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PUNITIVE DAMAGES IN ARBITRATION

STEPHEN P. BEDELL*

TABLE OF CONTENTS

Page

I. INTRODUCTION .................................. 22

II. HISTORICAL OVERVIEW ............................ 23
    A. The History of Arbitration ....................... 23
    B. The History of Punitive Damages ............... 26

III. PUNITIVE DAMAGES IN ARBITRATION ............. 32
    A. Pre-Willoughby: Hostility To Punitive Arbitra-
       tion Awards.................................... 32
       1. Early Treatment ............................. 32
       2. Garrity: Prohibition of Punitive Arbitration
          Awards ...................................... 33
       3. The Post-Garrity—Pre-Willoughby Period .... 34
    B. Willoughby: The Confirmation of Punitive Arbi-
       tral Awards .................................... 36
    C. Post-Willoughby: The Trend In Favor Of Puni-
       tive Damages .................................... 39

IV. PROPOSED GUIDELINES FOR CONSIDERATION
    AND AWARD OF PUNITIVE DAMAGES IN ARBITRA-
    TION ............................................. 41
    A. Conduct/State of Mind ............................. 42
    B. Types of Claims: Commercial Cases ............. 43
    C. Burden of Proof ..................................... 43
    D. Bifurcation ..................................... 44
    E. Amount and Judicial Review of Awards ......... 44
    F. Disclosure of Financial Data .................... 45

V. CONCLUSION ..................................... 46

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I. Introduction

Both in policy and in practice, arbitration is a favored method of dispute resolution. As a matter of standard practice, commercial contracts often contain arbitration clauses which typically are very broad, providing for arbitration of all disputes which arise from the contractual relationship. However, the judiciary has historically prohibited punitive arbitration awards, thus precluding arbitrators from fashioning a complete remedy in many instances. The capstone of this tradition, Garrity v. Lyle Stuart, Inc., decided in 1976, held that an arbitrator has no power to award punitive damages, even if allowed in the agreement between the parties. The Garrity court posited that punitive arbitration awards impinged upon the authority of the judiciary and were prone to abuse, and were thus violative of public policy. Although Garrity was frequently followed, a number of courts implicitly acted contrary to Garrity.

The first faltering break from the Garrity doctrine occurred in the 1983 case of Willis v. Shearson/American Express, Inc. Holding that federal law applied, the district court in Willis was able to distinguish Garrity on the basis that it restricted the power of arbitrators only under state law, not federal law. Only one year later, the Willis doctrine advanced a major step further in the case of Willoughby Roofing v. Kajima International, Inc., in which the United States District Court for the Middle District of North Carolina upheld an arbitral award of punitive damages on its own merit. In this watershed ruling, the Willoughby court held that public policy did not prohibit arbitrators from making punitive damage awards.

5. Id.
6. Id. at 833-34, 353 N.E.2d at 796.
7. See infra note 62.
8. Courts implicitly acted contrary to Garrity by compelling arbitration of punitive damage claims.
10. Id. at 823.
12. Id. at 364-65.
13. Id. at 359-61.
Significantly, the Willoughby court reasoned that a prohibition of punitive awards would undermine the value of arbitration and frustrate punitive damage policy. In apparent consensus, nearly every decision for the past three years has followed the Willoughby rule and upheld punitive arbitration awards.

This article will present a historical analysis of the role of punitive damages in arbitration, and propose guidelines under which arbitrators should be empowered to award punitive damages.

II. Historical Overview

A. The History Of Arbitration

With the passage of the Arbitration Act of 1925 (the "Arbitration Act"), Congress established a strong federal policy favoring arbitration. This legislation represented the first break from the English tradition in which the judiciary refused to enforce arbitration agreements on the basis that such agreements impinged upon the courts' jurisdiction. Prior to the passage of the Arbitration Act, American courts criticized this judicial attitude as illogical and unjust. Nevertheless, the precept was considered too deeply rooted to be overruled without legislative enactment.

The Arbitration Act provides that a written agreement to arbitrate in any "contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The statute further provides that any party aggrieved by the improper refusal of another party to commence arbitration may petition a federal court of competent jurisdiction for an order compelling arbitration. If the formation of an arbitration agreement is not at issue, "the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." The Arbitration Act was necessitated by the traditional reluctance of courts to enforce arbitration clauses, and simply codi-
ifies the common law duty of courts to enforce the terms of valid contracts.22

Despite the simple and direct language of the Arbitration Act, there has been considerable disagreement in the federal judiciary over its procedural23 and substantive interpretation and application. Disagreement over the substantive interpretation of the Arbitration Act resulted in the common judicial refusal to enforce arbitration clauses in disputes arising under federal remedial legislation. The judiciary has often found arbitration to be an unsuitable method of dispute resolution,24 and has generally precluded arbitration in the areas of securities,25 antitrust,26 bankruptcy,27 and RICO disputes.28

22. Id. at 219-20. (the Act "creates no new legislation, no new rights, except a remedy to enforce an agreement in commercial contracts . . . ") (quoting 65 CONG. REC. 1931 (1924)).

