Notes

The Expanding Availability of Punitive Damages in Contract Actions

Historically, punitive damages have been awarded only in tort actions and, even then, have been subjected to severe criticism as constituting a criminal punishment without the protection afforded by the usual criminal safeguards.[1] Despite such criticism, however, punitive damages have survived and indeed seem to be undergoing a marked expansion into the contract area. For many years fraud, or some other independent tort combined with a breach of contract, would support punitive damages in most jurisdictions. Recently, however, many courts have allowed punitive damages for less serious misdeeds. This Note will explore the modern concept that an oppressive breach of contract may be sufficient in itself to support an award of punitive damages.

Punitive damages have acquired various labels, such as exemplary damages and smart money,[2] but whatever they have been called, they have always been considered the complement of compensatory damages. Compensatory damages are measured against the loss suffered by the victim and have as their objective to make the victim whole. Punitive damages, on the other hand, have no fixed standard; their purpose is primarily to serve as a deterrent, so that the defendant and others will hesitate to repeat the proscribed conduct in the future.[3]

Clearly, compensatory damages also have a punitive effect.[4] Obviously the defendant is punished in a sense when he is forced to pay damages to the plaintiff, and, except in the case of absolute liability, the law will not inflict this punishment unless it is

---

[1] C. McCormick, Law of Damages § 77, at 276 (1935) [hereinafter cited as McCormick]; W. Prosser, Law of Torts § 2, at 11 (4th ed. 1971) [hereinafter cited as Prosser]; Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1176 (1931).

[2] McCormick § 77, at 275; Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517 (1957).

[3] D. Dobbs, Law of Remedies § 3.9, at 205 (1973) [hereinafter cited as Dobbs]; Prosser § 2, at 9; Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1184 (1931).

[4] Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1177 (1931).

justified by the defendant's conduct. The conceptual distinction between compensatory damages and punitive damages lies in the defendant's state of mind.[5] If the defendant is merely negligent, this negligence is sufficient to justify visiting him with the damage he has caused. However, if he is malicious or uncaring, more severe punishment may be warranted. In the latter instance, since an undesirable motive is consciously at work within the defendant's mind, punitive damages may be appropriate and effective in discouraging such conduct. In the case of mere negligence, however, since no conscious motive is at work, it is doubtful that punitive damages would be a very effective discouragement. Therefore, punitive damage awards are never available when only simple negligence is involved.[6]

I. Historical Development

Early common law allowed the jury virtually unlimited discretion in awarding damages. Therefore, it was never necessary to use the label "punitive damages."[7] However, soon after the courts began to require that the damages assessed by the jury bear a close relationship to the victim's loss, it became apparent that in certain circumstances it was desirable to allow the jury to inflict a penalty upon the defendant greater than mere com-

---

[5]

> It must be shown either that the defendant was actuated by ill will, malice, or evil motive (which may appear by direct evidence of such motive, or from the inherent character of the tort itself, or from the oppressive character of his conduct, sometimes called "circumstances of aggravation"), or by fraudulent purposes, or that he was so wanton and reckless as to evince a conscious disregard for the rights of others.

McCormick § 79, at 280 (footnotes omitted).

> It is usually the defendant's mental state that is said to justify a punitive award against him, rather than his outward conduct. Thus courts have developed a large vocabulary to describe the kind of mental state required—the defendant must be "malicious", "reckless", "oppressive", "evil", "wicked", or guilty of "wanton misconduct," or "morally culpable" conduct. Since all of these words refer to the same underlying culpable state of mind, and since courts have not been at all concerned with any shades of difference that might be found between, say, malice and recklessness, almost any term that describes misconduct coupled with a bad state of mind will describe the case for a punitive award.

Dobbs § 3.9, at 205 (footnote omitted).

[6] McCormick § 79, at 280; Prosser § 2, at 9-10.

[7] McClellan, *Exemplary Damages in Indiana*, 10 Ind. L.J. 275, 279 (1935); Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1176 n.4 (1931); Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 518-19 (1957).

pensation to the plaintiff would support.[8] At this stage of common law development, the concept of punitive damages began to emerge.

This historical evolution is responsible for the original determination that punitive damages could be awarded in an action based on tort, but not in an action based upon contract.[9] Of course there were other policy considerations involved in this determination, but this clean separation between tort and contract was primarily due to an historical accident. Since it was easier to develop objective standards for measuring the damage caused by breach of a contract than by a tortious injury, the common law courts were able to limit the jury's discretion in contract actions much earlier than in tort actions. By the time the courts recognized the need for punitive damages, the rule forbidding them in breach of contract actions was too firmly established by precedent to be disturbed.

II. Purposes Served by the Award of Punitive Damages

Although punitive damages have frequently been subjected to severe criticism, when properly utilized they provide a valuable judicial tool. Among the theories most frequently offered to justify punitive damage awards are deterrence, compensation, bounty, and vindication.

Deterrence is unquestionably the most frequently stated reason for allowing punitive damages.[10] When an injury is inflicted in a purposeful manner, or with a reckless disregard for the consequences, it may be desirable to discourage such conduct by resorting to punitive damages. As Clarence Morris points out, punitive damages are "ordinarily merely a means of increasing the severity of the admonition of 'compensatory' damages."[11] More severe admonition is especially desirable in what Morris terms "unjust enrichment" cases. A good illustration of the unjust enrichment concept is found in an early Pennsylvania case[12] which involved damages caused by blasting on a railroad right of way. Although the railroad was informed that the blasting was damag-

---

[8]Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1176 n.4 (1931); Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 518-19 (1957).

[9]McClellan, *Exemplary Damages in Indiana*, 10 Ind. L.J. 275, 279 (1935); Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 531 (1957).

[10]See authorities cited in note 3 *supra*.

[11]Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1177 (1931).

[12]Funk v. Kerbaugh, 222 Pa. 18, 70 A. 953 (1908), *noted in* Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1185-86 (1931).

ing plaintiff's buildings, the railroad, nonetheless, ignored plaintiff's requests to use smaller charges, apparently feeling that it would be cheaper to pay for the damage than to delay the project by reducing the charges. In assessing punitive damages, the court noted that mere compensatory damages would enable the railroad to force a form of eminent domain upon its neighbors.

