Case No. **B252995**

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION FOUR

PATRICIA SOTO, et al.,
Plaintiffs, Appellants, Cross-Respondents, and Cross-Appellants,

vs.

A BEST PRODUCTS COMPANY, et al.,
Defendants,

and

BORGWARNER MORSE TEC INC., AS SUCCESSOR-BY-MERGER TO BORG-WARNER CORPORATION,
Defendant, Respondent, Cross-Appellant, and Cross-Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY,
HON. ROBERT H. O'BRIEN, JUDGE PRESIDING, CASE NO. BC432930.

AMICUS CURIAE BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF DEFENDANT, RESPONDENT, CROSS-APPELLANT, AND CROSS-RESPONDENT BORGWARNER MORSE TEC INC.

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Defendant, Respondent, Cross-Appellant, and Cross-Respondent.

INTRODUCTION: IMPORTANCE OF ISSUES AND INTEREST OF AMICUS

The Civil Justice Association of California ("CJAC" or "amicus")[1] welcomes the opportunity to address two key issues presented by this asbestos exposure case that resulted in a judgment against defendant (found to be 35% at fault for plaintiffs' injuries) for $60,000 in compensatory damages and $32.5 million in punitive damages to the estate, on top of $391,367 in economic damages and $6 million in noneconomic damages to decedent's three daughters:

(1) Does evidence about a parent company's "financial condition" and extrapolations as to defendant subsidiary's current revenue and earnings based on

[1] By separate application lodged with this Court on January 16, 2015, CJAC requests this brief be accepted for filing. **This brief was written solely by CJAC's General Counsel and funded completely by CJAC. No party or any other counsel authored the brief or made a contribution intended to fund its preparation or submission. CRC 8.200(3).**

information more than a decade old suffice to show the present wealth of the defendant, a non-alter ego subsidiary, when determining the amount of punitive damages to impose; and

(2) Does it violate due process to subject defendant to a large punitive damage award for making a product (vehicle clutches) 40 years ago that contained asbestos it did not know would harm plaintiff, an employee of automobile assembly plant where the product was used, from his exposure to it?

Amicus contends in this brief that the answer to the question about the adequacy of evidence required to show the wealth of the defendant is "No," and the answer to whether due process is violated in these circumstances is "Yes," thus warranting reversal of the punitive damage award. These issues are important to amicus because their resolution impacts our members – manufacturers, businesses and professional associations – and concerns our principal purpose: to educate the public about ways to make our civil liability laws more fair, economical, and certain. Toward these ends, CJAC often petitions the government – the legislature, courts and the people themselves though the initiative process – when it comes to determining who should pay, how much, and to whom when their conduct or products are accused of occasioning harm to others. This is just such a case.

The issues we address arise in the context of asbestos litigation where punitive damage verdicts have forced many defendants into bankruptcy, leaving pennies on the dollar for settlements with current and future plaintiffs for their compensable injuries.[2]

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[2] See David C. Landin, Victor E. Schwartz & Phil Goldberg, *Lessons Learned from the Front*
(continued...)

Indeed, "asbestos litigation has caused an amount of medical and economic suffering never experienced under American tort law, [consigning] plaintiffs without compensation, corporations without assets, courts with crowded dockets, and litigators with hearty bank accounts." Brittan Jackson Bush, *Crafting an Asbestos Scheduled Compensation Solution for Louisiana and the Nation* (2012) 72 *LA. L. REV*. 757.

One study predicted that by this year there will be as many as 265,000 pending asbestos-injury cases,[3] which will eventually cost nearly $265 billion,[4] surpassing the litigation costs for tobacco and Agent Orange. Michelle J. White, *Asbestos and the Future of Mass Torts* (2004) 18 *J. Econ. Persp.* 192 (noting the total costs of Agent Orange litigation ($180 million) and tobacco litigation ($246 billion)). Of the $70 billion spent on asbestos litigation up to a decade ago, plaintiffs recovered $29 billion compared to legal counsels' $41 billion benefit.[5] When compared to the $13 billion collected by litigators in tobacco's $246 billion litigation, the disparity between asbestos litigation costs and other mass torts is startling.

