

Historically, most courts have refused to award punitive damages if a plaintiff seeks equitable as well as monetary relief (the "Traditional Rule"). Courts that rely on the Traditional Rule often cite the historical distinction between law and equity as a basis for their refusal to award punitive damages. More forward-thinking courts have rejected that distinction and permit punitive damages, even if equitable claims are interposed (the "Modern Rule"). Courts should adopt the Modern Rule universally, but, at a minimum, they should do so in probate cases, for reasons unique to probate law.

The Traditional (Wrong) Rule

Consider the following scenario. An elderly parent had a long-standing estate plan that provided equally for his two children. As he ages and his health declines, he executes a durable power of attorney, naming Child 1 his attorney-in-fact. The parent substantially alters his estate plan, providing more for Child 1 than Child 2 and naming Child 1 as sole estate executor and trustee of a trust benefiting Child 2. After the parent passes, Child 2 learns that Child 1, as attorney-in-fact, removed Child 2 as the designated beneficiary on a number of will substitutes (beneficiary designations, Totten Trusts). Child 2 also learns that several large cash gifts were purportedly made by the parent to Child 1, his spouse, and children shortly before passing. Child 2 files a complaint and seeks an accounting, a constructive trust, rescission of purported gifts, and the alterations of the will substitutes. After discovery, Child 2 learns that Child 1 has been the

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Punitive Damages Against Fiduciaries, Probate Cases, and Equitable Relief

By John Pankauski, Laurence A. Steckman, and Robert E. Conner



beneficiary of a large loan purportedly made by Child 1 as trustee. A number of impermissible trust distributions have been made by Child 1. Child 2 seeks to amend his complaint (petition) to include a number of tort counts and seeks monetary as well as punitive damages. Child 1 moves to dismiss the punitive damages demand, arguing the Traditional Rule precludes recovery for punitive damages when both equitable remedies and monetary damages are requested.

Two Florida cases illustrate how courts are grappling with the issue. In the first case, *Orkin Exterminating Co. v. Truly Nolen, Inc.*, 117 So. 2d 419, 422 (Fla. Dist. Ct. App. 1960), reh. den., 120 So. 2d 619 (Fla. 1960), the court relied on the Traditional Rule. The *Orkin* court began its analysis regarding the availability of punitive damages by noting that in England the "common conscience of the jury" was the basis for awarding an additional amount beyond compensatory damages to the injured party. *Id.* at 422. Denial to a chancellor of the right to award punitive damages, the *Orkin* court noted, was supported by the theory that by bringing the action in equity, the plaintiff waives the right to punitive damages and, also, that awarding punitive damages is incompatible with equitable principles—"a court of equity is not an instrument for the punishment of an individual or for the exacting of vengeance." *Id.*

The *Orkin* court explained that decisions following the Traditional Rule reflect two intuitions: first, that if a punitive award could be made by a chancellor sitting in equity, the protection of the "common conscience" would be eliminated; and, second, that, because the plaintiff could have sued for legal damages, he waived the rights he would have in a court of law. Restrictions against private punishment and the jury's better ability to determine the proper quantum of damages to punish a defendant justified the Traditional Rule—"It is not intimated that a chancellor has less of this inherent sense of justice, but his judgment is the judgment of one man and that of the jury is the judgment of many. The right

to assess a punitive fine for civil wrongs is best left to the jury." *Id.* at 423.

In the second Florida case decided, 13 years after *Orkin*, the court relied on the Modern Rule and permitted punitive damages even though equitable relief was sought. In *Glusman v. Lieberman*, 285 So. 2d 29 (Fla. Dist. Ct. App. 1973), a plaintiff sought damages for slander of title (a law action) and to quiet title (an action in equity). The court asked: "What rational basis is there to hold at this point and time that the trial judge could not try the damage question in its entirety and also grant the requested equitable relief?" *Id.* at 30. *Glusman*, like *Orkin*, considered English law, but held that the equity / law distinction ceased to be important in Florida because that state had established just one form of action, a civil action, which permits joinder of legal and equitable claims. The *Glusman* court spoke about the administration of justice in light of the merger of the equity and law "sides" of the court:

The court should at once be free to do equity on the one hand and, on the other, preserve the rights at law of the parties, including the right to jury trial if timely applied for. Colloquially, [*sic*] stated, the court ought to clean up the whole ball of wax in the straightest line possible, utilizing just so much of the existing rules as may be necessary to get to the heart of the matter.

