

## *Damages*

The law of damages is made up of rules and standards our justice system uses to compensate those who suffer loss due to the wrongful conduct of another. In the Forward to his Handbook on the Law of Damages, Charles McCormick states, “The rules of measurement are almost as much a matter of local habit and custom as are the rules of procedure...Only the text-book which deals with the law of a single state can with any approach to realism purport to reflect a unified system of rules of damages.” (McCormick, V). As we all know from our own experiences, the topic of damages is difficult to summarize. It is the intent of this paper to give a general overview of damages and conclude the discussion with a current look at punitive damages.

### Overview of Damages

The purpose of ordinary compensatory damages is to make one whole after suffering a loss or an injury. The injured person is to be placed in the position in which he or she would have been had the injury or loss not occurred. As a result, compensatory damages are considered remedial in nature, rather than preventive or punitive and are to “remedy” the wrong. However, punitive damages are awarded in cases where the defendant’s conduct was particularly willful, wanton, malicious, vindictive, or oppressive. More discussion concerning punitive damages will follow the general overview of damages.

Balancing the desire to compensate the wronged plaintiff is the overriding principle that damages are not intended to unjustly enrich a complaining party or award them for damages not suffered. For these reasons, Alabama courts have historically denied a recovery of damages where there has been no finding of injury. [Skipper v. South Central Bell Telephone Company, 334 So. 2d 863 (1976)].

Our court system distinguishes between various types of damages. This distinction is important because rules vary regarding recovery of each type of damage. Before going into punitive damages, the main focus of this paper, I'd like to take a quick look at other categories of damages.

Compensatory damages are, as the name suggests, awarded to compensate the injured plaintiff. With respect to these damages, a defendant is liable for the direct consequences of his wrongful actions. This type of damages must be capable of being measured based on rules of law that apply to damages. This causes difficulty when trying to affix an amount to cases involving claims for pain and suffering or emotional distress. In awarding compensatory damages, the judge or jury has broad guidelines to follow. These guidelines include good judgment, common sense, and knowledge of the economic and social affairs of life. Within these guidelines, the controlling factor is that the amount be supported by the evidence in a specific case.

Recovery can be made for a number of different injuries. Physical impairment, mental impairment, present and future physical pain and suffering and loss of enjoyment of life are examples of a few of these. Recovery is also allowed for injuries of an economic nature, i.e., loss of earnings, impairment of earning capacity, lost profits, as

well as the reasonable and necessary expenses incurred by the plaintiff as a result of the injury.

A second category of damages is nominal damages. Nominal damages are amounts awarded to a plaintiff who establishes that he or she has been injured but cannot offer proof of any kind as to damages suffered. The amount awarded is generally a small, symbolic sum, sometimes as little as one dollar. In some jurisdictions, it may equal the costs of bringing the lawsuit.

### Punitive Damages

The remainder of this paper is going to focus on punitive damages. The issue of punitive damages has been raging in our state for several years now and will most likely remain in the political spotlight for years to come. What is the current trend in punitive damages? What have recent cases said about punitive damages awards? What does the future hold in store for the punitive damages debate?

Tort reformers have turned the phrase ‘trial lawyer’ into a word with a negative connotation. At a time when many are taking shots at lawyers, specifically trial lawyers, we should be proud to represent victims of wrongdoing or negligence regardless of who or what the Defendant may be. Without access to the Court system, both state and federal, such victims have no real recourse against the insurance companies, lending institutions, automobile manufacturers, or other large entities that have the financial resources to employ an army of lawyers as well as lobbyists.

Over the past decade, we have seen a continuing debate in the United States concerning reform of our tort litigation system. While reform can be a good and positive

thing, the kind of reform currently being promoted would protect wrongdoers rather than the victims and would insulate these wrongdoers from further exposure.

