 32 HOUS. L. REV. 1059, 1073-74 & n.117 (1995) (covering how *Moriel*, *Kraus*, and *Lunsford v. Morris* shaped the 1995 amendments to the Texas Civil Practice and Remedies Code). The United States Supreme Court has approved the use of similar guidelines from other states. *See* BMW of N. Am. v. Gore, 517 U.S. 559, 574-75 (1996) (listing "guideposts" for appellate review: "the degree of reprehensibility," correlation to compensatory damages, and comparable punitive damage awards or civil penalty amounts); *Haslip*, 499 U.S. at 21-22 (supporting Alabama's use of a set factors for review and jury instructions). Since *Kraus* was decided, Texas courts and the legislature have addressed excessive verdicts; most notably with the imposition of caps, but also with more rigorous appellate review. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.011 (Vernon 1997 & Supp. 2006) (listing evidence the jury should consider when determining punitive damages); Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 30-31 (Tex. 1994) (stating that "courts of appeals must carefully scrutinize punitive awards to ensure that they are supported by the evidence").

143. *See* Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1435-36 (1993) (noting that a formula to translate moral rage to damages is futile). Galanter and Luban suggest that jury awards be symbolic of moral guidelines; the awards should be based on making an example "as transparent as possible [to] the true scale of values in the moral world." *Id.* The authors cite *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (Cal. Ct. App. 1981), and express approval of a one-hundred million dollar award given therein because it represented the difference in cost-benefit analysis between recalling the Ford Pinto (and saving lives) or absorbing the accident. *Id.* at 1436-38.

144. *See* Tom Baker, *Reconsidering Insurance for Punitive Damages*, 1998 WIS. L. REV. 101, 112-13 (noting that punitive damage insurance, if seen as allowing the wrongdoer to escape punishment, might interfere with the retributive message of a punitive damage award).

mation relating to the defendant's past and current punishment, insurance limits, actual amount paid in past awards and settlements, and any outstanding damage awards for similar conduct.[145] Additionally, whether the jury's imposition of punitive damages will be capped by statute is also withheld from consideration.[146] Thus, if Texas policy considers direct monetary payment from the defendant to the plaintiff to be the sole method of punishment, insurance will defeat such a policy,[147] but Texas seems more concerned with fairness than maximization of punishment on a grossly negligent defendant.[148]

In *Lunsford v. Morris*[149] the Texas Supreme Court addressed when to allow plaintiffs to introduce financial information of the defendant.[150] In doing so, it considered the policy behind punitive damages.[151] Such a rule appears to undercut punishment for indigent defendants by linking the level of punishment to something other than society's desire for awarding punishment.[152] If financial information served to fit punish-

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145. *See Malone*, 972 S.W.2d at 41 (declaring that Rule 403 of the Texas Rules of Evidence prohibiting evidence concerning insurance, past awards, pending claims, and future claims from being introduced to the jury, either creates bias towards the defendant or is irrelevant to the Texas Supreme Court's vision of punishment).

146. TEX. CIV. PRAC. & REM. CODE ANN. § 41.008 (Vernon 1997 & Supp. 2006) (preventing the jury from knowing which causes of action are capped, including gross negligence, and how those caps will effect their award determination). This prohibition extends to all phases of the trial. *Id.*

147. Tom Baker, *Reconsidering Insurance for Punitive Damages*, 1998 WIS. L. REV. 101, 112-13 (weighing the effects of insuring punitive damages and concluding that insurance significantly cuts into the specific retributionist punishment of an insured wrongdoer).

148. *See* J. Stephen Barrick, Comment, Moriel *and the Exemplary Damages Act: Texas Tag-Team Overhauls Punitive Damages*, 32 HOUS. L. REV. 1059, 1089-90 (1995) (noting that the general trend in Texas legislation and damage reforms represents a trend towards fairness to defendants). The dominant feature of these reforms is a desire to limit jury power over damage awards because the legislature saw the jury as biased and unpredictable. *Id.* at 1090.

149. 746 S.W.2d 471 (Tex. 1988) (orig. proceeding).

150. *See* Lunsford v. Morris, 746 S.W.2d 471, 471 (Tex. 1988) (orig. proceeding) (issuing a mandamus writ to force discovery of the defendant's net worth), *overruled on other grounds by* Walker v. Packer, 827 S.W.2d 833, 842 (Tex. 1992).

151. *See id.* (deciding that the ability of a defendant to pay relates directly to Texas's policy of punishment). *Lunsford* overturned *Young v. Kuhn*, 71 Tex. 645, 9 S.W. 860 (1888), the preceding case on point. *Id.* at 473. *Young* presented a retributionist view, linking damages to the reprehensibility of the crime and not the wealth of the defendant. *Young*, 9 S.W. at 862, *abrogated by* Lunsford v. Morris, 746 S.W.2d 471, 472-73 (Tex. 1988), and *superseded by statute*, TEX. R. EVID. 403. Some things do not change, as the 1888 Texas Supreme Court worried just as much about excessive and unprincipled judgments as the 1995 Texas Legislature. *Id.* (stating that considering the financial status of the defendant would lead to results "embarrassing [to] the administration of justice").

152. *See Young*, 9 S.W. at 863 (noting that mitigating damages for the poor and indigent is anathema to public policy).

ments to crimes better, then punitive damages would never be levied against the uninsured when the plaintiff has not shown why compensatory damages would not sufficiently deter the defendant—but in Texas they are.[153] Further, the Texas Supreme Court has allowed defendants to use financial information to mitigate damages and has held that such a right to mitigate can be waived.[154] All of this suggests that Texas's policy of retribution surrenders to other policies, such as fairness to defendant's and plaintiff's control of civil punishment.[155] The caps on punitive damages do not apply to intentional torts, suggesting that the Texas Legislature may have weighed the policy of imposing punitive damages and concluded that fairness trumped adequate retribution in gross negligence but not with respect to intentional torts.[156]

If, instead of a retribution policy based on direct monetary fines, Texas's retribution policy relates to a mix of symbolic, indirect, and attenuated[157] punishments that seek to educate as well as punish, then insur-

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153. *See* Gov't Employees Ins. Co. v. Lichte, 792 S.W.2d 546, 549 (Tex. App.—El Paso 1990) (preventing indemnification from a first party insurer based on public policy, because such policy considerations demand the defendant pay for his wrongdoing), *aff'd on other grounds*, 825 S.W.2d 431 (Tex. 1992). The defendant in *Lichte* lacked insurance and failed to appear in court, and the court levied $400,000 in punitive damages against him (an amount four times that of actual damages). *Id.* at 546.