The issues here concern the jurisprudence of punitive damages in general and must, accordingly, be considered in relation to the twin purposes of such damages: to

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[2](...continued)
Lines: A Trial Court Checklist for Promoting Order and Sound Policy in Asbestos Litigation (2008) 16 *BROOK. J.L. & POL'Y* 589, 603 (citing Quenna Sook Kim, *Asbestos Trust Says Assets are Reduced as the Medically Unimpaired File Claims*, *WALL ST. J.*, Dec. 14, 2001, at B6).

[3] See 60 *AM. JUR. TRIALS* § 4, note 35, citing Stephen Labaton, *Judges' Panel, Seeing Court Crisis, Combines 26,000 Asbestos Cases*, *N.Y. TIMES*, July 30, 1991, p. A1.

[4] Stephen J. Carroll, *ASBESTOS LITIGATION COSTS & COMPENSATION*, p. vii (2004).

[5] *Id.* at 195 (outlining the distribution of asbestos litigation costs among plaintiffs ($29 billion), their attorneys ($20 billion), and defense counsel ($21 billion)).

punish and *deter*. Amicus notes, though, that deterrence is not really served here because asbestos litigation arises from exposures that took place long ago. As one scholar remarked, "[f]or long-term risks, such as asbestos, the economic players today are quite different from those who made the risk decisions decades ago at the time of exposure," assuming they even knew of the risks then. W. Kip Viscusi, *Why There is No Defense of Punitive Damages* (1998) 87 *GEO. L.J.* 381, 383. As for punishment, we are now at a point in asbestos litigation where the continued awarding of punitive damages is detrimental to the primary goal of compensation. There is only a limited amount of assets available to compensate seriously injured victims of asbestos exposure, and spending those assets on punitive damages creates windfalls for some at the expense of compensating other seriously injured plaintiffs.

SUMMARY OF SALIENT FACTS[6]

The legal issues amicus addresses are informed by the facts giving rise to them.

Secundo Medina worked in and around various asbestos products for many years beginning in the 1940s and 1950s and ending in the late 1980s. From 1975 to 1988, he worked as a security guard in a General Motors assembly plant where clutches manufactured by Borg & Beck, one of several different automotive divisions of Borg-Warner Corporation, were used for installation and repair of vehicles. In 1987, Borg-Warner Corporation was merged into a newly created company, Borg Warner Morse TEC Inc., the defendant. A year later, the Borg & Beck division was sold to a different

[6] These facts are taken from the briefs of the parties and confined to the issues addressed in this brief, not all issues raised by defendant.

company, Fichtel and Sachs. Until 1988, Borg & Beck used asbestos as a friction material in its clutches.

In December 2009, Mr. Medina was diagnosed with mesothelioma from his exposure to asbestos. He died in July 2010 and his three adult daughters filed a survivorship and wrongful death action as the legal heirs and representatives of their father's estate. Numerous companies (30) were named in the lawsuit along with defendant. By time of trial, all but defendant were dropped from the suit due to settlements and dismissals.

Plaintiffs sought in trial to prove that Mr. Medina's mesothelioma was caused by his exposure to asbestos fibers from defendant's clutches. Two employees of defendant, Richard Anderson, who worked for the Borg & Beck division from 1960 to 1982, and Terry Lindquist, who worked within the BorgWarner Corporation from 1964 to 1989, testified as to their knowledge of the dangers of asbestos during the time Mr. Medina worked at the automobile assembly plant where Borg & Beck clutches were installed in vehicles. Both testified they had no knowledge that the Borg & Beck clutches presented a health hazard to anyone. They were aware that raw asbestos fibers could be hazardous in the mining, textile manufacturing and building products fields, but neither thought that Borg & Beck's clutches were hazardous because the asbestos fibers were fully encapsulated by resins and other compounds within the clutches.

Nine of 12 jurors found defendant liable for compensatory and punitive damages. Determination of the amount of punitive damages was then bifurcated and in this second phase of the trial plaintiffs submitted information about defendant's financial condition. This was presented in the form of an expert witness who testified

about a report he prepared on BorgWarner, Inc., the publicly-traded parent corporation of defendant. Plaintiffs' expert conceded that the only information he had about defendant's wealth concerned its revenue and profitability in 2002, 11 years before the trial. He admittedly did not know defendant's net worth, market capitalization, expenses, profits, losses or cash on hand at the time of trial. He was unable even to state whether defendant was making or losing money. On this evidence, the jury awarded punitive damages to the Estate for $32.5 million.

After entry of judgment, defendant moved for judgment notwithstanding the verdict or for a new trial because of the excessiveness of the punitive and noneconomic damage awards. The court denied these motions and this appeal and cross-appeal followed.

