

D R A F T
FOR DISCUSSION ONLY

UNIFORM LAW COMMISSIONERS'
MODEL PUNITIVE DAMAGES ACT

September 29, 1995, Draft

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. In any event, there is a general feeling that punitive awards should be more difficult to obtain and that the amounts of such awards 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 Conference 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 twice 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 Committee met to review the comments and suggestions it received from the membership. The current draft, which is the fourth tentative draft, reflects the Reporter's efforts to incorporate changes resulting from the annual meeting of the Conference and is scheduled to be reviewed by the Drafting Committee at its next meeting on December 1-3, 1995 in Miami, Florida.

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 would not be necessary. Finally, 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.

The Act does not address the question of whether it should be against public policy to insure against punitive damage awards. That issue is left to the existing law of the adopting State. The Drafting Committee has proceeded with its work mindful that the United States Congress is presently attempting 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 to consider in their respective legislative programs.

1 **UNIFORM LAW COMMISSIONERS'**
2 **MODEL PUNITIVE DAMAGES ACT**

3 **SECTION 1. DEFINITIONS.** In this [Act]:

4 (1) "Compensatory damages" means an award of money, including a nominal amount,
5 made to compensate a claimant for a legally recognized injury, but does not include punitive
6 damages.

7 (2) "Punitive damages" means an award of money made to a claimant solely to punish or
8 deter an actor, to deprive an actor of unwarranted economic gain, or to deter others.

9 (3) "Unwarranted economic gain" means profit or gain of an economic nature in excess
10 of that for which compensatory damages or restitution provides an adequate remedy to an injured
11 party.

12 **Reporter's Notes/Comments**

13
14 This Act is designed to facilitate and in some ways regulate awards of punitive damages
15 in the civil justice system. In order to do this, a distinction must be drawn between compensatory
16 damages and punitive damages, even though there is some overlap in the purposes served by
17 these two types of damages. Compensatory damages, in addition to providing reparations to a
18 tort victim, serve to admonish the tortfeasor, as well as others, not to repeat the wrongful conduct
19 in question. In some measure, compensatory damages also punish a tortfeasor for his or her
20 wrongful conduct. However, punitive damages, in the sense used in this Act, are those damages
21 that serve only to punish, deter, or deprive an actor of unwarranted economic gain. To the extent
22 that damages serve to compensate or provide restitution to a tort victim, they are not considered
23 to be punitive damages under this Act.

24
25 The Act does not dictate to a particular jurisdiction that would enact it how to determine
26 which damages are purely for punitive purposes and which serve to compensate or provide
27 restitution.

28
29 The resolution of that issue is left to existing law and future developments in the enacting
30 jurisdiction.

31 **SECTION 2. CIVIL CLAIM FOR PUNITIVE DAMAGES.** This [Act] applies to all
32
33 civil actions in which punitive damages may be awarded under the law of this State.

1 **Reporter's Notes/Comments**

2
3 This Act does not authorize awards of punitive damages in any State that enacts it, but
4 merely prescribes requirements for assessing, reviewing, and otherwise fine-tuning the law
5 already in existence under which punitive awards may be made. For example, one would have to
6 look to the existing state law to determine if a punitive award is available in a breach of contract
7 situation as compared to tort. The same would be true as to the issue of whether a punitive award
8 may be assessed against a governmental entity. In short, the Act does not speak to the types of
9 situations in which a punitive damage award may be made.

10
11 The Act only applies to civil actions that arise "under the law of this State." If an action
12 based on federal law is maintainable in the state courts, federal law would govern any award of
13 punitive damages that may be made. The federal law may provide its own standards or it may
14 adopt the standards of the State. In the latter instance, all or parts of the Model Act may be
15 applicable, depending on the extent that federal law applies state standards, if the State in which
16 the action is filed has adopted the Act.

17
18 **SECTION 3. PLEADING AMOUNT FOR PUNITIVE DAMAGES.** [(a)] A petition
19 may not designate a monetary amount for any punitive damages sought [except as provided in
20 _____].

21 [(b) If a statute or rule requires that a jurisdictional amount in controversy be pleaded, the
22 requirement is satisfied by pleading that the amount in controversy equals or exceeds that
23 amount.]

