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UNDERINSURED MOTORIST INSURANCE COVERAGE FOR AMOUNTS AWARDED AS PUNITIVE DAMAGES IN A SUIT AGAINST THE TORTFEASOR: DELVING INTO THE DILEMMA CREATED BY DIVERGING PUBLIC POLICIES AND PRIVATE INTERESTS

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I. INTRODUCTION

Every year, legal actions for damages—including thousands of suits resulting from motor vehicle accidents—are initiated against entities or individuals as a result of tortious acts causing injuries. Sometimes such tort claims request awards of punitive[1] (or, as such judgments are frequently characterized, exemplary) damages in addition to compensatory damages. When punitive damages have been imposed, numerous disputes have occurred involving whether a tortfeasor is entitled to be indemnified by liability insurance for that portion of the judgment.[2] More recently, several courts have addressed a similar, though dis-

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1. In the United States, punitive damages may be awarded when the tortious conduct was intentional, malicious, reckless, wanton, or particularly oppressive. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 9 (5th ed. 1984) ("Such damages are given to the plaintiff over and above the full compensation for the injuries for the purpose of punishing the defendant, of teaching the defendant not to do it again, and deterring others."); 6B JOHN A. APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE § 4312 (Buckley ed. 1979). Judges use phrases such as "wanton disregard of the consequences," "outrageous behavior," and "willful neglect" to describe the types of circumstances justifying an award of punitive damages. *Id.*; *see also* JAMES D. GHIARDI & JOHN J. KIRCHER, PUNITIVE DAMAGES: LAW AND PRACTICE § 1.01 (1985); *Symposium: Punitive Damages*, 56 U.S.F. L. REV. 1 (1982).

Ancient legal codes provided for punitive damages. For example, the Code of Hammurabi, § 107 states:

> If a merchant [has] cheated the agent, and the agent [has] returned already all which the merchant had given him, but the merchant den[ies] having received what was returned to him, then the agent shall accuse the merchant before God and witnesses. The merchant because he denied having received all that he had received, *shall pay the agent six times the amount.*

ALBERT KOCOUREK & JOHN H. WIGMORE, SOURCES OF ANCIENT AND PRIMITIVE LAW 387, 391 (1915), *reprinted in* HISTORICAL REPRINTS IN JURISPRUDENCE AND CLASSICAL LEGAL LITERATURE 407 (Benard D. Reams ed., 1994) (emphasis added).

2. *See* John D. Boyle & Michael R. O'Malley, *Insurance Coverage for Punitive Damages and Intentional Conduct in Massachusetts*, 25 NEW ENG. L. REV. 827 (1991); Scott Conely & David J. Bishop, *Punitive Damages and the General Liability Policy*, 25 FED'N INS. COUNS. Q. 309 (1975); Dorsey D. Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 71-76 (1982); Grace M. Giesel, *The Knowledge of Insurers and the Posture of the Parties in the Determination of the Insurability of Punitive Damages*, 39 KAN. L. REV. 355 (1991); Katherine B. Posner, *Coverage for Punitive Damages: Choice of Law Shell Game*, 60 DEF. COUNS.

tinguishable, question in regard to whether coverage is afforded by underinsured motorist insurance for punitive damages assessed against a tortfeasor adjudged legally responsible for injuries resulting from a motor vehicle accident.[3]

Underinsured motorist insurance provides individuals with indemnification in the event a negligent motorist is not adequately insured for damages resulting from a motor vehicle accident.[4] The importance increasingly attached to this type of insurance—by governmental officials, as well as by the public—is clearly indicated by the fact that it is now the subject of legislative requirements in approximately two-thirds of the states.[5] The statutory provisions generally have been integrated into the state's uninsured motorist legislation by modifying the definition of an "uninsured motor vehicle" or an "uninsured motorist."[6]

Insurers have rejected claims by insureds seeking indemnification from underinsured motorist insurance for amounts awarded as punitive damages on the premise that coverage for punitive damages is not within the scope of the protection provided by underinsured motorist insurance.[7] Although appellate court decisions in several states had previously addressed the comparable issue about whether *un*insured motorist insurance provides coverage for punitive damages, the introduction of *under*insured motorist insurance with much higher coverage limits—as much as several million dollars—now means the question is sometimes one of considerably greater significance to both insurers and insureds.[8]

Disagreements between insurers and insureds about whether coverage is provided by insurance policies are not uncommon. Each year hundreds of judicial decisions resolve such disputes. Frequently, judges decide issues about

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J. 399 (1993); George L. Priest, *Insurability and Punitive Damages*, 40 ALA. L. REV. 1009 (1989); Paul D. Seyferth, *The Construction and Admissibility of Insurance Policies that Provide Coverage for Punitive Damage Awards*, 7 ALASKA L. REV. 71 (1990); Debora S. Beck, Note, *An Overview of the Insurability of Punitive Damages Under General Liability Policies*, 33 BAYLOR L. REV. 203 (1981); Theodore Fisher, Note, *Insurance Coverage and the Punitive Award in the Automobile Accident Suit*, 19 U. PITT. L. REV. 144 (1957); S. Loyd Neal, Comment, *Punitive Damages: Suggested Reform for an Insurance Problem*, 18 ST. MARY'S L.J. 1019 (1987); Michael A. Rosenhouse, Annotation, *Liability Insurance Coverage as Extending to Liability for Punitive or Exemplary Damages*, 16 A.L.R.4th 11 (1982).

3. *See infra* parts II and III.

4. An "underinsured motor vehicle" is defined as "a land motor vehicle or trailer of any type to which a bodily injury liability bond or policy applies at the time of the accident but its limit for bodily injury *is less than the limit of liability for this coverage.*" For example, see the standard form prepared by the INSURANCE SERVICES OFFICE (on file with the *Drake Law Review*).

5. For example, see IOWA CODE ch. 516A, entitled Uninsured, Underinsured or Hit-and-Run Motorists (1994); AMERICAN INSURANCE ASSOCIATION, SUMMARY OF SELECTED STATE LAWS AND REGULATIONS RELATING TO AUTO INSURANCE 19-31 (1994).

6. For a state-by state summary see Table of Limits, FIRE, CASUALTY & SURETY BULLETINS (Nat'l Underwriter Co. 1994).

7. *See* 1 ALAN I. WIDISS, UNINSURED AND UNDERINSURED MOTORIST INSURANCE § 12.6 (2d ed. 1992).

8. Uninsured motorist insurance was issued by virtually all insurance companies with limits of liability that corresponded to the minimum requirements for liability insurance set forth in the state's financial responsibility law. The most common coverage limits were $10,000 in the event a single person is injured in an accident and $20,000 per occurrence when more than one individual is injured in the accident. *See* AMERICAN INSURANCE ASSOCIATION, *supra* note 5.

whether coverage exists which result in interpretations of insurance policy terms that extend doctrines and rules.[9] However, when a coverage issue involves an indemnification claim for amounts awarded as punitive damages, some interests[10] militate against applying or adopting an approach that would sustain an insured's right to recover from an insurer.[11]

Underinsured motorist insurance provides compensatory benefits to an injured person without affecting the tortfeasor's liability or responsibility to persons who sustained injuries.[12] Because such insurance benefits do not affect the extent of the tortfeasor's liability, a dispute whether this type of insurance does or should provide coverage for amounts awarded as punitive damages presents a question that is appropriately distinguished from the issue courts confront when an insured tortfeasor seeks to be indemnified by an insurer for such liability.

Even though the resolution of coverage questions about underinsured motorist insurance involves considerations that differ from those applying to liability insurance, judicial decisions about whether underinsured or uninsured motorist insurance encompasses punitive damages have frequently been influenced by the precedents established in cases involving liability insurance.[13] Moreover, legislation adopted in several states, which was probably only intended to address questions about liability coverage for punitive damages, has

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9. *See* ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES §§ 6.1 to 6.9(e) (practioner's ed. 1988).

10. *Cf.* Mazza v. Medical Mut. Ins. Co., 319 S.E.2d 217, 221 (N.C. 1984).

> Medical Mutual, in advancing its "public policy" argument, seems to ignore the proposition that the concept of "public policy" involves not one simplistic rule, but various competing doctrines. In this case, the law of contracts and the "public policy" doctrines encompassing that body of law, compete with the defendant's tort related "public policy" argument.

Id.; *see also* Stonewall Surplus Lines Ins. Co. v. Johnson Controls, Inc., 17 Cal. Rptr. 2d 713, 717 (Cal. Ct. App. 1993). In *Stonewall*, the court, after noting "the Wisconsin Supreme Court found . . . public policy did not prevent indemnity for punitive damages," observed:

> This state has more than one public policy. Another and countervailing public policy favors freedom of contract, in the absence of overriding reasons for depriving the parties of that freedom. Still another public policy favors the enforcement of insurance contracts according to their terms, where the insurance company accepts the premium and reasonably represents or implies . . . coverage is provided.

Id.

11. "The better position is that, absent specific language in the policy extending coverage for punitive damages, no coverage exists for such damages as it is against public policy to allow the insured wrongdoer to shift the burden of payment of punitives to its insurer." 15A GEORGE J. COUCH, COUCH CYCLOPEDIA OF INSURANCE LAW § 56:9 (2d ed. 1985).

12. Underinsured motorist insurance policies typically provide that the insurer will pay under this coverage only after the limits of liability under any applicable bodily injury liability bonds or policies have been exhausted by payment of judgments or settlements. *See, e.g.*, INSURANCE SERVICES OFFICE, INC., UNDERINSURED MOTORISTS INSURANCE POLICY FORM PP03 11 (1993) (on file with the *Drake Law Review*) [hereinafter INSURANCE SERVICES OFFICE].

13. *See infra* parts III(A) and III(B).

also been viewed by some judges as significant to disputes about whether underinsured motorist insurance policies provide coverage for punitive damages.[14]

Consequently, when punitive damages are awarded to a claimant injured in an occurrence involving an underinsured motorist, in determining if there is a right to indemnification from an insurer providing underinsured motorist insurance, initially it is essential to consider (1) whether judicial decisions involving liability insurance establish precedents which will be applied to a dispute involving underinsured motorist insurance (for example, coverage is limited to injuries resulting from accidents and is therefore precluded because the award is the result of injuries caused by an intentional tortious act); and (2) whether state legislation imposes a restriction on coverage for punitive damages generally or for specific types of situations including underinsured motorist insurance.[15]

In addition, the insurance policy forms used by some insurance companies include terms expressly excluding coverage for amounts awarded as punitive damages.[16] It is also essential, therefore, to ascertain whether an enforceable provision in the applicable insurance policy terms explicitly excludes coverage for punitive damages. Furthermore, in some states, courts impose an implied coverage restriction on a public policy basis, thereby precluding indemnification by insurers for punitive damages.[17] Judicial precedents employing one or more of these justifications for affirming an insurance company's rejection of a claim are briefly surveyed in Part I of this article.

In several states, courts have sustained an insured's claim for coverage by underinsured or uninsured motorist insurance for an amount imposed as punitive damages on a tortfeasor.[18] Those decisions have been rendered in a context in which there is a significant and, at least to some extent, conflicting array of public and private interests.[19] The material in Part II of this article focuses on the rationales articulated by courts and competing interests that apply when there is a coverage dispute.

II. JUSTIFICATIONS FOR REJECTING CLAIMS FOR PUNITIVE DAMAGES

A. *Insurance Policy Provisions Limit Coverage to Injuries Resulting from "Accidents"*

Insurance generally does not provide indemnification when an occurrence is not fortuitous,[20] and the proposition that only the consequences of fortuitous

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14. *See infra* part II(C).
15. *See infra* parts II and III.
16. *See infra* part II(B).
17. *See infra* part II(D).
18. *See infra* parts III(A), III(B) and III(C).
19. *See infra* parts III and IV.
20. Fortuity, or the lack thereof, is primarily a matter of intent. *See* KEETON & WIDISS, *supra* note 9, §§ 5.3(f), 5.4(d). Accordingly, it is important to bear in mind in insurance law, as in tort law, questions about intent generally focus on the consequences, not the acts. *See id.* § 5.3(a). The principle that insurance should only be employed to transfer risks associated with fortuitous

events are insurable losses is widely viewed as a fundamental principle of insurance.[21] For example, if punitive damages are awarded because a tortfeasor has intentionally caused an injury, a tortfeasor's right to be indemnified under a liability insurance policy is usually foreclosed by express provisions in the insurance contract.[22] Furthermore, if there is no explicit provision, coverage may still be precluded as a result of implied restrictions imposed by courts.[23]

The policy forms used by insurers for underinsured motorist insurance include a clause in the basic description of the coverage stating the insurer will only pay damages for which an insured becomes legally responsible because of bodily injury *caused by an accident*.[24] Thus, the policy terms used for underinsured motorist insurance—stating coverage is provided for injuries resulting from accidents—provide a basis for concluding that there is no right to recover punitive damages from the insurer when those damages are awarded in cases in which the evidence showed an insured intentionally caused the injuries.[25] Although this rationale has been employed in several instances by judges in regard to claims for uninsured motorist insurance benefits, it has rarely—if ever—been applied to a dispute about underinsured motorist coverage for punitive damages.

