



## Punitive damages ruling impact on long-term care facilities & nursing homes

On July 28, 2023, Governor J.B. Pritzker approved House Bill 0219, a significant amendment to the Illinois Wrongful Death Act.

This amendment will allow heirs of decedents in wrongful death actions the opportunity to obtain punitive damages in cases with evidence that the defendant's conduct was "with evil motive or with a reckless and outrageous indifference to a highly unreasonable risk of harm and with a conscious indifference to the rights and safety of others.\*" The amendment does not, however, provide opportunities for punitive damages in cases of legal or medical malpractice claims.

For years, the general rule of law in Illinois was that punitive damages are available only to the injured victim and do not survive the victim's death. \*However, House Bill 0219 provides the necessary statutory support for an opportunity for punitive damages in such cases to certain decedents.



## House Bill 0219's language, amending the Illinois Wrongful Death Act, is below and underlined as follows:

Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages including punitive damages when applicable, in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, including punitive damages when applicable, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

House Bill 0219 would allow a decedent's heirs in a wrongful death case to seek and obtain punitive damages under the same standard as a living victim in a personal injury case.

The legislation will undoubtedly have an effect on the landscape of litigation in Illinois by providing a new, potentially substantial, avenue of recovery for punitive damages in wrongful death cases and the possibility to increase claims, litigation, jury verdicts, and settlement costs.

## The impact on long-term care facilities & nursing homes

The impact in long-term care and nursing home litigation may be relatively limited.

- 1 First, the majority of cases involving long-term care facilities and nursing homes settle before going to trial. For those cases that do proceed to trial, there is often a medical malpractice claim associated with the treatment at issue. Medical malpractice actions are not included in punitive damages, therefore exempt from this Bill.
- 2 Second, the standard of proof for punitive damages in Illinois is high. A plaintiff must provide evidence that the defendant's conduct was with evil motive or a conscious disregard to the rights and safety of others. Long-term care and nursing home

advocates can emphasize this high standard in settlement negotiations to neutralize the perceptible advantage the new law would provide. According to the Illinois Trial Lawyers Association, Illinois juries have awarded punitive damages over \$10,000 in only 18 personal injury cases over the last decade. Additionally, in 2005, the U.S. Department of Justice, in its most recent nationwide survey on punitive damages, found that punitive damages were awarded in only 3% of successful cases involving the most common types of personal injury claims.

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Third, Illinois maintains a strong public policy prohibiting liability insurance for certain types of punitive damage awards. Illinois law can prohibit insurance for punitive damages for unintentional conduct that results in a punitive award directly against the insured. This can be applied as long as the conduct shows some level of conscious disregard for the safety of others. Therefore, the circumstances in which Illinois law would allow insurance coverage for punitive damages are exceptional. As such, a well-seasoned plaintiff's attorney would likely refrain from investing resources in pursuing a claim that would likely be uninsured. However, as a word of caution, plaintiffs' attorneys will likely use the threat of punitive damages as leverage against owners and operators due to the personal liability that could result from an award of punitive damages.

All this considered, owners working with attorneys defending wrongful death actions – even in the long-term care and nursing home arenas – should carefully consider the plaintiff's allegations and whether they may allow a realistic opportunity for punitive damages when assessing potential damages and negotiating settlements.



## Minimizing risk

Effective claims management is an important tool for minimizing the risk of punitive damages. By promptly investigating claims, communicating effectively with claimants or claimants' attorneys, and addressing systemic issues, long-term care

facilities and nursing homes can reduce the likelihood of punitive damages. It's encouraged to work with an insurance broker specialized in the senior care space and dedicated claims consultant to build a proactive approach to managing claims.



## How we can help

Contact Hinshaw Law for questions regarding punitive damages. For more ways to minimize your risk contact Marsh McLennan Agency.


### Resources

735 ILCS 5/2-1115.05(b).

*Marston v. Walgreen Company*, 389 Ill. App. 3d 337 (2009)

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Leslie Kaderavek is currently Vice President of the TPA Services Department and has more than 15 years of insurance experience. An expert in claims management, she provides leadership to MMA Midwest's Claims Team and serves as one of the agency's leading resources for resolving complex claim and coverage situations. With a special focus on clients within the healthcare industry, Leslie works closely with each of her clients to navigate their healthcare professional liability needs. Leslie launched the agency's TPA services department which specializes in professional and general liability claims management for the healthcare industry.

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