

MODEL PUNITIVE DAMAGES ACT (1996)

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-FIFTH YEAR
IN SAN ANTONIO, TEXAS
JULY 12 - JULY 19, 1996

WITH PREFATORY NOTE AND COMMENTS

COPYRIGHT © 1996

By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

MODEL PUNITIVE DAMAGES ACT (1996)

The Committee that acted for the National Conference of Commissioners on Uniform State Laws in preparing the Model Punitive Damages Act (1996) was as follows:

M. KING HILL, JR., 6th Floor, 100 Light Street, Baltimore, MD 21202, *Chair*
RICHARD T. CASSIDY, 100 Main Street, P.O. Box 1124, Burlington, VT 05402
NORMAN L. GREENE, Suite 3906, 60 East 42nd Street, New York, NY 10165
JOHN F. HAYES, 20 West 2nd, 2nd Floor, P.O. Box 2977, Hutchinson, KS 67504-2977
SCOTT N. HEIDEPRIEM, 431 North Phillips Avenue, Suite 400, Sioux Falls, SD 57104
RICHARD C. HITE, Suite 600, 200 West Douglas Avenue, Wichita, KS 67202
HARRY D. LEINENWEBER, U.S. District Court, Room 1778, 219 South Dearborn Street,
Chicago, IL 60604
HARVEY S. PERLMAN, University of Nebraska, College of Law, P.O. Box 830902, Lincoln,
NE 68583
GEORGE L. THOMPSON, III, P.O. Box 10113, Lubbock, TX 79408
ROBERT S. TOYOFUKU, Suite 902, 1000 Bishop Street, Honolulu, HI 96813-4209
DONALD JOE WILLIS, Suites 1600-1950, Pacwest Center, 1211 S.W. 5th Avenue, Portland,
OR 97204
ROGER C. HENDERSON, University of Arizona, College of Law, Tucson, AZ 85721, *Reporter*

EX OFFICIO

BION M. GREGORY, Office of Legislative Counsel, State Capitol, Suite 3021, Sacramento, CA
95814-4996
W. JACKSON WILLOUGHBY, Placer County Superior and Municipal Courts, Department 8,
11546 "B" Avenue, Auburn, CA 95603, *Division Chair*

EXECUTIVE DIRECTOR

FRED H. MILLER, University of Oklahoma, College of Law, 300 Timberdell Road, Norman,
OK 73019, *Executive Director*
WILLIAM J. PIERCE, 1505 Roxbury Road, Ann Arbor, MI 48104, *Executive Director Emeritus*

ADVISORS

P. CAMERON DEVORE, *American Bar Association Forum on Communications Law*
HUGH E. REYNOLDS, JR., *American Bar Association Advisor- Section of Tort & Insurance
Practice Law*
THOMAS E. DEACY, JR., *American College of Trial Lawyers*
MICHAEL A. STIEGAL, *American Bar Association - Section of Litigation*
STEVE TALLENT, *American Bar Association - Labor and Employment Law Section*

Copies of this Act may be obtained from:
NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS
676 St. Clair Street, Suite 1700
Chicago, Illinois 60611
312/915-0195

UNIFORM LAW COMMISSIONERS'

MODEL PUNITIVE DAMAGES ACT

PREFATORY NOTE

In 1994 the National Conference of Commissioners on Uniform State Laws established a Drafting Committee on the subject of punitive damages. The scope of the project was limited to one of developing a Model Act, as compared to a Uniform Act. Unlike a Uniform Act, whose principal objective is to obtain immediate uniformity among the States on a particular legal subject, a Model Act may be more of an experimental effort to assist States in developing effective new approaches to a particular problem area of the law. A Model Act may contain more novel approaches, the efficacy of which can only be attained through some trial and error. Although uniformity may prove to be desirable at some point, it is not imperative in the short term. Consequently, for reasons discussed below, the subject of punitive damages was thought to be appropriate for a Model Act.

Beginning with the 1980s, serious concern began to mount regarding the role of punitive damage awards in the civil justice system in the United States. This concern stemmed largely from what some perceived to be an increase in the size and frequency of such awards. See Mark A. Peterson, Syam Sarma & Michael G. Shanley, *Punitive Damages: Empirical Findings*, Rand, The Institute for Civil Justice (1987). In addition, it was argued that awards often bore no relation to deterrence, but merely reflected a jury's dissatisfaction with a defendant and a desire to punish without regard to the true harm threatened by a defendant's conduct. Others countered that civil awards of punitive damages have traditionally occupied an important place in our jurisprudence and actually serve to punish wrongdoers who not only deserve such treatment, but who in a number of instances would otherwise profit from their wrongful conduct. As a result, a number of studies and recommendations for change were made by such organizations as the American Bar Association and the American College of Trial Lawyers. Although the recommendations varied in the details, there did appear to be a consensus that punitive awards should be more closely limited to the situations where they are clearly justified and that the manner in which the amounts of such awards are determined should be subject to more control than is being exercised under existing law.

As a result of the widespread concern regarding the problems associated with punitive damages, a number of issues regarding the fairness of such awards were raised in the courts, both at the state and national level. In addition to the judicial responses, proponents of change demanded legislative action on the subject, not only from the states but also from Congress.

Although a number of reforms have been instituted at the state level, no clear pattern has emerged. Of those states that have addressed the problems regarding punitive damages, most now require that the plaintiff persuade the trier of fact by clear and convincing evidence that punitive damages should be awarded. One state even requires that the plaintiff prove beyond a reasonable doubt that punitive damages should be awarded. The law also has evolved in a number of jurisdictions to require that there be some conscious indifference to the rights of others before punitive damages are warranted. This means that a plaintiff has to establish that a

defendant either intended to cause harm or that the defendant acted in reckless disregard of the victim's rights. In addition, some jurisdictions now require a separate finding that the defendant acted to cause injury for a bad motive, sometimes expressed as malicious, fraudulent, oppressive, evil, or despicable reasons.

State legislatures also enacted a number of other statutory provisions that affect punitive awards. For example, some of these statutes limit the dollar amount of punitive awards, require a portion of any punitive award to be deposited in a state fund, prevent a defendant from being punished more than once for the same act or course of conduct, and require bifurcation or other procedures to avoid prejudice or undue burdens to defendants.

During this same period, many petitioners, against whom punitive awards had been made, sought relief from the Supreme Court of the United States. In response, the Court turned its attention in seven different cases to the question of whether there are federal constitutional limits on punitive damage awards. In the first two cases, although the Supreme Court declined the opportunity to speak to the constitutional issues that the parties sought to raise, it was apparent that some members of the court thought that such awards might involve constitutional problems. See *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828-29 (1986) ; *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 76-80 (1988). In the third case, *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), the Court agreed to review the issues of whether an award of \$6 million in punitive damages, amounting to 100 times the plaintiff's actual damages, was excessive under the Eighth Amendment or otherwise unconstitutional because it violated the Due Process Clause of the Fourteenth Amendment. In *Browning-Ferris*, the Court held that the Excessive Fines Clause of the Eighth Amendment was not violated because the amendment does not apply to private litigants. Rather, the clause only applies to situations where the state seeks punitive measures against a private party. Although the Court may have settled the issue with regard to the Excessive Fines Clause of the Eighth Amendment, it did not address the due process issue because it was not properly preserved. *Id.* at 278.

Two years later, however, the Court did take up the due process issue in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991). In this case a majority of the Court refused to reverse an award of \$1.04 million, the punitive portion of which was more than four times the compensatory award. Pacific Mutual argued that Alabama law was constitutionally flawed because it provided too little guidance for the jury, plus the post-verdict judicial review was inadequate to correct runaway awards. Both arguments were rejected by Justice Blackmun in writing for the majority; instead he found that the jury instructions provided adequate guidance and that Alabama had established a number of factors by which the trial and appellate courts could fairly gauge whether an award of punitive damages was reasonable. Nevertheless, the majority did indicate that the size of the award in *Haslip* may have come close to violating due process constraints under the Fourteenth Amendment. *Id.* at 23. Moreover, although the Court did not find the Alabama system flawed, the *Haslip* decision seemed to indicate that the Court was willing to require that states apply rigorous procedures and scrutiny under the Due Process Clause of the Fourteenth Amendment to make sure that punitive awards are not abused by juries. See *id.* at 18-24.