B. *Insurance Policy Provisions Expressly Precluding Coverage for Punitive Damages*

The policy forms used by some insurers for underinsured motorist, uninsured motorist, or liability insurance include clauses specifying no coverage

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occurrences means liability coverage does not apply when injuries are the result of an intentional tortious act. *See id.* §§ 5.3(f), 5.4(d).

21. *See, e.g.*, Ranger Ins. Co. v. Bal Harbour Club, Inc., 549 So. 2d 1005, 1007 (Fla. 1989) ("It is axiomatic in the insurance industry that one should not be able to insure against one's own intentional misconduct."); *see also* 12 APPLEMAN & APPLEMAN, *supra* note 1, § 7031 ("[I]t is the general rule that it is contrary to public policy to insure against the purposeful consequences of an intended act . . ."); 9 COUCH, *supra* note 11, § 39:15, at 506-07 ("It is generally held to be contrary to public policy to insure against liability arising directly against the insured from his willful wrong."); RICHARDS ON THE LAW OF INSURANCE (6th ed. 1990) ("It is universally recognized . . . an implied exception to coverage under any form of insurance is an intentional or expected injury, damage or loss. Insurance, by its very definition, covers injury, damage or loss which is fortuitous and not within the control of the insurer or the insured.").

22. Liability insurance policies usually include provisions—including explicit coverage limitations contained in the contract between the insurer and the insured—stating that losses intentionally caused by an insured are not covered . . . that the insurer will pay damages for which an insured (or, in many of the newer forms, a "covered person") becomes legally responsible *because of an accident*. KEETON & WIDISS, *supra* note 9 § 5.4(d); FIRE, CASUALTY & SURETY BULLETINS, *supra* note 6; *see also* 9 COUCH, *supra* note 11, § 39:15 ("Any insurance which purports to protect the insured against any loss which he may purposely and willfully cause, or which may arise from his immoral, fraudulent, or felonious conduct, is void as against public policy.").

23. *See* KEETON & WIDISS, *supra* note 9, § 5.4; *see also* WILLIAM L. PROSSER & W. PAGE KEETON, THE LAW OF TORTS § 8 (5th ed. 1984) ("There is a definite tendency to impose greater responsibility upon a defendant whose conduct was intended to do harm, or was morally wrong.").

24. *See* 3 WIDISS, *supra* note 7, § 34.1 (2d ed. 1992).

25. *See* 1 *id.* § 10 (2d ed. 1990) (covering terms which specify insurance is provided for "accidents").

exists for punitive damages. The provisions limiting coverage in liability insurance policy forms are often unmistakably clear and unambiguous: "This insurance does not apply to . . . [p]unitive or exemplary damages or any fine, penalty or claim for return of fees."[26] Similar provisions are commonly included in underinsured and uninsured motorist insurance forms: "We do not provide Uninsured/Underinsured Motorists Coverage for punitive or exemplary damages."[27]

Provisions in liability insurance policies which specify coverage is not provided for injuries resulting from intentional acts, are clearly in accord with the view that public policy prohibits the use of insurance to provide indemnification for civil tort liability resulting from an insured's intentional wrongdoing.[28] The provisions are also in accord with the view that punitive damages are imposed as a punishment or a deterrent and, therefore, the responsibility for payment should be borne by the tortfeasor.[29] However, considerations arising from concerns about punishment or deterrence are not relevant to questions about the enforceability of such a coverage limitation in underinsured or uninsured motorist insurance because tortfeasors do not benefit from payments of underinsured motorist insurance made directly to injured persons.

1. *Coverage Disputes in States that Have Adopted Statutory Mandates for Underinsured Motorist Insurance*

In approximately two-thirds of the states, legislative mandates have been adopted requiring insurance companies to offer underinsured motorist coverage to purchasers.[30] The objective of these statutory requirements is to allow insurance purchasers to acquire coverage that provides compensation when a tortfeasor's liability insurance is insufficient.[31] Courts in many states have commented on the public interests or objectives underlying the legislative man-

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26. 3 *id.* § 39.3 (2d ed. 1990); *see also* Continental Casualty Co. v. Kinsey, 499 N.W.2d 574, 577 (N.D. 1993) (holding that ambiguous language in an insurance contract obligated the insurance company to pay punitive damages).

27. 3 WIDISS, *supra* note 7, § 39.3 (2d ed. 1992).

28. *Cf.* Crull v. Gleb, 382 S.W.2d 17, 23 (Mo. Ct. App. 1964) ("[I]t seems only just that the burden of paying punitive damages should rest ultimately, as well as nominally, on the party who actually committed the wrong. If the defendant was permitted to shift . . . the burden of the punitive damage award, then the award would have served no purpose."). If an insured's tortious conduct warrants a denial of coverage on the basis of explicit provisions in liability insurance policies that apply when damages result from an intentional tort, it follows that coverage for punitive damages awarded as a consequence of such acts, as well as for compensatory damages, is not within the scope of the protection afforded by liability insurance. *Id.*

29. *Id.*

30. *See* AMERICAN INSURANCE ASSOCIATION, *supra* note 5.

31. For a discussion of when a motorist is "underinsured," see ALAN I. WIDISS, UNINSURED AND UNDERINSURED MOTORIST INSURANCE § 35.2 (1995).

dates establishing requirements for underinsured motorist insurance.[32] The goal of such statutes is well characterized by the comments of the New Mexico

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32. Ariz.: Campbell v. Farmers Ins. Co., 745 P.2d 160, 163 (Ariz. Ct. App. 1987) The purpose of underinsured coverage 'is to permit the insured to recover for damages caused by a negligent motorist as if the motorist had carried liability insurance' and to protect the insured and his family and passengers against injury caused by another driver with insufficient liability insurance. *Id.* (quoting Preferred Risk Mut. Ins. Co. v. Tank, 703 P.2d 580, 582 (Ariz. Ct. App. 1985)).

Iowa: Hernandez v. Farmers Ins. Co., 460 N.W.2d 842, 844 (Iowa 1990).

> Under the Iowa statute, uninsured and underinsured motorist coverage must be offered as a part of each automobile liability insurance policy. However, insurers may include in their policies terms, exclusions, limitations, conditions, and offsets which are designed to avoid duplication of insurance or other benefits. With both types of coverage we find no duplication of benefits until the purpose of the coverage has been met. In *Lemrick* . . . we held an "other insurance" clause to be invalid because the enforcement of its provisions would have frustrated the purpose of uninsured motorist coverage, *which is minimum compensation.* The purpose of underinsured motorist coverage *is aimed at full compensation of the victim.* Accordingly, we see no duplication of benefits until the victim has been *fully compensated.*

Id. (citations omitted) (emphasis added); *see* IOWA CODE § 516A.2 (1995).

Kan.: Rich v. Farm Bureau Mut. Ins. Co., 824 P.2d 955, 959 (Kan. 1992).

> 1. The purpose of legislation mandating the offer of uninsured and underinsured motorist coverage is to fill the gap inherent in motor vehicle financial responsibility and compulsory insurance legislation. This coverage is intended to provide recompense to innocent persons who are damaged through the wrongful conduct of motorists who, because they are uninsured or underinsured and not financially responsible, cannot be made to respond in damages.
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> 2. The uninsured and underinsured motorist statutes are remedial in nature. They should be liberally construed to provide a broad protection to the insured against all damages resulting from bodily injuries sustained by the insured that are caused by an automobile accident and arise out of the ownership, maintenance, or use of the insured motor vehicle, where those damages are caused by the acts of an uninsured or underinsured motorist.

Id.

La.: Washington v. Savoie, 607 So. 2d 704, 706-07 (La. Ct. App. 1992), *rev'd*, 634 So. 2d 1176 (La. 1994).

> In Louisiana, uninsured [and underinsured] motorist coverage is provided for by statute . . . and embodies a strong public policy. . . . The statute is designed to promote recovery of damages for innocent automobile accident victims by making uninsured motorist coverage available for their benefit as primary protection, when the tortfeasor is without insurance, and as additional or excess coverage, when he is inadequately insured. To carry out this objective, the Louisiana Supreme Court has liberally construed the statute.

Id.

N.M.: Gonzales v. Millers Casualty Ins. Co., 923 F.2d 1417, 1420 (10th Cir. 1991).

> The court turned for guidance to the objectives underlying § 66-5-301(b) and noted that the statute was designed to compensate victims of inadequately insured motorists, and more specifically, to put the injured insured in the same position the insured would have occupied had the tortfeasor had liability coverage equal to the insured's underinsured motorist coverage. According to the

Supreme Court, which observed "that in expanding uninsured motorist coverage to include underinsured motorist coverage, the legislature manifested the intent to compensate the innocent victims of inadequately insured drivers."[33]

The enforceability of provisions excluding coverage for punitive damages will almost certainly be challenged on the ground that such a limitation conflicts with the public interest manifested by a state's statutory mandate establishing requirements for underinsured motorist insurance. Clearly, the legislative mandates manifest a significant public interest in assuring indemnification for individuals who sustain injuries as a result of the negligent operation of motor vehicles. In virtually all states, however, punitive damages are not awarded in order to indemnify an injured person.[34] Therefore, absent an explicit statement in the applicable statute indicating the legislative intent encompasses coverage for punitive damages, exclusion of coverage for punitive damages does not conflict with the public interest underlying the statutory mandates. Thus, in these states there is little, if any, reason to require an insurer to provide coverage for punitive damages in an underinsured motorist's insurance policy. Therefore, provisions

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> district court, in practical terms these objectives . . . were furthered in the multiple claimant context by construing the statute so that the measure of liability coverage for purposes of the underinsured motorist determinations was the amount of liability proceeds actually available to an injured insured.

Id.

Ohio: Hill v. Allstate Ins. Co., 553 N.E.2d 658, 661 (Ohio 1990), *overruled on other grounds by* Savoie v. Grange Mut. Ins. Co., 620 N.E.2d 809 (Ohio 1993).

> Underinsured motorist coverage is an option by which an insured may voluntarily predetermine the amount of insurance he desires to protect him in the event of injury by a negligent motorist who has liability insurance in an amount *less* than that predetermined amount. This is in line with the public policy considerations of assuring that those persons injured by an underinsured motorist would receive at least the same amount of total compensation as they would have received had they been injured by an uninsured motorist.

Id.; *see also* Nationwide Ins. Co. v. Johnson, 616 N.E.2d 525, 528 (Ohio Ct. App. 1992).

> The purpose of the statute is clear and unequivocal: to provide uninsured and underinsured motorist coverage for injured persons who have a legal cause of action against a tortfeasor, but who are uncompensated because the tortfeasor is either (1) not covered by liability insurance, or (2) covered in an amount that is less than the insured's uninsured motorist coverage.

Id.

Okla.: State Farm Auto. Ins. Co. v. Greer, 777 P.2d 941, 943 (Okla. 1989) ("An insured must be allowed to look to the insurer when the liability limits of a negligent motorist prevent the insured from recovering fully from the injuries suffered.").

W. Va.: State Auto. Mut. Ins. Co. v. Youler, 396 S.E.2d 737, 745 (W. Va. 1990) ("[T]he legislature has articulated a public policy . . . . [T]he injured person [will] be *fully compensated* for his or her *damages* not compensated by a negligent tortfeasor, up to the limits of the uninsured or underinsured motorist coverage.") (emphasis in original).

33. Konnick v. Farmers Ins. Co., 703 P.2d 889, 891 (N.M. 1985). The court, in its opinion, also observed it was "simply giving effect to the reasonable expectations of . . . the purchaser of the policies . . . [who] would anticipate that the underinsured motorist protection would redound to the benefit of his stepdaughter no matter where she was when injured by an underinsured motorist." *Id.* at 893.

34. *See* KEETON ET AL., *supra* note 1, § 2, at 9.

specifically excluding coverage for punitive damages in underinsured motorist insurance policies will probably be sustained by judges as reasonable coverage limitations.

In a few jurisdictions, punitive damages are still viewed as compensatory.[35] In those few states, consideration should be given to allow recovery from underinsured motorist insurance for amounts which a court identifies as intended to indemnify the injured person.

