

## Punitive Damages Standards Act

### Summary

The Punitive Damages Standards Act establishes a procedure for pleading punitive damages, establishes a procedure for the award of punitive damages and allows a bifurcated trial before the same jury to separate determinations regarding compensatory damages from punitive damages, establishes a burden of proof and standard for liability for punitive damages, raises the burden of proof to clear and convincing evidence, allows a bifurcated trial on the question of whether the defendant is liable for punitive damages, limits the amount of a punitive damages awards to twice the amount of the plaintiff's actual compensatory damages, limits vicarious liability for punitive damages, and precludes imposition of punitive damages when a product or service was approved by a government agency or complies with government regulations.

[NOTE: Because state the laws governing punitive damages vary, and many states have adopted at least some of the reforms in the Act, among the states, a legislators planning to introduce the Act a punitive damages bill should first obtain information about existing law in their states his or her state's laws. Some states do not permit punitive damages at all.]

### Model Policy

#### Section 1. {Title}

This Act shall be known and may be cited as the Punitive Damages Standards Act.

#### Section 2. {Definitions}

For the purposes of this Act, the meaning of the terms specified shall be as follows:

(A) "Actual malice" means specific intent by the defendant to cause substantial injury or harm to the plaintiff.

(BA) "Clear and convincing evidence" means that standard of evidence which leaves no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. It is a standard which requires more than a preponderance of evidence, but less than beyond a reasonable doubt, to draw a conclusion.

(CB) "Compensatory damages" means damages intended to make good the loss of an injured party and no more. The term includes general and special damages and does not include nominal, exemplary or punitive damages.

(C) "Malice" means either conduct which is specifically intended by the defendant to cause tangible or intangible serious injury to the plaintiff or conduct that is carried out by the defendant both with a

~~flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct will result in tangible serious injury.~~

~~(D) "Nominal damages" are damages that are not designed to compensate a plaintiff and are less than \$500.~~

~~(E) "Product" means any object possessing intrinsic value, capable of delivery either as an assembled whole or as a component part or parts, and produced for introduction into trade or commerce.~~

~~(EF) "Punitive damages" includes exemplary or vindictive damages and means damages awarded against a party in a civil action because of aggravating circumstances in order to penalize and to provide additional deterrence against a defendant to discourage similar conduct in the future. Punitive damages do not include compensatory damages or nominal damages.~~

~~(G) "Service" means all activities engaged in for other persons for a consideration, which activities involve predominantly the performance of a service as distinguished from manufacture or sale of a product and that are regulated, approved, or licensed by a government agency. Services include, but are not limited to financial services and the provision of insurance.~~

### **Section 3. {Pleading Punitive Damages-}**

~~(A) No initial pleading in a civil action shall contain a claim for punitive damages. Any later pleading containing a claim for punitive damages may be filed only with leave of the court.~~

~~(B) A trial court may grant a plaintiff leave to file a pleading containing a claim for punitive damages only on written motion by the plaintiff, filed no later than one hundred twenty days prior to the final pretrial conference in the case or, if there is no scheduled pretrial conference, one hundred twenty days prior to the date set for trial, that is supported by affidavits, exhibits, or discovery materials establishing a reasonable basis for recovery of punitive damages. Any party opposing leave may file affidavits, exhibits, or discovery materials demonstrating that the standard for punitive damages has not been established.~~

~~(C) If the trial court concludes that based on the evidence to be admitted at trial a reasonable trier of fact is likely to conclude that the burden of proof and standard for liability for punitive damages in this Act has been met, the court shall grant leave for the plaintiff to file the pleading seeking punitive damages. The court shall rule on a motion for leave to file a pleading seeking punitive damages no later than forty-five days after a hearing on the motion or, if no hearing is held on the motion, after the party opposing the motion has filed its response to the motion.~~

~~(A) An award of punitive damages must be specifically prayed for in the complaint.~~

~~(D) The plaintiff shall not specifically plead an amount of punitive damages, only that such damages are sought in the action.~~

~~(C) The prayer for punitive damages shall be stricken prior to trial by the court, unless the plaintiff presents prima facie evidence sufficient to sustain an award of punitive damages under this Act to the court at least 30 days prior to trial.~~