In other situations, punitive damages may be necessary to fully compensate the plaintiff. This theory admits the inadequacy of ordinary compensatory damages. As a general rule it may be argued that there are public policy reasons which justify requiring each party to stand his own legal expenses. However, if the defendant's conduct has been particularly censurable, punitive damages determined by shifting the plaintiff's legal costs to the defendant may be desirable. In fact, the trend allowing more frequent recovery of punitive damages has been paralleled by a trend allowing more frequent recovery of attorneys' fees and court costs under the proper circumstances.[13] Both trends are based upon a similar concern—that a person with a legitimate cause of action should not be discouraged from seeking relief because of the prohibitive expenses of litigation, especially if the wrongdoer acted upon an improper motive.

Another justification for punitive damages is that they are a form of bounty. Under our judicial system it is glaringly obvious that a man cannot afford to resort to the courts if his injury is small. In situations involving small claims, punitive damages may serve to encourage an aggrieved person to protest an outrageous act by making the potential recovery attractive enough to justify investing the time and money required.[14] This option also has the advantage of freeing the legal system from total dependence upon governmental bureaucracy for prosecution.[15]

A final justification for the award of punitive damages is vindication. This ancient theory is of questionable value today,[16] but it still retains some life and is supported by some logic. It is reasoned that for particularly outrageous, insulting acts, such as spitting in a man's face,[17] a large punitive damage award may

---

[13]Saint Joseph's College v. Morrison, Inc., 302 N.E.2d 865 (Ind. Ct. App. 1973).

[14]PROSSER § 2, at 11; Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1183 (1931).

[15]DOBBS § 3.9, at 221; MCCORMICK § 77, at 276-77; PROSSER § 2, at 11; Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1196 (1931).

[16]Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1198 (1931); Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 522 (1957).

[17]Alcorn v. Mitchell, 63 Ill. 553, 554 (1872), *noted in* Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1198 (1931).

salve the victim's hurt pride and dissuade him from taking retaliatory action.

Since the main purpose of punitive damages is deterrence, the defendant's financial condition is an important fact to be considered by the jury in determining how large an award is necessary to provide sufficient discouragement. The jury should consider the compensatory damages and punitive damages as a whole so as not to over-punish the defendant.[18] Traditionally, the jury has been allowed virtually unlimited discretion in determining the amount of a punitive damages award. Appellate courts have been reluctant to interfere without a showing that the jury was influenced by passion and prejudice.[19] A lack of ascertainable objective standards has probably been responsible for the fact that trial judges and reviewing courts seem more reluctant to interfere with a punitive damage award than a compensatory damage award.[20]

Currently, however, there seems to be a shift in attitude. Courts are more willing to bring punitive damages under reasonable judicial controls not limited by a rigid formula.[21] This shift in attitude seems desirable because there is probably more danger that a jury will allow passion and prejudice to influence its judgment in an area with such a debilitating lack of objective standards. Extremely large punitive damage awards are arguably counter-productive. Large awards are seldom needed to perform adequately the deterrence function, whereas excessive awards may cause judges to be overly cautious in allowing punitive damages at all. In other words, greater control over the size of punitive damage awards hopefully will result in more frequent allowance of punitive damages, although the average size of the award might be smaller. It is often said of criminal penalties that the certainty of punishment has more deterrent effect than the severity of punishment.[22] The same argument would seem to be true for civil deterrence.

---

[18]Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1188 (1931).

[19]DOBBS § 3.9, at 204 n.4; MCCORMICK § 85, at 296-98.

[20]Hartman v. Peterson, 246 Iowa 41, 66 N.W.2d 849 (1954); McClellan, *Exemplary Damages in Indiana*, 10 IND. L.J. 275, 276-77 (1935).

[21]DOBBS § 3.9, at 210; PROSSER § 2, at 14.

[22]Mueller, *The Public Law of Wrongs—Its Concepts in the World of Reality*, 10 J. PUB. L. 203, 210 (1961); Singer, *Psychological Studies of Punishment*, 58 CALIF. L. REV. 405, 420-21 (1970). *See also* Bailey & Smith, *Punishment: Its Severity and Certainty*, 63 J. CRIM. L.C. & P.S. 530, 532 (1972), in which reference is made to the dismal failure that resulted from England's eighteenth-century experience with excessive punishment, such as execution for the minor infraction of picking a pocket.

III. Problem Areas

A. *Equitable Actions*

Our legal history has encumbered punitive damages with two frustrating quirks. First, there has been a great deal of reluctance to allow punitive damages in equity actions.[23] Since the ancient rules of equity require that the parties be treated fairly, the argument has been made that punishment has no place in an equity court. This attitude may have been compatible with eighteenth-century attitudes, but the twentieth-century merging of law and equity has greatly eroded any justification for such differentiation. Such a rule is especially frustrating because fraud is the basis for many punitive damage awards, and fraud commonly gives rise to the equitable action of reformation of a contract.

The Indiana courts have avoided the handicap of disallowing punitive damages in an equity action. In *Hedworth v. Chapman,*[24] the Indiana Court of Appeals stated that a court of equity may grant exemplary damages in a proper case. Although this is still regarded as a minority rule, the trend seems to be in the direction of allowing punitive damage awards in equity as well as at law.[25]

B. *Double Jeopardy*

The second quirk involves the double *jeopardy* or double *punishment* problem. The concept of punishing a person in two entirely unrelated actions, one involving a criminal sanction and the other involving punitive damages in a civil action, presents two undesirable features. First, without the proper controls, valuable judicial time will be squandered upon two separate court proceedings. Secondly, without adequate coordination, the two punishments may overly chastise the defendant.

There is a subtle but critical distinction between the theory of double jeopardy and that of double punishment. Double jeopardy is a constitutional bar to a second *criminal* trial for a single act that technically has no application to punitive damage awards in civil actions.[26] Double punishment, on the other hand, is very much involved when punitive damages may be recovered, since it

---

[23]Dobbs § 3.9, at 211; Annot., 48 A.L.R.2d 947, 948-49 (1956).

[24]135 Ind. App. 129, 192 N.E.2d 649 (1963).