2. *Coverage Disputes in States with No Statutory Mandate Establishing Requirements for Underinsured Motorist Insurance*

Many insurance companies voluntarily offer underinsured motorist insurance to purchasers in states that have not adopted statutory requirements for such coverages. When coverage issues arise in these states, it should be remembered that the courts may not view the underinsured motorist insurance as imbued with the same public policy interest recognized and applied by many courts in regard to the scope of coverage accorded to the uninsured motorist coverage. This view is well illustrated by the comments of the Idaho Supreme Court:

> [T]he Idaho statutes do not regulate *underinsured* motorist coverage. There are no requirements that insurance carriers offer such *underinsured* coverage. Neither the Idaho legislature nor the courts have declared that there exists a public policy applicable to *underinsured* motorist coverage. While such a policy might be desirable [citations deleted], that public policy should be enunciated by our legislature and not by this Court. Hence, we hold that there is no public policy basis upon which to rule that the language of the exclusion clause presented here is invalid.[36]

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35. *See infra* notes 73-78.

36. Meckert v. Transamerica Ins. Co., 701 P.2d 217, 220 (Idaho 1985). The following states have addressed this issue:

Mont.: Farmers Alliance Mut. Ins. Co. v. Miller, 869 F.2d 509, 514 (9th Cir. 1989).

> Montana has no similar requirement that purchasers be offered underinsured motorist coverage, suggesting that no analogous public policy would be offended if the insurance company were allowed an offset for an amount equal to the liability coverage available for the tortfeasor. The offset clause contained in the Millers' insurance policy is neither ambiguous nor contrary to the public policy of Montana.

Id.

N.C.: Brown v. Truck Ins. Exch., 404 S.E.2d 172, 175 (N.C. Ct. App. 1991) ("But coverage which is in addition to the mandatory requirements of the statute are voluntary and are not subject to the requirements of the Act. Voluntary coverage must be measured by the terms of the policy as written."); Aills v. Nationwide Mut. Ins. Co., 363 S.E.2d 880, 882 (N.C. Ct. App. 1988) ("Underinsured motorists coverage is not required by law (since the insured may reject the coverage), and therefore the terms of the coverage are within the control of the parties. It follows that we look to the insurance contract itself to determine the rights of the parties."); *see also* Nationwide Mut. Ins. Co. v. Massey, 346 S.E.2d 268, 270 (N.C. Ct. App. 1986) ("To the extent coverage provided by motor vehicle liability insurance policies exceeds the mandatory minimum coverage

In states in which underinsured motorist insurance is not subject to statutory mandates, courts usually enforce the plain and ordinary meaning of provisions in an insurance policy form that are unambiguous and easily understood.[37] Thus, a clearly phrased and easily understood exclusion would eliminate the coverage issue in these states.[38]

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required by statute, the additional coverage is voluntary, and is governed by the terms of the insurance contract.").

Penn.: Votedian v. General Accident Fire & Life Assurance Co., 478 A.2d 1324, 1327-28 (Pa. Super. Ct. 1984).

> Underinsured motorist coverage is not the same as uninsured motorist coverage. The Uninsured Motorist Coverage Act does not require underinsured motorist coverage; the statute contains no reference to and does not seek to regulate . . . underinsured motorist coverage. . . . When underinsured motorist coverage is included, the terms and limitations thereof are not controlled by statute or by public policy but by the agreement reached by the parties. That agreement, as expressed in the policy of insurance, may place limitations upon underinsured motorist coverage, subject only to the requirement that the limitation be clearly worded and conspicuously displayed . . . . A court . . . will not rewrite an agreement reached by the parties which prevents the cumulation of liability limits according to the number of vehicles insured. The limitation on stacking contained in the instant policy violated no public policy; and, therefore, the contract must be enforced according to its express and unambiguous terms.

Id. Effective October 1, 1984, however, Pennsylvania legislation requires that future motor vehicle policies shall not be "delivered or issued for delivery" within the state unless both uninsured and underinsured motorist coverage are offered. *Id.* at 1327 n.3; *see also* PA. STAT. ANN., tit. 75, § 1731 (a) (1994) (requiring motor vehicle liability insurance delivered in the state to offer optional uninsured and underinsured motorist coverages).

W. Va.: Transamerica Ins. Co. v. Arbogast, 662 F. Supp. 164, 170 (N.D. W. Va. 1987).

> As to the public policy aspect herein, it is quite clear that the underinsurance coverage provisions of 33-6-31 are not mandatory in nature and create no specific mandatory requirement applicable to insurance underwriters as once did the law regarding uninsured coverage prior to the amendments other than making underinsurance coverage available as an option to West Virginia citizens. Therefore, as underinsurance coverage is not mandatory and the West Virginia Legislature, in 1979, chose to amend this law in paragraph (k), allowing exclusions commensurate with risk involved and the premium charge, no public policy can be said to exist herein to which this exclusion runs contrary given the facts before the Court.

Id.

At the time when the courts addressed the matter before them involving underinsured motorist insurance in the cases cited above, underinsured motorist insurance was not subject to legislative requirements. Subsequently, several states adopted legislation establishing requirements for underinsured motorist coverage.

37. The treatment accorded the coverage provisions in underinsured motorist insurance in such instances is essentially the same as that which courts apply to provisions in other types of insurance. See the discussion in KEETON & WIDISS, *supra* note 9, at § b6.3; *see also* Robert H. Jerry, *General Principles of Contract Interpretation,* UNDERSTANDING INSURANCE LAW 98-103 (1987).

38. *But see* Stinbrink v. Farmers Ins. Co., 803 P.2d 664, 665 (N.M. 1990).

3. *Insurance Policy Terms Specifying Coverage for "Compensatory" Damages*

The coverage terms in some of the underinsured motorist insurance forms now use the term "compensatory damages" rather than "damages" or "sums."[39] Future adjudication will reveal whether courts will view the addition of the word compensatory as a clear and unambiguous term that excludes coverage for punitive damages.

C. *Legislatively Imposed Restrictions on Coverage for Punitive Damages*

In several states there are legislative provisions that explicitly or implicitly apply to the question whether underinsured motorist insurance provides coverage for punitive damages.[40] For example, in Tennessee, a court interpreted an amendment to the uninsured or underinsured motorist legislation, which inserted the word compensatory before the word damages, to preclude coverage for punitive damages.[41] The Ohio Insurance Code states: "No policy of automobile or motor vehicle insurance . . . *shall provide coverage for judgments or claims against an insured for punitive or exemplary damages*."[42] Although such legislative provisions were focused on the coverage provided by liability insurance, the penumbra created by such a statutory provision—including the effect of the public policy manifested by the enactment—arguably encompasses coverage questions involving underinsured motorist insurance.

D. *Judicially Implied Restrictions on Coverage for Punitive Damages*

The forms used for millions of insurance policies do not explicitly specify whether coverage is provided for punitive damages.[43] Furthermore, in some cases punitive damages are included in a judgment and insurance coverage is not precluded either by restrictions for intentional tortious acts, which apply both to compensatory and punitive damages, or by an explicit provision in the insurance policy excluding coverage for punitive damages.[44] In these instances, a clear disagreement exists among the judicial precedents about whether a public interest

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> The contract for insurance between Mr. Stinbrink and Farmers excluded coverage for punitive damages against uninsured motorists. Mr. Stinbrink argues that this clause contravenes statutory law and is therefore void. . . . We have thus determined that punitive damages are as much a part of the potential award under the uninsured motorist statute as damages for bodily injury, and therefore they *cannot be contracted away.*

Id. (emphasis added).

39. *See* INSURANCE SERVICES OFFICE, *supra* note 12.

40. *See infra* notes 26-29.

41. Carr v. Ford, 833 S.W.2d 68, 68-69 (Tenn. 1992); *see also* Crismon v. Curtiss, 785 S.W.2d 353, 354 (Tenn. 1990) ("By statutory amendment effective February 18, 1986, . . . coverage of uninsured motorist policies was limited to compensatory damages.").

42. OHIO REV. CODE ANN. § 3937.182 (Anderson 1988) (emphasis added).

43. *See* INSURANCE SERVICES OFFICE, *supra* note 12.

44. *See infra* notes 49-52.

exists that warrants an implied exception eliminating coverage for punitive damages by an otherwise applicable liability, underinsured motorist, or uninsured motorist insurance policy.[45]

Arguments supporting the view that liability insurance should not provide coverage for punitive damages generally are predicated on the rationale that punitive damages are awarded to either punish the wrongdoer or deter similar conduct in the future by the wrongdoer.[46] If an insured were allowed to shift the responsibility for punitive damages to an insurer, the public interests in attaining punishment and deterrence would be thwarted.[47] Judges in many states agree with the view persons should not be permitted to insure against harms they may intentionally and unlawfully cause others, thereby acquiring a license to engage in such activity.[48] Thus, numerous judicial precedents provide support for the proposition that liability insurance may not provide coverage for punitive damages on public policy grounds.[49]

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45. *See infra* notes 49-52.

46. *See* JOHN J. KIRCHER, PUNITIVE DAMAGES: LAW AND PRACTICE § 1.01 (1985). This argument is clearly and succinctly stated in a decision of the Alabama Supreme Court in *Green Oil Co. v. Hornsby*. Green Oil Co. v. Hornsby, 539 So. 2d 218 (Ala. 1989).

47. *See infra* note 50.

48. *See* American Sur. Co. v. Gold, 375 F.2d 523, 528 (10th Cir. 1965).

It has also been suggested liability insurance should not cover punitive damages because to do so would mean the public would bear the burden through increased premiums. *See* Northwestern Nat'l Casualty Co. v. McNulty, 307 F.2d 432, 440-41 (5th Cir. 1962). The *McNulty* court observed, because "the added liability . . . would be passed along to the premium payers, [s]ociety would then be punishing itself for the wrong committed by the insured." *Id.*; *see* Conely & Bishop, *supra* note 2, at 312-13; Charles M. Lauderback, Note, *The Exclusion Clause: A Simple and Genuine Solution to the Insurance for Punitive Damages Controversy*, 12 U.S.F. L. REV. 743, 748 (1978).

49. U.S.: Rossman v. State Farm Mut. Auto. Ins. Co., 832 F.2d 282, 288 (4th Cir. 1987) (noting Florida's and Illinois' public policies prohibit insuring against liability for punitive damages awarded as a result of an individual's own misconduct); Northwestern Nat'l Casualty Co. v. McNulty, 307 F.2d at 441-42 (noting Florida's and Virginia's public policies prohibiting construction of automobile liability policies as covering liability for punitive damages); *cf.* Union L.P. Gas Sys., Inc. v. International Surplus Lines Ins. Co., 869 F.2d 1109, 1110 (8th Cir. 1989) (finding under Missouri law, excess policy providing coverage for bodily injury and property damage did not cover payment of punitive damages unless specifically provided by the policy); Ging v. American Liberty Ins. Co., 423 F.2d 115, 120-21 (5th Cir. 1970) (holding although policy did not cover punitive damages under Florida law, question still existed whether automobile liability insurer undertook to defend the insured against claim for punitive damages).

Cal.: Peterson v. Superior Court, 642 P.2d 1305, 1311 (Cal. 1982) (stating California's rule against the indemnification of punitive damages by insurance is based on the public policy rationale "against diluting the deterrent effect of punitive damages by allowing the impact of the penalty to be shifted to" an insurer and the prohibition of indemnification for willful acts of an insured); *see also* Ford Motor Co. v. Home Ins. Co., 172 Cal. Rptr. 59, 64-65 (Cal. Ct. App. 1981) (products liability action); City Prod. Corp. v. Globe Indem. Co., 151 Cal. Rptr. 494, 496 (Cal. Ct. App. 1979) (holding insurance did not cover punitive damages for willful acts); *cf.* Certain Underwriters at Lloyd's of London v. Pacific Southwest Airlines, 786 F. Supp. 867, 873 (C.D. Cal. 1992) (holding airline's liability insurer was not estopped from denying coverage for punitive damages

when vicarious liability exception to California statute precluding insurance coverage for punitive damages was not applicable).

Colo.: Universal Indem. Ins. Co. v. Tenery, 39 P.2d 776, 779 (Colo. 1934); Gleason v. Fryer, 491 P.2d 85, 86 (Colo. Ct. App. 1971); Brown v. Western Casualty & Sur. Co., 484 P.2d 1252, 1253 (Colo. Ct. App. 1971).

Conn.: *See* American Ins. Co. v. Saulnier, 242 F. Supp. 257, 261 (D. Conn. 1965) ("It is contrary to public policy to insure a person against financial penalty imposed as a restraint against a wilful wrongdoer."); *cf.* Tedesco v. Maryland Casualty Co., 18 A.2d 357, 359 (Conn. 1941) ("[A] policy which expressly covered an obligation of an insured to pay a sum of money in no way representing injuries or losses suffered by the plaintiff but imposed as a penalty because of a public wrong . . . . would [certainly] be against public policy.").

