

The Legal Cap of Punitive Damage in Argentina

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ABSTRACT: Since 2008, the Argentine Consumer Protection Law has permitted punitive damages. Thus, Argentina has become the first (and only) country with a pure continental-civil law system that allows punitive damages awards. However, these awards cannot exceed 5 million Argentine pesos. Consequently, this paper analyzes the basis for the existence of this legal cap. We conclude that there is no real justification for a fixed legal cap. Furthermore, that the appropriate limit of a punitive damages award must be solely the amount necessary to accomplish its preventive function (a deterrence of damages according to the socially acceptable level of care).

KEYWORDS: Punitive damages; quantification; legal cap.

CONTENTS: 1. Introduction; – 2. Punitive damages in the United States; – 3. Punitive damages in Argentina; – 3.1. Civil legal nature of punitive damages; – 3.2. The limit of punitive damages; – 4. The function of punitive damage; – 5. A *lege lata* interpretation: What is the appropriate limit that a judge "has" to quantify punitive damages in Argentina? – 6. A *lege ferenda* interpretation: What is the appropriate limit that the judge "should have" to quantify punitive damages in Argentina? – 7. Conclusion; – 8. References.

TÍTULO: El tope máximo legal de los daños punitivos en Argentina

RESUMEN: Desde 2008, la Ley de Defensa del Consumidor argentina ha admitido daños punitivos. Por lo tanto, Argentina se ha convertido en el primer (y único) país con un sistema de derecho continental-civil puro que acepta este tipo de condenas. Sin embargo, estas condenas no pueden exceder los 5 millones de pesos argentinos. En consecuencia, en este trabajo, se analiza el fundamento para la existencia de este tope legal. Concluimos que no existe justificación alguna para el mismo. Además, que el tope adecuado de los daños punitivos debe ser exclusivamente el monto suficiente necesario para cumplir su función preventiva (disuasión de daños de acuerdo con el nivel de precaución socialmente aceptable).

PALABRAS CLAVE: Daños punitivos; cuantificación; límite legal

CONTENIDOS: 1. Introducción; – 2. Daños punitivos en Estados Unidos; – 3. Daños punitivos en Argentina; – 3.1. Naturaleza jurídica civil de los daños punitivos; – 3.2. Cuantía máxima de los daños punitivos; – 4. Función de los daños punitivos; – 5. Interpretación de lege lata: ¿Cuál es el tope máximo apropiado que un juez "tiene" que aplicar al cuantificar los daños punitivos en Argentina? – 6. Interpretación lege ferenda: ¿Cuál es el tope máximo apropiado que el juez "debería tener" al cuantificar los daños punitivos en Argentina? – 7. Conclusión; – 8. Referencias.

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TÍTULO: O teto legal dos danos punitivos na Argentina

RESUMO: Desde 2008, a Lei de Defesa do Consumidor argentina tem admitido danos punitivos. Para tanto, a Argentina se converteu no primeiro (e único) país com um sistema de direito continental-civil puro que aceita esse tipo de condenação. No entanto, essas condenações não podem exceder os 5 milhões de pesos argentinos. Em consequência, neste trabalho, analisa-se o fundamento para a existência desse teto legal. Concluímos que não existe justificação alguma para o mesmo. Ademais, que o teto adequado dos danos punitivos deve ser exclusivamente o montante suficiente necessário para cumprir sua função preventiva (dissuasão de danos de acordo com o nível de precaução socialmente aceitável).

PALAVRAS-CHAVE: Danos punitivos; quantificação; limite legal.

SUMÁRIO: 1. Introdução; – 2. Danos punitivos nos Estados Unidos; – 3. Danos punitivos na Argentina; – 3.1. Natureza jurídica civil dos danos punitivos; – 3.2. Valor máximo dos danos punitivos; – 4. Função dos danos punitivos; – 5. Interpretação de lege lata: Qual é o teto máximo apropriado que um juiz “tem” que aplicar ao quantificar os danos punitivos na Argentina? 6. Interpretação lege ferenda: Qual é o teto máximo apropriado que um juiz “deveria ter” que aplicar ao quantificar os danos punitivos na Argentina – 7. Conclusão; – 8. Referências.