SUMMARY OF ARGUMENT

The punitive damage award should be reversed because it violates defendant's constitutional guarantee to due process and is not based on any meaningful evidence of defendant's financial condition. Evidence of defendant's wealth is a prerequisite to obtaining punitive damages to assure that, for purposes of punishment and deterrence, the award is not too big or too small. Plaintiffs have that burden.

This punitive damage award is suspect as "excessive" because it runs afoul of the Supreme Court's countenance that rarely for purposes of due process will an award of punitive to compensatory damages be sustained if it exceeds a single digit ratio; here the ratio of these two damage components is 541 to 1. But evidence of a parent company's wealth, which is what plaintiff did present, is irrelevant to ascertaining the financial

condition of a subsidiary unless it is can be shown that the subsidiary is the alter ego of the parent. No such showing of that alter ego relationship was even attempted.

Most of what was introduced was irrelevant because it had to do with defendant's revenue and earnings in 2002, 11 years before the time of trial. The only relevant evidence of defendant's financial condition that the jury or appellate court can consider is confined to the time of trial.

The remaining evidence plaintiffs presented about defendant's wealth was too partial and incomplete to be "meaningful." It related solely to extrapolations from the parent company's data about defendant's revenue and earnings, but was bereft of information about whether, at time of trial, defendant had a "profit or loss," "cash on hand," or "debts." Plaintiffs' expert conceded that he did not know defendant's "net worth," "market capitalization, stock 'buy back' program, R&D development expenses," or "accounting fees."

Finally, the punitive damage award should be reversed because it violates defendant's right to procedural due process. Defendant had no fair notice of the *conduct* that could subject it decades later to punishment, nor of the *severity* of that $32.5 million penalty.

ARGUMENT

I. THE PUNITIVE DAMAGE AWARD SHOULD BE REVERSED BECAUSE THE PLAINTIFF FAILED TO PRESENT MEANINGFUL EVIDENCE OF DEFENDANT'S WEALTH FROM WHICH THE JURY OR THIS COURT CAN CONSIDER THE PROPER AMOUNT OF PUNITIVE DAMAGES.

A. Complete and Accurate Evidence of a Defendant's Financial Condition Must be Presented by the Plaintiff to the Trier of Fact for a Punitive Damage Award to be Sustained on Appeal.

Adams v. Murakami (1991) 54 Cal.3d 105, 109 ("*Adams*") instructs that "an award of punitive damages cannot be sustained on appeal unless the trial record contains *meaningful* evidence of the defendant's financial condition" (italics added).[7] Under California law, then, the defendant's financial condition is "an essential factor" in setting the amount of punitive damages. *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1185 ("*Simon*"). The plaintiff has the burden of producing this evidence and, absent it, the punitive damage award must be reversed. *Adams*, *supra*, 54 Cal.3d at 123-24.

Two reasons explicate why evidence of a defendant's wealth is essential for an award of punitive damages. First, evidence of financial condition in the record will assist the *appellate court* in determining whether the amount of an award of punitive damages

[7] See Cal. Civ. Code § 3295 which provides, in pertinent part, that "[t]he court may . . . grant any defendant a protective order requiring the plaintiff to produce evidence of a prima facie case of liability for [punitive] damages . . . prior to the introduction of evidence of : . . (2) The financial condition of the defendant." See also Judicial Council of Cal. Civil Jury Instructions § 3940 on punitive damages, which instructs that "[i]f you decide to award punitive damages, you should consider . . . in determining the amount . . . (b) [i]n 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.]"

is appropriate in a given case. Second, evidence of a defendant's wealth will assist the *jury* in determining what amount of damages, in light of the defendant's wealth, is required to punish past misconduct and deter the defendant's misconduct in the future.