[25]Dobbs § 3.9, at 211.

[26]Maddox v. State, 230 Ind. 92, 102 N.E.2d 225 (1951); State *ex rel.* Beedle v. Schoonover, 135 Ind. 526, 35 N.E. 119 (1893); Cohen v. Peoples, 140 Ind. App. 353, 220 N.E.2d 665 (1966); McClellan, *Exemplary Damages in Indiana,* 10 Ind. L.J. 275, 281-82 (1935).

is the duty of our judiciary, as the court pointed out in *Taber v. Hutson*,[27] to see that "each violation of the law [is] certainly followed by one appropriate punishment and no more."[28] Most jurisdictions, however, have chosen to ignore the double punishment problem altogether and have merely decided that there is no constitutional double jeopardy problem, because jeopardy is a legal concept that is restricted solely to criminal trials.[29] This approach overlooks the basic unfairness of the double punishment aspect.

In 1854, Indiana made a commendable effort to correct this problem in the case of *Taber v. Hutson*.[30] The court recognized the problem as one of double punishment by stating:

> [I]f the principle of the instruction be correct, Taber may be twice punished for the same assault and battery. This would not accord with the spirit of our institutions. The constitution declares, that "no person shall be twice put in jeopardy for the same offence;" and though that provision may not relate to the remedies secured by civil proceedings, still it serves to illustrate a fundamental principle inculcated by every well-regulated system of government, viz., that each violation of the law should be certainly followed by one appropriate punishment and no more.[31]

This passage indicates that the court realized there was no constitutional question involved, since the court held only that the possibility of being "twice punished for the same assault and battery" would not accord with the *spirit* of our institutions. Nevertheless, the court chose to base its holding on the double jeopardy rather than the double punishment concept. Unfortunately, the leniency allowed by such an approach has become at least as inequitable as the harshness caused by the approach taken in those jurisdictions which ignore the problem.

The basic fallacy is that true double jeopardy acts as a bar to the *second* action, not the first. Thus, when correctly applied, the prohibition against double jeopardy never aids the defendant in avoiding jeopardy completely. As Indiana has applied this concept to punitive damages, however, the civil punishment may be

---

[27] 5 Ind. 322 (1854).

[28] *Id.* at 325.

[29] McCormick § 82, at 292; Aldridge, *The Indiana Doctrine of Exemplary Damages and Double Jeopardy*, 20 Ind. L.J. 123 (1945); McClellan, *Exemplary Damages in Indiana*, 10 Ind. L.J. 275, 279 (1935); Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1195-98 (1931); Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 524-25 (1957).

[30] 5 Ind. 322 (1854).

[31] *Id.* at 325-26.

prevented even though no assurance is offered that the defendant will ever be charged criminally.

The potential for such a problem was recognized in *Taber* when the court noted that, although a defendant is "liable to be punished, a criminal proceeding may not, it is true be instituted against him."[32] Furthermore, *Moore v. Waitt*[33] indicates that our courts are not even concerned about the occurrence of this misguided result. The *Moore* court stated that any *possibility* of criminal prosecution was sufficient to bar punitive damages in a civil action.

The end result of such an approach is the strong possibility that a significant number of wrongdoers will go entirely unreprimanded for unacceptable conduct. Common knowledge of human nature indicates that certain types of undesirable conduct are very unlikely ever to attract criminal prosecution, for example, borderline fraud by the local used-car dealer and leading citizen. This is particularly disturbing because it actually favors criminal activity. In the example mentioned above, for instance, if the used-car dealer does not commit actual criminal fraud, he does not have the protection of "double jeopardy," so punitive damages may be assessed. However, if his actions are serious enough to be criminal, he is protected from civil punishment even though, as the court indicates in *Moore,* it may be virtually certain that no criminal prosecution will follow.[34]

This entire development can be traced to the unfortunate decision in *Taber* to base the prohibition of punitive damages on double jeopardy rather than double punishment. For some reason, the court felt it had the power to establish by judicial fiat that punitive damages could not be assessed against someone in danger of criminal prosecution for the same act; however, the court felt powerless to establish the more logically consistent, and more socially desirable, approach of declaring that *paying* punitive damages would prevent a subsequent criminal punishment for that act. The *Taber* court noted that "the rules of pleading and evidence do not permit a judgment like the present [award of punitive damages] to be set up as a bar to a state prosecution."[35] It should be noted that the suggested alternate approach would allow

---

[32] *Id.* at 326.

[33] 298 N.E.2d 456 (Ind. Ct. App. 1973). The court stated:

> [T]his court does not view the rule [disallowing punitive damages if the defendant's act also subjects him to criminal prosecution] as being one based on the probability of criminal prosecution but rather on the possibility of such prosecution.

Id. at 460.

[34] *See* True Temper Corp. v. Moore, 299 N.E.2d 844 (Ind. Ct. App. 1973).

[35] 5 Ind. at 326.

the trial judge to decide when, if ever, a punitive damage award would be paid, thus keeping open the possibility of a criminal trial.

There does not appear to be any reason why the *Taber* court could not have adopted the alternative theory of making the payment of punitive damages a bar to criminal punishment as easily as it adopted the approach of disallowing punitive damages altogether if there is a threat of criminal prosecution. Certainly, the court today could replace the *Taber* rule with a more desirable approach. In considering whether or not to replace the *Taber* rule, the court should not be overcome with sympathy for the defendant who relied on this precedent to protect him from punitive damages for some outrageous act, so long as the court continues to protect him from being punished twice for that act.

If this were a constitutionally mandated double jeopardy situation, there would be a strong policy argument for the approach taken by the *Taber* court. If only one trial is allowed, this opportunity properly should be reserved for the State whether or not the State elects to exercise it. However, double jeopardy is not the problem. Indiana follows the virtually unanimous rule that the only jeopardy sufficient to prevent a criminal prosecution must flow from a previous criminal trial. This rule, which was alluded to in *Taber* and specifically adopted in *State ex rel. Beedle v. Schoonover*,[36] has been accepted without question.[37] It is clear that no civil trial can ever constitute sufficient jeopardy to bar a subsequent criminal trial.