#### **Section 4. {Procedure for Award of Punitive Damages}**

~~(A) All actions tried before a jury involving punitive damages shall, if requested by any defendant against whom punitive damages are sought, must be conducted in a bifurcated manner trial before the same jury.~~

~~(B) In the first stage of a bifurcated trial, the jury shall determine liability for compensatory damages and the amount of compensatory damages or nominal damages. Evidence relevant only to the issues of punitive damages is shall not be admissible in this stage.~~

~~(C) Punitive damages may be awarded only if the jury awards more than nominal compensatory damages have been awarded in the first stage of the trial. An award of nominal damages cannot support an award of punitive damages.~~

~~(D) In the second stage of a bifurcated trial, the court shall determine whether the issue of punitive damages may be submitted to the jury and, if so, the jury shall determine whether to award if a defendant is liable for punitive damages and in what amount.~~

~~(E) Evidence of a defendant's financial condition or net worth is not admissible in the proceedings on punitive damages.~~

~~(F) Punitive damages shall not be based, in whole or in part, on harm to nonparties.~~

~~(G) In determining the amount of punitive damages, the trier of fact shall consider, to the extent relevant, the following:~~

~~(1) The degree of nature and reprehensibility of the defendant's conduct wrongdoing;~~

~~(2) The severity of the harm to suffered by the plaintiff caused by the as a result of the defendant's conduct, including whether the harm was physical rather than economic in nature;~~

~~(3) The extent to which the plaintiff's own conduct contributed to the harm;~~

~~(4) The duration of the conduct, the defendant's awareness, and any concealment by the defendant;~~

~~(5) The profitability of the conduct to the defendant; and~~

~~(6) Whether previous judgments or settlements in cases involving the same or different parties and the same conduct or course of conduct that is involved in the present claim have resulted in awards of~~

~~punitive damages, payment of damages in lieu of future punitive damages, or waivers of the right to recover punitive damages, such that an award of punitive damage in the present case would result in duplicative or excessive punishment;~~

~~(7) Whether an award of punitive damages in the present case would potentially impair the ability of successful plaintiffs in other pending cases to obtain satisfaction of any award of compensatory damages that might be made in the favor of the claimants in those pending cases.~~

~~(68) Any civil fines or criminal penalties that could be or have been imposed on the defendant as a result of the conduct complained of by the plaintiff, and~~

~~(9) The amount of any civil fines assessed against the defendant as a result of the conduct complained of by the plaintiff.~~

~~(H6) If a verdict is rendered awarding punitive damages, the trial court shall carefully review the decision of the trier of fact, considering all relevant evidence, including the factors identified in paragraph (G6) above, to ensure that the award satisfies due process and does not exceed an amount necessary for the sake of example and to punish the defendant. Trial courts are to reflect in the record their reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of damages.~~

~~(IH) The amount of punitive damages shall be reduced pursuant to the contributory or comparative fault principles of the law of this state. In any action in which there are two or more defendants, an award of punitive damages must be specific as to each defendant, and each defendant is liable only for the amount of the award made against that defendant.~~

#### **Section 5. {Proof Required for Award of Punitive Damages}**

~~Punitive damages may only be awarded if the plaintiff proves by clear and convincing evidence that the defendant acted with his or her harm was the result of actual malice. This burden of proof may not be satisfied by proof of any degree of negligence including gross negligence.~~

#### **Section 6. {Limitations on Ceiling for Punitive Damages Award}**

~~(A) An ~~no~~ award of punitive damages shall not exceed the greater of two times the amount of the plaintiff's actual compensatory damages or [SET \$-AMOUNT, E.G., \$250,000], whichever is greater. If the defendant is an individual or a business with 50 or fewer full-time employees, an award of ~~no award of~~ punitive damages shall not exceed the lesser of two times the amount of the plaintiff's actual compensatory damages or [SET \$-AMOUNT, E.G., \$250,000]. , whichever is less.~~

~~(B) Awards of judgment interest, attorneys' fees, and civil penalties shall not constitute actual compensatory damages for purposes of determining a punitive damages ratio under this subsection.~~

(B) (a) Except as provided in paragraph (b), punitive damages may not be awarded against a defendant in a civil action if that defendant establishes, before trial, that punitive damages have previously been awarded against that defendant in any court in any action alleging harm from the same act or course of conduct for which the plaintiff seeks compensatory damages. For purposes of a civil action, the term "the same act or course of conduct" includes acts resulting in the same manufacturing defects, acts resulting in the same defects in design, or failure to warn of the same hazards, with respect to similar units of a product.