Adams explained that the function of punitive damages is "a purely *public* one . . . to punish wrongdoing and thereby to protect itself from future misconduct." 54 Cal.3d at 110; italics original. Requiring sufficient and accurate financial data assures this interest is served. The public is well served by an award that punishes and deters, but not by one that cripples or destroys a defendant. Hence the courts must be able to meaningfully review awards with both considerations in mind. *Id.* at 112. As *Adams* underscored: "Sound judicial policy weighs in favor of fully informed decisions, especially when a public interest is at stake. . . . [T]the public policy nature of the award places in question the jurisdiction of the . . . court to award . . . punitive damages in the absence of proof of the wealth or financial condition of the defendant. [Citation.]" *Ibid.*

Plaintiffs seeking punitive damages must, then, prove the true financial condition of a defendant so that a punitive award is neither too big nor too little but, within reason, just "right" for punishment and deterrence. The vice of an award too small is that " 'deterrence . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort.' [Citation.] '[P]unitive damage awards should not be a routine cost of doing business that an industry can simply pass on to its customers through price increases, while continuing the conduct the law proscribes.' [Citation.]" *Simon, supra,* 35 Cal.4th 1159, 1185. Obviously the punitive award here of $32.5 million is not so small as to allow the defendant to "absorb [it] with little or no discomfort." *Ibid.*

But this particular punitive damage award strikes most reasonable persons as excessive; and excessive punishment also defeats its intended purpose and harms, rather than promotes, the public interest. "Juries must . . . avoid indiscriminately handing out excessive punitive damages awards, not merely because of . . . due process concerns, but [for] fear of potentially . . . negative second-order effects: overdeterrence, decreased productivity, increased cost, decreased consumption, and a decline in overall social welfare." Steve P. Calandrillo, *Penalizing Punitive Damages: Why the Supreme Court Needs a Lesson in Law and Economics* (2010) 78 *GEO. WASH. L. REV*. 774, 799.

An important clue as to why this punitive award is suspiciously "excessive" is, of course, the Supreme Court's admonition that "few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process." *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 424. Here the ratio between the punitive damages ($32.5 million) and compensatory damages ($60,000) awarded the estate is 541 to 1, suggesting the necessity of serious and genuine appellate review.

Reliance on defendant's wealth when determining the amount of damages necessary to punish a particular defendant is, absent strong trial court guidance, highly susceptible to excessiveness.

> In most cases, a plaintiff will present an inflated picture of the defendant's financial condition which is then used to depict the defendant's unlimited resources in contrast to the plaintiff's limited financial position. This implicit comparison can become a key point in the jury's deliberations, and the jury may want to help the shallow-pocketed plaintiff in his fight against the rich defendant.

Laura Clark Fey, et al., *The Supreme Court Raised its Voice: Are the Lower Courts Getting the Message? Punitive Damages Trends after State Farm v. Campbell* (2004) 56 BAYLOR L. REV. 807, 850-51. Other astute legal commentators concur:

> The wealth of the defendant matters a great deal to dollar awards. People will impose significantly higher punitive damages awards on significantly wealthier defendants – even though people do not see misconduct by wealthy defendants as more outrageous than equivalent misconduct by less-wealthy defendants. The lesson – perhaps not surprising, but highly relevant to legal practice – is that jury awards will be greatly affected by knowledge of [the] wealth of the defendant.

Cass R. Sunstein, et al., (2002) *PUNITIVE DAMAGES: HOW JURIES DECIDE* 32.

Several Supreme Court Justices have warned about the due process concerns invoked by the use of wealth evidence in punitive damage cases. See *BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559, 591 ("*BMW*")(Breyer, J., concurring)(suggesting consideration of financial position of defendant in determining punitive damages provides basis for inflating awards); *TXO Prod. Corp. v. Alliance Res. Corp.* (1993) 509 U.S. 443, 464 (arguing that emphasis on defendant's wealth may cause determination of damages to be influenced by anticorporate prejudice); *TXO,* 509 U.S. at 492 (O'Connor, J., dissenting, joined by Souter and White, JJ.) (noting that courts "must have authority to recognize the special danger" created by jury consideration of wealth evidence); *Pac. Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 42-43 (O'Connor, J., dissenting) ("States routinely authorize civil juries to impose punitive damages without providing them any meaningful instructions on how to do so . . .. Juries are permitted to target unpopular defendants, penalize unorthodox or controversial views, and redistribute wealth . . ..").

While a defendant's wealth is relevant to the determination of the proper amount of punitive damages to award, the potential for juror bias when considering it bars its use as an adequate upper limit for the award. This is because courts recognize that many of the wealthiest defendants are, as here, corporations; and the size of a corporate defendant is not an additional evil that in itself warrants an enhanced penalty. The judiciary understands that to remain competitive, large corporations count small as well as big costs, particularly if those costs may, as here, be recurrent. Therefore, even for a large corporation, a relatively modest punitive damage award may be sufficient to induce an end to the offensive conduct. See *Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 427 (concurring opinion. J. Brown.).

