PUNITIVE DAMAGES IN ARIZONA: THE REPORTS OF THEIR DEATH ARE GREATLY EXAGGERATED

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In the recent wake of threatened "tort reform" by the Arizona legislature and electorate, the Arizona Supreme Court significantly altered the availability of punitive damages in civil lawsuits.[1] Although it was once sufficient to merely demonstrate a defendant's reckless indifference in order to obtain punitive damages, the supreme court is speaking now in ominous, if not diabolical, terms. To prevail on punitive damages, the court mandates that a plaintiff now show that the defendant had an "evil mind." A mere "evil hand" is no longer enough. An actual specific intent to injure must be established or alternatively, the defendant must deliberately have pursued a course of conduct knowing and consciously disregarding that it created a substantial risk of significant harm to others.[2] Additionally, as if this was not enough, the court also held that the burden of proof for the establishment of exemplary damages would be raised to the clear and convincing evidence standard previously limited almost exclusively to fraud cases.[3]

As the plaintiffs' bar mourned, the defense bar celebrated, both sides believing punitive damages were virtually dead, except in the rare case where specific intent to injure could be proven. However, a close review of recent pronouncements from the Arizona Supreme Court reveal that, although somewhat emasculated, punitive damages are still viable under many fact scenarios in Arizona. How long punitive damages will remain viable is an open question. Serious constitutional challenges have been raised and are likely to soon be considered by the United States Supreme Court. Ironically, if punitive damages are to withstand constitutional attack, it is likely that standards like those enunciated in *Rawlings v. Apodaca*[4] and *Linthicum v. Nationwide Life Insurance Co.*[5] will be required.

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1. Rawlings v. Apodaca, 151 Ariz. 149, 726 P.2d 565 (1986). Linthicum v. Nationwide Life Ins. Co., 150 Ariz. 326, 723 P.2d 675 (1986). See discussion *infra* at notes 12-25.

2. *Rawlings*, 151 Ariz. at 161-63, 726 P.2d at 577-79; *Linthicum*, 150 Ariz. at 330-31, 723 P.2d at 679-80. See discussion *infra* at notes 18-25.

3. *Linthicum*, 150 Ariz. at 331-32, 723 P.2d at 680-81. See discussion *infra* at notes 25-30.

4. 151 Ariz. 149, 726 P.2d 565 (1986).

5. 150 Ariz. 326, 723 P.2d 675 (1986).

PUNITIVE DAMAGES BEFORE *LINTHICUM* AND *RAWLINGS*

Prior to *Rawlings* and *Apodaca*, punitive damages were appropriately awarded whenever there was evidence of wanton, malicious, or reckless conduct.[6] Gross or extreme negligence was enough. The Recommended Arizona Jury Instructions adopted by the Arizona Supreme Court on February 8, 1974 specifically defined the availability of punitive damages to include wanton conduct which was in turn defined as reckless indifference.[7]

Although similarities between fraud claims and punitive damages claims existed, most trial courts, prior to the fall of 1986, required only that the plaintiff establish a right to an award of punitive damages by the usual civil standard of a preponderance of the evidence.

The tocsin of things to come was sounded by the Arizona Court of Appeals in *Farr v. Transamerica Occidental Life Insurance Company*.[8] However, because the case involved insurance bad faith, most observers read it as just another peculiarity in an area of the law already wrought with peculiarities.[9] Accordingly, both trial bench and bar in Arizona interpreted *Farr* as setting forth new standards applicable only to the hybrid and unique tort of bad faith. It appeared that although the standard for punitive damages announced in *Farr* was something greater than had previously been required, that standard applied only to bad faith claims. We can now see that *Farr* is extremely important in all areas of tort law where punitive damages are sought.

Reading *Farr* today, we can readily discern that Justice Kleinschmidt was laying the foundation for new punitive damage standards in all tort cases. The focus is now on the motive and intent of the defendant. Reckless indifference is no longer enough. Gross negligence is no longer enough. The *Farr* court specified that the plaintiff must show some deliberate, overt and dishonest dealings by the defendant.[10] The court explained that the proof of

6. *See* Smith v. Chapman, 115 Ariz. 211, 564 P.2d 900 (1977) (punitive damages imposed for the gross, wanton act of driving while intoxicated); Acheson v. Schafter, 107 Ariz. 576, 490 P.2d 832 (1971) (punitive damages awarded for willful and malicious conversion of car).

7. Specifically the instruction provided: "Willful or wanton conduct is conduct which shows reckless indifference to the results of an act, or reckless indifference to the rights or safety of others. Willful or wanton conduct may be an action, or a failure to act." *Recommended Arizona Jury Instructions*, Negligence 16 (adopted by the Arizona Supreme Court Feb. 8, 1974). In adopting this language the supreme court relied upon its prior holdings in Nichols v. Baker, 101 Ariz. 151, 416 P.2d 584 (1966) and Butane Corp. v. Kirby, 66 Ariz. 272, 187 P.2d 325 (1947).

In accordance with these standards, the Arizona Supreme Court even went so far as to find punitive damages available based upon proof of a cumulation of several simple negligent acts which by themselves clearly would not support punitive damages, i.e., a plaintiff could recover punitive damages by simply showing that the defendant engaged in several acts of simple negligence which, when added together, rose to the level of gross conduct. *See* Southern Pac. Transp. Co. v. Lueck, 11 Ariz. 560, 535 P.2d 599 (1975).

8. 145 Ariz. 1, 699 P.2d 376 (Ct. App. 1984).

9. It has been frequently recognized that insurance bad faith is a unique hybrid of contract and tort law. *See* Trus Joist v. Safeco, 153 Ariz. 95, 735 P.2d 125 (Ct. App. 1986). Unlike most areas of tort law, the courts had recognized a right to attorneys' fees in the bad faith area and although they had categorized the tort as an intentional one, Noble v. National Am. Life Ins. Co., 128 Ariz. 188, 624 P.2d 866 (1981), the necessary "intent" required no real scienter or mens rea. It mattered not if the defendant was aware of the wrongfulness of his conduct or its consequences. Rather, the defendant need simply have intended to deny or delay the claim to establish a prima facie case of bad faith.

10. *Farr*, 145 Ariz. at 8-10, 699 P.2d at 383-85.

fraud, oppressive conduct, insult and personal abuse, as well as outrageous, cruel, vindictive or malicious conduct would support exemplary damages. In contrast, the mere bungling or arbitrary handling of a claim would not.[11]

THE NEW STANDARD SET FORTH IN *RAWLINGS* AND *LINTHICUM*

Like *Farr*, both *Rawlings* and *Linthicum* are insurance bad faith cases. Unlike *Farr*, it is abundantly clear on the face of the decisions that they are intended to apply to all areas of tort law.

In these cases, Justices Feldman and Cameron tell us unequivocally that gross negligence is not enough for the recovery of punitive damages in any tort case.[12] As Justice Kleinschmidt had forewarned in *Farr*, the focus now must be upon the defendant's motive and intent.[13] In essence, the court announces two separate criteria–meet either criterion by clear and convincing evidence and punitive damages are awardable.[14]

The first criterion is rather simple and easy to understand. In the rare case where a plaintiff can prove that the defendant specifically intended to injure the plaintiff, punitive damages are appropriate. This is not surprising. This has always been the law.[15]

The second criterion, however, is perplexing and perhaps raises more questions than it answers. The court tells us that to obtain exemplary damages an "evil hand" must be guided by an "evil mind." A defendant's evil mind cannot be established by a showing of "reckless indifference."[16] The court tells us that although reckless indifference is not enough to establish punitive damages, punitive damages are appropriately awarded where the defendant deliberately pursued a course of conduct, knowing and consciously disregarding a substantial risk of significant harm to others.[17]

Although the standard announced in place of the old "reckless indifference" standard has a number of new adjectives, one must wonder whether the new standard is significantly different, particularly to the fact finder, or whether it is a mere quibbling over semantics. It is unlikely that juries will be less easily swayed to find "conscious disregard" than they were to find "reckless indifference." Furthermore, the "substantial risk of significant harm" portion of this standard has been diluted by *Hawkins v. Allstate Insurance Company*.[18] Thus, the real battle will occur in chambers before the trial judge on motions for summary judgment, motions for directed verdict and in settling jury instructions. The challenge to plaintiff's counsel now is

11. *Id.* at 8-9, 699 P.2d at 383-84. It is significant that in *Rawlings*, the *Farr* decision was cited by the Arizona Supreme Court five times with approval. *See* Rawlings v. Apodaca, 151 Ariz. at 161, 163, 726 P.2d at 577, 579.