24 **Reporter's Notes/Comments**

25
26 Many states now prohibit the use of monetary figures in pleadings, particularly with
27 regard to claims for punitive damages. This type of provision has been relatively uncontroversial
28 in comparison to other changes purposed for the tort system.

29
30 If an enacting state does not have adequate measures, such as the possibility of a Rule 11
31 type sanction, for failure to comply with this section, the state may want to consider adopting
32 some type of penalty for those that intentionally violate the prohibition against pleading an
33 amount for punitive damages.

34
35 If an enacting state has other statutes that permit pleading of a punitive amount, such as a
36 treble damage provision, it may cross-reference to those statutes as an exception to the general
37 rule that one is not permitted to plead a monetary amount for punitive damages. That is the
38 purpose of the bracketed language and blank space contained in subsection (a). If there are no
39 cross-references to be inserted, the bracketed material should be deleted.

SECTION 4. DISCOVERY OF WEALTH, FINANCIAL CONDITION, OR ABILITY TO RESPOND IN PUNITIVE DAMAGES. Discovery regarding a party's wealth or financial condition may not be ordered, if the information is sought solely to establish the amount of a punitive award, unless a claimant has made a prima facie showing that the party may be liable for punitive damages under Section 5(a). [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 by requiring that there be a showing that there is a colorable claim that might 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. It does not prevent a claimant from engaging in discovery if that type of evidence 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.

All that is required is a prima facie showing as measured by the criteria set out in Section 5(a). The section does not dictate how 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.

The court probably already has the power to enter protective orders to protect 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.

SECTION 5. LIABILITY FOR PUNITIVE DAMAGES.

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

1 award punitive damages, the trier of fact must find that the plaintiff has established by clear and
2 convincing evidence that:

3 (1) the defendant meant to cause harm, knew that harm would result, or knew that
4 there was a strong probability that harm would result; and

5 (2) the defendant's conduct was malicious, dishonest, despicable, or constituted a
6 conscious and flagrant disregard for the rights or interests of others.

7 (b) Before punitive damages may be awarded, the trier of fact must find with regard to
8 the wrongful conduct described in subsection (a) that an award is necessary to:

9 (1) appropriately punish the defendant for the conduct;

10 (2) discourage the defendant and others from similar conduct in like situations; or

11 (3) deprive the defendant of any unwarranted economic gain the defendant
12 derived from the conduct.

13 **Reporter's Notes/Comments**

14
15 This section describes the standards of culpability or wrongdoing for which a punitive
16 award may be made. This language is found in subsection (a)(1) and is a paraphrase of the
17 language from the Restatement (Second) of Torts, describing the bases for punitive awards.
18 However, it differs from the Restatement in one regard. It does not encompass the situation, as
19 does the Restatement, where the actor, from facts which he or she knows, *should realize* that
20 there is a strong probability that harm may result. Although contained in the definition of
21 "reckless" conduct in Section 500 of the Restatement (Second) of Torts, this language sounds
22 more in negligence and would permit, in the opinion of the drafting committee, cases to go to the
23 jury without proof of the type of state of mind which should be required to warrant punitive
24 damages. The draft presently requires the plaintiff to prove that the defendant acted consciously
25 in disregarding the plaintiff's rights. The great majority of jurisdictions do not permit punitive
26 awards for negligent conduct, but require conscious wrongdoing.

27
28 The harm that is the object of the intent referred to in subsection (a)(1) may be that
29 suffered by the claimant alone or may include harm that is also caused to others whether or not
30 they are claimants in the case subjudice. For example, if an insurer is shown to have engaged in a
31 pattern or practice of defrauding insureds of a relatively small amount of money in each of a
32 number of claims but the aggregate of these amounts is large, the jury is entitled to consider the
33 aggregate harm in deciding whether punitive damages should be awarded to those claimants that

1 have brought the action, even if the harm to each claimant is rather small. Thus, a jury could
2 conclude that punitive damages should be assessed under subsection (a) because the insurer
3 knew that it was causing harm and the conduct was dishonest and despicable, and that it would
4 serve one or more of the purposes in subsection (b) to impose such a sanction on the insurer.