Accordingly, "a defendant's wealth cannot convert an unconstitutional punitive damages award into a constitutional one, but may perhaps play some role in a selection of the amount of punitive damages within the range of constitutionally permissible amounts." Laura Clark Fey, et al., *supra*, 56 BAYLOR L. REV. at 849. In assessing a defendant's wealth for determining the appropriate size of a of punitive award, then, it is critical that the jury and this court have a complete and accurate picture of defendant's financial condition. Providing jurors with partial information regarding the defendant's resources and liabilities invites them to speculate about defendant's true wealth. Jury speculation as to the defendant's finances operates to the detriment of defendants whose resources are overestimated, and "incomplete information leaves jurors ill-equipped to accurately assess [and this court to adequately review] the amount of punitive damages necessary to achieve the societal objectives of such an award."

Melissa Michelle Davis, *Procedural Protections in Punitive Damage Cases: Ensuring That Juries Are Asking the Right Questions about Wealth Evidence* (2008) 81 *TEMP. L. REV*. 1119, 1147.

Similarly, this court "cannot make a fully informed determination of whether an award of punitive damages is excessive unless the record contains evidence of the defendant's financial condition." *Adams, supra,* 54 Cal.3d at 110. "Absent such evidence, a reviewing court cannot make an informed decision whether the amount of punitive damages is excessive as a matter of law." *Id.* at 118.

B. The Evidence Presented as to the Defendant's Financial Condition was not Meaningful, but Irrelevant and too Incomplete for the Jury or this Court to Evaluate the Appropriateness of a Punitive Damage Award that is 541 Times Greater than the Accompanying Compensatory Damage Award.

1. A Financial Report on the Wealth of the Parent Company is not Relevant to Determining the Financial Condition of the Defendant Subsidiary.

Plaintiff concedes that its expert witness testified as to defendant's financial condition based solely on a report he prepared pertaining to defendant parent company's finances, but argues that the "numbers *derived* from those documents all related to [defendant's] own financial condition . . .."[8] This is a stretch that, unless a plaintiff can show the defendant is the *alter ego* of the parent company (which is not the case here), the law does not allow.

It is a general principle of corporate law that a parent corporation is not liable for the acts of its subsidiaries. *United States v. Bestfoods* (1998) 524 U.S. 51, 61. Absent a claim of piercing the corporate veil, absent here, the wealth of a parent corporation is

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[8] Plaintiffs' and X-Appellants' Opening Brief, p. 49; italics added.

not *relevant* to determining the appropriateness of punitive damages. See, *e.g.*, *Schutter v. Wyeth, Inc.,* No. 05 C 988, 2012 U.S. Dist. LEXIS 127082 at *20 (N.D. Ill. Feb. 24, 2012). This is the lesson of *Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, which holds that evidence of a parent corporation's wealth is relevant for determining a subsidiary's wealth *only* where there is evidence presented on "critical facts." "Critical facts" identified by *Tomaselli* include "inadequate capitalization, commingling of assets, disregard of corporate formalities," or any other facts that demonstrate the critical element: "that an inequitable result would have followed if the corporate separateness had been respected." *Id.* at 1285. Plaintiff does not contend these "critical facts" were present in this case, only that the information on defendant's financial condition was somehow "embedded" in the financial report the expert prepared about defendant's parent company that could be "derived" by its expert from that report.[9]

Other jurisdictions that have considered the inadmissibility of a parent company's financial information on the ground that it is irrelevant to the subsidiary company's wealth for punitive damages purposes, agree with *Tomaselli*.

- "[T]he wealth of a parent corporation is irrelevant to the jury's assessment of the appropriateness of punitive damages. See *Herman v. Hess Oil* (D. Virgin Is. 1974) 379 F.Supp. 1268, 1276, *aff'd* (3d Cir.1975) 524 F.2d 767, 772.

- "The jury may not consider the wealth of [the parent corporation] . . . , a non-party, in assessing the defendant [subsidiary's] ability to pay punitive damages. As such, [plaintiff's expert's] testimony regarding the financial condition of [the parent

[9] *Id.* at 49-50.

corporation] does not bear any relation to the particular disputed factual issues in the case and does not fit. Accordingly, we will exclude the testimony of [plaintiff's expert]." *St. Croix Renaissance Group, LLP v. St. Croix Alumina, LLC*, 2010 WL 4723897 (D. Virgin Islands).