Closer to home, the debate within our state has cast us into the national spotlight. In the Top Ten Verdicts of 1999, published by Lawyers Weekly USA, Alabama's \$581 million verdict against Whirlpool placed fourth. It was characterized as a financing scam that cost a family a few thousand dollars but resulted in a verdict of over half a billion dollars to family members who suffered no physical or emotional injuries. Instead of reporting this case as one in which an unscrupulous company was caught in a scheme it had hatched to target and exploit hundreds of vulnerable people they could take advantage of, various publications with hidden agendas of protecting their corporate backers have twisted the information to claim that Alabama juries and judges are running wild in awarding excessive punitive damages.

What is not addressed in articles like this is the benefit that large awards provide to society. Were it not for attention-getting punitive awards, this company would continue to defraud hard-working citizens of our state; the Ford Pinto, with its propensity to burst into flames in rear-end collisions, might have killed even more people than it did; and the heart-damaging diet drug fen-phen would still be on the market.

In my opinion, the attacks of the Alabama judicial system are unwarranted. The reality is that a very small percentage of Alabama cases result in punitive damages. Those that do, must pass through a thorough review at the post-verdict hearing stage and then later on appeal. No case with weak facts has survived the system in Alabama. Few cases have come out of the Alabama Supreme Court without large reductions of punitive damages, even when the wrongdoing was great and aggravated.

National publications have also failed to report that large punitive damages primarily occur in the area of insurance and consumer fraud, which is most significant. They have refused to point out that Alabama's Insurance Department is, without question, the weakest in the nation insofar as regulation of insurance companies and agents is concerned. It is inconceivable that a state regulatory body would not have fining authority over the companies and agents regulated, but that is the case with Alabama's Insurance Department. The Alabama Insurance Department's only real recourse is to bar companies from selling insurance in the State. To my knowledge, no other state in the country has an insurance department that has no fining authority and that operates on as small a budget and with as few regulatory employees as Alabama.

In Alabama, many companies know very little, if anything, at the outset about the persons they employ and license as agents. Very few of these companies do background checks on their prospective agents. Most companies do not even check with the Insurance Department for pending or prior complaints. This is not to say that all agents are bad. However, there are plenty of "bad apples" in the insurance barrel.

In a recent case against a recognized life insurance company, a series of questions were asked of the company's President relating to the supervision of agents. The President reported that the company had never terminated an agent for fraud or other improper conduct. During the same period of time, thousands of agents had been fired for failing to meet production quotas. After a punitive damage award, the company terminated over 400 agents and strengthened its supervisory practices. Score one for the benefit punitive damages serves in our society.

## Burying the Truth

There is another practice that is occurring in greater frequency that tells a great deal about the corporate mentality concerning wrongdoing and corporate fear of punitive damages. That surfaces in the concept of “confidentiality” of settlements. It has become quite common for a corporate Defendant to demand both the facts and amount of settlement remain confidential in cases where there is extreme bad conduct on the part of the Defendant and its agents. Documents containing proof and documentation of wrongdoing are all too often returned under protective order to the wrongdoer so that they can be kept away from the general public, including other victims of similar wrongdoing. Confidential settlements are worthless insofar as serving any “public good” is concerned. The type conduct that gives rise to punitive damage awards should be open to public scrutiny. In fact, the practice of confidential settlements most likely encourages future wrongdoing. If there is no real fear of being caught, some companies will continue to do wrong. If a person or corporation is caught, pays a settlement, and then **buries** the evidence, there is little deterrent effect and no knowledge passed to the public. I personally believe that the confidential settlement should be banned except in certain cases where the names of the victims and their families are due to be protected.

According to media reports and public perception, large punitive damages awards in Alabama are the regular practice in civil cases. But let’s take a closer look at the numbers and determine whether this belief is accurate.