1. Introduction¹

In Argentina, an Amendment bill to Law 24240 (2008),² *Ley de Defensa del Consumidor* (Argentine Consumer Protection Law 1993), was approved and incorporated in Article 52 bis, which provides:

Punitive Damages. If a supplier does not meet his legal or contractual obligations to a consumer, at the request of an injured party, the judge may impose on the supplier a civil fine in favor of the consumer, which is graduated according to the gravity of the offense and other circumstances, beyond compensatory damages. When more than one supplier is responsible for the failure, they are jointly and severally liable to the consumer, without prejudice to any contribution action in their favor. The civil fine that is imposed may not exceed the maximum monetary punishment of the fine provided in Article 47, inc. b of this law. [Article 47, inc. b establishes a maximum of 5 million Argentine pesos.]³

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² Law 26.361, Article 25, approved in March, 2008 (Adla, LXVIII-B, 1295), incorporated Article 52 bis in Law 24240, *Ley de Defensa del Consumidor* (Argentine Consumer Protection Law, 1993, Adla, LIII-D, 4125).

³ See Article 52 bis, Law 24240 (Adla, LIII-D, 4125). Retrieved November 27, 2017, from <http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/638/texact.htm>

Consequently, Argentina has become the first (and only) country with a pure continental-civil law system that allows punitive damages.⁴

This legal figure can be defined, according to the common law system, as a monetary award that does not compensate an injury suffered by a victim but sanctions a defendant guilty of flagrantly violating the plaintiff's rights, and deters the defendant and others from acting in the same way in the future.⁵

According to the last sentence of the aforementioned Article, punitive damages in Argentina can never exceed 5 million Argentine pesos. As reflected in its Statement of Purpose of the Law, a cap was established in accordance to the principle of reservation of criminal law, taking into account the punitive nature of legal figure.⁶

Additionally, the Argentine author María Isabel Rua claims that: “There are also different opinions, in favor and against legal caps of punitive damages. In this regard, I am of the opinion that the legal cap set by the law—five million pesos—is a considerable sum that will surely serve to the purpose of discouraging those illegal serious behaviors that are to be avoided”.⁷

In this paper, we demonstrate that five million pesos is not the appropriate cap of the punitive damages. Any fixed amount is inadequate. Punitive damages amount must be conditioned on the achievement of their main function: the deterrence of harm according to the socially acceptable level of care.

2. Punitive damages in the United States

The aforementioned Statement of Purpose of the Law that approved and incorporated punitive damages in Argentina explain that the punitive damages' cap was established in accordance to the principle of reservation of criminal law, taking into account the punitive nature of this legal figure.⁸ However, the Statement of Purpose also states that

⁴ Punitive damages are generally obtainable in legal systems that are derived at least partly from the common law tradition, such as in the United States, United Kingdom, Canada, Australia, New Zealand, Philippines, India, South Africa, and the People's Republic of China.

⁵ See: JERRY II, Robert H., *Understanding Insurance Law*. New York: Mathew Bender & Company, 1987, p. 349; OWEN, David G. A Punitive Damages Overview: Functions, Problems and Reform, *Villanova Law Review*, vol. 39, 1994, p. 363; COOTER, Robert D.; ULEN, Thomas, *Law and Economics*, Boston: Addison-Wesley Educational Publishers Inc., 2004, p. 311.

⁶ See Statement of Purpose of the Law 26.361, Article 25 (1061-D-2006). Retrieved November 27, 2017, from <http://www1.hcdn.gov.ar/proyxml/expediente.asp?fundamentos=si&numexp=1061-D-2006> (p. 22.)

⁷ RUA, María Isabel, El daño punitivo en la reforma de la ley de Defensa del Consumidor, *LA LEY* 2009-D, 1253 (La Ley Online, p. 7).