The next case to come before the Court, however, appeared to signal a retreat from the *Haslip* decision. In *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993) the jury, in a West Virginia slander of title case, returned a verdict for \$19,000 in compensatory damages and \$10 million in punitive damages. The Supreme Court refused to hold that there was a violation of the Due Process Clause even though the punitive award was 526 times greater than the compensatory award and 20 times higher than any award ever upheld in a West Virginia tort action. *Id.* at 462. Again, the defendant argued that the jury instructions were inadequate and, in particular, misguided the jury by emphasizing the wealth of the defendant. The defendant also argued that the post-trial review was inadequate based upon the standards seemingly adopted in *Haslip*. *Id.* at 462-63.

In an opinion by Justice Stevens, joined by Chief Justice Rehnquist and Justice Blackmun, the three justices agreed that any error as to the jury instructions had been waived by TXO and that only the issue of the excessiveness of the award was to be considered. With regard to the latter, they appeared to retreat somewhat from *Haslip* by indicating that even though the Fourteenth Amendment contains safeguards against excessive awards, these safeguards are perhaps less structured than indicated in *Haslip*. *Id.* at 458-60. The three justices went on to conclude that the award in the *TXO* case was not excessive by constitutional standards. *Id.* at 462.

Justice Kennedy concurred in the judgment in *TXO* but was much troubled by the amount of the award and again indicated that it came very close to a constitutional violation in his mind. *Id.* at 468

Justice Scalia, joined by Justice Thomas, reiterated his position in *Haslip* that as long as the jury is adequately instructed and there is judicial review of the award, the constitution is satisfied. *Id.* at 470 Thus, neither of these two justices felt any need to review the amount of the award. In addition, Justice Scalia specifically noted that he viewed Justice Stevens' opinion as a retreat from the *Haslip* majority. *Id.* at 471-72

Justice O'Connor, dissenting as she did in *Haslip*, was joined by Justices White and Souter and argued that the Alabama process was flawed because it permitted the jury to engage in an unwarranted transfer of money from a wealthy out-of-state corporation, *id.* at 486-95, and that the standards for review were deficient. *Id.* at 495-500.

Probably the most striking thing about the *TXO* case is that the Court did not conclude that the award violated the Due Process Clause solely on the basis of the disproportionate ratio that the punitive damages bore to compensatory damages. In *Haslip*, a majority of the court appeared to say that a punitive to compensatory ratio of 4:1 came very close to violating the constitution. Yet, in *TXO* a ratio of 526:1 did not violate the constitution. Thus, after *TXO*, the ratio of punitive to compensatory damages appears to be only one factor among many that courts need to employ in post-verdict reviews. Of these factors, it was the deliberate and malicious actions of

TXO that carried the most weight with the four members of the Court that reviewed the amount of the punitive award and found that it was not excessive.

After the *TXO* decision the Supreme Court granted review in a case involving the Oregon Constitution which prohibited judicial review of the size of a punitive award. *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994). In this case, seven members of the Supreme Court (Justice Stevens wrote the majority opinion, in which Justices Blackmun, O'Connor, Scalia, Kennedy, Souter, and Thomas joined. Justice Scalia also filed a concurring opinion.) agreed that the Oregon system was unconstitutional, emphasizing that there had to be meaningful judicial review of the amount even though there were elaborate jury instructions and a thorough post-verdict review to determine if there was any evidence to support an award. *Id.* at 2341-42. (Justice Ginsburg dissented, joined by Chief Justice Rehnquist. *Id.* at 2343.)

Based upon the cases discussed above, one might have concluded that the Supreme Court would decide that state law with regard to an award of punitive damages was constitutionally insufficient only in a case like the Oregon case. However, this conclusion proved to be unfounded. In January of 1995, the Supreme Court granted review in yet another case, the seventh since 1988. In *BMW of North America, Inc. v. Gore*, 646 So. 2d 619 (Ala. 1994), *cert. granted*, 115 S. Ct. 932 (1995) (No.94-896), the Court agreed to review a case awarding \$4,000 for compensatory damages and \$2 million for punitive damages. (The jury returned a verdict for \$4 million in punitive damages, but the Supreme court of Alabama ordered a remittitur of \$2 million. *Id.* at 629.) This case was initiated after the paint on a number of automobiles was damaged by acid rain during shipment from Europe to the United States. The distributor repaired the damages, but this information was never revealed to the customers who purchased the automobiles. Plaintiff, one of the customers, discovered that his automobile had been refinished and sued, alleging that the failure to disclose the refinishing constituted fraud, suppression of a material fact, and breach of contract. Only the suppression of fact claim was submitted to the jury. The verdict was based on a determination that the defendants were guilty of gross, malicious, intentional, and wanton fraud. *Id.* at 621.

BMW, in its petition to the United States Supreme Court, presented two questions:

1. Whether the Alabama Supreme Court, having found the jury's \$4,000,000 punitive damages verdict unconstitutionally punished petitioner for hundreds of transactions that occurred entirely outside of Alabama, was obligated to provide a meaningful remedy for that constitutional violation.
2. Whether the \$2,000,000 remitted punitive exaction, which is 500 times respondent's compensatory damages, is grossly excessive in violation of the Due Process Clause of the Fourteenth Amendment.

Petition for a Writ of Certiorari at (I), *BMW of North America, Inc. v. Gore*, 646 So. 2d 619 (Ala. 1994)(No. 94-896), *cert. granted*, 115 S.Ct. 932 (1995).

The *BMW* case was argued on October 11, 1995 and the Supreme Court handed down its opinion on May 20, 1996, holding that the Alabama award of punitive damages transcended constitutional limits because it was “grossly excessive.” *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996). In doing so, the court stated that “[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose.” *Id.* at 1598. In addition to its finding that the award was grossly excessive, the court let it be known that a State does not have the power to punish conduct that is lawful in another jurisdiction if it has no impact on the State or its residents. *Id.* 1597.

In reaching its decision under the Due Process Clause of the Fourteenth Amendment, the Supreme Court announced that three guideposts led it to conclude the award was excessive. The guideposts are: (1) the degree of reprehensibility of the defendant’s conduct; (2) the ratio between the harm or potential harm suffered by the claimant and the amount of the punitive award; and (3) the difference between the punitive award and any civil or criminal penalties authorized or imposed for comparable misconduct. *Id.* at 1598. In reviewing the record with these guideposts in mind, the court concluded that BMW had not acted in a particularly reprehensible manner since there were none of the aggravating factors that existed in a case like *TXO*, *id.* at 1599-1601, nor was the ratio of the punitive award to actual harm--a ratio of 500 to 1--justifiable under the facts, *id.* at 1601-03. Under the third element, the court pointed out that none of the pertinent statutes or interpretive decisions under which a fine or penalty might be imposed for BMW’s conduct would have put an out-of-state car distributor on notice that it might be subject to a multimillion dollar sanction. Moreover, in a case where there is no history of noncompliance with statutory requirements, there is no basis for assuming that a more modest sanction would not have sufficed. *Id.* at 1603.

Although the *BMW* decision and a few of its predecessors are helpful in setting out some guideposts for governing punitive awards in the civil system, the decisions seem to call for greater action at the state level. It is unrealistic for the highest court of the land to administer, other than through broad principles, the day to day application of the law regarding punitive damages. The first line of responsibility lies with the States and, since much is still left to be desired in this area, the Model Act may profitably be considered by those States that are considering reforms in the area of punitive damages. The Act not only incorporates and improves on the best provisions from the reforms in the various States to date, but it offers some new approaches to ensure that the system under which punitive damages are awarded is fair to all concerned.