- "Generally, evidence of the wealth of the parent corporation is irrelevant and inadmissible in assessing punitive damages against a subsidiary corporation." *Miller Brewing Co. v. Best Beers of Bloomington, Inc.* (1991), Ind.App., 579 N.E.2d 626, 642.

- "Financial documents regarding the wealth of a parent corporation are admissible *if* the subsidiary was merely an instrumentality of the parent corporation. [Plaintiff] does not argue that [the defendant subsidiary] was a mere instrumentality of [the parent], nor did the trial court so hold. Although [defendant] is a wholly owned subsidiary of [the parent company], the corporate form will not be disregarded solely because a corporation is the parent of another. Where no showing is made that the corporate veil should be pierced because the subsidiary was simply an alter ego or mere instrument of the parent, the wealth of the parent corporation cannot be considered for any purpose." *Cap Gemini America, Inc. v. Roy A. Judd & Software Synergy, Inc.* (App. Ct. 1992) 597 N.E.2d 1272, 1286; italics added.

- "Where a plaintiff seeks punitive damages against a subsidiary corporation, however, evidence of the wealth of the parent corporation is irrelevant and inadmissible unless the plaintiff can prove that the corporate veil should be pierced because the subsidiary was but the alter ego or mere instrument of the parent." *HCA Health Services, Inc. v. National Bank of Commerce* (1988) 294 Ark. 525, 531-532, 745 S.W.2d 120, 124; *Walker v. Dominick's Finer Foods, Inc.* (1981), 92 Ill.App.3d 645, 649-650, 415 N.E.2d

1213, 1217; *Liberty Financial Management Corp. v. Beneficial Data Processing Corp.* (1984), Mo.App., 670 S.W.2d 40, 51-52.

2. *Most of the Information Plaintiff's Expert Extrapolated from Defendant Parent Company's Financial Condition and Sought to Attribute to Defendant's Wealth was Irrelevant because it was too Old.*

The law is clear that the wealth of the defendant for the purpose of ascertaining the proper size of punitive damages to assess is measured at the time of trial, not an earlier period. "A punitive damages award is based on the defendant's financial condition *at the time of trial*," and will not be sustained on appeal if the record lacks such evidence. *Kelly v. Haag* (2006) 145 Cal.App.4th 910, 915; italics added ("*Kelly*"). This is common sense given that a primary purpose of punitive damages is deterrence. A defendant's past financial condition can vary greatly from its present one – either better or worse – but deterrence can only logically work from the present, not the past.

Yet much of the evidence plaintiff's expert "derived" from the financial report he prepared on defendant's parent company had to do with information as of 2002, 11 years before the trial took place. This included a report by the parent company that defendant's revenue in 2002 was $1.09 billion and that defendant's earnings before interest and taxes were 15% of its revenues.[10] This is, for the purpose of determining the appropriate amount of punitive damages to award at time of trial, what accountants sarcastically call "IBIR" data — an acronym for "interesting but irrelevant." Most significantly, it is also irrelevant as evidence; and the expert's testimony about it, including his inferences and speculation as to what if anything it might have to do with

[10] Defendant's Opening Brief, p. 21.

defendant's present financial condition, should have been stricken and the jury instructed not to consider it. "A punitive damages award is based on the defendant's financial condition at the time of trial," and not, as here, more than a decade earlier. *Zhadan v. Downtown Los Angeles Motor Distributors, Inc.* (1979) 100 Cal.App.3d 821, 839; *Washington v. Farlice* (1991) 1 Cal.App.4th 766, 777.

> 3. *Plaintiff's Expert Presented too Little Information for the Jury to Determine or this Court to Review the Appropriate Size of a Punitive Damage Award.*

There is no "rigid" or specific measure for determining a defendant's financial condition. *Adams, supra,* 54 Cal.3d at 116, fn. 7.

> Net worth is the most common . . ., but not the exclusive measure. In most cases, evidence of earnings or profit alone are not sufficient "without examining the liabilities side of the balance sheet." [Citation]. "What is required is evidence of the defendant's ability to pay the damage award." [Citation.] Thus, there should be some evidence of the defendant's actual wealth. Normally, evidence of liabilities should accompany evidence of assets, and evidence of expenses should accompany evidence of income.

Baxter v. Peterson (2007) 150 Cal.App.4th 673, 680 ("*Baxter*").