Id. 30.

The court further explained that the "more enlightened view, considering the changes in the Rules of Civil Procedure," is stated in cases such as *I.H.P. Corp. v. 210 Central Park South Corp.*, 228 N.Y.S.2d 883 (App. Div. 1962), which permits punitive damages in cases seeking equitable relief. *I.H.P.*, in a detailed ruling discussed immediately below, rejected the proposition that historic procedural separation between law and equity is a proper basis for denying punitive damages. Citing agreement with *I.H.P.*'s arguments, *Glusman* rejected the Traditional Rule, holding that when a judge sits as the trier of fact in a case involving legal and equitable

claims, compensatory and punitive damages as well as any equitable relief may be awarded.

I.H.P. has been referred to as the "seminal case" on the issue. *I.H.P.* was an action for injunction, tried without a jury, that resulted in a punitive award. New York's Appellate Division began analysis by noting that most New York cases had refused to issue punitive awards when equitable relief was sought because of the historic, procedural separation between law and equity. Although abolition of the ancient forms of action had not eliminated different legal and equitable principles governing remedies, it did remove "outmoded procedural barriers against awarding complete relief in a single action." *Id.* at 886. Concluding that prior cases had not adequately explored the rationale for the Traditional Rule and noting that authorities were in conflict, the *I.H.P.* court began its discussion of the main arguments for the Traditional Rule.

First, it rejected the argument that equity courts lack the power to award punitive damages, reasoning that such a view presupposes that courts still sit in law and equity, which was no longer the case in New York. The court rejected the argument that punitive damages are incompatible with equitable principles, calling it an "outgrowth of the procedural separation rather than as an independent substantive rule." *Id.* at 887. By assuming that equitable relief would grant all appropriate relief, the Traditional Rule prevented the law court from issuing appropriate, flexible legal relief, including punitive relief:

[T]he consequence last discussed is governed by procedural forms rather than reason or principle. It is one thing to deny legal relief in a court of equity. It is quite another for the equity side of the court to reach across the invisible line and forbid the law side to grant a legal remedy to which a party is otherwise unquestionably entitled. To do so would presuppose that the traditional equitable remedies—in this case, an injunction and ancillary compensatory damages—will invariably afford complete relief.

Such approach, however, would run counter to another equitable principle, of equal standing, that equity will mold its decrees to suit the needs of the particular case. Thus, while tradition and precedent might forbid the Chancellor, as such, from awarding punitive damages, an equally strong tradition would bar any unqualified rule that customary forms of equitable relief will invariably be adequate and will always preclude accepted forms of legal relief. Such inflexibility has never been characteristic of equity jurisprudence.

Id. (emphasis added).

It was clear from the equitable forms of relief, the court noted, that they might not always suffice as a substitute for a punitive award, for example, when an exemplary award was needed to deter malicious conduct.

Second, *I.H.P.* rejected the waiver argument, referring to this as the "least substantial of the attempted justifications." Id. at 888.

In the absence of words or conduct by a party which manifest an intention to waive any of his remedies, it merely begs the question to hold that a waiver has resulted from a mere asking for equitable relief. A party cannot reasonably be deemed to have waived a remedy unless he seeks others, knowing they are exclusive. But whether they are exclusive is the very issue to be here resolved. Nor is there any good reason, except that of historical accident, why one should be compelled to elect between two inadequate remedies.

Id.

Because the Traditional Rule was based on anachronistic historical distinctions, it was plainly unjustifiable:

[T]he rule which forbids combination of equitable relief with an award of punitive damages is founded upon an obsolete procedural division with no rational basis, apart from history, in modern substantive

law or equity. If the facts warrant, it may be entirely appropriate to grant an injunction or other forms of equitable relief and also exact punitive damages as a deterrent against flagrantly unlawful conduct, whether embraced within an injunction or not. Such freedom to grant whatever judicial relief the facts call for is entirely consonant with substantive legal and equitable principles and with present-day concepts of procedural efficiency. In this very context there may be found jurisdictions in which the broader view has been taken.