The Model Punitive Damages Act by itself does not authorize awards of punitive damages in the enacting State. The Act applies only if punitive damages are awardable in the State by common law or other authority. In other words, the Act does not define the types of cases in which an award may be made. Other authority needs to be consulted to make that determination. In addition, the Act does not place any limit or "caps" on punitive awards that do not already exist in the enacting State. The Drafting Committee felt that it could improve upon the procedure, burden of proof, judicial review, and similar matters so that arbitrary monetary

limitations may not be necessary. However, if a State currently has a monetary limit or desires to adopt one, there is nothing in the Model Act that would conflict with such a limiting provision.

In the main, the Act attempts to define more precisely when a punitive award may be made by the trier of fact in terms of the standards for culpability and the manner in which the amount of such an award is to be determined. In keeping with these goals, the Act employs measures to facilitate judicial review of punitive awards by juries, and does so in a way to satisfy due process requirements under the Fourteenth Amendment to the United States Constitution.

The Act adopts and clarifies the majority position in the United States when it comes to the role of *respondeat superior* and punitive damages. An employer or principal may be liable for punitive damages based upon the wrongful conduct of an employee or agent only if the employer or principal is also at fault. Although an employer or principal may be vicariously liable for compensatory damages on a strict liability basis, this is not the rule for punitive damages under the Act. The Act also addresses situations involving vicarious responsibility for acts or omissions of independent contractors and directors, officers, and other agents exercising policymaking authority, that result in awards of punitive damages.

In addition, the Act seeks to deal with situations where a defendant may be unfairly exposed to multiple awards of punitive damages. Although this is a problem that has been acknowledged by many, very few efforts have been made to resolve the problem. No doubt, this void exists because of the difficulty of addressing the problem on a state-by-state basis. Nonetheless, the Conference feels it has made an important contribution in this Act towards resolution of the problem.

The Act is designed to apply to court trials of cases that involve claims for punitive damages and does not address how punitive damages may be assessed under arbitrations or other alternative dispute resolution procedures. In addition, the Act does not address a number of public policy questions that are not central to the trial process. For example, the question of whether it should be against public policy to insure against punitive damage awards is left to the existing law of the adopting State.

Finally, the Drafting Committee proceeded with its work mindful that the United States Congress recently attempted to fashion federal legislation on the subject of punitive damages in the area of products liability and possibly other tort actions. It may be that Congressional action could preempt Conference efforts in drafting a Model Act. However, it does not appear that the efforts of the Conference are inconsistent with what has been proposed in Congress. Moreover, it may be that the Act would serve as a model for federal legislative efforts on the subject. Thus, at this point, it appears that it was prudent for the Conference to conclude its efforts to draft a Model Punitive Damages Act for the States, and perhaps even Congress, to consider in their respective legislative programs.

**UNIFORM LAW COMMISSIONERS’
MODEL PUNITIVE DAMAGES ACT**

SECTION 1. DEFINITIONS. In this [Act]:

(1) “Compensatory damages” means an award of money, including a nominal amount, made to compensate a claimant for a legally recognized injury. The term does not include punitive damages.

(2) “Punitive damages” means an award of money made to a claimant solely to punish or deter.

Comment

This Act is designed to facilitate and in some ways regulate awards of punitive damages in the civil justice system. In order to do this, a distinction must be drawn between compensatory damages and punitive damages, even though there is some overlap in the purposes served by these two types of damages. Compensatory damages, in addition to providing reparation to a tort victim, serve to admonish the tortfeasor, as well as others, not to repeat the wrongful conduct in question. In this sense, compensatory damages not only punish a tortfeasor for his or her wrongful conduct, but they also act as a warning or deterrent. However, punitive damages, in the sense used in this Act, are those damages that serve *only* to punish or deter. To the extent that damages serve to compensate or provide restitution to a tort victim, they are not considered to be punitive damages under this Act.

Compensatory damages is defined to include awards of nominal damages. The Model Act, however, takes no position on whether an award of punitive damages may be assessed in a situation where an award of nominal damages is made. The definition merely excludes nominal damages from being classified as a type of punitive damages unless such an award would only serve to punish or deter. If there is only an award of a nominal amount of money because there is no economic measure that suffices to compensate the claimant, one would have to consult other law in the enacting jurisdiction to determine whether such an award would support an additional award of punitive damages. For example, an award of nominal damages may be justified in a trespass to land or an offensive battery case where there is no demonstrable physical or economic harm. In either of these cases, the Act is neutral on the issue of whether punitive damages may be awarded in an enacting State.

The Act does not dictate to a particular jurisdiction that would enact it how to determine which damages are purely for punitive purposes and which serve to compensate or provide restitution. The resolution of that issue is left to existing law and future developments in the enacting jurisdiction.

SECTION 2. CIVIL CLAIM FOR PUNITIVE DAMAGES. This [Act] applies to all civil actions in which punitive damages may be awarded under the law of this State.

Comment

This Act does not authorize awards of punitive damages in any State that enacts it, but merely prescribes requirements for assessing, reviewing, and otherwise fine-tuning the law already in existence under which punitive awards may be made. For example, one would have to look to the existing state law to determine if a punitive award is available in a breach of contract situation as compared to tort. The same would be true as to the issue of whether a punitive award may be assessed against a governmental entity. In short, the Act does not speak to the types of situations in which a punitive damage award may be made. See also Section 5(a)(1).

The Act applies to civil actions that arise "under the law of this State." If an action based on federal law is maintainable in state court, federal law would govern any award of punitive damages that may be made. The federal law may provide its own standards or it may adopt the standards of the State. In the latter instance, if the State in which the action is filed has adopted the Model Act, all or parts of the Act may be applicable, depending on the extent to which federal law applies state standards.

If an action is filed in an adopting State seeking punitive damages under the law of a different jurisdiction, the conflict of law rules of the adopting State should govern. Although the substantive law of the other jurisdiction may provide the rules of liability for any punitive award, the procedural aspects of the Model Act may be employed by the adopting State to govern the trial and appellate process.

SECTION 3. PLEADING AMOUNT FOR PUNITIVE DAMAGES. A pleading may not state a monetary amount for any punitive damages sought [except as provided in _____].

Comment

A number of States now prohibit the use of monetary figures in pleadings, particularly with regard to claims for punitive damages. This type of provision has been relatively noncontroversial and has been readily accepted where proposed.

If an enacting State does not have adequate measures, such as the possibility of a Rule 11 type sanction, for failure to comply with this section, the State may want to consider adopting some type of penalty for those that intentionally violate the prohibition against pleading an amount for punitive damages.

If an enacting State has another statute that permits pleading of a punitive amount, such as a treble damage provision, it may cross-reference to the statute to create an exception to the

general rule that one is not permitted to plead a monetary amount for punitive damages. That is the purpose of the bracketed language and blank space contained at the end of the sentence in this section. If there is not any cross-reference to be inserted, the brackets and space therein should be deleted.

In some States a problem may arise regarding the pleading of an amount in controversy for the purpose of establishing the jurisdiction of a particular court. If an adopting State does not already have a statutory provision or rule that resolves the problem in a case where there is a prohibition on pleading a monetary amount of damages, it may consider enacting the following provision as part of this section:

If a statute or rule requires that a jurisdictional amount in controversy be pleaded and a claimant cannot satisfy the amount in controversy without pleading an amount of punitive damages, the requirement is satisfied by pleading that the amount in controversy equals or exceeds the required amount.

SECTION 4. DISCOVERY TO ESTABLISH AMOUNT OF PUNITIVE DAMAGES.

