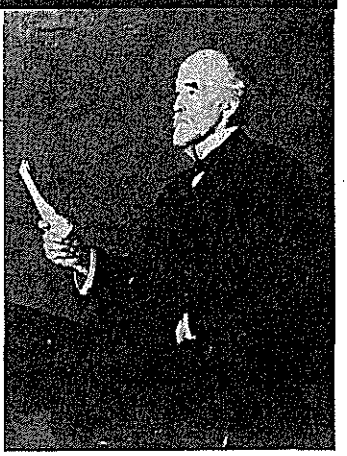

*How Much Is Enough?*

# Evidentiary and Instructional Issues in Trying the Amount of Punitive Damages[1]

*by*
*Robert Olson*

In most California punitive damages cases trial is bifurcated between liability and compensatory damages, on the one hand, and the amount of punitive damages, on the other. (See Civ. Code, § 3295, subd. (d).) All too often after the parties may have spent days, weeks, or even months trying the liability and compensatory damages issues, the punitive damages phase consists of no more than one or two pieces of noncontroversial evidence (typically the defendant's financial statement), counsels' argument rehashing the underlying facts, and the court reading, without objection, a standard instruction or two. Understandably, a defense disheartened by setback, a plaintiff elated by success, and a court worn-out by prolonged proceedings simply may not focus on the real *and different* issues presented in the punitive damages phase.

Although the proceedings often are abbreviated, the stakes are not. Hundreds of thousands or even millions of dollars, and potentially the defendant's continued financial health or even existence, can be at issue. With such stakes, the unique evidentiary and instructional issues that the trial's punitive damages phase poses deserve special attention at trial, both to influence the jury and to make an adequate record for any potential appeal. Like other issues on appeal, the appellate argument inevitably is much stronger when a firm evidentiary foundation has been laid at trial. When issues are not confronted, an inadequate record may handicap a party wishing to attack the punitive award on new trial motion or on appeal. The result then may be effectively to leave the punitive award's size entirely up to the trial and appellate judges' own personal sense of what might or might not be "too much."

The degree to which a defendant may be left to the vagaries of individual judicial temperament, however, can be mitigated. This article suggests some evidentiary and instructional issues that should be addressed in trying the amount of punitive damages.

As a preliminary matter, counsel should remember that the law in this area continues to evolve. In particular, constitutional challenges to the size of punitive awards once thought dead, see *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443 [113 S.Ct. 2711, 125 L.Ed.2d 366], now appear to be alive and well. (See *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]; *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424 [121 S.Ct. 1678, 149 L.Ed.2d 674], on remand (9th Cir. 2002) 285 F.3d 1146; *In re Exxon Valdez* (9th Cir. 2001) 270 F.3d 1215.) If constitutional challenges are not raised at the earliest opportunity, however, they may be waived and the benefit of the law's evolution lost. (See *People v. Bransford* (1994) 8 Cal.4th 885, 893, fn. 10 [constitutional issues must be raised at earliest opportunity or may be waived]; but see *Honda Motor Co., Ltd.* v. *Oberg* (1994) 512 U.S. 415 [114 S.Ct. 2331, 129 L.Ed.2d 336] [appellate courts owe independent constitutional obligation to review size of punitive awards].)

Assuming that *some* amount of punitive damages will pass constitutional muster, appellate courts have identified various facts as relevant to whether a punitive award is excessive, including:

1. **Reprehensibility of the defendant's conduct.** (*BMW of North America, Inc., supra,* 517 U.S. at p. 575 [116 S.Ct. at p. 1599] ["Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct"]; *Cooper Industries, Inc., supra,* 532 U.S. at p. 440 [121 S.Ct. at p. 1687]; *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928.)

2. **Relationship between punitive award and compensatory damages.** (*BMW of North America, Inc., supra,* 517 U.S. at p. 581 [116 S.Ct. at p. 1602] ["a comparison between the compensatory award and the punitive award is significant"]; *Cooper Industries, Inc., supra,* 532 U.S. at pp. 438-439 [121 S.Ct. at p. 1687]; *Neal, supra,* 21 Cal.3d at p. 928.)

3. **The defendant's financial condition.** (*Adams v. Murakami* (1991) 54 Cal.3d 105, 110; *Neal, supra,* 21 Cal.3d at p. 928.)