12. *Rawlings*, 151 Ariz. at 162, 726 P.2d at 578; *Linthicum*, 150 Ariz. at 331, 723 P. 2d at 680.

13. *Farr*, 145 Ariz. at 8, 699 P.2d at 383.

14. *Linthicum*, 150 Ariz. at 331-332, 723 P.2d at 680-81.

15. *See, e.g.*, Iaeger v. Metcalf, 11 Ariz. 283, 94 P. 1094 (1908).

16. *Rawlings*, 151 Ariz. at 162, 726 P.2d at 578; *Linthicum*, 150 Ariz. at 331, 723 P.2d at 680.

17. *Rawlings*, 151 Ariz. at 162, 726 P.2d at 578; *Linthicum*, 150 Ariz. at 330, 723 P.2d at 679. *Accord* Gurule v. Illinois Mut. Life & Casualty Co., 152 Ariz. 600, 602, 734 P.2d 85, 87 (1987).

18. 152 Ariz. 490, 733 P.2d 1073 (1987). In *Hawkins*, the Court sustained a $3.5 million punitive damage award despite the fact that in the court's own words the harm to plaintiff was "relatively small and innocous." *Id.* at 1085. As long as the cumulative harm suffered by all including nonplaintiffs is significant as a whole the criterion is met. *See infra* notes 10-54 and accompanying text.

to convince the trial court that the jury ought to be instructed on punitive damages. If that battle is won, the rest of the fight is made more difficult only by the new burden of proof[19] and not by the additional adjectives which will be required in the jury instruction defining "evil mind."

Both criteria of the new punitive damage test involve a subjective evaluation by the fact finder. However, either criterion can be proven with objective evidence. In other words, in order to prove the defendant actually intended to injure the plaintiff or that he had a "conscious disregard of a substantial risk of significant harm," the jury must evaluate the actual subjective intent of the defendant. The jury must conclude that the defendant knew in his mind that his actions were going to injure the plaintiff or knew in his mind that there was a substantial risk of such harm and the defendant nonetheless elected to take that risk. In making this determination, however, the jury is not limited to evidence of the defendant's actual subjective intent. To the contrary, the court recognized in *Rawlings*[20] and more recently in *Hawkins*[21] and *Gurule v. Illinois Mutual Life and Casualty Company*[22] that in most cases, the plaintiff will find it difficult, if not impossible, to prove the requisite evil mind with direct evidence of a subjective intent to harm. Accordingly, the court in these decisions makes it clear that the plaintiff can prove the punitive damage case by inference and with circumstantial evidence. More importantly, in these decisions the Arizona Supreme Court emphasizes that the necessary evil mind can be established with objective evidence,[23] for example, evidence that the defendant's conduct was "outrageous," "intolerable" or "egregious."[24]

In short, in order for a prima facie case of punitive damages to be established, the plaintiff must prove either that the defendant subjectively intended to injure the plaintiff, or that he, in conscious disregard of a substantial risk of significant harm, engaged in a course of conduct injuring

19. *See infra* note 25 and accompanying text.

20. *Rawlings*, 151 Ariz. at 162-63, 726 P.2d at 578-79.

21. *Hawkins*, 152 Ariz. at 498, 723 P.2d at 1081.

22. 152 Ariz. 600, 602, 734 P.2d 85, 87 (1987).

23. *Accord* Filasky v. Preferred Risk Mut. Ins. Co., 152 Ariz. 591, 597, 734 P.2d 77, 83 (1987).

24. Immediately following *Rawlings* and *Linthicum*, there was confusion on this point. *Linthicum* seemed to require that the plaintiff prove the necessary evil mind by both subjective and objective evidence. *Linthicum*, 150 Ariz. at 330, 723 P.2d at 679. The court stated that in addition to proving that the defendant acted with a conscious disregard for a substantial risk of significant harm to the plaintiff, he must prove that the conduct was also outrageous, intolerable and oppressive. *Id.* at 331, 723 P.2d at 680. In contrast, *Rawlings*, *Hawkins* and *Filaksy* discussed the objective standard as if it were yet a third criterion to the test. The courts in these decisons recognized that a plaintiff could establish a prima facie case of punitive damges by proving (subjectively) that the defendant intended to injure by engaging in conduct demonstrating conscious disregard *or* engaging in conduct which was outrageous, oppressive and intolerable. *Rawlings*, 151 Ariz. at 162-63, 726 P.2d at 578-79; *Hawkins*, 152 Ariz. at 497, 733 P.2d at 1080; *Filaksy*, 152 Ariz. at 598, 734 P.2d at 84. It appears from these decisions that if any one of the three criteria is met, punitive damages would be appropriate. *Gurule*, however, has once and for all resolved this confusion:

> For example, defendant may have conducted himself in an outrageous or egregiously improper manner, thus, permitting the inference that he intended to injure, or consciously disregarded the substantial risk that his conduct would cause significant harm...the quality of the defendant's conduct is relevant and important only because it provides one form of evidence from which defendant's motives may be inferred. The more outrageous the conduct, the more compelling would be the inference of "evil mind."

Gurule, 152 Ariz. 602, 734 P.2d at 87.

the plaintiff. This subjective intent can, however, be inferred from circumstantial evidence and objective evidence that the conduct was oppressive, outrageous and intolerable.

Finally, the court in *Linthicum* held that before a quasi-criminal sanction would be applied, the plaintiff would have to prove the defendant's egregious conduct by "clear and convincing" evidence.[25] Once again, the difference in the law is of more significance to the trial judge than it is likely to be to a jury. Convincing a jury that punitive damages ought to be awarded is not the greatest obstacle created by the new standard; rather it is convincing the trial court that a punitive damage instruction should be given.

RETROACTIVITY OF *RAWLINGS* AND *LINTHICUM*

Rawlings and *Linthicum* clearly represent a departure from the traditional understanding of punitive damages in Arizona. What are our judges and lawyers to do with cases currently pending where a trial has already been conducted and the "evil mind" standard and the "clear and convincing" evidence burden were not required in the jury instructions?

Before the Arizona Supreme Court gave us direction in this area, Divisions One and Two of the Arizona Court of Appeals were in disagreement regarding the retroactivity of the "clear and convincing" evidence standard. Division One felt that unless the defendant requested an instruction on clear and convincing evidence, the right to it would be waived.[26] In contrast, Division Two felt that unless the jury had been specifically instructed on the clear and convincing evidence standard, the case must be retried.[27] The Division Two court found that there would be no waiver in the lower court since to request such an instruction would have been pointless, based upon the state of the law at the time of trial.[28]

Based upon this same reasoning, the Arizona Supreme Court in *Hawkins* held that the clear and convincing evidence standard does not apply retroactively.[29] Because *Rawlings* and *Linthicum* "announced a new principle of law that overruled clear and reliable precedent," the clear and convincing standard may be applied only prospectively.[30] Thus, the supreme court adopted the approach of neither Division One nor Division Two. So, regardless of whether or not a defendant requested the "clear and convincing" evidence standard at trial, the standard will not have retroactive effect.

