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**PUNITIVE DAMAGES: PHASE TWO
STRATEGIC CONSIDERATIONS FOR
PLAINTIFF'S AND DEFENDANT'S CASES
IN THE PUNITIVE DAMAGES PHASE**

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I. SCOPE OF ARTICLE

This article focuses on strategic considerations for Plaintiffs and Defendants in handling cases in which an award of punitive damages is possible. The article will address relevant Texas case law and portions of the Texas Civil Practice and Remedies Code, as necessary, to fully develop the discussion.

II. PUNITIVE DAMAGES—AN OVERVIEW

Punitive damage awards are now governed by the Texas Civil Practice and Remedies Code section 41.001, *et. seq.* These provisions of the Texas Civil Practice and Remedies Code govern any action in which a Plaintiff seeks punitive damages, and establishes the maximum amount of punitive damages that may be awarded, even if the claim is brought under the law of another state. TEX. CIV. PRAC. & REM. CODE § 41.002(b); 41.008. However, if another Texas law establishes a lower maximum amount for a punitive damage award, the other provision will prevail. TEX. CIV. PRAC. & REM. CODE § 41.002(b).

A. Standard for Recovery

Generally, in order to recover punitive damages, the Plaintiff must demonstrate that the harm suffered was a result of fraud, malice or willful act or omission or gross neglect in wrongful death actions. TEX. CIV. PRAC. & REM. CODE § 41.003(a). A Plaintiff may also rely on a statutory basis for an award of punitive damages, such as Statutory Fraud, or a violation of the Texas Free Enterprise and Antitrust Act of 1983. TEX. CIV. PRAC. & REM. CODE §§ 41.002(d); 41.003(c).

1. Punitive damage awards require clear and convincing evidence

Unlike the burden for recovery of compensatory damages, in order to recover punitive damages, the Plaintiff must prove by clear and convincing evidence the elements required for punitive damages. TEX. CIV. PRAC. & REM. CODE § 41.003(b). This heightened burden of proof applies regardless of whether the Plaintiff seeks punitive damages based upon fraud, malice or willfulness, or based upon statutory authority for the award. TEX. CIV. PRAC. & REM. CODE § 41.003(b) and (c). The Plaintiff's burden may not be satisfied by evidence of ordinary negligence, bad faith, or a deceptive trade practice, and the burden may never be shifted to the Defendant. TEX. CIV. PRAC. & REM. CODE § 41.003(b).

a) “Clear and Convincing”–Defined

Under the Texas Civil Practice and Remedies Code, clear and convincing means “the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.” TEX. CIV. PRAC. & REM. CODE § 41.001(2).

2. Criminal conduct

In a suit in which the Plaintiff claims damages that resulted from criminal conduct, a Court may not award punitive damages against a Defendant because of the criminal conduct of another unless:

- 1) The criminal act was committed by an employee of the defendant;
- 2) The defendant is criminally responsible as a party to the criminal act under the provisions of Chapter 7 of the Penal Code;
- 3) The criminal act occurred at a location where, at the time of the criminal act, the defendant was maintaining a common nuisance under the provisions of Chapter 125 of the Civil Practice and Remedies Code, and had not made reasonable attempts to abate the nuisance; or
- 4) The criminal act resulted from the defendant’s intentional or knowing violation of a statutory duty under sub chapter D, Chapter 92 of the Property Code, and the criminal act occurred after the statutory deadline for compliance with that duty.

TEX. CIV. PRAC. & REM. CODE § 41.005(a) and (b).

Importantly, an employer is not automatically liable for punitive damages imposed because of the acts of its employees. Rather, a Plaintiff must establish an independent basis of liability against the Defendant. *See Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387, 391 (Tex. 1997). Accordingly, if the criminal act was committed by an employee, the employer may be liable for punitive damages if:

- 1) The principal authorized the doing and the manner of the act;
- 2) The agent was unfit and the principal acted with malice in employing or retaining him;
- 3) The agent was employed in a managerial capacity and was acting in the scope of employment; or

- 4) The employer or a manager of the employer ratified or approved the act.

TEX. CIV. PRAC. & REM. CODE § 41.005(c).