154. *See* Owens-Corning Fiberglas Corp. v. Malone, 972 S.W.2d 35, 40-41 (Tex. 1998) (stating that a defendant can introduce information about wealth to promote fair punishment).

155. A retributionist-oriented court would introduce financial information without regard for plaintiff's or defendant's trial strategy. *See* Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1431-32 (1993) (stating that the amount of punitive damages should be based on wealth, not the injury actually caused); *see also* Ellis County State Bank v. Keever, 913 S.W.2d 605, 610 (Tex. App.—Dallas 1995) (allowing evidence of whether the tortfeasor had shown remorse after the act or omission), *rev'd on other grounds*, 915 S.W.2d 478 (Tex. 1995). *Ellis County* relied upon a *Kraus* factor, codified into statute in Texas Civil Practice and Remedies Code section 41.011; the specific provision the court used was "the situation and sensibilities of the parties concerned." *Ellis County*, 913 S.W.2d at 609.

156. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.008 (Vernon 1997 & Supp. 2006) (creating exceptions to the punitive damage caps for such causes of actions as murder, assault, felony theft, and other "torts" taken from the Texas Penal Code); *cf.* Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1423 (1993) (reporting that the due process limit on punitive damages should be substantially higher for intentional acts than gross negligence).

157. *See* Am. Home Assurance Co. v. Safway Steel Prods. Co., 743 S.W.2d 693, 704 (Tex. App.—Austin 1987, writ denied) (referring to those effects that an insurance company can place upon a wrongdoer whom they have indemnified, such as cancellation of his or her policy or higher rates); *see also* Tom Baker, *Reconsidering Insurance for Punitive Damages*, 1998 WIS. L. REV. 101, 112 (referring to such effects as "muted punishments" relative to direct payment). Another instance in which punitive damages will deter a wrongdoer, even with insurance, comes when the amount of the award exceeds the policy

ance coverage for gross negligence will not substantially undercut public policy.[158] Texas allows juries to assess damages based on their views of the wrongdoer's culpability,[159] but it then reserves the right to cap or remit those damages.[160] This indicates a desire to limit retribution in the name of regularity and fairness, while sending a signal—in terms of monetary damage—about the quality of the wrongdoing.

2. Deterrence

Deterrence, as a policy of discouraging future detrimental behavior,[161] is simultaneously easy to comprehend and hard to apply. Whom does public policy demand we deter—the wrongdoer, future wrongdoers, or the agents and guardians of the wrongdoer?[162] Further, deterrence de-

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limits. *See id.* at 118-19 (noting that punitive damages based on egregious conduct, and not merely gross negligence, regularly exceed the insurance policy amounts of individuals and small businesses).

158. *See* Tom Baker, *Reconsidering Insurance for Punitive Damages*, 1998 WIS. L. REV. 101, 112-13 (noting that the assessment of punitive damages has a ceremonial consequence that makes a strong statement in support of public policy).

159. *See* Alamo Nat'l Bank v. Kraus, 616 S.W.2d 908, 910 (Tex. 1981) (rejecting attempts to set rules that link punitive damage to the extent of actual injury while explicitly listing culpability as the dominant factor in determining the amount of punitive damages).

160. TEX. CIV. PRAC. & REM. CODE ANN. § 41.008 (Vernon 1997 & Supp. 2006) (setting a cap relating to the amount of actual damages).

161. *See* Cass R. Sunstein, Daniel Kahneman & David Schkade, *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2082 (1998) (stating that the deterrence policy argument when assessing punitive damages focuses on "ensur[ing] that the award of compensatory damages is supplemented by an amount sufficient to cause wrongdoers to internalize the costs of their actions").

162. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.005 (Vernon 1997 & Supp. 2006) (limiting punitive damages for persons not directly involved in an act, with certain exceptions for employers and those with legal duties); Tom Baker, *Reconsidering Insurance for Punitive Damages*, 1998 WIS. L. REV. 101, 113-14 (concluding that because vicariously liable defendants are both less in control of the act or omission and less morally culpable, an award of punitive damages against them has fewer public policy benefits; thus, there are fewer objections to insuring against those damages). *But see* Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 71 (1982) (noting that almost all courts allow vicarious liability; the difference "is one of degree only"). *See also* Catherine M. Sharkey, *Revisiting the Noninsurable Costs of Accidents*, 64 MD. L. REV. 409, 429-30 (2005) (providing the view that despite the fact that deterrence is weakened when damages are assessed against a vicariously liable defendant, public policy still demands that courts do not further weaken the deterrent effect by allowing insurance). Professor Sharkey points to the holding in *Johnson & Johnson v. Aetna Casualty & Surety Co.*, 667 A.2d 1087 (N.J. Super. Ct. App. Div. 1995), a New Jersey case, which held that allowing insurance for punitive damages assessed for vicarious liability makes little sense in a products liability case. Catherine M. Sharkey, *Revisiting the Noninsurable Costs of Accidents*, 64 MD. L. REV. 409, 430 (2005) (citing *Johnson & Johnson*, 667 A.2d at 1091-92). While the *Johnson & Johnson* case appears to turn more on corporation and products liability law

mands that the actor have some sort of control over his actions.[163] So, how will this work when the action is gross negligence, and by definition, the actor has no control over his action?[164] Finally, how can a jury translate a state's deterrence policy into a dollar amount?[165]

(the two corporations sought to distance themselves from the design flaws, arguing that the designs originated from certain employees), it does contain language that disapproves of cases which allow insurance for punitive damages. *See Johnson & Johnson*, 667 A.2d at 1091 (stating that "New Jersey sides with those jurisdictions which proscribe coverage for punitive damage liability because such a result offends public policy and frustrates the purposes of punitive damage awards"). Note that New Jersey case law did not allow indemnification for punitive damages; the plaintiffs sought declaration on an exception for vicarious liability. *Id.* at 1091. Also interesting is the court's mention of possible legislative action overturning the New Jersey position. *Id.* at 1091 n.2. New Jersey legislators apparently did not overturn *Johnson & Johnson*—it is still good law. *See* Fireman's Fund Ins. Co. v. Imbesi, 826 A.2d 735, 757 (N.J. Super. Ct. App. Div. 2003) (upholding *Johnson & Johnson* on the issue of insuring punitive damages).