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25. *Linthicum*, 150 Ariz. at 331-32, 723 P.2d at 680-81. More recently in State v. Renforth, Slip Op. No. 1 CA-CR 9930 (June 9, 1987), the Arizona Court of Appeals clarified the meaning of "clear and convincing" evidence at least in the criminal context. The court stated that the burden of clear and convincing evidence does not require "certain and unambiguous" evidence, but rather the fact finder must be persuaded that the truth of the contention is "highly probable." *Id.* at 8-9. *Accord*, In the Matter of a Member of the State Bar of Arizona, Slip Op. No. SB-339 (Sept. 15, 1987).

26. Carter-Clogau Labs., Inc. v. Construction Prod. & Maintenance Laborers, 153 Ariz. 351, 736 P.2d 1163 (1986).

27. Ranburger v. Southern Pac. Life & Casualty Co., Slip Op. No. 2 CA-CIV 5792 at 8 (Nov. 26, 1986).

28. *Id.*

29. *Hawkins*, 152 Ariz. at 504, 733 P.2d at 1088.

30. *Id.*

After September 15, 1986, the date *Linthicum* was mandated, punitive damages are recoverable only upon clear and convincing evidence of a defendant's evil mind.[31]

The more troublesome question is whether or not the court will retroactively apply the evil mind standard to cases tried prior to pronouncement of the *Rawlings* and *Linthicum* standard. This question has yet to be properly raised by the defense in the appellate courts.[32]

Defense counsel will likely argue that unlike the clear and convincing evidence standard, the evil mind standard did not first become law in Arizona when *Linthicum* and *Rawlings* were published. The defense will point out that at least by the time the *Farr* decision was published in 1974, the requirement that the defendant's subjective intent be of a culpable nature was known. Furthermore, although the Arizona Supreme Court has recognized that specific language such as "evil mind" and "intent to injure" and "conscious disregard of a substantial risk of significant harm" need not be included in the jury instructions on punitive damages, the court has at least impliedly required pre-*Linthicum* and *Rawlings* instructions to address the necessity of proving some improper motive and intent.[33] The Arizona Supreme Court has in fact gone so far as to state that the use of words such as "gross negligence" or "reckless disregard" would require a new trial.[34]

In response, plaintiff attorneys will have to argue that the *Farr* decision was not reasonably interpreted by anyone to apply to cases other than those dealing with the tort of bad faith.[35] It was not until the pronouncement of *Rawlings* and *Linthicum* that the *Farr* standard was identified as applying to all tort cases. The plaintiffs' bar will also argue that the *Hawkins* decision stands as precedent for not allowing retroactive application of the evil mind standard: if the "clear and convincing" evidence standard was a sufficient departure from existing law to preclude retroactive application,[36] then the

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31. *Id.*

32. *See Gurule*, 152 Ariz. at 603, 734 P.2d at 88; *Filasky*, 152 Ariz. at 598 n.2, 734 P.2d at 83 n.2.

33. The Arizona Supreme Court in *Filasky* approved the following jury instruction even though it did not expressly contain "evil mind" or "conscious disregard of a substantial risk of significant harm" language:

> If you find that plaintiff suffered actual damage as a result of the conduct of the defendant on which you base a finding of liability, you may then consider and in your discretion award additional punitive or exemplary damages against defendant for the sake of example and by way of punishment. In making your determination, a finding that the defendant breached the duty of good faith and fair dealing owed to plaintiff does not by that fact alone make an award of punitive damages appropriate. You must examine the *motive* and *intent* of the defendant's conduct. You may award such damages if, but only if, you find by a preponderance of the evidence that the defendant's conduct amounted to any of the following:
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> 1. Deliberate, overt and dishonest dealings such as willful and knowing failure to process or pay a claim known to be valid;
> 2. Oppressive conduct;
> 3. Fraud.

Filasky, 152 Ariz. at 598-99, 734 P.2d at 83-84. In contrast the *Filasky* Court went on to hold that error would have been committed if phrases such as "gross negligence" or "reckless disregard" had been included. *Id.* at 599 n.3, 734 P.2d at 84 n.3.

34. *Id.*

35. *See supra* note 9 and accompanying text.

36. *See supra* note 30 and accompanying text.

same reasoning should apply to the "evil mind" aspect of the standard. Finally, plaintiffs' counsel will point out that the recommended Arizona Jury Instructions on punitive damages approved by our supreme court were reasonably relied upon by counsel in drafting instructions and clearly did not require evil mind language.[37] This latter point should be most persuasive and lead the courts to the conclusion that the evil mind standard should not be given retroactive application.

PROVING THE PUNITIVE DAMAGE CASE

Facing a new standard involving both objective and subjective factors, our understanding of when punitive damages are available is best aided by factual examples. These examples are normally provided in a slow, case-by-case progression. *Farr* has expedited the normal evolution of the law in this area by providing us with a number of specific examples.

As demonstrated in *Farr*, numerous fact patterns can be imagined where punitive damages are appropriate.[38] Rather than attempting to articulate every possible scenario where punitive damages might be awarded, the intent of this article is to focus on a discussion of the three aspects of a defendant's conduct which will most frequently be presented as a possible basis for an award of punitive damages. The case where the defendant's conduct was specifically intended to injure the plaintiff is so obvious, it really does not warrant extensive discussion. Three other areas, however, which are more common and which will involve the most debate before the courts, are the case of the intoxicated defendant, the case of the defendant who has engaged in fraudulent and dishonest conduct, and the case where the defendant's course of conduct over a period of time demonstrates a conscious disregard for the well-being of others.

The Intoxicated or Impaired Defendant

If the focus for punitive damages is now upon the defendant's motive and intent, can the plaintiff obtain punitive damages against an intoxicated or impaired defendant? Can the requisite evil mind be proven where the defendant is intoxicated out of his mind and has no "motive or intent" to cause harm to others? Can the defendant's evil mind be inferred when he testifies he did not think he was impaired or intoxicated at the time of the accident?

Prior to *Rawlings* and *Linthicum*, it was clear that in most cases a plaintiff was entitled to a punitive damage instruction when impairment could be proven. The Arizona appellate courts had repeatedly held that the voluntary intoxication of a defendant constituted gross negligence and reckless indifference of sufficient quality to justify punitive damages.[39] However, under *Rawlings* and *Linthicum*, gross negligence and reckless indifference are no longer enough to allow for an award of punitive damages.[40]

37. *See supra* note 7.
38. 145 Ariz. at 8-9, 699 P.2d at 639 (1929).
39. *See, e.g.*, Ross v. Clark, 35 Ariz. 60, 274 P. 639 (1929).
40. *See supra* note 33-34 and accompanying text.

Where possible, the plaintiff in the drunk driving case will want to prove that the defendant deliberately consumed alcohol, knowing that he would have to drive thereafter. Where at a minimum, the defendant, after becoming intoxicated, had a sufficient awareness to realize that driving would be unsafe but nonetheless elected to do so, the requisite evil mind exists. In this day and age, with public education being what it is concerning drunk drivers,[41] this may not be as difficult to prove as one might think, especially keeping in mind that a great deal can be proven by inference from circumstantial evidence. Certainly, evidence of this nature should suffice to allow the issue of punitive damages to go to the jury.