Id. The *I.H.P.* court then expressly overruled contrary authority, holding:

The courts which take the broader view reflect a realistic assessment of procedure as subordinate to the achievement of the just result in modern substantive law. This Court should now do no less.

Id.

Why the Traditional Rule Fails

First, although equity courts historically lacked statutory authorization to award punitive damages, the distinction between law and equity has largely been eliminated. Although some commentators have argued that the law/equity merger has affected only procedural rights and that because the right to a jury trial on punitive damages has been viewed as substantive, the merger of law and equity should not affect the availability of punitive damages. Others, however, argue that the merger of law and equity not only merged procedural matters but also substantive ones. The question whether elimination of the equity/law distinction justifies the Modern Rule may turn on whether the right to have a jury determination on punitive relief is viewed as a procedural or substantive matter. Many substantive rules of equity were assimilated into the unified court system created by merger:

[T]he law has in the past, and will probably continue in the future, to

move carefully in the reception of moral principles. But such caution cannot justify the law's refusal in one part of its judicial system to receive those moral principles which through the course of centuries have been received, tried, and proved in another part of the system. When law and equity were administered by separate and distinct tribunals, many equitable principles were able to travel the gulf and find their way into legal rules. Now that we have the one court, the trip is shorter and should be easier; but such has not proven to be the case. While conceding the validity of equitable principles when specific relief is sought, most courts deny the applicability of these principles when the same plaintiff seeks substitutional relief. Indeed, they deny the applicability of even those principles which have been reduced to more or less concrete rules. *Our courts are so enamored with the accident of history which truncated our judicial system and entrusted the two remedies to the different courts that they fail to see the propriety of questioning whether there is anything inherently different about the two remedies which demands the application of different rules to each.*

John J. Kircher & Christine M. Wiseman, *Punitive Damages: Law and Practice* (2d ed. 2009), ch. 20, at n.20 (quoting John J. Garvey, *Some Aspects of the Merger of Law and Equity*, 10 *Cath. L. Rev.* 59, 66 (1961) (emphasis added)). "Because courts have adopted equitable principles in some legal actions, it would appear to be reasonable that they should unequivocally merge the principles of the two systems." Id. at n.21.

The right to have the "collective conscience," expressed through a jury determination, assess and quantify the quantum of punishment, if any, remains an important factor that Traditional Rule apologists cite. (The idea of "collective wisdom" finds contemporary expression in current predictive models called "information markets." See Kris Steckman, *Market-based Prediction Models as an Aid to Litigation Strategy and Settlement Negotiations*, 2 J.

Bus. Entrepreneurship & L. 244 (2008) (research indicates that collective reasoning on predictive issues by incentivized persons outperforms all other predictive mechanisms)).

Second, Traditional Rule advocates argue that refusal to award punitive damages on equitable causes is consistent with the principle that equity will award only what is due in justice and fairness without regard to the reprehensibility of the defendant's conduct. In a merged system of law and equity, however, the rule against splitting a cause of action would deprive the plaintiff of a form of relief:

It is the height of legal paradox for a court to inform a litigant that he is estopped from asserting a legal claim for punitive damages because he cannot split his cause of action when in the prior proceeding for equitable relief he was not permitted to raise that very issue. The notion that a plaintiff "waives" his right to punitive damages by suing for equitable relief is, as the instant court observed, a constructive fiction based on nothing more than equity's reluctance to provide a forum of vengeance. . . . A plaintiff should not be precluded from pursuing his legal claim for punitive damages by reason of a prior equitable proceeding, but it would be anomalous to suggest that the law-equity dichotomy should be preserved in the disposition of claims for punitive damages which may be administered as effectively by the judiciary as other legal claims that are cognizable in an equitable action. . . . Adherence to the old equity rule for punitive damages would *pro tanto* subvert the very purpose of the merger of law and equity which is to facilitate and expedite judicial administration without modifying substantive rights. . . .

Recent Development: Punitive Damages Held Recoverable in Action for Equitable Relief, 63 Colum. L. Rev. 175, at 179 nn.32-34 (1963).