Since there is no constitutional bar to trying the defendant criminally after he has been exposed to the danger of punitive damages, it appears that the way is open for the court to adopt a less disruptive rule that will still accomplish the desired result of not punishing the defendant twice. Perhaps the most obvious solution would be to allow the jury to assess the punitive damage award, but to have the judge suspend execution of the award or hold the money in court until the statute of limitations has run on the criminal offense, thus eliminating any danger of criminal punishment.[38] This approach would accomplish the goal defined

---

[36]135 Ind. 526, 35 N.E. 119 (1893). The court stated:

> It is true that section 59, article 1, of the Bill of Rights provides that "No person shall be put in jeopardy twice for the same offense," but the jeopardy mentioned is the peril of a second criminal [i.e., one criminal prosecution followed by a second] prosecution for the same felony or misdemeanor . . . .

Id. at 531, 35 N.E. at 120.

[37]Crim v. State, 294 N.E.2d 822 (Ind. Ct. App. 1973).

[38]In this respect, it is worthy of note that Indiana has already established that punitive damages are recoverable if suit is brought after the statute has run. In Cohen v. Peoples, 140 Ind. App. 353, 220 N.E.2d 665 (1966), the

in *Taber* of not subjecting the defendant to double punishment but would avoid the undesirable side effect of preventing punitive damages when there is actually no danger of any criminal sanction.

Several statutes, both state and federal, have provided for both civil and criminal punishment for the same act.[39] This would certainly seem to indicate that such a policy meets with the approval of the ordinary citizen. In fact, Indiana has provided for punitive damages in the form of triple damages for losses from theft,[40] one of the most common of all crimes. It should be noted, however, that since most statutory punitive damage awards are limited by some formula, such as two or three times the actual damage, the danger of over-punishment is not serious.

All in all, there seems to be adequate justification for the courts of Indiana to adopt a procedure that would accomplish the desirable goal of avoiding double punishment without, at the same time, causing the inequities of our present double jeopardy dilemma.

IV. Where and Why Punitive Damages Are Expanding

A. In Other States

As was noted above, punitive damages have traditionally been limited to tort actions rather than contract actions. Several authorities have stated flatly that except for a few narrowly defined exceptions, punitive damages are inappropriate for an action based on contract.[41] However, it is clear that the courts have always been willing to recognize certain exceptions to this general rule and to add new exceptions when circumstances justified the addition.

One of the earliest and most widely recognized exceptions involved breach of a contract to marry.[42] If seduction is carried

---

court held that the jury was entitled to award exemplary damages since the statute of limitations precluded any criminal punishment.

[39]*See* 15 U.S.C. § 1681 (1970); *id.* § 1917 (Supp. III, 1973); Ind. Code § 8-2-13-4 (Burns 1973); *id.* §§ 24-1-2-3 to -7 (Burns 1974); *id.* §§ 25-18-1-20 to -21; *id.* § 34-1-48-19 (Burns 1973); *id.* § 35-17-5-12 (Ind. Ann. Stat. § 10-3039, Burns Supp. 1974).

[40]Ind. Code § 35-17-5-12 (Ind. Ann. Stat. § 10-3039, Burns Supp. 1974).

[41]J. Calamari & J. Perillo, Law of Contracts § 204, at 327 (1970); 5 A. Corbin, Corbin on Contracts § 1077, at 437 (1964); L. Simpson, Law of Contracts § 196, at 394 (1965); Comment, *Exemplary Damages in Contract Cases*, 7 Willamette L.J. 137, 138 (1971); Annot., 84 A.L.R. 1345, 1346 (1933).

[42]Kurtz v. Frank, 76 Ind. 594 (1881); Annot., 41 L.R.A. (N.S.) 840 (1913); McClellan, *Exemplary Damages in Indiana*, 10 Ind. L.J. 275, 279 (1935).

out by a fraudulent promise of marriage, punitive damages have long been deemed appropriate, notwithstanding that the suit is brought in contract rather than tort.

From this early exception, it was an easy step for most courts to allow punitive damages for any contract action involving fraud.[43] This is not to say that fraud satisfied per se the requirement for a sufficiently culpable mental state, but merely that if the defendant's conduct was sufficiently outrageous, punitive damages would be allowed even though the suit was in contract rather than tort. Perhaps the allowance of punitive damages for fraud was thought to be justified by the tort of deceit, because another longstanding exception has been that if a contract breach is sufficiently mingled with an independent tort, the fact that the plaintiff chose to sue in contract rather than tort would not bar punitive damages.[44]

Another of the early exceptions allowed punitive damages for an oppressive breach by a "public utility"[45] such as a water company,[46] a railroad company,[47] a bank,[48] and later, on rare occasions, an employer.[49] This exception is usually justified upon the theory that since the utility is given a favored position by the public, it owes the public a "legal" duty, so that breach of this duty is a tort. However, it also seems important that all these cases have two other things in common. First, the defendants were "big guys" with a great deal of economic leverage, and, secondly, the plaintiffs were "little guys" who could do very little to protect themselves from the defendants' bad faith. In circumstances involving considerable disparity of economic power, punitive damages offer one of the few ways for the court to protect the individual from being trampled upon, and thus to fulfill its responsibility of providing a remedy for every injury it has the power to relieve.

More recently, several courts have allowed punitive damages for oppressive breaches of contract by insurance companies guilty of over-reaching in an attempt to force an unfair settlement on

[43]Wheatcraft v. Myers, 57 Ind. App. 371, 107 N.E. 81 (1914); McCormick § 81, at 289.

[44]J. Calamari & J. Perillo, Law of Contracts § 204, at 327 (1970); 5 A. Corbin, Corbin on Contracts § 1077, at 439 (1964); L. Simpson, Law of Contracts § 196, at 394 (1965).

[45]Dobbs § 3.9, at 206-07; McCormick § 81, at 289-90; L. Simpson, Law of Contracts § 196, at 394 (1965); Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 531-32 (1957).

[46]Birmingham Waterworks Co. v. Keiley, 2 Ala. App. 629, 56 So. 838 (1911).

[47]Jeffersonville R.R. v. Rogers, 38 Ind. 116 (1871).