## The Real Truth about the Trend in Punitive Damages

The likelihood of an award of punitive damages is inflated by certain elements of the media. The actual percentage of all verdicts that result in punitive damages being awarded is 4 percent according to a study done by the Bureau of Justice Statistics. Perhaps the reason that Alabama has such a negative reputation as the state for “jackpot justice” is that the verdicts the media promote in their degradation of trial lawyers and punitive damages awards in Alabama are exceptions to the rule. Certain cases have been pushed to the forefront by the media when discussing the so-called “downward spiral” of justice in Alabama’s courts (i.e., BMW v. Gore, Exxon Mobil, etc). However, if you take a closer look at the facts of these cases, the actual computation of the verdicts and the actions of the courts after the announced verdict, you would see a different story altogether. For example, in the BMW case cited so many times in the headlines, the \$4 million punitive damages portion of the verdict was later reduced based on the fact that the jurors made a computation error. They originally based the “formula” of computing sufficient punitive damages on the amount of compensatory damages awarded in the case (\$4000) multiplied by the similar sales in the country instead of in the state. Therefore the \$4 million verdict was reduced to \$2 million. This was still held to be “grossly excessive” by the U.S. Supreme Court and remanded back to the Alabama Supreme Court. Having only heard the “huge” verdict of \$4 million to a “wealthy” doctor, the public is of course outraged over a “simple” paint job non-disclosure. However, if the average reasonable person were to see the rest of the story, they would see that sometimes the punishment may not appear to fit the crime, but in actuality it really does.

The notion that “doing away with” the current system of punitive damages available would benefit the society as a whole is preposterous. In states where juries are not allowed to assess traditional punitive damages, studies show that they inflate the amount of compensatory damages or award “exemplary” damages to counteract the lack of punitive damages. Unlike compensatory damages, punitive damages are to deter the future behavior of a defendant. The punitive damages awarded to a plaintiff are not just for that plaintiff in most cases. In cases like products liability and fraud cases, the punitive award, although given to the plaintiff in the case at hand, is a representation of the amount required to right a wrong done to all who have experienced the same problem. It is an attempt to punish and deter the same or similar acts by a defendant.

A juror is more sensible than the average corporation seems to think. Jurors are not going to award punitive damages when they believe that the corporation is doing all that it can to be responsible. The odds that a juror will find *for* a corporation are much greater than the odds they will find that the corporation is in need of being punished. In fact, in many products liability cases, the jury finds for the corporation.

Public Citizen has issued its annual Civil Justice Update, which is most revealing. The Department of Justice has deflated many of the myths that “tort reformers” have used over the years to criticize and weaken our civil justice system. The report is the third in a series of reports based on a survey of the 75 largest counties in the United States. According to the study, **punitive damages are only awarded in 3.3% of the tort trials won by plaintiffs**. The study also reveals that punitive damages are decreasing over time both in frequency and amounts awarded. The study disproves the “Runaway Jury” myth by showing that judges are much more likely to award punitive damages than are juries.

In fact, the statistics show that judges are more likely than juries to decide in favor of the plaintiffs in on liability questions. This also shows that the anti-consumer, pro-corporate-wrongdoer propaganda of “tort reformers” has succeeded in misleading average citizens nationwide. It is also interesting to note that product liability and medical malpractice lawsuits represent only a small portion of tort suits filed. Additionally, most lawsuits involve individuals suing one another – not individuals suing businesses. There are also a significant number of lawsuits -- including cases with some of the largest punitive damages awards -- where corporations sue another corporation. To get more information on Public Citizen’s summary and fact sheet, you can go to their website at [www.citizen.org](http://www.citizen.org).

#### How the System Should Work

It should be undisputed that the American Civil Justice System has served the people of this country well in many important ways. It has provided compensation to victims of wrongdoing; it also has punished misconduct and kept others from repeating similar conduct by the imposition of punitive damages. Further, it has prevented untold numbers of injuries and deaths by bringing to public attention the fact of dangerous products; it has encouraged improved safety and penalized those who knowingly ignored available safety practices and devices; and it has protected innocent victims who oftentimes are targeted for fraudulent and other improper conduct by persons and corporations who profited handsomely as a result. Without question, the concept of punitive damages has played an important role in our system. The limitations on punitive damages will have a chilling effect for American consumers, workers, and just common everyday folks. Such a happening would set back safety practices in industry and result

in the wholesale loss of life and tremendous increases in the incidence of crippling and disabling injuries. It is frightening to think of what the automobile industry would do if it had no fear of punitive damages. Companies who have shown a propensity to do wrong in the past, would certainly be encouraged to intensify their efforts in the future. It could also entice good companies, because of unfair competition, to go bad.

