

July 2006

## Illinois Punitive Damages Alert

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### Lost punitive damages not recoverable in subsequent legal malpractice case under Illinois law

#### Overview

On June 22, 2006, the Illinois Supreme Court issued an opinion in *Tri-G, Inc. v. Burke Bosselman & Weaver*, 2006 Ill. LEXIS 1090, where the court held that, in a matter of first impression under Illinois law, a legal malpractice plaintiff may not recover punitive damages that were lost in the underlying case. In finding that lost punitive damages are not compensatory damages in a subsequent legal malpractice case, the court followed the approach taken by the courts in California and New York. See *Ferguson v. Lieff, Cabraser, Heimann & Bernstein, LLP*, 30 Cal. 4th 1037, 69 P.3d 965 (2003); *Summerville v. Lipsig*, 270 A.D. 2d 213, 704 N.Y.S.2d 598 (2000).

#### Background

Tri-G, Inc. sued Elgin Federal Bank in 1981 concerning certain construction loans Tri-G received to build residential homes. Tri-G alleged breach of contract, common law fraud, and violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1, et. seq. Tri-G was represented by a succession of law firms. Three months before the May 11, 1987, trial, Tri-G retained Burke Bosselman & Weaver (“Burke”) to handle the case. The attorney from Burke assigned to represent Tri-G did not file an appearance until May 4, 1987, and when the case was called for trial, the attorney answered “not ready.” Because the attorney was not prepared to proceed, the trial court dismissed Tri-G’s case with prejudice. Burke represented Tri-G on appeal, which the appellate court dismissed sua sponte on the grounds that Tri-G had failed to comply with a previous order of that court. Tri-G replaced Burke with new counsel, who filed a second complaint against Elgin Federal, which later was dismissed based on res judicata.

Tri-G sued Burke for malpractice. The company alleged Burke was negligent for failing to file an appearance until May 4, 1987, failing to advise Tri-G’s witnesses and discuss their testimony in advance of depositions, failing to attend certain depositions, failing to properly prepare the case for trial, and failing to seek a voluntary non-suit on the date of trial.

Prior to trial, the trial court denied Burke’s motion in limine to exclude punitive damages. The court reasoned that if the jury assessed punitive damages against Elgin Federal in the underlying case, that amount would be compensatory damages to Tri-G in the legal malpractice case. The jury returned a verdict in favor of Tri-G for \$2,337,550, which included \$1,168,775 to compensate Tri-G for lost punitive damages it would have received in the underlying case against Elgin Federal but for Burke’s legal malpractice.

After denial of post-trial motions, Burke appealed, and Tri-G cross-appealed. In relevant part, the appellate court upheld the award of lost punitive damages to Tri-G. *Tri-G, Inc. v. Burke Bosselman & Weaver*, 353 Ill. App. 3d 197, 817 N.E.2d 1230 (2d Dist. 2004). The Illinois Supreme Court granted leave to appeal. 213 Ill. 2d 576 (2005).

#### Issue

Among the issues the Illinois Supreme Court considered was whether, as a matter of first impression in Illinois, a legal malpractice plaintiff properly may recover lost punitive damages against its lawyer, which the plaintiff claims he would have recovered in the underlying case but for the legal malpractice.

#### Decision

The court first noted the Illinois statute that expressly prohibits an award of punitive damages “[i]n all cases, whether in tort, contract or otherwise, in which the plaintiff seeks damages by reason of legal, medical, hospital, or other healing art malpractice.” *Tri-G, Inc.*, 2006 Ill. LEXIS 1090 at \*57-58 (quoting 735 ILCS 5/2-1115). The appellate court had found that lost punitive damages in the underlying case was an element of compensatory damages in the malpractice action and that Section 2-1115 did not prohibit such recovery. The appellate court recognized that courts in the states of New York and California have held based on public policy, that lost punitive damages are not recoverable in a legal malpractice action.

However, the appellate court sided with courts in other jurisdictions that held a plaintiff may recover as compensatory damages those damages that the plaintiff would have been awarded as punitive damages in the underlying action. Compare *Ferguson*, 30 Cal. 4th 1037; *Summerville*, 704 N.Y.S.2d 598; RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 53 cmt. h (2000), with *Jacobsen v. Oliver*, 201 F. Supp. 2d 93 (D.C. 2002) (applying District of Columbia law); *Haberer v. Rice*, 511 N.W.2d 279 (S.D. 1994); *Scognamillo v. Olsen*, 795 P.2d 1357 (Colo. App. 1990); *Elliott v. Videan*, 164 Ariz. 113 (1989); and *Hunt v. Dresie*, 241 Kan. 647 (1987).

After analyzing the rationale of the courts on both sides of the issue, the Illinois Supreme Court concluded that the approach taken by courts in California and New York represented the sounder view and concluded that “[l]ost punitive damages are not recoverable in a subsequent action for legal malpractice.” *Tri-G, Inc.*, 2006 Ill. LEXIS 1090 at \*70-74. While noting that “[d]isallowing lost punitive damages means that plaintiffs in legal malpractice actions may not receive as much money as they might have if the underlying action had been handled properly,” compensating a plaintiff is “but one of several factors that must be balanced in assessing whether lost punitive damages should be recognized in legal malpractice actions. There is no reason in logic or the law why it should be given preeminent effect where, as here, the jury has already awarded full compensation to the plaintiff for all the damages it actually sustained.” *Id.* at \*71-72.

The court further explained that punitive damages are awarded to punish the wrongdoer and to deter that party and others from committing similar acts. Punitive damages are not awarded as compensation to the plaintiff. *Id.* at \*72. Here, “[a]llowing Tri-G to recover its lost punitive damages from Burke would not advance that policy in any way. To the contrary, by holding the firm liable for the intentional or willful and wanton misconduct of a third party, it tears the concept of punitive damages from its doctrinal moorings.” *Id.*

Finally, the court found that Tri-G was attempting to side-step Section 2-1115 by characterizing the lost punitive damages as “compensatory damages,” explaining that because “the Illinois General Assembly has determined that lawyers cannot be compelled to pay punitive damages based on their own misconduct, as section 2-1115 decrees, it would be completely nonsensical to hold that they can nevertheless be compelled to pay punitive damages attributable to the misconduct of others. Any construction of the law that permits such a result would [be] absurd and unjust.” *Id.* at \*72-73.

Among the other issues decided, the court upheld the jury’s award of lost profits, explaining that while some cases have found that new business profits were too speculative to recover, “[t]here is no inviolate rule that a new business can never prove lost profits,” *id.* at \*38-42 (emphasis in original). It also entered a remittitur of \$420,213 or, alternatively, ordered a new trial on damages only if Tri-G did not consent to the remittitur, *id.* at \*42-49. And finally it affirmed the denial of interest based on the purported, hypothetical judgment that would have been entered against Elgin Federal in the underlying case but for Burke’s negligence, *id.* at \*50-57.

## Comment

*Tri-G, Inc.* is a significant victory for the defense bar. Illinois law is now consistent on the issue of recovery of punitive damages in legal malpractice cases. A legal malpractice plaintiff may not recover punitive damages from its own lawyer for misconduct under 735 ILCS 5/2-1115 and also may not recover as “compensatory damages” punitive damages lost in the underlying case as a result of the lawyer’s negligence.

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