

# How to Defend Punitive Damages Claims Effectively—and Maybe Successfully

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*Punitive damages cases present difficult challenges to defense counsel, but attention to a lot of details may produce success*

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If a man steals an ox or a sheep, and kills it or sells it, he shall pay five oxen for an ox, and four sheep for a sheep. He shall make restitution; if he has nothing, then he shall be sold for his theft. If the stolen beast is found alive in his possession, whether it is an ox or an ass or a sheep, he shall pay double.

—EXODUS 22:1

**By C. Barry Montgomery and  
Bradley C. Nahrstadt**

A PUNITIVE damage award in a high-profile case is a corporate defense counsel's worst nightmare. Consider, as examples,

- \$2.7 million punitive damages against McDonald's Corp. for burns a customer suffered from a coffee spill;
- \$7.1 million for a secretary who prevailed in a sexual harassment case;
- \$101 million against General Motors in a design defect case;
- \$125 million against a pharmaceutical company; and
- \$3 billion against Exxon Corp. related to the Exxon Valdez oil spill.

Although punitive damages often are reduced by the trial court or on appellate review, the original awards usually generate fierce debate and media hype, as well as injury to the defendant corporation's reputation.

In today's climate of intensified accountability and safety consciousness, juries expect manufacturers, professionals and other providers of products and services to account for the safety of their respective endeavors. When a plaintiff successfully proves liability against a highly visible defendant on the theory that the defendant failed to provide a safe product or

*IADC member C. Barry Montgomery is a member of Williams & Montgomery, Chicago. He is a graduate of Muskingum College (B.A. 1959) and the University of Michigan (J.D. 1962) and a member of the International Academy of Lawyers.*

*Bradley C. Nahrstadt is an associate in the same firm. He has a B.A. from Monmouth College (1989) and a J.D. from the University of Illinois (1992).*

service, the threat of a substantial punitive damages award must be taken seriously. In addition to the award itself, the corporation can anticipate the cost of litigating the issue to final appeal and of dealing with hostile media exposure and private activist groups.

In order to avoid this catastrophe, defense counsel must focus on the punitive aspect of the case from the day the file is opened. All too often, the punitive damages claim is one of the last things considered, when it should be one of the first.

There are risks associated with claims for punitive damages, and there are different methods that may be employed to protect a corporate defendant from those claims. It is important to remember that the law of punitive damages claims varies from jurisdiction to jurisdiction and must always be carefully researched and analyzed.

## A LITTLE HISTORY

Punitive damages in civil actions are defined in Section 908 of the Restatement (Second) of Torts as those damages

awarded “against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.” They have been characterized as “exemplary,” because they make an example of a defendant; “punitive,” because they punish a defendant; “vindictive,” because they exact revenge on a defendant; and “smart money,” because they make a defendant smart with pain, not intelligence.<sup>1</sup>

The concept of punitive damages dates back more 2,000 years before the birth of Christ to the Code of Hammurabi, under which a judge who altered a judgment previously rendered was required to pay a twelve-fold penalty. In 1400 B.C., Hittite law, according to Exodus 22:9, required the thief of a “great” bull or horse to repay the owner with 15 bulls or horses. Exodus also refers to exemplary damages for the commission of other egregious acts. These biblical references to exemplary damages appear to be the first indication that punitive damages should bear a multiple, albeit arguably reasonable, relationship to the compensatory award.<sup>2</sup>

The first recorded punitive damage award in a civil case appears in an 18th century case in England, *Huckle v. Money*.<sup>3</sup> Lord Camden found that the authority for punitive damages awards is inherent in the jury’s exercise of uncontrolled discretion in arriving at damages. Interestingly enough, he also found that the amount of punitive damages may warrant a new trial when it is so “outrageous”

that “all mankind at first blush must think so.”

In the United States, punitive damages have existed in one form or another since early days. In 1791, in *Coryell v. Colbaugh*,<sup>4</sup> a New Jersey court held that punitive damages may be appropriate “for example’s sake, to prevent such offenses in the future . . . [and] as would mark [the jury’s] disapprobation.” By 1851, the U.S. Supreme Court noted in *Day v. Woodworth*<sup>5</sup> that the doctrine of punitive damages was firmly entrenched in the American legal system. Justice Grier stated that a jury “may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff.”

Although the “theoretical correctness” of the punitive damages doctrine was debated as late as the 1880s and 1890s, nearly all American courts had accepted the concept by the turn of the century. In the last 30 years, thanks in large part to a spread of “consumerism” and extensive media attention on defective products, consumer goods and services, claims for punitive damages have become almost commonplace.<sup>6</sup> According to a pair of recent commentators, “the doctrine of punitive damages survives [to this day] because it continues to serve the useful purposes of expressing society’s disapproval of intolerable conduct and deterring such conduct where no other remedy would suffice.”<sup>7</sup>

## PINPOINTING APPLICABLE LAW

### A. Choice of Law

Because the law affecting punitive damages varies from jurisdiction to jurisdiction, defense counsel may need to analyze choice of law issues, if appropriate, based on the facts of the case. Courts typically consider these factors in determining choice of law for punitive damages: (1) the state of the plaintiff’s residence; (2) the state where the wrongful conduct occurred; and (3) competing states’ inter-

1. John D. Kitch, *Proving and Disproving Punitive Damages*, 21 LITIG. 13-14 (Winter 1995).

2. Gary T. Walker & Kenneth E. Keller, *Punitive Damage Claims in Products Liability Actions*, FOR THE DEFENSE 25 (Oct. 1988).

3. 95 Eng. Rep. 768 (K.B. 1763).

4. 1 N.J.L. 77 (1791).

5. 54 U.S. 363 (1851).

6. Walker & Keller, *supra* note 2, at 25-26. See also *Smith v. Wade*, 461 U.S. 30, 35 (1983).

7. Jane Mallor & Barry Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639 (1980).

ests.<sup>8</sup> Also worth noting is that in certain jurisdictions, the law applied to punitive damages may differ from the law applied to other issues in the same action.<sup>9</sup>

## B. Punitive Damages Law

It is important to note that there is no cause of action for punitive damages alone. Nearly all jurisdictions require entitlement to compensatory damages before punitive damages may be awarded, although some permit them if injunctive relief is granted. In many jurisdictions, nominal damages are insufficient as a matter of law to support punitive damages, while in others nominal damages will support punitive damages. What constitutes “nominal damages” is generally left to the trial court’s discretion.<sup>10</sup>

Punitive damages have been prohibited in certain types of cases, including wrongful death cases, property damage claims, and claims against public entities.<sup>11</sup> In addition, in most jurisdictions, if the complaint sounds in contract, punitive damages are unavailable.<sup>12</sup>

Jurisdictions differ in their descriptions of the type of conduct warranting punitive damages. Some courts require that the character of negligence necessary is the same as that required for a conviction of manslaughter.<sup>13</sup> Others require only a showing of gross negligence.<sup>14</sup> Still others

allow punitive damages when a defendant has exhibited “reckless or flagrant indifference,” or “willful,” “wanton” or “malicious” disregard of the rights of others.<sup>15</sup> Yet others have held that the exhibition of a “flagrant indifference to the public safety” is enough.<sup>16</sup>

No matter what description is employed, one thing is clear: punitive damages should not be awarded on the basis of the mere inadvertence, mistake or errors of judgment that constitute ordinary negligence.<sup>17</sup>