(b) In subsequent civil actions involving the same act or course of conduct for which punitive damages have already been awarded, if the court determines by clear and convincing evidence that the amount of prior punitive damages awarded was insufficient to punish that defendant's behavior, the court may permit a jury to consider an award of subsequent punitive damages. In permitting a jury to consider awarding subsequent punitive damages, the court shall make specific findings of fact in the record to support its conclusion. In addition, the court may consider whether the defendant's act or course of conduct has ceased. Any subsequent punitive damage awards must be reduced by the total amount of all earlier punitive damage awards paid by the defendant for the same act or course of conduct.

(C) A jury may not be instructed or informed as to the provisions of this section.

#### **Section 7. {Vicarious Liability}**

(A) The culpability of an employer or principal ~~defendant~~ for punitive damages whose liability is alleged to be vicarious shall be determined separately from that of any ~~alleged agent or, employee, or representative.~~

(B) Notwithstanding paragraph (A) of this subsection, punitive damages shall not ~~may~~ be awarded against an employer or principal ~~defendant based on vicarious liability~~ for the acts or omissions of an agent or employee unless the plaintiff can satisfy the standard of proof in Section 5 and: ~~only if the finder of fact determines by special verdict based on clear and convincing evidence that one or more of the following has occurred:~~

(1) Prior to the act or conduct, the employer or principal expressly authorized the doing and manner of the act or conduct;

(2) During or after the act or conduct, the employer or principal, with full knowledge of the doing and manner of the act or conduct, expressly ratified the act or conduct;

~~The act or omission was committed by a person employed in a management capacity while that person was acting within the scope of employment;~~

~~(3) The employee or agent was unfit to perform acts or duties of the kind for which punitive damages are sought, and the employer or principal expressly authorized the employee or agent to perform acts or duties of that kind.~~

(C) For purposes of this section, with respect to an employer or principal that is a legal entity or partnership, only the act, conduct, authorization, ratification, or intention of or by:

(1) The president, chair, or chief executive officer;

(2) The members of the governing body of the legal entity or partnership, when acting as such; or

(3) Any other officer, employee, or agent with policy-making authority,

shall be deemed to be the act, conduct, authorization, ratification or intention of the employer or principal.

~~The defendant was reckless in hiring, supervising, or training the agent or employee and that recklessness was the proximate cause of the act or omission that caused the loss or injury; or~~

~~(3) The defendant authorized, ratified, or approved the act or omission with knowledge or conscious or reckless disregard that the act or omission may result in the loss or injury.~~

(DC) Nothing in this subsection shall be construed to expand or increase the scope of vicarious liability for punitive damages under state law.

~~(D) For purposes of this subsection, "a person employed in a management capacity" means an employee with authority to set policy and exercise control, discretion, and independent judgment over a significant scope of the employer's business.~~

#### **Section 8. {Regulatory Compliance}**

(A) A defendant shall not be liable for punitive damages if:

(1) The product alleged to have caused the plaintiff's ~~the~~ harm was designed, manufactured, packaged, labeled, sold, or represented in relevant and material respects in accordance with the terms of an approval, license or similar determination of a government agency; ~~or~~

(2) The product was in compliance with a statute of this State or the United States, or a standard, rule, regulation, order, or other action of a government agency pursuant to statutory authority, where such statute or agency action is relevant to the event or risk allegedly causing the harm and the product was in compliance at the time the product left the control of the manufacturer or seller; ~~or~~

(3) The act or transaction forming the basis of the claim involves terms of service, contract provisions, representations, or other practices authorized by, or in compliance with, the rules, regulations, standards, or orders of, or a statute administered by, a government agency.