Third, the court criticized the rationale for the waiver argument

as question begging and conclusory because there is no good reason for supposing, absent contrary evidence, that a waiver was intended (or should be implied) merely because one seeks equitable relief:

In the absence of words or conduct by a party which manifest an intention to waive any of his remedies, it merely begs the question to hold that a waiver has resulted from a mere asking for equitable relief. A party cannot reasonably be deemed to have waived a remedy unless he seeks others, knowing they are exclusive. But whether they are exclusive is the very issue to be here resolved. Nor is there any good reason, except that of historical accident, why one should be compelled to elect between two inadequate remedies.

I.H.P., 228 N.Y.S. 2d at 888.

Fourth, allowing a court to award punitive damages would deprive a defendant of the state-guaranteed right to a jury trial before punishment is imposed. But the purpose of a punitive award is not just to punish, but to deter. Both federal and state courts have, despite the unavailability of punitive damages under specific federal or state laws, made "deterrent awards" in excess of compensatory loss, in appropriate cases. For example, in *Abell v. Potomac Ins. Co.*, 858 F.2d 1104, 1139 (5th Cir. 1988), cert. denied sub nom., *Abell v. Wright, Lindsey & Jennings*, 492 U.S. 918 (1989), the Fifth Circuit recognized "deterrent damages" could properly be awarded under the deterrent policies of the securities laws even though numerous cases hold that punitive damages are not available under Exchange Act § 28's "actual damages" language. "Deterrent damages," under the Fifth Circuit's analysis, are available when compensatory damages are inadequate to deter misconduct and compensatory damages would permit wrongdoers to profit from misconduct. In *Roman v. City of Richmond*, a § 1983 case, 570 F. Supp. 1554 (N.D. Cal. 1983), the court held that when state law did not provide for punitive awards, undermining

the deterrent purposes of a federal statute, "deterrent damages" could, nevertheless, be awarded to help realize the federal deterrent purpose.

Fifth, although at common law it was thought that the "common conscience" of the community was the best vehicle to determine the quantum of punishment appropriate in a given case, today defendants no longer look to the jury's "common conscience" to protect them from a chancellor but, rather, look to the court to protect them from the "common conscience." The logic supporting the Traditional Rule, that is, that the "common conscience" is best suited to make punitive damage assessments, has, therefore, lost considerable force. Today, defense counsel frequently wish to avoid jury trials rather than permit the plaintiff to make an impassioned case to the jury.

None of the arguments against the availability of punitive damages in equity provides a sound basis for denying such relief.

Punitive Damages Should Be Available for Fiduciary Wrongs

Courts should be deemed to have the legal authority to award punitive damages when equitable relief is sought.

First, punitive damages are intended to deter wrongdoing, not merely to punish it. Commentators have argued that even when state policy prevents punitive awards, the deterrent justification of punitive damage awards should provide an adequate justification for rendering such deterrent awards:

To borrow a concept from economics, the deterrent effect sought is to make the "marginal cost" of misconduct unprofitable, a measure, as in economics, inherently unrelated to the net worth of the prospective offender. . . . Deterrent damages are imposed under different standards, are computed in different ways, are measured by different criteria, are designed for different purposes, and, critically, have been awarded in federal court . . . where and because punitive damages were unavailable under state law.

Laurence A. Steckman & Robert E. Conner, *Arbitral Awards in Excess of Actual Damages*, N.Y.L.J., Jan. 11, 1996, at n.20.

Second, continued reference to the "split" of legal and equity courts ignores the current merger of law and equity.

Third, the rationale in decisions such as *Orkin* is dubious. The notion that one is not entitled to punitive damages for actions cognizable in equity may itself be based on a mistaken rationale, namely that equity could not punish wrongdoers by providing punitive damages.

This issue was discussed at length by the Supreme Court in *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 256-59 (1993). Justice Scalia, writing for the majority, explained that courts of equity not only provided monetary relief, but, on occasion, punitive damages. He noted that, at common law, there were situations—including breach of trust cases—in which equity courts provided all relief appropriate, including punitive damages. *Mertens* was an ERISA case and ERISA provides that injured parties may recover, inter alia, "such other equitable or remedial relief as the court may deem appropriate." *Id.* at 252. Justice Scalia noted ERISA's roots in trust law, and he discussed the availability of punitive damages in trust cases, criticizing the dissent's statement that punitive damages were not available in equity:

