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Case Number: AC 17-0694

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IN THE ASBESTOS CLAIMS COURT OF THE STATE OF MONTANA

IN RE ASBESTOS LITIGATION, *Consolidated Cases*	Cause No. AC 17-0694 PLAINTIFF'S RESONSE TO MCC'S MOTION IN LIMINE ON PUNITIVE DAMAGES Applicable to *Hutt v. Maryland Casualty Co. et al.*, DDV-18-0175

Comes now the Plaintiff and responds to Maryland Casualty Company's ("MCC's") Motion In Limine On Punitive Damages. **This is a motion that does not have application beyond the Hutt case and may be deferred to the trial court's ruling.**

INTRODUCTION

MCC seeks, by way of a motion *in limine*, a limitation on evidence and argument on punitive damage issues. The argument below addresses each contention.

ARGUMENT

A. Except in cases where different evidentiary rules apply, bifurcation of a punitive damage liability trial is only appropriate with respect to evidence of financial condition, because the same jury must resolve liability for compensatory and punitive damages.

MCC contends that the Court should hold a bifurcated trial on liability for punitive

Malcolm at ¶ 118 (emphasis added).

In the instant case, there are no conflicting rules of evidence that govern what is admissible to prove liability for compensatory damages and what constitutes "malice," for purposes of punitive damage liability. The only evidence in the punitive damage case that is not likewise admissible in the underlying tort liability case is the financial condition which is already statutorily in the bifurcated mini-trial.

The Court has set aside a firm trial date for this case in order to secure a full adjudication of the case that will accomplish the overall objective of the Asbestos Claims Court for this and related cases. This objective should not undermined by a bifurcation that is not necessitated under the principles discussed above.

B. **Zurich American Insurance Company is liable for any punitive damage verdict against MCC.**

MCC cites to *Bowen v. W.R. Grace & Co.*, 781 F. Supp. 682 (D. Mont. 1991) for the proposition that a punitive damage award against a defendant cannot be collected from its successor. The argument fails for numerous reasons,

First, if *Bowen* stands for the proposition that a successor through merger is safe from liability of the merging entities, it is **overruled** by the Montana Supreme Court, as the federal court incorrectly predicted the law and public policy of Montana. Specifically, in the subsequent case of *McCulley v. U.S. Bank of Montana*, 2015 MT 100, ¶¶ 39-41, 378 Mont. 462, 473–74, 347 P.3d 247, 257–58 the Montana Supreme Court reached the opposite conclusion regarding the effect of a merger on liability for punitive damages:

> The Bank argues that, as a successor corporation, it cannot be held liable for punitive damages arising out of Heritage Bank's pre-merger actions. It reasons that punitive damages are designed to punish the tortfeasor and not successor corporations. ...
>
> [Under federal law governing bank mergers] the "corporate existence of each of the merging banks or banking associations participating in such merger shall be merged

therein) were cases involving acquisitions. In contrast, in this case, the defendant sued is Maryland Casualty Company. By its Answer, defendant appeared as Maryland Casualty Company now known as Zurich:

> "Defendant, Maryland Casualty Company ("MCC"), n/k/a Zurich American Insurance Company ("ZAIC"), successor by merger to MCC as of December 31, 2015, through undersigned counsel, hereby answers the Complaint as follows:"

Under the law of both Montana and New York, a merger, **unlike a mere acquisition of corporate assets**, makes the surviving corporation the successor to each merged corporation and has no effect on claims or causes of action.

The third reason MCC's argument fails is that a corporation may not escape its liability for punitive damages by entering into corporate reorganization in the middle of litigation and after the liability for punitive damages attaches. To do so would constitute a fraudulent transfer under Montana law §31-2-327 *et seq.* MCA. Plaintiffs claim, while barred by injunctions in the Grace Bankruptcy, accrued in 2002. MCC did not pursue reorganization until December 31, 2015 **while** it fought with Hutt in the Bankruptcy Court to deprive him of his right to pursue his punitive damage claim.

C. **MCC is not entitled to summary judgment on Hutt's punitive damage claim.**

MCC attempts, through its motion *in limine*, to obtain a summary judgment ruling that would deprive plaintiff of the due process of the procedures under Rule 56 M.R.Civ.P. It may not be permitted to do so. The trial of this case will determine if there is sufficient evidence for the jury to find that MCC acted with "malice" under the definition in Section 27-1-221, MCA:

> A defendant is guilty of actual malice if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the plaintiff and:
> (a) deliberately proceeds to act in conscious or intentional disregard of the high probability of injury to the plaintiff; or
> (b) deliberately proceeds to act with indifference to the high probability of injury to the plaintiff.

policy argument, the lowly financial condition of the corporation at the time of trial would not be relevant, and the Plaintiff could obtain a punitive damage recovery solely reflecting the company's multi-billion dollar size at the time of the wrongful act. Examination of the language of the statute and the underlying purposes of punitive damages does not support assessing punitive damages exclusively based on the financial condition at the time of the wrongdoing under either of these alternative scenarios.

Before, turning to the statutory language and the legitimate governmental policies for consideration of financial condition in a punitive damage assessment, a point of factual clarification is in order. MCC's argument pretends that Maryland Casualty was a small company that has little significance to Zurich American's current financial success. In reality, Maryland Casualty was a huge company, and Zurich American Insurance Company's acquisition of Maryland Casualty Company doubled the size of the resulting insurance company, and set the company on the path of enormous financial success:

> The acquisition of Maryland, a property casualty insurance group with $2 billion in gross annual premiums, will double Zurich's United States revenues.

Exhibit MCE172.

Since Maryland Casualty's contribution of assets and business is at least half of the genesis of Zurich's current condition, defendant's policy arguments have little merit.