5
6 Many jurisdictions today, and in increasing numbers, have also said that the mere
7 commission of a tort is not sufficient to support an award of punitive damages. There must be
8 more, i.e., a bad motive. It is inherent in some types of torts that the evidence showing
9 commission also shows bad motive, but this is not true of all torts for which an award of punitive
10 damages may be available. Subsection (a)(2) attempts to describe the particular type of state of
11 mind required, in addition to the conduct described in subsection (a)(1), to justify an award of
12 punitive damages.

13
14 In an action for defamation or other related torts where speech is directly related to
15 matters of public concern, the imposition of punitive damages may raise questions under the
16 First Amendment or applicable state constitutional guarantees of free expression. At a minimum,
17 in those cases where "actual malice" is required as a prerequisite to an award of compensatory
18 damages, that finding is not the equivalent of the malice or the other terms required by Section 5
19 as a basis for awarding punitive damages. To award punitive damages in such cases, the trier of
20 fact must additionally find that the defendant had the intention and acted in a manner described
21 in Section 5.

22
23 Subsection (b) states the purposes for which punitive damages may be awarded. This
24 language tracks the definition of punitive damages found in the definitions of the Act. See
25 Section 1.

26 27 **SECTION 6. LIABILITY OF EMPLOYER OR PRINCIPAL.**

28 (a) If an employee or agent is employed in a managerial capacity and is liable for punitive
29 damages under Section 5 for an act or omission occurring in the course and scope of the
30 managerial employment or agency, the employer or principal of the employee or agent is also
31 liable for punitive damages [if the employer or principal is a business entity organized for-
32 profit.]

33 (b) If any employee or agent who is not employed in a managerial capacity is liable for
34 punitive damages under Section 5, the employer or principal is also subject to liability for
35 punitive damages if the trier of fact finds by clear and convincing evidence that the employee or
36 agent was acting in the course and scope of the employment or agency at the time of the

wrongful conduct and the employer or principal or a managerial agent of the employer or principal, with knowledge of its wrongful nature, directed, authorized, participated in, consented to, acquiesced in, or ratified the conduct of the employee or agent.

(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.

Reporter's Notes/Comments

This provision 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 pure vicarious responsibility for punitive damages. An employer or principal may be liable for punitive damages if the conduct of such a person or a managerial employee or agent satisfies the criteria of Section 5. Liability in this instance, however, is not incurred vicariously. The acts of one of these individuals are in fact the acts of the employer or principal who are liable in their own right.

An employer or principal may be liable for punitive damages on the basis of the conduct of a nonmanagerial employee or agent, but the employer or principal must be at fault in some manner. The employer or principal is not liable for punitive damages just because the employee or agent was acting in the course and scope of the employment or agency when he or she engaged in the type of conduct for which punitive damages may be awarded.

An employer or principal is subject to liability for punitive damages if an employee or agent is found liable under Section 5 and the employer or principal was implicated by directing, authorizing, participating in, consenting to, acquiescing in, or ratifying the act of the employee or agent, knowing of the wrongful character of the employee's or agent's conduct. Liability on the part of the employer or principal is not automatically established just because the employee or agent 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 or principal under subsection (b). Liability of a managerial employee or agent for punitive damages, however, automatically causes the employer or principal to be liable for the award under subsection (a).

This result obtains because the acts of the managerial employee or agent are in fact the acts of the employer or principal.

The employee or agent has to be acting in the course and scope of the employment or agency before the employer or principal may be held liable for their acts.

1
2 The "clear and convincing" evidence standard employed in Section 5(a) is also employed
3 in this section with regard to the burden of proof required for a claimant to establish an
4 employer's or principal's liability for punitive damages based on acts of an employee or agent.
5

6 **SECTION 7. AMOUNT OF PUNITIVE DAMAGES.**

7 (a) If a defendant is found liable for punitive damages, a fair and reasonable amount of
8 damages may be awarded for the purposes stated in Section 5(b). In deciding what is fair and
9 reasonable, evidence of the following factors, if otherwise admissible, shall be considered by the
10 trier of fact:

- 11 (1) the nature of defendant's wrongful conduct and its impact on the claimant;
12 (2) the impact of defendant's wrongful conduct on others;
13 (3) the defendant's present and future financial condition and the impact of the
14 amount of an award on each;
15 (4) the amount of compensatory damages awarded;
16 (5) any unwarranted economic gain the defendant derived from the wrongful
17 conduct;
18 (6) any fines, penalties, or restitution paid by the defendant arising from the
19 wrongful conduct;
20 (7) any mitigating circumstances;
21 (8) any impact of the award on innocent persons; and
22 (9) any other factors relevant to the amount of the award.