A close read of the parties' briefs in this case does not show any of this evidence in the record. Indeed, plaintiff's expert admitted that his report on defendant's parent company failed to reveal any information about whether, at time of trial, defendant had a "profit or loss," "cash on hand," or "debts."[11] He conceded that he did not know defendant's "net worth, " its "market capitalization, its stock 'buy back' program, its

[11] Defendant's Opening Brief, p. 22.

R&D development expenses," or "accounting fees."[12] This paucity of financial information is insufficient to form any meaningful picture of defendant's financial condition. Consideration of these factors is necessary for the jury and this court to come to grips with defendant's actual "wealth." In fact, some valuation methods can produce vastly different results depending on the financial structure of a defendant. See *Mathias v. Accor Economy Lodging Inc.* (2003) 347 F.3d 672, 678 ("A firm financed largely by equity investors has a large 'net worth[,]' . . . while the identical firm financed largely by debt may have only a small net worth because accountants treat debt as a liability."). Defendants with fewer assets may want evidence of net worth before the jury in an attempt to limit punitive damages based on their ability to pay. "[V]arious accounting gimmicks involving nonoperating and nonrecurring income . . . inflate (or distort) profits." Howard M. Schilit, *FINANCIAL SHENANIGANS* 60 (1993). These "gimmicks" include boosting profits by selling undervalued assets, retiring debt, failing to segregate unusual and nonrecurring gains or losses from recurring income, and burying losses under noncontinuing operations. *Id.* at 60-75. In sum, to quarry out a defendant's true financial condition requires the weighing of many economic factors that plaintiff here simply failed to present as meaningful evidence.

Appellate courts have interpreted *Adams* to require plaintiffs to provide a balanced overview of a defendant's financial condition; a selective, "cherry-picked" presentation of financial condition evidence such as that presented here will not survive scrutiny. See *Baxter*, *supra*, 150 Cal.App.4th at 676, 681 (record "silent with respect to . . . liabilities" is insufficient); *Kelly, supra,* 145 Cal.App.4th at 916–917; *Robert L. Cloud & Associates, Inc.*

[12] *Id.*

v. Mikesell (1999) 69 Cal.App.4th 1141, 1151–1153; *Lara v. Cadag* (1993) 13 Cal.App.4th 1061, 1063–1064 (evidence of earnings is not by itself sufficient.). Courts may not infer sufficient wealth to pay a punitive award from a narrow set of data points, such as those presented by plaintiff; and that lacunae warrants reversal of the punitive damage award.

II. DEFENDANT'S RIGHT TO DUE PROCESS WAS VIOLATED BECAUSE NO PRIOR NOTICE WAS GIVEN OF THE CONDUCT THAT WOULD SUBJECT IT TO PUNISHMENT OR OF THE SEVERITY OF THE PENALTY THAT THE STATE MAY IMPOSE ON IT FOR THAT CONDUCT.

The federal and California Constitutions guarantee to all persons "due process" of law.[13] It has long been settled that for purposes of "due process," corporations are "persons" entitled to its protections. See *Gulf, C & S.F. Ry. v. Ellis* (1897) 165 U.S. 154, 17; *American De Forest Wireless Telegraph Co. v. Superior Court* (1908) 153 Cal. 533, 535. "The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice." *State Farm*, *supra*, 538 U.S. at 427 (quoting *BMW*, 517 U.S. at 585). See *id.* at 59 (Breyer, J., concurring). Moreover, courts are a co-equal and coordinate branch of government, so when they act to impose a penalty by way of punitive damages on a person that constitutes "state action" subject to due process protections.

Essential to the "fair notice" requirement of procedural due process is that it include "not only . . . the conduct that will subject a defendant to punishment, but also . . . the severity of the penalty that a State may impose." *BMW,* 517 U.S. at 574. Notice of possible punishment alone does not fulfill the purpose of procedural due process –

[13] U.S. Const., Fifth (Federal government)and Fourteenth Amend. (State governments); Cal. Const., art. 1, § 7(a).

to allow people to order their behavior – especially given the inconsistency in the amounts of punitive damage awards. Ronald A. Cass, *THE RULE OF LAW IN AMERICA* (2001) 119-130. Moreover, notice of possible punishment alone cannot fulfill procedural due process's rule of law origins. Procedural due process also requires that a person be given fair notice of the likely severity of the award, meaning its amount. Only then are citizens truly provided fair warning of the likely government response. See, *e.g.*, *Haslip*, *supra*, 499 U.S. at 12 (majority opinion) (quoting *Newport v. Fact Concerts, Inc.* (1981) 453 U.S. 247, 270-71); *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 350.