[48]Woody v. National Bank, 194 N.C. 549, 140 S.E. 150 (1927).

[49]Taylor v. Atchison, T. & S.F. Ry., 92 F. Supp. 968 (W.D. Mo. 1950).

the claimant.[50] An oppressive breach sufficient to justify punitive damages typically involves an unconscionable breach of contract by someone with a great deal of economic power over the other party; it is an attempt to use this economic leverage to force the weaker party to submit to demands supported by no legal or contractual obligation. For example, in *Fletcher v. Western National Life Insurance Co.*,[51] the insured had a sound claim for disability payments, but Western National attempted to force him to waive this claim by threatening, without justification, to sue him for the return of previous benefits paid. By the assertion of pure economic power, with no reasonable color of legal right, Western National attempted to compel Fletcher to give up a valid legal claim against them. Although the insurance company's action did not constitute a recognized tort in the ordinary sense, punitive damages appropriately were awarded. The parallel between the *Fletcher* exception and the earlier ones involving other "big guys" is striking. The court was again required to grapple with a situation in which economic power was used to oppress a "little guy" who had no practical means of defense. If the courts deny punitive damages for such oppression, they are positively encouraging this sort of barbarism.

The justification for punitive damages in the insurance cases is similar to the justification noted in the "unjust enrichment" situation. If punitive damages are denied, such economic oppression will actually be rewarded, because, in the absence of punitive damages, the most serious consequence threatening the company is that it may be forced eventually to pay only what it owed in the first place. Meanwhile, the delay will permit the company to use the contested money at a very favorable rate of interest, and additionally it will permit the company to take advantage of the statistical certainty that a significant number of claimants will be persuaded to give up or compromise their claims.

Although this newest exception began with insurance companies, there seems to be little judicial reluctance to extend it to other oppressive breaches.[52] There are no fundamental differences

---

[50]Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973); Fletcher v. Western Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970); Rex Ins. Co. v. Baldwin, 323 N.E.2d 270 (Ind. Ct. App. 1975); Vernon Fire & Cas. Co. v. Sharp, 316 N.E.2d 381 (Ind. Ct. App. 1974); Kirk v. Safeco Ins. Co. of America, 28 Ohio Misc. 44, 273 N.E.2d 919 (C.P. Franklin County 1970). *Contra*, Eckenrode v. Life of America Ins. Co., 470 F.2d 1 (7th Cir. 1972); Cassady v. United Ins. Co. of America, 370 F. Supp. 388 (W.D. Ark. 1974).

[51]10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970).

[52]Notice how the courts state their holdings: Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973); Fletcher

which would cause punitive damages to be more appropriate against an insurance company than against a car dealer or a realtor, for instance. The fact that most of the leading cases awarding punitive damages for an oppressive breach of contract involve insurance companies seems merely to be because insurance companies are more likely to be involved in such suits. Perhaps this is because insurance companies are more likely to use oppressive tactics, or perhaps it is because insurance companies are attractive defendants.

Faced with the obvious injustice of this oppressive type of situation, most courts are discovering ways to extend punitive damages into this new exception to the rule that forbids punitive damages for breach of contract. The development of punitive damages in California presents an interesting case study. Since the California courts were confined by a statute which prohibited punitive damages for breach of contract, they chose the straightforward method of declaring oppressive breaches to be torts.[53] This feat was accomplished by finding an implied-in-law duty to deal fairly and do nothing to injure the other party. It is interesting to observe that the court discovered this implied-in-law duty by returning to an early contract case and reading the implied-in-law covenant of good faith as an implied-in-law legal duty.[54]

Another way in which courts structure a foundation for punitive damages is by redefining a presently existing tort to make it less restrictive. A popular tort for this approach, quite understandably, is the tort of intentional infliction of emotional distress.[55] A slight variation in this approach was taken by the Su-

---

v. Western Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970); Kirk v. Safeco Ins. Co. of America, 28 Ohio Misc. 44, 273 N.E.2d 919 (C.P. Franklin County 1970). The courts discussed breaches of contracts generally, rather than confining themselves strictly to insurance contracts. For example, in *Kirk* the court stated:

> Therefore, it is the finding of the court that the actions of the defendant were such as to be a *breach of contract* amounting to a wilful, wanton and malicious tort and fixes punitive damages.

Id. at 46, 273 N.E.2d at 921 (emphasis added).

[53]See California cases in note 52 *supra.*

[54]The court "found" this legal duty in Crisci v. Security Ins. Co., 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967), by going back to Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 328 P.2d 198 (1958). However, *Comunale* speaks only of an implied contractual duty.

[55]*Compare* Wetzel v. Gulf Oil Corp., 455 F.2d 857 (9th Cir. 1972), *with* Eckenrode v. Life of America Ins. Co., 470 F.2d 1 (7th Cir. 1972). Also, there is an interesting dissent in Boswell v. Hughes, 491 S.W.2d 762 (Tex. Civ. App. 1973), in which Chief Judge Ramsey said:

> In attempting to classify causes of action, the lines of delineation between tort and contract actions may become somewhat obscure, particularly when contractual relief as well as damages for

preme Court of South Carolina when it defined fraud in such vague terms as to include a wide variety of sins, thus, perhaps, allowing punitive damages merely for "dealing unfairly."[56]

A few courts have finally taken the most desirable approach of all, declaring unequivocally that punitive damages are allowable for sufficiently outrageous breaches of contract.[57] This approach has the advantage of avoiding the intricacies of legal fictions required by the other methods. These legal fictions too often lead to miscarriages of justice in individual cases. It appears, however, that courts are more likely to adopt this theory as the culmination of a gradual process rather than as an abrupt reversal. Thus, it is safe to predict that several courts which are presently relying on some form of legal fiction will be able to shed this encumberance as soon as the evolution in thinking has matured. In this respect, the courts are following a time tested method of changing the common law. First they cut several exceptions from the general rule, then they expand these exceptions, until finally it becomes necessary to redefine the general rule in narrower terms.