B. Limitations on Punitive Damage Awards

It has long been held that there must be a reasonable relationship between the amount of actual damages awarded and a punitive damage award. *See Alamo National Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981) (setting forth five factors to consider in addressing whether a punitive damage award is reasonable). The United States Supreme Court has also set forth three “guideposts” to consider in determining whether an award of punitive damages is “grossly excessive” and could withstand a due process challenge. *See BMW of North America v. Gore*, 517 U.S. 559, 574-75 (1996); *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35 (Tex. 1998). First, the court should consider the degree of reprehensibility of the Defendant’s conduct. Second, the Court should consider the disparity between actual and punitive damages. Third, the Court should compare the punitive damage award with other civil or criminal penalties that could be imposed for similar misconduct. *Id.* In *Apache Corp. v. Moore*, 960 S.W.2d 746 (Tex.App.–Amarillo 1997, pet. denied), the Court of Appeals held that the three factors set forth by the United States Supreme Court have been addressed by the Texas legislature and are accounted for in the factors enumerated in the Civil Practice and Remedies Code.

1. Nominal damages

Generally, exemplary damages may only be awarded if the Plaintiff recovers something other than nominal damages in the suit. TEX. CIV. PRAC. & REM. CODE § 41.004(a). However, if the Plaintiff proves that his damages resulted from the Defendant’s malice, then he may recover punitive damages despite having only been awarded nominal compensatory damages. TEX. CIV. PRAC. & REM. CODE § 41.004(b). The Plaintiff must prove malice by clear and convincing evidence. TEX. CIV. PRAC. & REM. CODE § 41.004(b).

a) Damages are a prerequisite to a punitive damage award

In *Travelers Indemnity Company of Illinois v. Fuller*, 892 S.W.2d 848 (Tex. 1995), the Plaintiff attempted to circumvent the Workers’ Compensation Act bar by filing suit for punitive damages pursuant to Article 16, section 26 of the Texas Constitution. Article 16, section 26 provides that “every person that may commit a homicide, through willful act shall be responsible in exemplary damages to the survivor.”

The Court rejected the Plaintiff’s attempt. The Court held that the Workers’

Compensation Act bars plaintiff's cause of action for compensatory damages. Therefore, the Court held that Article 16, section 26 of the Texas Constitution was not intended to abrogate the common law requirement that a Plaintiff receive damages as a prerequisite to being awarded punitive damages. *Id.* at 851-52.

2. Statutory damages

If a Plaintiff elects to have his damages multiplied pursuant to statutory authority, such as treble damages provided by the Texas Deceptive Trade Practices and Consumer Protection Act, then punitive damages may not be awarded. TEX. CIV. PRAC. & REM. CODE § 41.004(b).

3. Prejudgment interest

Prejudgment interest may not be assessed or recovered on an award of punitive damages. TEX. CIV. PRAC. & REM. CODE § 41.007

4. Multiple defendants are not jointly and severally liable for a punitive damage award

In a suit in which there are two or more defendants, any award of punitive damages must be specific as to each individual defendant, and each defendant will only be liable for the amount made against that defendant. TEX. CIV. PRAC. & REM. CODE § 41.006

5. Integrated Enterprises

Although the single integrated enterprise doctrine can form a basis for liability against related entities, unless named as a Defendant, and found liable, a related enterprise's assets may not be considered by the jury in determining a punitive damage award against the Defendant. *George Grubbs Enterprises, Inc. v. Bien*, 900 S.W.2d 337 (Tex. 1995). For a discussion of the single integrated enterprise doctrine, see *Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773 (5th Cir. 1997).

In *George Grubbs Enterprises, Inc. v. Bien*, the Plaintiff filed suit against George Grubbs Enterprises, Inc., the parent company of Grubbs Nissan. Plaintiff did not sue Grubbs Auto Park, Inc., which owns other Grubbs dealerships. Despite the fact that Plaintiff did not file suit against Grubbs Auto Park, the Court instructed the jury that it could consider the assets of Grubbs Auto Park in determining an amount of punitive damages if the jury found that Grubbs Auto Park and George Grubbs Enterprises "constitute a single enterprise." *Id.* at 338-39. The jury awarded Bien \$5,000,000 in punitive damages. *Id.*

The Supreme Court reversed on the grounds that the jury instruction sought to disregard the corporate structure of the entities. *Id.* The Court held that unlike

compensatory damages, exemplary damages are based on considerations similar to those relied on for criminal punishment. *Id.* at 339. Therefore, punitive damage awards require appropriate safeguards to minimize the risk of unjust punishment. *Id.* Therefore, the Court held that awarding exemplary damages against a Defendant based on the wealth of an entity not a party to the suit substantially increases the risk of unjust punishment, and was erroneous. *Id.* (citing *Castleberry v. Branscum*, 721 S.W.2d 270, 273 (Tex. 1986)).

6. A plaintiff may not seek punitive damages from his own insurance company

Notably, a Plaintiff may not seek punitive damages from his own insurance company through the underinsured motorist clause of his policy. See *Vanderlinden v. United Services Automobile Association Property and Casualty Insurance Co.*, 885 S.W.2d 239 (Tex.App.–Texarkana 1994, writ denied).