~~(B) This section shall not apply if the plaintiff claimant establishes that the defendant at any time before the event that allegedly caused the harm did any of the following:~~

~~(1) The product or service which allegedly caused the plaintiff's harm was sold by the defendant Sold the product or service after the effective date of an order of a government agency removing to remove the product from the market, after the agency to withdraw its approval of the product or service, or after the agency to substantially altered its terms of approval of the product or service in a manner that would have avoided in the plaintiff's claimant's alleged injury; or~~

~~(2) The government agency relevant to the event or risk allegedly causing the harm has determined that the defendant, intentionally, and in violation of applicable regulations, withheld from or misrepresented to the government agency information material to the approval or maintaining of approval of the product or service, and such information is relevant to the harm which the plaintiff claimant allegedly suffered; or~~

~~(3) The government agency relevant to the event or risk allegedly causing the harm has determined that the defendant mMade an illegal payment to an official or employee of the a government agency for the purpose of securing or maintaining approval of the product or service.~~

#### **Section 9. {Availability of Punitive Damages}**

~~Nothing contained in this Act is to be construed as to creating any claim for punitive damages that did not exist on the Act's effective date, which is not now present under the law of this state.~~

#### **Section 10. {Severability Clause}**

#### **Section 11. {Repealer Clause}**

#### **Section 12. {Effective Date}**

~~This Act applies to shall be effective as to any civil suit for damages commenced on or after the Act's date of enactment, of the Act regardless of whether the claim arose prior to that e-date-of-enactment.~~

### **Section by Section Summary**

#### **Model Policy**

**Section 1. {Title}** - Punitive Damages Standards Act.

**Section 2. {Definitions}**

**Section 3. {Pleading Punitive Damages}**





An award of punitive damages shall be reduced pursuant to the contributory or comparative fault principles of the law of the state.

### Section 5. {Proof Required for Award of Punitive Damages}

Punitive damages may only be awarded if the plaintiff proves by clear and convincing evidence<sup>6</sup> that the defendant acted with actual malice.<sup>7</sup>

### Section 6. {Ceiling for Punitive Damages Award}

Ann. § 2A:15-5.12(b), (c); N.C. Gen. Stat. § 1D-35; N.D. Cent. Code § 32-03.2-11(5); Ohio Rev. Code Ann. § 2307.80(B); Okla. Stat. Ann. tit. 23, § 9.1(A); Or. Rev. Stat. § 30.925(2); S.C. Code Ann. § 15-32-520(E); Tenn. Code Ann. §29-39-104(a)(4); Tex. Civ. Prac. & Rem. Code § 41.011(a).

<sup>6</sup> See Ala. Code § 6-11-20(a); Alaska Stat. § 9.17.020(b); Ark. Code Ann. § 16-55-207; Cal. Civ. Code § 3294(a); Fla. Stat. § 768.72(2); Fla. Stat. § 768.725; Ga. Code Ann. § 51-12-5.1(b); Idaho Code § 6-1604(1); Iowa Code § 668A.1(1); Kan. Stat. Ann. § 60-3701(c); Ky. Rev. Stat. Ann. § 411.184(2); Minn. Stat. Ann. § 549.20(1); Miss. Code Ann. § 11-1-65(1)(a); Mont. Code Ann. § 27-1-221(5); N.J. Stat. Ann. § 2A:15-5.12(a); Nev. Rev. Stat. Ann. § 42.005(1); N.C. Gen. Stat. § 1D-15(b); N.D. Cent. Code § 32-03.2-11(1); Ohio Rev. Code Ann. § 2307.80(A); Ohio Rev. Code Ann. § 2315.21(D)(4); Okla. Stat. Ann. tit. 23, § 9.1; Or. Rev. Stat. § 31.730(1); S.C. Code Ann. § 15-33-135(D); S.C. Code Ann. § 15-32-520(D); S.D. Codified Laws § 21-1-4.1; Tenn. Code Ann. §29-39-104(a)(1); Tex. Civ. Prac. & Rem. Code § 41.003(a); Utah Code Ann. § 78B-8-201(1); W. Va. Code § 55-7-29(a). For cases adopting clear and convincing evidence standard by judicial decision, see *Linthicum v. Nationwide Life Ins. Co.*, 723 P.2d 675 (Ariz. 1986); *Jonathan Woodner, Co. v. Breeden*, 665 A.2d 929 (D.C. 1995); *Masaki v. General Motors Corp.*, 780 P.2d 566 (Haw. 1989); *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349 (Ind. 1982); *Tuttel v. Raymond*, 494 A.2d 1353 (Me. 1985); *Owens-Illinois v. Zenobia*, 601 A.2d 633 (Md. 1992); *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. 1996); *Wangen v. Ford Motor Co.*, 294 N.W.2d 437 (Wis. 1980). Cf. Colo. Rev. Stat. § 13-25-127(2) (proof "beyond a reasonable doubt" required).