Fla.: Concrete Pipe Co. v. Bould, 437 So. 2d 1061, 1064 (Fla. 1983) (stating although Florida public policy prohibits liability insurance coverage for punitive damages assessed against a person for his own wrongful acts, it does not preclude insurance coverage for punitive damages when the insured himself is vicariously liable for another's wrong); Sterling Ins. Co. v. Hughes, 187 So. 2d 898, 900 (Fla. Ct. App. 1966); *see also* Dorsey v. Honda Motor Co. Ltd., 655 F.2d 650, 659 (5th Cir. 1981), *cert. denied*, 459 U.S. 880 (1982).

> The basic rule of Florida law is that public policy forbids insurance coverage of punitive damages in order that the punitive and deterrent purposes of these damages will not be thwarted. Florida's intermediate appellate courts, however, have permitted insurance coverage of punitive damages where the insured party was not itself at fault but was merely vicariously liable for punitive damages based on the reckless conduct of another.

Id.; Northwestern Nat'l Casualty Co. v. McNulty, 307 F.2d 432, 441-42 (5th Cir. 1962).

Ill.: Beaver v. Country Mut. Ins. Co., 420 N.E.2d 1058, 1060 (Ill. Ct. App. 1981) ("Where a person is able to insure himself against punishment he gains a freedom of misconduct inconsistent with the establishment of sanctions against such misconduct. . . . And, there is no point in punishing the insurance company; it has done no wrong."); *see also* United States Fire Ins. Co. v. Beltmann North Am. Co., 695 F. Supp. 941, 947 (N.D. Ill. 1988) ("An agreement to indemnify or insure against one's voluntary, not accidental, misconduct is against public policy and unenforceable."), *rev'd*, 883 F.2d 564 (7th Cir. 1989); Affiliated FM Ins. Co. v. Beatrice, 645 F. Supp. 298, 301 (N.D. Ill. 1985) ("[C]ontracts of insurance should not be construed to indemnify a person for damages resulting from his own intentional misconduct.").

Kan.: Guarantee Abstract & Title Co. v. Interstate Fire & Casualty Co., 618 P.2d 1195, 1198 (Kan. 1980) ("Public policy requires that payment of punitive damages rests on the party who committed the wrong, rather than his insurance company."); *see* American Sur. Co. v. Gold, 375 F.2d 523, 527-28 (10th Cir. 1966) (finding Kansas public policy forbids contracts insuring against punitive damage awards and the policy has not been superceded in cases regarding policies complying with Kansas Motor Vehicle Safety Responsibility Act). In 1984, a statute became effective, stating "it was not against public policy for a person to obtain insurance covering punitive damages assessed as a result of intentional acts." KAN. STAT. ANN. § 40-2.115 (1984); *see* Golf Course Superintendents Ass'n v. Underwriters at Lloyd's of London, 761 F. Supp. 1485, 1491 (D.C. Kan. 1991).

La.: Dubois v. Arkansas Valley Dredging Co., 651 F. Supp. 299, 302 (W.D. La. 1987) (deciding it would be against public policy to allow insurance companies to indemnify for punitive damages as it would defeat the punishment purpose).

Mo.: Heartland Stores, Inc. v. Royal Ins. Co., 815 S.W.2d 39, 43 (Mo. Ct. App. 1991) (concluding a business comprehensive insurance policy did not cover punitive damages because such damages are not within the definition of "personal injury"); Crull v. Gleb, 382 S.W.2d 17, 23 (Mo. Ct. App. 1964) ("We hold that to allow a motorist to insure himself against judgments imposed against him for punitive damages, which were assessed against him for his wanton, reckless or willful acts, would be contrary to public policy.").

Nev.: New Hampshire Ins. Co. v. Gruhn, 670 P.2d 941, 943 (Nev. 1983).

> [I]t is incumbent upon the party whose conduct was so outrageous as to merit punishment by means of punitive damages to bear the burden of paying the award. Only then will the goal of punishment and deterrence be effectuated. This policy would be thwarted if the tortfeasor is able to skirt the award by passing the liability on to a surety.

Id.

N.J.: Variety Farms, Inc. v. New Jersey Mfrs. Ins. Co., 410 A.2d 696, 703 (N.J. Super. Ct. App. Div. 1980) ("We consider the sounder rule to be that public policy does not permit a tortfeasor to shift the burden of punitive damages to his insurer."); *see also* City of Newark v. Hartford Accident & Indem. Co., 342 A.2d 513, 518 (N.J. Super. Ct. App. Div. 1975) ("[Public policy] would plainly not permit a defense or indemnification by the carrier of any claim for punitive damages."); LoRocco v. New Jersey Mfrs. Indem. Ins. Co., 197 A.2d 591, 596 (N.J. Super. Ct. App. Div. 1964) (indicating it is contrary to public policy to indemnify a wilful wrongdoer). *But see* Ambassador Ins. Co. v. Montes, 388 A.2d 603, 606 (N.J. 1978) ("The general principle that an insurer may not contract to indemnify an insured against the civil consequences of his own wilful criminal act" need not be universally applied.).

N.Y.: Hartford Accident & Indem. Co. v. Village of Hemstead, 397 N.E.2d 737, 744 (N.Y. 1979).

> [W]e conclude that the rule to be applied with respect to a punitive damage award made in a Civil Rights Act action is that coverage is proscribed as a matter of public policy . . . because to allow insurance coverage defeats the purpose of punitive damages.

Id.; *see also* Home Ins. Co. v. American Home Prod. Corp., 550 N.E.2d 930, 932 (N.Y. 1990) (disallowing the insurance of punitive damages through a second-level excess insurer in an out-of-state products liability case after considering the nature of the claim, the degree of wrongfulness for which the damages were awarded, the state's law, and the public policy on punitive damages); Public Serv. Mut. Ins. Co. v. Goldfarb, 425 N.E.2d 810, 814 (N.Y. 1981) (determining even though professional liability policy provided coverage for punitive damages and the insurer charged premiums for such coverage, if a trier-of-fact found the insured intentionally caused the injuries complained of, and therefore awarded punitive damages, then the dentist could not look to his insurer to indemnify for such damages).

N.D.: Yesel v. Watson, 226 N.W. 624, 625 (N.D. 1929) ("The authorities abundantly support the ruling of the trial court that one who is liable for the act of another by reason of being surety upon his official bond is not answerable for punitive damages that might be recoverable against the wrongdoer.").

Ohio: Casey v. Calhoun, 531 N.E.2d 1348, 1348 (Ohio 1989) ("Public policy prohibits the enforcement of a clause in an insurance contract insuring against punitive damages."); Ruffin v. Sawchyn, 599 N.E.2d 852, 856 (Ohio Ct. App. 1991) (using *Casey* reasoning to hold punitive damages are not insurable).

Okla.: Dayton Hudson Corp. v. American Mut. Liab. Ins. Co., 621 P.2d 1155, 1160 (Okla. 1980).

> Allowing an insurance company to bear the financial impact specifically intended for those guilty of "oppression, fraud or malice" is to contravene the very public policy we are charged to recognize and implement. We adopt the *McNulty* rule because its reasoning accords best with the current policy of Oklahoma statutory law with respect to imposition of punitive damages. Giving full effect to the purpose punitive damages must serve, we hold that a culpable party is not to be permitted to escape the civil consequences of its wrong.

Id.

When an insurer providing uninsured or underinsured motorist insurance rejects an insured's request for indemnification, judges have also decided the coverage issue on the basis of whether public policy interests justify the imposition of an implied exception precluding coverage for punitive damages. In several states, appellate courts have held questions about coverage by underinsured or uninsured motorist insurance for punitive damages are appropriately resolved in accordance with precedents, which preclude indemnification, established in cases involving liability insurance.[50] Nevertheless, it is important to

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Penn.: Creed v. Allstate Ins. Co., 529 A.2d 10, 12 (Pa. Super. Ct. 1987) (holding when an insurer has agreed to indemnify for bodily injury and property damages, it has no obligation to provide indemnity for punitive damages; the court specifically noted, however, that it was not addressing the public policy of whether one can insure against punitive damages); Esmond v. Liscio, 224 A.2d 793, 800 (Pa. Super. Ct. 1966) (concluding an insurance company was not required to pay punitive damages awarded against additional insured because public policy does not permit a tortfeasor who is personally guilty of wanton misconduct to shift the burden of punitive damages to an insurer).

S.D.: City of Fort Pierre v. United Fire & Casualty Co., 463 N.W.2d 845, 849 (S.D. 1990) ("Because we have determined that the civil penalties prayed for by the federal government were punitive in nature and that in this instance the award of punitive damages would violate public policy, we hold United had no duty to defend City under the policy.").

Va.: Northwestern Nat'l Casualty Co. v. McNulty, 307 F.2d 432, 440 (5th Cir. 1962) ("The policy considerations . . . where . . . punitive damages are awarded for punishment and deterrence would seem to require that the damages rest ultimately as well as nominally on the party actually responsible for the wrong . . . . And there is no point in punishing the insurance company; it has done no wrong.").

Several commentators also oppose allowing insurance for punitive damages. *See, e.g.*, Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 71-76 (1982); Roland H. Long, THE LAW OF LIABILITY INSURANCE § 1.28 (1991); David A. Sprentall, Note, *Insurance Coverage of Punitive Damages*, 84 DICK. L. REV. 221, 221 (1979); Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 527 (1957).

50. Ariz.: State Farm Mut. Auto. Ins. Co. v. Wilson, 782 P.2d 727, 736 (Ariz. 1989).

> We conclude that the legislative objective in compelling such protection is to compensate victims for bodily injury caused by negligent, financially irresponsible or underinsured motorists. Because punitive damages are not compensatory and are intended to punish and deter tortfeasors from wrongful conduct, we hold UIM and UM insurers are not liable to pay such damages unless they have specifically provided to do so. State Farm did not so contract. No reasonable expectation of the insured—nothing in the dickered deal, the nature of the transaction, or clear intent manifested in the policy language—militates in favor of finding such an undertaking.

Id.

Conn.: Bodner v. United Serv. Auto. Ass'n, 610 A.2d 1212, 1219, 1222 (Conn. 1992).

> The parties agree that the punitive damages that Bodner seeks are common law punitive damages, which in Connecticut are limited to the plaintiff's attorney's fees and nontaxable costs, and thus serve a function that is both compensatory and punitive. . . . Thus, in limiting punitive damage awards to the costs of litigation less taxable costs, our rule fulfills the salutary purpose of fully compensating a victim for the harm inflicted on him while avoiding the potential for injustice which may result from the exercise of unfettered discretion by a jury. . . . Even for common law punitive damages, as they are defined in this state, there is no discernible reason of public policy why unisured

> motorist coverage should impliedly encompass a claimant's right to recover attorney's fees for pursuit of a claim against his own insurer that is premised on the egregious misconduct of third party torfeasor. . . . [T]he compensatory nature of common law punitive damages cannot overshadow the underlying fact that such attorney's fees are awarded only when punishment of the tortfeasor is warranted.

Id.

Fla.: Holton v. McCutcheon, 584 So. 2d 50, 51 (Fla. Ct. App. 1991) ("The Third District has held that punitive damages for the negligent conduct of a third party are not recoverable from one's own uninsured motorist carrier.").

Ga.: State Farm Mut. Auto. Ins. Co. v. Weathers, 392 S.E.2d 1, 1 (Ga. 1990) (involving uninsured motorist insurance); Roman v. Terrell, 393 S.E.2d 83, 86 (Ga. Ct. App. 1990) ("Because we find the proper construction of the statute, as well as the proper public policy of this state, is that no recovery of punitive damages may be had against an uninsured motorist carrier, *Weathers* . . . is overruled and we affirm the trial court's judgment in this case."); *see also* Coker v. State Farm Mut. Auto. Ins. Co., 388 S.E.2d 34, 34-35 (Ga. Ct. App. 1989) (sustaining the trial court's decision to grant a motion, by the insurance company providing underinsured motorist insurance, "to strike Coker's claim for punitive damages" when Coker, unable to locate the alleged tortfeasor for service, served the uninsured motorist insurance carrier); State Farm Mut. Ins. Co. v. Kuharik, 347 S.E.2d 281, 282 (Ga. Ct. App. 1986) ("We agree with State Farm's contention that to award punitive damages against an unknown tortfeasor for the purpose of deterring him from repeating his alleged misconduct would be nonsensical.").

Ind.: Shuamber v. Henderson, 563 N.E.2d 1314, 1315, 1318 (Ind. Ct. App. 1990) ("The trial court did not err in granting [the insurer's] motion for partial summary judgment as to the Shuambers' claim for punitive damages under the underinsured motorist clause of their insurance policy."), *vacated*, 599 N.E.2d 452 (Ind. 1991).