7. Statutory cap on punitive damage awards

Under the latest amendments to the Texas Civil Practice and Remedies Code, the legislature imposed new caps on the amount of punitive damages that may be awarded. First, the Civil Practice and Remedies Code specifies that in actions in which a plaintiff seeks punitive damages, the trier of fact is to determine the amount of economic damages separately from the amount of other compensatory damages. This breakdown is required to enable the Court to calculate the applicable cap on punitive damages.

Under section 41.008 of the Civil Practice and Remedies Code:

Punitive damages awarded against a defendant may not exceed an amount equal:

- 1) two times the amount of economic damages awarded; plus an amount equal to any non-economic damages found by the jury, such non-economic damages not to exceed \$750,000; or
- 2) \$200,000,

whichever amount is greater.

For example, in a personal injury case in which the jury returned a verdict with the following actual damages:

Lost wages:	\$550,000
Medical expenses	\$150,000

Pain and suffering	\$300,000
Physical impairment	\$250,000

the cap on a punitive damage award would be as follows:

2 x Economic Damages → \$1,400,000 + non-economic damages → \$550,000, or a cap of \$1,950,000.

Say, for example, that instead of the amounts in the previous example, the jury has returned a verdict with the following amounts:

Lost wages:	\$550,000
Medical expenses	\$150,000
Pain and suffering	\$400,000
Physical impairment	\$450,000

then the cap on a punitive damage award would change because the non-economic damages would be subject to the \$750,000 limit:

2 x Economic Damages → \$1,400,000 + non-economic damages → \$750,000 (reduced from \$850,000), or a cap of \$2,150,000.

Finally, if the jury had returned a verdict with the following amounts:

Lost wages:	\$10,000
Medical expenses	\$5,000
Pain and suffering	\$10,000
Physical impairment	\$10,000

then the cap on a punitive damage award would fall under section 41.008(b)(2):

2 x Economic Damages → \$15,000 + non-economic damages → \$20,000 would be \$35,000. Accordingly, the maximum punitive damage award would not be \$35,000. Rather, the cap would be \$200,000.

Note that the cap on punitive damages does not apply to awards resulting from certain criminal conduct specified in § 41.008 of the Texas Civil Practice and Remedies Code. TEX. CIV. PRAC. & REM. CODE § 41.008.

a) The jury is not instructed on the punitive damage cap

The Civil Practice and Remedies Code outlines the specific provisions on which the jury is to be instructed. The jury is not to be informed of the cap on punitive damages during the trial. TEX. CIV. PRAC. & REM. CODE § 41.012.

C. Bifurcation

1. *Transportation Insurance Company v. Moriel*

In *Transportation Insurance Company v. Moriel*, 879 S.W.2d 10 (Tex. 1994), the Texas Supreme Court held that because evidence of the wealth of the Defendant has a real potential for prejudicing the jury's determination of other issues, a trial court "if presented with a timely motion, should bifurcate the determination of the amount of punitive damages from the remaining issues." *Id.* at 30 (citing *Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322, 329-32 (Tex.1993) (Gonzalez, J., concurring)). The *Moriel* Court outlined the procedure as follows:

Under this approach, the jury first hears evidence relevant to liability for actual damages, the amount of actual damages, and liability for punitive damages (e.g. gross negligence), and then returns findings on these issues. If the jury answers the punitive damage liability question in the plaintiff's favor, the same jury is then presented evidence relevant only to the amount of punitive damages, and determines the proper amount of punitive damages, considering the totality of the evidence presented at both phases of the trial.

Transportation Insurance Company v. Moriel, 879 S.W.2d at 30. The Court noted that several states require bifurcation of the entire punitive damage claim, including liability and amount. *Id.* However, the Court rejected that approach because "some of the evidence relevant to punitive damage liability, such as evidence of gross negligence, will also be relevant to liability for actual damages." *Id.* (emphasis in original). "Bifurcating only the amount of punitive damages therefore eliminates the most serious risk of prejudice, while minimizing the confusion and inefficiency that can result from a bifurcated trial." *Id.*

2. Each of the jurors who signed the initial verdict form must sign the punitive damage verdict form

In *Hyman Farm Service v. Earth Oil & Gas*, 920 S.W.2d 452 (Tex.App.–Amarillo 1996, no pet.), the Court of Appeals held that the *Moriel* Court did not sanction a severance procedure defined as a separate trial. Rather, the Court intended to allow a true "separate trial," such being one trial with separate parts. *Id.* at 457. Therefore,

the *Hyman Farm Service* Court held that where one juror fails to sign the initial verdict, and is yet one of the ten to sign and agree to the verdict on punitive damages, the final verdict is not in compliance with Rule 292 of the Texas Rules of Civil Procedure. *Id.* at 457-58. *But see Greater Houston Transportation Co. v. Zrubeck*, 850 S.W.2d 579, 588 (Tex.App.–Corpus Christi 1993, writ denied).

