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## THE BASSETT BULLETIN™

### DOES YOUR INSURANCE POLICY COVER YOU FOR PUNITIVE DAMAGES? PART I

Facing litigation, companies are sometimes left with the real possibility that a jury may find for the Plaintiff and award punitive damages against the Defendant. If you are facing that situation, you may have wondered if your insurance policy will cover a jury's award of punitive damages against you.

Recently, the Texas Supreme Court and the United States Fifth Circuit Court of Appeals dealt with the issue of whether Texas law permits insurance coverage for punitive damages. This article is intended to give you the reasoning behind the Courts' rulings and give you some advice on what you need to know when faced with this situation.

This is a two part article. In the first part, we will address the Texas Supreme Court's ruling. Then, in the second part, we will address the Fifth Circuit Court of Appeals' ruling and how it differs from the ruling handed down by the Texas Supreme Court.

### THE TEXAS SUPREME COURT'S OPINION *FAIRFIELD INS. CO. V. STEPHENS MARTIN PAVING, L.P.*

In *Fairfield*, the Texas Supreme Court decided whether an insurance company had to insure a company that was being sued only for punitive damages in a wrongful death case. *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653 (Tex. 2008).

In this case, Stephens Martin Paving, a highway paving company, employed Roy Edward Bennett as a brooming machine operator. On December 20, 2002, Bennett died as a result of injuries that occurred when a brooming machine rolled over.

Stephens Martin Paving carried a workers' compensation and employer's liability insurance policy issued by Fairfield Insurance Company. Fairfield paid workers' compensation benefits to Bennett's wife and children under the policy in accordance with Texas workers' compensation law.

On January 24, 2003, Bennett's survivors sued Stephens Martin Paving for gross negligence, seeking exemplary damages, because Stephens Martin Paving allegedly failed to provide Bennett a safe place to work, failed to follow and enforce OSHA safety rules and regulations, and failed to properly train and supervise its employees. Having received workers' compensation benefits, Bennett's survivors were barred by statute from recovering actual damages and could seek only exemplary damages for Mr. Bennett's death.

On February 24, 2003, Fairfield sued Stephens Martin Paving and Bennett's survivors in federal district court, seeking a declaratory judgment that Fairfield owed no duty to defend or indemnify Stephens Martin Paving in the suit for exemplary damages. The trial court denied Fairfield's motion for summary judgment and entered a judgment declaring that Fairfield had a duty to defend Stephens Martin Paving and a duty to indemnify Stephens Martin Paving as provided by the policy if Stephens Martin Paving was found liable to the deceased employee's family.

On appeal by Fairfield, the Texas Supreme Court was left with deciding if Fairfield should have to cover Stephens Martin Paving should the jury award punitive damages.

After much debate about the purpose of punitive damages in a litigation context, and whether the Texas Legislature intended for there to be insurance coverage for these damages, the Court held that the Legislature authorized the Texas Department of Insurance to create a policy that provides insurance coverage for exemplary damages in workers' compensation cases. Therefore, the Court held that the public policy of Texas does not prohibit insurance coverage of exemplary damages for gross negligence in the workers' compensation context. In other words, in some cases, punitive damage awards could be covered under an insurance policy.

However, the Court was hesitant to make this a broad, sweeping rule without clear legislative intent to generally prohibit or allow the insurance of exemplary damages arising from gross negligence.

As such, there is much room open for debate and argument on whether punitive damages are covered in Texas. Also, this case dealt with a workers' compensation policy. The Court specified that its ruling was in the context of a workers' compensation policy only.

In the second part of this article, we will discuss the Fifth Circuit Court of Appeals' rulings on these issues and how that Court takes into account the actions of the insured when determining whether there is coverage for punitive damages.

## WHAT COMPANIES NEED TO KNOW

1. Try to take an objective look at your case. This Court did not think the Defendant's actions were egregious enough to deny coverage for punitive damages. What rules or policies were violated? Consider hiring qualified experts to investigate the accident to help you determine if there were rules or codes not followed that will support a claim for gross negligence.
2. Protect yourself. Document (1) all safety training that you provide and (2) who was in attendance. Make it detailed so you can show the steps you took to make safety a priority. For example, the document should have (1) all topics discussed, (2) what papers were given out to employees, (3) what videos were shown, (4) the date and time of the training, and (5) the signatures of all who attended as proof that they were there.
3. What does your insurance policy say? Before this happens to you, you should know whether your insurance policy covers you against punitive damages.

4. In the event of any accident, it is important that you investigate it. Are there witnesses? Did someone see what happened? What evidence do you have that the employee violated a safety policy? Did they receive training on that policy? What does the accident scene look like? What's out there that helps you and hurts you? Knowing this early on helps you quantify your exposure (if any) as soon as possible.

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