The dissent's confident assertion that punitive damages "were not available" in equity . . . simply does not correspond to the state of the law when ERISA was enacted. A year earlier, a major treatise on remedies was prepared to say only that "a majority of courts that have examined the point probably still refuse to grant punitive damages in equity cases." D. Dobbs, *Remedies* § 3.9, p. 211 (1973). That, of course, was speaking of equity cases in general. It would have been even riskier to presume that punitive damages were unavailable in that subclass of equity cases in which law-type damages were routinely awarded, namely,

breach-of-trust cases. The few trust cases that did allow punitive damages were not exclusively actions at law. See *Rivero v. Thomas*, 86 Cal. App.2d 225, 194 P.2d 533 (1948).

Mertens, 508 U.S. at 259 (emphasis added).

The dissent had vigorously denied punitive damages were available in trust cases, citing, inter alia, *Orkin*, the Florida case that adopted the Traditional Rule as Florida law.

In *Rivero v. Thomas*, 194 P.2d 533 (Cal. Dist. Ct. App. 1948), Justice Scalia's primary authority, a California appeals court noted the Traditional Rule—and, also, the fact that it was "not without exception." Citing deterrent principles, the court noted that the case involved fraud in the performance of a trust and that, in the circumstances, punitive damages could be awarded.

Numerous cases support a view similar to that expressed in *Rivero*. In *Gould v. Starr*, 558 S.W.2d 755, 771 (Mo. Ct. App. 1977), cert. denied, 436 U.S. 905 (1978), for example, an action to remove certain trustees, obtain an accounting, and surcharge the trustees for misconduct, the court, noting case conflict, cited *I.H.P.* and *Glusman* and followed the Modern Rule. In *Miner v. International Typographical Union Negotiated Pension Plan*, 601 F. Supp. 1390, 1393 (D.C. Colo. 1985), plaintiffs sued plan trustees and sought punitive damages. Citing *Rivero*, the court held punitive damages are available under the common law of trusts to deter misconduct harmful to trusts. In *Vale v. Union Bank*, 151 Cal. Rptr. 784 (Ct. App. 1979), plaintiffs sued the trustee of a pension and profit-sharing plan for fraud and fiduciary breach. The court held punitive damages could be awarded against a trustee. In *Sharts v. Douglas*, 163 N.E. 109 (Ind. Ct. App. 1928) (en banc), the court awarded punitive damages against a trustee for defrauding a trust beneficiary.

It has been estimated that tens of trillions of dollars will pass from the WWII generation to the baby-boomers over the next 20 to 30 years. This enormous shift of wealth is unprecedented

and much of that wealth will end up in the hands of fiduciaries, trustees, executors, attorneys-in-fact, and guardians. Much of it will also end up in the hands of fraudsters.

As a practical matter, increased longevity and the likelihood that many older persons will become incompetent before passing away virtually guarantee that one's property, during life or a period of guardianship, will be administered by other people. When issues of conversion, fraud, breach of fiduciary duty, self-dealing, and civil theft are involved, it makes little sense to view punitive damages as prohibited merely because a judge has been asked to declare a document invalid, impose a constructive trust, or rescind a transfer. Overreaching by those who are charged with managing property for others is a great problem. Attorneys-in-fact misuse powers of attorney; trustees treat trust property as their own; children abuse their parent's illnesses or frailties for their own benefit. The combination of the current, extraordinary aggregation of wealth, and the difficult economic circumstances that are afflicting so many people, have created the incentive and opportunity for fiduciaries to abuse positions of trust and confidence. It is a unique, explosive situation.

Conclusion

Today litigators, particularly probate litigators and those who sue or defend fiduciaries, cannot be sure how a court will react to a claim for punitive damages, if equitable relief is sought in the case. Bank robber Willie Sutton, when asked why he robbed banks, famously said, "That's where the money is." Today, bank accounts, will-substitutes, and trust accounts, including revocable trusts, are where the money is. Grantors and beneficiaries need legal protection, and punitive damages are a critical part of the law's deterrent arsenal. Cases such as *Orkin* and its progeny should be rejected and cases like *Glusman* should be recognized as current law in much the same way *I.H.P.* rejected prior, contrary New York law that had once adopted the Traditional Rule. ■