3. Section 41.009 of Civil Practice & Remedies Code

In 1995, the Texas legislature amended the Civil Practice and Remedies Code and codified the *Moriel* Court’s holding. Under section 41.009 of the Civil Practice and Remedies Code, “[o]n motion by a defendant, the court shall provide for a bifurcated trial under this section.” TEX. CIV. PRAC. & REM. CODE § 41.009(a). Thus, the Texas legislature made two significant changes to the Court’s holding in *Moriel*.

a) Only the Defendant may move for bifurcation

First, under the Civil Practice and Remedies Code, the statute provides that only a Defendant may move for bifurcation of punitive damages. TEX. CIV. PRAC. & REM. CODE § 41.009(a).

b) The trial court has no discretion to deny a motion to bifurcate

Second, and more importantly, if a Defendant moves for bifurcation of punitive damages, the trial court has no discretion to refuse the motion. TEX. CIV. PRAC. & REM. CODE § 41.009(a).

c) Federal Courts have discretion to bifurcate on punitive damages

In Federal Court, a Defendant does not have an automatic right to bifurcation on punitive damages. Rather, motions to bifurcate on punitive damages are governed by Rule 42 of the Federal Rules of Civil Procedure and are at the discretion of the judge. *See, e.g., Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277 (2nd Cir. 1990).

d) Multiple Defendants

In actions with more than one Defendant, all of the Defendants need not agree on bifurcation. Rather, once any of the Defendants moves for bifurcation, the Court is required to bifurcate the trial on punitive damages. TEX. CIV. PRAC. & REM. CODE § 41.009(b).

4. Refusing to bifurcate is not always reversible error

Although the Court is required to bifurcate upon motion by the Defendant, the Court's refusal to bifurcate may not necessarily be reversible error. In *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 342-43 (Tex. 1998), the District Court denied the Defendant's request for bifurcation on punitive damages. The Texas Supreme Court held that the District Court's denial of bifurcation was erroneous.

However, the Court of Appeals affirmed the District Court, holding that the Court's refusal to bifurcate the trial was harmless error. *Id.* Specifically, the Court held that "the rationale given for bifurcation in *Moriel* was that "evidence of a defendant's net worth, which is generally relevant only to the *amount* of punitive damages, by highlighting the relative wealth of a defendant, has a very real potential for prejudicing the jury's determination of other disputed issues in a tort case." *Id.* at 342.

In *Martinez*, the Court found that the jury was not presented with any evidence of the Defendant's net worth. "While we do not hold that net worth evidence is the only prejudice that may result from trying actual and punitive damages claims together, there is not prejudice in this case requiring reversal of the judgment." *Id.* at 342-43. Moreover, because other prejudicial evidence relating to punitive damages was properly in evidence on the issue of liability, the error was harmless. *Id.* at 343.

5. Erroneous refusal to instruct on punitive damages requires a new trial on both liability and damages

If the trial court erroneously refuses to instruct the jury on punitive damages, then the plaintiff has the option of keeping the verdict, or re-trying the case completely. The Court will generally not remand for a trial on punitive damages only. *See Green Tree Financial Corp. v. Garcia*, 988 S.W.2d 776, 785 (Tex.App.—San Antonio 1999, no pet.) (citing *Ford Motor Co. v. Miles*, 967 S.W.2d 377, 389-90 (Tex.1998) (Gonzalez, J., concurring)). *See also Hardin v. Caterpillar, Inc.*, 227 F.3d 268 (5th Cir. 2000).

III. LITIGATION TACTICS AND CONSIDERATIONS

A. Carefully Review the Factors to be Considered by the Jury

The first step for both Plaintiffs and Defendants in litigating a case potentially involving an award of punitive damages is to consider the inquiry that will be made by the fact-finder in assessing a punitive damage award. In 1981, the Texas Supreme Court set forth five factors for appellate courts to consider in reviewing whether a punitive damage award was reasonable. *See Alamo National Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981). These factors include:

- 1) the nature of the wrong;

- 2) the character of the conduct involved;
- 3) the degree of culpability of the wrongdoer;
- 4) the situation and sensibilities of the parties concerned; and
- 5) the extent to which such conduct offends a public sense of justice and propriety.