23 (b) If an award of punitive damages is authorized or governed by another statute of this
24 State, any limitation of amount or method of calculation established by that statute also governs
25 an award under this [Act].

(c) If the issue of the amount of punitive damages is submitted to a jury, the court upon the request of a party shall submit interrogatories in substantially the following form, in addition to the instructions required under subsection (a), to the jury regarding each defendant who is subject to an award:

Question 1. What amount of money, if any, do you award against [defendant] for punitive damages?

ANSWER: \$_____

If you have not awarded punitive damages against [defendant], do not answer the following question. Otherwise, you should answer it.

Question 2. You were instructed that if you found that a defendant engaged in conduct of a kind for which punitive damages are appropriate, you could award this type of damages for one or more of three reasons: (1) that an award is necessary to impose an appropriate punishment on the defendant for the wrongful conduct (punishment); (2) that the award is necessary to deter the defendant or others similarly situated from like conduct (deterrence); or (3) that the award is necessary to deprive the defendant of unwarranted economic gain (unwarranted gain). As to [defendant], indicate what percentage of your award was based on punishment, deterrence, or unwarranted gain. Your award may be based on one or more of the reasons, but the total percentages of your award must equal 100 percent.

Reason (1) To punish: _____ %

Reason (2) To deter: _____ %

Reason (3) To prevent unwarranted gain: %

Total 100 %

(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 in answer to the interrogatories set out in subsection (c) for each defendant against whom a punitive award is made.

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 factors relevant to the amount of the award" may be considered. However, it does attempt to list those factors 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.

SECTION 8. REVIEW BY TRIAL COURT OF JURY AWARD.

(a) If a jury awards punitive damages, the party against whom the 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

1 new trial or a remittitur. Upon hearing the motion, the court shall review the evidence to
2 determine whether the evidence supports the jury findings.

3 (b) If the court determines that there is no legally sufficient basis for a jury reasonably to
4 find liability for punitive damages under the criteria and purposes stated in Section 5, it shall
5 enter judgment [as a matter of law] [notwithstanding the verdict].

6 (c) If the court determines that the amount of the punitive award is manifestly against the
7 great weight of the evidence under the factors a jury was required to consider under Section 7,
8 the court shall grant a new trial unless the claimant agrees to a remittitur determined by the court.

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

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

14 **Reporter's Notes/Comments**

15
16 One of the problems alluded to by critics of the present process by which punitive
17 damages are awarded involves the lack of judicial control over juries. Section 8 attempts to
18 provide standards for trial court review. Section 9 provides standards for appellate review.

19
20 Subsection (b) of Section 8 adopts the standard employed in the federal rule of procedure
21 for determining whether a case should be dismissed for failure to make out a prima facie case or
22 in ruling on a motion for judgment notwithstanding the verdict. See Rule 50, Federal Rules of
23 Civil Procedure.

24
25 Subsection (c) deals with the standard for reviewing the amount of a punitive award by a
26 jury, as compared to subsection (b) which deals with the issue of liability. Subsection (c) uses a
27 standard that is familiar in many states. It requires the reviewing court to determine whether or
28 not the award is "manifestly against the great weight of the evidence" in light of the factors that
29 the jury was required to consider under Section 7. In *Honda Motor Co. v. Oberg*, 114 S. Ct.
30 2331 (1994) the Supreme Court of the United States reiterated that there must be meaningful
31 judicial review of jury awards for punitive damages. It held a provision of the Oregon
32 Constitution, which prohibited judicial review of the sufficiency of the evidence of a punitive
33 award, to violate the Due Process Clause of the Fourteenth Amendment to the United States