(a) Discovery of information, including a defendant's wealth or financial condition, sought by a claimant solely to establish the amount of an award of punitive damages, may not be ordered unless the claimant has made a prima facie showing that the defendant is liable for a legally recognized injury for which punitive damages are allowable under the law of this State and the defendant maliciously intended to cause the injury or consciously and flagrantly disregarded the rights or interests of others in causing the injury.

(b) A prima facie showing under subsection (a) may be made at any time, unless the court orders that the showing be made by a date certain, [pursuant to the rules of civil procedure] [by affidavit, deposition, or testimony or in any other manner permitted by the court].

[(c) If discovery is allowed, a court may issue orders to protect the confidentiality of the information or to avoid undue prejudice to the party from or about whom the information is sought.]

Comment

This section attempts to balance the rights of claimants and defendants regarding discovery of information that may be used to establish the amount of any punitive award. First, a claimant and defendant may come to some agreement regarding disclosure of the information without having to involve the court. Likewise, a defendant may voluntarily produce the information. The section only deals with the situation where the defendant will not agree to produce the information without a court order. Secondly, it does not prevent a claimant from engaging in

discovery if the information sought is relevant to issues other than the amount of an award. For example, a claimant may engage in discovery regarding wealth, financial condition, and the like without first obtaining approval from the court if that evidence bears on whether or not the defendant may be liable. However, if the evidence is only relevant to the amount of any punitive award, prior approval for such discovery must be obtained from the court unless the information is provided voluntarily. Thus, the section only applies when a defendant refuses to provide the information sought. In that event, it requires a showing that there is a colorable claim that could succeed for punitive damages before a claimant is permitted to delve into such matters as wealth, financial condition, or the ability to respond in punitive damages.

In addition to wealth and financial information, there are other types of information that may only be relevant to the issue of the amount of a punitive award as compared to the issue of liability. For example, evidence regarding subsequent remedial measures, the impact of an award on innocent persons, or fines, penalties, or damages that have been paid or that are to be paid may not be admissible in a punitive damages trial except on the issue of the amount of any such award. If the defendant objects to discovery, these could be examples of other information that should not be obtainable without a prima facie showing of liability under Section 5(1) and (2).

If the section does apply, all that is required for a claimant to overcome an objection to discovery is a prima facie showing as measured by the criteria set out in paragraphs (1) and (2) of Section 5. There is no requirement that the criteria of Section 5(3) also must be met in the prima facie showing. The latter paragraph reiterates the common law regarding the discretion of the trier of fact as to whether any punitive award should be made, even though it has found that there is a sufficient factual basis to do so. Thus, since paragraph (3) addresses a matter that is discretionary with the trier of fact, it does not admit to a prima facie showing and there is no requirement for a claimant to attempt to make such a showing.

Subsection (b) is drafted with language in two sets of brackets. Each set of brackets is there for a different reason. The first set is there because an enacting State may already have rules that would adequately govern a hearing involving a prima facie showing. If so, the appropriate cross reference needs to be inserted and the brackets removed. If not, the appropriate rule making authority needs to address the matter either in the statute or elsewhere. The second set of brackets in subsection (b) contains language suggesting some of the ways that a prima facie showing may be made, but in the final analysis an enacting State can tailor the provision, if it chooses to address the issue, in any manner it sees fit. However, the first set of brackets points out a matter that needs to be addressed if there is no current rule in the enacting State that adequately governs the hearing contemplated.

A court may have the power under existing rules to enter protective orders to guarantee confidentiality of the information sought and to avoid undue prejudice or inconvenience. If the court does not have this power, an enacting State should consider whether it needs to adopt a rule providing that power and may consider the bracketed language in subsection (c) in that regard.

SECTION 5. LIABILITY FOR PUNITIVE DAMAGES.

(a) The trier of fact may award punitive damages against a defendant if:

(1) the defendant has been found liable for a legally recognized injury which supports an award of punitive damages under the law of this State;

(2) the plaintiff has established by clear and convincing evidence that the defendant maliciously intended to cause the injury or consciously and flagrantly disregarded the rights or interests of others in causing the injury; and

(3) an award is necessary to punish the defendant for the conduct or to deter the defendant from similar conduct in like circumstances.

(b) If another statute of this State establishes criteria for determining liability for an award of punitive damages, subsection (a) does not apply to an action brought under that statute.

Comment

The Act does not create liability for punitive damages in situations where it does not otherwise exist. See comment to Section 2.

This section describes the standards of culpability or categories of wrongdoing for which a punitive award may be made. Paragraph (2) essentially paraphrases the language from the Restatement (Second) of Torts, describing the bases for punitive awards. However, it differs from the Restatement in one regard. It does not encompass the situation, as does the Restatement, where the actor, from facts which he or she knows, *should realize* that there is a strong probability that harm may result. Although contained in the definition of "reckless" conduct in Section 500 of the Restatement (Second) of Torts, this language sounds more in negligence and would permit, in the opinion of the Drafting Committee, cases to go to the jury without proof of the type of state of mind which should be required to warrant punitive damages.

The Act requires the plaintiff to prove that the defendant acted in a conscious manner in disregarding the plaintiff's rights. This standard is satisfied if the defendant knows that harm will result or that there is a very high risk that it will result. The standard also applies to a defendant who wants to harm another person, but under the circumstances recognizes that the chances of that occurring are very remote. For example, the defendant may see the prospective victim standing at a great distance and know that the chances of any attempt to injure are hardly likely to be realized. Nonetheless, the defendant wants to do so and attempts to shoot the individual, and to his surprise he succeeds. The defendant should not be less of a candidate for a punitive award than the person who knows that he or she will succeed in injuring another.

The great majority of jurisdictions do not permit punitive awards for negligent conduct. This also is true for aggravated forms of negligence that pass under the heading of "gross negligence." Whether punitive damages should be allowable for the type of "reckless" conduct described

under the second prong of Section 500 of the Restatement (Second) of Torts, which was discussed above, is more debatable. Under the Restatement test, an actor that is in possession of facts regarding certain conduct, but who is oblivious to the consequences of the conduct, may be liable for punitive damages if a reasonable person would understand that the conduct creates a high risk of harm. This test utilizes an objective standard in comparison with the subjective test employed under Section 5. The Drafting Committee feels that a subjective test – one which at a minimum requires conscious indifference – should be the touchstone for any punitive award over and above the compensatory damages that have already been assessed. Section 5 is more consistent with the goals of punishment and deterrence that underlie punitive awards than a test that would permit such awards for inadvertent conduct, even though the latter conduct may be more egregious than mere carelessness. The compensatory award should serve to adequately punish and deter inadvertent conduct.

An increasing number of jurisdictions have also said that the mere commission of a tort is not sufficient to support an award of punitive damages. There must be more, i.e., a bad motive. It is inherent in some types of torts that the evidence showing commission also shows bad motive, but this is not true of all torts for which an award of punitive damages may be available. Paragraph (2) attempts to describe the particular type of state of mind or motive that is required to justify an award of punitive damages. Although other terms have been used to describe the element of malevolence, the Drafting Committee adopted one – “malicious” – as being sufficient to describe the type of *scienter* for which punitive awards are justified. The term is intended to apply to all types of torts, including those that are purely economic in nature – such as fraud – as well as those involving personal injury and property damage. If an enacting State feels other terms are more suitable for delineating the state of mind required to support an award of punitive damages, it may adopt those either in addition to or in lieu of the term “malicious” that is contained in paragraph (2).

A defendant may also be subject to a punitive award under paragraph (2) for consciously and flagrantly disregarding the rights of others. Although this test does not use an explicit term, such as “malicious,” to describe the malevolent element required, the fact that the actor “just does not give a damn” about the consequences to others embodies the same type of dereliction that is found in the terms commonly used to describe the necessary *scienter* to support an award of punitive damages. Thus, the trier of fact may find that a punitive award is justified for a drunken driver because the individual consciously and flagrantly disregarded the rights of others, even though there was no specific malice involved.