Id. Additionally, subsequent to the Court's holding in *Kraus*, the Court held that the net worth of a Defendant is a factor to be considered assessing an award of punitive damages. *See, e.g., Lunsford v. Morris*, 746 S.W.2d 471, 473 (Tex.1988).

While these factors were initially set forth for appellate courts to consider, they have now been codified in the Texas Civil Practice and Remedies Code as factors for the trier of fact to consider in determining the amount of a punitive damage award. TEX. CIV. PRAC. & REM. CODE § 41.011(a). In a bifurcated trial, evidence relating to a Defendant's *liability* for punitive damages is offered during the *first* phase. Only evidence relevant to *the amount* of a punitive damage award is excluded until the second phase. TEX. CIV. PRAC. & REM. CODE § 41.011(b).

B. Tailor Discovery Requests in Accordance with the Punitive Damage Factors

After carefully considering the factors that the jury will consider in determining the amount of a punitive damage award, the next step in preparing for trial is to obtain the necessary information during discovery, and overcoming some potential discovery obstacles.

1. Information regarding net worth is discoverable

In *Lunsford v. Morris*, 746 S.W.2d 471, 473 (Tex.1988), the Court held that in cases "in which exemplary damages may be recovered," information regarding net worth is discoverable. "The amount of punitive damages necessary to punish and deter wrongful conduct depends on the financial strength of the Defendant." *Transportation Insurance Co. v. Moriel*, 879 S.W.2d at 29.

However, Texas Courts have acknowledged the sensitivity of financial and net worth information. *See Transportation Insurance Co. v. Moriel*, 879 S.W.2d at 30 (noting that the wealth of a defendant has great potential to prejudice a jury's determination of disputed issues in a tort case).

a) Plaintiff must plead sufficient facts to justify punitive damages

Accordingly, because of the sensitivity of financial information of a Defendant, a Plaintiff is not automatically entitled to such discovery simply because he desires information regarding net worth. Rather, in order to obtain discovery regarding the net worth of a Defendant, a Plaintiff must allege facts in the Petition showing that the Defendant may be liable for punitive damages. *See Al Parker Buick v. Touchy*, 788 S.W.2d 129, 131 (Tex.App.--Houston [1st Dist.], 1990, orig. proceeding). The pleading threshold is not high, however. For example, in a personal injury suit, a pleading that the Defendant was “consciously indifferent” to the safety of others may be sufficient. *See, e.g., Trenholm v. Ratcliff*, 646 S.W.2d 927, 933 (Tex.1983).

b) Defendants might seek specific facts before complying with discovery requests concerning net worth

A Defendant may resist discovery requests that seek information regarding net worth based solely on the pleadings, arguing that a Plaintiff needs to set forth specific facts that entitle the Plaintiff to punitive damages before discovery regarding a Defendant’s net worth is permitted. In support, the Defendant may cite a line of cases in which Justice Gonzalez has argued in concurrence that a Plaintiff seeking discovery of financial information should do more than simply meet a pleading threshold.

For example, in *Wal-Mart Stores, Inc. v. Alexander*, Justice Gonzalez argued that Plaintiffs should be required to demonstrate a factual basis for punitive damages before being allowed to discover financial information from which net worth can be determined. *Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322, 331-32 (Tex.1993) (Gonzalez, J., concurring).

Justice Gonzalez also has argued that “Plaintiffs should make a prima facie showing that punitive damages are appropriate before they may discover net worth information.” *In re Jerry's Chevrolet-Buick, Inc.*, 977 S.W.2d 565, 566 (Tex. 1998) (Gonzalez, J., concurring). Justice Gonzalez reasoned that this “would protect defendants from intrusive and pointless discovery of sensitive, private, and confidential net worth information based upon a plaintiff’s mere assertion of gross negligence in a petition.” *Id.* In his concurring opinion, Justice Gonzalez noted that the Court had yet to specify when and on what basis a party is entitled to discover that information. *Id.*

Notably, the Texas Supreme Court has shown a willingness to address this issue in the past. The Court granted petitions for writ of mandamus in *Aramark Uniform Services, Inc. v. Tyson*, 40 Tex. Sup.Ct. J. 84 (November 15, 1996), and *Perry Home Contractors, Inc. v. Patterson*, 39 Tex. Sup.Ct. J. 237 (February 9, 1996), in which the Court would have specified whether a plaintiff must make a prima facie showing of entitlement to exemplary damages before being entitled to discovery regarding a Defendant’s net worth. However, both of those cases settled prior to the Court issuing

an opinion, and the petitions were dismissed. *Perry Home Contractors, Inc. v. Patterson*, 40 Tex. Sup.Ct. J. 398 (March 6, 1997); *Aramark Uniform Servs., Inc. v. Tyson*, 40 Tex. Sup.Ct. J. 131 (December 13, 1996).