Mass.: Santos v. Lumbermens Mut. Casualty Co., 556 N.E.2d 983, 990 (Mass. 1990).

> We do not think that the Legislature . . . obligated the insurer to provide coverage for punitive damages. Allowing recovery of punitive damages would not serve the purpose of compensating the injured party. In the underinsurance context, where the wrongdoer is not in a contractual relationship with the insurance company, there is not even the possible deterrent effect of higher premium rates. It is not enough to say that the insurance company may sue the tortfeasor to recover the punitive damages. In the case of hit-and-run drivers, there may be no tortfeasor to sue, and the probability of recovering from other underinsured tortfeasors, who often are judgment-proof, is not great. In sum, neither the purposes of the underinsurance statute nor the wrongful death statute will be served by requiring that punitive damages shall be considered as part of the "damages" allowable under GAL. c. 275, § 113L.

Id. (citations omitted).

Nev.: Siggelkow v. Phoenix Ins. Co., 846 P.2d 303, 305 (Nev. 1993).

> If punitive damages could be recovered from the innocent party's own insurer, the peculiar office of such would be distorted, misdirected, and expanded to the detriment of society at large. Responsibility for satisfying punitive awards would then shift from deserving tortfeasors to undeserving insured owners of vehicles in the form of higher insurance premiums.

Id.

Ohio: State Farm Mut. Ins. Co. v. Blevins, 551 N.E.2d 955, 959 (Ohio 1990) ("In the absence of specific contractual language, coverage for punitive or exemplary damages will not be presumed under a provision for uninsured motorist coverage.").

Okla.: Aetna Casualty & Sur. Co. v. Craig, 771 P.2d 212, 216 (Okla. 1989).

recognize some notably different considerations apply to the issue of whether the coverage provided by underinsured or uninsured motorist insurance should indemnify an insured for amounts an insured has been adjudged legally entitled to recover as an award of punitive damages against a tortfeasor.[51]

In many states, liability insurance does *not* provide coverage for punitive damages.[52] In those states allowing a recovery of punitive damages from the insurer providing underinsured motorist insurance would place the insured in a better position than exists in regard to recoveries from the liability insurance afforded the tortfeasors. If the underinsured motorist insurance is viewed as a coverage that essentially replicates the circumstances which would have existed had the tortfeasor been insured with liability coverage limits selected for the underinsured motorist insurance, in these states allowing a recovery of punitive damages from underinsured motorists places the injured party in a notably better

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> The focus of the second certified question is the degree of recovery afforded by uninsured motorist coverage and which is consistent with the public policy of this state. We are presented with a blameless injured employee of an equally blameless insured combined with an admittedly blameless insurer. The employee was grievously injured by a third person: an uninsured tortfeasor. In this situation, neither public interest of punishment or deterrence would be served by requiring the insurer to assume the responsibility of paying a punitive damage award assessed against the third person/tortfeasor. We therefore hold that payment of punitive damages under uninsured motorist coverage contravenes the public policy of the State of Oklahoma.

Id.

Tenn.: Carr v. Ford, 833 S.W.2d 68, 68-69 (Tenn. 1992).

> The question is whether injured motorists may recover punitive damages under uninsured motorist coverage, in the absence of an explicit agreement that such coverage will be provided under the policy. We answer this question in the negative and hold that the 1986 amendment to the statute limits requisite uninsured motorist coverage to compensatory damages. Unless there is a specific contractual clause providing for punitive damages, insureds may not recover punitive damages from their insurers under uninsured motorist coverage.

Id. However, the court also commented: "Our ruling today does not affect insurers who decide voluntarily to offer uninsured motorist coverage for punitive damages." *Id.* at 71.

Tex.: Government Employees Ins. Co. v. Lichte, 792 S.W.2d 546, 549 (Tex. Ct. App. 1990).

> We hold that the uninsured/underinsured coverage provision stating the insurer will pay damages which a covered person is legally entitled to recover from an uninsured motorist because of *bodily injury* incurred does not include coverage for an award of exemplary damages. The purpose of allowing the recovery of punitive damages is to punish the wrongdoer. In the instant case, the wrongdoer was the uninsured motorist not the insured. Therefore, we are not bound to follow those cases that hold that an insured's liability insurance policy provides coverage when a judgment is obtained against the insured awarding exemplary damages.

Id. (citations omitted); *see* Eric Hollowell, Annotation, *Punitive Damages as Within Coverage of Uninsured or Underinsured Motorist Insurance,* 54 A.L.R.4th 1186 (1987).

51. *See infra* part III.

52. There are numerous judicial precedents stating that liability insurance may not provide coverage for punitive damages because such coverage violates public policy. *See, e.g., supra* note 50.

position than that which would have existed in regard to an adequately insured tortfeasor.

III. RATIONALES AND JUSTIFICATIONS APPLIED IN DISPUTES TO SUSTAIN UNDERINSURED MOTORIST INSURANCE COVERAGE FOR PUNITIVE DAMAGES

There are several states in which courts have concluded underinsured or uninsured motorist insurance provides coverage for awards of punitive damages against an underinsured tortfeasor.[53] In most of these decisions, one or more of the justifications previously articulated in cases involving liability insurance were set forth as reasons for sustaining the existence of coverage for punitive damages.[54]

A. *Expansive Interpretations of Terms Such as "Sums" or "Damages" in Coverage Provisions*

Judicial precedents sustaining an insured's right to indemnification from liability insurance have often been grounded on interpretations of coverage terms stating the insurer will pay "on behalf of the insured *all sums* which the insured shall become legally obligated to pay."[55] In these decisions, judges reason puni-

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53. *See infra* parts III(A), III(B), and III(C); *see also supra* note 49.

54. *See infra* parts III(A), III(B), and III(C).

55. Ala.: American Fidelity & Casualty Co. v. Werfel, 162 So. 103, 106 (Ala. 1935).

> The [insurance] policy, being broad enough to cover personal injury or death as the result of an accident occurring while the policy was in force, was therefore broad enough to cover liability for death, and recovery under the homicide statute (section 5696, Code) for wrongful death. This recovery would have been for punitive damages purely. It may not be successfully contended that the [insurance] policy did not protect against punitive damages for bodily injuries so inflicted.

General Casualty Co. v. Woodby, 238 F.2d 452, 457 (6th Cir. 1956).

Ariz.: Price v. Hartford Accident & Indem. Co., 502 P.2d 522, 525 (Ariz. 1972). In sustaining coverage for exemplary damages, the court commented: "It is our holding that the premium has been paid and accepted and the protection has been tendered, and that under the circumstances public policy would be best served by requiring the insurance company to honor its obligation." *Id.* at 525; *see also* Michael v. Cole, 595 P.2d 995, 997 (Ariz. 1979) (holding testimony at trial that defendant's insurance policy would cover punitive damages constituted reversible error); State v. Sanchez, 579 P.2d 568, 571-73 (Ariz. Ct. App. 1978) (stating the general rule that absent a specific statutory provision punitive damages may not be awarded against municipal corporations and that it was error to allow the awarded damages).

Ark.: Southern Farm Bureau Casualty Ins. Co. v. Daniel, 440 S.W.2d 582, 584 (Ark. 1969).

> As we read the [insurance] policy herein it agrees to pay . . . all sums which the insured shall become legally obligated to pay as damages, because of bodily injury . . . [and we do not] find anything in the state's public policy that prevents an insurer from indemnifying its insured against punitive damages.

Id.; *see also* California Union Ins. Co. v. Arkansas Louisiana Gas Co., 572 S.W.2d 393, 395 (Ark. 1978) (holding the rule set forth in *Daniel* controlled and allowed insured to recover from insurer

for punitive damages paid by insured under an Oklahoma judgment when Oklahoma law was silent on the issue of insurer's liability for punitive damages).

Ga.: Greenwood Cemetery, Inc. v. Travelers Indem. Co., 232 S.E.2d 910, 914 (Ga. 1977) ("The Georgia Insurance Code, Code Ann. § 56-101 et seq. authorizes the issuance of liability insurance. Code Ann. § 56-408(1) provides, 'Liability insurance . . . is insurance against legal liability for . . . damage to property . . . .' Punitive damages is a legal liability and accordingly insurance against such damages is expressly authorized.").

Idaho: Abbie Uriguen Oldsmobile Buick, Inc. v. United States Fire Ins. Co., 511 P.2d 783, 789 (Idaho 1973) ("Insofar as public policy is concerned we reject *McNulty* and adopt the *Lazenby* approach.").

Ill.: Scott v. Instant Parking, Inc., 245 N.E.2d 124, 126 (Ill. Ct. App. 1969).

> We hold that these words [caused by accident] include injuries caused by willful and wanton misconduct, and since punitive damages may be allowed in such a case, they are part of "all sums" which the insured became liable to pay, and thus are covered by express wording of the policy.

Id.

Ind.: Norfolk & Western Ry. Co. v. Hartford Accident & Indem. Co., 420 F. Supp. 92, 98 (N.D. Ind. 1976) ("Under Indiana law it is not contrary to public policy for Norfolk & Western to shift the punitive damage award to its liability insurer, and under the terms of the insurance contract between Norfolk & Western and Hartford, these damages were within the scope of coverage.").

Iowa: Skyline Harvestore Sys., Inc. v. Centennial Ins. Co., 331 N.W.2d 106, 109 (Iowa 1983) ("We hold that Skyline's [insurance] policy includes coverage of punitive damages, and the public policy purposes of punitive damages do not preclude such a construction."); *see also* Cedar Rapids v. Northwestern Nat'l Ins. Co., 304 N.W.2d 228, 231 (Iowa 1981), *overruled by* Parks v. City of Marshalltown, 440 N.W.2d 377 (Iowa 1989).

> There was no intention by the legislature to limit the authority of municipalities to cover their risks. The legislative purpose was the protection of the public treasury by insurance. It would frustrate that intent if we, after allowing the recovery of punitive damages against municipalities, were to hold there was no authority for municipalities to secure insurance protection.

Id.

Kan.: Southern Am. Ins. Co. v. Gabbert-Jones, Inc., 769 P.2d 1194, 1195 (Kan. Ct. App. 1989) ("The question whether under a certain excess liability insurance policy there is an enforceable obligation of the insurer to pay punitive damages awarded against the insured is considered and, under the facts of this case, it is found the insurer is not responsible for the payment of punitive damages."). The court noted, however, that the Kansas statute provides:

> It is not against the public policy of this state for a person or entity to obtain insurance covering liability for punitive or exemplary damages assessed against such insured as the result of acts or omissions, intentional or otherwise, of such insured's employees, agents or servants, or of any other person or entity for whose acts such insured shall be vicariously liable, without the actual prior knowledge of such insured.

Id. (quoting KAN. STAT. ANN. § 40-2, 115(a) (1984)).

Ky.: Continental Ins. Co. v. Hancock, 507 S.W.2d 146, 151-52 (Ky. 1973).

> Even though punitive damages are allowed solely as punishment and as a deterrent, we do not deem it against public policy to allow liability therefore to be insured against when the punitive damages are imposed for a grossly negligent act of the insured rather than an intentional wrong of the insured.

Id.; *see also* Maryland Casualty Co. v. Baker, 200 S.W.2d 757, 761-62 (Ky. 1947) (finding statute requiring taxicab operator to furnish insurance policy to protect passengers from "act or omission connected with" operating automobile included intentional assault by cab driver and statute was used to construe policy so that insurer was liable for punitive damages from the assault).

La.: Taylor v. Lumar, 612 So. 2d 798, 800 (La. Ct. App. 1992); Creech v. Aetna Casualty & Sur. Co., 516 So. 2d 1168, 1174 (La. Ct. App. 1987) ("Public policy is better served by giving effect to the insurance contract rather than by creating an exclusion based on a judicial perception of public policy not expressed by the legislature. We hold that public policy does not preclude insurance coverage of exemplary damage awards under LSA-C.C. Art. 2315.4."); *see also* Fagot v. Ciravola, 445 F. Supp. 342, 344 (E.D. La. 1978) ("The wording of the professional liability policy that covered the City of Kenner Police Department and its paid employees at the time of Mr. Fagot's arrest would be highly misleading if the policy did not cover jury awards of punitive damages" and, as a matter of law, "the policy in question covers punitive damages.").

Me.: Concord Gen. Mut. Ins. Co. v. Hills, 345 F. Supp. 1090, 1095 (D. Me. 1972) ("It is well settled that such broad provisions in automobile liability policies unmistakably include both compensatory and punitive damages.").

Md.: First Nat'l Bank v. Fidelity & Deposit Co., 389 A.2d 359, 367 (Md. 1978) ("Applying 'the utmost circumspection,' we find that 'the common sense of the entire community would [not] pronounce it' against public policy for the Bank's insurance company to pay the judgment for exemplary damages assessed against the Bank here.").