B. In Indiana

Indiana clearly seems to have established herself at the forefront of this modern trend of allowing punitive damage awards for oppressive breaches of contract with a case recently decided by the First District Indiana Court of Appeals, *Vernon Fire & Casualty Insurance Co. v. Sharp.*[58] Prior to *Vernon,* the law in

---

tortious conduct are sought. In an effort to define a tort, it has been stated that the term "tort" has never been accurately defined and from its nature, the term may be incapable of exact definition.

Id. at 764.

[56]Wright v. Public Sav. Ins. Co., 204 S.E.2d 57 (S.C. 1974):

> Fraud assumes so many hues and forms, that courts are compelled to content themselves with comparatively few general rules for its discovery and defeat, and allow the facts and circumstances peculiar to each case to bear heavily upon the conscience and judgment of the court or jury in determining its presence or absence. While it has often been said that fraud cannot be precisely defined, the books contain many definitions, such as *unfair dealing;* the unlawful appropriation of another's property by design.

Id. at 59 (emphasis added).

[57]Adams v. Whitfield, 290 So. 2d 49 (Fla. 1974); Vernon Fire & Cas. Ins. Co. v. Sharp, 316 N.E.2d 381 (Ind. Ct. App. 1974); *see* Isagholian v. Carnegie Institute of Detroit, 51 Mich. App. 220, 214 N.W.2d 864 (1974); Kirk v. Safeco Ins. Co. of America, 28 Ohio Misc. 44, 273 N.E.2d 919 (C.P. Franklin County 1970).

[58]316 N.E.2d 381 (Ind. Ct. App. 1974). In a similar case *Vernon* was cited by the appellate court to support a punitive damage award against an insurance company for its bad faith refusal to pay a claim. Rex Ins.

Indiana with respect to this expansion in punitive damages was uncertain. Perhaps a few recent cases will help put *Vernon* in perspective.

The case of *Jerry Alderman Ford Sales, Inc. v. Bailey*,[59] decided by the Second District Court of Appeals, appeared to be the most progressive. The essential facts were that Bailey purchased a gravel truck from Jerry Alderman Ford which proved to be unsatisfactory, so Bailey returned it for repairs. Jerry Alderman repaired the truck but refused to return it until reimbursed for the cost of repairs. The trial court, however, found that Jerry Alderman's claim was invalid because of an implied warranty of fitness and, after characterizing the defendant's actions as oppressive, the court awarded punitive damages.

The Second District Court of Appeals upheld this award, but it is not clear whether the court of appeals' decision was based upon a finding of a technical tort of conversion, some variation of fraud, or simply an oppressive breach of contract. The court pointed out:

> It may be observed that it is quite possible for a single act to constitute not only actionable fraud, *if such fraud were alleged,* but to constitute as well, evidence of a malicious or fraudulent state of mind on the part of defendant so as to authorize the award to plaintiff of punitive damages pursuant to a complaint for contract rescission and damages . . . or as here, a complaint for damages for conversion or for breach of a contract of bailment.[60]

The court then observed that the allegation of the plaintiff was that the conduct of the defendants was "malicious and oppressive" rather than fraudulent.[61]

Even if this case did not clearly hold that an oppressive breach of contract would be a sufficient foundation for punitive damages, at least it certainly indicated that the court would be receptive to such an approach. It is true that the court never explained exactly what supported the punitive damage award, and it could be argued that the award was based upon some well recognized exception, such as the independent tort of conversion involved. However, the mere fact that the court hesitated to restrict itself may be significant. The opinion certainly did not indicate that an oppressive breach was *not* sufficient. Furthermore, it must be emphasized that in reading the opinion, one is impressed by the fact that no

Co. v. Baldwin, 323 N.E.2d 270 (Ind. Ct. App. 1975). Thus, *Vernon* is not an isolated holding.

[59] 291 N.E.2d 92 (Ind. Ct. App. 1972).

[60] *Id.* at 98 (citation omitted).

[61] *Id.*

matter what legal explanation is offered, punitive damages were obviously awarded by the jury simply because the jurors thought the oppressive conduct involved required a reprimand.

The holding in *Jerry Alderman Ford,* however, seemed to be at odds with the pre-*Vernon* decisions issuing from the First District Court of Appeals. These cases all required that fraud be specifically proved before punitive damages could be allowed in a contract action. However, by approaching these decisions on a case by case basis, the results can be reconciled with *Vernon,* although the language used by the First District Court of Appeals can only be explained by admitting that the court has changed its attitude.

One of the most important cases from the first district is *Standard Land Corp. v. Bogardus.*[62] There was a complicated joint venture in which Standard was to build a golf course and Macke Homes was to build homes for a planned community. Standard flagrantly breached its contract, attempting to force Macke Homes and those who had already purchased homes to buy the golf course. The trial court awarded five thousand dollars punitive damages against Standard because Standard's breach "import[ed] oppression" and indicated a "spirit of wanton disregard for the rights of Macke."[63] However, the appellate court reversed the punitive damages award because there was no specific finding of fraud. The court also noticed the fact that punitive damages were not prayed for but first appeared when the judge awarded them. The opinion of the court clearly indicated that the absence of a finding of fraud was the deciding factor in causing reversal. But one cannot ignore another critical element of this case, which is that Macke Homes can hardly be considered a "little guy." This is not a typical "consumer oppression" case; rather, it is a rough and tumble businessman versus businessman situation in which it is certainly arguable that the court should be slow to punish.

On this basis, that businessmen should be allowed to struggle with each other, *Standard* may remain a sound decision. Certainly there are justifiable policy reasons for arguing that even though a "little guy" may deserve a punitive damage award for an oppressive breach, a businessman needs it only as protection against fraud. This question remains open, but *Vernon* seems to have established that the "little guy" is no longer remedyless against an oppressive breach, even in the absence of a specific finding of fraud.

Another recent case in which the first district court held that fraud was a necessary element for punitive damages at contract

---

[62]289 N.E.2d 803 (Ind. Ct. App. 1972).

[63]*Id.* at 820.

was *Physicians Mutual Insurance Co. v. Savage.*[64] However, in *Physicians Mutual,* the trial court had found fraud, so there was no pressure upon the court to reconsider the issue.