<sup>7</sup> See *Owens-Illinois v. Zenobia*, 601 A.2d 633 (Md. 1992) (actual malice); Mont. Code Ann. § 27-1-221(1) (actual fraud or actual malice). Ala. Code § 6-11-20(a); Alaska Stat. § 9.17.020(b); Ark. Code Ann. § 16-55-206, 207; Cal. Civ. Code § 3294(a) (actions other than breach of contract); Colo. Rev. Stat. § 13-25-127(2) (proof "beyond a reasonable doubt" required); Fla. Stat. § 768.725; Fla. Stat. § 768.72(2)(b); Ga. Code Ann. § 51-12-5.1(b); Idaho Code § 6-1604(1); Iowa Code Ann. § 668A.1(1); Kan. Stat. Ann. § 60-3701(c); Ky. Rev. Stat. Ann. § 411.184(2); Minn. Stat. Ann. § 549.20(1); Miss. Code Ann. § 11-1-65(1)(a); Mont. Code Ann. § 27-1-221(1), (5); N.J. Stat. Ann. § 2A:15-5.12(a); Nev. Rev. Stat. Ann. § 42.005(1) (actions other than breach of contract); N.C. Gen. Stat. § 1D-15(a), (b); N.D. Cent. Code § 32-03.2-11(1); Ohio Rev. Code Ann. § 2307.80(A); Ohio Rev. Code Ann. § 2315.21(D)(4); Okla. Stat. Ann. tit. 23, § 9.1(C); Or. Rev. Stat. § 31.730(1); S.C. Code Ann. § 15-33-135; S.C. Code Ann. § 15-32-520(D); S.D. Codified Laws § 21-1-4.1; Tenn. Code Ann. §29-39-104(a)(1); Tex. Civ. Prac. & Rem. Code § 41.003(a); Utah Code Ann. § 78B-8-201(1); W. Va. Code § 55-7-29(a).

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Punitive damages against larger businesses are limited to two times the plaintiff's compensatory damages or [SET AMOUNT, E.G., \$250,000], whichever is greater.<sup>89</sup> For individuals and small business

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<sup>89</sup> See Ala. Code § 6-11-21(a), (d); Alaska Stat. § 9.17.020(f)-(g); Colo. Rev. Stat. § 13-21-102(1)(a); Conn. Gen. Stat. Ann. § 52-240b; Fla. Stat. § 768.73(1); Ga. Code Ann. § 51-12-5.1(f), (g); Idaho Code § 6-1604(3); Ind. Code Ann. § 34-51-3-4; Kan. Stat. Ann. § 60-3701(e); Me. Rev. Stat. Ann. tit. 18-A, § 2-804(b); Miss. Code Ann. § 11-1-65(3); Mont. Code Ann. § 27-1-220(3); Nev. Rev. Stat. Ann. § 42.005(1); N.J. Stat. Ann. § 2A:15-5.14(b); N.C. Gen. Stat. § 1D-25(b); N.D. Cent. Code § 32-03.2-11(4); Ohio Rev. Code Ann. § 2315.21(D)(2)(a); Okla. Stat. Ann. tit. 23, § 9.1(B)-(D); 40 Pa. Cons. Stat. Ann. § 1303.505(d) (actions against healthcare provider); S.C. Code Ann. § 15-32-530; Tenn. Code Ann. § 29-39-104(a)(5); Tex. Civ. Prac. & Rem. Code § 41.008(b); Va. Code Ann. § 8.01-38.1; W. Va. Code § 55-7-29(c); Wis. Stat. § 895.043(6). A few state trial courts and federal courts have invalidated state statutes limiting punitive damages, but these statutes have not been held unconstitutional by the state's high court. See *Olson v. Hyundai Motor Co.*, 2014 WL 5040001 (Mont. Dist. Ct. Sept. 19, 2014) (Montana's cap); *Roginski v. Shelly Co.*, 31 N.E.3d 724 (Ohio Ct. Comm. Pleas 2014) (Ohio's cap); *Lindenberg v. Jackson Nat'l Life Ins. Co.*, 912 F.3d 348 (6th Cir. 2018) (Tennessee's cap).