4. **The statutory sanctions available for comparable misconduct.** (*BMW of North America, Inc., supra,* 517 U.S. at p. 583 [116 S.Ct. at p. 1603]; *Cooper Industries, Inc., supra,* 532 U.S. at p. 440 [121 S.Ct. at p. 1687].)

5. **The absolute size of the award and the amount by which it exceeds compensatory damages.** (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 821-822 ["the magnitude of the punitive award, including the amount by which it exceeded the compensatory [award is also a] proper consideration[] for determining whether the award was excessive as a matter of law"].)

6. **And, how closely the award comports with punitive damages' purpose to punish and deter, but not to destroy.** (*Adams, supra,* 54 Cal.3d at p. 112.)

These same facts should be equally relevant to the jury's initial punitive amount determination. Indeed, in most instances the evidence to support these facts, and any claims that the jury should consider them, must be developed at trial, not for the first time on appeal. Thus, they provide a useful framework for considering what evidentiary and instructional arguments trial counsel may wish to advance.

### *1. Reprehensibility.*

This may well be the most important fact in determining a punitive award's size; it is also one of the most misunderstood. Reprehensibility has become a straw man. Plaintiffs simply reargue the facts that led the jury to find malice, fraud or oppression, and then argue "of course this conduct is reprehensible." As far as they go, plaintiffs are correct. If the defendant's conduct was not reprehensible (e.g., "despicable"), the jury has no business awarding *any* punitive damages and there should not be a punitive damage phase at all. On the other hand, one of the biggest mistakes the defense makes is to argue that the defendant's conduct was not reprehensible at all. If there is a punitive damage phase, the defense has already lost that argument; the jury found malice, oppression or fraud *because* it thought the defendant's conduct reprehensible in some way. Thus, such a defense argument is likely doomed to fail.

The problem is that plaintiff and defense alike mistake (just as jurors and courts may) what "reprehensibility" means in this context. The reprehensibility that appellate courts reference is *relative* reprehensibility, that is, how reprehensible is this defendant's conduct "in light of the types of misconduct that will support punitive damages." (*Adams, supra,* 54 Cal.3d at pp. 110-112, fn. 2.) The question is not how bad is the defendant's conduct on a scale of one to ten with one being saintly conduct, it is how bad is the defendant's conduct on a scale of one to ten with one being despicable conduct deserving punitive damages and ten being evil incarnate.

A wrongful economic act (even if "despicable") harming one victim is not as reprehensible as, say, double murder or a product defect causing multiple deaths and severe injury. More generally, acts causing economic harm are not as reprehensible as acts causing physical injury; intentionally inflicted injuries are worse than those resulting from despicable disregard for others' rights; harm to many is worse than harm to few. (See *BMW of North America, Inc., supra,* 517 U.S. at pp. 575-576 [116 S.Ct. at p. 1599] [purely economic harm is less reprehensible conduct and, absent intentional, affirmative acts of misconduct or a target that is particularly financially vulnerable, economic harm torts "are [not] sufficiently reprehensible to justify a significant sanction in addition to compensatory damages"]; *In re Exxon Valdez, supra,* 270 F.3d at pp. 1241-1243 [economic harm caused by unintentional oil spill on lower end of reprehensibility scale]; *Cooper Industries, Inc., supra,* 285 F.3d at p. 1151 [economic harm caused by conduct "more foolish than reprehensible" requires lesser award]; *Vossler v. Richards Manufacturing Co.* (1983) 143 Cal.App.3d 952, 966 [continued sale of surgical implant knowing it would cause excruciating pain to hundreds of mostly elderly arthritic patients still less reprehensible than marketing defective vehicles which top management knew would result in fiery deaths], disapproved on other grounds, *Adams, supra,* 54 Cal.3d at pp. 115-116; cf. *Rufo v. Simpson* (2001) 86 Cal.App.4th 573 [double murder is on the far end of the reprehensibility scale]; *In re Exxon Valdez, supra,* 270 F.3d at p. 1243 [citing by comparing *Hilao v. Estate of*

*Marcos* (1996) 103 F.3d 767, 771, where "defendant intentionally caused thousands of people to be tortured and killed"].)

Likewise an act directed by top management is worse than one approved at a lower echelon, see *TXO Production Corp. v. Alliance Resources Corp., supra,* 509 U.S. at pp. 468-469 [113 S.Ct. at p. 2726] (conc. opn. of Kennedy, J.), and a first offense is less reprehensible than an act that is just the latest in a pattern and practice of misbehavior. (The federal criminal sentencing guidelines may provide some useful relative reprehensibility guidelines.)