⁸ See Statement of Purpose of the Law 26.361, cit.

punitive damages proposed to incorporate into the Argentine Consumer Protection Law are the same as punitive damages from Common Law.⁹ Consequently, it is worthwhile to recall that the Supreme Court of the United States claims that constitutional safeguards concerning criminal law should not be implemented for cases of punitive damages, given the civil nature of this civil fine. Thus, John J. Kircher and Christine M. Wiseman explained that “the Court consistently has denied the application of criminal process safeguards to defendants faced with punitive damages in civil proceedings”.¹⁰ In particular, relating to the Eighth Amendment (Amendment VIII) of the U.S. Constitution that prescribes that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted”,¹¹ the Supreme Court has rejected its application to punitive damages, again, because of their civil legal nature.

Accordingly, the Supreme Court does not impose an immovable economic cap for the legal figure under study. The Supreme Court considers that punitive damages awards, by themselves, are not in violation of the due process contemplated in the Fourteenth Amendment (Amendment XIV) of the U.S. Constitution. The most transcendental legal cases associated with the analyzed amount are the following: *Gore* (1996);¹² *Campbell* (2003);¹³ and—to a lesser extent—*Williams* (2007).¹⁴ During those legal rulings, the Court did not recommend a fix amount as a cap of punitive damages and argued that the amount should be sufficient to achieve the function of deterrence (and sanction) of the legal figure under study. The Court clarified that after ensuring fulfillment of this function, a punitive damages award should not have to exceed nine times the amount of compensatory damages, in order to have a high probability of satisfying the constitutional requirement of due process in a civil case. Nevertheless, the Court added that this kind of rule about the ratio of nine times (between punitive damages and compensatory damages) should not be taken into consideration *under infamous or egregious cases that caused patrimonial damages of small amount or extra-patrimonial damages of complex monetary valuation, among others*.

⁹ *Ibidem*.

¹⁰ KIRCHER, John J.; WISEMAN, Christine M. *Punitive Damages: Law and Practice*, vol. 1. St. Paul, MN: West Group, 2000 (2003, 2004 *Cumulative Supplements*), chapter 3rd, p. 18.

¹¹ See Eighth Amendment (Amendment VIII) of the U.S. Constitution. Retrieved November 27, 2017, from <http://www.house.gov/jcp/Business/pockconst1.pdf>.

¹² See *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996). Retrieved November 27, 2017, from <http://www.supremecourtus.gov>.

¹³ See *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 1522, 155 L. Ed. 2d 585 (2003). Retrieved November 27, 2017, from <http://www.supremecourtus.gov>. Also see KIRCHER, John J.; WISEMAN, Christine M.; GHIARDI, James D, *Punitive Damages, Law and Practice*. St. Paul, MN: Thompson West, West Group, 2000, 2004 *Cumulative Supplement*., 6/2004, pp. 3-6.

¹⁴ See *Philip Morris USA v. Williams*, 549 U.S. 346, 127 S. Ct. 1057, 166 L. Ed. 2d 940 (2007). Retrieved November 27, 2017, from <http://www.supremecourtus.gov>.

3. Punitive damages in Argentina

3.1. Civil legal nature of punitive damages

Argentine legislation qualifies punitive damages as civil fines (Article 52 bis, Consumer Protection Law: *multas civiles*). In addition, the prevailing doctrine describes this fine as a private pecuniary penalty with civil legal nature. In this way, we anticipate our position: the Argentine constitutional guarantees of criminal law are not applied to punitive damages (in particular, the satisfaction of the principle of reservation of the criminal law is not applicable to punitive damages).¹⁵ In this way, we believe that there is no constitutional legal basis to impose a legal cap on punitive damages.