Paragraph (3) also imposes a requirement that the trier of fact find that the goals of punishment and deterrence would be served by imposing an award of punitive damages on the defendant. This requirement emphasizes the point that a claimant has no right under common law to punitive damages even if the trier of fact were to find in favor of the claimant on the elements embodied under paragraphs (1) and (2). The decision regarding the issue of whether punitive damages should be awarded is solely within the discretion of the trier of fact, unless there is a statutory basis providing otherwise. The requirement that an award be “necessary” to punish or deter provides an objective standard for review of punitive awards. Juries and courts

must consider whether punishments otherwise inflicted on a defendant are sufficient. In addition, the amount of the award must be measured by its necessity to punish and deter. In fact, the United States Supreme Court decision in *BMW of North America, Inc. v. Gore, supra*, appears to require such consideration. The claimant bears the burden on these requirements.

The injury that is referred to in paragraph (2) may be that suffered by the claimant alone or may include injury that is also caused to others, whether or not they are claimants in the case *subjudice*. For example, if a defendant is shown to have engaged in a pattern or practice of defrauding thousands of customers of a relatively small amount of money in each of a number of transactions but the aggregate of these amounts is large, the jury is entitled to consider the aggregate harm in deciding whether punitive damages should be awarded to any particular claimant that brought the action, even if the harm to the claimant is rather small. Thus, a jury could conclude that punitive damages should be assessed because the defendant knew that it was causing harm, the defendant acted with a bad motive, and it would serve one or more of the purposes of punitive damages to impose such a sanction on the defendant. Since the award is to punish or deter, and not to compensate the claimant, it matters not that the claimant receives an award that is far in excess of the actual injury. However, there may be a problem of an unfairly duplicative award if another claimant subsequently seeks a punitive award against the defendant based on the same act or course of conduct that gave rise to the first award. The problem of unfairly duplicative awards is addressed in Section 10. As long as the underlying conduct is unlawful in other States, or has a sufficient impact on the enacting State, this provision does not conflict with the decision in *BMW of North America, Inc. v. Gore, supra*.

Subsection (b) makes it clear that Section 5 of the Act does not apply if punitive damages are sought under another statute that supplies the criteria for determining liability for such an award. For example, it is not uncommon for some jurisdictions to have statutes authorizing punitive damages for waste of timber or trespass to realty. If an enacting State has this type of statute, the statute would govern any action brought under it for punitive damages. If a consumer protection statute permits awards of punitive damages without proof of malicious behavior, it would govern any award based on the statute. However, other provisions of the Act may apply to such proceedings if they do not conflict with provisions in the statute that is the basis for the action.

The Act does not speak to the applicability of any affirmative defenses that might be invoked in an action where punitive damages are sought. Again the Act is not intended to change the law in that regard, whatever it might be, in an enacting State.

In an action for defamation or other related torts where speech is directly related to matters of public concern, the imposition of punitive damages may raise questions under the First Amendment or applicable state constitutional guarantees of free expression. At a minimum, in those cases where "actual malice" is required as a prerequisite to an award of compensatory damages, that finding is not the equivalent of the malice or the other terms required by Section 5 as a basis for awarding punitive damages. To award punitive damages in such cases, the trier of

fact must additionally find that the defendant had the intention and acted in a manner described in Section 5.

SECTION 6. VICARIOUS LIABILITY OF EMPLOYERS AND PRINCIPALS.

(a) If an employee or agent is found liable for punitive damages under Section 5 and the trier of fact finds by clear and convincing evidence that the employee's or agent's wrongful conduct occurred in the course and within the scope of the employment or agency and the employer or principal, with knowledge of its wrongful nature, directed, authorized, participated in, consented to, acquiesced in, or ratified the conduct of the employee or agent, the trier of fact may also find the employer or principal liable for the punitive award if such an award is necessary to punish the employer or principal for the employer's or principal's conduct or to deter the employer or principal from similar conduct in like circumstances.

(b) If an independent contractor is found liable for a legally recognized injury which results in an award of punitive damages under Section 5 for an act or omission occurring in the course and within the scope of performing a contract and the legal entity or individual who engaged the independent contractor is also found liable for the legally recognized injury caused by the contractor, the trier of fact may also find the legal entity or individual liable for the punitive award under subsection (a) as if the relationship of the legal entity or individual with the contractor were that of an employer or principal.

(c) If a director, officer, or agent, with policymaking authority to bind a legal entity or other principal, is found liable for punitive damages under Section 5 for an act or omission occurring in the course and within the scope of exercising the authority on behalf of the entity or principal, the entity or principal is also liable for punitive damages. Unless liability is also established for a legal entity or principal under subsection (a) or (b), liability of a legal entity or principal for punitive damages under this subsection is limited to an amount necessary to deprive the entity or principal of any profit or gain, obtained through the wrongful action of the director, officer, or agent, in excess of that likely to be divested by an action against the entity or principal for compensatory damages or restitution.

(d) Except as otherwise provided in subsections (a), (b), and (c), an employer or principal is liable for punitive damages only if the trier of fact finds that the employer's or principal's conduct satisfies the criteria and purposes of Section 5.

(e) This section does not subject a legal entity to liability for punitive damages if it is a legal entity that is not liable for punitive damages under the law of this State.

Comment

This section deals with situations under the common law where tort liability for harm is imposed on an individual or legal entity because of the acts of another. This type of liability is imposed on employers and principals and is often referred to as the doctrine of *respondeat superior*. When dealing with compensatory damages, there is no need to distinguish between vicarious liability imposed on employers and principals because liability is imposed without regard to any fault in both situations. On the other hand, when it comes to punitive awards, it would appear that a distinction needs to be drawn between liability that is imposed on a principal-agent basis in some situations as compared to that imposed on a master-servant basis.

When the president of a corporation negligently drives her car while on company business, thereby causing accidental injury to another, she is acting as any other employee of a business, regardless of the form of business organization. In this instance, however, she would not be exercising agency authority and liability would not be imposed on that basis. Rather, the corporation is liable under the doctrine of *respondeat superior* because of the right to control her conduct. On the other hand, when the president, in exercising policymaking authority created by the board of directors, establishes a marketing program that she knows will defraud existing and prospective customers, the president and the corporation in its own right may be liable because the president was in effect the corporation when the authority was exercised. In other words, liability could be imposed on the corporation because, as an agent, the president was empowered to act in a manner that treats her acts as those of the corporation. In addition, the corporation might be liable because she was an employee acting within the course and scope of her employment, but liability under the two theories rests on different bases, bases that can produce different results. Subsection (a) deals with liability imposed under master-servant and principal-agent relationships in general, while subsection (c) deals with liability imposed as the result of a principal-agent relationship that only involves policymaking authority.

Subsection (a) basically tracks the American Law Institute Restatements regarding vicarious responsibility for punitive awards. See Restatement (Second) of Agency § 217C (1958) and Restatement (Second) of Torts § 909 (1979). It adopts the majority position in the United States that the usual rule of strict liability that is imposed on an employer for compensatory damages under *respondeat superior* is not warranted for punitive damages. An employer is not liable for punitive damages just because an employee was acting in the course and scope of the employment when he or she engaged in the type of conduct for which punitive damages may be awarded against the employee. Since punitive damages serve only to punish or deter, unlike

compensatory damages which also serve to redress a loss, the law requires that there be some wrongdoing on the part of the person sought to be punished or deterred. The wrongdoing, however, of an employer need not rise to the same egregious level of that of the employee before the employer is liable for punitive damages under the doctrine of *respondeat superior*.

An employer is subject to liability for punitive damages if an employee meets the requirements under Section 5 and the employer is implicated by directing, authorizing, participating in, consenting to, acquiescing in, or ratifying the act of the employee, knowing of the wrongful character of the employee's conduct. However, liability on the part of the employer is not automatically established just because the employee is found liable and the employer is implicated. Just as the trier of fact has discretion to award or not award punitive damages against a defendant that has been found to violate Section 5, the trier of fact has the same discretion with regard to an award against an employer under subsection (a) of Section 6. Although the trier of fact finds the necessary employer implication, it still may decide not to award punitive damages against the employer.

It should also be noted that the "clear and convincing" evidence standard employed in Section 5 is also employed under subsection (a) with regard to the burden of proof required for a claimant to establish an employer's complicity in order to hold the employer liable for punitive damages based on the acts of an employee.

The rules under subsection (a) apply to principals as well as to employers, but they only apply to principals in situations that involve agents who are not engaged in exercising policymaking authority. The latter are covered under subsection (c), discussed below.

Subsection (b) deals with those who retain independent contractors. Under general rules of *respondeat superior*, vicarious responsibility is not imposed upon one who engages an independent contractor as compared to an employee or agent. However, there are exceptions to this rule. For example, if an independent contractor is retained to carry out an inherently dangerous activity, a number of courts have held that the person hiring the independent contractor may not avoid responsibility for the contractor's tortious conduct while performing the contract. This responsibility is sometimes explained on the basis that the activity in question involves a duty that is considered nondelegable. For example, the owner of a high-rise building may not be able to escape responsibility for properly maintaining elevators in the building by hiring an independent contractor to undertake that function. Subsection (b) recognizes these exceptions and subjects an individual or entity engaging an independent contractor to liability for punitive damages in situations where the engaging individual or entity is liable for any compensatory damages or other relief awarded against the independent contractor. This is accomplished by treating the engaging individual or entity as an employer under subsection (a), in which case punitive damages may be awarded if the individual or entity, knowing the wrongful nature of the independent contractor's conduct, directed, authorized, participated in, consented to, acquiesced in, or ratified the conduct and the trier of fact determines that such an award is necessary to punish or deter the individual or entity.

The situation described above for an employer or principal under subsection (a) may be contrasted with that under subsection (c). Under subsection (c), a finding of liability on the part of an agent for punitive damages automatically results in the principal being liable for an award of punitive damages. The latter result obtains because the acts of the agent are in fact the acts of the principal and there is no separate requirement to show that the principal was also implicated in the wrongdoing. To establish liability, the claimant must show that the agent was a director, officer, or some other type of managerial agent empowered to act in a policymaking role on behalf of the corporation or principal. Although the agent's conduct must satisfy the criteria of Section 5 before such liability may be imposed, imposition of liability on the agent automatically results in liability for the legal entity or principal.

If liability is imposed under subsection (c), there is a question whether the same amount of punitive damages imposed on the director, officer, or other agent should be imposed on the legal entity or principal in this situation. If compensatory damages are involved, it is clear that, since such damages are designed to make the claimant whole and nothing more, that there should be only one recovery. Since the tort victim can only collect once, the tort victim should be able to collect the award from either the agent or principal and the principal may seek indemnity from the agent if that is warranted. In the case of punitive damages, however, there is no similar limitation and it may be appropriate under some circumstances for a claimant to seek and the trier of fact to award one amount against a director, officer, or other agent and another amount against the legal entity or principal. Subsection (c) would permit such awards. However, since the legal entity or principal has not done anything wrong in its own right (and in the case of a corporation could never do anything wrong given the fact it is not an individual), it is only just that the award against the legal entity or principal should be limited to any unwarranted economic gain obtained as a result of the wrongful action of the director, officer, or agent. Whether a corporation or other legal entity will be permitted to indemnify a director, officer, or other agent for a punitive award assessed against one of these individuals is left to be answered by the relevant law governing the particular type of business organization in the enacting jurisdiction. Thus, the vicarious liability under subsection (c) is imposed for the purpose of requiring the legal entity or principal to disgorge unwarranted economic gain that would not otherwise be the subject of a compensatory or restitutionary award and is so limited. However, if the legal entity also is implicated in the misconduct, liability may be imposed on the entity under subsection (a) and the limitation on damages under subsection (c) would not apply.

Section 6 does not identify the types of corporate entities that may be subject to awards of punitive damages, that is, whether punitive damages are awardable against nonprofit versus for-profit entities or governmental versus nongovernmental entities. That is a matter that is left to the public policy and governing law of the enacting state. However, subsection (c) does contemplate that strict liability may be imposed on a principal other than a corporate entity when an agent possesses the same type of policymaking authority that is placed in a director or officer of a corporation and the agent, while in the course and scope of exercising that authority, acts in a manner that would warrant an award of punitive damages against the agent under Section 5.

SECTION 7. AMOUNT OF PUNITIVE DAMAGES.

(a) If a defendant is found liable for punitive damages, a fair and reasonable amount of damages may be awarded for the purposes stated in Section 5(a)(3). The court shall instruct the jury in determining what constitutes a fair and reasonable amount of punitive damages to consider any evidence that has been admitted regarding the following factors:

(1) the nature of defendant's wrongful conduct and its effect on the claimant and others;

(2) the amount of compensatory damages;

(3) any fines, penalties, damages, or restitution paid or to be paid by the defendant arising from the wrongful conduct;

(4) the defendant's present and future financial condition and the effect of an award on each condition;

(5) any profit or gain, obtained by the defendant through the wrongful conduct, in excess of that likely to be divested by this and any other actions against the defendant for compensatory damages or restitution;

(6) any adverse effect of the award on innocent persons;

(7) any remedial measures taken or not taken by the defendant since the wrongful conduct;

(8) compliance or noncompliance with any applicable standard promulgated by a governmental or other generally recognized agency or organization whose function it is to establish standards; and

(9) any other aggravating or mitigating factors relevant to the amount of the award.

(b) If an award of punitive damages is authorized or governed by another statute of this State, any requirement as to amount or method of calculation established by that statute governs the award.

(c) If the amount of punitive damages is decided by the court, the court upon motion of a party shall make findings showing the basis for the amount awarded against each defendant and enter its findings in the record.

Comment

Section 7 deals exclusively with how the amount of punitive damages should be determined by the trier of fact. Whereas Section 5 requires that the trier of fact find by clear and convincing evidence that the defendant is liable for punitive damages, no such standard of proof is required for the amount of punitive damages. Present law in the enacting State will govern the standard of proof for determining the amount of a punitive award.

Subsection (a) lists a number of factors that the trier of fact is to consider in determining the amount of a punitive award, assuming that evidence has been admitted on the particular factor. This list is not exclusive as the last factor states that any other evidence relevant to the amount of the award may be considered. What the Act does do, however, is to attempt to list those factors which are relatively noncontroversial and which would probably come into play in most cases involving a claim for punitive damages. In fact, the first three factors are essentially the same as the three guide posts that the Supreme Court of the United States recently utilized in reviewing the constitutionality of a punitive damage award in *BMW of North America, Inc. v. Gore, supra*.

It should be noted that Section 6(c) limits the amount of punitive damages that may be awarded against a legal entity, such as a corporation, or other principal to any unwarranted economic gain, where the entity is held liable for such damages on the basis of a principal-agent relationship that involves policymaking authority. In an action brought solely on the basis of Section 6(c), the only evidence that would be admissible for the purpose of establishing a punitive award would be that under paragraph (5) of Section 7(a).

Subsection (b) deals with a situation where the enacting jurisdiction has legislation that may limit an award of punitive damages in certain situations. If the enacting State has such legislation, subsection (b) states that it governs the amount of any award made under the authority of such a statute. For example, if the enacting State has legislation stating that any award of punitive damages shall not exceed a particular figure, such as \$250,000, in a medical malpractice action, that type of limitation would not be negated by the enactment of the Model Punitive Damages Act. Similarly, a statute requiring a tripling of compensatory damages would not be affected by the Act. On the other hand, other provisions of the Model Act may apply to such actions if there is no conflict between the Act and the other statute.