A more difficult question arises when the defendant was unaware of any need to get behind the wheel before he began imbibing and where he drank so much that he has no recollection of ever getting behind the wheel thereafter. In that case, how could one possibly prove that the defendant did anything consciously, let alone with a conscious disregard of a substantial risk of significant harm? At first blush, *Rawlings* and *Linthicum* would seem to preclude a punitive damage instruction under such a scenario. *Linthicum* in particular seems to preclude an award of punitive damages based on constructive knowledge alone.[42] A defendant must consciously be aware of his evil conduct. Proving that he "should have known" is not enough. Fortunately, a citation in *Rawlings* seems to solve this problem. In pointing out that punitive damages should be awarded upon proof of the defendant's conscious disregard of a substantial and unjustified risk, the court cites as support Arizona Revised Statute Section 13-105(5)(c) which defines criminal recklessness.[43] The final sentence of that section states that "a person who creates such a risk but is unaware of such risk solely by reason of voluntary intoxication also acts recklessly with respect to such risk."[44]

Also, where the defendant testifies that he did not feel that he had consumed enough alcohol to result in impairment, the circumstantial evidence must be carefully analyzed. The court's reliance upon the definition of criminal recklessness in the Arizona criminal statutes to demonstrate what is meant by "conscious disregard" suggests that where the defendant voluntarily becomes intoxicated to the point of impairing his ability to act, this alone constitutes a sufficient "conscious disregard" to satisfy the evil mind standard. Thus, if the defendant's blood alcohol level is sufficiently high or his behavior was observed to be consistent with intoxication, the jury should be permitted to consider this evidence and make its own determination as to whether or not the requisite evil mind can be inferred.

In other words, where a defendant testifies that he intended no harm to the plaintiff, nor did he consciously disregard any substantial risk of harm,

41. Public outrage over the increasing number of injuries and deaths caused by drunk drivers in 1978 resulted in the enactment of Ariz. Rev. Stat. Ann. § 28-692.01 (Supp. 1986) which requires a mandatory 24 hour jail sentence and alcohol abuse screening for all individuals convicted of driving while intoxicated.

42. *Linthicum*, 150 Ariz. at 330, 723 P.2d at 679. *But see infra* note 45 and accompanying text.

43. 151 Ariz. at 162, 726 P.2d at 578. This reference is reiterated by Justice Feldman in *Gurule*, 152 Ariz. at 601, 734 P.2d at 86, as support for the proposition that the defendant's requisite mental state can be inferred.

44. Ariz. Rev. Stat. Ann. § 13-105(5)(c)(Supp. 1986).

the jury may nonetheless award punitive damages if, based upon circumstantial and objective evidence, they find the conduct to be sufficiently outrageous, egregious, or intolerable. Similarly, even where the defendant testifies that he did not believe he was intoxicated and that he intended the plaintiff no harm, circumstantial and objective evidence that he was indeed significantly intoxicated should allow the jury to make the same inference.

Fraudulent and Dishonest Conduct

In most cases where the defendant engages in fraudulent and dishonest dealings with the plaintiff, the plaintiff will be able to establish a prima facie case for punitive damages. In this scenario, the defendant's dishonest conduct may actually be intended to injure the plaintiff. Even when this is not the case, the plaintiff need only prove circumstantially or by inference that the defendant consciously disregarded a substantial risk of significant harm created by the misrepresentation.

Once again, however, the question of constructive knowledge may arise. If the defendant claims he had no idea his misrepresentation created any risk of harm to the plaintiff, may the plaintiff prevail by proving a reasonable person should have known of the substantial risk of significant harm created by the dishonesty? *Rawlings* and *Linthicum* do not seem to support a right to punitive damages based upon constructive knowledge. The emphasis on conscious and deliberate intent and motive would seem to militate against such a finding. However, at one place in *Linthicum*, the door seems to have been left open for such an interpretation: "It is only when the wrongdoer *should be* consciously aware of the evil of his actions, of the spitefulness of his motives or that his conduct is so outrageous or intolerable that it creates a substantial risk of tremendous harm to others that the evil mind required for the imposition of punitive damages may be found."[45]

The argument that constructive knowledge alone is sufficient to establish a prima facie case for punitive damages is further supported by the recent Arizona Supreme Court decision of *Wiper v. Downtown Development Corporation of Tucson*.[46] In this decision, the court, after rendering its opinions in *Rawlings* and *Linthicum*, announced its continued rejection of the Restatement view which prohibits vicarious liability of an employer for punitive damages based upon an employee's conduct.[47] As long as the employee's conduct is "committed in the furtherance of the employer's business and acting within the scope of the employment," the defendant employer

45. *Lithicum*, 150 Ariz. at 309, 723 P.2d at 679 (emphasis added).

46. 152 Ariz. 309, 732 P.2d 200 (1987).

47. *Id.* at 310, 732 P.2d at 201. The RESTATEMENT (SECOND) OF AGENCY § 217(c)(1958) provides:

> Punitive damages can properly be awarded against a master or other principal because of an act by an agent, if but only if:
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> (a) the principal authorized the doing and the manner of the act, or
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> (b) the agent was unfit and the principal was reckless in employing him, or
>
> (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
>
> (d) the principal or a managerial agent of the principal ratified or approved the act.

Id. RESTATEMENT (SECOND) OF TORTS § 909 (1979) is virtually identical.

can be found liable for punitive damages.[48] This is true even when the defendant employer engages in no independent conduct tantamount to the evil mind standard of *Rawlings* and *Linthicum*. If the supreme court continues to approve of vicarious liability for punitive damages, where no evil mind, motive or intent can be proven on behalf of the vicariously liable defendant, it could be argued that constructive knowledge should also be sufficient to establish a prima facie case for punitive damages.[49]

In response to this, however, the defense will argue that vicarious liability really has nothing to do with constructive knowledge. The underpinning of vicarious liability for punitive damages in the employer/employee relationship is that the employee's mind is that of the employer's when the employee's conduct is in furtherance of that employment. The requisite evil mind to support punitive damages against the employer is imputed to that employer because the employee acts for and on behalf of the employer in the course of his employment. The employee's evil mind becomes the employer's evil mind.

The most likely resolution of these arguments will be that the jury must once again look at all of the evidence, particularly any circumstantial or objective evidence which refutes the defendant's claim of ignorance. Only where this evidence supports the argument that the defendant must have known of the risk of harm he was creating to the plaintiff should the court take the punitive damage question away from the jury.

Another issue likely to arise in these cases is whether punitive damages are appropriate where the requisite conscious and deliberate disregard is

48. *Wiper*, 152 Ariz. at 310, 732 P.2d 201, *quoting* Western Coach Co. v. Vaughn, 9 Ariz. App. 336, 338-39, 452 P.2d 117, 119-20 (1969).

49. Whether the Arizona Supreme Court will continue to expand vicarious liability for punitive damages is rendered suspect in light of the recent Arizona Court of Appeals pronouncement in *Jacobson v. Superior Court*, Slip. Op. 96, 1 CA-SA 202 (filed Sept. 22, 1987). In that case, the Arizona Court of Appeals was asked to overturn the trial court's denial of a motion to compel discovery of the defendant's income tax returns in support of a claim for punitive damages. In this case, the plaintiff was rendered a quadraplegic while riding as a passenger in an automobile driven by his teenage friend. He sought to compel discovery of the income tax returns of his friend's parents based upon the Family Purpose Doctrine. This doctrine provides vicarious liability for the parents of minors who provide a family automobile for the use of their children. The Arizona Court of Appeals affirmed the trial court's denial of the motion to compel holding that punitive damages are not recoverable against the parents of a minor based solely upon the Family Purpose Doctrine. Unless there is independent evidence of negligence and an evil mind directly attributable to the parents, punitive damages will not be allowed against the parents. In so deciding, the Arizona Court of Appeals acknowledged the Arizona Supreme Court's continued holding that an employer can be held vicariously liable for punitive damages based upon the acts of its employees committed within the scope of their employment even where the employer is not shown to have the requisite evil mind.