The above statement is based on several reasons. In the first place, let us remember that the patrimonial penalties (among them the penalties of fine) “were known by the Roman Law, inside and outside of what today constitutes a criminal offence”.¹⁶ Likewise, according to the modern legal doctrine, the functions of Civil Responsibility (in particular, Tort Law) are deterrence, compensation and sanction (or punishment). The first one pursues an ex ante solution; the last two seek ex post alternatives after the occurrence of the harmful event.¹⁷

Second, there are several examples of civil penalties in Argentina; so punitive damages are not an exception in the Argentine Civil Law. From almost two decades, at the XVII National Conference on Civil Law,¹⁸ the national doctrine unanimously stated (as a *lege*

¹⁵ According to Ricardo C. Núñez, “the division into what is punishable and what is not punishable represents a basic condition of the principle of reservation of the criminal law.” In addition, the author explained that the principle of reservation of the criminal law has the following *sine qua non* conditions: “a) The legal determination of punishable acts; b) The legal determination of the corresponding penalties; c) The prohibition of analogy; d) The non-retroactivity of the criminal law.” Núñez clarified that the principle *nullum crimen sine lege* (subsection a) must be completed with the *nulla poena sine lege* (subsection b) and that the latter constitutional safeguard “is not satisfied with a simple legal statement that the act must be punished or that it deserves a penalty; the the latter constitutional safeguard [*nulla poena sine leg*] demands the concrete determination of a legal punishment that should be imposed for each crime. This determination requires that the penalty be directly related to each criminal act and that the penalty be individualized by its kind and measure. ... *This requirement is not contradicted because the amount of the penalty depends on calculations to be made on pre-established bases, as it happens if the amount of the fine is made depend on the amount of pecuniary damage caused by the crime...*” [The highlight belongs to us]. See NÚÑEZ, Ricardo C. *Manual of Criminal Law. General Part*. Córdoba: Marcos Lerner Editora, 1999, p. 66-67. See also: BACIGALUPO, Enrique, *Constitutional Principles of Criminal Law*. Buenos Aires: Hammurabi, 1999, p 44.

¹⁶ See NOCETTI FASOLINO, Alfredo N. Penas Patrimoniales. In: AA.VV. *Enciclopedia Jurídica OMEBA*, vol. 21. Buenos Aires: Ed. Bibliográfica Argentina, 1966, p. 985.

¹⁷ See ZAVALA DE GONZÁLEZ, Matilde, *Resarcimiento de daños, 2d, Daños a las personas [Integridad espiritual y social]*. Buenos Aires: Hammurabi, 1999, p. 454; ALTERINI, Atilio A., AMEAL, Oscar J., LÓPEZ CABANA, Roberto M., *Derecho de Obligaciones: Civiles y Comerciales*. Buenos Aires: Abeledo-Perrot, 1998, p. 144.

¹⁸ See XVII National Conference on Civil Law (*XVII Jornadas Nacionales de Derecho Civil*). Santa Fe, Argentina, September, 1999. In: *LLGran Cuyo* 1999, 827 (La Ley Online, p. 13).

lata conclusion) that “the sanction or punishment of certain contractual or extracontractual illicit, through the imposition of private penalties, is not alien to our law in force, and is manifested in institutes such as the penalty clause (*cláusula penal*), punitive interests (*intereses punitorios*), sanctioning interests (*intereses sancionatorios*), non-compliance penalties (*astreintes*), among others”. In addition, the national doctrine also proposed unanimously (as a *lege ferenda* conclusion) “the admission [in Argentina] of civil fines [punitive damages], as private legal penalties, to sanction serious misconducts by making the responsible pay a sum of money”.

Finally, most of the Argentine authors who have written about this issue understand that punitive damages are private civil penalties.¹⁹ In particular, with regard to Consumer Protection Law, scholars have said that these civil fines fit perfectly in the Consumer Protection Law because consumers have enjoyed special constitutional safeguards since the constitutional reform in 1994 (Article 42 of the Argentine National Constitution).²⁰

3.2. The limit of punitive damages

Before and after the Amendment Bill to the Law 24240 (2008), which incorporated punitive damages in the Argentine Consumer Protection Law, some other bills prescribed punitive damages with no fixed legal caps. For example, the Bill of the Argentine Civil and Commerce National Code in 1998,²¹ a Bill in 2007,²² and more recently, the Bill of the Argentine Civil and Commerce National Code in 2012.²³

