

The Status of Trial Lawyers, Punitive Damages and the Public Interest
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Court clogging, market obstructing, fee bloated – the public image of trial lawyers is not a pretty one. Of course, this image, for the most part, has been manufactured by the large corporations against whom we often litigate, and whose resources for addressing the public far exceed ours. Nonetheless, a significant portion of the public recognizes that trial lawyers – and often only trial lawyers -- advance the public interest by holding large corporations accountable for their acts of malfeasance.

One way we can improve public perception of trial lawyers is to enhance this favorable side of our image by actually strengthening our capacity to secure corporate accountability. Enacting punitive damages in Washington could achieve this end. On its face, it is difficult to imagine anything Washington trial lawyers could do to worsen still our public image than to be linked to – much less campaign for -- punitive damages.

After all, one of the principal reasons Washington currently does not allow recovery of punitive damages is that they provide an unfair windfall to victims – and inferentially, to the trial attorneys who would share in them. Nor is this notion frivolous. By definition, punitive damages are damages in excess of the amount required to make the plaintiff whole. However, as explained below, this objection is easily overcome, since punitive damages need not accrue to plaintiffs or their counsel.

Moreover, and crucially, the windfall concern addresses only one side of the story. Punitive damages serve a valuable social function, which is to deter intentional and reckless lawlessness that subjects the public to serious financial loss, personal injury and even death. In fact, if we are correct in assuming that market forces affect conduct, the absence of punitive damages undoubtedly deprives the people of Washington of an important – and perhaps essential – law enforcement tool.

The reason is that the “white collar” lawlessness, which typically forms the predicate of lawsuits that could result in punitive damages, usually goes unpunished by government. Even lawless commercial conduct that may amount to a felony, such as marketing a product with a potentially lethal and intentionally concealed defect, is rarely prosecuted. The criminal prosecutions in the Enron case are the exception, not the rule. The infrequency of government law enforcement in such cases undoubtedly reflects both the scarcity of public litigation resources and the considerable political influence of many of the larger corporate lawbreakers. Neither of these conditions is likely to change in the near future.

Thus, from the perspective of the bottom line, deliberately breaking the law sometimes can be the optimal course of conduct. In such cases, neither the risk of significant governmental sanction nor the episodic payment of compensatory damages is sufficiently costly to offset the profit to be made by avoiding the expense of making the product safe.

If punitive damages are added to the equation, that calculation changes. Since punitive damages may substantially exceed the amount of loss suffered by the victim, the profit in lawless conduct commensurately decreases. Market driven lawlessness, therefore, also declines. So, were plaintiffs, and their trial lawyers, able to obtain punitive damages from the most blameworthy lawbreakers, they would clearly advance a public interest in law enforcement that currently is largely unprotected.

The windfall typically yielded by punitive damages may be avoided by changing the recipient of the punitive damages. Several states that permit punitive damages, including Oregon, Illinois and -- at least for a limited time-- California, require a portion of punitive damages awarded be directed to the public treasury. There is no reason Washington could not take this one step further -- enacting a punitive damage statute requiring the entirety of any such award go to the public treasury, or perhaps to some specific public agency for child care, health care, education or one of our many other grossly underfunded public services. Such a punitive damage measure likely would contribute tens of millions of dollars annually to public services in Washington.

Thus, litigating under such a punitive damage regime not only would strengthen the contribution of trial lawyers to law enforcement, it also would result in our providing a significant contribution to the public treasury. Practicing law to such effect could not help but significantly benefit the public image of trial lawyers as well.

There is still one clear problem with such a punitive damage system -- motivating anyone to use it. Recovering punitive damages generally increases the burden of proof on plaintiffs, which means it increases the demands on plaintiffs and their counsel. If they are to receive no share of the punitive damages, and thus no compensation for the additional work and risk required by their procurement, it is difficult to imagine plaintiffs often would go to the trouble of seeking punitive damages.

This problem could be solved by including a fee shifting provision in the punitive damages measure. There is ample precedent for such a provision. The Washington Law Against Discrimination, for example, grants prevailing plaintiffs their attorney fees in addition to any other relief they might obtain. The fee shifting is justified on the grounds that the litigation vindicates an important public interest extending beyond the rights of the individual plaintiff. Certainly, the deterrence and punishment of wanton injury causing lawlessness also may fairly be so characterized. Thus, incentive for plaintiffs to seek punitive damages they will not receive need not be a problem.

Enactment of a punitive damage measure along the lines sketched above is both practical and desirable as a matter of public policy. Moreover, its enactment would enable us as trial lawyers to enhance our contribution to the public interest --one of the reasons most of us chose to practice law in the first place -- and at the same time help us to rectify our public image.