

PUNITIVE DAMAGES IMPLICATIONS FOR MARKETING

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INTRODUCTION

Punitive damages have been traced back 2,000 by historians (Belli 1980). In product liability litigation, punitive damages were first granted in 1967 because of falsified laboratory test data and incorrect promotional information associated with drug products (*Toole v. Richardson-Merrell* 1967; *Roginsky v. Richardson-Merrell* 1967). In the past 20 years litigants have increasingly requested punitive awards; over 100 product liability lawsuits annually involve punitive damages.

CURRENT STATUS OF PUNITIVE DAMAGES

The basic purpose of punitive damages is to punish wrongdoers and to deter others from behaving the same way (Ausness 1986), although law enforcement and compensation for victims are sometimes noted as secondary goals (Kenefick 1987).

In recent years critics have suggested that punitive damages may not be appropriate in the contemporary product liability setting because:

1. Strict liability is a product quality concept, while punitive damages is a fault concept.
2. Punitive damages were originated in response to individual behavior, while product liability is based on group (corporate) decision-making.
3. Mass tort litigation (DES, agent orange, asbestos) could result in multiple penalties for the same offense.

Arguments for and against these positions have been developed. At this time, it is difficult to predict which reasoning will prevail.

UNACCEPTABLE MARKETING BEHAVIOR

Four kinds of marketing behavior have resulted in punitive damages assessments: post-sale failure to warn, conscious failure to warn, intentionally misleading advertising, and blatant salesperson misstatements.

Failure to Warn

This is the most common marketing cause of punitive damages. If the defendant can show that the marketer knew about the problem because of consumer complaints or prior litigation, failure to warn post-sale can lead to punitive damages (*Lewy v. Remington Arms* 1988).

Conscious failure to warn prior to selling a product can lead to exemplary awards, particularly if the company tries to conceal the extent of the dangers (*Gold v. Johns-Manville* 1982).

Misleading Advertising

Encouraging consumers through advertising to use a product in an unsafe manner can lead to punitive damages, particularly if warnings are insufficient (*Leichtamer v. American Motors* 1981).

Salesperson Errors

Salespersons' statements can also be a factor in punitive damages awards, especially if salespeople do not the dangers associated with a product (*Wooderson v. Ortho Pharmaceutical* 1984).

SUMMARY

Marketers must quickly respond when consumers are injured by products. Subsequent buyers should be warned, either via salesperson statements or through labels or packages inserts. All employees should develop an attitude related to preventing consumer injuries. Any kind of deceitful or intentionally harmful actions should not be tolerated by top management, which is responsible for corporate-wide ethical behavior.

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