UNIFORM LAW COMMISSIONER'S
MODEL PUNITIVE DAMAGES ACT

PREFATORY NOTE

During the past decade serious concern has been expressed regarding the role of punitive damage awards in the civil justice system in the United States. It has been argued that awards often bear no relation to deterrence and merely reflect a jury's dissatisfaction with a defendant and a desire to punish without regard to the true harm threatened by the defendant's conduct. Others have countered that civil awards of punitive damages have an important place in our jurisprudence and serve to punish wrongdoers who not only deserve such treatment, but who in a number of instances would otherwise profit from their wrongful conduct. In any event, after all the arguments are considered there appears 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.

A number of recommendations for change have been made by such organizations as the American Bar Association and the American College of Trial Lawyers. As a result, the Uniform Laws Commission Study Committee on Tort Reform Proposals reviewed these concerns and recommended to the Committee on Scope and Program that the Conference undertake a drafting project with regard to the subject of punitive damages. In turn, the Committee on Scope and Program recommended to the Executive Committee that such a project be approved. In 1994, the Executive Committee established a Drafting Committee on the subject, but limited the scope of the project to one of developing a model act, as compared to a uniform act.

The Drafting Committee has met on three different occasions since it was created to review drafts of the Model Act proposed by the Reporter. The third tentative draft was reviewed line-by-line in a meeting of the committee of the whole at the Annual Meeting of NCCUSL in Kansas City, Missouri on August 1, 1995. At the conclusion of this reading, the Drafting Committee met to review the comments and suggestions it received from the membership. Subsequently a fourth tentative draft, which reflected the Reporter's efforts to incorporate changes resulting from the annual meeting of the Conference, was produced. This draft was reviewed by the Drafting Committee at its meeting on December 1-3, 1995 in Miami, Florida.

The attached draft--the Fifth Tentative Draft--contains the changes that were made by the Drafting Committee in Miami in December of 1995. It is scheduled to be reviewed by the Drafting Committee at its next meeting on March 29-31, 1996 in Washington, D.C.

The Model Punitive Damages Act does not authorize awards of punitive damages in the enacting State. Rather, if punitive damages are awardable in the State by common law or other authority, the Act is designed to govern such awards. In other words, it 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 current draft 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. 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 this goal, the Act addresses how trial and appellate courts should conduct reviews of punitive awards by juries.

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 has been created

by the difficulty of addressing the problem on a state-by-state basis. Nonetheless, the Drafting Committee feels it has made an important contribution towards resolution of the problem in this Act.

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 has proceeded with its work mindful that the United States Congress has 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, at this time it does not appear that the efforts of the Drafting Committee are inconsistent with what is being proposed in Congress. Moreover, it is not clear that Congress will actually enact legislation on the subject or, if it does, whether the President will sign the legislation into law. Thus, at this point, it appears that it would be prudent for the Conference to continue with 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 COMMISSIONER'S 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 a defendant or to deter others.

Reporter's Notes/Comments

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 reparations 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, but this does not dictate whether an award of punitive damages may be assessed in the jurisdiction. 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 a claimant is not able to prove the type of harm for which some economic measure would suffice to compensate the claimant, one would have to consult other law to determine whether such an award would support an award of punitive damages in the jurisdiction.

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.

Reporter's Notes/Comments

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.

The Act only applies to civil actions that arise "under the law of this State." If an action based on federal law is maintainable in the state courts, 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.

SECTION 3. PLEADING AMOUNT FOR PUNITIVE DAMAGES.

[(a)] A pleading may not state a monetary amount for any punitive damages sought [except as provided in _____].

[(b) 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.]

Reporter's Notes/Comments

Many 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 other statutes that permit pleading of a punitive amount, such as a treble damage provision, it may cross-reference to those statutes as 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 in subsection (a). If there are no cross-references to be inserted, the brackets and material therein should be deleted.

SECTION 4. DISCOVERY TO ESTABLISH AMOUNT OF PUNITIVE DAMAGES.

[(a)] Discovery of information, including a defendant's wealth or financial condition, sought solely to establish the amount of an award of punitive damages, may not be ordered unless a claimant has made a prima facie showing that the defendant may be liable for punitive damages under Section 5 (b)(1) and (2).

[(b) A prima facie showing under subsection (a) may be made before or during trial [pursuant to the rules of civil procedure] by affidavit, deposition, or testimony.]

[(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.]

Reporter's Notes/Comments

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 about the information and when it will be produced 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 such evidence is only relevant to the amount of any punitive award, prior approval for such discovery must be obtained from the court unless the party voluntarily agrees to provide the information. Only in the latter instance does the section require 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.