Further, the fact of life is that certain defendants (e.g., large employers, brokerages, insurers) sooner or later inevitably are going to suffer a punitive damage award. That only a handful of successful punitive damages claims result from multiple tens of thousands of transactions which could generate punitive damages claims, likewise, suggests lower reprehensibility. If the defense has such evidence, it may wish to show or argue that the transgression was an aberration, not the norm.

The comparative reprehensibility of various defendants and actors is also relevant. For example, the actions of one joining a conspiracy should be less reprehensible than those of the conspiracy's leader and the acts of one allowing another to inflict injury should be less reprehensible than those of the person actually inflicting the harm. (See *In re Exxon Valdez, supra,* 270 F.3d at p. 1242 [punitives out of kilter where a jury awarded against a company that knowingly employed a reckless tanker captain but only $5,000 against the captain himself].) And, "[r]eprehensibility should be discounted if defendants act promptly and comprehensively to ameliorate any harm they cause . . . ." (Ibid.)

For the defense to argue such *relative* reprehensibility to the jury, e.g., in disputes between large entities or where the harm is purely economic, it is important to have the jury properly instructed on the relevant standard. Sadly, the standard BAJI instruction, 14.71 or 14.72.2 (depending on whether trial is bifurcated), does not contain the critical definition that reprehensibility means reprehensibility *relative to other conduct warranting punitive damages.* (BAJI Nos. 14.71, 14.72.2 (9th Ed. 2002).) The defense should insist that the court modify the BAJI instruction to define reprehensibility as being relative to other conduct deserving punitive damages. If the trial court refuses to modify the BAJI instruction, the defense may have an instructional error it can appeal. Failing to request the modification, however, might waive any instructional error on appeal. (See *Agarwal v. Johnson* (1979) 25 Cal.3d 932, 948-949, disapproved on other grounds, *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563.)

By contrast, plaintiffs may attempt to present evidence of misconduct going beyond the conduct for which the jury found malice, oppression, or fraud. They may attempt to explore (and present evidence of) a pattern or practice of malfeasance and to establish direct, high-level responsibility. (See *TXO Production Corp., supra,* 509 U.S. at pp. 468-469 [113 S.Ct. at p. 2726] (conc. opn. of Kennedy, J.).) Obviously, such efforts should be resisted. The best line of defense may be to show how time-consuming such collateral matters may be. The defense may wish to argue that if a plaintiff wishes to put on evidence of such supposed other bad acts, then the defense, as a matter of due process, should be allowed to present its version of the facts in each such instance and any mitigating circumstances as well as the defendant's *overall* record of appropriate behavior, so that it is not subject to trial by anecdote.

### *2. A Reasonable Relationship To Compensatory Harm.*

The jury will determine, in the first instance, the reasonable relationship between punitive damages and compensatory harm. As a general proposition, however, the larger the compensatory award, the smaller the punitive to compensatory damages ratio it will support. Likewise, a high ratio is hard to justify where the punitive award may significantly reduce the defendant's net worth. Thus, the only California cases approving high punitive to compensatory damages ratios involve either small compensatory awards or minuscule proportions of the defendant's net worth or both.[2] Two California Supreme Court justices have opined that they believe that a ratio between punitive and compensatory damages of greater than three to one is only warranted in extraordinary circumstances. (*Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 423 (conc. opn. of Brown, J.); see also *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 23 [111 S.Ct. 1032, 1046, 113 L.Ed.2d 1] [a four to one ratio is "close to the line"]; *Cooper Industries, Inc., supra,* 285 F.3d at pp. 1147-1148 [reducing punitive award from $4.5 million, a 90 to 1 ratio, to $500,000, a 10 to 1 ratio].)[3]

On the other hand, a small compensatory award is more likely to justify a higher than normal ratio. The plaintiff may also be entitled to present evidence of other harm suffered or that plaintiff potentially might have suffered and for which the plaintiff is not compensated by ordinary damages. (*TXO Production Corp., supra,* 509 U.S. at pp. 459-462 [113 S.Ct. at pp. 2721-2722] [a more than 500:1 ratio between punitive and compensatory damages justified because the *potential* harm that plaintiff might have suffered, but did not, would have resulted in a 10:1 ratio]; but see *BMW of North America, Inc., supra,* 517 U.S. at p. 572 [116 S.Ct. at p. 1597] [plaintiff may not rely on similar conduct in other states that may be legal in those states]; *Cooper Industries, Inc., supra,* 285 F.3d at pp. 1146, 1149 [plaintiff cannot rely on unrealistic speculation about other possible harm].)