163. *See* Cass R. Sunstein, Daniel Kahneman & David Schkade, *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2083 (1998) (citing WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 160 (1987) (providing that while "intentional torts, i.e. those involving deliberate infliction of an injury, may provide particularly appropriate cases for punitive damage awards," punitive damages "do not make sense for highly visible torts where the probability of detection and compensation is extremely high. In such cases, compensatory damages are all that is required")).

164. It is less likely that a person will perform a cost-benefit analysis to test a weak point in the law than that he or she will merely look to the "seriousness" of the law to see if it is likely to be enforced. *See* Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1429 (1993) (noting that most people will comply with the law if told that the law should be followed); *see also* Robert D. Cooter, *Economic Analysis of Punitive Damages*, 56 S. CAL. L. REV. 79, 85 (1982) (arguing that many people will easily misjudge the standard of care due to vague "standard[s] of 'reasonable care' . . . in tort law"). *But see* Tom Baker, *Reconsidering Insurance for Punitive Damages*, 1998 WIS. L. REV. 101, 111-12 (dividing torts into accidental and purposeful causes and stating that the former need no additional damages to deter, while the latter need such damages to send the appropriate message).

165. *Compare* David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 377-78 (1994) (proposing that the main purpose of deterrence is either to publicize the existence of latent wrongdoings or to compensate for the profits made that will not be accounted for since not all victims will bring suit), *with* Robert D. Cooter, *Economic Analysis of Punitive Damages*, 56 S. CAL. L. REV. 79, 89 (1982) (relating the amount of a punitive damage award to the amount of illicit gain not covered in a compensation award, subject to a cost-benefit analysis to prevent over-deterrence). *But see* Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1449 (1993) (criticizing "[t]he efficient deterrence theory" as removing the punishment aspect of punitive damages, stating that computing the amount of punitive damages necessary to represent victims who will not seek compensation is "merely an augmentation of compensatory damages").

The majority of Texas appellate cases have denied indemnity of punitive damages in the context of uninsured motorist insurance.[166] These courts noted that the lack of a relationship between the plaintiff's insurance company and the defendant eliminates practically any chance of a beneficial deterrent effect.[167] Rather than upholding a punitive damage policy based on deterrence, these cases suggest punitive damages should not be awarded against uninsured motorists.[168] The strongest proponent of a deterrence policy appears in the Texas Supreme Court opinion of *Transportation Insurance Co. v. Moriel*.[169] However, *Moriel* did not speak to insurance but to reform.[170] Tort reform cases like *Moriel* and

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166. *See, e.g.*, Gov't Employees Ins. Co. v. Lichte, 792 S.W.2d 546, 549 (Tex. App.—El Paso 1990) (holding that plaintiff's uninsured motorist insurance coverage for bodily injury does not include punitive damages), *aff'd on other grounds*, 825 S.W.2d 431 (Tex. 1992). Other cases that followed *Lichte* in excluding coverage of punitive damages under uninsured motorist policies include *Milligan*, *Vanderlinden*, and *Shaffer*. *See* Hartford Cas. Ins. Co. v. Powell, 19 F. Supp. 2d 678, 687-91 (N.D. Tex. 1998) (discussing Texas cases on the issue by year).

167. *See* Milligan v. State Farm Mut. Auto. Ins. Co., 940 S.W.2d 228, 231 (Tex. App.—Houston [14th Dist.] 1997, writ denied) (noting that a public policy of deterrence is not served in the uninsured motorist context); *Lichte*, 792 S.W.2d at 549 (ruling that the punishment must land on the wrongdoer, not the plaintiff's insurance carrier).

168. *See* Vanderlinden v. United Servs. Auto. Ass'n Prop. & Cas. Ins. Co., 885 S.W.2d 239, 242 (Tex. App.—Texarkana 1994, writ denied) (upholding the trial court that struck punitive damages from an insured driver's petition in a suit against her first-party insurance provider). Ms. Vanderlinden first received the policy limits from the defendant's insurance company, but then chose to sue her own insurance company for additional damages under the uninsured motorist coverage. *Id.* at 240. The insurance company refused to further indemnify Ms. Vanderlinden. *Id.* This was the basis of the trial in which the jury awarded her actual damages consisting of less than half of the amount she had previously received, which when offset against the prior disbursement, reduced the insurer's liability to nothing. *Id.*

Texas's policy of crafting punishment to fit a defendant's wealth suggests that uninsured motorists should ordinarily be required to pay nominal punitive damage awards, as compensatory damages will deter a person of ordinary financial security. *See* Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 17 (Tex. 1994) (holding that damages should adequately deter without becoming excessive); Lunsford v. Morris, 746 S.W.2d 471, 472-73 (Tex. 1988) (orig. proceeding) (allowing financial information in order to fit punishments to "a defendant's ability to pay"). Courts should carefully consider assessing punitive damages against a non-appearing defendant because without the defendant's testimony, the burden of showing the quality and nature of the wrong meets the statutory requirements by clear and convincing evidence is difficult to meet. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (Vernon 1997 & Supp. 2006) (requiring clear and convincing proof of gross negligence to award punitive damages).

169. *See Powell*, 19 F. Supp. 2d at 693 (noting that *Moriel* sets a clear statement that the public policies behind punitive damages are punishment and deterrence).

170. *See* Westchester Fire Ins. Co. v. Admiral Ins. Co., 152 S.W.3d 172, 189 (Tex. App.—Fort Worth 2004, pet. filed) (en banc) (noting that *Moriel* did not consider the issue of insuring punitive damages).