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<sup>90</sup> See Ala. Code § 6-11-21(a), (d) (greater of three times compensatory damages or \$500,000 in non-physical injury cases, and greater of three times compensatory damages or \$1.5 million in physical injury cases with fixed limits adjusted for inflation); Alaska Stat. § 9.17.020(f)-(g) (greater of three times compensatory damages or \$500,000, and, in cases involving malice, greater of four times compensatory damages or the financial gain defendant received, or \$7 million); Colo. Rev. Stat. § 13-21-102(1)(a), (3) (amount of actual damages, but may be up to three times compensatory damages if defendant continued the behavior or repeated the action); Conn. Gen. Stat. Ann. § 52-240b (two times compensatory damages in product liability actions); Fla. Stat. § 768.73(1) (greater of three times compensatory damages or \$500,000, and, where motivated by unreasonable financial gain, greater of four times compensatory damages or \$2 million, and no cap if specific intent to harm); Ga. Code Ann. § 51-12-5.1(f), (g) (\$250,000 unless specific intent to harm); Idaho Code § 6-1604(3) (greater of three times compensatory damages or \$250,000); Ind. Code Ann. § 34-51-3-4 (greater of three times compensatory damages or \$50,000); Kan. Stat. Ann. § 60-3701(e) (lesser of \$5 million or defendant's highest annual gross income over previous five years, or, if defendant's profitability from misconduct exceeds limitation, 1.5 times the gained or expected profit); Me. Rev. Stat. Ann. tit. 18-A, § 2-804(b) (\$250,000 in wrongful death cases); Miss. Code Ann. § 11-1-65(3) (six different limits based on defendant's net worth); Mont. Code Ann. § 27-1-220(3) (lesser of \$10 million or 3% of defendant's net worth); Nev. Rev. Stat. Ann. § 42.005(1) (\$300,000 if compensatory award is less than \$100,000, or three times compensatory award that is \$100,000 or more); N.J. Stat. Ann. § 2A:15-5.14(b) (greater of five times compensatory damages or \$350,000); N.C. Gen. Stat. § 1D-25(b) (greater of three times compensatory damages or \$250,000); N.D. Cent. Code § 32-03.2-11(4) (greater of two times compensatory damages or \$250,000); Ohio Rev. Code Ann. §§ 2315.21(D)(2)(a) (two times compensatory damages); Okla. Stat. Ann. tit. 23, § 9.1(B)-(D) (three categories based on degree of conduct); 40 Pa. Cons. Stat. Ann. § 1303.505(d) (two times compensatory damages in action against healthcare provider absent intentional misconduct); S.C. Code Ann. § 15-32-530 (greater of three times compensatory damages or \$500,000 (adjusted for inflation), and, where motivated by unreasonable financial gain or known likelihood of felony, greater of four times compensatory damages or \$2 million, and no cap for intentional harm, felony conviction or action under influence of alcohol or drugs); Tenn. Code Ann. § 29-39-104(a)(5) (greater of two times compensatory damages or \$500,000); Tex. Civ. Prac. & Rem. Code § 41.008(b) (greater of two times economic damages plus amount equal to noneconomic damages up to \$750,000, or \$200,000); Va. Code Ann. § 8.01-38.1 (\$350,000); W. Va. Code § 55-7-29(c) (greater of four times compensatory damages or \$500,000); Wis. Stat. § 895.043(6) (greater of two times compensatory damages or \$200,000). A few state trial courts and a federal court applying Tennessee law have invalidated limits on state statutes limiting punitive damages, but these statutes have not been held unconstitutional by the state's high court. See *Olson v. Hyundai Motor Co.*, 2014 WL 5040001 (Mont. Dist. Ct. Sept. 19, 2014) (Montana's cap); *Roginski v. Shelly Co.*, 31 N.E.3d 724 (Ohio Ct. Comm. Pleas 2014) (Ohio's cap); *Lindenberg v. Jackson Nat'l Life Ins. Co.*, 912 F.3d 348 (6th Cir. 2018) (Tennessee's cap).