1 Constitution. The Court did not elaborate on what type of judicial review would suffice.
2 However, it clearly stated that a mere "no evidence" standard did not provide meaningful judicial
3 review.
4

5 The present draft of the Model Punitive Damages Act contains a provision which the
6 committee feels would satisfy due process requirements. Whether something less than this
7 standard would also satisfy the Due Process Clause is not clear at this time.
8

9 This section is designed to require the trial court to conduct a meaningful review of any
10 award for punitive damages. The trial court in reviewing both the liability issue and the amount
11 of a punitive award is required to set out its findings and the basis for its decisions on the record.
12 This should further enhance judicial review, both by the trial court and the appellate courts.
13

14 The rule in most jurisdictions is that an order granting a new trial by the trial court is not
15 immediately appealable. Subsection (e) makes such an order appealable.
16

17 **SECTION 9. APPELLATE REVIEW.** If a party perfects a timely appeal [pursuant to
18 appellate rules of civil procedure] regarding liability for or the amount of punitive damages, the
19 appellate court shall review the findings and basis for the trial court's decision in light of the
20 record to determine whether the court properly applied the standards of review set forth in
21 Section 8(b), (c), and (d).

22 **Reporter's Notes/Comments**

23

24 The drafting committee has not decided as of this time whether to say anything about
25 appellate review of punitive damage issues, or, if it does, what the standard of review should be.
26 As currently drafted, Section 9 requires the appellate court to review the trial court's decisions to
27 see if the trial court "properly applied the standards of review" required of the trial court. An
28 alternative standard for appellate review would be to have the appellate court review the record
29 *de novo* and make an independent determination regarding the issue of liability or amount, or
30 both. Another standard that would not go as far as a *de novo* review, would require the appellate
31 court to review the record to determine if the decision of the trial court was supported by the
32 evidence. The latter approach could be cast in one of several ways. First, it could be stated that
33 the appellate court shall reverse and remand the case for a new trial unless the decision of the
34 trial court is supported by a preponderance the evidence in the record. Second, it could be cast in
35 the opposite manner, by stating the appellate court shall not reverse the trial court unless the
36 appellate court finds that the trial court's decision is not supported by a preponderance of the
37 evidence in the record. Or, the two standards could be cast without any reference to the weight of
38 the evidence by requiring the appellate court to determine whether or not the trial court's decision
39 is supported by the record. There are probably other variations, but the drafting committee needs
40 to come to some decision on the matter of appellate review.
41

1 In considering appellate review, it should be remembered that the court of last resort in
2 many states does not have jurisdiction to review the sufficiency of the evidence, but can only
3 decide if there is any evidence to support the decision in the trial court. It is not clear
4 what *Honda Motor Co. v. Oberg* portends in this regard. If there is an intermediate appellate
5 court with jurisdiction to review the sufficiency of the evidence, that arguably would satisfy any
6 due process requirement under the Fourteenth Amendment to the U. S. Constitution, whether or
7 not the court of last resort in the jurisdiction is empowered to conduct such a review. The more
8 difficult issue arises where there is no intermediate appellate court and the court of last resort has
9 no power to conduct a sufficiency of the evidence review. In *Oberg*, the Oregon Constitution did
10 not allow any judicial review, be it trial or appellate, of the sufficiency of the evidence to support
11 a damage award. The only review permitted was to determine if there was any evidence to
12 support the award, and this was found to be a denial of due process by seven members of the
13 United States Supreme Court. Thus, it is not clear whether a sufficiency review solely by the trial
14 court would satisfy any due process requirements or whether a similar standard of review at the
15 appellate level is also needed. Presently, there is no case pending before the Supreme Court that
16 raises this issue.

17
18 **SECTION 10. MULTIPLE AWARDS FOR SAME ACT OR COURSE OF**
19 **CONDUCT.**

20 (a) If a defendant is found in this State to be liable for punitive damages and has
21 previously been found liable for punitive damages, the defendant, before entry of judgment, may
22 petition the court for a hearing to determine whether the liability for the punitive awards arose
23 out of the same act or course of conduct and, if so, whether the defendant is entitled to have the
24 award in the pending case reduced. If the court determines that the awards of punitive damages
25 are unfairly duplicative, it shall reduce the award in the pending case by the amount that it finds
26 the award to be unfair.