Pacific Mutual Life Insurance Co. v. Haslip[171] presented a common theme of over-deterrence,[172] seeking to reform the procedural aspects of punitive damages, not the underlying public policy.[173]

The *Moriel* Court held, in discussing the effect of financial evidence, that a punitive damage award should relate to the defendant's wealth.[174] This could be read as instructing courts to address deterrence as an effective policy by ensuring awards are adequate to cause a defendant to factor such punishment into decisions about future actions.[175] By examining the profitability of an action and assessing additional damages to offset any deficiency in actual damage liability, a court can provide adequate deterrence in tort cases.[176]

While a model that determines exactly what damages are needed to force potential wrongdoers to internalize all the effects and losses of their

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171. 499 U.S. 1 (1991) (considering the excessiveness of punitive damage awards and setting guideposts for their assessment).

172. *See Moriel*, 879 S.W.2d at 18 (citing over-deterrence as a reason for reforming gross negligence). *But cf.* Borden, Inc. v. Guerra, 860 S.W.2d 515, 527 (Tex. App.—Corpus Christi 1993, writ dism'd by agr.) (stating that fairness is a secondary consideration in determining the amount of punitive damages, punishment being the first consideration). While it may be true that juries are not allowed to consider fairness to the defendant as a factor—although "the situation and sensibilities of the parties" may suffice, *Alamo National Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981)—the legislature may have wanted the jury to decide an amount based on the quality of the wrongdoing, while limiting the amount of damages in the name of fairness or due process by statute. Jennifer Bruch Hogan & Richard P. Hogan, Jr., *Charging the Jury in Changing Times*, 46 S. TEX. L. REV. 973, 990-91 (2005).

173. *See Moriel*, 879 S.W.2d at 17 (describing their aim as "ensur[ing] that defendants who deserved to be punished in fact receive an appropriate level of punishment, while at the same time preventing punishment that is excessive or otherwise erroneous").

174. *See id.* at 29 (stating that "the amount of punitive damages necessary to punish and deter wrongful conduct depends on the financial strength of the defendant").

175. *See* Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 25 (1982) (discussing situations in which punitive damages are necessary for a deterrent effect, because actual damages would not be substantial enough to prevent the defendant from causing the injury).

176. *See* Owens-Corning Fiberglas Corp. v. Malone, 972 S.W.2d 35, 40-41 (Tex. 1998) (allowing the introduction of information "about the profitability of a defendant's misconduct" to be a factor in determining punitive damage); Robert D. Cooter, *Economic Analysis of Punitive Damages*, 56 S. CAL. L. REV. 79, 80-84 (1982) (giving mathematical examples of what amount of damages are needed to deter a wrongdoer under various levels of detection and both negligence and strict liability regimes). Deterrence must offset illicit benefits and the probability that an injured party might not bring suit because of cost or inability to determine the party committing the wrong. *See* David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 377-78 (1994) (noting that a defendant might not weigh the public interest in preventing a wrong against his or her own profits, unless such a wrong has been clearly defined by a judgment in court).

actions is admirable,[177] such models, unfortunately, have little utility in the real world.[178] When defendants commit gross negligence, they are guilty of conscious indifference to a standard of care.[179] Sometimes this involves the kind of cost-benefit analysis that undervalues the rights of

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177. *See* Seth J. Chandler, *The Interaction of the Tort System and Liability Insurance Regulation: Understanding Moral Hazard*, 2 CONN. INS. L.J. 91, 152-55 (1996) (running a model weighing levels of precaution, presence of liability insurance at various levels of wrongdoing, public policy, and a wrongdoer's state of mind); Robert D. Cooter, *Economic Analysis of Punitive Damages*, 56 S. CAL. L. REV. 79, 89 (1982) (proposing a deterrence rationale based on the economics principle that a "wrong" is not a wrong if it produces a net benefit in utility; thus, so long as courts force a wrongdoer to pay all damages and externalities, the wrongdoer can make perfectly informed choices which benefit everyone in aggregate); Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1444 (1993) (preferring a deterrence rationale based on publicly shaming the wrongdoer). The efficient deterrence theory, in which the goal is for the defendant merely to pay the true social cost of his actions, suggests punitive damages are most appropriate when the tort is not easily discoverable or lacks a clear cause of action—both increasing the likelihood that potential plaintiffs will not bring suit; the actual losses are not translatable to money—such as in rape, assault, and most intentional torts where the actor derives benefit from his crime. Cass R. Sunstein, Daniel Kahneman & David Schkade, *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2082-83 (1998). Based on Texas's jury instructions and other law, Texas's retribution-based method for determining damages fails to recognize the efficient deterrence theory. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.001 (Vernon 1997 & Supp. 2006) (establishing punishment as the only reason to assess punitive damages); *see also Malone*, 972 S.W.2d at 41-42 (disallowing introduction of amounts paid for similar cases, number of pending cases, and estimated number of future cases arising from the same incident to mitigate against the award of punitive damages); Ellis County State Bank v. Keever, 936 S.W.2d 683, 686-89 (Tex. App.—Dallas 1996, no writ) (detailing the types of evidence admissible to justify a punitive damage award).

178. *See* Cass R. Sunstein, Daniel Kahneman & David Schkade, *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2078 (1998) (pointing out that juries produce inconsistent results when asked to award monetary damages). Specifically, juries suffer from hindsight, whereby every accident looks completely foreseeable; thus, juries consistently overestimate foreseeable harm and the probability of detecting and punishing the wrongdoing. *Id.* at 2112. It may be appropriate, therefore, to have the jury find fault and use a statutory formula to translate a safe amount. *Id.* at 2122. *But see* Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1445 (1993) (noting that jury control of punitive damages is essential to maintain the balance of federalism and legal pluralism, preferring review of awards rather than judicial or state governmental control).