In today's anti-regulatory climate, it has generally been civil trial lawyers who have brought to public scrutiny evidence of monumental fraud and dangerous safety practices in the corporate world. Because we have this, we have become a convenient target. Instead of just killing the lawyers, the message has more recently been, "kill the trial lawyers!"

One Alabama case that received a large amount of national attention was the state's case against Exxon in December 2000. A great deal has been said, both pro and con, about the large jury verdict that was rendered. Dr. David G. Bronner, who enjoys tremendous respect in the business and financial communities throughout the country, made some rather interesting observations in the March issue of the *Advisor*. Dr. Bronner stated for his many readers:

"Clearly Exxon ignored what was legal, ethical, and the right thing to do when the verdict was so large and Alabama was only claiming \$87.7 Million in compensatory damages. This case is not a simple contract dispute but regards a big corporate thief. Jury awards are often reduced on appeal by the judge or appellate courts, yet this judgment should withstand any appeals to state or federal courts. This case is a warning to businessmen that they have nowhere to hide when abusing the taxpayers and citizens of this great country."

Dr. Bronner commends Governor Siegelman, Attorney General Pryor, and the trial team who so ably assisted the Attorney General's office in taking on Exxon in a classic case of corporate fraud. I wonder, however, why it is so bad to defraud the State but acceptable in some circles when massive frauds are committed against consumers. Surely the State is more capable of dealing with fraud than would be an uneducated, unsophisticated consumer who lives from paycheck-to-paycheck.

### A Sampling of Other Alabama Verdicts

In the next few pages, I'd like to touch on a few cases worth mentioning to highlight the conduct and attitudes punitive damages help to punish. Many of you can probably add to this list other cases that you are aware of and have been a part of.

#### 1. Johnston v. General Motors Corporation

The death of a small child resulted in a \$15 million jury verdict. General Motors had experienced significant stalling problems with several of its vehicles (all equipped with the same engine), but never saw fit to inform its customers of the known problems. General Motors knew the exact reason for the problem that caused a multitude of problems, including stalling. The brand new Chevrolet pick-up truck in which the child was riding with his grandfather stalled after entering an intersection and was struck by a log truck. Testimony from General Motors' engineers and documentary evidence from General Motors' files proved that they had known of many other stalling incidents prior to this one. General Motors had put a "silent recall" of the vehicles into effect many

months prior to the child's death. The general public, including purchasers of vehicles, were never made aware of the "secret recall." After the jury verdict, and an appeal to the Alabama Supreme Court (which resulted in a \$7.5 million remittitur), General Motors quietly recalled a great number of the models. Through the time of the recall, General Motors had profited to the tune of over \$42 million. General Motors actually made their customers pay for replacing the defective parts unless a customer requested General Motors to pay. Interestingly, at oral arguments before the Alabama Supreme Court, General Motors' lawyers from Atlanta denied the existence of any problems. A few months later GM issued a massive recall based on the identical problems that we had in the Johnson case. This case is a prime example of corporate deceit at the highest levels. It also indicates that profits generally win out over safety in the corporate boardrooms of many automobile manufacturers.

## 2. Spivey v. Kubota Tractor Company

This case was settled after four days of trial for \$10 million. We proved at trial that Kubota, with knowledge of numerous fatalities as a result of tractor rollover accidents, sold tractors in the United States without providing rollover protection (roll bars and seat belts). Internal memoranda from Kubota revealed that the company was well aware of the hazards and highly dangerous conditions created when no rollover protection is provided for tractor operators. It was proved at trial that Kubota made a conscious and calculated decision to sell tractors without rollover protection. In so doing, Kubota was literally disregarding the recommendations of its own safety engineers and outside safety consultants who advocated rollover protection on all tractors. The dealer

who sold the tractor in question admitted at trial that he had never heard of roll bars or seat belts being installed on farm tractors. Kubota had planned a retrofit program for all existing tractors sold by Kubota that were still in use in the U.S.A. This plan was never carried out. Defendant's last offer prior to actual settlement was \$10 million with the settlement conditioned upon strict confidentiality and return of all documents. This offer was rejected by the Plaintiff and her family. A few hours later the confidentiality requirement was withdrawn and the case settled. There are more things that I'd like to say about this case but will save it for the conclusion of this paper.