It is generally recognized that an employer may be liable to third parties for the tortious acts of its employees, but there appears to be a conflict of opinion as to when an employer can be held vicariously liable for punitive damages based on an employee’s conduct. According to Section 217C of the Restatement (Second) of the Law of Agency and Section 909 of the Restatement (Second) of Torts, employers are vicariously liable for punitive damages when the employee’s act was ratified, approved or authorized by the employer, when the employee was acting in a managerial capacity, or when the employee was unfit for duty.<sup>18</sup>

California Civil Code Section 3294(b) states that an employer may be vicariously liable for punitive damages based on the actions of an employee if the employer “had advanced knowledge of the unfitness

8. John M. Thomas, *Compliance with Government Standards and the New Product Liability Restatement* 1, 7-8, in Corporate Legal Times Conference “How To Minimize and Manage Products Liability Cases,” Oct. 12-13, 1995, *citing* In re Air Crash Disaster near Chicago, 644 F.2d 594 (7th Cir. 1981), *cert. denied*, 454 U.S. 878 (1981); Sheperd v. Boston Old County Ins. Co., 811 F.Supp. 225 (S.D. Miss. 1992); People’s Bank & Trust Co. v. Piper Aircraft Corp., 598 F.Supp. 377 (S.D. Fla. 1984).

9. Meyer v. Crain Communications Inc., 1992 WL 77655 (N.D. Ill. 1992), not reported in F.Supp.

10. Kitch *supra* note 1, at 14.

11. *See, e.g.*, In re Paris Air Crash, 622 F.2d 1315 (9th Cir. 1980) (wrongful death); Eisert v. Grumberg Roofing & Sheet Metal Co., 314 N.W.2d 226 (Minn. 1982) (wrongful death and property damage); CAL. CIV. CODE § 818.

12. Kitch, *supra* note 1, at 15.

13. Chrysler Corp. v. Wolmer, 499 So.2d 823, 824 (La. 1986).

14. Schwartz v. Sears, Roebuck & Co., 669 F.2d 1091 (5th Cir. 1982) (applying Texas law).

15. Grimshaw v. Ford Motor Co., 174 Cal.Rptr. 348 (Cal.App.1981); Dorsey v. Honda Motor Co., 655 F.2d 650 (5th Cir. 1981); Rinker v. Ford Motor Co., 567 S.W.2d 655 (Mo.App. 1978); Wangen v. Ford Motor Co., 294 N.W.2d 437 (Wis. 1980).

16. Moore v. Remington Arms Co., 427 N.E.2d 608 (Ill.App. 1981); Leichtamer v. Am. Motors Corp., 424 N.E.2d 568 (Ohio 1981).

17. Loitz v. Remington Arms Co., 563 N.E.2d 397 (Ill.App. 1990); Deitemann v. Times Inc., 449 F.2d 245 (9th Cir. 1971); Clements v. Withers, 437 S.W.2d 818 (Tex. 1969).

18. Walker & Keller, *supra* note 2, at 27. *See also* Agarwal v. Johnson, 160 Cal.Rptr. 141 (Cal.App. 1979).

of the employee and employed him or her with a conscious disregard of the rights or safety of others[,] or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud or malice.” One California case imposed vicarious liability for punitive damages without authorization or ratification of the actions of employees who had been placed in a managerial capacity.<sup>19</sup>

Other jurisdictions impose punitive damages on an employer if those damages would have been charged to the employee—for example, if the employee acted wantonly or willfully, or with a reckless indifference to the rights of others.<sup>20</sup> Yet other courts require some showing of an act or omission on the part of the employer before imposing liability, so that an “innocent employer” cannot be held vicariously liable for punitive damages.<sup>21</sup> Still other states recognize specific instances where punitive damages cannot be imputed to an employer for an employee’s act, such as when the employee has been discharged from personal liability. Essentially, a favorable judgment for the employee relieves the employer of liability.<sup>22</sup>

### C. Plaintiff’s Burden of Proof

The burden of proof for punitive damages differs among jurisdictions. For example, the Indiana Supreme Court has held that the standard in that state is proof of the misconduct by “clear and convincing

evidence.”<sup>23</sup> In Maine, Idaho, Arizona and California, punitive damages may be awarded only when the plaintiff proves by clear and convincing evidence that the defendant acted with malice or engaged in wanton, gross or outrageous conduct.<sup>24</sup> In Colorado, the standard is “proof beyond a reasonable doubt.”<sup>25</sup>

Clearly, the general rule regarding punitive damages and a plaintiff’s burden of proof is that there is no general rule. Defense counsel must carefully research the plaintiff’s burden of proof when a punitive damages claim is made.

## FOCUS ON THE PLEADINGS

After determining the applicable law, defense counsel must examine and dissect the punitive damages claim in the pleadings. A major task is defining and limiting the plaintiff’s underlying theory and facts. To the extent the defense allows, the plaintiff’s attorney will resist disclosure of the specifics of the punitive damages case. Sometimes this is a strategic move, and other times it is because the plaintiff’s attorney has not formulated a coherent basis for the claim. Whatever the case, defense counsel must compel disclosure of the theory and the evidence supporting the claim as early as possible.

### A. Attack Plaintiff’s Theory

The first step is to compel the plaintiff to articulate the theory in the complaint clearly. Defense counsel should consider moving for dismissal of the punitive damages claim under applicable state law, Rule 12 of the Federal Rules of Civil Procedure, or in appropriate cases, Federal Rule 56. Defense counsel should promptly move to strike allegations that do not comport with the governing procedural and substantive law and, where permissible, should demand particulars as to the factual basis for the punitive damages claim.

In several jurisdictions, plaintiffs are prohibited from pleading punitive damages in their original complaint. Moreover, be-

19. *Kutch v. Allied Builders Corp.*, 98 Cal. Rptr. 588 (Cal.App. 1971).

20. *U.S. Concrete Pipe Co. v. Bould*, 437 So.2d 1061 (Fla. 1983).

21. *Country Roads Inc. v. Witt* 737 S.W.2d 362 (Tex.App. 1987).

22. *See Rosenzweig & Sons v. Jones*, 72 P.2d 417 (Ariz. 1937).

23. *Orkin Exterminating Co. v. Traina*, 486 N.E.2d 1019 (Ind. 1986).

24. *See, e.g., Tuttle v. Raymond*, 494 A.2d 1353 (Me. 1985); *Unfried v. Libert*, 119 P. 885 (Idaho 1911); *Linthicum v. Nationwide Life Ins. Co.*, 723 P.2d 675 (Ariz. 1986); CAL. CIV. CODE § 3294(a).

25. COLO. REV. STATS. § 13-25-172(2).

fore a plaintiff may amend the original complaint to include a prayer for punitive relief, an evidentiary hearing must be held.<sup>26</sup>

Punitive damages claims can be eliminated even though the plaintiff has alleged enough to support liability on the underlying compensatory damages claim. But if the defense is unsuccessful in striking the punitive damages allegations—for example, for lack of particularity or failure to state a claim—these efforts will educate the court and defense counsel as to the nature of the punitive damages claim and will set the stage for future efforts to defeat the punitive aspects of the case before trial.

## B. Use Affirmative Defenses

If a defense motion to dismiss is denied and an answer must be filed, defense counsel must negate the facts alleged in the complaint regarding punitive damages and must be sure to include all arguable affirmative defenses. These include the following.