### *3. Defendant's Financial Condition.*

This is one of the areas of greatest current evidentiary dispute. It is now resolved in California that a plaintiff must establish the defendant's "financial condition." (*Adams, supra,* 54 Cal.3d at pp. 110-111.) How to measure financial condition, though, is another question. The most common measures are the defendant's net worth and net income. (*Kenly v. Ukegawa* (1993) 16 Cal.App.4th 49, 57 ["We are convinced that in most cases there must be evidence of the defendant's net worth in order to support the punitive damage award"]; *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc., supra,* 155 Cal.App.3d at p. 391 ["Net worth generally is considered the best measure of a defendant's 'wealth' for purposes of assessing punitive damages" (citation omitted)]; *Pistorius v. Prudential Ins. Co., supra,* 123 Cal.App.3d at pp. 554-555 [net worth and net income are relevant standards].) Gross assets (or gross income) is *not* relevant. (*Little v. Stuyvesant Life Ins. Co.* (1977) 67 Cal.App.3d 451, 469, fn. 5.) The defense may wish to object to (and even to move in limine to restrict) any reference to gross assets (or gross income).

Book net worth, however, is not the only possible measure of financial condition. A defendant may have financial resources, including a lifetime earning capacity, not reflected in traditional balance sheet assets. (E.g., *Rufo v. Simpson, supra,* 86 Cal.App.4th at pp. 623-625 [punitive damage award exceeding net worth justified based on defendant's high future earning capacity and pension fund income exempt from

execution]; see *Zaxis v. Wireless Communications, Inc. v. Motor Sound Corp.* (2001) 89 Cal.App.4th 577, 582 [rejecting net worth as hard and fast measure of ability to pay].)

Several appellate courts have suggested 10% of net worth (or presumably other financial condition measure) as a presumptive maximum for punitive damages. (*Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1596; *Storage Services v. Oosterbaan (formerly People ex rel. Dept. of Transp. v. Grocers' Wholesale Co.)* (1989) 214 Cal.App.3d 498, 514-516; see *Little v. Stuyvesant Life Ins. Co., supra,* 67 Cal.App.3d at p. 469 [15% of net worth excessive]; *Burnett v. National Enquirer, Inc.* (1983) 144 Cal.App.3d 991, 1012 [29% of net worth excessive; award reduced to 6% of net worth]; *Zhadan v. Downtown L. A. Motors* (1976) 66 Cal.App.3d 481, 500 [33% of net worth excessive]; *Merlo v. Standard Life & Acc. Ins. Co.* (1976) 59 Cal.App.3d 5, 18 [30% of net worth excessive]; but see *Vallbona v. Springer* (1996) 43 Cal.App.4th 1525 [approving punitive awards representing 23% of individual defendants' net worth and almost 33% of their corporation's assets]; *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc., supra,* 155 Cal.App.3d at p. 391 [approving punitive award constituting 17.5% of defendant's net worth on default].) Equally, appellate courts are reluctant to approve more than a small percentage of a defendant's annual net income. (*Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 824 [seven months of defendant insurer's net income was excessive]; *Burnett v. National Enquirer, Inc., supra,* 144 Cal.App.3d at p. 1012 [punitive damages constituting 50% of annual net income excessive as a matter of law].)

What the defendant's net worth or financial condition is may be subject to proof. For example, in *Vallbona v. Springer, supra,* 43 Cal.App.4th 1525, defendants claimed little or no equity in various properties they owned, testifying that the properties were encumbered with various debts. But they produced documentary evidence supporting only two such encumbrances. The appellate court held that the jury could be assumed to have disregarded the defendants' uncontradicted testimony regarding encumbrances for which documentation had not been produced. The court also held that the jury could be assumed to have disregarded the defendants' testimony that equipment their corporation had purchased for $77,000 was now worth $17,000, again because there was no documentary support. *Vallbona* strongly suggests that if the defendant's net worth is disputed, documentary evidence and perhaps expert testimony are in order. (See also *Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597 [where defendant fails to produce financial information as required by discovery order, plaintiff is relieved of burden of proof as to defendants' financial condition].)