All that is required is a prima facie showing as measured by the criteria set out in subsections (b)(1) and (2) of Section 5. There is no requirement that the criteria of subsection (b)(3) also must be met in the prima facie showing.

The section is drafted with additional language in brackets to give an enacting state a choice of whether it wants to address the issues of how and when a prima facie showing may be made. The bracketed language in subsection (b) does not dictate when the showing may be made, but leaves that to be decided, just as time frames for pleadings and discovery are left to be resolved, by existing rules in the enacting State. However, it does suggest 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.

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) If a defendant is found liable for a legally recognized injury for which punitive damages are allowed and for which a claimant has made a timely claim, the trier of fact may award punitive damages in addition to any award of compensatory damages.

(b) To award punitive damages, the trier of fact must find that the plaintiff has established by clear and convincing evidence that:

(1) the defendant meant to cause harm or knew that there was a high risk or certainty that harm would result;

(2) the defendant's conduct was malicious or fraudulent or constituted a conscious and flagrant disregard for the rights or interests of others; and

(3) with regard to the wrongful conduct described in paragraphs (1) and (2), that an award should be made for the purpose of punishing the defendant for the conduct or detering the defendant and others from similar conduct in like circumstances.

Reporter's Notes/Comments

This section describes the standards of culpability or categories of wrongdoing for which a punitive award may be made. The language found in subsection (b)(1) and (2) is a paraphrase of 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 draft requires the plaintiff to prove that the defendant acted in a conscious manner in disregarding the plaintiff's rights. This may be accomplished because the defendant knows that harm will result or that there is a very high risk that it will result. In addition, the defendant may desire or want to harm another, but under the circumstances the chances of that occurring may be very remote. For example, the defendant may see the object of his malevolence 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 lie for the type of "reckless" conduct described under the second prong of Section 500 of the Restatement (Second) of Torts is more debatable. Under this 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 of conscious indifference, should be the touchstone for any punitive award over and above the compensatory damages that have already been assessed and that it is more consistent with the goals of punishment and deterrence that underly punitive awards.

Many jurisdictions today, and in increasing numbers, 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. Subsection (b)(2) attempts to describe the particular type of state of mind or motive that is required, in addition to the conduct described in subsection (b)(1), to justify an award of punitive damages.

Subsection (b)(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 subsections (b)(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 harm that is the object of the intent referred to in subsection (b)(1) and (2) may be that suffered by the claimant alone or may include harm that is also caused to others whether or not they are claimants in the case subjudice. For example, if an insurer is shown to have engaged in a pattern or practice of defrauding insureds of a relatively small amount of money in each of a number of claims 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 those claimants that have brought the action, even if the harm to each claimant is rather small. Thus, a jury could conclude that punitive damages should be assessed because the insurer knew that it was causing harm under subsection (b)(1), the conduct was fraudulent under subsection (b)(2), and it would serve one or more of the purposes in subsection (b) (3) to impose such a sanction on the insurer.

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. LIABILITY OF PRINCIPALS AND EMPLOYERS.

(a) If an individual acting as a director, officer, or partner or otherwise as an agent of a legal entity or other prinicipal is found to be liable for punitive damages under Section 5 for an act or omission occurring within the course and scope of exercising authority on behalf of the

entity or principal, the entity or principal is also liable for punitive damages. The liability of a legal entity or principal for punitive damages under this subsection is limited to the award against the director, officer, or partner or other agent unless a separate award is sought by the claimant and made against the entity or principal by the trier of fact under Section 7, in which case the entity or principal is liable only for the separate award made against it. [A separate award may not be made against a legal entity or principal unless the trier of fact finds that such an award is necessary to deprive the entity or principal of any profit or gain, obtained through the wrongful actions of its director, officer, or partner or other agent, in excess of that likely to be divested by the action against the entity or principal for compensatory damages or restitution.]

(b) If an employee is found to be liable for punitive damages under Section 5, the employer is also subject to liability for punitive damages if the trier of fact finds by clear and convincing evidence that the employee was acting in the course and scope of the employment at the time of the wrongful conduct and the employer, with knowledge of its wrongful nature, directed, authorized, participated in, consented to, acquiesced in, or ratified the conduct of the employee.

(c) Except as otherwise provided in this section, a principal or employer is not liable for punitive damages unless the trier of fact finds that the principal's or employer's conduct satisfies the criteria and purposes of Section 5.