FCC v. Fox Television Stations, Inc. (2012) 132 S.Ct. 2307 ("*Fox Television*") is the most recent Supreme Court opinion to hold that due process precludes the government from punishing a television network for its broadcasting of "fleeting expletives," because the enforcement regulations did not give it "fair notice" that such conduct could subject it to punishment. *Fox Television* explains that "a . . . punishment fails to comply with due process if the statute . . . under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Id.* at 2317, citing to and quoting from *United States v. Williams* (2008) 553 U.S. 285, 304.

Similarly, *Christopher v. SmithKline Beecham Corp.* (2012) 132 S.Ct. 2156, decided the same term as *Fox Television*, holds that an employer cannot be found liable under the Fair Labor Standards Act for wage and hour violations to its employee sales representatives because agency interpretations of that law changed as to whether the employees were exempt from its ambit. In reaching this conclusion, *Christopher* stated that "[t]o defer to the agency's [latest] interpretation in this circumstance [i.e., imposing

liability] would seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a law] prohibits or requires.' " *Id.* at 2167. See also (1997) 520 U.S. 259, 266 where punishments for past conduct were reversed because "neither the statute nor any prior judicial decision . . . fairly disclosed [the defendant's conduct] to be within its scope."

Fox and *Christopher* underscore the due process principle that a defendant is entitled to fair notice of conduct that can give rise to punitive damages liability and the severity of that punishment. The Court has termed punitive damages "quasi-criminal," and has made clear that such damages "further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." *BMW*, 517 U.S. at 568. Thus, because punitive damages are intended to punish, they cannot be imposed on a defendant without fair notice that the conduct at issue could result in punitive damages liability and the severity of that punishment.

California's punitive damage statute, facially or as applied here, fails to provide fair notice to defendant as to its liability and the potential severity of punishment it could suffer. The statutory standards for imposing punitive damages liability are vague and open-ended, especially when viewed under the prism of Supreme Court opinions as to what due process requires. Factors a potential defendant must weigh in deciding whether his conduct will subject him to a punitive damage award, and the magnitude of that possible penalty, defy reasonable comprehension. Indeed, there are so many matters a potential defendant must consider in seeking to order his behavior to avoid being hit with a punitive award as to boggle the minds of reasonable people. As *Honda*

Motor Co. v. Oberg (1994) 512 U.S. 415, 432 explains about the jury instructions typically given on punitive damages:

> Punitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.

How, for instance, could defendant here have reasonably understood that asbestos in its clutches could subject it to severe financial punishment ($32.5 million) decades later because plaintiff was exposed to asbestos dust from them when he milled around workers in an automobile assembly plant who repaired and installed those clutches on vehicles? The record does not disclose defendant knew at the time of decedent's employment at the plant that his exposure to asbestos dust from its clutches was dangerous. Can a person act with "malice, oppression or fraud" without actual knowledge about dangers inherent from use of its product, dangers the jury here found did not render the clutches "defective" under product liability law? Is mere negligence sufficient to constitute "malice oppression or fraud"? How can a person have a duty to warn of dangers about exposure to its product that he is unaware of? How does any of this comport with the requirement that for punitive damages to apply the defendant must have "notice of the likelihood" of the specific injury alleged. *Simon*, *supra*, 35 Cal.4th at 1177.

CONCLUSION

For all the reasons aforementioned, CJAC urges the Court to reverse the punitive damage judgment because it violates defendant's due process guarantee to "fair notice" and is not based on meaningful evidence of the defendant's financial condition.

Dated: January 26, 2015

Respectfully submitted,

/s/

Fred J. Hiestand
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CERTIFICATE OF WORD COUNT

I certify that the WordPerfect® software program used to compose and print this document contains, exclusive of the caption, tables, certificate and proof of service, approximately 6,400 words.

Dated: January 26, 2015

/s/
Fred J. Hiestand

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I, David Cooper, am employed in the city of Sacramento, Sacramento County, State of California. I am over the age of 18 years and not a party to the within action. My business address is 3418 Third Street, Suite 1, Sacramento, CA 95817.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed this 26th day of January 2015 at Sacramento, California.

/s/
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