### 3. Gallant v. Prudential Life Insurance Company

A jury returned a verdict against the Prudential Insurance Company and one of its former agents for a total of \$25,430,000. Leslie and Rebecca Gallant of Opelika, Alabama, had sued Prudential and one of its agents for fraud and Prudential for improper hiring and retention of the insurance agent.

The evidence against Prudential and its agent was overwhelming. This agent, whose record was extremely bad, had committed legal fraud against approximately 200 known policyholders over a period of years. (Prudential later admitted that over 400 persons were involved.) Much of the fraud was committed during a time that the agent himself was on probation for serious violations of Prudential's own rules of conduct. Nevertheless, Prudential continued to allow the agent to defraud policyholders with virtually no supervision. Reports both to the State Insurance Department and to Prudential itself of the agent's activities were contained in the agent's personnel file. Prudential did not see fit, however, to terminate the agent, who was described by

Prudential's District Manager as a "bad one," until late 1992. By that time, over 400 policyholders had been hurt. The reason for termination was listed by Prudential as misrepresentations to policyholders.

The fraud involved, among other things, false representations concerning future retirement benefits to the policyholders. Prudential's attorneys admitted at trial that the agent had not been truthful in his dealings with the policyholders.

The jury could not believe that a large insurance company like Prudential would operate in such a manner. Prior to the Gallant trial, Prudential had settled approximately 35 separate claims by policyholders on a confidential basis for millions of dollars. Prudential selected the Gallant case to try as a "test case" for the nation.

Since the Gallant verdict, hundreds of other cases in the same Alabama county were settled – all on a confidential basis. I suspect that the total number of victims in Alabama alone will be in the thousands.

#### 4. Johnson v. Mercury Finance Corporation

After hearing damaging testimony from a branch manager of Mercury Finance Company, an Alabama civil jury returned a punitive damage award of \$50 million. This was against a company that, by its own admission, targets low-income customers for high interest automobile loans. Testimony that included corporate documents from the top levels of Mercury Finance Company revealed a corporate policy of "keeping low-income borrowers in debt." This policy was admitted at trial.

Trial testimony also revealed a nationwide corporate scheme that provided a secret reserve account allowing Mercury Finance to retain \$500 to \$1,000 on each

automobile loan ever made by the company. This reserve is taken from the loan proceeds, after being added to the cost of the automobile by the dealer, and is deposited in a special Mercury Finance account. Regardless of whether the full loan is paid or not, the reserve account is retained by Mercury Finance. This scheme is never revealed to the borrower who pays 26.29% interest (APR) on the loan. During the trial, it was estimated by a corporate official that Mercury Finance Company had made up to \$1,150,000,000 from the scheme.

Willie Ed Johnson, a 25-year old single male, who was working at a full-time job, bought a used automobile and financed it with a 26.29% Mercury Finance Company loan. Over the course of his dealing with Mercury Finance, the borrower's credit was virtually destroyed. Mr. Johnson traded in his older automobile and wound up owing approximately \$6,500 on the 1985 Chrysler purchased. This vehicle had carried a sticker price of \$2,995 and had been purchased by the dealer for around \$1,900. The original loan by Mercury Finance was for \$4,054.31. Mr. Johnson's Chrysler was repossessed by Mercury Finance after the borrower found himself unable to pay a monthly loan payment of \$257 out of his monthly take home pay of \$450.