With *Vernon,* though, it appears that the first district has closed the gap that previously existed between itself and the Second District Court of Appeals. *Vernon* has a rather confusing factual basis, and unfortunately the brief court opinion does little to clarify it. This is especially lamentable, because without knowing more of the background, it is difficult to decide whether or not the court actually went too far.

Sharp owned a creosoting plant operated by Easter with a total value of approximately $125,000.00.[65] Sharp originally carried full insurance, split equally with four companies, $31,250.00 face value each. But later Sharp cancelled one policy and still later Easter cancelled another policy without Sharp's knowledge. Thus, at the time of the fire, only two policies remained effective, one with Vernon and one with Great American Insurance Company.

In addition to Sharp's claim, Easter lost personal property in the fire that he claimed should have been insured. He, therefore, sued the agent involved and Vernon for negligently failing to insure him.

Since the fire caused over $94,000.00 of damage, more than the full face value of both policies ($62,500.00), Sharp claimed full recovery. The insurance companies, however, refused to settle for two reasons. First, they argued that Easter, if covered at all, was actually covered under these policies, so if they paid Sharp, they might be forced to pay twice. Secondly, they argued that each policy covered only one-fourth of the loss anyway ($23,527.02). During the two year period before the trial, Sharp repeatedly informed the insurance companies how desperately he needed the money, but they refused to discuss a settlement with him, each offering only to pay $23,527.02 if he would make Easter withdraw his suit.

Obviously, a fact situation as complex as this is capable of several interpretations. However, for the present purposes, it will be sufficient merely to point out what the jury must have concluded in order to reach the verdict it rendered. First, the jury must have found, as the plaintiff argued, that Easter's claim had absolutely nothing to do with Sharp's, and that the insurance

---

[64]296 N.E.2d 165 (Ind. Ct. App. 1973).

[65]This information obtained from appellate opinion, Vernon Fire & Cas. Ins. Co. v. Sharp, 316 N.E.2d 381 (Ind. Ct. App. 1974); Briefs for Appellant and Appellee, *id.*; and Interview with John T. Lorenz, counsel for Vernon, in Indianapolis, Indiana, Oct. 17, 1974.

company was merely trying to take advantage of its economic leverage to force Sharp to intercede for them.

Secondly, it must have been determined that the insurance companies, possibly through oversight, had failed to write policies covering only one-fourth of the total loss each, as they claimed. Thus, when half of the insurance was cancelled, those companies remaining were indeed liable for the full face amount of each policy in the event that over half the property was destroyed. If this were the case, then the jury easily could have decided that the companies realized their liability but were maliciously going to court, possibly out of spite, or possibly in the hope of making Sharp back down in spite of their contractual obligations to pay him.

These conclusions are supported by the evidence. First of all, part of the language in the insurance contract itself indicates that the coverage was not restricted to one-fourth of the loss:

> This company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not.[66]

Secondly, and perhaps most damning of all, the insurance companies failed to introduce one scrap of evidence to support their contention either that Easter's claim interfered with Sharp's, or that the policies covered only one-fourth of the loss. The insurance companies were content to rest their case at the conclusion of the plaintiff's presentation. These facts are certainly not conclusive of the case, but they do lend support to the findings of the jury that the contract was clear on its face, and that the insurance companies breached in bad faith. The appellate court's holding that such findings support punitive damages, and that a finding of fraud is unnecessary, is a commendable step forward.

This case does, however, acquaint us with a disagreeable specter associated with allowing punitive damages for oppressive breaches—the chilling effect involved. It is clear that if this were an honest dispute, as the insurance companies claimed, punitive damages would be undesirable. Punitive damages ought never be available to discourage someone from asserting his rights, even questionable ones, in a court of law.

However, the actor's state of mind here, as in a criminal trial, is a difficult thing to prove, and the jury must be allowed to consider evidence of his conduct in deciding whether or not to award punitive damages. This does not mean that there are no safeguards; nor does it mean that if the jury finds that an insurance company, or some other "big guy," has made an erroneous

[66] 316 N.E.2d at 383.

defense, punitive damages can be tacked on automatically. The trial judge is still in an excellent position to remove this question from the jury, and has a responsibility to do so, if he is convinced that this is a sincere contest. Thus, no one should be fearful of asserting an honest claim in court.

Although a miscarriage of justice admittedly is always possible, so long as proper safeguards are maintained, there is no reason to believe that the jury system will not continue to be a fair method of dispensing justice. To require proof that the defendant's actual thoughts were malicious would be no more possible in a punitive damage case than in a criminal case. Since it is impossible to know what a man is thinking, the jury must be allowed to decide on the basis of external indications. This being the situation, our appellate court adopted the proper method of review when it chose to examine the record in the light most favorable to the plaintiff.[67] This approach still allows the defendant a triple safeguard against unjustified punishment. First, the trial judge will not allow the question to go to the jury unless he can see evidence of bad faith or oppressive conduct. Secondly, the jury must actually find such oppressive action. Finally, the appellate court must determine that as a matter of law the jury could so find. This would seem to allow the defendant sufficient protection and, at the same time, offer the court a workable method of preventing contract oppression.

After several years of uncertainty, the first and second appellate districts of Indiana seem to have agreed that, even in a contract action, Indiana law permits recovery of punitive damages where the conduct of the wrongdoer indicates a heedless disregard of the consequences, malice, gross fraud, or oppressive conduct.[68] The third district has not yet been asked to extend the availability of punitive damage awards to cases involving findings of less than fraud, but there is no reason to believe they will oppose the other districts when the time comes.[69]

---

[67]

> In examining the factual record to determine whether there is sufficient evidence to warrant the award of punitive damages, it goes without saying that we must and will examine it in the light most favorable to the decision of the trial court. In this context Appellee is entitled to such favorable inferences from all the evidence produced no matter from what source.

Id. at 384.

[68]Rex Ins. Co. v. Baldwin, 323 N.E.2d 270 (Ind. Ct. App. 1975); Vernon Fire & Cas. Co. v. Sharp, 316 N.E.2d 381 (Ind. Ct. App. 1974).

[69]Bob Anderson Pontiac, Inc. v. Davidson, 293 N.E.2d 232 (Ind. Ct. App. 1973).