Reporter's Notes/Comments

This section deals with the two situations under the common law where tort liability for harm is imposed on an individual or legal entity because of the acts of another: principal and employer liability. This type of liablility is often referred to as vicarious liability. In the realm of compensatory damages, it may not make any difference if this type of legal responsibility is viewed as a form of *respondeat superior*. For example, since a corporation can only act through its agents and employees, corporate responsibility is at least analogous to that of *respondeat superior* when a director or officer engages in conduct that is in fact the conduct of the corporation as compared to conduct that is merely carried out in the capacity of an employee. 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 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, as part of her managerial authority, orders that toxic waste be dumped into a river that provides the public with drinking water and others are injured as a result, the corporation, as well as the president, may be liable in its own right because the president was in effect the corporation when the order was given. Subsection (a) deals with the latter situation, while subsection (b) deals with *respondeat superior.*

Subsection (a) provides that a corporate or other legal entity is liable for the acts of its agents, whether the individual is a director, officer, or some other type of managerial employee that is empowered with authority to act on behalf of the corporation. Although the individual's conduct must satisfy the criteria of Section 5 before such liability may be imposed by the trier of fact, imposition of liability against the individual automatically results in corporate liability. The only question is whether there should be a different amount for the two defendants. 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 award. In the case of punitive damages, however, there is no such inherent limitation. The trier of fact may choose to make only one award and, if so, the corporation, as well as the individual actor, is liable for the amount. On the other hand, it may be appropriate under some circumstances for a claimant to seek and the trier fact to award different amounts against the director, officer, or other managerial employee and the corporation. Subsection (a) would permit such awards. The bracketed language raises the issue of when it may be appropriate to permit different awards and the Drafting Committee will need to resolve this issue.

Subsection (a) does not speak to different types of corporate entities, 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.

Subsection (b) deals with employer liability for punitive damages and 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 rule in the United States that there should be no strict liability for vicarious responsibility for punitive damages. An employer may be liable for punitive damages on the basis of the conduct of an employee, but the employer must be at fault in some manner. The employer is not liable for punitive damages just because the 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. The usual rule of strict liability that is imposed on employers for compensatory damages under *respondeat superiour* is not warranted for punitive damages because the latter serve a much narrower purpose, a purpose that requires that there be serious wrongdoing on the part of the person sought to be punished or deterred.

An employer is subject to liability for punitive damages if an employee is found liable under Section 5 and the employer was 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. 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 awards against an employer under subsection (b) of Section 6. This situation may be contrasted with that under subsection (a) where liability of an agent for punitive damages automatically causes the corporate or other legal entity to be 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.

Finally, the "clear and convincing" evidence standard employed in Section 5 is also employed under subsection (b) with regard to the burden of proof required for a claimant to

establish an employer's complicity so that the employer would be liable for punitive damages based on the acts of an employee.

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

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

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

(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 limitation of amount or method of calculation established by that statute also governs an award under this [Act].

(c) If the issue of the amount of punitive damages is submitted to a jury, the court, if appropriate and upon the request of a party, shall submit special interrogatories regarding how the factors in subsection (a) were used in determining the amount of any punitive damages awarded.

(d) If the amount of punitive damages is decided by the court, the court upon motion of a party shall make the same findings that a jury would be required to make under subsection (c) for each defendant against whom punitive damages are awarded.

Reporter's Notes/Comments

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. For example, it may be relevant that the defendant either does or does not have liability insurance that would cover a punitive award. The Act does not take a position on the issue of whether this information should be admitted at the phase of the trial that deals with the amount of any punitive award. 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.

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 also governs the amount of the award. For example, if the enacting State has legislation requiring that the punitive damages be no more than three times the compensatory damages or that the punitive damages shall not exceed a particular figure, such as $250,000, those limitations would not be negated by the enactment of the Model Punitive Damages Act.

Subsection (c) is an attempt to provide reviewing courts with some basis of determining how the jury reached its decision as to the amount of the award. Subsection (d) requires a court, when acting as the trier of fact, to make the same findings that are required of a jury. However, these findings are to be made only when one of the parties to the proceedings requests the court to submit such interrogatories to the jury or make such findings itself. If it would be inapporpriate, for example because it would be impractical, to have the jury attempt to answer special interrogatories as to how they arrived at the amount of a punitive award, the court may deny a party's request to submit interrogatories to the jury.

SECTION 8. REVIEW BY TRIAL COURT OF JURY AWARD.

(a) If a jury awards punitive damages, a party against whom an award is made 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 either 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 reasonably to find liability for punitive damages under Section 5, it shall enter judgment [as a matter of law] [notwithstanding the verdict].

(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.

(d) In determining whether liability for or the amount of punitive damages awarded is supported by the evidence, the court shall make findings independent of those made by the jury 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.

(e) An order granting a new trial solely for the purpose of determining the amount of punitive damages is appealable at the time it is entered.