After Mercury Finance took his vehicle and sold it to a third party (related to Mercury Finance) for \$500, Mr. Johnson was said to owe Mercury Finance a debt on the automobile loan of approximately \$6,500. Mercury Finance then reported Mr. Johnson's bad credit to credit bureaus and threatened to sue him for the debt, which by that time was more than double the original price of the vehicle when purchased in 1991.

In addition, Mercury Finance required what is known as "forced placed" insurance on the Johnson vehicle which purported to cover the vehicle for collision, theft,

and fire loss. An annual premium of some \$700 was added to the loan. When a total loss occurred due to theft and fire, Mr. Johnston learned that coverage was afforded under his policy only in the event of repossession by Mercury-Finance. Otherwise, he had no coverage. Then conveniently, Mercury Finance loaned him an additional amount (over \$2,000) to repair the vehicle, which was burned by the thief.

##### 5. Sheridan v. Northwestern Mutual Life Insurance Company

In Northwestern, a Montgomery County jury returned a verdict of \$25,727,248 based upon fraud and improper supervision of an agent. This is a case in which an insurance company hired an agent who had a horrible background, including a history of fraudulent conduct. At the time the agent was hired as a special or soliciting agent by Northwestern, the following was known by the company: the agent's prior company had suffered insolvency and financial failure; there were over 170 judgments and six tax liens in the agent's county of residence against the agent or his old corporation; the agent or his company had been sued sixteen additional times within a two-year time-frame (seven of the lawsuits contained claims of fraud. After hiring the agent, Northwestern also learned that the leopard's spots had not changed: There were several lawsuits filed against the agent after Northwestern employed him. One of these lawsuits resulted in a garnishment of the agent's accounts at Northwestern. At trial, other agents of Northwestern told a sordid tale of bad conduct that they had personally observed. Their testimony included the forgery of signatures by the agent and the cashing of commission checks written to other Northwestern agents by forging their endorsements. All of the above disreputable activity had been reported to the agent's supervisors with Northwestern. Instead of

terminating the agent, Northwestern honored him with numerous awards based upon production activity. The agent's sales volume with Northwestern reached a career total of \$67,300,000. During this time, Northwestern promoted the agent from "Special Agent" to "Field Director" for two South Alabama counties and later expanded his territory to include three additional counties. It is not difficult to understand why the jury returned a substantial punitive damage award against Northwestern based upon fraud and Northwestern's total failure to supervise the agent. Unfortunately, the Alabama Supreme Court saw fit to reduce the verdict on appeal by over \$12 million.

#### 6. Foster v. Life Insurance Company of Georgia

Life Insurance Company of Georgia sold Ms. Foster, a 71-year old woman, who could neither read nor write, a Medicare supplement policy. She paid the premiums for three years. When a claim was made, it was denied by Life Insurance of Georgia because Ms. Foster did not have underlying Medicare coverage. The company was sued for fraud and the jury returned a verdict for just over \$1 million.

#### 7. Callaway v. Life and Health Insurance Company

This was a fraud case against a group health insurer filed by Mrs. Callaway, a lady who had a history of cancer at the time she applied for the insurance policy. The insurance company's agent used the old bait and switch scheme to get Mrs. Callaway to change policies. A good policy was dropped and replaced by the Life and Health policy. Mrs. Callaway's cancer reoccurred and she filed a claim that was denied. In addition to the fraudulent representations, Mrs. Callaway proved a material alteration in the policy

application. After the application was signed and delivered, someone changed a portion of the application in an attempt to avoid coverage. The jury awarded \$3 million in compensatory damages and \$3 million in punitive damages for a total of \$6 million. The case was settled while on appeal.

8. Harris v. Sears, Roebuck & Company and States Industries, Inc.

This case involved the death of a teenage girl and injuries to three other family members due to carbon monoxide poisoning from a gas water heater that was improperly connected and not properly vented. The wrongful death award was \$4 million. The personal injury awards to the three individuals who were injured totaled \$8 million. The plaintiffs proved through employees of States Industries (who manufactured the heater) that for over ten years this large manufacturer of gas water heaters had actively campaigned against the implementation of safety devices for gas water heaters. A pro tanto settlement was reached with two other Defendants for \$1.5 million prior to trial. The Alabama Supreme Court upheld the verdict but reduced the amount of damages substantially.

