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## Attempted Cap on Punitive Damages Continues to Spark Debate

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# Attempted Cap on Punitive Damages Continues to Spark Debate

By Susan J. Becker  
LITIGATION NEWS ASSOCIATE EDITOR

The debate surrounding federal product liability law has not been silenced by recent compromises reached by the House and Senate regarding appropriate boundaries for such laws. To the contrary, President Clinton's threatened veto of Congress's Common Sense Product Liability Reform Act of 1996 and continued opposition by the ABA Section of Litigation and other groups to parts of the Act guarantee that the 20-year-old debate will continue to rage.

The most controversial aspects of the legislation are its punitive damage provisions. The Act limits punitive damage awards to \$250,000 or twice the combined damage award for economic and noneconomic damages, whichever is greater. Individuals with a net worth of

\$500,000 or less and businesses with less than 25 employees, however, would only be liable for punitive damages amounting to the lesser of \$250,000 or twice the compensatory damages.

Punitive damages awards would be available only where a claimant establishes by clear and convincing evidence "that conduct carried out by the defendant with a conscious, flagrant indifference to the rights and safety of others" caused the claimant's injuries. (This standard is already used in a number of states.)

Contrary to reports in the popular press, the caps on punitives contained in the Product Liability Reform Act are not absolute. The jurors are not informed of the limitations on their punitive damage awards and thus may award any amount of punitive damages they deem appropriate. If the amount of an award exceeds the statutory cap, the court may decline to apply the cap upon a determination that the capped amount would be insufficient to punish and deter the defendant.

A judicial determination to disregard the cap must take place in a separate proceeding during which the court con-

siders the factors include the extent to which the defendant acted with actual malice, the likelihood that harm would ensue from the defendant's conduct, the profitability of the misconduct to the defendant, and the financial condition of the defendant. The court cannot enter an award of punitives that is larger than the jury's punitive damage award.

Previous civil justice reform measures passed by the House as part of the Republicans' Contract with America included caps for punitive damages in all tort actions, including medical malpractice claims. That legislation has not been well received in the Senate and the battles over punitive damages and other reform measures will no doubt continue at the state, if not federal, level regardless of whether the Product Liability Reform Act becomes law.

"The issue of punitive damages has been the subject of a lot of discussion," says Susan Stevens Dunn, a Chapel Hill, NC, attorney who co-chairs the Products Liability Litigation Committee of the Section. "At the Committee's Midyear meeting (this past February) we had a panel presentation on the top-

tiffs' bar, manufacturers, and consumer groups.

"I think it is safe to say that the plaintiffs' lawyers were adamant that the absence of unlimited potential liability will result in many manufacturers making unsafe products," Dunn says. "The manufacturers were equally convinced that some type of legislative intervention was necessary on product liability dam-

ages because the threat of these damages creates such a serious business risk."

Dunn also observes that the punitive damages is-

ssues present a significant public relations challenge to the legal profession.

"We need to be concerned about what the public thinks of this situation and of the legal profession when the issue of punitive damages comes up," Dunn says. "Many people think that lawyers are just trying to feather their own nests no matter which side they take."

Dunn believes that the controversy surrounding punitive damages generally will continue regardless of whether the President vetoes the Product Liability Reform Act or allows it to become law. Michael A. Stiegel, a Chicago attorney who serves

*"We are at the point where people say you are not serious about tort reform unless you include some kind of cap on the punitive damages."*

(Please turn to page 6—Punies)

Editor's Note: As this issue went to press, the President had just received and vetoed the Common Sense Product Liability Reform Act.

## Punies

(Continued from page 3)

as the Litigation Section Advisor to the National Conference of Commissioners on Uniform State Laws (NCCUSL) in its preparation of a Model Punitive Damages Act, echoes Dunn's sentiment.

"The official ABA position is that any cap on punitive damages is artificial and subverts the goals of punitive damages, which are to punish and deter," according to Stiegel. "But even if you disagree with this, and you assume caps are appropriate, there are better ways to establish caps than just setting some arbitrary limit."

Stiegel believes that caps can be made more palatable to a broader group by employing more flexible standards, such as setting the limit at the amount

of the defendant's ill-gotten gain or at a percentage of the defendant's net worth. He also agrees with Dunn regarding the public image of lawyers and the role that punitives play in that image.

"We are at the point where people say you are not serious about tort reform unless you include some kind of cap on the punitive damages," Stiegel says. "This is as complex of a social and legal problem as you can have."

The Product Liability Reform Act governs all actions brought "on any theory for harm caused by a product" in both state and federal courts. "Products" mean "any object, substance, mixture, or raw material" that is "capable of delivery itself" or as a part of an assembled product that "is intended for sale or lease to persons for commercial or personal use." The two-year statute of limitations set

forth in the Act incorporates the discovery rule, as the limitations period begins running when "the claimant discovered, or, with reasonable care, should have discovered" the injury. The Act also establishes a 15-year statute of repose and eliminates joint and several liability for noneconomic loss.

The Act also severely restricts liability claims against biomaterial suppliers, defined as any entities "that directly or indirectly supply a component part or raw material for use in the manufacture of an implant." The biomaterial section of the Act contains its only fee-shifting provision; it al-

lows for attorneys' fees against a claimant who brings a claim that is "without merit and frivolous" against a biomaterial supplier.

While Congress was attempting to set the appropriate boundaries for product liability reform, President Clinton issued Executive Order 12988 directing the manner in which civil

claims involving the federal government will be litigated. The Executive Order only applies to cases where the United States is a litigant, but the lengthy document clearly sets forth the President's vision for improving the civil justice system. □

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