V. Factors Influencing the Expansion of Punitive Damages

There can no longer be any doubt that the availability of punitive damages is increasing; the question now is where to draw the line. Behind the scenes, several forces are having justifiable influence on the courts.

First, courts are exhibiting a growing intolerance for "contractual oppression," which they often refer to as "consumer fraud,"[70] although the label is not quite broad enough. While it is true that such oppression usually involves consumers, the touchstone is really the economic oppression involved. It just happens that this oppression usually occurs in the consumer context. Fraud, too, seems not quite accurate. Oppression is the actual key, and justifiably so. Does it make any difference whether the man never intended to do as he promised, or whether he realized after the contract was signed that he could extort more from the other party? One is fraud, the other is merely an oppressive breach; but can anyone argue that the end result is any different, or that one action is less demanding of deterrence than the other? Courts are recognizing that entering a contract often makes one party dependent on the other—creating a type of fiduciary relationship.[71]

Perhaps the courts are compensating for our changing economic structure. People no longer deal with the village blacksmith and the town grocer. Now the public deals with General Motors and A & P. The individual consumer no longer has the bargaining strength that competition provided when the parties dealt on a one to one basis, so he is more vulnerable. When the courts attempt to increase the consumer's muscle, they are using punitive damages for the same reasons they have always used them—to prevent oppressive behavior "actuated by ill will, malice, or evil motive."[72] The difference is merely that a changing society has created new opportunities for oppressive behavior, so the courts have developed new ways to control it.

However, there are some valid reasons for applying restraints to this expansion. Perhaps most importantly, the courts must be careful not to discourage honest litigation by allowing punitive damages against someone who is merely exercising his right to adjudicate an honest dispute—even if he is found to be in error and, indeed, even if this litigation injures the other party.[73] The

---

[70]Capitol Dodge v. Haley, 288 N.E.2d 766 (Ind. Ct. App. 1972); Walker v. Sheldon, 10 N.Y.2d 401, 179 N.E.2d 497, 223 N.Y.S.2d 488 (1961).

[71]*See* Fletcher v. Western Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970).

[72]McCormick § 79, at 280. See note 5 *supra*.

[73]See text accompanying notes 66 & 67 *supra*.

cases indicate, however, that courts are very much aware of this problem and are protecting the right to adjudicate honest disputes.[74]

Another reason for restraint was mentioned earlier.[75] Our economic system seems to operate best when a certain amount of friction is allowed to exist between people with roughly equal bargaining power. The judiciary is not justified in interfering with the business world to the extent of punitive damages merely to prevent the normal jockeying that occurs. It is only as a last resort, when someone is "picking on a little guy" who lacks the power to protect himself in the ordinary ways (typically a consumer), that the court is justified in awarding punitive damages to deter similar oppression in the future.

Probably one of the most neglected problems is that of exercising appropriate control over the size of the punitive award.[76] It seems that most courts merely ignore this problem so long as punitive damage awards remain uncommon, but as soon as an individual court begins to encounter such awards more frequently and to realize that it must deal with the problem, a solution is seldom troublesome. Several courts have already established a workable procedure.[77] One of the most effective solutions is to allow the trial judge to order remittitur if he feels the award is excessive.

It has been suggested that allowing punitive damages in a contract action would create too much uncertainty in litigation. But so long as the courts continue to be guided by the considerations discussed in the last few paragraphs, uncertainty should not be a serious problem. Further, courts have always been willing to allow punitive damages for certain contract breaches, and these exceptions have not proved overly troublesome. The present development merely adds another type of breach to the existing list of exceptions.

VI. Conclusion

Although courts have always allowed punitive damages for certain contract breaches, there currently seems to be an expansion under way. The requirement appears to be drifting from breach plus fraud to breach plus oppression.

---

[74]Crenshaw v. Great Cent. Ins. Co., 482 F.2d 1255 (8th Cir. 1973); Cassady v. United Ins. Co. of America, 370 F. Supp. 388 (W.D. Ark. 1974); McNutt v. State Farm Mut. Auto. Ins. Co., 369 F. Supp. 381 (W.D. Ky. 1973).

[75]See text accompanying notes 63 & 64 *supra*.

[76]McCormick § 85, at 296; Prosser § 2, at 14.

[77]Addair v. Hoffman, 195 S.E.2d 739 (W.Va. 1973); Prosser § 2, at 14.

As with any evolution of this type, the fringes are frayed and uncertain.[78] Several states have adopted differing requirements,[79] while some states have refused to allow any expansion at all.[80] Many opinions carefully avoid explaining their positions, holding simply that in the particular breach of contract before the court, punitive damages are justified. Then, if a case arises in which punitive damages are really not justified, the court reverts to the tired phrase that "this is an action in contract, therefore punitive damages are not available."[81]

This indecisive approach obviously provides little in the way of direction for future disputes, and it would be helpful for the courts to establish better guidelines. But, as with most changes in the common law, this is an evolutionary process, and it simply remains for time and the sediment of case law to eventually establish the boundaries for this new "island" of law.

MICHAEL L. MINER

[78] *Accord,* Glenn v. Esco Corp., 520 P.2d 443 (Ore. 1974).

[79] California has emphasized unconscionable acts and bad faith. Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973). A Florida court said in dictum that legal malice is sufficient for punitive damages in a breach of contract action. Adams v. Whitfield, 290 So. 2d 49 (Fla. 1974). Oregon has expressed a willingness to allow punitive damages for an act that violates " 'social interests' of importance." Glenn v. Esco Corp., 520 P.2d 443, 445 (Ore. 1974). South Carolina has attacked the problem by declaring that fraud includes "unfair dealing." Wright v. Public Sav. Ins. Co., 204 S.E.2d 57 (S.C. 1974).

[80] Waters v. Trenckmann, 503 P.2d 1187 (Wyo. 1972).

[81] Vanston v. Connecticut Gen. Life Ins. Co., 482 F.2d 337 (5th Cir. 1973); Henry Morrison Flagler Museum v. Lee, 268 So. 2d 434 (Fla. 1972); Eskew v. Camp, 204 S.E.2d 465 (Ga. Ct. App. 1974).