> Where there is a clearly defined master-servant relationship, a stronger argument for imputed punitive damage liability is proper because the master defines the scope of employment, often in quite specific terms, and will often closely supervise the servant's activities in the scope of that employment. The master thus has a greater ability to control the servant's actions and prevent the negligent or willful tort. A parent, on the other hand, frequently has no idea how the car he or she provides is being used and has no direct means of controlling its use. . . . an employer receives some economic benefit from the employee's labor and specifically defines for the employee the scope of the employment. It is here that the doctrine of respondeat superior departs from the Family Purpose Doctrine, wherein an automobile is provided simply for the convenience of family members. We believe the difference in purpose is sufficient to justify a difference in liability.

Id. at 6-7. Petitioners in the *Jacobson* case did not petition the Arizona Supreme Court for review of this decision.

proven but the resulting harm to plaintiff is something less than significant. Here, the defendant will argue that unless the plaintiff can prove by clear and convincing evidence that he has sustained truly significant and substantial physical and financial harm, punitive damages are inappropriate. In contrast, plaintiff must argue that whether or not the harm is "substantial and significant" is a question that certainly must be left to the jury. Further, in the proper case, plaintiff must argue that the substantial and significant harm required need not be totally sustained by the plaintiff. If the plaintiff can show that, while his specific harm may not be "substantial or significant," the defendant's conduct overall has caused enough harm to enough other people that it can be viewed as substantial and significant by the jury, then punitive damages are appropriate.

The recent case of *Hawkins*[50] is illustrative of these points. In that case, the plaintiffs made a property damage claim arising out of the "total loss" of their new automobile.[51] Allstate continually attempted to compromise the claim in an amount less than the actual fair market value of the vehicle. Additionally, the amount Allstate offered to pay was reduced for items such as cleaning fees where there was no evidence that such fees were appropriately included in computing the claim. Plaintiffs called to the stand other claims examiners who had worked for Allstate, all of whom testified that it was Allstate's corporate policy to deduct a $35 cleaning fee on all "total loss" automobile adjustments whether cleaning was needed or not. Allstate instructed its claims people that such "chiseling" might be insignificant to a single claimant but could result in significant savings to the company: "if you could save one dollar on a million claims, you would save the company as much as a million dollars."[52]

Allstate finally pressured the plaintiffs into accepting an inferior replacement vehicle, promising to bring the vehicle up to the quality of the now-totalled car. Susequently, Allstate reneged on this promise. Based upon these fraudulent and dishonest acts, the Arizona Supreme Court sustained a $3.5 million punitive damage award.[53]

Of most interest is the fact that plaintiffs suffered no physical injury. Their only "significant harm" was the frustration, inconvenience and emotional distress suffered in attempting to get an adequate replacement vehicle. Nonetheless, the court found the punitive damage award appropriate based upon either criterion of the new standard.[54] Under these facts, the jury could have found that Allstate intended to harm the plaintiff and an untold number of other claimants, or that Allstate consciously pursued a course of conduct knowing that although it created a "relatively small and innocuous" degree of harm to any one claimant, the conduct was performed on such a large scale as to constitute "significant harm" to claimants generally. Either criterion could be inferred from the objective evidence that Allstate's con-

50. Hawkins v. Allstate Ins. Co., 152 Ariz. 490, 733 P.2d 1073 (1987).
51. The facts are stated at *id.* at 493-94, 733 P.2d at 1076-79.
52. *Id.* at 495, 733 P.2d at 1078.
53. *Id.* at 502, 733 P.2d at 1085.
54. *Id.*

duct was "oppressive, outrageous or intolerable."[55]

Another area to consider when evaluating the appropriateness of punitive damages in cases involving alleged dishonesty is the way in which the defendant's product or services were marketed. Misleading advertising or misrepresentation in soliciting the plaintiff's business can form the basis for exemplary awards. For example, in *Palmer v. A.H. Robins Company*[56] the Colorado Supreme Court sustained a $6.2 million punitive damage award against the manufacturer of a defective intrauterine device (IUD). The punitive damage claim was based primarily upon fraudulent conduct of the defendant. In *Palmer*, plaintiff proved that the defendant had hired an advertising agency to encourage media publicity favorable to all of the defendant's products, including its IUD.[57] The court explained that this advertising demonstrated a motive on the part of the defendant to profit by making exaggerated statements regarding the safety and efficacy of its IUD. Such dishonest conduct would support punitive damages.[58]

In pursuing a punitive damage claim based upon misleading advertising, it must be recognized that in Arizona self-interest alone is not evidence of an "evil mind."[59] Thus, the plaintiff must not only prove that the defendant's advertising misled the plaintiff and others into falsely believing the defendant's product was safe, but must further prove that when the advertisement was published, the defendant had knowledge of the unsafe nature of the product. The mere touting of one's product in advertisement, motivated by self interest for profit, does not in and of itself establish a right to punitive damages. To establish the necessary motive and intent, the defendant must be shown to have known that the advertising was misleading because the product was unsafe. However, once the plaintiff has established this requisite knowledge on behalf of the defendant, the profitability of the defendant's conduct is relevant to the jury's assessment of the appropriate amount of punitive damages.[60]

Common Scheme or Course of Conduct

An approach seldom explored until recently which is particularly well suited to the new punitive damage standards is to show that the defendant's

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55. *Id.* In contrast, the Arizona Supreme Court in *Gurule v. Illinois Mutual Life & Casualty*, 152 Ariz. 600, 734 P.2d 85 (1987), cited *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 813, 174 Cal. Rptr. 348, 384 (Ct. App. 1981) with approval regarding the evil mind standard, but then found that absent proof of such an evil mind "compensatory damages usually provide the optimum level of deterrence. . .If juries could award punitive damages without proof of anything more than bad faith, insurance companies may be over-deterred, and may pay legitimately questionable claims to avoid the risk of a punitive damages award." *Gurule*, 152 Ariz. at 601-602, 734 P.2d at 86-87.

Ironically, in *Grimshaw* the court justified a $125 million punitive damage award on the ground that even a $2.5 million compensatory award was not enough to deter manufacturers from designing defective products. The court felt that many manufacturers treated compensatory awards as a cost of doing business. See *infra* notes 63-65.

56. 684 P.2d 187 (Colo. 1984).

57. *Id.* at 204.

58. *Id.* at 220-21.

59. *See Gurule*, 152 Ariz. at 607, 734 P.2d at 92.

60. *See Hawkins*, 152 Ariz. at 497, 733 P.2d at 1080-81 ("a third relevant consideration is the profitability of the defendant's conduct. A punitive damage award that disgorges ill-gotten profits serves to deter future similar conduct by eliminating any profit incentive.")

evil conduct is part of an overall scheme or way of doing business which affects and harms many. When proven, this approach not only justifies an award of exemplary damages, it often results in a large award.

As has already been discussed, in the bad faith case where a plaintiff can show that the defendant's tortious handling of his or her claim was in keeping with the company's normal claims handling procedures, punitive damages are appropriate.[61] Similarly, in a broader context, whatever the defendant's business, where the defendant's dealing or transaction with the plaintiff is part of a normal business practice and is found to be fraudulent, dishonest or otherwise tortious, a prima facie case for punitive damages has been arguably presented. Likewise, in the product liability field where a defendant is proven to manufacture and sell a defective product with knowledge of an unreasonably dangerous propensity of the product that is unforeseen by persons using the product, the requisite evil mind is established. The product liability area would appear to be one of the most vulnerable areas of all to punitive damage awards based upon a defendant's course of conduct. The policy reasons supporting the creation of strict product liability theories dovetail nicely with the policy reasons supporting punitive damages. The Restatement and commentators have repeatedly recognized that strict product liability law encourages manufacturers to improve their products by making them safer.[62] The safety incentive has been

61. *See supra* notes 49-54 and accompanying text. In *Hawkins*, the defendant attempted to adjust the plaintiff's property damage claim below its true value as part of a normal claims handling procedure. Plaintiffs proved a right to punitive damages through other former claims representatives who testified that Allstate instructed them to automatically make certain deductions, such as tire wear and cleaning fees, in determining the car's actual cash value, regardless of the damaged car's actual cleanliness or tire wear. Claims people were told that although five dollars per claim did not seem like much when subtracted from every claim, it could mean a lot of money to the company. Claims representatives testified that they were told to offer an insured the lowest value on a claim because the insured would probably accept it to get the car fixed quickly. An adjuster's performance was evaluated based upon the number of dollars paid out in claims over the number of claims, which encouraged claims adjusters to "chisel." *Hawkins*, 152 Ariz. at 495, 733 P.2d at 1078.