¹⁹ See: ALTERINI, Atilio A. Las reformas a la ley de defensa del consumidor. Primera lectura, 20 años después. *La Ley*, 2008-B, p. 1239 (La Ley Online, p. 10); STIGLITZ, Rubén S.; PIZARRO, Ramón D. Reformas a la ley de defensa del consumidor, *La Ley*, 2009-B, p. 949. (La Ley Online, p. 6.); GÓMEZ LEO, Osvaldo R.; AICEGA, María V. Las reformas a la Ley de Defensa del Consumidor, *Jurisprudencia Argentina*, 2008-III, p. 1353 (Lexis N° 0003/013985, p. 52); LÓPEZ HERRERA, Edgardo. Daños punitivos por trato discriminatorio al consumidor, *APBA* 2009-9-1026 (Lexis N° 0003/800748; 0003/800756, p. 3); ÁLVAREZ LARRONDO, Federico. La consistencia de los daños punitivos. *La Ley*, 2009-B, p. 1156 (La Ley Online, p. 4); COLOMBRES, Fernando Matías. Los daños punitivos en la ley de defensa del consumidor, *LA LEY* 2008-E, 1159 (La Ley Online, p. 1); PREVOT, Juan Manuel. ¿Prevenir, punir o resarcir? La finalidad de la responsabilidad civil, *La Ley*, 2009-B, p. 747. (La Ley Online, p. 4). On the other hand, some minor sector of the Argentine doctrine, with which we disagree, considers that punitive damages are private penalties that have a criminal legal nature. See: PISCASSO, Sebastián. Los ‘Daños Punitivos’. In: PICASSO, Sebastián; VÁZQUEZ FERREYRA, Roberto A. (directors). *Ley de Defensa del Consumidor comentada y anotada*, vol. 1. Buenos Aires: La Ley, 2009, pp. 933-633; BUERES, Alberto J. Los “Daños Punitivos”. In: PICASSO; VÁZQUEZ FERREYRA (directors). *Ley de Defensa del Consumidor comentada y anotada*, cit., pp. 633- 641; MAYO, Jorge. La inconsistencia de los daños punitivos, *La Ley*, 2009-B, p. 1269; SÁNCHEZ COSTA, Pablo F. Los daños punitivos y su inclusión en la ley de defensa del consumidor, *La Ley*, 2009-D, p. 1113 (La Ley Online, p. 4); BUSTAMANTE ALSINA, Jorge. Algo más sobre los llamados daños punitivos, *La Ley*, 1994-D, p. 860; BUSTAMANTE ALSINA, Jorge. Los llamados daños punitivos son extraños a nuestro sistema de responsabilidad civil, *La Ley*, 1994-B, p. 863.

²⁰ See ÁLVAREZ LARRONDO, La consistencia de los daños punitivos, cit, p. 1156 (La Ley Online, p. 4).

²¹ See *Proyecto de Código de la República Argentina unificado con el Código de Comercio*. Buenos Aires: Abeledo-Perrot, 1999, art. 1587.

Likewise, Argentine doctrine concluded unanimously in both the 23rd *National Conference on Civil Law* (2009)²⁴ and the 12th *Bonaerense Conference on Civil, Commercial, Procedure, and Labor Law* (2009)²⁵ that the cap analyzed "is inappropriate for purposes of the fulfillment of the aim pursued by the norm." Accordingly, the immense majority of the authors who have written about this issue also disagree with a legal cap for punitive damages.²⁶

4. The function of punitive damage

In accordance with the Argentine national legal hermeneutics (Article 2 of the National Civil and Commerce Code²⁷ and the doctrine of the National Supreme Court of Justice),²⁸ the socially desirable maximum amount of the punitive damages must be interpreted in accordance with their main function.

The function of punitive damages, as we explained in previous papers,²⁹ can be divided into a principal function (deterrence) and an accessory function (sanction). The former,

²² However, this Bill establishes that a punitive damages award "may never be lower than the amount set as compensatory damages, or higher than ten times this amount". See Bill (1791-D-2007). Retrieved November 27, 2017, from <http://www1.hcdn.gov.ar/proyxml/expediente.asp?fundamentos=si&numexp=1791-D-2007> (p. 1).