Accordingly, a Defendant may argue to the trial court that a Plaintiff must set forth specific facts before discovering information on net worth, seeking to obtain Supreme Court review of the issue in the future. Therefore, Plaintiff should always be prepared to address such a challenge by a Defendant during discovery, and can point out to the trial court that Justice Gonzalez's opinions do not represent the majority opinion, and that under current Texas law, a Plaintiff need only allege facts in the Petition showing that the Defendant may be liable for punitive damages in order to discover net worth information. *Al Parker Buick v. Touchy*, 788 S.W.2d 129, 131 (Tex.App.—Houston [1st Dist.], 1990, orig. proceeding).

2. Discovery requests must be reasonable

Even if a court determines that a Plaintiff is entitled to discovery of financial worth, the discovery requests must still be reasonable. After the Court's holding in *Lunsford*, the Court of Appeals has held that a Defendant's income tax returns and financial statements over a 10-year period were discoverable. *See, e.g., Miller v. O'Neill*, 775 S.W.2d 56, 59 (Tex.App.—Houston [1st Dist.] 1989, orig. proceeding); *see also In re Jerry's Chevrolet-Buick, Inc.*, 977 S.W.2d 565 (discovery of Defendant's financial statements for a 4-year period in order to determine the Defendant's net worth was reasonable and relevant to the proper amount of punitive damages that may be awarded. (*citing Lunsford v. Morris*, 746 S.W.2d 471, 473 (Tex.1988)).

In *Miller*, the Court held that because the Defendants had failed to produce evidence to the trial court, they had waived their objection to the discovery on the basis that the discovery requests were harassing. *Id.*; *see also Independent Insulating Glass/Southwest, Inc. v. Street*, 722 S.W.2d 798, 802 (Tex.App.—Fort Worth 1987, orig. proceeding). *But see Inwood West Civic Ass'n v. Touchy*, 754 S.W.2d 276, 278 (Tex.App.—Houston [14th Dist.] 1988, orig. proceeding) (trial court properly sustained the Defendant's objections to discovery based on privilege and lack of relevance, even though the defendant presented no evidence substantiating its claims).

However, it is important to remember that a trial court still has discretion to preclude discovery if a request for production involves "unnecessary harassment or invasion of personal or property rights." *Delgado v. Kitzman*, 793 S.W.2d 332, 333 (Tex.App.—Houston [1st Dist.] 1990, Orig. Proceeding) (*citing Lunsford v. Morris*, 746 S.W.2d at 473) (Mirabal, J., concurring).

3. Corporate tax returns

If a Defendant produces annual reports sufficient to determine its net worth, then a Plaintiff may not also obtain the Defendant's tax returns during discovery. *See Sears, Roebuck and Co. v. Ramirez*, 824 S.W.2d 558 (Tex. 1992).

C. Plaintiffs Should Retain an Economic Expert to Review the Defendant's Financial Records

As noted above, when punitive damages are at issue, the Defendant's net worth becomes relevant and admissible. As a result, during discovery Plaintiffs will have sought financial records, such as annual reports, from the Defendant. I suggest that a Plaintiff always retain a CPA to review in detail the Defendant's financial records that have been produced. By retaining an economic expert, a Plaintiff can have the economic expert testify on the Defendant's net worth during trial rather than relying solely on the Defendant's own records. For example, the Defendant may have included a depreciation, or utilized other accounting maneuvers in its reports in order to portray the business in a worse financial condition than that in which it otherwise may be. A CPA can likely point out where the Defendant may have utilized some accounting principles, and can show how the Defendant may have reduced its net worth on paper.

D. Mitigating Evidence

A Defendant facing a potential punitive damage award should always consider any evidence that it may offer to mitigate punitive damages.

1. *Owens-Corning Fiberglas Corp. v. Malone*

In *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35 (Tex. 1998), the Texas Supreme Court recognized that Defendants have a right to introduce evidence to mitigate punitive damages.

In *Owens-Corning*, the Court held that “[p]unitive damages are not designed or intended to compensate or enrich individual victims.” *Id.* at 39-40. Rather, “the purpose of punitive damages is to punish a party for its ‘outrageous, malicious, or otherwise morally culpable conduct’ and to deter it and others from committing the same or similar acts in the future. *Id.* at 40 (quoting *Transportation Insurance Company v. Moriel*, 879 S.W.2d at 16-17). The *Owens-Corning* Court recognized that the Courts have never considered the type of evidence that is admissible to mitigate punitive damages, and acknowledged that a defendant's ability to pay bears directly on the question of adequate punishment and deterrence. *Id.*

Because of the lack of authority in Texas governing mitigation of punitive damages, the *Owens-Corning* Court then discussed decisions from other jurisdictions, in which Courts had permitted evidence relating to the Defendant's financial condition, and other punitive damage awards for the same conduct that the Defendant had paid.