Mich.: New Amsterdam Casualty Co. v. Jones, 135 F.2d 191, 193 (6th Cir. 1943).

Miss.: Anthony v. Frith, 394 So. 2d 867, 868 (Miss. 1981) ("As to there being any public policy in this state against allowing recovery for punitive damages in a case as this under the terms of an insurance contract as set forth herein, . . . it was not against public policy to require the carrier to pay punitive damages.").

Mo.: Colson v. Lloyd's of London, 435 S.W.2d 42, 47 (Mo. Ct. App. 1968). The court considered "whether it would be against public policy to permit an association of law enforcement officers to insure themselves against alleged willful and intentional acts." *Id.* The court concluded that "it would tend to discourage them from entering into that public service" if "they were told by the courts that they could not enter into a contract which would afford them protection against financial loss arising from claims for punitive damages." *Id.*; *see also* Ohio Casualty Ins. Co. v. Welfare Fin. Co., 75 F.2d 58, 60 (8th Cir. 1934) ("We hold that the punitive damages under the facts here must be held to be within the meaning and protection of this [insurance] policy; that there is no public policy, under the circumstances of this case, requiring such provision to be held invalid.").

Mont.: First Bank v. TransAmerica Ins. Co., 679 P.2d 1217, 1223 (Mont. 1984). The court found "that providing insurance coverage of punitive damages is not contrary to public policy." *Id.* The court also observed:

> Until such time that the law of punitive damages is more certain and predictable, or until the legislature alters the law of punitive damages or expressly declares a policy against coverage in all cases, we leave the decision of whether coverage will be permitted to the insurance carriers and their customers.

Id.; *see also* Fitzgerald v. Western Fire Ins. Co., 679 P.2d 790, 792 (Mont. 1984).

> In the instant case, appellant [the insurer] creates an ambiguity in the language by contending that we must read into the language the distinction between punitive and compensatory damages . . . [w]e therefore hold that the language of the insurance contract provides for coverage of punitive damages and that no public policy in Montana precludes payment of these damages by an insurance carrier.

Id.

N.M.: Wolff v. General Casualty Co., 361 P.2d 330, 335 (N.M. 1961) ("We hold that under the terms of the insurance policy involved and on the basis of the facts alleged in the complaint and the motion for summary judgment, that there is no public policy in New Mexico which requires denial of coverage.").

N.C.: Mazza v. Medical Mut. Ins. Co., 319 S.E.2d 217, 220 (N.C. 1984) ("We know of no public policy of this State that precludes liability insurance coverage for punitive damages in medi-

cal malpractice cases. North Carolina General Statute § 58-72 appears to authorize insurers to provide coverage for punitive damages."); Boyd v. Nationwide Mut. Ins. Co., 424 S.E.2d 168, 171-72 (N.C. Ct. App. 1993) ("We find no public policy to prevent coverage for punitive damages."); Collins & Aikman Corp. v. Hartford Accident & Indem. Co., 416 S.E.2d 591, 594 (N.C. Ct. App. 1992) (finding the definition of damages did not operate to exclude punitive damages from coverage, and if Hartford "intended to eliminate coverage for punitive damages it could and should have inserted a single provision stating 'the policy does not include recovery for punitive damages.'"), *aff'd*, 436 S.E.2d 243 (N.C. 1993).

Or.: Harrell v. Travelers Indem. Co., 567 P.2d 1013, 1021 (Or. 1977).

> [A]s long as insurance companies are willing, for a price, to contract for insurance to provide protection against liability for punitive damages to persons or corporations deemed by them to be "good risks" for such coverage, and as long as liability for punitive damages continues to be extended to "gross negligence," "recklessness," and for other conduct, "contrary to societal interests," we are in agreement with those authorities which hold that insurance contracts providing protection against such liability should not be held by courts to be void as against public policy.

Id.

R.I.: Morrell v. Lalonde, 120 A. 435, 438 (R.I. 1923) (per curiam).

> The defendant insurance company by the terms of its liability policy agreed to indemnify defendant to the amount stipulated therein "against loss from the liability imposed by law upon the assured for damages on account of bodily injuries or death suffered by any person or persons in consequence of any malpractice, error or mistake of the assured in the practice of his profession." The defendant company was liable to the amount insured to pay any lawful damages which in a case, such as the case at bar, includes punitive as well as compensatory damages.

Id.

S.C.: South Carolina State Budget & Control Bd. v. Prince, 403 S.E.2d 643, 648 (S.C. 1991) ("The policy provides that: 'The Fund will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages'" and "under the rules of construction and interpretation of insurance policies" this "must be read as encompassing punitive damages."); Carroway v. Johnson, 139 S.E.2d 908, 910 (S.C. 1965).

> The policy under consideration did not limit recovery to actual or compensatory damages. The language of the policy here is sufficiently broad enough to cover liability for punitive damages as such damages are included in the "sums" which the insured is legally obligated to pay as damages because of bodily injury within the meaning of the policy.

Id.; *see also* Pennsylvania Threshermen & Farmers' Mut. Casualty Ins. Co. v. Thornton, 244 F.2d 823, 827 (4th Cir. 1957) (barring insurance coverage for punitive damages is contrary to purpose and spirit of liability policies to protect the public).

Tenn.: Lazenby v. University Underwriters Ins. Co., 383 S.W.2d 1, 5 (Tenn. 1964).

> The insurance contract in the case at bar is a private contract between defendant and their assured, . . . which when construed as written would be held to protect him against claims for both compensatory and punitive damages. Then to hold assured, as a matter of public policy, is not protected by the [insurance] policy on a claim for punitive damages would have the effect to partially void the contract. We do not think such should be done except in a clear case, and the reasons advanced do not make such a clear case.

Id.; *see also* General Casualty Co. v. Woodby, 238 F.2d 452, 457 (6th Cir. 1956) (holding that policy obligated appellants "to pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability").

tive damages are a "sum" an insured is "legally obligated to pay," in the absence of explicit policy provisions to the contrary, the insurance covers punitive damages as well as compensatory damages.[56] Similarly, several decisions involving either underinsured or uninsured motorist insurance have emphasized that an insured is entitled to recover from the insurer because provisions in the "insuring agreement" state the insurer will pay "damages" that "an insured is legally entitled to recover" from an owner or operator of an uninsured motor vehicle or an

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Tex.: American Home Assurance Co. v. Safway Steel Prods. Co., 743 S.W.2d 693, 705 (Tex. Ct. App. 1987) ("[W]e hold that under Texas law it was not contrary to public policy for Rawlings and Safway to shift the punitive damages awards to their liability insurance carriers, and that, under the terms of the insurance contracts between the parties, punitive damages were within the scope of coverage."); Dairyland County Mut. Ins. Co. v. Wallgren, 477 S.W.2d 341, 342 (Tex. Ct. App. 1972) ("[A] policy of automobile liability insurance affords indemnity applicable to exemplary damages as well as compensatory damages."); *see also* Ridgway v. Gulf Life Ins. Co., 578 F.2d 1026, 1029 (5th Cir. 1978) (holding that as a matter of law, "Ranger is legally obligated for punitive damages within the limits of its policy.").

Vt.: State v. Glens Falls Ins. Co., 404 A.2d 101, 105 (Vt. 1979). "The language 'all sums as damages' means the whole amount due a plaintiff as damages pursuant to a legal judgment or settlement regardless of how characterized. The insurer drafts the contract and can easily include exclusions for punitive damages, or can bargain a higher premium. Where it does neither and uses the language involved here, coverage ought to be had." *Id.*

Va.: United Serv. Auto. Ass'n v. Webb, 369 S.E.2d 196, 199 (Va. 1988) ("The insurance company could have inserted the word 'compensatory' before the word 'damages,' or specifically excluded liability for punitive damages elsewhere in the policy, and resolved the ambiguity, but it did not. Therefore, we construe the resulting ambiguity against the insurance company and in favor of coverage.").

W. Va.: Hensley v. Erie Ins. Co., 283 S.E.2d 227, 233 (W. Va. 1981).

> [W]here the liability policy of an insurance company provides that it will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury and the policy only excludes damages caused intentionally by or at the direction of the insured, such policy will be deemed to cover punitive damages arising from bodily injury occasioned by gross, reckless or wanton negligence on the part of the insured. . . . The public policy of this State does not preclude insurance coverage for punitive damages arising from gross, reckless or wanton negligence.

Id.

Wis.: Brown v. Maxey, 369 N.W.2d 677, 688-89 (Wis. 1985) ("[W]e hold that it is not contrary to public policy in this state to insure against punitive damages.").

Wyo.: Sinclair Oil Co. v. Columbia Casualty Co., 682 P.2d 975, 981 (Wyo. 1984) ("We hold that it is not against the public policy of the State of Wyoming to insure against either liability for punitive damages imposed vicariously based on willful and wanton misconduct or personal liability for punitive damages imposed on the basis of willful and wanton misconduct."); *see also* Thomas F. Lambert, *Does Liability Insurance Cover Punitive Damages?*, 1966 INS. L.J. 75, 75 (advocating insurance for punitive damages); Martin G. Lentz, *Payment of Punitive Damages by Insurance Companies*, 15 CLEV.-MAR. L. REV. 313, 320-21 (1966) (stating public policy favors insurance companies paying punitive damages); Roger A. Kelly, Note, *Punitive Damages and Liability Insurance: Theory, Reality and Practicality*, 9 CUMB. L. REV. 487, 508-09 (1978) (stating a majority of the courts currently hold an insurer must pay liability for punitive damages).

56. *See* cases cited *supra* note 55.

underinsured motor vehicle.[57] In some of the judicial decisions, such results are grounded on the existence of an ambiguity.[58]

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57. Ala.: Lavender v. State Farm Mut. Auto. Ins. Co., 828 F.2d 1517, 1517-18 (11th Cir. 1987) ("In this case, we decide that where an insured motorist is entitled to punitive damages from an underinsured motorist, punitive damages may be awarded against the carrier providing the insured motorist with uninsured motorist coverage."). Alabama Code section 32-7-23(b)(4)

> [c]learly requires State Farm to be liable to its insured for all damages that its insured is "legally entitled to recover" from the underinsured motorist. It is conceded that Lavender is legally entitled to recover punitive damages against the underinsured motorist. . . . State Farm readily admits that as a liability carrier, it would be liable for punitive damages against its insured even though the insurance company itself would have done no wrong. . . . The effect of the Alabama statute is to require State Farm's contract to include that agreement.

Id. at 1518.

Del.: Jones v. State Farm Mut. Auto. Ins. Co., 610 A.2d 1352, 1353-54 (Del. 1992):

> Specifically, use of the generic terms "damages" and "all damages" can reasonably be construed to encompass punitive, as well as compensatory, damages. Under such circumstances, the policy is ambiguous as a matter of law. This leads to the inevitable result that the policy will be construed against the insurer and in favor of the insured. Absent contrary public policy grounds, given the foregoing principle of interpretation, Jones is entitled to a determination that UM/UIM coverage embraces punitive damages.
>
> Turning to the issue of public policy, a brief analysis of our law and the function of UM/UIM coverage support [sic] a conclusion that such coverage embraces punitive damages. We have recognized that the "public policy [underlying UM/UIM insurance] is achieved by making available coverage that mirrors [an insured's] liability insurance. . . ." We also have held that the liability coverage includes punitive damages. Thus, it follows both from contractual and public policy standpoints that such compensation is afforded under Delaware law to those protected by a UM/UIM policy. If such a result is undesirable as a matter of public policy, the General Assembly is the proper forum to seek a change.

Id. at 1353-54 (citations omitted).

The decision by the Delaware Supreme Court in *Jones* implicitly overrules *Grissom v. Nationwide Mut. Ins. Co.*, which stated:

> The Court finds that the insurance carrier, as a matter of law, under the clear terms of the uninsured motorist coverage provisions of the insurance policy, is not liable to plaintiff for any punitive damages arising out of the conduct of an uninsured motorist. The Court also finds that there is nothing in the law of Delaware that requires an insurance carrier to provide coverage to its insured for punitive damages as part of uninsured motorist coverage.

Grissom v. Nationwide Mut. Ins. Co., 599 A.2d 1086, 1087 (Del. Ch. 1991).

> Punitive damages are not awarded as damages for property or bodily injury. Compensatory damages serve that function. Although the extent of a plaintiff's injury is considered in calculating the amount of punitive damages to be awarded, it is irrelevant to the determination of whether the defendant's conduct warrants an award of punitive damages. . . . The only reasonable interpretation of the language in the policy, therefore, is that the policy covers payment for bodily injury and property damage only and it does not require Nationwide to

> pay punitive damages which may be assessed because of the acts of an uninsured motorist.