²³ See Bill of the Argentine Civil and Commerce National Code in 2012. Retrieved November 27, 2017, from <http://www.nuevocodigocivil.com/wp-content/uploads/2015/texto-proyecto-de-codigo-civil-y-comercial-de-la-nacion.pdf>.

²⁴ 22nd *National Conference on Civil Law: Conclusions*, Universidad Nacional de Córdoba, September, 2009.

²⁵ 12th *Bonaerense Conference on Civil, Commercial, Procedure, and Labor Law: Conclusions*, Junín, October, 2009.

²⁶ See IRIGOYEN TESTA, Matías. ¿Cuándo el juez puede y cuándo debe condenar por daños punitivos? *Revista de Responsabilidad Civil y Seguros*, La Ley, Año XI - N° 10, 2009, pp. 16– 26, *RCyS* 2009-X, 16 (La Ley Online, footnote 59, p. 10); ALTERINI, Las reformas a la ley de defensa del consumidor. Primera lectura, 20 años después, cit. (*La Ley Online*, p. 11); STIGLITZ; PIZARRO, Reformas a la ley de defensa del consumidor, cit. (*La Ley Online*, p. 7); PIZARRO, Ramón D. *et al.* Los Daños Punitivos en la reforma a la ley de Defensa del Consumidor. In: AA.VV. *Libro de Ponencias XII Jornadas Nacionales de Derecho Civil – V Congreso Nacional de Derecho Civil*, vol. 5. Córdoba: Advocatus, pp. 167-168. LÓPEZ HERRERA, Edgardo. *Los Daños Punitivos*. Buenos Aires: Abeledo Perrot, 2008, pp. 371-372; ÁLVAREZ LARRONDO, Federico M. La incorporación de los daños punitivos al Derecho de Consumo argentino. *JA* 2008-II-1246 - *SJA* 5/28/2008. (Lexis N° 0003/013848, pp. 13 – 14); COLOMBRES, Los daños punitivos en la ley de defensa del consumidor, cit. (*La Ley Online*, p. 6); SHINA, Fernando. Una nueva obligación de fuente legal: los daños punitivos. Su aplicación en el Derecho Comparado. La situación en la Argentina. La ley 26361, *SJA* 9/30/2009 (Lexis N° 0003/014693, p. 5.); URRUTIA, Liliana A. B. Derechos del consumidor: incidencias de la reforma introducidas por la ley 26.361. In: AA.VV. *Libro de Ponencias...*, cit., pp. 129-135; SÁNCHEZ COSTA, Los daños punitivos y su inclusión en la ley de defensa del consumidor, cit. (*La Ley Online*, p. 7); CANDELARIA SAPPPIA, Los daños punitivos y su inclusión en la ley de defensa del consumidor, cit. (*La Ley Online*, p. 4); LOVECE, Graciela Isabel. Los daños punitivos en el derecho del consumidor. *LA LEY* 08/07/2010, 08/07/2010, 1 (*La Ley Online*, p. 4); ÁLVAREZ, Agustín; CANDELARIA SAPPPIA, María. Daños Punitivos. In: AA.VV. *Libro de Ponencias...*, cit., p. 127.

²⁷ See *Código Civil y Comercial de la Nación Argentina*, October, 2014. Retrieved November 27, 2017, from <http://www.nuevocodigocivil.com/wp-content/uploads/2015/texto-boletin-oficial.pdf>.

²⁸ See Aban, Francisca América c. ANSES, Supreme Court of Justice of Argentina (08/11/2009), *La Ley* 08/28/2009, 7 (*La Ley Online*, p. 7).

²⁹ See IRIGOYEN TESTA ¿Cuándo el juez puede y cuándo debe condenar por daños punitivos?, cit. (*La Ley Online*, pp. 2-3).

the main function, is the deterrence of harm conforming to the socially acceptable level of care. The latter, the accessory function, is the sanction of the defendant; this accessory function (sanction based on the factual circumstance that the monetary award extends beyond compensatory damages) follows the fortunes of the principal function (deterrence). That is, the defendant should be imposed with punitive damages (sanction function) only if society needs to deter them (principal function of deterrence), in an extra way, with an additional monetary award beyond compensatory damages.