179. *Compare* TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(11) (Vernon Supp. 2006) (defining gross negligence and focusing on a subjective and actual knowledge of extreme risks of harm), *and* Lee Lewis Constr., Inc. v. Harrison, 70 S.W.3d 778, 798 (Tex. 2001) (explaining gross negligence requires that, "[s]ubjectively, the actor must actually be aware of risk and consciously indifferent to the consequences"), *with* Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 19-20 (Tex. 1994) (providing the Texas common law definition of gross negligence as the following: "[an] entire want of care which would raise the belief that the act or omission complained of was the result of conscious indifference to the right and

the public, such as the public's safety, to make a profit.[180] When advertised, however, punitive damages draw attention to a wrongdoer, and others will notice the message sent—because actors normally decide how to act by looking at other people's behavior.[181] Therefore, a sensible deterrence function need only show a willingness to punish and prosecute future wrongdoers, rather than a complex damages formula.[182]

In sum, deterrence is a real feature of punitive damages, but it is not sufficiently measurable or translatable into monetary awards.[183] Consequently, any attempt to void an insurance contract based on such valuation arguments lacks merit.[184] The Texas Supreme Court has said as much in considering the reprehensibility of the wrongdoer's actions

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welfare of the person . . . affected by it" (quoting Mo. Pac. Ry. v. Shuford, 72 Tex. 165, 171, 10 S.W. 408, 411 (1888))).

180. *See* Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 360-62 (Cal. Ct. App. 1981) (discussing Ford Motor Company's "rush project" to design and manufacture an inexpensive car before considering safety); Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1436 (1993) (stating that Ford Motor Company in the *Grimshaw* case "relie[d] on cost-benefit analysis indicat[ing] that it could be deterred only if it lost money through its decision, and the jury's punitive damages were calculated precisely to annihilate Ford's profit"); *see also* David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 378 (1994) (noting that the "deterrence rationale is especially applicable in contexts involving repetitive profit-seeking misbehavior where the wrongfulness of an actor's conduct is not readily apparent," such as in a products liability case).

181. *See* DAVID G. OWEN, M. STUART MADDEN & MARY J. DAVIS, 2 MADDEN & OWEN ON PRODUCTS LIABILITY § 18:2, 223-24 (3d ed. 2006) (noting that deterrence needs publicity to be effective); Tom Baker, *Reconsidering Insurance for Punitive Damages*, 1998 WIS. L. REV. 101, 105 (recognizing that when making moral decisions or deciding when to use precaution, we look to others for the community norm, not a calculation). Without punitive damages, a civil judgment awarding only compensatory damages potentially sends a signal that an accident has occurred in which the defendant was only ordinarily negligent. *See id.* at 111 (arguing extra-compensatory damages are appropriate because compensatory damages may not deter intentional wrongdoers).

182. *See* Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 439-40 (2001) (dismissing various proponents of "efficient deterrence theory" and other economics-minded deterrence theories as not well reconciled with the way juries and courts work).

183. *See* Cass R. Sunstein, Daniel Kahneman & David Schkade, *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2075-77 (1998) (calling the current state of jury awards on punishment-based punitive damages to be "erratic," but that available evidence shows that awards by juries are not related to any deterrence theory).

184. *See* Lazenby v. Universal Underwriters Ins. Co., 383 S.W.2d 1, 5 (Tenn. 1964) (describing the deterrence argument as speculative); City of Gladewater v. Pike, 727 S.W.2d 514, 524 (Tex. 1987) (doubting the deterrence effect of punitive damages when assessed against a municipality); Sinclair Oil Corp. v. Columbia Cas. Co., 682 P.2d 975, 981 (Wyo. 1984) (noting that "[i]t has never been demonstrated, so far as we know, that a person has been deterred from willful and wanton misconduct because of the potential for punitive damages").

before considering the wrongdoer's profits when determining and reviewing punitive damage awards.[185]

3. Compensation

In defining punitive damages as "any damages awarded as a penalty or by way of punishment but not for compensatory purposes," the Texas Legislature has explicitly barred compensation as a factor relevant to the award of punitive damages.[186] The Texas Supreme Court has also stated specifically that punishment provides the sole justification for non-compensatory damages.[187] Yet, one can find an interesting line of cases in Texas jurisprudence that supports a compensatory function for punitive damages.[188] In *Hofer v. Lavender*,[189] the Texas Supreme Court weighed various reasons to allow or disallow punitive damages under a survival action.[190] After noting that punishment and deterrence cannot be obtained against a deceased defendant, the court considered other reasons to award punitive damages, including exemplary and compensatory functions.[191] While additional support for the compensatory function of puni-

185. *See* Owens-Corning Fiberglas Corp. v. Malone, 972 S.W.2d 35, 45-46 (Tex. 1998) (noting that while economic considerations could be admitted, it plays a secondary role to the nature of the conduct). Note that none of the *Kraus* factors speak to deterrence. *See* Alamo Nat'l Bank v. Kraus, 616 S.W.2d 908, 910 (Tex. 1981) (listing the factors to consider in determining punitive damages as the following: "(1) the nature of the wrong, (2) the character of the conduct involved, (3) the degree of culpability of the wrongdoer, (4) the situation and sensibilities of the parties concerned, and (5) the extent to which such conduct offends a public sense of justice and propriety").

186. TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(5) (Vernon 1997 & Supp. 2006); Cavnar v. Quality Control Parking, 696 S.W.2d 549, 555-56 (Tex. 1985) (noting that punitive damages are levied after determination of compensatory damages; thus, the plaintiff is made whole without punitive damages), *superseded in part by statute*, TEX. FIN. CODE ANN. §§ 304.101-.107 (Vernon 2006).

187. *See* Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 16-17 (Tex. 1994) (comparing punitive damages to criminal fines with respect to justification).

188. *See* Hartford Cas. Ins. Co. v. Powell, 19 F. Supp. 2d 678, 683 (N.D. Tex. 1998) (noting that "from time to time the concept that punitive damages play a compensatory role as well as a punishment role has appeared in Texas court decisions" (citing Hofer v. Lavender, 679 S.W.2d 470, 474-75 (Tex. 1984); Traweek v. Martin-Brown Co., 79 Tex. 460, 14 S.W. 564, 565-66 (1890); Qualicare of E. Tex., Inc. v. Runnels, 863 S.W.2d 220, 224 (Tex. App.—Eastland 1993, writ dism'd))); *see also* Joe McKay, Comment, *Texas Public Policy on Insuring Punitive Damages: Time for a Fresh Look*, 2 TEX. WESLEYAN L. REV. 205, 219 (1995) (tracing cases supporting compensation back to 1851).

189. 679 S.W.2d 470 (Tex. 1984).