2. Defendant's current financial condition is a relevant consideration in the jury's analysis of how the Montana's legitimate state interest in punishment and deterrence are furthered.

The legal analysis should begin with the recognition that the role of punitive damage assessments is a function of the policies and goals of the state law that provides for such assessment, and, specifically, that both punishment and deterrence are legitimate state law goals:

> This Court has long made clear that "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." *BMW, supra*, at 568, 116 S.Ct. 1589. See also *Gertz v. Robert Welch,*

> As the California Supreme Court has observed, in conjunction with its holding that "the defendant's financial condition is an essential factor in fixing an amount" that serves the goals of punitive damages:
>
> > Obviously, the function of **deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort**. Punitive damage awards should not be a routine cost of doing business that an industry can simply pass on to its customers through price increases, while continuing the conduct the law proscribes. On the other hand, the purpose of punitive damages is not served by financially destroying a defendant.
>
> *Simon v. San Paolo U.S. Holding Co., Inc.,* 35 Cal.4th 1159, 29 Cal.Rptr.3d 379, 113 P.3d 63, 78–79 (2005) (citations, internal quotation marks, and alterations omitted).
>
> The purpose of a punitive damages verdict is to have an impact on the defendant in the form of **punishment and deterrence**. *Campbell,* 538 U.S. at 416, 123 S.Ct. at 1519. Without knowledge of the defendant's financial condition, the jury cannot know what impact any particular punitive damages verdict will have.
>
> * * *
>
> While Defendants here disapprove of the fact that evidence of a tortfeasor's financial condition can lead to large punitive verdicts, they apparently do not recognize the **critical role that such evidence plays in *constraining* punitive verdicts**. As we have observed, a defendant's financial condition may be the primary reason precluding a substantial punitive damages verdict. *Cartwright,* 276 Mont. at 44, 914 P.2d at 1002. ...[T]the logic and practicality of considering the defendant's financial condition is clearly evident—it is, in fact, **the only way to make an informed decision which ensures that the punitive damages award is properly tailored** so as not to be too harsh or too lenient.

Seltzer v. Morton, 2007 MT 62, ¶¶ 132-135, 336 Mont. 225, 272–74, 154 P.3d 561, 597–98 (emphasis added).

Certainly, with respect to the legitimate state interest in deterrence, the current financial condition of the corporate entity continuing to do business in the state is appropriately considered. Deterrence is a forward-looking objective: the assessment should reflect the concern that, in the future the corporate entity is deterred from engaging in malicious conduct. Only its current wealth is relevant to the assessment that would serve that purpose with respect to future conduct.

With respect to the retribution/punishment element, there can be two considerations that may be appropriate. First, to the extent that the wrongful conduct was profitable to a company,

3. The Court should not impose an arbitrary limitation on evidence that is substantially probative of defendant's financial condition.

The evidence that may be offered and considered by the jury in a punitive damage assessment is not limited to the assets and liabilities that demonstrate the defendant's "net worth." In addition to and distinct from "net worth," the statute expressly allows evidence of financial "condition" and financial "affairs." 27-1-221(7)(a), MCA. Such additional evidence would certainly include the defendant's income (which, in the case of an insurance company, is primarily insurance premiums[1]), as well as other information that would be important to a reasonable person's assessment of the company's financial affairs and condition.

Essential to the Montana system for assessing punitive damages is that the amount of the assessment will be determined through the exercise of judgment by the jury (§27-1-221(7)(a)) and judge (§27-1-221(7)(c)). The Montana Supreme Court has made clear that the jury should not be hindered in its exercise of judgment by arbitrary withholding of evidence that is within the considerations recognized in Montana jurisprudence as appropriate considerations that guide the jury to the goal of "truth":

> [T]he legislature did not prohibit juries from considering where a punitive damage payment would go when determining the amount of the award. Furthermore, party plaintiffs are the true recipients of punitive damage awards and keeping such information from jurors would only frustrate the goal of every trial which is a search for the truth.

Finstad, *supra* at ¶ 38.

In the instant case, the jury and judge will both be assisted in the evaluation, of what punitive damage award is appropriate to punish past conduct and deter future conduct, by

[1] Exhibit MCE172 demonstrates that a press release of the sale of Maryland Casualty described the significance of Zurich's acquisition in terms of what it meant financially to companies in the business of insurance: the acquisition of property casualty business lines generating "$2billion in gross annual premiums."

The New York Times https://nyti.ms/29m5Vyb

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COMPANY NEWS; Swiss Insurer to Get Maryland Casualty

By NINA ANDREWS and SPECIAL TO THE NEW YORK TIMES

The American General Corporation, a Houston-based financial services holding company, said today that it would sell its Maryland Casualty Company to a leading Swiss insurance company for $740 million in cash.

Under the agreement, the Baltimore-based insurance company will become an independent subsidiary of the Zurich Insurance Company, which owns five United States insurance companies. The acquisition of Maryland, a property casualty insurance group with $2 billion in gross annual premiums, will double Zurich's United States revenues. Although currency exchange rates hurt the company's revenues last year, the company's North American operations have accounted historically for about 20 to 25 percent of Zurich's total revenues worldwide, said a spokesman for the Zurich-American Insurance Group of Schaumburg, Ill., one of the American units.

Analysts said they were pleasantly surprised by the price that American General was getting for Maryland in light of the the property casualty business's weak outlook for the next few years. American General's shares rose 75 cents today, to $34.125, in New York Stock Exchange trading.

"There had been some doubts on the Street about their ability to sell the company and some question about getting a good price because of its poor record." said Prudential-Bache's insurance analyst, June Hoffer, who said Maryland Casualty's sale price represents a premium to its 1988 year-end book value of $661 million.

James S. D'Agostino, senior vice president and treasurer of American General,

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EXHIBIT MCE-172

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