These ideas have been accepted by Argentine jurisprudence. For example, the National Civil Court of Appeals, Chamber F (Cámara Nacional de Apelaciones en lo Civil, sala F), in the case *Cañadas Pérez María v. Bank Boston NA* (2009),³⁰ said:

The principal function [of punitive damages] is the deterrence of harm according to the socially desirable level of care (...). The accessory function of punitive damages would be the sanction of the offender, because any civil fine, by definition, has a sanction function for the factual circumstance of being a money award that goes beyond compensatory damages—civil fines are to sanction defendants as compensatory damage are to compensate victims — (in accordance with Irigoyen-Testa, Matías, *¿Cuándo el juez puede y cuándo debe condenar por daños punitivos?* [When can and when should a judge award punitive damage?], published in *Revista de Responsabilidad civil y seguros*, La Ley, no. 10, October 2009).

The same ideas are also explained in decisions of the Superior Courts of Argentine provinces,³¹ Courts of Appeals of other Argentine provinces,³² and National Courts of First Instance of Argentina.³³

Consequently, when punitive damages are necessary, their amount should not be higher nor lower than the amount necessary to dissuade wrongdoers from provoking socially intolerable damages.

³⁰ *Cañadas Pérez María v. Bank Boston NA* (11/18/2009), Cámara Nacional Civil, F, *La Ley* 2010-A, 203. Retrieved November 27, 2017, from <http://www.iprofesional.com/notas/91283-Fallo-Canadas-Perez-Maria-c-Bank-Boston-NA-s-danos-y-perjuicios>

³¹ *Borquez Juana Francisca v. Cía. de Teléfonos del Interior S.A. CTI Móvil* (12/06/2011), Corte Suprema de Justicia, Tucumán, Civil y Penal. Retrieved November 27, 2017, from www.justucuman.gov.ar/

³² *Suhs, Javier Alejandro v. Armorique Motors S.A.* (12/20/2012), Cámara de Apelaciones en lo Civil, Comercial, Laboral y de Minería, 1º Circunscripción Judicial, sala I, Neuquén. Retrieved November 27, 2017, from www.jusneuquen.gov.ar/

³³ *Pinillos, Pablo Daniel v. Supermercados Mayoristas Yaguar S.A.* (11/07/2013), Juzgado Nacional de Primera instancia en lo Civil N° 96). Unpublished sentence.

5. *A lege lata* interpretation: What is the appropriate limit that a judge “has” to quantify punitive damages in Argentina?

From the Economic Analysis of Law, Mitchell Polinsky and Steven Shavell argue that courts usually pay insufficient attention to the potential problem of dissuading with sentences greater than those socially desirable.³⁴ Precisely, only an adequate sentence (adjusted to the amount necessary to achieve—through a sanction—the function of socially desirable deterrence) leads to the optimal market equilibrium, by the internalization of social costs that the production of goods provokes.³⁵ On the one hand, an insufficient amount of punitive damages leads to significant negative externalities (distortion of the market equilibrium, insufficient level of care, overproduction of goods and entry barrier for good companies). On the other hand, an excessive amount of punitive damages also causes externalities but their effects are in the opposing direction (distortion of the market equilibrium, excessive inversion in level of care, unnecessary increase of prices, and underproduction of goods).

Additionally, statistical studies also detected another problem caused by the caps of punitive damages: the caps may negatively affect judges, who would tend to impose higher amounts than the socially desirable amounts (higher amounts that are unnecessarily close to the caps).³⁶

Therefore, the judge should take into account that five million pesos is not the only limit they have when calculating, in a non-arbitrary manner, a punitive damages award. According to the Rule of Law, the judge must graduate the amount of punitive damages with *an explicit (non-arbitrary) argument based on the Law in force*. Thus, that amount cannot exceed (nor be lower) than what is sufficient (or necessary) to comply with the punitive damages function: *deterrence (through a sanction) of harmful behaviors according to socially acceptable level of care*.