Plaintiffs have also attempted at times to question various accounting entries included in a defendant's financial statement, e.g., claiming that depreciation expenses and other accounting "book entries" should not be deducted from gross income or assets. (*Zaxis Wireless Communications, Inc. v. Motor Sound Corp., supra,* 89 Cal.App.4th at pp. 579-580 [affirming $300,000 punitive award against corporate defendant with negative $6 million net worth where $6 million was note to sole owner, there was $4.9 million in depreciation, and company had $50 million line of credit and $250 million in gross revenues].) This approach appears dubious, at least where generally accepted accounting principles have been followed. (See *Rudolph v. Johnson* (1932) 127 Cal.App. 451, 462 [deducting depreciation to obtain net lost prof-

its]; *Lee v. Durango Music* (1960) 144 Colo. 270, 280 [355 P.2d 1083, 1088] ["The expenses of the business, including depreciation of capital, deducted from its income . . . produces the customary net profits of the business"]; *All Star Amusement, Inc. v. Jones* (Mo. Ct. App. 1987) 727 S.W.2d 930, 932 [same].)

A creative plaintiff might, however, present expert evidence that particular entries were improper or that the defendant's lifestyle reflected greater assets or income than reported in financial statements. As the issue is the defendant's available financial ability to respond to a punitive award, the defendant's future monetary needs, including any amounts necessary to respond to this or other compensatory judgments, properly could be taken into consideration. So, too, the financial resources a defendant needs to meet regulatory requirements (e.g., insurance company minimum capitalization) or to continue to provide services or respond to other debts is relevant. A large award effect on a defendant's continued operations should be a legitimate area of evidence in an appropriate case.

To the extent the defendant's financial ability is a disputed fact, a defendant may wish to request a special verdict to determine on just what "net worth" or "financial condition" the jury bases its punitive award. Further, to the extent that plaintiff seeks to present expert testimony, especially where the defendant's finances are publicly available, the defense may object to testimony by a previously undisclosed expert. (Code Civ. Proc., § 2034, subd. (j).)

Another looming question as to a defendant's net worth is whether a parent corporation's net worth can be considered, at least absent an alter ego showing. To date, the answer appears to be "no." (E.g. *Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1284-1286 [due process forbids use of parent company's financial status to prove net worth absent showing that parent controlled litigation]; *Institute of Veterinary Pathology, Inc. v. California Health Lab., Inc.* (1981) 116 Cal.App.3d 111, 120; *HCA Health Services of Midwest, Inc. v. National Bank of Commerce* (1988) 294 Ark. 525, 531-532 [745 S.W.2d 120, 124]; *Walker v. Dominick's Finer Foods, Inc.* (Ill.App.Ct. 1980) 92 Ill.App.3d 645, 649 [415 N.E.2d 1213, 1216-1217]; see also *Liberatore v. Thompson* (Ariz.Ct.App. 1988) 157 Ariz. 612, 621 [760 P.2d 612, 621] [where punitive damages are insurable, carrier's net worth is irrelevant; "It is a defendant's own wealth, not his insurer's wealth, that bears on the proper level of punitive damages"].) For similar reasons, an individual's financial resources should not include the wealth of relatives.

Alternate financial condition measures have been suggested. All such alternates are controversial. One is the profit the defendant made from the wrongful activity. (Compare *Wyatt v. Union Mortgage Co., supra,* 24 Cal.3d at pp. 790-791 and *Cummings Medical Corp. v. Occupational Medical Corp.* (1992) 10 Cal.App.4th 1291, 1298-1301 with *Kenly v. Ukegawa, supra,* 16 Cal.App.4th at p. 57 [disagreeing with *Cummings Medical*]; cf. *Adams v. Murakami, supra,* 54 Cal.3d at p. 116, fn. 7 [leaving open whether profit from the misconduct is a proper measure].) Some have argued that the defendant's true financial condition is best reflected by a publicly traded defendant company's stock market value. The argument is that the market's valuation more accurately reflects a company's true worth, both in net assets and earnings potential, than a net worth based on historical asset purchase prices. On the other hand, such a market value arguably measures only investor expectation and not true value and can be notoriously subject to inexplicable market fluctuations. An investment banker or similar expert's valuation opinion

may be more relevant. If expected future earnings are relevant, then an individual defendant's financial condition might include his or her discounted expected lifetime income, as reflected, e.g., in how much life insurance or disability insurance he or she might have.

