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by: Colin E. Flora  
Associate Civil Litigation Attorney

## Does Indiana’s Cap on Punitive Damages Apply to Statutory Treble-Damage Awards? Court Says ‘No’

Today we find only our second occasion to discuss an opinion by the Indiana Supreme Court’s most recent addition—Justice Loretta H. Rush. Unlike our first discussion, in which your author was very critical of the decision in *Kesling v. Hubler Nissan, Inc.* that found the statement “Sporty Car at a Great Value Price” by a car dealership did not represent that the car was safe to drive, today’s discussion is of a case that, in your author’s opinion, was well decided. Interestingly, both today’s case for discussion— *Andrews v. Mor/Ryde International, Inc.*—and *Kesling* were transfers from divided (2-1) court of appeals panels and both resulted in a different result from the unanimous supreme court. With that said, let us turn to today’s discussion.

In *Andrews*, the single issue was whether Indiana’s Punitive Damages Statute acts to limit non-common law forms of punitive damages; specifically, whether the treble damages provision under the Indiana Sales Representative Act is subject to the dictates of the Punitive Damages Statute. We have previously discussed in great detail how Indiana’s Punitive Damages Statute works. Consequently, we won’t go into great detail here. In short, the amount of punitive damages recoverable is capped at the greater of \$50,000 or three times the compensatory damages. The Punitive Damages Statute goes one step further and

carves 75% of any punitive damages award out of the case and diverts it to the State of Indiana.

The specific facts of the case do not add much to the analysis, but because we have not previously discussed the Indiana Sales Representative Act on the Hoosier Litigation Blog, we shall take a brief peak at what happened in the underlying case so you can have an example of a successful claim under the Sales Representative Act. The court succinctly summarized it:

The Sales Representative Act requires certain businesses to pay their commissioned wholesale sales agents all accrued commissions within fourteen days of terminating the principal-agent relationship. “A principal who in bad faith fails to comply” with that requirement “shall be liable, in a civil action brought by the sales representative, for exemplary damages in an amount no more than three (3) times the sum of the commissions owed to the sales representative.”

As we’ve said, the issue here is the “three (3) times the sum of the commissions owed” provision. A “three times” damages provision is common in many statutes and is generally referred to as treble damages; calling upon a somewhat archaic word meaning just that. The amount of commissions owed is the compensatory damage amount, but the other portion—i.e., two times the amount owed—is punitive in nature—it is a punishment for not timely paying that is not intended to compensate the injured party for its actual harm. However, merely being “punitive in nature” does not mean that it is a “punitive damage” as that term applies to the Punitive Damages Statute.

The trial court agreed with the defendant, Mor/Ryde, that the Punitive Damages Statute applied to the treble damages, but granted leave for interlocutory appeal to allow the Indiana Court of Appeals to take a crack at the issue. The court of appeals’s decision resulted in a split panel (2-1) with the majority again agreeing with Mor/Ryde and affirming the trial court. The dissenter, Judge Michael P. Barnes, “agreeing with Andrews that the Act applies only to discretionary common-law punitive damage awards, not statutory damage awards like the Sales Representative Act[.]” In reaching his conclusion, Judge Barnes relied on a 1986 Indiana Supreme Court case: *Obremski v. Henderson*. In *Obremski*, the supreme court held “that similar treble-damage awards as a civil remedy for certain crime victims are ‘regarded as distinct from recovery of common law punitive damages,’ and thus not limited by the Act.”

The court began its analysis by looking at the brief history and purpose of Indiana's restrictions on common-law punitive damages.

Indiana first restricted common-law punitive damage awards in 1984, when it required them to be proved by "clear and convincing evidence." But the current Punitive Damages Act's sweeping limitations were enacted in 1995, "as part of a comprehensive tort-reform package" aimed at "the tort and products liability fields." The Act's goals were to "discourage plaintiffs from bringing punitive damages claims," to "decrease the plaintiff's windfall recovery" and "protect defendants from excessive punitive damage awards," and generally to "combat perceived ills associated with the rising number of punitive damage awards." And it used three mechanisms to accomplish those objectives: requiring proof by "clear and convincing evidence;" capping awards at the greater of three times compensatory damages or \$50,000; and diverting three-fourths of the punitive damage award to the State. In each regard, the Act—both in its goals and its mechanisms—were targeted at the type of discretionary, open-ended punitive damage awards available at common law, which the Legislature had concluded were being sought and awarded too liberally. Since punitive damages are a creation of common law, limiting (or even prohibiting) their recoverability is within the Legislature's discretion.

The court made sure to add a note in its discussion: "Such public policy determinations are the Legislature's prerogative, and we do not judge the wisdom or suitability of the laws it enacts to those ends."

Just as the legislature could choose to limit the amount of punitive damages available, it could also enact statutes proscribing mandatory or additional forms of recovery. One such example, as recognized by the court, is the Indiana Crime Victims Relief Act, "which permits the victims of certain crimes to bring an action for up to three times their pecuniary losses plus attorney fees." As I pointed out above, and the court noted here, "To the extent those awards exceed the victim's actual damages, their purpose is no less 'punitive' or 'exemplary' than their common-law counterparts." Nevertheless, in *Obremski* the supreme court drew that distinction. That is, common-law punitive damages as an uncapped measure to punish the behavior of a defendant are "punitive" and therefore subject to the Punitive Damages Statute and its restrictions. However, treble-damage awards and similar provisions in statutes are a different species of the same beast labeled as "exemplary" damages instead and thus are not confined by the Punitive Damages Statute.

The court points out that the Punitive Damages Statute's purpose and function is to limit punitive damages that could be sought at common law. However, exemplary damages exist to provide a form of recovery that would not otherwise be available at common law. For example:

Moreover, there is a substantive distinction between statutory treble damages under the Sales Representative Act and common-law punitive damages. A claim for unpaid commissions sounds in contract. But Indiana follows "the rule of no punitive damages in contract cases," unless the claimant "plead[s] and prove[s] the existence of an independent tort of the kind for which Indiana law recognizes that punitive damages may be awarded." "Bad faith" breach of a contract will not support punitive damages unless there is a "special relationship" between the parties (such as the sometimes arms-length, sometimes- fiduciary relationship between an insurer and its insured) "to support imposition of a tort duty." But the Sales Representative Act deviates from those common-law principles by permitting treble damages for a principal's "bad faith" failure to pay commissions within the specified time. Since such a damage award would not have been available at common law, it cannot be the type of "common law punitive damages" that *Obremski* holds are restricted by the Punitive Damages Act.

This result makes sense. Both the limitations from the Punitive Damages Statute and the defined exemplary statutes in the Indiana Sales Representative Act, Indiana Crime Victims Relief Act, and other similar acts are decisions made by the legislature. If the legislature had wanted to cap exemplary damages it could have and almost certainly would have said so in the statute defining the exemplary damages. The court finds it noteworthy, perhaps even important, though not outcome-determinative that the Punitive Damages Statute underwent major amendments in 1995 and no apparent effort was made to overrule *Obremski*. "While a single decision of [the state's supreme court] may not be enough to establish 'legislative acquiescence,' we find it instructive[.]"

As a result, the unanimous court reversed the trial court and we have extremely clear caselaw that stands for the proposition that where an Indiana statute provides for additional damages that are punitive in nature they are deemed "exemplary" and therefore not governed by the rigors of the Punitive Damages Statute.

Join us again next time for further discussion of developments in the law.

## Sources

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