### 1. Statute of Limitations

Since a punitive damages claim is not in and of itself a cause of action, the statute of limitations that governs the underlying action usually is applied as well to the exemplary claim. If the underlying action is not brought within the applicable statute of limitations, the defendant should assert a defense based on that statute. A trial

court's disposition of the issue will eliminate any punitive damages claim.<sup>27</sup>

### 2. Statutory Limitations

Certain statutes, including the Federal Tort Claims Act and the Federal Employers' Liability Act, explicitly prohibit the recovery of punitive damages.<sup>28</sup>

### 3. Status of Parties

Defense counsel should examine the status of the parties joined to the punitive damages claim. Sometimes certain parties may be exempt from punitive damages by law—for instance, governmental entities, decedents through their estate, heirs or representatives, or a defendant who is an infant under applicable statutes.<sup>29</sup> In addition, exemplary damages may not be recoverable from governmental entities that act in a receivership role.<sup>30</sup> The joinder of one party exempt from punitive damages may preclude recovery of punitive damages against other parties.

### 4. Compliance with Statutes and Regulations

Although compliance with governmental standards may not be a complete defense to a compensatory damage claim, in some jurisdictions it may be treated as a complete defense to a punitive damages claim. Some states, for example, have statutes providing that a product is presumed safe if it complies with required standards.<sup>31</sup> In those jurisdictions, compliance

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26. MINN. STAT. § 549.191; IDAHO CODE § 6-1604(2); 735 ILL. COMP. STAT. 5/2-604.1; FLA. STAT. ch. 160, § 768.72.

27. See generally JAMES D. GHIARDI & JOHN J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE ch. 9, at page 68 (1997). See, e.g., TENN. CODE ANN. § 28-3104, which provides a one-year limitations period in which to bring a civil action seeking compensatory or punitive damages for violations of the federal civil rights statutes.

28. 28 U.S.C. § 2671 *et seq.* and 45 U.S.C. § 51 *et seq.*

29. Stuart M. Gordon & Diane R. Crowley, *Defending the Punitive Damages Claim*, 49 INS. COUNS. J. 300, 311 (July 1982); IND. CODE § 34-4-16.5-4; OR. REV. STAT. § 30.270; WIS. STAT. § 893.80 (4); Lawrence v. Virginia Ins. Reciprocal, 979 F.2d 1053 (5th Cir. 1992).

30. Diaz v. McAllen State Bank, 975 F.2d 1145 (5th Cir. 1992).

31. J. Jeffrey Zimmerman, Patrick J. Phillips & Joseph G. Bisceglia, *A Review of the Illinois Civil Justice reform Act of 1995*, 83 ILL. B.J. 288; McDaniel v. McNeal Labs. Inc., 240 N.W.2d 822 (Neb. 1976).

should be included in an affirmative defense.

### 5. Common Law Privileges

When the underlying cause of action alleges an intentional tort, defense counsel should consider pleading one or more of the common law privileges to intentional torts. If the defendant's conduct is later found to have been privileged, the plaintiff's underlying action will be defeated, along with the claim for punitive damages. Moreover, to the extent that a privilege must be proved as an affirmative defense, alleging it will allow the defense to "present its own case" and not merely rely on cross-examination of the plaintiff's witnesses.<sup>32</sup>

### 6. Provocation

During the pleading stage, if the facts warrant it, defense counsel should consider arguing that the plaintiff's actions "provoked" the defendant's conduct and thus mitigate the plaintiff's possible exemplary recovery. At least two courts have held, "Provocation, while not a justification or a defense in an action for compensatory damages for an assault, may be considered in mitigation of exemplary damages."<sup>33</sup>

### 7. Acting on Advice of Counsel

Another possible defense may be the fact that the defendant acted on the advice of counsel. This is relevant to proving intent or knowledge, which in turn tends to rebut allegations of malice and bad faith. Acting on the advice of counsel, however,

will not always preclude an award of punitive damages. To invoke this defense, the defendant must plead and prove full disclosure of the situation and good faith reliance on the advice procured.<sup>34</sup>

### 8. Constitutional Challenges

If defense counsel intends to attack the constitutionality of punitive damages at a later stage in the proceeding, the attack should be preserved specifically through the use of affirmative defenses.

One of the major constitutional arguments against punitive damages is based on the U.S. Constitution's 14th Amendment due process clause, which requires that legal proceedings be consistent with fundamental fairness, ordinary notions of fair play, settled rules of law, and not offend the community's sense of decency. Several recent U.S. Supreme Court cases discuss the constitutionality of punitive damages under the due process clause

In 1991, in *Pacific Mutual Life Insurance Co. v. Haslip*,<sup>35</sup> the Court upheld the Alabama standard of review for punitive damages awards against a due process challenge. Justice Blackmun articulated a two-part test to be used to determine whether the procedures employed in Alabama satisfied common law and procedural requirements: (1) the state must provide the jury with "adequate guidance" as to the nature and intent of punitive damages; and (2) the post-verdict judicial review, both by the trial court and appellate courts, must ensure that the amount of punitive damages is reasonable.

In 1993, however, the Court in *TXO Production Corp. v. Alliance Resources Corp.*,<sup>36</sup> appeared to retreat from its more definitive *Haslip* decision in a confusing plurality result expressed in four separate opinions. In *TXO*, it was argued that the award of punitive damages violated both procedural and substantive due process, but the award ultimately was upheld through a wide variety of legal reasoning.

In addition to being confusing, *TXO* offers little guidance for defense counsel re-

32. GHIARDI & KIRCHER, *supra* note 27, at 69, citing W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS § 65 (5th ed. 1984).

33. *Traister v. Gerton*, 626 P.2d 737 (Colo.App. 1981). See also *Garrett v. Olsen*, 691 P.2d 123 (Or.App. 1984).

34. GHIARDI & KIRCHER, *supra* note 27, at 70, citing *Hamilton County Bank v. Hinkle Creek Friends Church*, 478 N.E.2d 689 (Ind.App. 1985).

35. 499 U.S. 1 (1991).

36. 509 U.S. 443 (1993).

garding the limits that are to be placed on punitive damages. According to the Court, punitive damages awards are to be measured under a “grossly excessive standard.” The Court articulated a similar stance a year later in *Honda Motor Co. v. Oberg*,<sup>37</sup> in which it refused to create a standard for determining the excessiveness of punitive damages.

The Court’s most recent pronouncement came in 1996 in *BMW of North America v. Gore*.<sup>38</sup> The plaintiff sued BMW in Alabama state court for allegedly selling a \$41,000 BMW sedan with an undisclosed retouched paint job. The jury awarded the plaintiff \$4,000 in compensatory damages and \$4 million in punitive damages. The Alabama Supreme Court later reduced that award to \$2 million because the jury improperly multiplied the plaintiff’s compensatory damages by the number of automobiles sold in all 50 states, not just Alabama.

In an opinion authored by Justice Stevens, the U.S. Supreme Court held that the \$2 million punitive damages award was grossly excessive and therefore exceeded constitutional limits. According to the Court, when an award can be categorized as “grossly excessive” in relation to the state’s interest in punishment and deterrence, it enters a “zone of arbitrariness that violates” the due process clause.

The Court concluded that Alabama exceeded the scope of its legitimate interest based on the application of the following three “guideposts”: (1) the degree of reprehensibility, (2) the ratio of the punitive damages award to the actual harm inflicted on the plaintiff, and (3) the state’s sanctions for comparable misconduct. Defense counsel should carefully review these criteria and, where appropriate, fashion these criteria into a constitutional affirmative defense designed to guard the defendant’s due process rights.