190. *See* Hofer v. Lavender, 679 S.W.2d 470, 472-73 (Tex. 1984) (relating the justifications for and against allowing punitive damages against the estate of a deceased tortfeasor).

191. *See id.* at 473-75 (discussing the impact of survival statutes on punitive damages). *But see* Joe McKay, Comment, *Texas Public Policy on Insuring Punitive Damages: Time for*

tive damages can be traced back to 1889 in Texas,[192] by the time the supreme court decided *Hofer*, punishment was becoming the sole stated purpose for awarding punitive damages.[193]

However, despite legislative and judicial attempts to divest compensation from its association with punitive damages, punitive damages clearly compensate the plaintiff.[194] Unlike criminal or administrative law, the plaintiff must make the decision to pursue the wrongdoer.[195] When pleading a cause of action, the right to obtain non-compensatory damages can be waived by procedure or by settlement.[196] Furthermore, in pleading and obtaining punitive damages, the plaintiff does not represent the public,[197] for that is the role of an attorney general or district attorney.[198] Thus, the proceeds of punitive damages become "private windfall[s]" to the plaintiff,[199] and the injured person's interest in retribution against a

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a Fresh Look, 2 TEX. WESLEYAN L. REV. 205, 222-24 (1995) (proposing an interpretation of *Hofer* that allows punitive damages against a deceased tortfeasor as a special exception necessary to prevent a situation in which a plaintiff loses a part of their case because of a factor, i.e., the defendant's death, unrelated to the merits of the case).

192. *See Hofer*, 679 S.W.2d at 474 (stating "that exemplary damages also exist to reimburse for losses too remote to be considered as elements of strict compensation" (citing Mayer v. Duke, 72 Tex. 445, 10 S.W. 565 (1889))).

193. *See* Cavnar v. Quality Control Parking, 696 S.W.2d 549, 555-56 (Tex. 1985) (affirming a prior case that advocated punishment), *superseded in part by statute*, TEX. FIN. CODE ANN. §§ 304.101-.107 (Vernon 2006). *But see Runnels*, 863 S.W.2d at 224 (choosing to quote *Hofer* on the purpose of punitive damages, instead of *Cavnar* or other cases advocating punishment as the only reason for punitive damages). Thus, compensation appears to be a basis for awarding punitive damages as late as 1993. *See id.* (asserting in its 1993 ruling that compensation is a legitimate reason to award punitive damages).

194. *See* Cole v. Tucker, 6 Tex. 266, 271 (1851) (stating that "[i]t is only by fiction that" the plaintiff suing for exemplary damages "represent[s] the public").

195. *See* 2 ELAINE A. GRAFTON CARLSON, MCDONALD & CARLSON TEX. CIV. PRAC. § 8:43 (2d ed. 2006) (noting that the court will not presume the plaintiff wants punitive damages because punitive damages are special damages and must be pled in order to be recovered). *But cf.* Phillips v. Phillips, 820 S.W.2d 785, 789 (Tex. 1991) (holding that the failure to plead certain affirmative defenses will not prevent them from being raised later if there is no surprise to the plaintiff and there is a strong relation to Texas public policy).

196. *See* 2 ELAINE A. GRAFTON CARLSON, MCDONALD & CARLSON TEX. CIV. PRAC. § 8:43 (2d ed. 2006) (noting that in addition to pleading for punitive damages, gross negligence, malice, or fraud must be pled by specific allegations).

197. *See* Scoggins v. Sw. Elec. Serv. Co., 434 S.W.2d 376, 379 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.) (claiming that "the right to recover exemplary or punitive damages is considered generally to be a personal right that abates with the death of the injured party").

198. *See* W. Kip Viscusi, *Why There Is No Defense of Punitive Damages*, 87 GEO. L.J. 381, 389-90 (1998) (finding that government regulations enforce an adequate and fair level of care among businesses and actors).

199. Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 17 (Tex. 1994) (remarking that unlike compensatory damages, punitive damages are taxable income).

specific defendant for a specific harm outweighs any public interest which may be incidentally served.[200] Likewise, compensatory damages punish the wrongdoer.[201]

In truth, compensation contributes directly to the deterrence and retribution aims of punitive damages by inducing plaintiffs to bring forth a cause of action, especially in difficult or costly cases.[202] This works to increase retribution and deterrence because more wrongdoers receive punishment, even if each wrongdoer is punished less than if insurance were not allowed.[203] For example, consider the American Bar Association's (ABA) assessment of Texas's reform of medical malpractice.[204] The ABA noted a substantial shift in the medical malpractice field after damages were capped in 2003, which operated as a detriment towards prosecution of marginal cases.[205] While advocates of the restrictions on medical malpractice liability can point to the need to relieve doctors and their malpractice carriers of financial stress,[206] no such argument can be made in favor of limiting liability for grossly negligent actors.

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200. *See* Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1406 (1993) (arguing that a person's decision to sue is often based solely on a personal desire for retribution and not compensation).

201. *See id.* at 1406-07 (presenting examples of plaintiffs who made no distinction between compensatory and punitive damages as far as punishment was concerned).

202. *See* David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 380 (1994) (noting that "[i]n so energizing the law through increased enforcement, punitive damage assessments serve instrumentally to promote each of the underlying substantive objectives of punitive damages—education, retribution, deterrence and compensation"). Of course, this could lead to frivolous filings, but punitive damages are reserved for egregious conduct. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (Vernon 1997 & Supp. 2006) (stating when recovery of punitive damages is possible). Further, the higher standard of proof required for punitive damages largely prevents abuse. *See id.* § 41.003(b) (requiring a clear and convincing standard).

203. *See* Tom Baker, *Reconsidering Insurance for Punitive Damages*, 1998 WIS. L. REV. 101, 129 (stating that insurance coverage for punitive damages will directly achieve the retribution that tort law seeks to impose on grossly negligent wrongdoers by increasing their chances of being involved in litigation); Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1441-45 (1993) (noting a way in which punitive damages can supplement the criminal justice system). Galanter and Luban point out that punitive damages function better than criminal law in punishing corporations. *Id.* at 1425-26, 1441-45.

204. Terry Carter, *Tort Reform Texas Style: New Laws and Med-Mal Damage Caps Devastate Plaintiff and Defense Firms Alike*, 92 A.B.A. J., Oct. 2006, at 30, 30.