Appellate courts have not ruled definitively on these alternative financial condition theories. Until they do, defendants will want to object as appropriate and to provide expert testimony as to why their theory is better.

The defense may also wish to focus upon financial factors that do not address a corporate defendant as a whole, but rather just its parts. If the misconduct is limited to a particular division, department, branch or office, the defense may wish to present evidence of that division's, department's, branch's or office's budget or profits or size compared to the corporate entity as a whole. Arguably, if the problem is a rogue office, the punishment should be limited to that office.

Another problem arises where both federal and state claims are tried together. The burden of proving financial condition is a substantive legal rule and governed by the applicable substantive law. Contrary to California law, federal law imposes the burden of proving financial condition on the *defendant.* (*Chavez v. Keat* (1995) 34 Cal.App.4th 1406, 1410-1411.) Thus, if federal and state claims are tried together, the plaintiff has the burden of proving financial condition on the state claims while the defendant has the burden of proving financial condition as to the federal claims. (*Id.* at pp. 1413-1416 [defendant has burden of showing financial condition as to federal claims tried in state court]; *Morgan v. Woessner* (9th Cir. 1993) 997 F.3d 1244, 1259 [plaintiff bears burden of proof of financial condition as to state claims tried in federal court].) This can lead to a procedural morass. The defense may want to seek to have the state claims tried first. Alternatively, the defense may have to make a tactical decision as to whether to put on its own evidence of financial resources (to defend against the federal claim) or to rely on the absence of such evidence to defeat the state claim and defend against a federal punitive claim without pleading limited resources.

### *4. Comparable Statutory Sanctions.*

*BMW of North America, Inc. v. Gore, supra,* 517 U.S. at p. 583 [116 S.Ct. at p. 1603], relied on statutory civil and criminal sanctions for comparable misconduct as one of three factors in concluding that a punitive damage award was constitutionally excessive. Previous California decisions hardly mentioned this factor. Now, however, the parties should scrutinize statutory provisions for comparable penalties. (See *In re Exxon Valdez, supra,* 270 F.3d at p. 1245 [$5 billion punitive award excessive as greatly exceeding any possible criminal fine, $200,000 to $1 billion, or statutory civil penalty $100 million to $800 million].)

One common statutory civil penalty is treble damages. This is the equivalent to a two-to-one ratio between punitive and compensatory damages. There are other, set penalties, for example, insurance or employment violations. (E.g., Ins. Code, § 1859.1; Lab. Code, § 1103; but see *Swinton v. Potomac Corp.* (9th Cir. 2001) 270 F.3d 794, 820 [affirming $1 million punitive award in employment discrimination case even though Title VII caps non-economic compensatory damage in such cases at $300,000].)

The standard BAJI jury instructions do not direct the jury even to consider comparable statutory penalties. Again, if the defense wants to rely on such comparable statutory sanctions, it should request appropriate instructions and modifications to the current BAJI instructions.

### *5. The Size of the Punitive Award.*

Punitive damages are a windfall. (E.g., *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1258; *In re Exxon Valdez, supra,* 270 F.3d at p. 1221, fn. 2.) For a plaintiff, obtaining a punitive award is a lot like winning the lottery. Punitive damages' windfall nature becomes more prominent the larger the award. A punitive award is a wealth transfer. Although the wealth is privately owned, it reflects the right and ability to use society's resources. The defense may well want to argue that the plaintiff needs to justify why a large amount should be transferred. It need not be shy about calling any punitive award a windfall and explaining the uses to which the money will not be put (e.g., investing in equipment, generating jobs) if it is given to the plaintiff.

A large, very wealthy defendant presents a punitive damage dilemma. Even a very small percentage of its net worth may be a staggering sum in absolute dollar terms. A balance needs to be struck between an award large enough to make a difference to the defendant and one that simply is too great a windfall. But the present standard jury instructions do not even mention the absolute size of the award as a consideration for the jury. Again, proffering an appropriate jury instruction and objecting to the standard instructions as deficient may at least preserve the issue for appeal.

### *6. To Punish And To Deter, But Not To Destroy.*

This in many ways is the ultimate test for any punitive damage award. A civil trial's punitive damage phase has much in common with a criminal sentencing hearing. The defense, if possible, may wish to emphasize why such misconduct will not happen again: e.g., the defendant has gone out of the particular business, the responsible individuals have left, the responsible individuals have been disci-

plined. Plaintiffs sometimes argue that the defendant remains recalcitrant and unrepentant.