It is important to note that some of this testimony was somewhat remote to the plaintiff's claim. For example, one claims representative testified to claims practices in Tacoma, Washington when the Hawkins' claim was adjusted in Phoenix. In holding that this was nonetheless admissible evidence on the issue of punitive damages, the court pointed out that all evidence which bears upon the purpose and function of punitive damages should be admitted. *Id.* at 496-97, 733 P.2d 1079-80. The court recognized that although the purpose of punitive damages was not to compensate the plaintiff, it was to "express society's disapproval of outrageous conduct and to deter such conduct by the defendants and others in the future." *Id.* The court went on to point out various categories of relevant evidence on the issue of punitive damages, including defendant's financial position, the nature of the defendant's conduct, including reprehensibility, and the severity of harm that had occurred and was likely to occur in the future, the duration of the misconduct, the degree of defendant's awareness of harm, concealment, and the profitability of the defendant's conduct. *Id.* at 497-98, 733 P.2d at 1080-81.

The court recognized that evidence of prior similar acts against other claimants tends to militate in favor of the "intentional" nature of the defendant's action. The court noted that the evil mind in most cases must be proven by inference from circumstantal evidence and that therefore a pattern of similar unfair practices is extremely relevant. With respect to the remoteness in time and place of some of the evidence, the court simply held that this went to the weight and not to the admissiblity of the evidence. *Id.* at 498, 733 P.2d at 1081-82. Such evidence went to the duration and the scope of the defendant's misconduct which further supported the amount of punitive damages awarded.

62. *See* RESTATEMENT (SECOND) OF TORTS § 402A, Comment c (1965):

> On whatever theory, the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsiblity toward any member of the consuming public who may be injured by

a significant factor in the evolution of Arizona product liability law.[63] Similarly, exemplary damages are intended to punish and deter and in the products area, to encourage the discontinuation of producing unsafe products. In fact, the California Court of Appeals has taken the rationale used to support the application of strict product liability theories and applied it to justify the award of punitive damages in a product liability case. In *Grimshaw v. Ford Motor Co.*,[64] the California court began its analysis of the punitive damage award by pointing out that many manufacturers may consider compensatory and general damage awards arising out of the manufacture of defective products to be a recognized cost of doing business. The court reasoned that many manufacturers may in fact budget for payment of these personal injury awards and ignore necessary safety improvements as long as their profits exceed this "incidental cost of doing business."[65] This same California court recognized the woeful inadequacy of governmental regulations of the manufacturing industry and the fact that the threat of punitive damages is the last vestige of economic hardship which keeps manufacturers in line.[66]

In addition to public policy grounds, the very nature of the mass production industry lends itself well to the second criterion of the evil mind standard. Because manufacturers produce the identical product over and over again, if the product is defective, the odds are that eventually someone will be injured and the company will be told about that injury through a customer complaint or lawsuit. If the manufacturer makes no changes in its product in the face of such injury, it arguably does so consciously disregarding a substantial risk of significant harm.[67]

Further, in a mass production industry, quality control testing and product improvement and development procedures are frequently required either by the industry itself or by the government. These internal activities often reveal potential dangers in the product. Manufacturers may ignore these dangers if the cost of preventing them is high or the likelihood of their occurrence is low. Nonetheless, these internal procedures will often estab-

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it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum protection at the hands of someone, and the proper persons to afford it are those who market the products.

63. Several basic policy justifications have proved convincing to courts which have accepted the doctrine of strict liability in tort. One acknowledged by this court is 'that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them.' O.S. Stapley Co. v. Miller, 103 Ariz. 556, 559, 447 P.2d 248, 251-52 (1968). . . Another reason advanced for imposition of strict liability in tort is that the social goal of product safety is better fulfilled by strict liability theory than by traditional negligence theory.

Salt River Project v. Westinghouse, 143 Ariz. 368, 375, 694 P.2d 198, 205 (1984).

64. 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (Ct. App. 1981).

65. *Id.* at 811, 174 Cal. Rptr. at 382.

66. *Id.* at 811, 174 Cal. Rptr. at 382-83.

67. *See, e.g.*, Mallor & Roberts, *Punitive Damages: Towards a Principled Approach*, 31 HASTINGS L.J. 639, 655-56 (1980); Note, *Developments in the Law: Corporate Crime*, 92 HARVARD L. REV. 1227, 1369 (1979); Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258, 288-89 (1976).

lish evidence of the requisite conscious disregard to support a punitive damage claim.

Finally, even when the manufacturer initiates safety improvements, it may find itself vulnerable to a punitive damage claim. If through internal design developments, the manufacturer determines a way to make a safer product, yet makes no effort to warn *prior* consumers of the danger and improved design which diminishes or eliminates the danger, the second criterion of the evil mind standard is met. In all of these cases, there will be evidence that the defendant knew of the danger and consciously disregarded a means of diminishing or avoiding that danger to prior or subsequent purchasers.

Once again, an examination of cases is illustrative. To begin, the Arizona Supreme Court has recognized the relevance and admissibility of safety history evidence both to prove elements of the prima facie products liability case as well as punitive damages. In *Jones v. Pak-Mor Manufacturing Company*,[68] the Arizona Supreme Court tells us that the trial court has discretion under Rule of Evidence 407[69] to admit proof of safety history concerning both the existence and nonexistence of prior accidents. The court points out that this evidence would be relevant to prove defectiveness, unreasonable danger, cause of the accident and foreseeability.

In *Readenour v. Marion Power Shovel*,[70] the court took this reasoning one step further. The plaintiff in *Readenour* was seriously injured by a defective power shovel. Plaintiff offered evidence of post-sale design changes by the manufacturer which would have prevented the plaintiff's injury had they been incorporated into the shovel on which he was working.[71] Arizona Revised Statute section 12-686(2), part of Arizona's Product Liability Act, prohibits introduction of evidence of any change in a design, method of manufacture or testing of a product, subsequent to the time it was first sold as direct evidence of a defect.[72] The Arizona Supreme Court in *Readenour* narrowly construed the statute to prohibit post sale evidence of design changes only so far as that evidence is offered as direct evidence of a defect. If a plaintiff can demonstrate any other legitimate reason for offering the evidence, it will be received. For example, where, in *Readenour*, foreseeability of the danger and knowledge of the danger by the manufacturer are at issue, the evidence is admissible despite the statute.[73]

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68. 145 Ariz. 132, 700 P.2d 830 (Ct. App. 1984), *affirmed in part*, 145 Ariz. 121, 700 P.2d 819 (1985).

69. When after an event, measures are taken, which if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Ariz. R. Evid. 407 (Supp. 1986).

70. 149 Ariz. 442, 719 P.2d 1058 (1986).

71. *Id.* at 44, 719 P.2d at 1060.

72. In contrast, Rule 407 of the Rules of Evidence provides that subsequent changes are not admissible to prove negligence or culpability but are admissible to prove impeachment or to prove other things such as control, ownership, or feasibility. Further, this rule applies only to subsequent changes occurring after the injury as opposed to the date of sale.

73. *Ridenour*, 149 Ariz. at 446-47, 719 P.2d at 1062-63.