“By considering other punishment for the same conduct, along with evidence of the defendant’s current financial status, a jury should be able to make a more informed judgment of the amount necessary for punishment and deterrence.” *Id.* (quoting Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 *FORDHAM L. REV.* 37, 59 (1983)).

In considering authority from other jurisdictions, the Court held that “[w]e are persuaded that Texas law should allow defendants to introduce some evidence to mitigate punitive damages.” *Id.* The Court continued:

Accordingly, we hold that evidence about the profitability of a defendant’s misconduct and about any settlement amounts *for punitive damages* or prior *punitive damages awards* that the defendant has actually paid for the same course of conduct is admissible when the defendant offers it in mitigation of punitive damages.

Id. (emphasis added). The Court cautioned that “this evidence is only relevant and admissible at trial about the amount of punitive damages—usually in the second part of a bifurcated trial.” *Id.* at 41. Of course, if the Defendant does not move for bifurcation, then it can offer this evidence before the jury considers liability and compensatory damages.

2. Certain evidence may not be offered to mitigate punitive damages

In *Owens-Corning*, the Court proceeded to specify the types of evidence that may *not* be offered to mitigate punitive damages. Specifically, the Court held:

Evidence that is not relevant, or is unduly prejudicial, and thus, not admissible to mitigate punitive damages, includes actual damage amounts paid by settlements or by judgments; the number of pending claims filed against a defendant for the same conduct; the number of anticipated claims for the same conduct; insurance coverage; unpaid punitive damages awards for the same course of conduct; and evidence of punitive damages that may be levied in the future.

Id. at 41 (citing *TEX. R. EVID.* 403; *Dunn v. HOVIC*, 1 F.3d 1371, 1389-90 (3d Cir.) (en banc), *modified in part*, 13 F.3d 58 (3d Cir. 1993)). In other words, if the Defendant paid a large settlement for similar conduct, only a small part of which was designated as punitive damages, the Court will only permit the settlement amount designated as punitive damages to be admitted as mitigating evidence.

The Court further held that a Defendant that intends to offer mitigating

evidence must announce its intention to do so timely. Once a Defendant offers mitigating evidence, the Plaintiff is free to present rebuttal evidence on the same matters. *Id.* at 40, n. 3.

a) Defendants should consider mitigating evidence early in the litigation

In light of the Court's holding in *Owens-Corning Fiberglas v. Malone*, Defendants should always consider any mitigating evidence that may be offered as soon as it is aware that punitive damages may be implicated by the Plaintiff's claims. Moreover, if a Defendant has multiple related claims that may subject it to punitive damage awards, it should specify in the settlement agreements of the cases that settle precisely how much of the settlement is designated for punitive damages. Therefore, it can use that portion of the settlement agreement as mitigating evidence at trial in those cases that do not settle. *See Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d at 40.

b) Plaintiffs should obtain any mitigating evidence from the Defendant during discovery

Because Defendants may introduce evidence to mitigate a punitive damage award only if they disclose such information timely, Plaintiffs should send interrogatories and requests for production early in the litigation seeking any information that the Defendant intends to introduce as evidence mitigating a punitive damage award, such as previous settlements or punitive damage awards for similar conduct. Many times, the Defendant will object to the discovery request, and refuse to provide the information. Then the Plaintiff may move to exclude the mitigating evidence from being used at trial. TEX. R. CIV. P. 215.2; *Schenck v. Ebby Halliday Real Estate, Inc.*, 803 S.W.2d 361, 372-73 (Tex.App.—Fort Worth 1990, no writ).

3. Good faith efforts

In *Kolstad v. American Dental Association*, 119 S.Ct. 2118 (1999), an employer was found liable for intentional discrimination under Title VII, but the Supreme Court held that if the employer made “good faith efforts” to comply with Title VII, then it could not be subject to punitive damages. *Id.* at 2129. The Supreme Court rejected the Court of Appeals holding that punitive damages may be assessed only upon a showing of extraordinary egregiousness. *Id.* at 2124-25. Rather, the Court held that under Title VII and ADA actions, a Plaintiff may recover punitive damages when the employer engaged in discriminatory practices “with malice or with reckless indifference to the federally protected rights of the aggrieved individual.” *Id.* at 2124. The Court noted that malice relates to the Defendant's state of mind, whereas egregiousness describes conduct. *Id.* at 2124-25. In the future, Courts could conceivably take the reasoning of *Kolstad*, and apply it in other areas, thereby providing defenses to punitive damage awards in many other contexts.