205. *See id.* at 30 (reporting medical malpractice practitioners' complaints that meritorious clients must be turned away because their recovery will most likely not cover the cost of trial).

206. Patricia F. Miller, Comment, *2003 Texas House Bill 4: Unanimous Exemplary Damage Awards and Texas Civil Jury Instructions*, 37 ST. MARY'S L.J. 515, 523-28 (2006) (detailing the Texas Legislature's desire to alleviate the high cost of medical malpractice insurance by reforming punitive damage).

C. *True Sources of Public Policy*

"[Texas's] public policy is reflected in its statutes."[207] This statement by the Texas Supreme Court sums up the stiff requirements a court must meet in order to invalidate a contract.[208] The Texas Legislature has not enacted any law that directly prohibits general liability insurers from indemnifying punitive damages;[209] therefore, only a strong, well-settled public policy can defeat indemnification.[210] *Moriel* sent a strong message about the need for reform.[211] The punitive damages doctrine, however, is anything but well settled.[212]

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207. Tex. Commerce Bank v. Grizzle, 96 S.W.3d 240, 250 (Tex. 2002); *accord* Dairyland County Mut. Ins. Co. v. Wallgren, 477 S.W.2d 341, 342 (Tex. Civ. App.—Fort Worth 1972, writ ref'd n.r.e.) (describing the proper sources of public policy including courts, statutes, and well established administrative practices). For an example of a strong public policy on the issue of insuring punitive damages, look to Virginia's statute on the subject. *See* VA. CODE ANN. § 38.2-227 (2002) (providing that "[i]t 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").

208. *See* Lawrence v. CDB Servs., Inc., 44 S.W.3d 544, 553 (Tex. 2001) (warning courts not to cross the line into judicial activism by invalidating contracts based on weak public policy considerations), *superseded by statute on other grounds*, TEX. LAB. CODE ANN. § 406.033(e) (Vernon 2006); James v. Fulcrod, 5 Tex. 512, 520 (1851) (describing the type of activity that would invalidate a contract in the name of public policy: that which is unconscionable or threatening towards morals or policy).

209. *See* Milligan v. State Farm Mut. Auto. Ins. Co., 940 S.W.2d 228, 230-31 (Tex. App.—Houston [14th Dist.] 1997, writ denied) (examining the statutory definition and policy considerations to deny coverage of punitive damages under uninsured motorist provisions).

210. *See Lawrence*, 44 S.W.3d at 553 (requiring legislative action or "some well-established rule of law" to invalidate a contract).

211. *See* Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 26 (Tex. 1994) (declaring that "[t]he [procedural] standards we announce apply to all punitive damage cases tried in the future").

212. *Compare* Drew Ranier, *Pro: Exemplary Damages: Checks and Balances on Corporate America*, 43 LA. B.J. 256, 256 (1995) (urging the use of punitive damages to offset pro-corporate biases in criminal and regulatory law), *and* Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1394 (1993) (declaring punitive damages to be part of grass-roots civil punishment), *and* Robert D. Cooter, *Economic Analysis of Punitive Damages*, 56 S. CAL. L. REV. 79, 80 (1982) (stating that punitive damages serve to offset the wrongdoer's gains from the tort, forcing him to internalize fully the loss), *with* Gary S. Franklin, Comment, *Punitive Damages Insurance: Why Some Courts Take the Smart Out of "Smart Money,"* 40 U. MIAMI L. REV. 979, 984 (1986) (asserting that arguments supporting insurance for punitive damages make more sense as an attack on the existence of punitive damages altogether). Although contested with regards to its insurability, punitive damages have longevity as an accepted doctrine in American jurisprudence. *Cf.* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 39-40 (1991) (Scalia, J., concurring) (arguing that in the past the punitive damages doctrine has not seriously violated any constitutional provisions; therefore, some deference should be given

The members of the Texas Legislature proved capable of dealing with the issue of insurers indemnifying punitive damages when they outlawed such activity in the context of hospitals and not-for-profit nursing homes.[213] Thus, appellate courts should not assume that the legislature has delegated to them authority to act as the dominant arbitrator of public policy. Texas lawmakers explicitly stated that their actions with respect to medical providers should not be read as intent to reform other areas of tort law.[214] These provisions of the Texas Insurance Code and subsequent amendments show that the Texas Legislature was acutely aware of how to balance punishment and fairness in deciding whether to allow insurance contracts to cover punitive damages.[215]

If agreement over the public policy benefits provided by un-indemnified punitive damage awards exists,[216] it cannot surpass the interest in enforcing the performance of private contracts.[217] This interest extends beyond the desire that injured plaintiffs receive adequate compensation; it is a public policy goal itself.[218] Furthermore, just as the court in *Dairyland County* mentioned, the plaintiffs themselves are members of the

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to prior courts and the common law leading to a presumption of the doctrine's continuing validity).

213. *See* Commercial Underwriters Ins. Co. v. Royal Surplus Lines Ins. Co., 345 F. Supp. 2d 652, 664 (S.D. Tex. 2004) (explaining that the Texas Insurance Code "provide[s] that medical professional liability insurance policies could not include coverage for exemplary damages that might be assessed against a not-for-profit nursing home and its employees unless the policy contained a special endorsement approved by the Texas Insurance Commissioner").

214. *See* Westchester Fire Ins. Co. v. Admiral Ins. Co., 152 S.W.3d 172, 187 (Tex. App.—Fort Worth 2004, pet. filed) (en banc) (commenting on the legislative intent behind medical insurance law and quoting the Medical Liability and Insurance Improvement Act of 1977).

215. *See id.* at 187-88 (listing text and comments that tie legislation to a desire to decrease health care costs for consumers, strengthen punishment of negligent health care providers, and preserve the financial integrity of providers).

216. *See, e.g.*, Fairfield Ins. Co. v. Stephens Martin Paving, L.P., 381 F.3d 435, 437 (5th Cir. 2004) (asking the Texas Supreme Court to settle the lack of consensus over competing public policies), *petition for certified question accepted*, Tex. Aug. 27, 2004.