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defendants (50 or fewer full-time employees), punitive damages are capped at the *lesser* of two times the plaintiff's compensatory damages or [SET AMOUNT, E.G., \$250,000].<sup>10</sup>

If punitive damages have already been awarded against the defendant based on the same act or course of conduct, the defendant is not subject to repeat punishment unless the court finds that the prior awards were insufficient to punish the defendant.<sup>11</sup> Any subsequent punitive damage awards must be reduced by the total amount of all earlier punitive damage awards paid by the defendant for the same act or course of conduct.

### Section 7. {Vicarious Liability}

Liability of an employer or principal for the acts or omissions of an agent or employee is limited to instances in which: (1) the employer or principal expressly authorized the act or conduct; (2) during or after the act or conduct, the employer or principal expressly ratified the act or conduct; or (3) the employee or agent was unfit to perform acts or duties of the kind for which punitive damages are sought, and the employer or principal expressly authorized the employee or agent to perform acts or duties of that kind.<sup>12</sup>

### Section 8. {Regulatory Compliance}

Punitive damages are not permitted against a defendant for a product that was approved by a government agency or complies with government regulations, or the act or transaction forming the basis of the claim involves terms of service, contract provisions, representations, or other practices that comply with government standards.<sup>13</sup>

<sup>10</sup> See Ala. Code § 6-11-21(b) (greater of \$50,000 (adjusted for inflation) or up to 10% of net worth in non-physical injury cases against small businesses); Ohio Rev. Code Ann. § 2315.21(D)(2)(b) (lesser of two times compensatory damages or 10% of net worth, up to maximum of \$350,000, if defendant is individual or small employer).

<sup>11</sup> See Fla. Stat. § 768.73(2); Ga. Code Ann. § 51-12-5.1(e); Mo. Rev. Stat. § 510.263(4); Ohio Rev. Code Ann. § 2315.21(D)(5); Or. Rev. Stat. § 31.730(3).

<sup>12</sup> See Ala. Code § 6-11-27(a); Alaska Stat. § 9.17.020(k); Cal. Civ. Code § 3294(b); Fla. Stat. § 768.72(3); Kan. Stat. Ann. § 60-3701(d); Ky. Rev. Stat. Ann. § 411.184(3); Minn. Stat. Ann. § 549.20(2); Nev. Rev. Stat. Ann. § 42.007(1); N.C. Gen. Stat. § 1D-15(c); N.D. Cent. Code § 32-03.2-11(8); Ohio Rev. Code Ann. § 2315.21(C); 40 Pa. Cons. Stat. Ann. § 1303.505(c) (actions against health care providers); Tenn. Code Ann. § 29-39-104(g).

<sup>13</sup> See Ariz. Rev. Stat. § 12-689 (all products and services); Ariz. Rev. Stat. § 12-701(A) (pharmaceuticals); N.D. Cent. Code § 32-03.2-11(6) (all products); Ohio Code Ann. § 2307.80(C) (pharmaceuticals); Ohio Code Ann. § 2307.80(D) (products other than pharmaceuticals); Or. Rev. Stat. Ann. § 30.927 (pharmaceuticals); Tenn. Code Ann. § 29-39-104(d) (medical devices and pharmaceuticals); Tenn. Code Ann. § 29-39-104(b) (products other than drug or medical device); Tenn. Code Ann. § 29-39-104(e) (all products and services); Utah Code Ann. § 78B-8-203(1) (pharmaceuticals).

The requirement that the agency has made its own determinations of fraud or bribery is federal law with respect to FDA-approved products, according to most courts. See *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 348 (2001), ("plaintiffs' state-law fraud-on-the-FDA claims conflict with, and are therefore impliedly pre-empted by, federal law."); *Garcia v. Wyeth-Ayerst Labs.*, 385 F.3d 961, 966 (6th

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