Yet another issue that arises in regard to the constitutionality of punitive damages is what limitations apply in cases in which a defendant has been subjected to multiple

or successive punitive damages awards. A federal district court in New Jersey held that due process considerations prohibit the imposition of multiple or successive punitive damage awards against the defendant for the same course of conduct.<sup>39</sup> When dealing with a defendant who has been subjected to multiple punitive damage awards, defense counsel should plead a violation of the defendant’s due process rights as an affirmative defense.

Another constitutional challenge that can be made is that punitive damages awards violate the Eighth Amendment’s prohibition against excessive fines. The U.S. Supreme Court in *Browning-Ferris Industries v. Kelco Disposal Inc.*<sup>40</sup> held that an excessive fine argument was not available under the Eighth Amendment when the suit is between private parties. It has yet to be determined whether governmental involvement would produce the same result.

Three states (Utah, Florida and Georgia) have recently enacted statutes that allow the state to recover a portion of punitive damages in a range of civil actions.<sup>41</sup> These statutes reflect the intent of punitive damages to punish the wrongdoer, rather than to compensate an injured party. Defense counsel working under a statute in which the state shares in or affirmatively seeks punitive damages should be wary of potential abuse and should seek constitutional protection pursuant to the excessive fines clause of the Eighth Amendment.

Yet another argument that can be made as an affirmative defense is that an award of punitive damages would violate the separation of powers doctrine, since the

37. 512 U.S. 415 (1994).

38. 517 U.S. 559 (1996).

39. *Juzwin v. Amtorg Trading Corp.*, 705 F.Supp. 1053 (D. N.J. 1989), *vacated on other grounds*, 718 F.Supp. 1233 (D. N.J. 1989).

40. 492 U.S. 257 (1989).

41. James McKowan, *Punitive Damages: State Trends and Developments*, 14 REV. LITIG. 419 (1995), *citing*, FLA. STAT. § 768.73; GA. CODE § 51-12-5.1(e)(2); UTAH CODE § 78-18-1(3).

court and jury would be usurping the exclusive power of the legislature to define crimes and establish punishments. In the relatively few jurisdictions in which plaintiffs may recover punitive damages on contract claims, defense counsel may opt to argue that an award of punitive damages would violate the contract clause of Article 1, Section 10, of the U.S. Constitution. In addition, counsel may wish to file an affirmative defense than an award of punitive damages would violate the defendant's constitutional right not to be placed twice in jeopardy for the same conduct.<sup>42</sup>

Affirmative defenses raising constitutional challenges may not be successful at the trial level, but including them in the answer to the complaint will preserve them. For that reason alone, defense counsel is well advised to consider incorporating constitutional affirmative defenses in the answer.

### INVESTIGATE THE CLAIM

The defense of a punitive damages claim involves a race for the facts. Defense counsel should realize that they start this race at a disadvantage. Not only does the plaintiff's attorney have a substantial lead in the investigation of the particular events that give rise to the claim, but in most cases the attorney also will be drawing on the experience of the plaintiffs' bar in similar cases. With this in mind, it cannot be stressed enough that defense counsel must investigate the claim for punitive damages at the earliest possible stage.

#### A. Meeting with Defendant and Interviewing Defendant's Employees

While the applicable law is being determined, and the pleadings are being put in order, the very first thing that defense counsel should do is to meet with corpo-

rate representatives who will explain and justify the conduct alleged as giving rise to the punitive damages claim. In these early stages, counsel can begin to "circle the corporate wagons." This involves informing the corporation of the nature of the punitive damages claim, as well as the seriousness of the claim, even if the plaintiff's theory has not yet been delineated in the pleadings. At this point, counsel can begin building a working rapport with corporate officers who may serve as witnesses at the trial and who invariably can aid counsel in the investigation of the claim.

It is critical at this juncture that defense counsel stress to the corporate defendant the importance of presenting a unified front through to the conclusion of the litigation. In fortifying the unified front, defense counsel must stress to personnel from management on down the corporate ladder that there will be no passing of the buck, pointing of fingers at other employees, or any discussion of the case outside the corporate environment.

Finally, counsel should work hand-in-hand with corporate management at the earliest stages of preparation in order to create an impression of corporate harmony and to avoid damaging statements from all levels of the corporation. Counsel should also be sure to discuss with the defendant the costs involved in defending the punitive damages claim. These may be substantial, but defense dollars are well spent on early and thorough efforts to undermine punitive damages claims.

#### B. Building Rapport with Defendant's Employees

Defense counsel must ascertain which employees were involved in the incidents or actions giving rise to the punitive damages claim and build a rapport with them. For example, in the product liability context, defense counsel should meet the key people affiliated with the corporation who were responsible for the research, testing, design and construction of the product. These employees will explain and justify

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42. It should be noted that the double jeopardy clause does not apply to cases between private parties. *United States v. Halper*, 490 U.S. 435, 451 (1981).

how the product was developed and manufactured; they will be the most important witnesses at trial. In addition, they will provide invaluable assistance in directing the course of future investigation and discovery.

Once the key employees have been identified and interviewed, defense counsel should extend the investigation to former employees and outside consultants or contractors who helped develop the product. These potential witnesses, because of the lack of direct interest, may be among the defendant's most effective witnesses. They also are the individuals in whom the plaintiffs' investigators will be particularly interested.

The prosecution of most punitive damages claims proceeds according to one or more proven formulas or themes. One very popular formula with corporate defendants is for plaintiffs to develop their cases through the cooperation and contribution of disgruntled former employees of the defendant company. The defense team must be on the lookout for "rotten eggs."

Through early investigation and meetings with the corporate defendant, defense counsel can learn the identities of problem witnesses before the plaintiff's discovery requests are filed. Defense counsel must then spend time with these potential witnesses, not only to learn what they know, but to encourage their cooperation with the defendant. This step cannot be emphasized enough, since meetings with these individuals will allow counsel to learn more about the witnesses they will be working with during the course of the litigation and to win those individuals over before their identity must be disclosed during discovery.

Defense counsel should be careful to maintain the attorney-client privilege with all these witnesses, to explain the privilege to the witnesses, and to encourage them to speak freely. Whenever defense counsel reviews any documents that are uncovered, the privilege ramifications of the documents must be considered. To protect and

maintain the attorney-client privilege, defense counsel is wise to keep all documentation within the control of a specified, defined control group.

## **DISCOVERY**

Discovery efforts on the punitive damages aspect of a case must exceed that normally devoted to the liability and compensatory damages aspects. A passive role in discovery when punitive damages are sought is a recipe for disaster.

### **A. Discovery Addressed to Plaintiff**

Aggressive discovery against the plaintiff should commence as soon as possible. Specific interrogatories should be designed to elicit information regarding the theory and facts in support of the punitive damages claim, any documents that would support the claim, and any experts expected to testify. If the answers set forth factual material that enables the defense to outline the claim, defense counsel is in a position to alert the defendant and the defendant's witnesses of the plaintiff's expected theory and approach.

In addition, defense counsel should serve a request for production of documents, mindful of the fact that the plaintiff's attorney may have a complete library of defense documents obtained from the network of plaintiffs' attorneys who handle similar cases. This library of documents will enable the plaintiff's attorney to scrutinize whether all relevant documents have been produced by the defendant in response to his own request to produce. To ensure possession of all of a client's documents and to blunt any effort by the plaintiff to imply guilt on the basis of failure to produce, defense counsel should request that the plaintiff's counsel produce any and all of the defendant's documents in the plaintiff's possession.

Plaintiffs' attorneys often respond to defense interrogatories in a general way, indicating that specific answers cannot be provided because discovery has not yet

been completed. These typically vague, non-responsive answers should be challenged with motions to compel, motions for a more definite statement, or other similar motions, in an attempt to make the plaintiff commit to paper the theories on which the punitive damages claim rests.

Motions to compel more complete responses to discovery serve at least two purposes.

First, even assuming that no discovery was undertaken prior to the filing of the lawsuit, the plaintiff's attorney obviously did not file the lawsuit in a vacuum; there is some theory or theories underlying the claim. The plaintiff's attorney should be required to set forth those theories as soon as possible.

A second reason for filing a motion to compel is to determine whether the plaintiff's claim for punitive damages is frivolous. When a complaint has no supporting facts, having the plaintiff admit as much educates the judge to the possibility that the plaintiff has simply embarked on a fishing expedition. In light of this information, some judges will severely limit discovery or cause other problems for the plaintiff's attorney.<sup>43</sup>

## **B. Discovery Addressed to Defendant**

Many successful punitive damages cases are based on incriminating information contained in answers to interrogatories or incriminating documents produced by the defendant. Defense counsel should work closely with the appropriate corporate representatives to ensure that the plaintiff's interrogatories are answered as accurately and carefully as possible. Special care should be taken so as not to volunteer information that has not been specifically requested, and every effort must be made to object to the questions that are vague, ambiguous, overbroad or unduly burdensome.

It cannot be stressed enough how important it is to respond carefully and methodically to a request for documents. Defense counsel must review all the relevant documents in the defendant's possession in order to know all the pertinent information in the documents and be able to pinpoint documents that may have the potential to cause problems.

Every effort should be made to resist broad discovery requests that seek an all-inclusive or exhaustive production of all documents in the defendant's possession. Possible objections are that the documents contain trade secrets, are protected by the attorney-client privilege, or are irrelevant. When required to produce voluminous documents, defense counsel should make every effort to obtain a protective order from the court to prohibit the dissemination of the documents to parties outside the lawsuit.

It is of particular importance in a punitive damages case for defense counsel to ensure that relevant documents are not destroyed or withheld and that production to the plaintiff is complete. The destruction or withholding of key documents can destroy a defendant at trial. If the jury believes the defendant has deliberately destroyed or withheld material documents, the likelihood of a very big hit—runaway compensatory and punitive damages awards—is greatly enhanced.

Extreme care should be exercised to prevent the inadvertent destruction of potentially relevant documents. Defense counsel should promptly advise the client that documents must not be destroyed after the commencement of litigation or firsthand knowledge of the claim. As to materials already disposed of before the beginning of the case, defense counsel must be prepared to demonstrate that the disposal was pursuant to a pre-established corporate document retention and disposal policy. Defense counsel should establish the defendant's corporate document retention system early on and should look for a categorization of documents and retention pe-

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43. See generally for discovery against the plaintiff, Albert H. Parnell, *An Aggressive Defense Against Punitive Damages Claims (Part I)*, FOR THE DEFENSE 18, 20 (Oct. 1987).

riods for each category, as well as the document destruction process and its enforcement and control procedures.<sup>44</sup>

Given that the philosophy of punitive damages is to punish the defendant, the plaintiff's attorney undoubtedly will argue that the jury is entitled to know the extent of the defendant's wealth so that it can decide what penalty is substantial enough to punish the defendant for its bad deeds. To that end, the plaintiff's attorney will use interrogatories or requests for production of documents designed to discover the defendant's financial worth.

Some states have statutes governing the scope of discovery in punitive damages cases. For example, in some jurisdictions, information regarding a defendant's assets may not be sought until the plaintiff has made a prima facie showing that the defendant may be liable for punitive damages.<sup>45</sup> In others, evidence of a defendant's financial worth is not admissible, even though the jury is authorized to award punitive damages.<sup>46</sup> When possible, defense counsel should take advantage of these statutes to limit or defeat requests for financial information.

Depending on the law of the particular jurisdiction, defense counsel should resist discovery of financial information either by obtaining a protective order on the ground that a prima facie case does not exist or deferring the discovery until a case for punitive damages is proved. At the very least, counsel should ask for a protective order to put financial information under seal until the appropriate time.<sup>47</sup>

Usually plaintiffs can discover only information regarding the defendant's net worth, not gross earnings. The rationale for this rule is simple: net worth more accurately establishes the defendant's true financial status, and the defendant may be unduly prejudiced by proof of high gross earnings that do not correctly reflect the actual financial condition. Many courts limit how far back the financial discovery may go, often restricting it to two or three years before the incident being litigated.<sup>48</sup>

In some limited circumstances, evidence of the defendant's financial status may work to the defendant's advantage. A dire financial condition implies an inability to pay a large punitive damages award. If that is the situation, the defendant should consider presenting that evidence at trial in order to contend on appeal that the amount of punitive damages awarded constitutes an undue financial burden.<sup>49</sup>

One final thing should be mentioned regarding the disclosure of financial information. Defense counsel should be very careful when the court has allowed discovery on this issue to make certain that the defendant is completely honest in the financial information provided. If the jury thinks that the defendant has "fudged the numbers," nothing good can happen at trial.<sup>50</sup>

### C. Depositions of Defense Witnesses

The importance of the depositions of the defendant's representatives cannot be overstated. Mistakes and inaccuracies in discovery depositions are unlikely to be overcome, are unlikely to be meaningless, usually cannot be explained away, and will not become less important with time. In addition, conflicts between witnesses that seem largely irrelevant may be extremely significant to the jury.

For these reasons, it is essential that defense counsel meet with the defense witnesses days in advance of their deposition

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44. Michael A. Brown, *Preventing Litigation in Products Liability Cases: Can It Be Done?* 1, 5, in *Corporate Legal Times Conference*, *supra* note 8.

45. *See, e.g.*, CAL. CIV. CODE § 3295; *Rupert v. Sellers*, 368 N.Y.S.2d 904 (App.Div. 4th Dep't 1975).

46. *See, e.g.*, *Smith v. Colorado Interstate Gas Co.*, 794 F.Supp. 1035, 1044 (D. Colo. 1992); *Shane v. Rhines*, 672 P.2d 895 (Alaska 1983); *Fowler v. Mantooth*, 683 S.W.2d 250, 253 (Ky. 1984); *Texas Pub. Util. Corp. v. Edwards*, 358 So.2d 1025 (Ala. 1978).

47. *Kitch*, *supra* note 1, at 16.

48. *Id.*

49. *See, e.g.*, *Motsch v. Pine Roofing Co.*, 533 N.E.2d 1 (Ill.App.1989).

50. *Kitch*, *supra* note 1, at 16.

testimony. Counsel must go over their versions of events so that each has a familiarity with the others' expected testimony and each has some sense of history and perspective regarding the events that are alleged to give rise to the claim for punitive damages. Spending many hours with the defense witnesses has the added advantage of providing defense counsel with a clear understanding of how all of the witnesses interrelate with each other. In addition, proper preparation of defense witnesses probably will highlight testimony that may cause difficulties during cross-examination at trial.<sup>51</sup>

### MOTIONS FOR SUMMARY JUDGMENT

After discovery has been completed and the plaintiff has been pinned down to a certain version of events, defense counsel should consider a motion for summary judgment. If the plaintiff's attorney has resisted particularization of the punitive damages claim, that may be advantageously turned against him. Although in most jurisdictions courts are usually reluctant to grant summary judgment, they often are willing to do so on the issue of punitive damages because such damages traditionally have not been favored by the law.<sup>52</sup> This is especially true when the plaintiff has not articulated a viable theory for recovering punitive damages. Moreover, trial courts are not blind to the fact that often a plaintiff's compensatory damage claim will survive a summary judgment motion, and for that reason they will enter partial summary judgment for the defense on the issue of punitive damages.

51. See generally for defense witness depositions, Parnell, *supra* note 43, at 22.

52. *Gombos v. Ashe*, 322 P.2d 933 (Cal.App. 1958).

53. See Albert H. Parnell, *An Aggressive Defense Against Punitive Damages Claims (Part II)*, FOR THE DEFENSE 25 (Nov. 1987).

54. See generally Jonathan Gross, *Defending "Pattern and Practice" Evidence in Punitive Damages Cases*, 61 DEF. COUNS. J. 403, 405, 406 (July 1994), for this and the following paragraph.

Even if the motion is not successful, the process itself may be beneficial. If nothing else, it forces the plaintiff's attorney to respond and to articulate a cogent theory regarding the punitive damages claim right before trial.

### TRYING PUNITIVE DAMAGES CASES

#### A. Pretrial Motions

##### 1. In Limine

The motion in limine probably is defense counsel's very best tool in confining the scope of inquiry at trial to narrow matters of relevance. One important aspect of the motion is to limit all references or evidence of punitive damages at trial until such time as the plaintiff makes a prima facie showing of entitlement to such relief. This motion should include a request that the plaintiff be restricted in the opening statement from making any reference to or providing a full factual discussion of the issue of punitive damages. Another issue that should be included is a request that any evidence of other misconduct on the part of the defendant, including evidence of other lawsuits, be barred.

In addition, if the judge usually issues a pretrial instruction to the jury regarding punitive damages, defense counsel should consider filing a motion in limine if there is any reasonable basis to ask the judge to delay reference to the punitive damages claim because of its weakness and the likelihood that it might be subject to a motion for a directed verdict.<sup>53</sup>

One of the issues that repeatedly presents itself is the plaintiff's attempt to introduce pattern and practice evidence. Under this theory, the plaintiff will attempt to introduce evidence of other claims against the defendant that, although not necessarily similar to the claim in the instant case, nevertheless bolsters the plaintiff's case that the defendant is a horrendous entity worthy of punitive damages punishment.<sup>54</sup>

Sometimes, in response to specific discovery requests, plaintiffs will not disclose

the identity and nature of the other claims they intend to try to put into evidence at trial. In these cases, defense counsel should use a motion in limine to exclude evidence of other claims as a sanction for discovery abuse or to force the court to establish what the evidence of other activities can and cannot be used to prove at the time of trial.

## 2. Bifurcate or Trifurcate

Another motion that defense counsel should consider is to bifurcate or trifurcate the trial. If the court orders the trial bifurcated, the jury first hears evidence on liability and the amount of actual damages. If the jury finds liability exists for punitive damages, the same jury then hears evidence relevant only to the amount of punitive damages and makes its findings based on the evidence presented during both phases of the bifurcated trial.<sup>55</sup> If the trial is trifurcated, the jury first decides liability, then compensatory damages, and then punitive damages.

Most courts, but not all, have the power to order a bifurcated trial. In fact, at least 13 states now require bifurcation of trials in which punitive damages are sought.<sup>56</sup> Some of these states require bifurcation of the entire punitive damages claim, including liability and amount.<sup>57</sup> In the majority, however, only the amount of punitive damages is bifurcated.

The ability to bifurcate the trial is important because it can block harmful evidence that may not be admissible on issues other than punitive damages. It also promotes efficiency in that if the jury finds for the defendant on the liability question, the punitive aspects of the case need never be tried.

The basis of these motions is that the plaintiff's proof of compensatory damages does not involve evidence of defendant's aggravated conduct or, just as important, wealth. When presenting a motion to bifurcate, defense counsel should argue to the court that trying the punitive damages claim with the compensatory damages

claim would introduce evidence that would unfairly prejudice the defendant in the jury's consideration of the basic liability and compensatory damages issues.

## 3. Advantages

By filing carefully reasoned and judicially supported motions in limine, defense counsel can either narrow the issues at trial or, at the very least, clarify them and gain a more thorough understanding of the plaintiff's trial strategy. Pretrial motions should be designed to make the plaintiff reveal as much as possible about the theory of the claim and the tactics of the attack. An effective pretrial motion strategy also may acquaint the defense team with nuances of the plaintiff's case that ultimately may prove helpful during the trial.

## B. Trial Briefs

If a punitive damages case is tried, a trial brief should be submitted solely on the punitive damages aspect. The trial brief should outline arguments supporting the delay of all statements from the plaintiff's attorney about punitive damages until the necessary evidence has been produced to justify placing the claim before the jury. It also should state the requirements to be fulfilled by the plaintiff before submitting

55. Steven G. Goode, *Defending Against Punitives*, 21 LITIG. 29, 31 (Winter 1995).

56. See, e.g., FED. R. CIV. P. 42(b); ALA. CODE R. 42(b); ALASKA R. CT. 42(b); ARIZ. REV. STAT. R. 42(b); ARK. CODE ANN. R. 42(b); COLO. REV. STAT. R. 42(b); DEL. CODE ANN. R. 42(b); D.C. CODE ANN. § 11-946 (explaining that federal procedural rules govern in District of Columbia); IDAHO CT. R. 42(b); IND. CODE ANN. § 34 APP. R. 42(b); IOWA CODE ANN. R. 186; KAN. STAT. ANN. § 60-242(b); KY. REV. STAT. ANN. R. 42.02; MD. R. CIV. P. 2-503(b); MICH. CT. R. 2.505(b); MONT. CODE ANN. R. 42(b); N.D. CENT. CODE 42(b); OHIO REV. CODE ANN. R. 42(b); R.I. GEN. LAWS R. 42(b); TENN. CODE ANN. R. 42.02; UTAH CT. R. 42(b); VT. STAT. ANN. R. 42(b); W. VA. CODE R. 42(b); WYO. STAT. R. 42(b).

57. They are California, Georgia, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, North Dakota, Ohio, Tennessee, Texas, Utah and Wyoming. Goode, *supra* note 55, at 31.

arguments and before the court instructs the jury on the issue of punitive damages.

### C. Selecting a Jury

It is vitally important that defense counsel conveys to the prospective jurors, from start to finish, that defense counsel is committed to the defendant's cause. Even before the voir dire, counsel should pay special attention to the age, sex, ethnic background, dress and demeanor of each individual. An effort should be made to determine what the prospective jurors are reading and what they are doing with their time while they are waiting. Personal characteristics and interests that make prospective jurors appealing to defense counsel make them good candidates for the jury—or at least the kinds of individuals on whom defense counsel should focus once voir dire begins.<sup>58</sup>

Defense counsel should describe the defendant to the prospective jurors in such a manner that they will not see the defendant as a callous institution and that it acted as a responsible corporation or individual would have in similar circumstances. Special attention should be paid to desensitizing some of the punitive damages issues that the plaintiff will raise during trial, including the extent of the injuries, disabilities, and the claimed amount of loss.

Defense counsel should present the defendant's theory of the case beginning with voir dire. The defense theory, to the extent that the court will permit, should include references to both the facts and the law that support the defendant's version of events.

One of the key issues that should be addressed during voir dire is the burden of

proof. Regardless of the jurisdiction, a juror must be able to follow the court's instructions on the burden of proof. This is especially important if the case is in a jurisdiction where proof of punitive damages requires more than a preponderance of the evidence. Defense counsel must describe the purpose of punitive damages to discover whether prospective jurors can distinguish between compensatory and punitive damages and to determine if they have any preconceived opinions that the plaintiff is entitled to be compensated.

One other consideration should be kept in mind, especially in a products liability action. Defense counsel should make a list of the products made by the defendant that might have been used by the jurors. The names of each of the products should be read to the jury during voir dire, and they should be questioned about their use of these products. Jurors who provide favorable comments or impressions about the defendant's products should be targeted for inclusion on the jury.<sup>59</sup>

Over the years, numerous studies have been performed regarding the types of individuals who are inclined and disinclined to grant punitive damages. Without ignoring their instincts, defense counsel should recognize the types of persons to keep off the jury in a punitive damages case. It has been suggested that individuals who are depressed and underemployed are more likely to award punitive damages.

Some studies suggest that people who have suffered significant personal losses, such as the death of loved ones, job disappointments, divorces or similar situations, are particularly inclined to award punitive damages. In the same category, some studies place people who lack a set of values or who are strongly liberal in their social and political beliefs in the category of persons who are inclined to award punitive damages. Interestingly enough, some also suggest that women are slightly more likely than men to award punitive damages.<sup>60</sup>

In order to impanel a defense jury in a punitive damages case, defense counsel

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58. See generally Steven A. Cozen & Joann Selleck, *Picking a Jury in a Punitive Damages Case*, FOR THE DEFENSE 13-15 (Jan. 1988), for this and the following three paragraphs.

59. Parnell (*Part II*), *supra* note 53, at 26.

60. Walker & Keller, *supra* note 2, at 31; Debra Cassens Moss, *Punitive-Damages Jurors: Study Suggests Selecting Depressed People*, A.B.A. J. 18 (Sept. 1988).

should look for people who have had problems in their lives and have overcome them on their own. Ideal jurors may even express some hesitancy about levying punitive damages on a defendant who either acted reasonably under the circumstances or merely made a mistake. Some commentators have suggested that conservative, well-educated, intelligent or financially well-off persons are less likely to part with the defendant's money.<sup>61</sup>

#### D. Opening Statement

Without a doubt, the opening statement is the most important part of any trial. The jurors are receptive to new information and they are eager to learn the defense position. They want to know if the plaintiff's allegations are true and if the defendant is really as bad as the plaintiff's attorney has led them to believe in the plaintiff's opening statement. They want defense counsel to tell them where the plaintiff is wrong. The jurors must be provided with short, concise, and believable explanations supporting the contention that punitive damages are inappropriate in this case.<sup>62</sup>

#### E. Presenting Evidence

##### 1. Theory of the Defense

Defense counsel must make a special effort to elicit testimony designed to bolster the defendant's theory of the case and to put into play the theory originally formulated when the complaint was filed. Several theories have proven successful in resisting punitive damages claims, particularly in products liability actions.<sup>63</sup> They are:

- There is not really a danger or a defect in the product itself.
- The injury was caused by the plaintiff's assumption of the risk or misuse of the product.
- Even after the course of conduct was set in motion, the plaintiff's personal action could have prevented the occurrence.
- The manufacturer did not know—and could not have known—of the hazard or

defect at the time of manufacture.

- The defendant knew of some danger associated with the use of its product, and through investigation, research and testing, it determined certain safety precautions that were adequately explained to the plaintiff or the user on the label.
- The defendant complied with all state and federal regulations in the manufacture and distribution of the product.
- The activities of the manufacturer were reasonable and all that one would expect based on the knowledge available.
- To the extent that there have been other injuries associated with the use of similar products, the manufacturer's product was somehow different, or the way in which the product was used was different.

##### 2. Personalize Corporate Defendants

Keeping in mind that the plaintiff will seek not only compensation but also punishment of the defendant, defense counsel must have as a primary goal to personalize the corporate defendant—that the “corporation” is a composition of individual people who would be affected by an award of punitive damages against the corporation. As a legal entity, the corporation is incapable of suffering, but an award of punitive damages hurts the employees who depend on the corporation for their livelihood, as well as stockholders, suppliers, charities, and often entire communities that rely on the defendant's continued health.<sup>64</sup>

##### 3. Choose Good Corporate Representatives

One way to personalize the corporate defendant and favorably affect the jury's evaluation of the corporation's integrity is to present knowledgeable and appealing

61. Cozen & Selleck, *supra* note 58, at 16-17.

62. Parnell (*Part II*), *supra* note 53, at 27-28.

63. Alan F. Herman, *Damages: Practical Tips on the Trial of the Issue of Punitive Damages*, DRI Damages Seminar Coursebook, page B-54 (March 1997).

64. Goode, *supra* note 55, at 32.

corporate representatives throughout the course of the trial. "Humanizing" the corporation should start during voir dire, when beside defense counsel there sits the defendant's most appealing representative and who appears to be the very personification of good faith, sincerity, professionalism, honesty and credibility.<sup>65</sup>

The corporate representatives must have sufficient stature within the corporation to signal the defendant's concern with the case. Defense witnesses must be selected carefully based not only on what they know, but on how they will reflect the defendant's interest and integrity.

In a products liability action, the manufacturer's top-level manager must be called to testify and to show concern for the plaintiff and for the product. That person must have some familiarity with the product, be able to describe it and to discuss the concerns that management has for over-all safety, its image, and the consumer. This person has to be an amenable, quick-witted individual who can project an image of trust to the jury and the court, as well as being fully prepared about all aspects of the litigation.

If the litigation involves the adequacy of a warning label, the designer of the label or the official with the responsibility for ensuring that the label was properly drawn must testify. The designer of the label can tell why the label was prepared as it was, how the language was chosen, and what safety factors were considered. Nothing is worse than to have a challenge against the label without any real person stepping up for the defendant to take responsibility for it.<sup>66</sup>

#### **4. Emphasize Reasonableness of Defendant's Conduct**

Defense counsel must affirmatively demonstrate the reasonableness of the

defendant's conduct in light of circumstances as they existed at the relevant time. Especially in products liability cases, it is important to show whether there were prior complaints or accidents, and if so, whether and when the defendant learned of them. If counsel can show that the defendant has a clean record—no citations, no fines, no lawsuits, no licenses suspended or revoked—then counsel can argue that the defendant satisfied society's recognized standards of conduct and should not be punished with punitive damages.<sup>67</sup>

#### **5. Portray Defendant as Honest and Forthright**

It is of paramount importance to persuade the jury that the defendant is making a full and frank disclosure. The slightest hint of deception or cover-up can be fatal. Defense counsel should exude the attitude that the more the jury knows, the better the outcome will be for the defense. Defense witnesses should be adequately prepared before trial to ensure that they will not appear evasive or defensive. If they and defense counsel appear less than forthright, the jury will assume that the defendant's course of conduct was undertaken with the same level of integrity.

#### **6. Point to Culpable Conduct of Plaintiff and Others**

To the extent possible, the defense should shift the jury's attention from the defendant's conduct to the conduct of the plaintiff or others. All of the plaintiff's behavior, including personal habits, domestic disputes, exaggerations, malingering and other types of behavior, must be thoroughly described to the jury. If the plaintiff's actions, as viewed against the jurors' reasonable expectations, suggest that the injury was the plaintiff's own fault, the defense must be ready to assert the theories of contributory negligence or assumption of the risk.<sup>68</sup> Although comparative negligence, misuse, or assumption of the risk may not bar an award of punitive damages as a matter of law, most ju-

65. Cozen & Selleck, *supra* note 58, at 16.

66. Parnell (*Part II*), *supra* note 53, at 30.

67. Goode, *supra* note 55, at 32.

68. Parnell (*Part II*), *supra* note 53, at 28.

ries will sense something fundamentally unfair in punishing a defendant for an injury that would not have occurred but for the plaintiff's own negligence or misuse of the product.