Id. at 1088.

Fla.: Adams v. Brannan, 500 So. 2d 236, 239 (Fla. Ct. App. 1986).

> UM protection insures only the injured plaintiffs rather than the wrongdoer. Because of this, decisively unlike a liability carrier, which may not recover any payment from the tortfeasor because he is its own insured, the uninsured motorist insurer becomes subrogated to the rights of his insureds, the plaintiffs . . . against the wrongdoer. Thus, in the present circumstances, the carrier, upon payment of the loss, may recover the punitive damages award against the wrongdoer, just as the plaintiffs could. She remains personally and fully liable for their payment—albeit (and irrelevantly) to a different entity. Florida's asserted interest in preserving the punishment and deterrence functions of punitive damages is therefore not in the least compromised by the recovery of punitive damages against an uninsured motorist carrier, and there is consequently no basis for declining to apply the law of North Carolina that its carriers are responsible for these losses under policies paid for and issued within its borders.

Id. (citations omitted); *see* Eric Hollowell, Annotation, *Punitive Damages as Within Coverage of Uninsured or Underinsured Motorist Insurance*, 54 A.L.R.4th 1186 (1987).

La.: Gonzalez v. Casadaban, 556 So. 2d 1291, 1292 (La. Ct. App. 1990) ("We . . . reaffirm our holding that exemplary damages are recoverable from the insured victim's uninsured motorist carrier up to the policy limits where the insurer promises to pay all sums the insured is legally entitled to recover, unless specifically excluded by the policy."); *see* Sharp v. Daigre, 545 So. 2d 1063, 1068 (La. Ct. App. 1989), *aff'd*, 555 So. 2d 640 (La. 1990).

> We hold that public policy does not preclude insurance coverage of exemplary damage awards under LSA—C.C. art. 2315.4. A careful examination of the provisions of the respective uninsured motorist policies in the instant case demonstrates that policy provisions are sufficiently broad enough to encompass exemplary damage and do not attempt to specifically exclude such coverage. Therefore, we find that to effectuate the purposes of . . . the Louisiana UM Statute . . ., and as well as clear reading of the policies, exemplary damages are recoverable under both uninsured motorist policies.

Id.; *see* Morvant v. United States Fidelity & Guar. Co., 538 So. 2d 1107, 1109-12 (La. Ct. App. 1989).

> In effect, were we to deny exemplary damages to the plaintiff because the deterrent effect is seemingly absent, as the defendant insurer urges, we would defeat one of the purposes of the statute and the purpose of obtaining UM coverage. This would also penalize the victim plaintiff who paid the stipulated UM premium to the defendant insurer who agreed that "we will pay all sums the insured is *legally entitled to recover as damages* from the owner or driver of an uninsured vehicle." The very purpose of obtaining and paying an extra premium for UM coverage is to protect oneself from the failure of the other motorist to adequately insure himself. . . . [W]e find that exemplary damages are recoverable from the insured victim's UM carrier, up to the policy limits of the UM coverage, where the insured is legally entitled to recover as damages from the owner or driver of an uninsured motor vehicle, unless such exemplary damages are specifically excluded by clear and unqualified language in the policy.

Id. (emphasis added); *see* Bauer v. White, 532 So. 2d 506, 508 (La. Ct. App. 1988).

> The object of the [Uninsured Motorist] statute is to promote full recovery for damages by innocent automobile accident victims by making uninsured

An ambiguity in a contract is construed against the party responsible for the drafting.[59] Thousands of judicial opinions affirm the application of this proposition to resolve insurance coverage disputes in favor of claimants. Once a provision in an insurance policy is found to be ambiguous, it is generally construed against the insurer as the drafter of the contract.[60] Among the judicial decisions sustaining claims by insureds for indemnification when punitive dam-

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> motorist coverage available for their benefit as primary protection when the tortfeasor is without insurance and as additional or excess coverage when he is inadequately insured. The intent of uninsured motorist coverage is "to protect the insured at all times against the generalized risk of damages at the hands of the uninsured motorists and not to limit coverage to certain situations or to a certain degree of risk of exposure to the uninsured motorists." To carry out this object of providing reparation for those injured through no fault of their own, our supreme court has held the statute is to be liberally construed. The purposes of the uninsured motorist statute are all furthered by liberally construing the statute to include exemplary damages as well as compensatory damages in those "damages . . . because of bodily injury" that insurers are required to pay.

Id. (citations omitted). In *Bauer*, the court also concluded:

> Even if the uninsured motorist statute should be construed not to require coverage for exemplary damages, still it seems to us that the insurance policy in question did cover these damages. The policy provided coverage to its insured for "damages for bodily injury an insured is legally entitled to collect from the owner or driver of an uninsured motor vehicle." Exemplary damages, once proven, are "damages for bodily injury an insured is legally entitled to collect." If it be contended that this phrase of the insurance policy is ambiguous, the rule that ambiguities in insurance contracts must be construed in favor of the insured would constrain us to reach the same conclusion.

Id. (citations omitted).

N.M.: Stinbrink v. Farmers Ins. Co., 803 P.2d 664, 665 (N.M. 1990). "The contract for insurance between Mr. Stinbrink and Farmers excluded coverage for punitive damages against uninsured motorists. Mr. Stinbrink argues that this clause contravenes statutory law and is therefore void. . . . We have thus determined that punitive damages are as much a part of the potential award under the uninsured motorist statute as damages for bodily injury, and therefore they *cannot be contracted away.*" *Id.* *But see* State Farm Mut. Auto. Ins. Co. v. Maidment, 761 P.2d 446, 449 (N.M. Ct. App. 1988) ("We agree and join the majority by holding that punitive damages may not be awarded against the estate of a deceased tort-feasor.").

58. *See supra* note 57 and *infra* notes 61 and 63.

59. *See generally* SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 621 (3d ed. Walter H.E. Jager, 1961) ("Since once who speaks or writes, can by exactness of expression more easily prevent mistakes in meaning, than one with whom he is dealing, doubts arising from ambiguity of language are resolved in favor of the latter . . . ."); GEORGE C. COUCH, *supra* note 11, § 15.74, at 341 ("Ambiguous or doubtful language or terms, it is said, should be given the strongest interpretation against the insurer which they will reasonably bear."); *see also* CORBIN ON CONTRACTS § 559 (1960) ("If, however, it is clear that the parties tried to make a valid contract, and the remaining doubt as to the proper interpretation is merely as to which of two possible meanings should be adopted, the court will adopt that one which is less favorable in its legal effect to the party who chose the words."); KEETON & WIDISS, *supra* note 9, § 6.3(2); ROBERT H. JERRY, III UNDERSTANDING INSURANCE LAW § 25A (1987); RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981).

60. *See* APPLEMAN & APPLEMAN, *supra* note 1, § 7401; COUCH, *supra* note 11, § 15:14; KEETON & WIDISS, *supra* note 9, § 6.3.

ages were awarded, several opinions have held punitive damages are covered by liability insurance,[61] uninsured motorist,[62] or underinsured motorist insurance policies[63] because the insurance policy terms were ambiguous. For example, Judge Whiting, writing on behalf of the Virginia Supreme Court, concluded: "We agree with those decisions that have found that language similar to the language at issue is ambiguous, and that the ambiguity should be construed against the insurer which drafted the policy."[64]

Questions about whether liability insurance, uninsured motorist insurance or underinsured motorist insurance provides indemnification for punitive damages have been occurring for several decades.[65] Express restrictions specifying that coverage is not provided for punitive damages—often set forth as an exclusion—are included in many insurance policy forms.[66] Obviously, excluding coverage for punitive damages is a matter that can be addressed by the contract

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61. *Cf.* United Serv. Auto. Ass'n v. Webb, 369 S.E.2d 196, 199 (Va. 1988) ("The insurance company could have inserted the word 'compensatory' before the word 'damages,' or specifically excluded liability for punitive damages elsewhere in the policy, and resolved the ambiguity, but it did not. Therefore, we construe the resulting ambiguity against the insurance company and in favor of coverage."); Greenwood Cemetery, Inc. v. Travelers Indem. Co., 232 S.E.2d 910, 913 (Ga. 1977) ("In view of this ambiguity, that interpretation which favors the insured prevails. We find that this insurance policy covered punitive damages of the type here in issue."); Harrell v. Travelers Indem. Co., 567 P.2d 1013, 1015 (Or. 1977) (en banc):

> [W]e hold that such provisions were ambiguous, at the least, so as to require the resolution of any reasonable doubts against the insurance company; that upon reading the policy provisions as set forth above, and in the absence of any express exclusion of liability for punitive damages, a person insured by such a policy would have reason to suppose that he would be protected against liability for "all sums" which the insured might become "legally obligated to pay" and that the term "damages" would include all damages, including punitive damages which became, by judgment, a "sum" that he became "legally obligated to pay."

Id.

62. *See* 1 WIDISS, *supra* note 7, § 12.6.

63. Jones v. State Farm Mut. Auto. Ins. Co., 610 A.2d 1352, 1353-54 (Del. 1992).

> Specifically, use of the generic terms "damages" and "all damages" can reasonably be construed to encompass punitive, as well as compensatory damages. *Under such circumstances, the policy is ambigous as a matter of law.* This leads to the inevitable result that the policy will be construed against the insurer and in favor of the insured. The phrase "all damages" reasonably embraces punitive damages. Absent contrary public policy grounds, given the foregoing principle of interpretation, Jones is entitled to a determination that UM/UIM coverage embraces punitive damages.

Id. (citations omitted).

64. United Serv. Auto. Ass'n v. Webb, 369 S.E.2d at 198.

65. *See supra* note 49.

66. *See* Taylor v. Lumar, 612 So. 2d 798, 800 (La. Ct. App. 1992). The insurance policy provided the following definition of "damages" in the definitions section: "Damages means the cost of compensating those who suffer bodily injury or property damage from a car accident. *It does not include amounts awarded as a punishment or deterrent, or for punitive damages.*" *Id.* (emphasis added).

provisions. The decisions of individual insurers, as well as industry entities responsible for drafting standard forms, to not include a provision in the insurance policy terms clearly addressing whether coverage is afforded for punitive damages, provide considerable support for arguments that the very absence of a provision that addresses a long-recognized coverage issue, in effect, creates an ambiguity in the coverage terms that is appropriately construed against insurers.[67]

Indisputably, insurance companies are, or should be, aware of the disputes arising in the absence of provisions in the insurance policy terms, which clearly address whether coverage is afforded for punitive damages. Insurers desirous of precluding coverage for punitive damages can do so by including exclusions.[68] Moreover, because provisions excluding coverage for punitive damages have been added to some insurance forms, responsibility for the absence of provisions explicitly addressing whether coverage "is" or "is not" provided for punitive damages in an underinsured motorist insurance policy is clearly attributable to the insurer.

B. *Protecting the Insured's Reasonable Expectations*

Courts across the country have recognized the need to protect the reasonable expectations of policyholders.[69] In some instances, judgments holding

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67. *Cf.* Collins & Ackman Corp. v. Hartford Accident & Indem. Co., 416 S.E.2d 591, 595 (N.C. Ct. App. 1992), *aff'd*, 436 S.E.2d 243 (N.C. 1993). "If Hartford 'intended to eliminate coverage for punitive damages it could and should have inserted a single provision stating "this policy does not include recovery for punitive damages."'" *Id.* (citations omitted).

68. The coverage issue could also be resolved by regulatory action—either legislative or administrative.

69. In 1947, Judge Learned Hand commented:

> An underwriter might so understand the phrase, when read in its context, but the application was not to be submitted to underwriters; it was to go to persons utterly unacquainted with the niceties of life insurance, who would read it colloquially. *It is the understanding of such persons that counts;* and not one in a hundred would suppose that he would be covered, not "as of the date of completion of Part B," as the defendant promised, but only as of the date of approval.

Gaunt v. John Hancock Mut. Life Ins. Co., 160 F.2d 599, 601 (2d Cir.), *cert. denied*, 331 U.S. 849 (1947) (emphasis added). Analysis and comments of this type by judges established the milieu in which courts began to enunciate a new principle upon which to justify holdings that claimants are entitled to rights at variance with the terms of an insurance contract even when the applicable provisions in the insurance policy are not ambiguous.

The doctrine of protecting reasonable expectations can appropriately be stated in the following way: In general, courts will protect the reasonable expectations of applicants and insureds regarding the coverage afforded by insurance contracts even though a careful examination of the policy provisions indicates that such expectations are contrary to the unambiguously expressed intention of the insurer.