For plaintiffs, this argument is made easier if the defense continues to deny that the defendant did anything wrong. The defense, therefore, must walk a fine line between a mea culpa (which might come back to haunt the defense on appeal from the liability verdict) and a denial of any wrongdoing. One approach may be for the defense to argue that the defendant recognizes that the jury has found that it acted wrongfully. If the facts are as the jury found them, the defendant recognizes that such conduct is impermissible. And, the defendant has taken a number of steps to ensure that similar conduct does not happen in the future (regardless whether it happened here).

Evidence of how much the conduct has already cost the defendant, e.g., in terms of compensatory damages, may be relevant to show that the defendant already has ample incentive to avoid similar missteps in the future. (*In re Exxon Valdez, supra,* 270 F.3d at p. 1244.) In that regard, evidence that senior management is aware of and has taken an interest in the case might be admissible. Evidence of correction or remedial measures taken to prevent recurrences of similar conduct also should be admissible. (But see *Swinton v. Potomac Corp., supra,* 270 F.3d at p. 817 [trial court has discretion to, but need not, admit evidence of remedial actions].)

Plaintiffs typically argue even in circumstances where the defendant may have gone out of the particular business, that punitive damages are necessary to deter others. In that event, the defense may wish to present evidence whether the misconduct at issue is a problem with others still engaged in the former line of business.

If the defendant is still in the particular business, another issue is when will the punitive award be large enough to be felt. If the award is premised upon senior management conduct, the relevant standard may be that of materiality under general accounting standards for the purposes of accounting reports and financial disclosures to owners and stockholders. If the conduct at issue took place at a lower echelon, the standard may more appropriately be based on the particular department's or office's budget or what amount would have an effect on the individual actor's career.

## *Conclusion*

This article has not attempted comprehensively to survey all the possible evidence relevant to determining a punitive damages' amount. Rather, the point is that the trial's punitive damages phase should be more than just regurgitating the evidence during the trial's liability and compensatory damages phase. Given the potential stakes, thorough attention to evidentiary and instructional issues and a complete record are in order, both for the jury's initial decision and to allow for thorough review on motion for new trial and on appeal. ■

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FOOTNOTES

[1] *Editor's Note: This article is a revised,* updated version of an article first published in the Association of Business Trial Lawyers *Report,* September, 1996.

[2] E.g., *Finney v. Lockhart* (1950) 35 Cal.2d 161, 163 [2000:1 ratio, but only $1 in compensatory damages]; *Wetherbee v. United Ins. Co. of America* (1971) 18 Cal.App.3d 266 [200:1 ratio, $1,050 in compensatory damages, 0.33% of net worth]; *Moore v. American United Life Ins. Co.* (1984) 150 Cal.App.3d 610 [83:1 ratio, $30,000 in compensatory damages, 3.2% of net worth]; *Neal, supra,* 21 Cal.3d at p. 910 [74:1 ratio, less than $10,000 in compensatory damages, 0.73% of net worth]; *Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773 [200:1 ratio, but only $1,000 in compensatory damages]; *West v. Johnson & Johnson Products, Inc.* (1985) 174 Cal.App.3d 831 [10:1 ratio but 0.04% of net worth]; *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381 [27:1 ratio, but only $3,000 in compensatory damages]; *Chodos v. Insurance Co. of North America* (1981) 126 Cal.App.3d 86 [38.9:1 ratio, but compensatory damages of $5,146; punitive award no more than 0.2% of net worth]; *Pistorius v. Prudential Insurance Co.*<> (1981) 123 Cal.App.3d 541 [22:1 ratio, but only $45,000 in compensatory damages; 0.05% of net worth]; see *TXO Production Corp., supra,* 509 U.S. at pp. 443-444, 459, fn. 9, 460-462 [113 S.Ct. at pp. 2713, 2716, fn. 9, 2721-2722] [approving 500 to 1 ratio, but only a 10 to 1 ratio if prospective harm taken into account; even so, punitive damages represented only 0.45% of net worth].

[3] The standard of trebled damages that is used in many statutes is a two to one ratio between punitive and compensatory damages as the total award is the compensatory damage trebled; the compensatory award remains one-third of the total.