

ALERT

# Out-of-State Punitive Damages Award Precluded from Coverage Under New York Law When It Would Offend the Public Policy of New York and the Other State

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Applying New York law, the New York Supreme Court, New York County, has found that a professional liability policy precludes coverage for the punitive damages portion of a jury verdict award against an insured in an out-of-state action. *Certain Underwriters at Lloyd's, et al. v. BDO Seidman LLP*, 2012 WL 3115581 (N.Y. Sup. July 27, 2012). The court also rejected the insured's argument that the court was precluded from ruling on this issue because an appeal of the jury verdict and punitive damages award was pending in a Florida state appellate court.

In the underlying Florida state court action, a jury verdict was entered against an insured accounting firm for \$36 million in compensatory damages and \$55 million in punitive damages. The insured accounting firm filed a notice of appeal from the judgment in the underlying action, which remained pending while the insurers filed a declaratory judgment action in a New York state court seeking a ruling that their policies did not provide coverage for the Florida jury award and judgment for punitive damages. An exclusion in the professional liability policy precluded coverage for "any claim or claims for fines, penalties, punitive or exemplary damages imposed by judgment or any other final adjudication."

The court first looked to the public policy of New York, which precludes indemnification for punitive damages awarded by a New York court because it would defeat the purpose of punishing the offender and deterring similar conduct on the part of others. Next,

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the court employed a two-part test to determine whether out-of-state punitive damage awards are indemnifiable in New York. First, this test required that the court examine the “nature of the claim, including the degree of wrongfulness for which damages are awarded in the foreign State,” to determine whether the damages awarded in the Florida action may be considered “punitive” in nature. The court concluded that the jury instructions in the underlying Florida action were clear in directing the jury to decide whether the insured was guilty of intentional misconduct and gross negligence, and to decide whether the imposition of punitive damages was warranted as punishment to the insured and as a deterrent to others.

Second, the test required the court to examine Florida law and public policy relating to punitive damages to ascertain whether indemnification for punitive damages would offend the public policy of that state. The court found that, under both Florida and New York law, the purpose of punitive damage awards is not to further compensate the plaintiff but to punish the defendant for its wrongdoing and deter similar misconduct by others in the future. The court found that there was no significant difference between the law of New York precluding the indemnification of punitive damages and comparable law in Florida. Therefore, in granting the insurer’s motion for summary judgment, the court found that it would be contrary to New York and Florida public policy and the policy’s exclusion for “fines, penalties, punitive or exemplary damages.” Additionally, the court held that it was not precluded from ruling on the summary judgment motion because of the fact that an appeal was pending in the underlying action.

The opinion is available [here](#).