

PUNITIVE DAMAGES: The Role of the Expert Witness

Barron's Law Dictionary defines punitive damages as:

Compensation in excess of actual damages; a form of punishment to the wrongdoer and excess enhancement to the injured; nominal or actual damages must exist before exemplary damages will be found and then they will be awarded in instances of malicious and willful misconduct.

As such, the purpose of punitive damages is to punish the defendant for the malicious and willful misconduct and to deter him from future wrongdoings.

As a result of the U.S. Supreme Court decision in *State Farm Mutual Auto Insurance Company v. Campbell et al.* (No. 01-1289) and other cases, such as *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (121 S.Ct. 1678; 2001) and *BMW North America, Inc. v. Gore* (116 S. Ct. 1589; 1996), there has been an increased need to present financial information to guide the judge and jury through the process of awarding punitive damages. The role of the expert witness is to present such financial information in a manner that would assist the trier of fact in determining the appropriate level of punitive damages, and not to provide an actual amount or even a range.

The expert witness obtains advice from the attorney to identify the right defendant subject to punitive damages. A review of the defendant's organizational structure is critical in determining the relevant financial data to be presented to the trier of fact. For example, an entity may be a holding company with numerous subsidiaries and/or related entities that may or may not be defendants in an action and subject to punitive damages. Once the entities are identified, the expert witness reviews their financial statements, annual and quarterly reports, marketing materials, press releases and other documents obtained from the attorney, defendant or Web sites. The expert witness assists the attorney on the most effective way to present the financial



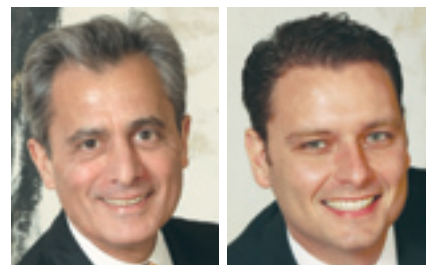
information to the trier of fact.

As part of this review, the expert witness assesses the financial position of the defendant, via a review of revenues, assets, liabilities, equity, net income, cash flow and dividends.

In considering the reasonableness of a punitive damage award, the expert witness attempts to demonstrate the impact of certain levels of punitive damage awards on the operations of the defendant via materiality measurements. Also known as Materiality Rules of Thumb, they may include percentages of average pre-tax income, total assets, total equity and total revenues, amongst several measurements. The expert witness also considers liquidity indices, such as working capital, which would indicate a defendant's ability to pay a punitive damage award. These measurements should represent the range of materiality awards that would not adversely affect the financial condition of the defendant. This goes back to the theory that punitive damage awards are meant to

punish and not obliterate a business.

To conclude, the role of the expert witness in the punitive damage awards process has significantly increased in providing the relevant and basic financial information that the trier of facts needs to determine the appropriate level of punitive damages. ¹



**BY ANTONIO L. ARGIZ, CPA/ABV/CFF, ASA, CVA, CFF
AND RAMON DE LEGORBURU, CVA, CFF**
MORRISON, BROWN, ARGIZ & FARRA, LLP
1001 BRICKELL BAY DRIVE, 9TH FLOOR
MIAMI, FL 33131
305 373-5500
WWW.MBAFCPA.COM