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FOR APPROVAL

UNIFORM LAW COMMISSIONERS' MODEL PUNITIVE DAMAGES ACT

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UNIFORM LAW COMMISSIONERS' MODEL PUNITIVE DAMAGES ACT

WITH PREFATORY NOTE AND COMMENTS

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UNIFORM LAW COMMISSIONERS' 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 a 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. As a result, a number of studies and recommendations for change have been made by such organizations as the American Bar Association and the American College of Trial Lawyers. Although the recommendations vary in the details, there does 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.

In 1994, the Executive Committee of the National Conference of Commissioners on Uniform State Laws was persuaded by a report from its Study Committee on Tort Reform Proposals to establish 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. 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. Consequently, a Model Act may contain more novel approaches, the efficacy of which can only be attained through some trial and error. Thus, although uniformity may prove to be desirable at some point, it is not imperative in the short term.

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 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.

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 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 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 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 in the enacting jurisdiction to determine whether such an award would support an additional award of punitive damages.

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.

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 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 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(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 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 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 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 do so.

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

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

(2) the plaintiff has established by clear and convincing evidence that the defendant acted with a malicious or fraudulent intent to cause the injury or a conscious and flagrant disregard for the rights or interests of others in causing the injury; and

(3) an award should be made for the purpose of punishing the defendant for the conduct or deterring the defendant from similar conduct in like circumstances in the future.

Comment

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 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, which was discussed in the first paragraph of this Comment, 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 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. This test 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.

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. 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 two – "malicious" and "fraudulent" – as being sufficient. If an enacting State feels other terms are more
suitable, it may adopt those either in addition to or in lieu of those 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 may be justified for a drunken driver because the individual consciously and flagrantly disregarded the rights of others, even though there was no malice or deceit 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 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 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 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 insurer knew that it was causing harm, the insurer 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 insurer. 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.

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 EMPLOYERS AND PRINCIPALS.

(a) 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.

(b) If an individual acts, not as a mere employee, but as a director or officer of a legal entity or otherwise as an agent with similar authority to bind a principal and is found to be liable for punitive damages under Section 5 for an act or omission occurring within the course and scope of exercising the 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 an amount necessary to deprive the entity or principal of any profit or gain, obtained through the wrongful action of its director, officer, or agent, in excess of that likely to be divested by the action against the entity or principal for compensatory damages or restitution.

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

Comment

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: employer and principal liability. This type of liability is often referred to as vicarious liability and 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* in both situations. 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, in exercising managerial authority created by the board of directors, 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. In other words, liability could be imposed on the corporation because , as an agent, she 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 a master-servant relationship, while subsection (b) deals with liability imposed as the result of a principal-agent relationship.

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 does not have

to rise to the 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 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. 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.

This situation just described for an employer under subsection (a) may be contrasted with that under subsection (b), where liability of an agent for punitive damages automatically causes the principal 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 and there is no separate requirement to show that the principal was also implicated in the wrongdoing. Thus, liability of the principal occurs solely as a result of the authority imposed in the agent.

Subsection (b) provides that a legal entity, such as corporation, or other principal is liable for the acts of an agent, whether the latter individual is a director, officer, or some other type of managerial agent empowered with authority to act on behalf of the corporation or principal. 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 liability for the legal entity or principal. However, a question arises whether the amount of punitive damages imposed on the director, officer, or other agent should be the amount 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 award. 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 such inherent limitation and it may be appropriate under some circumstances for a claimant to seek and the trier fact to award one amount against a director, officer, or other agent and another amount against the legal entity or principal. Subsection (b) 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 in the enacting jurisdiction governing the particular type of business organization. Nonetheless, the vicarious liability imposed under subsection (b) is directed to making the legal entity or principal disgorge unwarranted economic gain that would not otherwise be the subject of a compensatory or restitutionary award and is so limited.

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. However, subsection (b) does contemplate that strict liability may be imposed on a principal other than a corporate entity when an agent possesses the same type of managerial 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.

Finally, 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 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(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 may submit special interrogatories to determine how the factors in subsection (a) were used to determine 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.

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. 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.

It should be noted that the Section 6(b) 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. In an action brought solely on the basis of Section 6(b), the only evidence that would be admissible for the purpose of establishing a punitive award would be that under paragraph (3) of Section 7(a). This limitation does not apply to corporate liability based on the doctrine of *respondeat superior* arising out of a master-servant relationship.

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, that type of limitation would not be negated solely by the enactment of the Model Punitive Damages Act.

Subsection (c) is an attempt to provide reviewing courts with some basis of determining how a jury reached its decision as to the amount of any punitive award. Likewise, subsection (d) requires a court, when acting as the trier of fact, to make the same findings that are required of a jury. It may not be practicable to submit interrogatories in every case involving a claim for punitive damages, but the courts should be encouraged to do so where it is possible.

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 reasonably to find liability for punitive damages under Section 5, it shall enter judgment for the defendant [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. 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 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.

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*, 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.

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 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) 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) and obtained the trial court findings and basis for decision required under Section 8(d).

(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.

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*, 114 S. Ct. 2331 (1994) 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 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 determined to be liable for punitive damages under a final judgment, 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 under Section 6(b), 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 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.

Comment

Subsection (a) applies to situations where an action has been tried in the enacting State and a verdict has been returned for punitive damages. 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 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. 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. 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 otherwise invoke process to collect the portion of the judgment for punitive damages.

Comment

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 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) _____