Reporter's Notes/Comments

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 provide standards for trial court review. Section 9 provides standards for appellate review.

Subsection (b) of Section 8 adopts the standard employed in the federal rule of procedure 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*, 114 S. Ct. 2331 (1994) 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.

The present draft of the Model Punitive Damages Act contains a provision which the Drafting Committee feels would satisfy due process requirements. Whether something less than this standard would also satisfy the Due Process Clause is not clear at this time.

This section is designed to require the trial court to conduct a meaningful review of any award for punitive damages. The trial court in reviewing both the liability issue and the amount of a punitive award is required to set out its findings and the basis for its decisions on the record. This should further enhance judicial review, both by the trial court and the appellate courts.

The rule in most jurisdictions is that an order granting a new trial by the trial court is not immediately appealable. Subsection (e) makes such an order appealable.

SECTION 9. APPELLATE REVIEW OF PUNITIVE DAMAGES.

(a) A party may not seek appellate review 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) and obtained the trial court findings and basis for decision required under Section 8(d). (b) If a party perfects a timely appeal [pursuant to appellate rules of civil procedure] regarding liability for or the amount of an award of punitive damages, the appellate court shall review the findings and basis for the trial court's decision in light of the record to determine whether the court properly applied the standards of review set forth in Section 8(b) and (c). If the appellate court determines that the findings or basis for decision of the trial court 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. Otherwise, the appellate court shall affirm the decision of the trial court.

Reporter's Notes/Comments

If a timely appeal is lodged under the adopting state's rules of civil procedure, Section 9 requires the appellate court to review the trial court's decisions to see if the trial court "properly applied the standards of review" required in Section 8(b) and (c). Section 9 adopts a "clearly erroneous standard" for appellate review. Although it is not the case in every state that a party file a motion for new trial in order to perfect an appeal, this, in effect, is a requirement for an appeal under the Model Punitive Damages Act. Not only should the trial court be given a chance to correct any errrors it may have made, but one of the main purposes of the Act is to address the problems of alleged unbridled jury discretion in making awards of punitive damages. Thus, it is

important for 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 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.

The Drafting Committee has not made a final decision on the issue of appellate review of *liability* for punitive damages, as compared to review of the *amount*. If nothing is said in this Act regarding appellate review of the liability issue, presumably whatever standards for review of liability issues in general that already exist in the adopting jurisdiction would apply. As currently drafted, Section 9 speaks to both the liability issue and the issue of the amount of an award insofar
as appellate review is concerned.

In considering appellate review, it should be remembered that the court of last resort in many states does not have jurisdiction to review the sufficiency of the evidence, but can only decide if there is any evidence to support the decision in the trial court. It is not clear what *Honda Motor Co. v. Oberg* portends in this regard. If there is an intermediate appellate court with juridiction to review the sufficiency of the evidence, that arguably would satisfy any due process requirement under the Fourteenth Amendment to the U. S. 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.

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

(a) If a defendant is found in this State to be liable for punitive damages and has previously been found liable for punitive damages, the defendant, 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 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 unfair.

(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, 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 findings or basis for decision of the trial court 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 may also stay process to collect an award of punitive damages pending resolution of an appeal [or trial] of one or more other actions seeking punitive damages if a prima facie showing is made that another action involves the same act or course of conduct that gave rise to the punitive damages awarded in the judgment sought to be enforced.

Reporter's Notes/Comments

Subsection (a) applies to situations where an action is pending in the enacting State. It gives the defendant an opportunity to show that he has already been punished by a punitive award

contained in another judgment for the same conduct and that the punitive award in the present case should be reduced to prevent excessive punishment.

Subsection (b) applies to situations where multiple judgments have been entered, perhaps in several different states, and one or more of those judgments are 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 a number of 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.]

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 manifest injustice. The court may otherwise order a separate trial of any claim or issue in furtherance of convenience or to avoid undue prejudice.

Reporter's Notes/Comments

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 "manifest injustice" 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.]

Reporter's Notes/Comments

Most states already have provisions in their rules of civil procedure providing for consolidation. Thus, this section is in brackets to indicate that a State should consider adopting this provision if the rules of civil procedure do not provide for consolidation.

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 United States Supreme Court seeking a reversal or modification of an award of punitive damages, a judgment creditor may perfect a lien or establish its priority, but may not invoke process to collect the portion of the judgment for punitive damages.

Reporter's Notes/Comments

The section suspends enforcement of an award of punitive damages during the time an appeal is pending. The purpose is to obviate the need for a supersedeas bond. However, the provision does not affect the right of a judgment creditor to perfect a lien or establish its priority.

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 Commissioner's 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: