

**Invitation to Comment**

Title	Civil Jury Instructions (CACI) Revisions
Summary	Revisions to punitive damages instructions (CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949) required by the United States Supreme Court decision in <i>Philip Morris USA v. Williams</i> (2007) -- U.S. --, -- [127 S.Ct. 1057; 166 L.Ed.2d 940] (2007 U.S. LEXIS 1332). The same change is proposed for all six instructions.
Source	Advisory Committee on Civil Jury Instructions Hon. H. Walter Croskey, Chair
Staff	Bruce Greenlee, Attorney, 415-865-7698 bruce.greenlee @jud.ca.gov
	Attachment

<p style="text-align: center;"><b>CIVIL JURY INSTRUCTIONS (CACI)</b> <b>SUMMER 2007 REVISIONS—TABLE OF CONTENTS</b></p>
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**DAMAGES SERIES**

3940	Punitive Damages—Individual Defendant—Trial Not Bifurcated.....	<b>1-7</b>
3942	Punitive Damages—Individual Defendant—Bifurcated Trial (Second Phase) .....	<b>8-13</b>
3943	Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated.....	<b>14-21</b>
3945	Punitive Damages—Entity Defendant—Trial Not Bifurcated.....	<b>22-27</b>
3047	Punitive Damages—Individual and Entity Defendants—Trial Not Bifurcated.....	<b>28-35</b>
3949	Punitive Damages—Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual) —Bifurcated Trial (Second Phase).....	<b>36-41</b>

**3940. Punitive Damages—Individual Defendant—Trial Not Bifurcated**

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If you decide that *[name of defendant]*'s conduct caused *[name of plaintiff]* harm, you must decide whether that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.

You may award punitive damages only if *[name of plaintiff]* proves by clear and convincing evidence that *[name of defendant]* engaged in that conduct with malice, oppression, or fraud.

“Malice” means that *[name of defendant]* acted with intent to cause injury or that *[name of defendant]*'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.

“Oppression” means that *[name of defendant]*'s conduct was despicable and subjected *[name of plaintiff]* to cruel and unjust hardship in knowing disregard of *[his/her]* rights.

“Despicable conduct” is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

“Fraud” means that *[name of defendant]* intentionally misrepresented or concealed a material fact and did so intending to harm *[name of plaintiff]*.

There is no fixed standard for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following in determining the amount:

- (a) How reprehensible was *[name of defendant]*'s conduct? In deciding how reprehensible *[name of defendant]*'s conduct was, you may consider, among other factors:
  1. Whether the conduct caused physical harm;
  2. Whether *[name of defendant]* disregarded the health or safety of others;
  3. Whether *[name of plaintiff]* was financially weak or vulnerable and *[name of defendant]* knew *[name of plaintiff]* was financially weak or vulnerable and took advantage of *[him/her/it]*;
  4. Whether *[name of defendant]*'s conduct involved a pattern or practice; and
  5. Whether *[name of defendant]* acted with trickery or deceit.
- (b) Is there a reasonable relationship between the amount of punitive damages and

[*name of plaintiff*]'s harm [or between the amount of punitive damages and potential harm to [*name of plaintiff*] that [*name of defendant*] knew was likely to occur because of [his/her/its] conduct]? [Punitive damages may not be used to punish [*name of defendant*] for the impact of [his/her/its] alleged misconduct on persons other than [*name of plaintiff*].]

- (c) **In view of [*name of defendant*]'s financial condition, what amount is necessary to punish [him/her] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [*name of defendant*] has substantial financial resources. [Any award you impose may not exceed [*name of defendant*]'s ability to pay.]**

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*New September 2003; Revised April 2004, October 2004, December 2005, June 2006, April 2007, August 2007*

### Directions for Use

~~CAUTION: The United States Supreme Court recently held that the Due Process Clause of the U.S. Constitution forbids the award of punitive damages to punish a defendant for injuries caused to nonparties. (*Philip Morris USA v. Williams* (2007) 549 U.S. \_\_\_, \_\_\_ [127 S.Ct. 1057, 166 L.Ed.2d 940] (2007 U.S. LEXIS 1332).) This instruction may need to be revised in light of this holding. The advisory committee will be considering revisions for the next release.~~

This instruction is intended to apply to individual persons only. When the plaintiff is seeking punitive damages against corporate defendants, use CACI No. 3943, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated*, or CACI No. 3945, *Punitive Damages—Entity Defendant—Trial Not Bifurcated*. When plaintiff is seeking punitive damages against both an individual person and a corporate defendant, use CACI No. 3947, *Punitive Damages—Individual and Entity Defendants—Trial Not Bifurcated*.

For an instruction explaining “clear and convincing evidence,” see CACI No. 201, *More Likely True—Clear and Convincing Proof*.

Read the bracketed language ~~in subdivision~~ at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning “potential harm” might be appropriate, for example, ~~where-if~~ damages actually caused by the defendant’s acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate’s recovery of emotional distress damages]), or ~~where-if~~ the harm caused by defendant’s acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra*, 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance

only damaging a pair of glasses]). The bracketed phrase should not be given where an award of compensatory damages is the “true measure” of the harm or potential harm caused by defendant’s wrongful acts. (*Simon, supra*, 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff’s loss of the benefit of the bargain ~~where if~~ the jury had found that there was no binding contract]).

~~Read the optional final sentence of factor (b) if there is a possibility that the jury might consider harm the defendant’s conduct might have caused to nonparties in arriving at an amount of punitive damages. (See *Philip Morris USA v. Williams* (2007) -- U.S. --, -- [127 S.Ct. 1057; 166 L.Ed.2d 940] (2007 U.S. LEXIS 1332).)~~

Read the ~~bracketed language in subdivision~~ optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

“A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.” (*State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 422 [123 S.Ct. 1513, 155 L.Ed.2d 585].) An instruction on this point should be included within this instruction if appropriate to the facts.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word “misrepresentation” is used in the instruction’s definition of “fraud.”

Courts have stated that “[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight.” (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra*, 49 Cal.App.4th at p. 1663, fn. 7.)

~~Regarding the relationship between punitive and compensatory damages, case law suggests that a jury may consider harm that could have been caused by the defendant’s conduct, even if that harm did not come to pass: “The high court in *TXO* [*TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443 [113 S.Ct. 2711, 125 L.Ed.2d 366]] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the potential loss to the plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff.” (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726];~~

~~internal citations omitted.~~

### **Sources and Authority**

- Civil Code section 3294 provides, in part:
  - (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.
  - (b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness 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. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.
  - (c) As used in this section, the following definitions shall apply:
    - (1) “Malice” means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.
    - (2) “Oppression” means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person’s rights.
    - (3) “Fraud” means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.
- “An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant’s conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is ‘but one verdict based upon contract’ a punitive damage award is improper.” (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)
- “The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts.” (*Neal v. Farmers Insurance Exchange* (1978) 21 Cal.3d 910, 928, fn. 13 [148 Cal.Rptr. 389, 582 P.2d 980].)
- “Punitive damages are to be assessed in an amount which, depending upon the defendant’s financial worth and other factors, will deter him and others from committing similar misdeeds. Because

compensatory damages are designed to make the plaintiff ‘whole,’ punitive damages are a ‘windfall’ form of recovery.” (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712 [34 Cal.Rptr2d 898, 882 P.2d 894], internal citations omitted.)

- “It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective.” (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65 [118 Cal.Rptr. 184, 529 P.2d 608].)
- “ ‘A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, in the exercise of its untrammelled discretion, has made the award.’ ” (*Brewer v. Second Baptist Church of Los Angeles* (1948) 32 Cal.2d 791, 801 [197 P.2d 713], internal citation omitted.)
- “In light of our holding that evidence of a defendant’s financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant’s financial condition, such evidence is ‘essential to the claim for relief.’ ” (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)
- “[W]e are afforded guidance by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant’s acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant’s wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter.” (*Neal, supra*, 21 Cal.3d at p. 928, internal citations and footnote omitted.)
- “[T]he Constitution’s Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation.” (*Philip Morris USA v. Williams, supra*, 549 U.S. at p. \_\_\_\_ (2007 U.S. LEXIS 1332, \*13).)
- “Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—

although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.” (*Philip Morris USA v. Williams, supra*, 549 U.S. at p. \_\_\_ (2007 U.S. LEXIS 1332, \*16).)

- “We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.” (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 419, internal citation omitted.)
- “The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant’s conduct, the defendant’s wealth, and the plaintiff’s actual damages.” (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)
- “The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.” (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 427, internal citation omitted.)
- “[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy.” (*Adams, supra*, 54 Cal.3d at p. 112.)
- “[A] punitive damages award is excessive if it is disproportionate to the defendant’s ability to pay.” (*Adams, supra*, 54 Cal.3d at p. 112, internal citations omitted.)
- “It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant’s net worth.” (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)
- “In light of our discussion, we conclude that even where, as here, punitive but not compensatory damages are available to the plaintiff, the defendant is entitled to an instruction that punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff and proved at trial. Consequently, the trial court erred in failing to so instruct the jury.” (*Gagnon, supra*, 211 Cal.App.3d at p. 1605.)
- “Malice, for purposes of awarding exemplary damages, includes ‘despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.’ To establish conscious disregard, the plaintiff must show ‘that the defendant was aware of the probable dangerous consequences of his conduct, and that he wilfully and deliberately failed to avoid those consequences.’ ” (*Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 61 [29 Cal.Rptr.2d 615], internal citations omitted.)



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- “Used in its ordinary sense, the adjective ‘despicable’ is a powerful term that refers to circumstances that are ‘base,’ ‘vile,’ or ‘contemptible.’ As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, ‘malice’ requires more than a ‘willful and conscious’ disregard of the plaintiffs’ interests. The additional component of ‘despicable conduct’ must be found.” (*College Hospital, Inc., supra*, 8 Cal.4th at p. 725, internal citations omitted.)
- “We conclude that the rule ... that an award of exemplary damages must be accompanied by an award of compensatory damages [or its equivalent] is still sound. That rule cannot be deemed satisfied where the jury has made an express determination not to award compensatory damages.” (*Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677 [42 Cal.Rptr.2d 164], footnote omitted.)
- “With the focus on the plaintiff’s injury rather than the amount of compensatory damages, the [“reasonable relation”] rule can be applied even in cases where only equitable relief is obtained or where nominal damages are awarded or, as here, where compensatory damages are unavailable.” (*Gagnon, supra*, 211 Cal.App.3d at p. 1605.)

***Secondary Sources***

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1559, 1562, 1572–1577, 1607–1623

California Tort Damages (Cont.Ed.Bar) Punitive Damages, §§ 14.1–14.12, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, §§ 54.01–54.06, 54.20–54.25 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

3942. Punitive Damages—Individual Defendant—Bifurcated Trial (Second Phase)

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You must now decide the amount, if any, that you should award *[name of plaintiff]* in punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.

There is no fixed standard for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following in determining the amount:

(a) How reprehensible was *[name of defendant]*'s conduct? In deciding how reprehensible *[name of defendant]*'s conduct was, you may consider, among other factors:

1. Whether the conduct caused physical harm;
2. Whether *[name of defendant]* disregarded the health or safety of others;
3. Whether *[name of plaintiff]* was financially weak or vulnerable and *[name of defendant]* knew *[name of plaintiff]* was financially weak or vulnerable and took advantage of *[him/her/it]*;
4. Whether *[name of defendant]*'s conduct involved a pattern or practice; and
5. Whether *[name of defendant]* acted with trickery or deceit.

(b) Is there a reasonable relationship between the amount of punitive damages and *[name of plaintiff]*'s harm [or between the amount of punitive damages and potential harm to *[name of plaintiff]* that *[name of defendant]* knew was likely to occur because of *[his/her/its]* conduct]? [Punitive damages may not be used to punish *[name of defendant]* for the impact of *[his/her/its]* alleged misconduct on persons other than *[name of plaintiff]*.]

(c) In view of *[name of defendant]*'s financial condition, what amount is necessary to punish *[him/her]* and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because *[name of defendant]* has substantial financial resources. [Any award you impose may not exceed *[name of defendant]*'s ability to pay.]

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*New September 2003; Revised April 2004, October 2004, June 2006, April 2007, [August 2007](#)*

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~~(2007 U.S. LEXIS 1332).) This instruction may need to be revised in light of this holding. The advisory committee will be considering revisions for the next release.~~

Read the bracketed language ~~in subdivision~~ at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning “potential harm” might be appropriate, for example, where-if damages actually caused by the defendant’s acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate’s recovery of emotional distress damages]), or where-if the harm caused by defendant’s acts could have been great but by chance only slight harm was inflicted. (*Simon, supra*, 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses]). The bracketed phrase should not be given where-if an award of compensatory damages is the “true measure” of the harm or potential harm caused by defendant’s wrongful acts. (*Simon, supra*, 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff’s loss of the benefit of the bargain where the jury had found that there was no binding contract]).

Read the optional final sentence of factor (b) if there is a possibility that the jury might consider harm the defendant’s conduct might have caused to nonparties in arriving at an amount of punitive damages. (See *Philip Morris USA v. Williams* (2007) -- U.S. --, -- [127 S.Ct. 1057; 166 L.Ed.2d 940] (2007 U.S. LEXIS 1332).)

Read the ~~bracketed language in subdivision~~ optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

“A jury must be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.” (*State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 422 [123 S.Ct. 1513, 155 L.Ed.2d 585].) An instruction on this point should be included within this instruction if appropriate to the facts.

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If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a

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### **Sources and Authority**

- Civil Code section 3294 provides, in part: "In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."
- Civil Code section 3295(d) provides: "The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud."
- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)
- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295." (*City of El Monte, supra*, 29 Cal.App.4th at p. 276, internal citations omitted.)
- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)

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- “The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts.” (*Neal v. Farmers Insurance Exchange* (1978) 21 Cal.3d 910, 928, fn. 13 [148 Cal.Rptr. 389, 582 P.2d 980].)
- “Punitive damages are to be assessed in an amount which, depending upon the defendant’s financial worth and other factors, will deter him and others from committing similar misdeeds. Because compensatory damages are designed to make the plaintiff ‘whole,’ punitive damages are a ‘windfall’ form of recovery.” (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)
- “It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective.” (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65 [118 Cal.Rptr. 184, 529 P.2d 608].)
- “ ‘A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, in the exercise of its untrammelled discretion, has made the award.’ ” (*Brewer v. Second Baptist Church of Los Angeles* (1948) 32 Cal.2d 791, 801 [197 P.2d 713], internal citation omitted.)
- “In light of our holding that evidence of a defendant’s financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant’s financial condition, such evidence is ‘essential to the claim for relief.’ ” (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)
- “[W]e are afforded guidance by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant’s acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant’s wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter.” (*Neal, supra*, 21 Cal.3d at p. 928, internal citations and footnote omitted.)
- “[T]he Constitution’s Due Process Clause forbids a State to use a punitive damages award to punish a

defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation.” (*Philip Morris USA v. Williams, supra*, 549 U.S. at p. -- (2007 U.S. LEXIS 1332, \*13).)

- “Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible— although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.” (*Philip Morris USA v. Williams, supra*, 549 U.S. at p. -- (2007 U.S. LEXIS 1332, \*16).)
- “We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.” (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 419, internal citation omitted.)
- “The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant’s conduct, the defendant’s wealth, and the plaintiff’s actual damages.” (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)
- “The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.” (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 427, internal citation omitted.)
- “[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy.” (*Adams, supra*, 54 Cal.3d at p. 112.)
- “[A] punitive damages award is excessive if it is disproportionate to the defendant’s ability to pay.” (*Adams, supra*, 54 Cal.3d at p. 112, internal citations omitted.)
- “It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant’s net worth.” (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)
- “In light of our discussion, we conclude that even where, as here, punitive but not compensatory damages are available to the plaintiff, the defendant is entitled to an instruction that punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff and proved at trial. Consequently, the trial court erred in failing to so instruct the jury.” (*Gagnon, supra*, 211 Cal.App.3d at p. 1605.)

- “We conclude that the rule . . . that an award of exemplary damages must be accompanied by an award of compensatory damages [or its equivalent] is still sound. That rule cannot be deemed satisfied where the jury has made an express determination not to award compensatory damages.” (*Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677 [42 Cal.Rptr.2d 164], footnote omitted.)
- “With the focus on the plaintiff’s injury rather than the amount of compensatory damages, the [“reasonable relation”] rule can be applied even in cases where only equitable relief is obtained or where nominal damages are awarded or, as here, where compensatory damages are unavailable.” (*Gagnon, supra*, 211 Cal.App.3d at p. 1605.)

***Secondary Sources***

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1559, 1562, 1572–1577, 1607–1623

California Tort Damages (Cont.Ed.Bar) Punitive Damages, §§ 14.1–14.12, 14.37–14.39

4 Levy et al., California Torts, Ch. 54, Punitive Damages, §§ 54.20–54.25, 54.24[4][d] (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, Damages (Matthew Bender)

6 California Points and Authorities, Ch. 65, Damages (Matthew Bender)

**3943. Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated**

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**If you decide [name of employee/agent]’s conduct caused [name of plaintiff] harm, you must decide whether that conduct justifies an award of punitive damages against [name of defendant] for [name of employee/agent]’s conduct. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.**

**You may award punitive damages against [name of defendant] for [name of employee/agent]’s conduct only if [name of plaintiff] proves by clear and convincing evidence that [name of employee/agent] engaged in that conduct with malice, oppression, or fraud.**

**“Malice” means that [name of employee/agent] acted with intent to cause injury, or that [name of employee/agent]’s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.**

**“Oppression” means that [name of employee/agent]’s conduct was despicable and subjected [name of plaintiff] to cruel and unjust hardship in knowing disregard of [his/her] rights.**

**“Despicable conduct” is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.**

**“Fraud” means that [name of employee/agent] intentionally misrepresented or concealed a material fact and did so intending to harm [name of plaintiff].**

**[Name of plaintiff] must also prove [one of] the following by clear and convincing evidence:**

- 1. [That [name of employee/agent] was an officer, a director, or a managing agent of [name of defendant], who was acting on behalf of [name of defendant]; [or]]**
- 2. [That an officer, a director, or a managing agent of [name of defendant] had advance knowledge of the unfitness of [name of employee/agent] and employed [him/her] with a knowing disregard of the rights or safety of others; [or]]**
- 3. [That an officer, a director, or a managing agent of [name of defendant] authorized [name of employee/agent]’s conduct; [or]]**
- 4. [That an officer, a director, or a managing agent of [name of defendant] knew of [name of employee/agent]’s wrongful conduct and adopted or approved the conduct after it occurred.]**

**An employee is a “managing agent” if he or she exercises substantial independent authority and judgment in his or her corporate decision making such that his or her decisions ultimately**



determine corporate policy.

There is no fixed standard for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following in determining the amount:

- (a) **How reprehensible was [name of defendant]’s conduct? In deciding how reprehensible [name of defendant]’s conduct was, you may consider, among other factors:**
- 1. Whether the conduct caused physical harm;**
  - 2. Whether [name of defendant] disregarded the health or safety of others;**
  - 3. Whether [name of plaintiff] was financially weak or vulnerable and [name of defendant] knew [name of plaintiff] was financially weak or vulnerable and took advantage of [him/her/it];**
  - 4. Whether [name of defendant]’s conduct involved a pattern or practice; and**
  - 5. Whether [name of defendant] acted with trickery or deceit.**
- (b) **Is there a reasonable relationship between the amount of punitive damages and [name of plaintiff]’s harm [or between the amount of punitive damages and potential harm to [name of plaintiff] that [name of defendant] knew was likely to occur because of [his/her/its] conduct]? [Punitive damages may not be used to punish [name of defendant] for the impact of [his/her/its] alleged misconduct on persons other than [name of plaintiff].]**
- (c) **In view of [name of defendant]’s financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [name of defendant] has substantial financial resources. [Any award you impose may not exceed [name of defendant]’s ability to pay.]**

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*New September 2003; Revised April 2004, October 2004, December 2005, June 2006, April 2007, [August 2007](#)*

#### **Directions for Use**

~~CAUTION: The United States Supreme Court recently held that the Due Process Clause of the U.S. Constitution forbids the award of punitive damages to punish a defendant for injuries caused to nonparties. (*Philip Morris USA v. Williams* (2007) 549 U.S. \_\_\_, \_\_\_ [127 S.Ct. 1057, 166 L.Ed.2d 940] (2007 U.S. LEXIS 1332).) This instruction may need to be revised in light of this holding. The advisory committee will be considering revisions for the next release.~~

**PRELIMINARY DRAFT ONLY - NOT APPROVED FOR USE BY THE JUDICIAL COUNCIL**

This instruction is intended for use when the plaintiff is seeking to hold only an employer or principal liable for punitive damages based on the conduct of a specific employee or agent. When the plaintiff is seeking punitive damages from both the employer/principal and the employee/agent, use CACI No. 3947, *Punitive Damages—Individual and Entity Defendants—Trial Not Bifurcated*. When punitive damages are sought against a corporation or other entity for the conduct of its directors, officers, and managing agents, use CACI No. 3945, *Punitive Damages—Entity Defendant—Trial Not Bifurcated*.

For an instruction explaining “clear and convincing evidence,” see CACI No. 201, *More Likely True—Clear and Convincing Proof*.

Read the bracketed language ~~in subdivision~~ at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning “potential harm” might be appropriate, for example, ~~where-if~~ damages actually caused by the defendant’s acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate’s recovery of emotional distress damages]), or ~~where-if~~ the harm caused by defendant’s acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra*, 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses]). The bracketed phrase should not be given ~~where-if~~ an award of compensatory damages is the “true measure” of the harm or potential harm caused by defendant’s wrongful acts. (*Simon, supra*, 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff’s loss of the benefit of the bargain where the jury had found that there was no binding contract]).

Read the optional final sentence of factor (b) if there is a possibility that the jury might consider harm the defendant’s conduct might have caused to nonparties in arriving at an amount of punitive damages. (See *Philip Morris USA v. Williams* (2007) -- U.S. --, -- [127 S.Ct. 1057; 166 L.Ed.2d 940] (2007 U.S. LEXIS 1332).)

Read the ~~bracketed language in subdivision~~ optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

“A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.” (*State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 422 [123 S.Ct. 1513, 155 L.Ed.2d 585].) An instruction on this point should be included within this instruction if appropriate to the facts.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word “misrepresentation” is used in the instruction’s

definition of “fraud.”

See CACI No. 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated* for additional sources and authority.

Courts have stated that “[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight.” (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra*, 49 Cal.App.4th at p. 1663, fn. 7.)

~~Regarding the relationship between punitive and compensatory damages, case law suggests that a jury may consider harm that could have been caused by the defendant’s conduct, even if that harm did not come to pass: “The high court in *TXO [TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443 [113 S.Ct. 2711, 125 L.Ed.2d 366]] and *BMW [BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the potential loss to the plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff.” (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726]; internal citations omitted.)~~

### **Sources and Authority**

- Civil Code section 3294 provides, in part:
  - (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.
  - (b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness 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. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an

officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

- (1) “Malice” means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.
- (2) “Oppression” means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person’s rights.
- (3) “Fraud” means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

- “[E]vidence of ratification of [agent’s] actions by Hamilton, and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence.” (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)
- “Subdivision (b) is not a model of clarity, but in light of California’s history of employer liability for punitive damages and of the Legislature’s reasons for enacting subdivision (b), we have no doubt that it does no more than codify and refine existing law. Subdivision (b) thus authorizes the imposition of punitive damages on an employer in three situations: (1) when an employee was guilty of oppression, fraud or malice, and the employer with advance knowledge of the unfitness of the employee employed him or her with a conscious disregard of the rights or safety of others, (2) when an employee was guilty of oppression, fraud or malice, and the employer authorized or ratified the wrongful conduct, or (3) when the employer was itself guilty of the oppression, fraud or malice.” (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1151 [74 Cal.Rptr.2d 510].)
- “ ‘California has traditionally allowed punitive damages to be assessed against an employer (or principal) for the acts of an employee (or agent) only where the circumstances indicate that the employer himself was guilty of fraud, oppression, or malice. Thus, even before section 3294, subdivision (b) was added to the Civil Code in 1980, the courts required evidence that the employer authorized or ratified a malicious act, personally committed such an act, or wrongfully hired or retained an unfit employee.’ The ‘additional’ burden on a plaintiff seeking punitive damages from an employer is to show not only that an employee acted with oppression, fraud or malice, but that the employer engaged in conduct defined in subdivision (b).” (*Weeks, supra*, 63 Cal.App.4th at p. 1154, internal citation omitted.)
- “Civil Code section 3294, subdivision (b) does not authorize an award of punitive damages against an employer for the employee’s wrongful conduct. It authorizes an award of punitive damages against an employer for the employer’s own wrongful conduct. Liability under subdivision (b) is vicarious only to the extent that the employer is liable for the actions of its officer, director or managing agent in hiring or controlling the offending employee, in ratifying the offense or in acting with oppression,

fraud or malice. It is not vicarious in the sense that the employer is liable for the wrongful conduct of the offending employee.” (*Weeks, supra*, 63 Cal.App.4th at pp. 1154–1155.)

- “An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant’s conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is ‘but one verdict based upon contract’ a punitive damage award is improper.” (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)
- “We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.” (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 419, internal citation omitted.)
- “[T]he Constitution’s Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation.” (*Philip Morris USA v. Williams, supra*, 549 U.S. at p. \_\_\_ (2007 U.S. LEXIS 1332, \*13).)
- “Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible -- although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties. ” (*Philip Morris USA v. Williams, supra*, 549 U.S. at p. --\_\_\_ (2007 U.S. LEXIS 1332, \*16).)
- “[P]unitive damages are not assessed against employers on a pure respondeat superior basis. Some evidence of fault by the employer itself is also required.” (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 724, fn. 11 [34 Cal.Rptr.2d 898, 882 P.2d 894].)
- “Subdivision (b) ... governs awards of punitive damages against employers, and permits an award for the conduct described there without an additional finding that the employer engaged in oppression, fraud or malice.” (*Weeks, supra*, 63 Cal.App.4th at p. 1137.)
- “Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an ‘officer, director, or managing agent.’ ” (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944].)
- “[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the

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organization's representative, not in some other capacity." (*College Hospital, Inc.*, *supra*, 8 Cal.4th at p. 723.)

- The concept of “managing agent” “assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred.” (*College Hospital, Inc.*, *supra*, 8 Cal.4th at p. 723.)
- “No purpose would be served by punishing the employer for an employee’s conduct that is wholly unrelated to its business or to the employee’s duties therein.” (*College Hospital, Inc.*, *supra*, 8 Cal.4th at pp. 723–724.)
- “ ‘The determination whether employees act in a managerial capacity [i.e., are managing agents] does not necessarily hinge on their “level” in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy.’ ” (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 421 [27 Cal.Rptr.2d 457], internal citation omitted.)
- “[W]e conclude the Legislature intended the term ‘managing agent’ to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee’s discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis.” (*White*, *supra*, 21 Cal.4th at pp. 566–567.)
- “In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation’s business.” (*White*, *supra*, 21 Cal.4th at p. 577.)
- “ ‘[C]orporate policy’ is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A ‘managing agent’ is one with substantial authority over decisions that set these general principles and rules.” (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)
- “[R]atification’ is the ‘[c]onfirmation and acceptance of a previous act.’ A corporation cannot confirm and accept that which it does not actually know about.” (*Cruz*, *supra*, 83 Cal.App.4th at p. 168, internal citations omitted.)
- “For purposes of determining an employer’s liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties.” (*College Hospital, Inc.*, *supra*, 8 Cal.4th at p. 726.)
- “Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature.” (*College Hospital, Inc.*, *supra*, 8 Cal.4th at p. 726.)

**Secondary Sources**

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1581–1585

California Tort Damages (Cont.Ed.Bar) Punitive Damages, §§ 14.1–14.12, 14.20–14.23, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, § 54.07 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

**3945. Punitive Damages—Entity Defendant—Trial Not Bifurcated**

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**If you decide that [name of defendant]’s conduct caused [name of plaintiff] harm, you must decide whether that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.**

**You may award punitive damages against [name of defendant] only if [name of plaintiff] proves that [name of defendant] engaged in that conduct with malice, oppression, or fraud. To do this, [name of plaintiff] must prove [one of] the following by clear and convincing evidence:**

- 1. [That the conduct constituting malice, oppression, or fraud was committed by one or more officers, directors, or managing agents of [name of defendant], who acted on behalf of [name of defendant]; [or]]**
- 2. [That the conduct constituting malice, oppression, or fraud was authorized by one or more officers, directors, or managing agents of [name of defendant]; [or]]**
- 3. [That one or more officers, directors, or managing agents of [name of defendant] knew of the conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.]**

**“Malice” means that [name of defendant] acted with intent to cause injury or that [name of defendant]’s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.**

**“Oppression” means that [name of defendant]’s conduct was despicable and subjected [name of plaintiff] to cruel and unjust hardship in knowing disregard of [his/her] rights.**

**“Despicable conduct” is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.**

**“Fraud” means that [name of defendant] intentionally misrepresented or concealed a material fact and did so intending to harm [name of plaintiff].**

**An employee is a “managing agent” if he or she exercises substantial independent authority and judgment in his or her corporate decision making such that his or her decisions ultimately determine corporate policy.**

**There is no fixed standard for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following in determining the amount:**



- (a) **How reprehensible was [name of defendant]’s conduct? In deciding how reprehensible [name of defendant]’s conduct was, you may consider, among other factors:**
- 1. Whether the conduct caused physical harm;**
  - 2. Whether [name of defendant] disregarded the health or safety of others;**
  - 3. Whether [name of plaintiff] was financially weak or vulnerable and [name of defendant] knew [name of plaintiff] was financially weak or vulnerable and took advantage of [him/her/it];**
  - 4. Whether [name of defendant]’s conduct involved a pattern or practice; and**
  - 5. Whether [name of defendant] acted with trickery or deceit.**
- (b) **Is there a reasonable relationship between the amount of punitive damages and [name of plaintiff]’s harm [or between the amount of punitive damages and potential harm to [name of plaintiff] that [name of defendant] knew was likely to occur because of [his/her/its] conduct]? [Punitive damages may not be used to punish [name of defendant] for the impact of [his/her/its] alleged misconduct on persons other than [name of plaintiff].]**
- (c) **In view of [name of defendant]’s financial condition, what amount is necessary to punish it and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [name of defendant] has substantial financial resources. [Any award you impose may not exceed [name of defendant]’s ability to pay.]**
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*New September 2004; Revised April 2004, June 2004, December 2005, June 2006, April 2007, August 2007*

#### Directions for Use

~~CAUTION: The United States Supreme Court recently held that the Due Process Clause of the U.S. Constitution forbids the award of punitive damages to punish a defendant for injuries caused to nonparties. (*Philip Morris USA v. Williams* (2007) 549 U.S. \_\_\_, \_\_\_ [127 S.Ct. 1057, 166 L.Ed.2d 940] (2007 U.S. LEXIS 1332).) This instruction may need to be revised in light of this holding. The advisory committee will be considering revisions for the next release.~~

This instruction is intended for use when the plaintiff is seeking punitive damages against a corporation or other entity for the conduct of its directors, officers, and managing agents. When the plaintiff seeks to hold an employer or principal liable for the conduct of a specific employee or agent, use CACI No. 3943, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated*. When the plaintiff is seeking punitive damages from both the employer/principal and the employee/agent, use CACI No. 3947, *Punitive Damages—Individual and Entity Defendants—Trial not*

*Bifurcated.*

For an instruction explaining “clear and convincing evidence,” see CACI No. 201, *More Likely True—Clear and Convincing Proof*.

Read the bracketed language ~~in subdivision~~ at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning “potential harm” might be appropriate, for example, ~~where-if~~ damages actually caused by the defendant’s acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate’s recovery of emotional distress damages]), or ~~where-if~~ the harm caused by defendant’s acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra*, 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses]). The bracketed phrase should not be given ~~where-if~~ an award of compensatory damages is the “true measure” of the harm or potential harm caused by defendant’s wrongful acts. (*Simon, supra*, 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff’s loss of the benefit of the bargain where the jury had found that there was no binding contract]).

Read the optional final sentence of factor (b) if there is a possibility that the jury might consider harm the defendant’s conduct might have caused to nonparties in arriving at an amount of punitive damages. (See *Philip Morris USA v. Williams* (2007) -- U.S. --, -- [127 S.Ct. 1057; 166 L.Ed.2d 940] (2007 U.S. LEXIS 1332).)

Read the ~~bracketed language in subdivision~~ optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

See CACI No. 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated*, for additional sources and authority.

“A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.” (*State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 422 [123 S.Ct. 1513, 155 L.Ed.2d 585].) An instruction on this point should be included within this instruction if appropriate to the facts.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word “misrepresentation” is used in the instruction’s definition of “fraud.”

Courts have stated that “[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight.” (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525].) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra*, 49 Cal.App.4th at p. 1663, fn. 7.)

~~Regarding the relationship between punitive and compensatory damages, case law suggests that a jury may consider harm that could have been caused by the defendant’s conduct, even if that harm did not come to pass: “The high court in *TXO* [*TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443 [113 S.Ct. 2711, 125 L.Ed.2d 366]] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the potential loss to the plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff.” (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], internal citations omitted.)~~

### **Sources and Authority**

- Civil Code section 3294 provides, in part:
  - (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.
  - (b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness 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. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.
  - (c) As used in this section, the following definitions shall apply:
    - (1) “Malice” means conduct which is intended by the defendant to cause injury to the

plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

- (2) “Oppression” means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person’s rights.
- (3) “Fraud” means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

- “Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an ‘officer, director, or managing agent.’ ” (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944].)
- “[E]vidence of ratification of [agent’s] actions by Hamilton, and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence.” (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)
- “An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant’s conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is ‘but one verdict based upon contract’ a punitive damage award is improper.” (*Myers Building Industries v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)
- “We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.” (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 419, internal citation omitted.)
- “[T]he Constitution’s Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation.” (*Philip Morris USA v. Williams, supra*, 549 U.S. at p. \_\_\_\_ (2007 U.S. LEXIS 1332, \*13).)
- “Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury

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may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.” (*Philip Morris USA v. Williams, supra*, 549 U.S. at p. \_\_\_ (2007 U.S. LEXIS 1332, \*16).)

- “[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization’s representative, not in some other capacity.” (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 723 [34 Cal.Rptr.2d 898, 882 P.2d 894].)
- “[T]he concept [of managing agent] assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred.” (*College Hospital, Inc., supra*, 8 Cal.4th at p. 723.)
- “No purpose would be served by punishing the employer for an employee’s conduct that is wholly unrelated to its business or to the employee’s duties therein.” (*College Hospital, Inc., supra*, 8 Cal.4th at pp. 723–724.)
- “ ‘The determination whether employees act in a managerial capacity [i.e., are managing agents] does not necessarily hinge on their “level” in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy.’ ” (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 421 [27 Cal.Rptr.2d 457], internal citation omitted.)
- “[W]e conclude the Legislature intended the term ‘managing agent’ to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee’s discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis.” (*White, supra*, 21 Cal.4th at pp. 566–567.)

**Secondary Sources**

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1581–1585

California Tort Damages (Cont.Ed.Bar) Punitive Damages, §§ 14.1–14.12, 14.18–14.31, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, § 54.07 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

**3947. Punitive Damages—Individual and Entity Defendants—Trial Not Bifurcated**

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**If you decide that [name of individual defendant]’s or [name of entity defendant]’s conduct caused [name of plaintiff] harm, you must decide whether that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.**

**You may award punitive damages against [name of individual defendant] only if [name of plaintiff] proves by clear and convincing evidence that [name of individual defendant] engaged in that conduct with malice, oppression, or fraud.**

**You may award punitive damages against [name of entity defendant] only if [name of plaintiff] proves that [name of entity defendant] acted with malice, oppression, or fraud. To do this, [name of plaintiff] must prove [one of] the following by clear and convincing evidence:**

- 1. [That the malice, oppression, or fraud was conduct of one or more officers, directors, or managing agents of [name of entity defendant], who acted on behalf of [name of entity defendant]; [or]]**
- 2. [That an officer, a director, or a managing agent of [name of entity defendant] had advance knowledge of the unfitness of [name of individual defendant] and employed [him/her] with a knowing disregard of the rights or safety of others; [or]]**
- 3. [That the conduct constituting malice, oppression, or fraud was authorized by one or more officers, directors, or managing agents of [name of entity defendant]; [or]]**
- 4. [That one or more officers, directors, or managing agents of [name of entity defendant] knew of the conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.]**

**“Malice” means that a defendant acted with intent to cause injury or that a defendant’s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A defendant acts with knowing disregard when the defendant is aware of the probable dangerous consequences of his, her, or its conduct and deliberately fails to avoid those consequences.**

**“Oppression” means that a defendant’s conduct was despicable and subjected [name of plaintiff] to cruel and unjust hardship in knowing disregard of [his/her] rights.**

**“Despicable conduct” is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.**

**“Fraud” means that a defendant intentionally misrepresented or concealed a material fact and did so intending to harm [name of plaintiff].**

An employee is a “managing agent” if he or she exercises substantial independent authority and judgment in his or her corporate decision making such that his or her decisions ultimately determine corporate policy.

There is no fixed standard for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following separately for each defendant in determining the amount:

- (a) **How reprehensible was that defendant’s conduct? In deciding how reprehensible a defendant’s conduct was, you may consider, among other factors:**
  - 1. Whether the conduct caused physical harm;
  - 2. Whether the defendant disregarded the health or safety of others;
  - 3. Whether [name of plaintiff] was financially weak or vulnerable and the defendant knew [name of plaintiff] was financially weak or vulnerable and took advantage of [him/her/it];
  - 4. Whether the defendant’s conduct involved a pattern or practice; and
  - 5. Whether the defendant acted with trickery or deceit.
- (b) **Is there a reasonable relationship between the amount of punitive damages and [name of plaintiff]’s harm [or between the amount of punitive damages and potential harm to [name of plaintiff] that [name of defendant] knew was likely to occur because of [his/her/its] conduct]? [Punitive damages may not be used to punish [name of defendant] for the impact of [his/her/its] alleged misconduct on persons other than [name of plaintiff].]**
- (c) **In view of that defendant’s financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because a defendant has substantial financial resources. [Any award you impose may not exceed that defendant’s ability to pay.]**

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*New September 2003; Revised April 2004, October 2004, December 2005, June 2006, April 2007, August 2007*

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This instruction is intended to apply to cases ~~where~~if punitive damages are sought against both an individual person and a corporate defendant. When punitive damages are sought only against corporate defendants, use CACI No. 3943, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated* or CACI No. 3945, *Punitive Damages—Entity Defendant—Trial Not Bifurcated*. When punitive damages are sought against an individual defendant, use CACI No. 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated*.

For an instruction explaining “clear and convincing evidence,” see CACI No. 201, *More Likely True—Clear and Convincing Proof*.

Read the bracketed language ~~in subdivision~~at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning “potential harm” might be appropriate, for example, ~~where~~if damages actually caused by the defendant’s acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate’s recovery of emotional distress damages]), or ~~where~~if the harm caused by defendant’s acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra*, 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses]). The bracketed phrase should not be given ~~where~~if an award of compensatory damages is the “true measure” of the harm or potential harm caused by defendant’s wrongful acts. (*Simon, supra*, 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff’s loss of the benefit of the bargain where the jury had found that there was no binding contract]).

Read the optional final sentence of factor (b) if there is a possibility that the jury might consider harm the defendant’s conduct might have caused to nonparties in arriving at an amount of punitive damages. (See *Philip Morris USA v. Williams* (2007) -- U.S. --, -- [127 S.Ct. 1057; 166 L.Ed.2d 940] (2007 U.S. LEXIS 1332).)

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### **Sources and Authority**

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  - (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.
  - (b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness 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. With respect to a corporate employer, the advance knowledge and conscious disregard,

authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

- (1) “Malice” means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.
- (2) “Oppression” means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person’s rights.
- (3) “Fraud” means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

- “[E]vidence of ratification of [agent’s] actions by Hamilton, and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence.” (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)
- “Subdivision (b) is not a model of clarity, but in light of California’s history of employer liability for punitive damages and of the Legislature’s reasons for enacting subdivision (b), we have no doubt that it does no more than codify and refine existing law. Subdivision (b) thus authorizes the imposition of punitive damages on an employer in three situations: (1) when an employee was guilty of oppression, fraud or malice, and the employer with advance knowledge of the unfitness of the employee employed him or her with a conscious disregard of the rights or safety of others, (2) when an employee was guilty of oppression, fraud or malice, and the employer authorized or ratified the wrongful conduct, or (3) when the employer was itself guilty of the oppression, fraud or malice.” (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1151 [74 Cal.Rptr.2d 510].)
- “California has traditionally allowed punitive damages to be assessed against an employer (or principal) for the acts of an employee (or agent) only where the circumstances indicate that the employer himself was guilty of fraud, oppression, or malice. Thus, even before section 3294, subdivision (b) was added to the Civil Code in 1980, the courts required evidence that the employer authorized or ratified a malicious act, personally committed such an act, or wrongfully hired or retained an unfit employee.’ The ‘additional’ burden on a plaintiff seeking punitive damages from an employer is to show not only that an employee acted with oppression, fraud or malice, but that the employer engaged in conduct defined in subdivision (b).” (*Weeks, supra*, 63 Cal.App.4th at p. 1154, internal citation omitted.)
- “Civil Code section 3294, subdivision (b) does not authorize an award of punitive damages against an employer for the employee’s wrongful conduct. It authorizes an award of punitive damages against an employer for the employer’s own wrongful conduct. Liability under subdivision (b) is vicarious only to the extent that the employer is liable for the actions of its officer, director or managing agent in

hiring or controlling the offending employee, in ratifying the offense or in acting with oppression, fraud or malice. It is not vicarious in the sense that the employer is liable for the wrongful conduct of the offending employee.” (*Weeks, supra*, 63 Cal.App.4th at pp. 1154–1155.)

- “We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.” (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 419, internal citation omitted.)
- “[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation.” (*Philip Morris USA v. Williams, supra*, 549 U.S. at p. \_\_\_ (2007 U.S. LEXIS 1332, \*13).)
- “Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible— although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties. ” (*Philip Morris USA v. Williams, supra*, 549 U.S. at p. \_\_\_ (2007 U.S. LEXIS 1332, \*16).)
- “An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant’s conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is ‘but one verdict based upon contract’ a punitive damage award is improper.” (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)
- “[P]unitive damages are not assessed against employers on a pure respondeat superior basis. Some evidence of fault by the employer itself is also required.” (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 724, fn. 11 [34 Cal.Rptr.2d 898, 882 P.2d 894].)
- “Subdivision (b) ... governs awards of punitive damages against employers, and permits an award for the conduct described there without an additional finding that the employer engaged in oppression, fraud or malice.” (*Weeks, supra*, 63 Cal.App.4th at p. 1137.)
- “Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an ‘officer, director, or managing agent.’” (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944].)

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- “[T]he concept [of managing agent] assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred.” (*College Hospital, Inc.*, *supra*, 8 Cal.4th at p. 723.)
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- “[W]e conclude the Legislature intended the term ‘managing agent’ to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee’s discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis.” (*White, supra*, 21 Cal.4th at pp. 566–567.)
- “In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation’s business.” (*White, supra*, 21 Cal.4th at p. 577.)
- “[C]orporate policy’ is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A ‘managing agent’ is one with substantial authority over decisions that set these general principles and rules.” (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)
- “[R]atification’ is the ‘[c]onfirmation and acceptance of a previous act.’ A corporation cannot confirm and accept that which it does not actually know about.” (*Cruz, supra*, 83 Cal.App.4th at p. 168.)
- “For purposes of determining an employer’s liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties.” (*College Hospital, Inc.*, *supra*, 8 Cal.4th at p. 726.)
- “Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature.” (*College Hospital, Inc.*, *supra*, 8 Cal.4th at p. 726.)

***Secondary Sources***

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1581–1585

California Tort Damages (Cont.Ed.Bar) Punitive Damages, §§ 14.1–14.12, 14.18–14.31, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, § 54.07 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

3949. Punitive Damages—Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)—Bifurcated Trial (Second Phase)

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You must now decide the amount, if any, that you should award *[name of plaintiff]* in punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.

There is no fixed standard for determining the amount of punitive damages and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following separately for each defendant in determining the amount:

- (a) How reprehensible was that defendant's conduct? In deciding how reprehensible a defendant's conduct was, you may consider, among other factors:
    1. Whether the conduct caused physical harm;
    2. Whether the defendant disregarded the health or safety of others;
    3. Whether *[name of plaintiff]* was financially weak or vulnerable and the defendant knew *[name of plaintiff]* was financially weak or vulnerable and took advantage of *[him/her/it]*;
    4. Whether the defendant's conduct involved a pattern or practice; and
    5. Whether the defendant acted with trickery or deceit.
  - (b) Is there a reasonable relationship between the amount of punitive damages and *[name of plaintiff]*'s harm [or between the amount of punitive damages and potential harm **to *[name of plaintiff]*** that *[name of defendant]* knew was likely to occur because of *[his/her/its]* conduct]? **[Punitive damages may not be used to punish *[name of defendant]* for the impact of *[his/her/its]* alleged misconduct on persons other than *[name of plaintiff]*.]**
  - (c) In view of that defendant's financial condition, what amount is necessary to punish *[him/her/it]* and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because a defendant has substantial financial resources. [Any award you impose may not exceed that defendant's ability to pay.]
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*New September 2003; Revised April 2004, October 2004, June 2006, April 2007, August 2007*

**Directions for Use**

**~~CAUTION: The United States Supreme Court recently held that the Due Process Clause of the U.S.~~**

~~Constitution forbids the award of punitive damages to punish a defendant for injuries caused to nonparties. (*Philip Morris USA v. Williams* (2007) 549 U.S. \_\_\_, \_\_\_ [127 S.Ct. 1057, 166 L.Ed.2d 940] (2007 U.S. LEXIS 1332).) This instruction may need to be revised in light of this holding. The advisory committee will be considering revisions for the next release.~~

Read the bracketed language ~~in subdivision~~ at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning “potential harm” might be appropriate, for example, ~~where-if~~ damages actually caused by the defendant’s acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate’s recovery of emotional distress damages]), or ~~where-if~~ the harm caused by defendant’s acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra*, 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses]). The bracketed phrase should not be given ~~where-if~~ an award of compensatory damages is the “true measure” of the harm or potential harm caused by defendant’s wrongful acts. (*Simon, supra*, 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff’s loss of the benefit of the bargain where the jury had found that there was no binding contract]).

Read the optional final sentence of factor (b) if there is a possibility that the jury might consider harm the defendant’s conduct might have caused to nonparties in arriving at an amount of punitive damages. (See *Philip Morris USA v. Williams* (2007) -- U.S. --, -- [127 S.Ct. 1057; 166 L.Ed.2d 940] (2007 U.S. LEXIS 1332).)

Read the ~~bracketed language in subdivision~~ optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

“A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.” (*State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 422 [123 S.Ct. 1513, 155 L.Ed.2d 585].) An instruction on this point should be included within this instruction if appropriate to the facts.

Courts have stated that “[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight.” (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the

defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra*, 49 Cal.App.4th at p. 1663, fn. 7.)

~~Regarding the relationship between punitive and compensatory damages, case law suggests that a jury may consider harm that could have been caused by the defendant's conduct, even if that harm did not come to pass: "The high court in *TXO* [*TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443 [113 S.Ct. 2711, 125 L.Ed.2d 366]] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the potential loss to the plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], internal citations omitted.)~~

### **Sources and Authority**

- Civil Code section 3294 provides, in part: "In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."
- Civil Code section 3295(d) provides: "The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud."
- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)
- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295." (*City of El Monte, supra*, 29 Cal.App.4th at p. 276, internal citations omitted.)
- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)



- “The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts.” (*Neal v. Farmers Insurance Exchange* (1978) 21 Cal.3d 910, 928, fn. 13 [148 Cal.Rptr. 389, 582 P.2d 980].)
- “Punitive damages are to be assessed in an amount which, depending upon the defendant’s financial worth and other factors, will deter him and others from committing similar misdeeds. Because compensatory damages are designed to make the plaintiff ‘whole,’ punitive damages are a ‘windfall’ form of recovery.” (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)
- “It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective.” (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65 [118 Cal.Rptr. 184, 529 P.2d 608].)
- “ ‘A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, in the exercise of its untrammelled discretion, has made the award.’ ” (*Brewer v. Second Baptist Church of Los Angeles* (1948) 32 Cal.2d 791, 801 [197 P.2d 713], internal citations omitted.)
- “In light of our holding that evidence of a defendant’s financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant’s financial condition, such evidence is ‘essential to the claim for relief.’ ” (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)
- “[W]e are afforded guidance by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant’s acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant’s wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter.” (*Neal, supra*, 21 Cal.3d at p. 928, internal citations and footnote omitted.)
- “[T]he Constitution’s Due Process Clause forbids a State to use a punitive damages award to punish a

defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation.” (*Philip Morris USA v. Williams, supra*, 549 U.S. at p. \_\_\_ (2007 U.S. LEXIS 1332, \*13).)

- “Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.” (*Philip Morris USA v. Williams, supra*, 549 U.S. at p. \_\_\_ (2007 U.S. LEXIS 1332, \*16).)
- “We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.” (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 419, internal citation omitted.)
- “The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant’s conduct, the defendant’s wealth, and the plaintiff’s actual damages.” (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)
- “The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.” (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 427, internal citation omitted.)
- “[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy.” (*Adams, supra*, 54 Cal.3d at p. 112.)
- “[A] punitive damages award is excessive if it is disproportionate to the defendant’s ability to pay.” (*Adams, supra*, 54 Cal.3d at p. 112, internal citations omitted.)
- “It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant’s net worth.” (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)
- “In light of our discussion, we conclude that even where, as here, punitive but not compensatory damages are available to the plaintiff, the defendant is entitled to an instruction that punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff and proved at trial. Consequently, the trial court erred in failing to so instruct the jury.” (*Gagnon, supra*, 211 Cal.App.3d at p. 1605.)
- “We conclude that the rule ... that an award of exemplary damages must be accompanied by an award

of compensatory damages [or its equivalent] is still sound. That rule cannot be deemed satisfied where the jury has made an express determination not to award compensatory damages.” (*Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677 [42 Cal.Rptr.2d 164], footnote omitted.)

- “With the focus on the plaintiff’s injury rather than the amount of compensatory damages, the [“reasonable relation”] rule can be applied even in cases where only equitable relief is obtained or where nominal damages are awarded or, as here, where compensatory damages are unavailable.” (*Gagnon, supra*, 211 Cal.App.3d at p. 1605.)

***Secondary Sources***

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1581–1585

California Tort Damages (Cont.Ed.Bar) Punitive Damages, §§ 14.1–14.12, 14.21, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, §§ 54.07, 54.24[4][d] (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

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