The defense should not lose sight of one of the primary advantages for focusing on the plaintiff's behavior or the behavior of another party, including a co-defendant. Evidence of the plaintiff's fault, or another party's fault, may serve as an effective counter-balance to an allegation of outrageous behavior on the part of the defendant. If defense counsel can plant in the jury's mind the notion that the defendant is not the only party at fault, the threat of a punitive damages award will be greatly reduced.

Defense counsel also should remember that although some experts suggest that the jury must be continually reminded of the plaintiff's fault and greed and the high burden of establishing entitlement to punitive damages, such a frontal attack on the plaintiff may backfire. A caveat worth remembering is the importance of being subtle. Juries are rarely amenable to defendants who try to excuse their behavior solely by attacking others.

### **7. Show Compliance with Applicable Federal and State Standards**

Even in jurisdictions that do not have a presumption under which a defendant who complied with applicable state and federal standards has a complete defense to punitive damages, compliance still should be emphasized. The jury should be made to understand the defendant's concern for the safety of the product, service or other instrumentality that allegedly caused the damages.

The jury also should be reminded of the manufacturer's attempt to build safety into its products by observing specific design criteria. Even if the jury finds that the criteria were inadequate, the defendant's demonstrated concern for the quality of its product or service may preclude an award of punitive damages. Again, defense coun-

sel should avoid presenting the jury with the perception of indifference.

### **8. Introduce Evidence of Subsequent Remedial Measures**

Careful consideration should be given as to whether the client will favor or oppose the introduction of post-accident remedial changes. They may serve as indications of corporate concern for safety and support the argument that no punitive damages are required, because the problem has been remedied voluntarily by the defendant. If, however, such a strategy is chosen, defense counsel should strongly consider moving to bifurcate the punitive damages claim in order to avoid the possibility of an admission of liability as to the compensatory damages claim.

### **9. Justify, Don't Apologize**

In explaining the defendant's conduct, a clear distinction must be made between apology and justification. Apologies during trial offer too little too late. To avoid punitive damages, what must be presented at trial is a clear explanation of the decisions and conduct of the defendant that demonstrate that the conduct, although perhaps faulty, is not deserving of punishment. If the jury does not receive a clear and logical explanation for the events that led to the manufacturer of an allegedly defective product or the provision of an allegedly substandard service, it will assume the worst—that the defendant placed selfish business concerns over concerns for the safety of its product or service.

### **10. Educate the Jury on Punitive Damages**

During the defendant's case, the jury must be reminded of the practical effects of a substantial award of punitive damages. Plaintiffs will highlight the defendant's total assets and net worth, while profits and operating margins of most corporations reflect much smaller values. If punitive damages are to serve a curative

function, the cure should not kill the patient. Moreover, the amount of punishment should bear some rational relationship to the harm caused. If punitive damages have been awarded against the defendant in other suits on account of the same defective product or service, defense counsel should carefully consider whether to bring that fact to the jury's attention in mitigation of the imposition of an additional award.

### F. Directed Verdict

After the close of the plaintiff's case-in-chief, defense counsel should move for a directed verdict on the punitive damages claim. This is the last chance to keep the issue away from the jury. Depending on the jurisdiction's standard of proof, defense counsel may have an increasingly good chance of winning such a motion. Where, for example, the plaintiff must show by clear and convincing evidence that the defendant acted with malice or engaged in wanton, gross or outrageous conduct, trial judges often are receptive to a motion for a directed verdict if the plaintiff has failed to bring out truly damaging evidence that would meet a heightened burden of proof.

### G. Preserving the Record

In the event that defense counsel's motion for a directed verdict is denied, and the jury is charged with addressing the issue of punitive damages, defense counsel must make a concerted effort, before the return of the verdict, to preserve all errors in connection with the punitive damages issues. Counsel must make sure that (1) all appropriate objections have been stated with sufficient particularity for the record; (2) that all necessary offers of proof have been made; and (3) that any exhibits have been properly offered into evidence.

### H. Instructions and Closing Argument

Jury instructions and closing argument offer defense counsel a final opportunity to educate the jury on the very limited legal basis for the imposition of punitive damages. Counsel should emphasize that the terms used in the instructions to describe the conduct warranting punitive damages are precise legal concepts. Those terms—"reckless," "malice," etc.—should be defined and contrasted with mere negligence. The jury must understand that punitive damages are an extraordinary remedy awarded only for truly outrageous conduct.

Defense counsel should use closing argument as the last opportunity to present the defendant's theory of the case. Counsel must be fair and reasonable and should make every effort not to overreach. If a punitive damages award is probable, an outright denial of fault most likely will prove to be counter-productive. In that case and in order to avoid an excessively large punitive damages verdict, counsel should consider providing the jury with specific guidance as to the amount of punitive damages that should be awarded if they are inclined to do so. That may well serve as a way to reign in a potential runaway punitive damages verdict.

### AFTER THE VERDICT

If punitive damages are awarded, defense counsel should undertake further efforts. One study cited by the U.S. Supreme Court in *Honda Motor Co. v. Oberg* found that "over half of punitive damages awards were appealed, and that more than half of those appealed resulted in reductions or reversals of the punitive damages."<sup>69</sup>

### A. Judgment Notwithstanding Verdict

If the jury opts for punitive damages, defense counsel should request that the trial court enter judgment notwithstanding the verdict on the punitive damages claim based on the insufficiency of the evidence presented at trial. This motion may have significant potential where the standard of

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69. 512 U.S. 415 (1994).

proof exceeds the preponderance of the evidence standard. Moreover, the trial court may be more sympathetic to defense arguments once it knows that the plaintiff will be fairly compensated for actual damages.

### **B. Remittitur**

Even if the trial court believes that an award of punitive damages is warranted in some amount, defense counsel may argue successfully for remittitur based on the unreasonable amount of the punitive damages. Remittiturs have been granted recently to reduce punitive damages awards to reasonable levels. Counsel should take care to preserve arguments regarding remittitur for purposes of appeal, as errors with respect to punitive damages are often the focus of review in the appellate courts.

### **CONCLUSION**

Defending a punitive damages claim requires particular care and preparation since most of the evidence used to prove the claim is initially under the control of the

defendant, and the risk of incurring a substantial verdict is ever present. Before responding to discovery, defense counsel should aggressively seek out the facts and formulate a precise defense strategy. During the proceedings, counsel should pursue the issue, continually challenging the basis of the claim and seeking to limit its scope.

At trial, the jury's attention should be directed to the plaintiff's conduct. The defendant corporation's own conduct should be explained accurately within its historical context, without apology. What the jury seeks is a logical explanation for what occurred. They will forgive mistakes in judgment, but they will not forgive—or forget—evasiveness, dishonesty or disinterest by defense witnesses or counsel.

Defense counsel must clearly explain the purpose and legal limits of the punitive damages remedy and demonstrate why punitive damages should not be awarded. To ignore the punitive damages issue, or to fail to draw out the particulars of the defendant's conduct and the applicable law, is to court disaster.