27 (b) If more than one judgment awarding punitive damages is entered against a defendant
28 and one or more of the judgments is sought to be enforced against the defendant in this State, the
29 defendant judgment debtor may petition the court in this State in which the judgment is sought to
30 be enforced for a hearing to determine how much, if any, of the amount of punitive damages
31 previously paid by the defendant judgment debtor to satisfy one or more of the judgments is
32 unfairly duplicative because the judgments were based on the same act or course of conduct. If

1 the court determines that the judgments contain awards of punitive damages that are unfairly
2 duplicative, it shall credit any judgment sought to be enforced in this State with any amount
3 previously paid by the judgment debtor which the court finds to be unfair.

4 (c) In determining whether a reduction should be made under subsection (a) or credit
5 should be allowed under subsection (b), the court shall consider the bases of liability for the
6 punitive awards, the purposes for which the awards were made, how the awards were determined
7 or calculated, and any other evidence offered by the parties relevant to the issue of whether the
8 petitioner is being subjected to unfair duplicative awards of punitive damages.

9 (d) The court may stay entry of judgment or execution on the portion of a judgment
10 sought to be enforced to collect punitive damages pending a motion and hearing under this
11 section and enter any other orders to avoid prejudice or unnecessary cost or delay while the
12 hearing is pending.

13 **Reporter's Notes/Comments**

14
15 Subsection (a) applies to situations where an action is pending in the enacting State. It
16 gives the defendant an opportunity to show that he has already been punished by a punitive
17 award in another judgment for the same conduct and that the punitive award in the present case
18 should be reduced to prevent excessive punishment.

19
20 Subsection (b) applies to situations where multiple judgments have been entered, perhaps
21 in several different states, and one or more of those judgments are sought to be enforced in the
22 enacting State. Again, a judgment debtor is given the opportunity to prevent unfairly duplicative
23 awards of punitive damages from being enforced against the debtor.

24
25 **SECTION 11. SEPARATE TRIALS.** In a trial involving a claim for punitive damages
26 in which evidence may be admissible solely on the issue of the liability for or the amount of
27 punitive damages, the court shall order a separate trial of the issue upon motion of a party if
28 necessary to avoid manifest injustice. The court may otherwise order a separate trial of any claim
29 or issue in furtherance of convenience or to avoid undue prejudice.

1 **Reporter's Notes/Comments**

2
3 This section provides that a court may bifurcate or otherwise divide a trial in order to
4 avoid undue prejudice or for convenience. However, if the trial involves evidence which is
5 admissible solely on the issue of liability or solely on the issue of the amount of punitive
6 damages, the trial court is required upon motion of a party to order a separate trial of the issue or
7 issues if it is necessary to avoid "manifest injustice" to the party.
8

9 **[SECTION 12. CONSOLIDATION OF TRIALS.**

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

13 (1) the actions consolidated for trial; or

14 (2) a joint hearing or trial of the matters in issue in the actions.

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

17 **Reporter's Notes/Comments**

18
19 Most states already have provisions in their rules of civil procedure providing for
20 consolidation. Thus, this section is in brackets to indicate that a State should consider adopting
21 this provision if the rules of civil procedure do not provide for consolidation.
22

23 **SECTION 13. LIENS AND EXECUTION ON JUDGMENT PENDING APPEAL.**

24 Pending timely appellate review pursuant to [the rules of appellate procedure] or a petition for
25 certiorari pursuant to the rules of the United States Supreme Court seeking a reversal or
26 modification of an award of punitive damages, a judgment creditor may perfect a lien or
27 establish its priority, but may not invoke process to collect the portion of the judgment for
28 punitive damages.

29 **Reporter's Notes/Comments**

1 The section suspends enforcement of an award of punitive damages during the time an
2 appeal is pending. The purpose is to obviate the need for a supersedeas bond. However, the
3 provision does not affect the right of a judgment creditor to perfect a lien or establish its priority.
4

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

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

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

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

14 **SECTION 18. REPEAL.** The following acts and parts of acts are repealed:
15