See also RESTATEMENT (SECOND) OF CONTRACTS § 211(c) (1981): "Where the other party has reason to believe that the party manifesting such assent [that is, by signing or otherwise agreeing] would not do so if he knew that the writing contained a particular term, the term is not part of the agreement." *Id.* The comment explains: "Although customers typically adhere to standardized

insureds are entitled to coverage for punitive damages have been premised, at least in part, on protecting an insured's reasonable expectations about the scope of coverage.[70] In a Tennessee Supreme Court decision, for example, Justice Dyer wrote:

> The language in the insurance policy in the case at bar, which is similar to many types of liability policies, has been construed by most courts, as a matter of interpretation of the language of a policy, to cover both compensatory and punitive damages. Since most courts have so construed this language in the policy, *we think the average policy holder reading this language would expect to be protected against all claims, not intentionally inflicted.*[71]

When an insurance company has broadly defined the scope of coverage by using terms such as "sums," "all sums," or "all damages" in an insurance policy, it is reasonable for insureds—particularly those who lack expertise about insurance arrangements—to expect that the coverage applies (subject to the policy's limit of liability) to *any* amount that may be awarded, including punitive damages.[72]

C. *Maximizing Indemnification for Claimants*

During the middle of the eighteenth century, courts in England began to award punitive damages[73] to provide injured persons with compensation for non-physical injuries,[74] as well as to punish wrongdoers.[75] At the beginning of the nineteenth century, courts in the United States recognized the right of injured

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[contracts] and are bound by them without even appearing to know the standard terms in detail, they are not bound to unknown terms which are beyond the range of reasonable expectation[s]." *Id.* § 211(3) cmt. f. The conceptualization of the reasonable expectations doctrine in the Restatement is considerably more circumscribed than that which is frequently applied by the courts to insurance coverage disputes. In most instances, insurers can make a very compelling case that they are not including coverage terms which they know the purchaser would not agree to if they were aware of them. Especially when the terms at issue have been subjected to substantial scrutiny by drafting committees and, particularly for the insurance policy forms currently in use for the coverages acquired most frequently by individuals, state regulatory authorities have scrutinized the coverage terms so that insurers have little reason "to believe that the [purchaser of insurance] would not [do so] if he knew that the writing contained a particular term." *Id.*

70. KEETON & WIDISS, *supra* note 9, § 6.3.

71. Lazenby v. Universal Underwriters Ins. Co., 383 S.W.2d 1, 5 (Tenn. 1964) (emphasis added).

72. Arguably, the reasonable expectations of the insured are not involved when the purchaser has expertise and, therefore, is aware of the long-standing issue about whether coverage is afforded for punitive damages.

73. *See* Wilkes v. Wood, 2 Wils. K.B. 203, 95 Eng. Rep. 766 (1763); Huckle v. Money, 2 Wils. K.B. 205, 95 Eng. Rep. 768 (1763).

74. *See* GHIARDI & KIRCHER, *supra* note 1, § 1.01; Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173 (1931); Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517 (1957).

75. *See* Griffin B. Bell & Perry E. Pearce, *Punitive Damages and the Tort System*, 22 U. RICH. L. REV. 1, 3 (1987).

persons to recover compensation for pain, suffering, and mental anguish in tort actions.[76] Thereafter, most American courts rested the justification for imposing punitive damage awards exclusively on the goals of punishment and deterrence.[77] However, some judicial decisions in the United States have held awards of punitive damages to be compensatory.[78] Arguably, in these states, when liability

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76. *Id.* at 3; *see* KENNETH R. REDDEN, PUNITIVE DAMAGES § 2.3 (1980); 15 AMERICAN DIGEST, DAMAGES-MENTAL SUFFERING.

77. Bell & Pearce, *supra* note 75, at 4 ("After the 1830s, the increasing number of actual damage awards for mental anguish led courts to focus on the deterrence and penal functions of exemplary damages.").

78. Conn.: Tedesco v. Maryland Casualty Co., 18 A.2d 357, 359 (Conn. 1941) ("Under our law the purpose of awarding so-called punitive damages is 'not to punish the defendant for his offense but to compensate the plaintiff for his injuries,' and they cannot exceed the amount of the plaintiff's expenses of litigation less taxable costs."); Lanese v. Carlson, 344 A.2d 361, 364 (Conn. Super. Ct. 1975) ("[I]n this state, the purpose of exemplary damages and the rules for their determination indicate that they are essentially compensatory, not punitive, in fact and effect."); *see also* LeBlanc v. Spector, 378 F. Supp. 301, 305 (D. Conn. 1973) ("[T]he term 'punitive' is a misnomer, as 'punitive' damages in Connecticut serve a compensatory function limited by plaintiff's actual costs, rather than a punitive function which computes damages in terms of the wantonness of defendant's conduct.").

La.: Fagot v. Ciravola, 445 F. Supp. 342, 345 (E.D. La. 1978). The court stated: "Indeed, to the extent that Louisiana permits damage awards that other states would term 'exemplary' or 'punitive,' Louisiana has relied on what may often be viewed as the compensatory nature of even punitive damages." *Id.*

Mich.: McFadden v. Tate, 85 N.W.2d 181, 183-84 (Mich. 1957).

> Further statements in the charge indicated that by the term exemplary damages was meant "just compensation" resulting from the sense of outrage, mortification, humiliation and indignity caused by the manner in which the attack was made. There is nothing in the charge from which the jury might have inferred that an allowance of damages could properly be made by way of punishment of the defendants. Rather, emphasis was placed on the matter of compensation. . . . The trial judge was not in error in advising the jury with reference to the computing of damages by way of compensation if the injury inflicted on plaintiff was determined to have been so inflicted maliciously, willfully and wantonly.

Id. Wise v. Daniel, 190 N.W. 746, 747 (Mich. 1922) ("Exemplary damages are of necessity intangible in nature and therefore, cannot well be considered apart from those matters which are capable of exact pecuniary valuation. They may enlarge the compensatory allowance, but they are not to be considered as authorizing a separate sum by way of example or punishment."); Ray v. City of Detroit, 242 N.W.2d 494, 496 (Mich. Ct. App. 1976).

> We find that the award of the trial judge was entirely proper. The exemplary damages were compensatory in nature and constituted an appropriate enlargement of actual damages. They were not punitive nor were they given for the purpose of making an example of the defendant. . . . We see no reason why the municipal corporation, if found to be liable to the plaintiff, should be excused from compensating her for the injury to her feelings and for the sense of indignity and outrage when these are part of the totality of the injury she actually suffered.

Id.

N.H.: Vratsenes v. New Hampshire Auto, Inc., 289 A.2d 66, 68 (N.H. 1972).

insurance is actually paid to an injured party, it should afford coverage for punitive damages to provide more complete indemnification for injured individuals. In these states, the same argument applies with even greater force to underinsured motorist insurance because it is a first party coverage providing indemnification directly to an injured party.

IV. OBSERVATIONS AND COMMENTS

Cogent arguments have been urged both in support of and in opposition to construing the terms in underinsured motorist insurance policy forms to provide insureds with coverage for amounts awarded as punitive damages. In several states, assessments about whether this type of insurance provides coverage when punitive damages are awarded against an underinsured or uninsured tortfeasor seem to have been significantly influenced by judicial precedents holding that liability insurance does not provide coverage for punitive damages because it would, in effect, prevent punishment, retribution, and deterrence.[79]

A. *Punishment and Retribution*

One of the primary rationales for awarding punitive damages is to punish the tortfeasor.[80] When a court assesses the insurability of punitive damages in regard to liability insurance, if the rationale, which supports a particular award, is retribution or punishment, then the reasons for sustaining the award also apply—with equal force—as a persuasive justification for *not* allowing the responsibility for paying the judgment to be shifted to anyone other than the party who has transgressed. In other words, no matter how compelling and persuasive the case is against awarding punitive damages, as long as those considerations do not outweigh the reasons for imposing punitive damages, the justification for an award designed to punish also militates against the insurability of punitive damages and against interpreting the coverage terms in liability insurance policies to provide indemnification for punitive damages.[81]

Attaining retribution or punishment is of little significance for the resolution of questions about the insurability of punitive damages in regard to underinsured motorist insurance. The tortfeasor's obligation is not affected by the payment of underinsured or uninsured insurance benefits. The judgment against the tortfeasor continues to stand. Furthermore, it is even possible that an

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> No damages are to be awarded as a punishment to the defendant or as a warning and example to deter him and others from committing like offenses in the future. In other words, no damages other than compensatory are to be awarded. However, when the act involved is wanton, malicious, or oppressive, the compensatory damages awarded may reflect the aggravating circumstances.

Id.; *see also* William P. Zuger, *Insurance Coverage of Punitive Damages*, 53 N.D. L. REV. 239, 257-58 (1976).

79. *See supra* part II(D).

80. *See supra* notes 49-51.

81. *Cf. supra* notes 49-51. In considering this question, it is undoubtedly appropriate to recognize that the efficacy of punitive damages as a means of affecting conduct has been questioned by both judges and commentators in the legal system.

insurer, which has paid a substantial amount of underinsured or uninsured motorist coverage and, consequently, is subrogated to the insured's right against the tortfeasor, would be more assiduous in pursuing the tortfeasor (including taking steps to renew the judgment) than would some injured persons. Thus, allowing recoveries of punitive damages from underinsured motorist insurance might actually, at least in some circumstances, enhance the prospect of attaining the "punishment" goal.

B. *Deterrence*

Deterrence—discouraging either the tortfeasor or others from doing comparable wrongful acts in the future—is a goal often advanced as a justification for the imposition of punitive damages.[82] The public's interest in deterrence is not impeded by allowing an injured party to recover punitive damages from an insurer providing underinsured or uninsured motorist insurance. The insurer has no relationship to the tortfeasor whose conduct warrants the award of punitive damages. Recoveries from such insurers will not reduce the possibility of deterrence because it will not affect judgments against the tortfeasor and, accordingly, could not become a factor considered relevant by a tortfeasor.

C. *Increased Costs for Insurance Coverages*

One consequence of affording insureds the right to recover punitive damages from insurers providing underinsured motorist insurance coverage will almost certainly be higher premiums for purchasers. Indisputedly, the total amount of claims paid by underinsured motorist insurance will increase as the result of providing payments when such damages are awarded. Eventually, this would mean purchasers will pay higher premiums. Moreover, affording coverage will also create an inducement for injured persons to pursue tort claims to the judgment stage because an imposition of punitive damages against the tortfeasor is only possible in an action involving an adjudication of a tort claim. Such an inducement may result in greater litigation expenses for insurers obligated to defend the underinsured tortfeasor. If this lure resulted in a significant increase in litigation expenses, eventually the cost of liability insurance will reflect that increase. In addition, any increases in litigation affect and may result in increased operational costs of the judicial systems. The nation's taxpayers ultimately would bear these increased costs.

Judicial decisions sustaining claims by insureds in coverage disputes involving insurance hold, either explicitly or implicitly, that it is not contrary to public policy for an insured to acquire insurance that provides indemnification for punitive damages.[83] In these cases, the court's decision has usually been predicated on doctrines justifying a construction of some policy term or provision

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82. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 9 (5th ed. 1984).

83. *See supra* part III.

of the insurance policy.[84] The insureds prevailed either on the basis of an expansive interpretation of terminology or on an interpretation of the coverage that favors the insured.[85] The justification for according terms such as "sums" or "damages" the broadest possible scope, while consistent with practices commonly employed by courts, is not an immutable practice. Questions about coverage for punitive damages are rarely, if ever, a matter of assuring full indemnification for individuals injured by an underinsured motorist. Therefore, the public's interests arguably are not served by applying such doctrines in this context. In my view, no public interests are served by sustaining claims that insureds, who secure a judgment against a tortfeasor that involves an award of punitive damages, are entitled to recover such an amount from an insurer providing underinsured motorist insurance.

D. *Explicit Exclusions*

The coverage disputes in which courts have held an insured may recover an amount awarded as punitive damages from an insurer providing underinsured or uninsured motorist insurance did not involve insurance policy provisions that specifically excluded coverage.[86] Judicial decisions in such cases, predicating coverage for punitive damages on either the expansive construction of the terms in the applicable insurance policy or protecting an insured's reasonable expectations, do not deny insurers the opportunity to make an explicit qualification, limitation, or restriction. Insurers could—and, I believe should—avoid disputes about whether coverage is provided by underinsured motorist insurance by including a clear exclusion in the policy forms that ensures the purchaser's actual expectation is the same as the insurer's, or at least that it will not be "reasonable" for a purchaser to have a contrary expectation.

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84. *See supra* part III.

85. *See supra* part III(A) and (B).

86. *But see* Stinbrink v. Farmers Ins. Co., 803 P.2d 664, 665 (N.M. 1990) ("We have thus determined that punitive damages are as much a part of the potential award under the uninsured motorist statute as damages for bodily injury, and therefore they *cannot be contracted away.*") (emphasis added).