9. Little v. Bunn Construction Company

This case involved the wrongful death of a construction worker at a highway construction site. The decedent was run over by a dump truck that was backing up to an asphalt spreader. Liability was based upon the failure to provide back-up alarms for dump trucks working at the construction site and the improper design of truck mirrors. Ford Motor Company had designed and installed side windows on a truck chassis, which

was later fitted by Fontaine Industries with a dump body. This body created a blind spot to the rear of the vehicle. Both Defendants admitted that use as a dump truck at a construction site, where backing would necessarily be required, was anticipated. Back-up alarms were not required as standard equipment by either Ford or Fontaine but were available as optional equipment to the dealer. This information was never made known to the purchaser. There was significant testimony from defense witnesses that the Defendants had been aware of numerous fatalities and disabling injuries resulting from backing vehicles operating without back-up alarms at construction sites and in other settings. Numerous documents from files of Fontaine showed actual knowledge of the hazardous conditions created under such circumstances when back-up alarms are not utilized. Ford Motor Company settled during trial for \$1,250,000. The jury returned a verdict against Fontaine for \$25 million. The case was settled later for a lesser amount.

#### 10. Baker v. Union Mortgage Company

This case involved five families who sued Union Mortgage Company for fraudulent lending practices. The jury awarded a total of \$45,000,000 (\$9,000,000 per family). Union Mortgage Company, a Dallas-based mortgage lender, was targeting low-income, poorly educated, and primarily black homeowners in several states. Union Mortgage Company solicited home-improvement contractors who in turn solicited the homeowners for second mortgages. The Plaintiffs received almost nothing of value and wound up with mortgages for approximately \$10,000 on their homes. Union Mortgage Company received an off-the-top discount of ten percent on each loan, which was not disclosed. In addition, an origination fee of \$125 per application was charged and

deducted. Any work done by the contractor was of poor quality. In some instances, no work of any value was ever done. The contractors recruited by Union Mortgage Company were individuals who could be expected to lie, cheat, and steal. At trial, a former employee of Union Mortgage Company testified that a good day for him was when “nobody from 60 Minutes showed up.” Another gem was testimony that the Dallas office processed applications immediately so that the homeowner would be legally obligated “before the ether wore off.” The case was settled while on appeal along with approximately seventy-five other cases against the same Defendant. The settlements had to be approved by the Finnish government since Skopbank, the owner of Union Mortgage Company, was regulated by the Republic of Finland. Union Mortgage Company had made tremendous sums of money in the United States utilizing the worst scheme that I have witnessed in my legal career.

#### 11. Turner v. Alabama Power Company

A \$5,000,000 verdict resulted from the electrocution of a truck driver who was killed when the doors of his truck contacted a guy wire owned by Alabama Power Company, which was located alongside a public street. The guy wire had become energized because of the defective design and configuration of overhead power lines at a relocation project in a business-industrial district. The decedent, who had unloaded meat from his truck at a business establishment, was closing his truck doors at the time of his death. One of the doors accidentally engaged the guy wire, which caused an electrical current to pass through the door into the decedent. Proof at trial from Alabama Power Company engineers revealed that there are many more such potentially hazardous

conditions of a similar nature existing on Alabama Power Company's lines in various parts of Alabama. The Alabama Supreme Court remitted the verdict to \$3,500,000.

This series of cases illustrate my contention that excessively bad conduct will and should result in substantial punitive damage awards. The sole reasons for punitive damages are to punish the wrongdoer and to keep that wrongdoer and others from committing similar wrongs in the future. My experience has been that wrongdoings of an isolated nature, without recurring events of a similar nature, do not result in large awards. As all of you know, a simple mistake or act of carelessness cannot support a punitive damage award in any amount. While our system can always be improved, it would be a grave mistake to "throw out the baby with the bath water."

