

Testimony Before the North Dakota House Judiciary Committee
in Opposition to S.B. 2290: A Bill That Would Make Punitive Damages
Significantly More Common in North Dakota
Cary Silverman on Behalf of the American Tort Reform Association
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On behalf of the American Tort Reform Association (ATRA), thank you for the opportunity to testify today. ATRA opposes S.B. 2290, which would reduce the standard for imposing punitive damages, exposing those who live, work, and do business in North Dakota to a significantly higher risk of massive awards.

ATRA is a broad-based coalition of businesses, municipalities, associations, and professional firms that share the goal of having a fair, balanced, and predictable civil justice system. I am a partner in the Washington, D.C. office of Shook, Hardy & Bacon L.L.P. As part of my public policy practice, I closely study civil justice issues and have published several law review articles related to punitive damages.

S.B. 2290 alters longstanding North Dakota law that ensures punitive damages are reserved for punishing and deterring truly reprehensible conduct, that which stems from “oppression, fraud, or actual malice.”¹ The North Dakota Supreme Court has explained that actual malice involves an “improper motive implying the purpose and desire to injure,” “spite or ill will toward plaintiff,” or the intent to “harass, annoy, or injure another person.”²

Instead, the bill redefines and dilutes “malice” to include anything that might be considered unintentional, reckless conduct. Many cases will arguably meet this standard. If this bill is enacted, plaintiffs’ lawyers will routinely seek punitive damages in a wide range of litigation in the future in North Dakota, including cases involving no more than mere negligence. That threat alone will pressure individuals and businesses into settling what may be meritless cases and doing so for significantly larger amounts.

Like North Dakota, courts elsewhere have kept a high standard for punitive damages, reserving them for malicious, fraudulent, or deliberate misconduct, in states such as Maine,³ Maryland,⁴ and New York,⁵ as well as the District of Columbia.⁶ Additional states have codified a similarly high standard for punitive damages.⁷ In fact, just last Friday, my home state of Maryland rejected a similar bill that would have weakened its “actual malice” standard.⁸ Also keep in mind that a half dozen states generally do not authorize punitive damage awards or tightly restrict them to certain contexts where specifically authorized by statute.⁹

Some states, over time, have relaxed their standards for punitive damages, making such awards highly unpredictable and increasingly commonplace. It was this change that, in the words of the U.S. Supreme Court, led to punitive damages “run wild.”¹⁰ North Dakota has, so far, avoided that problem.

For these reasons, ATRA respectfully requests that the Committee not broaden and dilute the actual malice standard for punitive damage awards.

¹ N.D. Cent. Code § 32-03.2-11.

² *Zander v. Morsette*, 2021 ND 84, ¶ 31, 959 N.W.2d 838, 846 (citing decades of North Dakota precedent).

³ *Kinderhaus North LLC v. Nicolas*, 314 A. 3d 300, 313 (Maine 2024) (“Under Maine law, punitive damages may be awarded for tortious conduct only if the defendant acted with malice.”); *see also Tuttle v. Raymond*, 494 A.2d 1353, 1361, 1361 (Me.1985) (rejecting gross negligence standard for punitive damages as “too broad and too vague” and having an insufficient distinction from mere negligence).

⁴ *Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633, 648 (Md. 1992) (requiring “actual malice” and rejecting a lower standard as “overextend[ing] the availability of punitive damages,” dulling their impact as an effective deterrent of truly reprehensible behavior).

⁵ *Prozeralik v. Capital Cities Commc’n, Inc.*, 82 N.Y.2d 466, 479 (1993) (“Punitive damages are awarded in tort actions ‘where the defendant’s wrongdoing has been intentional and deliberate and has the character of outrage frequently associated with crime.’”).

⁶ *Dist. of Columbia v. Bamidele*, 103 A.3d 516, 522 (D.C. 2014) (requiring “a state of mind evincing malice or its equivalent”); *Croley v. Republican Nat’l Comm.*, 759 A.2d 682, 695 (D.C. 2000) (requiring a showing of “evil motive or actual malice”).

⁷ *See, e.g.*, Cal. Civ. Code § 3294(a) (“oppression, fraud, or malice”); Idaho Code § 6-1604(1) (“oppressive, fraudulent, malicious or outrageous conduct”); Mont. Code Ann. § 27-1-221(1) (“actual fraud or actual malice”); Ohio Rev. Code Ann. § 2315.21(C)(1) (“malice or aggravated or egregious fraud”); Wis. Stat. § 895.043(3) (when a “defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff”).

⁸ Md. H.B. 1099 (2025) (withdrawn from House Judiciary Committee consideration after hearing).

⁹ These states include Louisiana, Massachusetts, Michigan, Nebraska, New Hampshire, and Washington.

¹⁰ *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991); *see also* Victor E. Schwartz & Cary Silverman, *The Case in Favor of Civil Justice Reform*, Emory L.J. Online 2065, 2068 (2016) (discussing how the departure from the “intentional tort” moorings of punitive damages, and move to allowing punitive damages for reckless or grossly negligent conduct in some states, led to such awards becoming commonplace).