The court went on to point out that proof of changes in the design of the product, including evidence of subsequent warnings sent to some owners, but not all, is relevant to the issue of punitive damages. The failure to take safety measures with regard to the particular shovel in question, after discovering its danger and realizing what could be done to prevent injuries from occurring, was found to support punitive damages. The court recognized that this evidence goes to the quality of the defendant's conduct and is not offered as evidence of a defect. Accordingly, on the issue of punitive damages, such evidence was found admissible.[74]

Of even more interest, the court recognized that at least where there is a small number of purchasers, it may be appropriate for the court to allow the plaintiff to pursue yet a separate and distinct product liability theory regarding failure to warn subsequent to sale but prior to injury.[75] In other words, where the manufacturer discovers a danger and designs its product differently to protect against that danger, the manufacturer may have a duty to either warn past purchasers, or recall or retrofit the products already manufactured. This separate theory would seem on its face to support a claim for punitive damages. The mere fact that a product improvement eliminating or diminishing the dangerousness of the product has occurred prior to injury but subsequent to sale would support plaintiff's claim that the defendant knew of the danger yet consciously failed to properly warn, retrofit or recall. In contrast, defendants would argue that this only goes to prove a defect and is inadmissible under the Products Liability Act.[76] Further, defendant should argue pursuant to Rule of Evidence 403[77] that the prejudice of such evidence outweighs its limited probative value.[78]

A California decision of interest in the product liability area is *Grimshaw*.[79] In this case, a 1972 Pinto stalled on the freeway was rear-ended. The car burst into flames, killing the driver and severely burning a 13-year-old boy. A $2.5 million compensatory award and $125 million punitive damage award was appealed. Viewing the evidence most favorably to sustaining the verdict, the court found that Ford had allowed style decisions to be made on this "rush" project ahead of engineering decisions. As a result, there was a poor placement of the fuel tank, inadequate strength in the rear bumper and inadequate strength in the chassis. Testing by Ford prior to sale

74. *Id.* at 448, 719 P.2d at 1064.

75. *Id.*

76. *See supra* notes 71-72 and accompanying text.

77. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.

Ariz. R. Evid. 403 (Supp. 1986).

78. If the evidence is admitted, the defendant must ask for a limiting instruction pursuant to Rule 105 of Evidence:

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Ariz. R. Evid. 105 (Supp. 1986). If requested, such a limiting instruction is mandatory and not discretionary with the court. Obviously, however, if the defendant fails to ask for it, the right to it is waived.

79. Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (Ct. App. 1981).

of the product demonstrated that the gas tank in the rear had a tendency to puncture during rear-end collisions of less than 20 miles per hour and that gas could then find its way into the driver and passenger compartment. The evidence[80] inferentially supported the theory that Ford elected to go forward with the sale of the product, knowing of these dangers. Plaintiff argued that Ford had put the cost of improving the safety of the design, which was nominal on a per car basis, beneath its desire to get the product on the market quickly and to profit by the sale of a small economical vehicle at a low price.[81]

Interestingly, the California Code provision which establishes a right to exemplary damages in California is quite similar to the standards announced in *Rawlings* and *Linthicum*. Under the California Civil Code, a plaintiff must show that the defendant's conduct was fraudulent, oppressive or malicious. Malice is defined as the intent to injure or "conscious disregard of the probability that the act or conduct will result in injury to others or an awareness of the probable dangerous consequences and a willful and deliberate failure to avoid those consequences."[82]

The California Court of Appeals, applying this standard to the facts in *Grimshaw*, found the punitive damage award appropriate. The court was particularly persuaded by evidence that the defendant had placed profit over safety in the face of a known defect which was unreasonably dangerous and could cause substantial harm.[83]

The case in the product liability field to watch on the issue of punitive damages is *Volz v. Coleman Company*.[84] In this case, a jury awarded $6.8 million in punitive damages against the Coleman Company. The Arizona Supreme Court has accepted a Petition for Review and specifically requested that the parties brief the issue of punitive damages.[85]

In *Volz*, the plaintiff was severely burned when a stream of white gas spurted from a Coleman stove in the vicinity of a camp fire. In support of her claim for punitive damages, the plaintiff introduced a 1963 internal memorandum of the Coleman Company and a 1967 patent application, both addressing the stove's propensity to squirt gas unexpectedly. On the issue of punitive damages, plaintiffs argued that this evidence showed Coleman's longstanding knowledge of the gas cap's dangerous characteristic. The court of appeals found that this evidence was admissible to prove a right to punitive damages, even though it might also be interpreted as direct evidence of a defect.[86] Once again, as long as there is an admissible purpose for the evidence, it will be admitted despite Rule 407 of Evidence and Arizona Revised

80. The California Court of Appeals held that evidence that profit took priority over safety in the decison-making process of the company was admissible. *Id.* at 790. Evidence of tests showing a similar but not identical defect in other Ford cars was admissible. *Id.* at 791. Evidence of design changes in unrelated automobiles was admissible to show feasibility. *Id.*

81. *Id.* at 819.

82. CAL. CIVIL CODE. § 3294 (West 1970 & Supp. 1987).

83. *Grimshaw*, 119 Cal. App. 3d at 811-14; 174 Cal. Rptr. at 382-84.

84. Slip Op. No. 2 CA-CIV 5595 (Petition for Review Granted, Slip. Op. No. CV 86-0321, April 2, 1986).

85. Slip Op. No. CV 86-0321 PR (April 2, 1986).

86. Slip Op. No. 2 CA-CIV 5595.

Statute section 12-686(2).[87]

Viewing the evidence most favorably to sustain the verdict, the Arizona Court of Appeals held that the Coleman Company knew for twenty years that its stove could squirt gas and someone could be burned.[88] The likelihood of serious harm was substantial and despite this knowledge, Coleman did not recall the product or warn prior purchasers. The only remedial effort made by Coleman was to substitute a safer cap on subsequently manufactured stoves. The court of appeals found this evidence adequate to sustain the jury's punitive damage award.

The Arizona Supreme Court in accepting the defendant's Petition for Review in *Volz* specifically asked the parties to file supplemental briefs addressing whether the new evil mind standard is met under the facts of this case. This case is likely to result in a much clearer understanding of the right to punitive damages in the product liability field.

CONSTITUTIONAL CHALLENGES TO PUNITIVE DAMAGES

Although as of this moment, punitive damages continue to have vitality in Arizona and other jurisdictions, the area where they are most vulnerable to extinction is in the constitutional law field. In *Aetna Life Insurance Company v. Lavoie*,[89] the United States Supreme Court was asked to decide the constitutionality of punitive damages in civil cases. Although this specific issue was not ruled upon in that decision, the Court recognized that "these arguments raise important issues which, in an appropriate setting, must be resolved. . ."[90]

The crux of the constitutional challenge is that punitive damages are criminal in nature. Our own Arizona Supreme Court has said as much.[91] Punitive damages, like criminal sanctions, are designed to further the public policy of punishment and deterrence.[92] This being the case, defendants argue that they are entitled to all of the constitutional safeguards offered criminal defendants,[93] most notably the fifth amendment right to due process[94]

87. See *supra* notes 68-72 & 75-76 and accompanying text.

88. Slip Op. No. 2 CA-CIV 5595. On appeal, defendants complained that Coleman's knowledge was of a propensity to squirt gas in a scenario dissimilar to the one plaintiff claimed existed when her injury occurred. Nonetheless, the court of appeals held that the knowledge which defendant must possess need only be of the general dangerous characteristics and not the specific characteristics which caused the injury to plaintiff. Slip Op. No. 2 CA-CIV 5595. *See also* Rossell v. Volkswagon, 147 Ariz. 160, 709 P.2d 533 (Ct. App. 1984).

89. 106 S. Ct. 1580 (1986).

90. *Id.* at 1589.