E. Determine Whether to Bifurcate on Punitive Damages

The final step is to determine whether to bifurcate the trial on the issue of punitive damages.

1. Defendants should not move for bifurcation as a matter of course

On many occasions, Defendants move for bifurcation as a matter of course, without thoughtfully weighing the benefits of bifurcation against any possible ramifications. This is a mistake. In fact, I believe that, with few exceptions, a Defendant should not move for bifurcation.

2. The only benefit is the exclusion of net worth

Under the Civil Practice and Remedies Code, the only benefit of bifurcating a trial is the Plaintiff is precluded from offering evidence of the Defendant's net worth during the liability and compensatory damage phase. TEX. CIV. PRAC. & REM. CODE § 41.011(b). Indeed, most other evidence that the Plaintiff would offer regarding punitive damages will also be relevant to liability and actual damages. *See Transportation Insurance Company v. Moriel*, 879 S.W.2d at 30. Therefore, Plaintiff will still be permitted to offer most of his evidence relating to punitive damages during the liability phase of the trial.

3. Jurors might wrongfully assume that a corporate Defendant is wealthy

Moreover, most members of today's juries are well-educated, and likely have some level of higher education. Accordingly, jury members will figure out (or at least assume) that a corporate Defendant has a significant amount of net worth. Therefore, concealing this evidence during the liability phase is of little benefit, and may even work to the Defendant's disadvantage, since the jury may be thinking that the Defendant has more net worth than it actually does.

a) The Defendant may want to offer evidence of net worth during the liability and compensatory damage phase

If the Defendant is a business that is in poor financial condition, the Defendant will want the jury to hear this evidence before it awards any damages. Otherwise, the jury may inflate its compensatory damage award under the mistaken belief that the Defendant has deep pockets.

4. The Defendant may offer evidence relating to the factors to be considered in determining punitive damages

In reviewing the factors on punitive damages set forth in section 41.011 of the Civil Practice and Remedies Code, it becomes clear that if a Defendant chooses not to bifurcate, then the Defendant may offer evidence during the liability phase that the Court may otherwise have required it to present during the punitive phase.

For example, a Defendant may wish to offer evidence of its reputation in the community. While this would generally be excluded from consideration in the liability phase, the Defendant can argue that it is relevant to the character of the conduct involved or the situation and sensibilities of the parties concerned, and is therefore admissible on the issue punitive damages. TEX. CIV. PRAC. & REM. CODE § 41.011. Consequently, if the Defendant chooses not to bifurcate, the jury will hear this evidence prior to considering liability.

5. Bifurcation allows the jury to award damages twice

By seeking bifurcation, the Defendant is giving the jury an opportunity to award monetary damages twice. This is not wise for Defendants, particularly in light of the fact that the same jury that decides compensatory damages will be deciding punitive damages.

a) The jury may improperly include punitive damages in the compensatory damage award

Moreover, bifurcating the trial may cause confusion in the minds of the jurors regarding its opportunity to award punitive damages. For example, the jury will likely hear about punitive damages during *voir dire*. But in a bifurcated trial, the jury will not get an instruction on punitive damages, or an opportunity to award punitive damages on the verdict form, after the liability and compensatory phase, and will not be instructed that there is a second phase to come. As a result, the jury may load up on compensatory damages to include an amount for punitive damages, not knowing that it will not have the opportunity to award punitive damages at a later time.

6. Circumstances in which the Defendant may benefit from bifurcation

As noted above, there may be some limited circumstances in which bifurcation benefits Defendant. For example, if it is not obvious to the jury that the Defendant has substantial net worth, and the Defendant does in fact have significant assets, then the Defendant may consider bifurcation to keep this evidence from the jury before it considers liability and compensatory damages.

In addition, if the Defendant has taken extraordinary measures to protect its assets from creditors, such as putting assets in particular trusts, the Defendant would want to exclude these facts from evidence prior to a liability determination, given the emotional impact that it may have on a jury.

Moreover, as explained above, a Defendant may offer evidence to mitigate a punitive damage award. If the Defendant intends to offer evidence that it has paid punitive damage awards in the past for similar conduct, it would want to bifurcate the trial, so that the jury would not hear about other punitive damage awards prior to considering liability.

IV. CONCLUSION

In the final analysis, a Defendant should carefully consider all of the circumstances before deciding on a motion to bifurcate. After such consideration, many defense attorneys will find that there are many benefits to not bifurcating.