Subsection (c) is an attempt to provide a basis for appellate review in cases where a trial court, when acting as the trier of fact, assesses a punitive award. Although the court is only required to make findings and place them on the record when requested to do so by one of the parties, there is nothing to prevent the court from doing so on its own motion.

SECTION 8. TRIAL COURT REVIEW OF JURY AWARD.

(a) If a jury awards punitive damages, a party against whom an award is made, in addition to any other post-trial relief that may be available, may move the trial court [pursuant to the rules of civil procedure] to review the award for the purpose of entering a judgment [as a

matter of law] [notwithstanding the verdict] or requiring a new trial or a remittitur. Upon considering the motion, the court shall review the evidence pursuant to subsections (b) and (c) to determine whether the evidence supports the jury findings.

(b) If the court determines that there is no legally sufficient basis for a jury to find liability for punitive damages under Section 5, it shall enter judgment for the defendant [as a matter of law] [notwithstanding the verdict] on the award of punitive damages. If the court determines that the jury's decision to award punitive damages is against the great weight of the evidence, it shall order a new trial on liability for punitive damages and, if appropriate, other issues in the case.

(c) If the court determines that the amount of punitive damages awarded is against the great weight of the evidence under the factors the jury was required to consider under Section 7, the court shall order a new trial unless the claimant agrees to a remittitur determined by the court. An order granting a new trial solely for the purpose of determining the amount of punitive damages under this subsection is appealable at the time it is entered.

(d) In determining whether liability for or the amount of punitive damages awarded is supported by the evidence, the court shall make findings and enter its findings and the basis for its decision in the record, including in the case of a remittitur the method for determining the reduced award.

Comment

One of the problems alluded to by critics of the present process by which punitive damages are awarded involves the lack of judicial control over juries. Section 8 attempts to meet this criticism by providing standards for trial court review. Section 9 deals with appellate review.

Subsection (b) of Section 8 adopts the standard employed in the federal courts for determining whether a case should be dismissed for failure to make out a prima facie case or in ruling on a motion for judgment notwithstanding the verdict. See Rule 50, Federal Rules of Civil Procedure.

Subsection (c) deals with the standard for reviewing the amount of a punitive award by a jury, as compared to subsection (b) which deals with the issue of liability. Subsection (c) uses a standard that is familiar in many States. It requires the reviewing court to determine whether or not the award is "against the great weight of the evidence" in light of the factors that the jury was required to consider under Section 7. In *Honda Motor Co. v. Oberg, supra*, the Supreme Court of the United States reiterated that there must be meaningful judicial review of jury awards for

punitive damages. It held a provision of the Oregon Constitution, which prohibited judicial review of the sufficiency of the evidence regarding the *amount* of a punitive award, to violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The Court did not elaborate on what type of judicial review would suffice. However, it clearly stated that a mere "no evidence" standard did not provide meaningful judicial review.

This section contains a provision which the Drafting Committee feels would satisfy the due process requirements announced in *Oberg*, at least at the trial court level. Whether there needs to be judicial review employing a similar standard at the appellate level to satisfy the Due Process Clause is not clear at this time. See comment to Section 9.

In addition to the *Oberg* decision, the Supreme Court of the United States has announced three guideposts for reviewing civil awards of punitive damages under the Due Process Clause of the Fourteenth Amendment. *BMW of North America, Inc. v. Gore, supra*. The guideposts are: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio between the harm or potential harm suffered by the claimant and the amount of the punitive award; and (3) the difference between the punitive award and any civil or criminal penalties authorized or imposed for comparable misconduct. The Act takes into account *BMW* by requiring that the trial court review the award based on the factors that the jury was instructed to consider under Section 7(a), the first three of which track the guideposts set out in the decision.

In addition to setting out the standards for reviewing jury awards of punitive damages, this section also requires the trial court, both as to the liability issue and the amount of a punitive award, to set out its findings and the basis for its decisions on the record. This requirement is found in subsection (d) and should further enhance judicial review, both by the trial court and the appellate courts. In fact, in order to appeal from an award of punitive damages, the appealing party must first comply with this section. See Section 9(a).

The rule in most jurisdictions is that an order granting a new trial by the trial court is not immediately appealable. Subsection (c) changes this rule and makes such an order appealable if the new trial is granted just for the purpose of determining the amount of a punitive award. If a new trial is granted on the liability issue too, the right to appeal is left to existing law in the enacting State.

SECTION 9. APPELLATE REVIEW OF JURY AWARD OF PUNITIVE DAMAGES.

(a) A party may not seek appellate review of a jury determination of liability for or the amount of an award of punitive damages without having filed a motion for review by the trial court under Section 8(a).

(b) If a party perfects a timely appeal regarding liability for or the amount of an award of punitive damages, the appellate court shall review the issues [pursuant to appellate rules of civil procedure] and enter such orders as are fair and just under the circumstances. If the appellate court determines that the amount of an award of punitive damages is excessive, it may reverse and remand the case for a new trial on the issue of the amount unless the claimant agrees to a remittitur determined by the court.

Comment

Although it is not the case in every State that a party need file a motion for new trial in order to perfect an appeal, this, in effect, is a requirement for an appeal of a jury award of punitive damages under the Model Punitive Damages Act. Not only should the trial court be given a chance to correct any errors it may have made, but one of the main purposes of the Act is to address the problem of alleged unbridled jury discretion in making awards of punitive damages. Thus, subsection (a) of Section 9 requires, as a condition for appellate review, that a motion be filed under Section 8 requesting the trial court to review the jury findings in light of the evidence to determine if any abuse or excess has taken place in the trial process. Moreover, the trial court is also required to make independent findings and state the basis for whatever decision it makes regarding its review. See Section 8(d). The latter should provide a better basis for appellate review as a further safeguard to ensure that the amount of any punitive award is fair and equitable.

An enacting State may need to consider an amendment to its rules of civil procedure. If the filing of a motion for judgment notwithstanding the verdict or for a new trial tolls the time for filing an appeal, the enacting State should consider whether the filing of a motion under subsection (a) should have the same effect.

To avoid any uncertainty about the power of an appellate court to order a remittitur, unless the claimant opts for a new trial to determine the amount of a punitive award, this section makes it clear that the court may do so if it finds that the award is excessive.

Nothing is said in this Act regarding the standard of appellate review, either as to the liability issue or as to the amount of an award of punitive damages. Unless an enacting State adopts specific standards for reviewing awards of punitive damages, the existing standards that govern reviews of damage awards in general will apply.

In considering standards for appellate review of punitive damage awards, it is not clear what *Honda Motor Co. v. Oberg, supra*, portends in this regard. If there is an intermediate appellate court with jurisdiction to review the sufficiency of the evidence, that arguably would satisfy any due process requirement under the Fourteenth Amendment to the United States Constitution, whether or not the court of last resort in the jurisdiction is empowered to conduct such a review. The more difficult issue arises where there is no intermediate appellate court and the court of last

resort has no power to conduct a sufficiency of the evidence review. In *Oberg*, the Oregon Constitution did not allow any judicial review, be it trial or appellate, of the sufficiency of the evidence to support the amount of a damage award. The only review permitted was to determine if there was any evidence to support the award, and this was found to be a denial of due process by seven members of the United States Supreme Court. Thus, it is not clear whether a sufficiency review solely by the trial court would satisfy any due process requirements or whether a similar standard of review at the appellate level is also needed. Presently, there is no case pending before the Supreme Court that raises this issue.

Since the *Oberg* decision the Supreme Court has announced that the Due Process Clause of the Fourteenth Amendment also requires that a person receive fair notice not only of the conduct that will subject the person to punishment but also of the severity of the penalty that a State may impose. *BMW of North America, Inc. v. Gore, supra*. In reviewing the amount of the punitive damage award in *BMW*, the court announced three guideposts that led it to conclude that the award was grossly excessive. These guideposts are incorporated into the factors that the trier of fact is to consider in making an award of punitive damages under Section 7(a) and the requirements for trial court review under Section 8. See comments to Sections 7 and 8. The same three factors will also be relevant guideposts for appellate review of punitive damage awards.

SECTION 10. MULTIPLE AWARDS FOR SAME ACT OR COURSE OF CONDUCT.

(a) If, in an action in this State, a defendant is found liable for punitive damages and has previously been found liable for punitive damages under a final judgment, wherever entered, the defendant, [pursuant to the rules of civil procedure for filing a motion for new trial][before entry of judgment], may move the court to determine whether the liability for the punitive damages awarded arose out of the same act or course of conduct and, if so, whether the defendant is entitled to have the award in the pending case reduced. If the court determines that an award of punitive damages in the pending case is unfairly duplicative, it shall reduce the award accordingly.

(b) If more than one final judgment awarding punitive damages is entered against a defendant and one or more of the judgments is sought to be enforced against the defendant in this State, the defendant may petition a court of competent jurisdiction in this State to determine how much, if any, of the amount of punitive damages previously paid by the defendant to satisfy one or more of the judgments unfairly duplicates an award of punitive damages in the judgment

sought to be enforced because the awards were based on the same act or course of conduct. If the court determines that the judgments contain awards of punitive damages that are unfairly duplicative, it shall credit any judgment sought to be enforced in this State with any amount previously paid by the defendant which the court finds to be unfairly duplicative.

(c) In determining whether a reduction under subsection (a) or credit under subsection (b) should be granted, the court shall consider the bases of liability for the punitive damages awarded, the purposes for which the awards were made, how the awards were determined or calculated, whether the defendant has already disgorged any unwarranted economic gain for which it was held liable, and any other evidence offered by the parties relevant to the issue of whether the petitioner is being subjected to unfair duplicative awards of punitive damages. The court shall make and enter in the record its findings and the basis for its decision. The action of the court may be reviewed on appeal [pursuant to appellate rules of procedure]. If the appellate court determines that the decision of the trial court to award a reduction or credit or deny a reduction or credit is clearly erroneous in light of the record, it shall reverse the decision of the trial court and enter such other orders as are fair and just under the circumstances.

(d) The court may stay entry of judgment or execution on the portion of a judgment sought to be enforced to collect punitive damages pending a hearing on a motion under this section and enter any other orders to avoid prejudice or unnecessary cost or delay while the hearing is pending. The court for a reasonable time, and subject to any other condition imposed by the court, may also stay process to collect an award of punitive damages pending resolution of a trial or appeal of another action seeking punitive damages if a prima facie showing is made that the other action involves the same act or course of conduct that gave rise to the punitive damages awarded in the judgment sought to be enforced.

Comment

Subsection (a) applies to situations where an action has been tried in the enacting State and a civil award has been returned for punitive damages. It does not apply to criminal fines or penalties. It gives the defendant an opportunity to show that he has already been punished by a punitive award contained in a final judgment entered earlier for the same conduct and that the punitive award in the present case should be reduced to prevent excessive punishment. The bracketed language in subsection (a) is included to indicate that an enacting jurisdiction must make a decision regarding the procedure for filing a post-trial motion for reduction. If the enacting State finds that the rules governing a motion for a new trial would adequately govern

the situation, it may merely cross reference to those rules. However, in some States, the alternative language contained in the brackets that requires that the motion be filed before entry of judgment may suffice. In any event, the enacting State needs to decide how best to handle the matter.

Subsection (b) applies to situations where multiple judgments have been entered, perhaps in several different States, and one or more of the judgments is sought to be enforced in the enacting State. Again, a judgment debtor is given the opportunity to prevent unfairly duplicative awards of punitive damages from being enforced against the debtor.

Subsection (c) provides some guidelines for a court in attempting to decide whether a reduction or credit should be granted. In the final analysis, the burden is on the moving party to persuade the court that an injustice is taking place and that relief is warranted. The trial court is required to make findings and state the basis of its decision in the record so that there will be an opportunity for meaningful appellate review.

Subsection (d) allows the trial court to stay entry or execution of judgment in order to make a timely decision on a petition for reduction or credit under this section. It would also allow the court to suspend process for a reasonable amount of time to determine if an award of punitive damages in another court, in or out of State, involving the same act or course of conduct is sustained, reversed, or modified on appeal. The power of the court to stay process could also encompass situations where there are one or more other law suits pending at the trial level in which punitive damages are being sought against a petitioner-judgment debtor and it would be unfair or unjust to allow a current creditor to enforce a judgment for punitive damages because the pending actions involve the same act or course of conduct that gave rise to the punitive award in the judgment that is sought to be enforced. In order to obtain a stay, the court may impose certain conditions on the moving party, such as posting security for all or part of the award in question.

SECTION 11. SEPARATE TRIALS. In a trial involving a claim for punitive damages in which evidence may be admissible solely on the issue of the liability for or the amount of punitive damages, the court upon motion of a party shall order a separate trial of the issue if necessary to avoid undue prejudice. The court may order a separate trial of any claim or issue in furtherance of convenience of the parties or other good cause.

Comment

This section provides that a court may bifurcate or otherwise divide a trial in order to avoid undue prejudice or for convenience. However, if the trial involves evidence which is admissible solely on the issue of liability or solely on the issue of the amount of punitive damages, the trial court is required upon motion of a party to order a separate trial of the issue or issues if it is necessary to avoid "undue prejudice" to the party.

SECTION 12. CONSOLIDATION OF TRIALS.

(a) If more than one action asserting a claim for punitive damages is commenced in this State against a defendant for the same act or course of conduct, a court [pursuant to rules of civil procedure] may order:

- (1) the actions consolidated for trial; or
- (2) a joint hearing or trial of the matters in issue in the actions.

(b) The court may issue orders concerning any proceedings under subsection (a) to avoid manifest injustice or unnecessary expense or delay.

Comment

Most States already have provisions in their rules of civil procedure providing for consolidation. However, if the rules of civil procedure do not adequately provide for consolidation, a State should consider adopting this provision. Otherwise, it may be deleted.

SECTION 13. LIENS AND EXECUTION ON JUDGMENT PENDING APPEAL.

Pending timely appellate review [pursuant to the rules of appellate procedure] or a petition for certiorari pursuant to the rules of the Supreme Court of the United States seeking a reversal or modification of an award of punitive damages, a judgment creditor may perfect a lien or establish its priority or seek other relief, but may not invoke process to collect the portion of the judgment for punitive damages unless the court orders otherwise for good cause shown. In the latter event, the defendant may file a supersedeas bond [pursuant to the rules of civil procedure].

Comment

The section suspends enforcement of an award of punitive damages during the time an appeal is pending unless the court orders otherwise. The purpose is to obviate the need for a supersedeas bond and the costs involved. However, if the judgment creditor can establish that there is good cause for process to issue, the court may so order. Good cause may consist of a showing that the judgment debtor is attempting to secret or dissipate assets in fraud of the judgment creditor's rights or that another judgment creditor with an award of punitive damages is attempting to collect it and that such action would substantially lessen the likelihood that the judgment debtor would remain solvent.

The provision does not affect the right of a judgment creditor to perfect a lien or establish its priority while an appeal is pending.

SECTION 14. APPLICABILITY. This [Act] applies to all claims for punitive damages accruing on or after its effective date.

SECTION 15. SHORT TITLE. This [Act] may be cited as the Uniform Law Commissioners' Model Punitive Damages Act.

SECTION 16. SEVERABILITY CLAUSE. If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

SECTION 17. EFFECTIVE DATE. This [Act] takes effect on _____.

SECTION 18. REPEAL. The following acts and parts of acts are repealed:

- (1) _____
- (2) _____
- (3) _____