Finally, it should be pointed out that many cases of massive fraud and other improper conduct are settled. These are cases where punitive damages would clearly have been returned by a jury had the settlement not occurred. Without this fear, the victims would have been ignored for the most part.

### Conclusion

Just this week, the United States Supreme Court addressed the issue of how closely an appellate court must scrutinize a trial court's review of a jury's punitive damage award. In Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 2001 WL 501732 (U.S. May 14, 2001), the Court rejected as too lenient the "abuse of discretion" standard for appellate review of a trial court's determination whether a jury's punitive damage award violated the United States Constitution. The Court instead held an appellate court must review the trial court's determination of the reasonableness of a

jury's punitive award *de novo*, with no deference to the trial court's application of the constitutional damage standards.

In reaching this conclusion, the Supreme Court asserted it was *not* disturbing the principles a trial court is to use in evaluating the size of a punitive damage award as set out in BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996). However, in holding that the trial court's application of those principles must be reviewed *de novo*, the Court rested on its conclusion that a punitive damage award, as an expression of the community's moral outrage, is *not* a finding of fact. I find this troubling, because I believe, as Justice Ginsberg argued in her dissent, that the amount necessary to punish and deter wrongdoing is just as much a finding of "fact" by the jury as the amount needed to fairly compensate a victim for his or her injuries and losses.

It may be, as Justice Ginsberg also noted, that this new standard of review may not make much practical difference in courts' reviews of juries' punitive damage awards. However, only time (and experience with the appellate courts) will tell whether *Cooper Industries* will become one more tool activist, anti-democratic judges use to chisel away at the great equalizing effect of requiring individual and corporate wrongdoers to face their responsibility before a jury of twelve lay citizens.

I mentioned the Spivey v. Kubota Tractor Company case earlier. In closing, I'd like to mention it again and give some "behind the scenes" information about the plaintiffs in the case. The story of the Spivey family gives me hope that what we are doing as trial lawyers benefits society and gives victims recourse against wrongdoers. In the Spivey case, we developed a classic case of a corporation that put its own profits over the safety of persons who would operate its farm tractors. After 5 days of trial and

testimony that was extremely damaging to Kubota, the case was settled for \$10 million. Such evidence as internal documents that revealed how Kubota had actually calculated what it would cost them in compensatory and punitive damages if they elected to leave the roll bars off the tractors was seen by the jury. Offers of settlement had started at around \$100,000 prior to the trial and escalated to the final \$10 million offer that was subsequently accepted by the Spivey family. The important contribution that Mrs. Spivey and her family made to farm tractor safety, however, would never have been told had the final offer been accepted in its stated form.

The offer made to Mrs. Spivey to settle the case was made conditional on total confidentiality and a return of all documents to Kubota. The court file was to be sealed and the public shielded from any knowledge concerning how bad the problems were concerning tractors being operated without the needed roll-over protection. Mrs. Spivey instructed Greg Allen and me as her lawyers to tell Kubota that they could keep their money if the settlement had to be confidential as outlined above. We did just that to their great surprise and perhaps even shock. After a few hours of negotiations, Kubota reluctantly agreed to the settlement but without confidentiality and the other conditions. The next day, we had a news conference in Montgomery and revealed to the world how truly bad Kubota's conduct had been. The reporters were shown a vast array of documents and evidence used at trial. This story was told by the news media, not only in the United States, but also throughout the world. The result of Mrs. Spivey's actions, which were fully supported by all of her children, have been most revealing. Kubota decided to clean up its act. Interestingly, and most significant, is the fact that today, Kubota advertises itself as "the leader" in the providing of roll-over protection for its

farm tractors. Had Mrs. Spivey not been so committed to improving things for others, that advertisement would possibly never have been made and the changes never implemented that have come about since the *Spivey* case.

Finally, I am a trial lawyer and am extremely proud of it. I sincerely believe that the right to trial by jury is the single thing that keeps corporate America somewhat honest!