217. *See* BMG Direct Mktg., Inc. v. Peake, 178 S.W.3d 763, 767 (Tex. 2005) (reaffirming "Texas's public policy [of] strongly favoring the freedom of parties to contract"); Am. Home Assurance Co. v. Safway Steel Prods. Co., 743 S.W.2d 693, 699 (Tex. App.—Austin 1987, writ denied) (noting Texas's policy in making insurance companies fulfill their contractual obligations especially when contract terms are ambiguous).

218. *See Am. Home Assurance Co.*, 743 S.W.2d at 699 (looking to the Texas Insurance Code as a positive source of public policy). The *Safway* court noted that choice of law principles might conspire to deny Texas citizens indemnifications of damage awards because their claims would be interpreted under foreign laws that prevent coverage of certain damages. *See id.* (focusing on which state's law to use and the clear importance of that decision).

public.[219] The Texas Supreme Court demands that courts first find that a contract "tend[s] to be injurious to the public good" before refusing to enforce a contract.[220] Thus, the question is presented, who benefits from the doctrine of denying enforcement because of public policy?

Finally, when the Texas Legislature had a direct hand in approving and mandating insurance contract content,[221] it did not alter the basic language present in almost all liability insurance contracts: "all sums which the insured shall become legally obligated to pay."[222] Unless the legislature overlooked the meaning of such language, courts should assume that these words specify public policy and that all sums should be covered regardless of the reason imposed by law.[223] Thus, the issue goes back to contract interpretation in which the majority of courts have held that the language involved in the standard liability contract does extend to punitive damages.[224]

IV. CONCLUSION

If the Texas Supreme Court looks to the definition of punitive damages to find a policy, they likely will find only confusion. The current definition came to life as a creature of tort reform.[225] The present debate

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219. *See* Dairyland County Mut. Ins. Co. v. Wallgren, 477 S.W.2d 341, 343 (Tex. Civ. App.—Fort Worth 1972, writ ref'd n.r.e.) (interpreting the Restatement of the Law on Contracts section 601).

220. *See* Sacks v. Dallas Gold & Silver Exch., Inc., 720 S.W.2d 177, 180 (Tex. 1986) (upholding the trial court's refusal to enforce an employment contract when the employee's labor furthered a fraudulent scheme).

221. *See, e.g.*, *Dairyland County*, 477 S.W.2d at 342 (finding the contract at issue to be written in accordance with Texas Insurance Code mandates).

222. Milligan v. State Farm Mut. Auto. Ins. Co., 940 S.W.2d 228, 230 (Tex. App.—Houston [14th Dist.] 1997, writ denied) (noting that the Texas Insurance Code specified the language present in the uninsured motorist insurance contract before the court).

223. *See Dairyland County*, 477 S.W.2d at 342 (noting that enforcement of a statutory contract is per se amenable to public policy).

224. *See* Fairfield Ins. Co. v. Stephens Martin Paving, L.P., No. Civ.A. 1:03-CV-037-C, 2003 WL 22005877, at *8 (N.D. Tex. Aug. 25, 2003) (looking to *Ridgway* in declaring that the contract language included punitive damages); Tom Baker, *Reconsidering Insurance for Punitive Damages*, 1998 WIS. L. REV. 101, 115 (stating that because insurance contracts do not discriminate in the type of damages involved in the accident, the conclusion is inescapable that the commonsense understanding of such contracts includes punitive damages); *see also* Am. Home Assurance Co. v. Safway Steel Prods. Co., 743 S.W.2d 693, 702 (Tex. App.—Austin 1987, writ denied) (listing the various arguments used by courts to argue in favor of coverage of punitive damages under standard policy language). *But see* Vanderlinden v. United Servs. Auto. Ass'n Prop. & Cas. Ins. Co., 885 S.W.2d 239, 241 (Tex. App.—Texarkana 1994, writ denied) (focusing on the "bodily injury" term and finding punitive damages not to arise from such injury).

225. *See* Patricia F. Miller, Comment, *2003 Texas House Bill 4: Unanimous Exemplary Damage Awards and Texas Civil Jury Instructions*, 37 ST. MARY'S L.J. 515, 522-29 (2006)

needs new rhetoric and viewpoints because public policy demands that insurance be provided for cases of punitive damages. Consumers of liability expect insurability,[226] and wrongdoers still face the sting of punitive damage awards that cannot be fully healed by indemnification, i.e., higher insurance rates, exclusion from coverage, or loss of coverage. Furthermore, the ability of punitive damages to define the standards of care, strengthened by a unanimous jury finding, under a clear and convincing standard, ensures such damages will be assessed only in appropriate cases.[227]

Punitive damages are rough tools, and its benefits are at best speculative.[228] Insurance can take the edge off of an often unpredictable remedy. The Texas Supreme Court, the United States Supreme Court, and countless other courts have expressed concern over the fairness of punitive damages.[229] Courts and commentators would no doubt support insurability of gross negligence, so long as it did not cross the line into malice or wrongful intent. The insurance industry already provides exclusions for truly reprehensible conduct, so courts should defer to the market to uphold public policy. Allowing insurance for gross negligence permits punitive damages to work for the public, without such a high price to individuals and corporations who find themselves on the wrong side of the courtroom.

(describing the motivation behind the 2003 reformation of punitive damages as part of the tort reform trend); *see also* Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 27-29 (Tex. 1994) (describing the dangerous nature of unchecked jury discretion in awarding punitive damages and reforms to prevent their abuse).

226. *See Am. Home Assurance Co.*, 743 S.W.2d at 702 (stating that the average Texan would expect coverage for punitive damages); Kent D. Syverud, *On the Demand for Liability Insurance*, 72 TEX. L. REV. 1629, 1646-48 (1994) (describing the demand for liability insurance among individuals, the reasons for its desire, and the effects of such a demand).

227. TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (Vernon 1997 & Supp. 2006).

228. *See* Lazenby v. Universal Underwriters Ins. Co., 383 S.W.2d 1, 5 (Tenn. 1964) (doubting the deterrent effect of punitive damages).

229. *See* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 9 (1991) (reporting the Supreme Court's concern over possible due process violations of certain punitive damage awards); *Moriel*, 879 S.W.2d at 28-29 (noting the need for procedural safeguards).