91. Gurule v. Illinois Mut. Life & Casualty Co., 152 Ariz. at 601, 734 P.2d at 86.

92. *Id.*

93. It has been argued that punitive damages are criminal in nature and therefore violate the following defendant's rights: 1) proof beyond a reasonable doubt; 2) protection against double jeopardy; 3) privilege against self-incrimination; 4) conviction by a unanimous jury; 5) due process; 6) prohibition against unreasonable search and seizure; 7) requirement that the police have probable cause; 8) indictment by a grand jury; 9) speedy trial; 10) prohibition against excessive fines. Challenging the violation of these rights may constitute affirmative defenses. Preservation of these challenges probably requires that they be alleged in the answer to a complaint alleging punitive damages.

The United States Supreme Court has already held that where a civil sanction is designed to punish, the procedural safeguards of the fifth and sixth amendment must apply. Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

94. U.S. CONST. amend. XIV.

and eighth amendment protection against excessive fines.[95] These consitutional safeguards are lacking, defendants argue, when a jury is entitled to award punitive damages without adequate guidelines and constrictions designed to assure that the defendant's conduct truly warrants punitive damages and that the amount of damages assesssed is proportionate to the actual harm caused by the conduct.[96] In other words, the conduct must warrant punishment and the punishment must fit the crime.

In response, plaintiffs argue that punitive damages are only "quasi-criminal" in nature and have their true historical and public policy groundings in state tort law. The Supreme Court has long recognized that the states have a significant interest in defining and regulating tort law.[97] Further, the eighth amendment excessive fines provision has been specifically interpreted as only controlling federal courts in their exercise of criminal jurisdiction.[98] The case to watch for a pronouncement on the constitutionality of punitive damages is *Banker's Life v. Crenshaw*.[99]

If the Court does find these constitutional safeguards applicable to punitive damage awards, the law of each individual state must then be examined to determine whether or not the safeguards are in fact adequately preserved. In this regard, as a result of *Rawlings* and *Linthicum*, Arizona has a better chance than most states of having its punitive damage law upheld as complying with the due process clause. Requirements of due process are probably adequately protected in Arizona in light of the "evil mind" standard and the requirement that punitive damages be proven by "clear and convincing" evidence. Arizona juries do not have wide latitude and discretion to award punitive damages without adequate guidelines to assure that the conduct truly warrants punishment.

The more troublesome question is whether or not punitive damages in Arizona nonetheless are vulnerable to attack under the eighth amendment's excessive fines provision.

The Arizona courts have repeatedly refused to require that a punitive damage award bear some proportionate relationship to the general damages awarded in the case.[100] As recently as February, 1987 our supreme court

95. U.S. CONST. amend. VIII. *See infra* note 102.

96. Similarly, the U.S. Supreme Court has held that the punitive damages are not allowed in defamation cases because "jury discretion over the amounts awarded is limited only by the general rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts, bearing no necessary relation to the actual harm caused." Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).

97. Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

98. *See* In Re Walsh, 315 N.Y.S. 2d 59, 64 Misc. 2d 293 (1970). *See also* Ingraham v. Wright, 430 U.S. 651, 669 n.37 (1977).

99. 107 S.Ct. 1367 (1987) (probable jurisdiction noted). In this case the plaintiff sued his insurer for bad faith in the investigation and denial of a claim under his health and accident policy. The jury returned a verdict for $20,000 actual damages and $1.6 million punitive damages. The Mississippi Supreme Court sustained the award based upon a finding that the insurer intentionally failed to fully investigate the claim fearing such an investigation would reveal grounds for paying the claim. Bankers Life & Casualty Co. v. Crenshaw, 483 So. 2d 254, (Miss. 1985), (appeal filed, prob. juris. noted, 107 S. Ct. 1367 (1987)). The primary argument on appeal is that the punitive damage award was excessive and in violation of the eighth amendment.

100. *See, e.g.*, Schmidt v. American Leasco, 139 Ariz. 509, 679 P.2d 532 (Ct. App. 1983); Dodge City Motors, Inc. v. Rogers, 16 Ariz. App. 24, 490 P.2d 853 (1971).

has upheld a punitive damage award of $3.5 million when the general damage award was only $15,000.[101] The safeguards against an excessive award are found in Rules 58(b) and 59(i) of the Arizona Rules of Civil Procedure.[102] Under these rules the court may remit an award if it is determined that the amount was the result of passion and prejudice on behalf of the jury.[103] In practice, this procedure is seldom invoked and in any case is not governed by any rule of proportionality. As such, some guideline for the bench and jury demanding proportionality may ultimately be required if Arizona's punitive damage law is to withstand constitutional challenge.[104]

CONCLUSION

Contrary to immediate popular belief, *Rawlings* and *Linthicum* did not eliminate the availability of punitive damages in Arizona. Granted, the standards are tougher to meet. Nonetheless, because the necessary evil mind can be proven by circumstantial evidence and by inference, punitive damages will continue to be awarded in a wide variety of cases. Specifically the area of bad faith and other business torts, fraud and dishonest dealings, drunk drivers and products liability remain vulnerable to punitive damage awards.

Punitive damages serve an important public policy of punishing wrongdoers and deterring future misconduct. For this very reason, however, they are criminal in nature and cannot be awarded unless the defendant's rights

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101. Hawkins v. Allstate Ins. Co., 152 Ariz. 490, 733 P.2d 1073 (1987).

102. When a motion for new trial is made upon the ground that the damages awarded are either excessive or insufficient, the court may grant the new trial conditionally upon the filing within the fixed period of time of a statement by the party adversely affected by reduction or increase of damages accepting that amount of damages which the court shall designate. If such a statement is filed within the prescribed time, the motion for new trial shall be regarded as of the date of such filing. If no statement is filed, the motion for new trial shall be regarded as granted as of the date of the expiration of the time period within which a statement could have been filed. No further written order shall be required to make an order granting or denying the new trial final. If the conditional order of the court requires reduction of or increase in damages, the new trial will be granted in respect of the damages only and the verdict shall stand in all other respects.

Ariz. R. Civ. Proc. 59(i)(1)(1973). Rule 59(b) provides that a plaintiff may remit any part of a verdict or judgment on his own motion. Ariz. R. Civ. Proc. 58(b) (1973).

103. *See e.g.*, Waqui v. Tanner Bros. Contracting Co., 121 Ariz. 323, 589 P.2d 1351 (Ct. App. 1978).

104. The United States Court of Appeals for the Ninth Circuit has, in fact, articulated the type of considerations which must be made when evaluating whether or not the amount of damages awarded in any given case violate the eighth amendment:

> The district court must consider (1) the harshness of the penalty in light of the gravity of the offense, (2) sentences imposed for other offenses in the federal system, and (3) sentences imposed for the same or similar offenses in other jurisdictions. The court may consider the circumstances surrounding the defendant's criminal conduct. In considering the gravity of the offense, a court should look both at the harm suffered by the victim and the defendant's culpability. In considering the harm caused by a defendant's conduct, it is certainly appropriate to take into account its magnitude: The dollar volume of the loss caused, whether physical harm to persons was inflicted, threatened, or risked, and whether the crime has severe collateral consequences. The court may also consider the benefit reaped by the defendant. However, the forefeiture is not unconstitutional because it exceeds the harm to the victims benefit to the defendant. After all RICO's forfeiture provisions are intended to be punitive.

United States v. Busher, 817 F.2d 1409 (9th Cir. 1987). Although this pronouncement was made in a RICO case, it is illustrative of the pertinent points in evaluating the constitutional challenges to punitive damages.

to due process and protection against excessive fines have been sufficiently guaranteed.

Ironically, *Rawlings* and *Linthicum* were first seen as the death knell to punitive damages in Arizona. In the final analysis, these very decisions may preserve the viability of punitive damages against constitutional attack.