³⁴ See POLINSKY, A. Mitchell; SHAVELL, Steven. Punitive Damages: An Economic Analysis, *Harvard Law Review*, vol. 3, 869, 1998, p. 899.

³⁵ See IRIGOYEN TESTA, Matías. Daños Punitivos: Análisis Económico del Derecho y Teoría de Juegos. *Lexis-Nexis Jurisprudencia Argentina, Número Especial sobre Derecho y Economía*, Buenos Aires, 2006, pp. 36-52; SJA 5/17/2006, JA 2006-II-1024 (Lexis N° 0003/012583, pp. 10 - 15).

³⁶ See: ROBBENNOLT, Jennifer K.; STUDEBAKER, Christina A. Anchoring in the courtroom: The effects of caps on punitive damages, *Law and Human Behavior*, vol. 23, no. 3, 1999, pp. 353-373; ROBBENNOLT, Jennifer K. Punitive Damage Decision Making: The Decisions of Citizens and Trial Court Judges. *Law and Human Behavior*, vol. 26, no. 3, 2002, pp. 315-341; LÓPEZ HERRERA, *Los Daños Punitivos*, cit., pp. 46-47; JUANES, Norma *et al.* Daños Punitivos. Su recepción en el derecho positivo argentino. Determinación y destino de la multa. Asegurabilidad. In: AA.VV. *Libro de Ponencias...*, cit., pp. 159-165.

Consequently, an amount of punitive damages without any justification that is higher (or lower) than that necessary to satisfy the main function punitive damages (deterrence), would be susceptible to be labeled as an arbitrary legal ruling. That sentence with an excessive amount could also be considered contrary to the constitutional right of property (Article 17, Argentine National Constitution).

6. A *lege ferenda* interpretation: What is the appropriate limit that the judge “should have” to quantify punitive damages in Argentina?

Again, the only appropriate limit that the judge should have when quantifying punitive damages in Argentina is the amount sufficient to fulfill the punitive damages' function of deterrence. Otherwise, under certain circumstances, punitive damages would not be able to accomplish that preventive purpose.

Accordingly, the Civil Code of Quebec (1992) prescribes (Article 1621): “Where the awarding of punitive damages is provided for by law, the amount of such damages may not exceed what is sufficient to fulfill their preventive purpose. (...)”.³⁷

On the other hand, from the Economic Analysis of Law, Polinsky and Shavell explained that legal caps of punitive damages are not justified in line with the socially acceptable level of deterrence, since it could impede to award an appropriate amount to achieve that purpose.³⁸ Clearly, punitive damages with a legal cap can solve problems of dissuasion of less serious illegal behaviors and fail to solve them with respect to those that are more serious (and that therefore, require an extraordinary high amount of punitive damages, higher than the legal cap). Thus, an Argentine consumer is protected against minor risks and unprotected against major disasters; for example, large-scale lucrative damages, illegal behaviors against consumer life, physical integrity, health and dignity, cases of racial discrimination, multiple micro-damages of small individual values and a large global amount, and severely reprehensible behaviors whose discovery is difficult.

Therefore, Argentine legislature must repeal the punitive damages' fixed limit of five million pesos. The only admissible limit for punitive damages is the amount necessary to fulfill their preventive purposes: dissuasion (through a sanction) of harmful conducts.

³⁷ See *Code civil du Québec - Civil Code of Québec*, Article 1621. Retrieved November 27, 2017, from <http://legisquebec.gouv.qc.ca/en/showdoc/cs/CCQ-1991>

³⁸ See POLINSKY; SHAVELL, *Punitive Damages: An Economic Analysis*, cit., p. 900.

7. Conclusion

To conclude, we suggest the following, as a *lege lata* interpretation of Article 52 bis of Law 24.240: a punitive damages award cannot be lower or exceed the amount necessary to fulfill its preventive function. Additionally, it cannot exceed five million pesos.

Finally, as a *lege ferenda* proposal for Article 52 bis of Law 24.240, we recommend the repeal of the punitive damages' legal cap. In addition, we suggest the following Amendment Bill in order to replace the current legal cap: *Punitive damages awards may not exceed what is sufficient to fulfill their preventive function.*

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