23. Procedural issues focused on the judicial severance of arbitrable and non-arbitrable claims, with the resultant arbitration of the former and judicial review of the latter. Belke v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 693 F.2d 1023, 1027 (11th Cir. 1982); Wick v. Atlantic Marine, Inc., 605 F.2d 166 (5th Cir. 1979). If both arbitrable and non-arbitrable claims arose out of the same transaction, however, courts have questioned the wisdom and practicality of severing the arbitrable claims. Belke, 693 F.2d at 1026; Miley v. Oppenheimer & Co., 637 F.2d 318, (5th Cir. 1981); Cunningham v. Dean Witter Reynolds, Inc., 550 F. Supp. 578 (E.D. Cal. 1982). Judicial authorities have noted the inefficiency of bifurcated proceedings related to a single transaction, and have expressed concern for the possible preclusive effect of factual issues resolved by arbitration. Belke, 693 F.2d at 1026; Miley, 637 F.2d at 334-37; Cunningham, 550 F. Supp. at 585.

As a result of this procedural dilemma, several federal circuits until recently applied the "intertwining doctrine." The "intertwining doctrine" provided that federal district courts, in their discretion, could refuse to compel arbitration of arbitrable claims under a written agreement where such claims were so intertwined with non-arbitrable claims that their severance could result in substantial inefficiency or collateral estoppel problems. In Byrd, the Supreme Court sounded the death knell of the intertwining doctrine. See infra note 28.

24. See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore, 590 F.2d 823 (10th Cir. 1978) (holding arbitration clauses void as to the federal securities laws concerned); Applied Digital Technology v. Continental Casualty Co., 576 F.2d 116 (7th Cir. 1978) (holding antitrust claims inappropriate for enforcement by arbitrator); Allegra v. Perot, 548 F.2d 432 (2d Cir.) (holding a trustee cannot be forced to arbitrate his claims under the securities laws and bankruptcy act), cert. denied, 432 U.S. 910 (1977); S.A. Mineracso da Trinidad-Samitri v. Utah Int'l, Inc., 576 F. Supp. 566 (S.D.N.Y. 1983) (holding arbitration clauses unenforceable in the areas of antitrust, bankruptcy, § 10(b)-(5) claims and RICO respectively).


The judiciary has advanced several rationales for rejecting arbitration in these areas. The most palatable of these rationales is that Congress—for example, in the Securities Act of 1933—has legislatively mandated that parties may not waive their rights to judicial proceedings through private agreements.29

In the recent trilogy of Dean Witter Reynolds, Inc. v. Byrd,30 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,31 and Shearson/American Express, Inc. v. McMahon,32 the United States Supreme Court rejected the traditional judicial antipathy to arbitration and significantly broadened the scope of enforceability of arbitration agreements. In Byrd, the Supreme Court rejected application of the intertwining doctrine, thus requiring arbitration of arbitrable claims irrespective of non-arbitrable claims. In Mitsubishi, the Court deemed international antitrust disputes to be arbitrable, notwithstanding the judicial hostility to the arbitration of domestic antitrust disputes. Most recently, in McMahon, the Supreme Court expanded the substantive scope of arbitrability by enforcing agreements to arbitrate claims arising under the Securities Exchange Act of 1934 and the Racketeer Influenced and Corrupt Organizations Act.

Thus, federal policy, embodied in the Arbitration Act and in the recent decisions of the Supreme Court, unequivocally favors arbitration as a means of resolving disputes.33 As the Supreme Court recently observed in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth: "[W]e are well past the time when judicial suspicion of the desirability of arbitration of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."34 Thus, the Supreme Court has recognized that

33. Id. at 98.
the effect of the Arbitration Act was to create a body of federal substantive law of arbitrability, and that the Arbitration Act "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . ." Indeed, since the Wilko decision in 1953, every relevant Supreme Court decision has favored arbitration.

In Byrd, the Supreme Court specifically noted that the Arbitration Act, by its terms, mandates that the district court "shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." The Supreme Court's message is clear: "[T]he only legitimate ground upon which to decline enforcement of an arbitration clause is the manifest congressional intention to the contrary." With the watershed Byrd, Mitsubishi and McMahon rulings, the Supreme Court has swept away any doubts about the enforceability of valid arbitration clauses. In essence, the Supreme Court has finally placed arbitration agreements on an equal footing with other contracts, and has signalled its intention to enforce the arbitrability of virtually all actions. Presumably, the Supreme Court's recent pronouncements will accelerate the judicial acceptance of punitive damages as a valid component of the substantive law of arbitrability.

B. The History Of Punitive Damages

The earliest system of law to utilize civil punitive damages was the Code of Hammurabi in 2000 B.C. Prior to the Eighteenth Century, addressed with a healthy regard for the federal policy favoring arbitration"; Southland Corp. v. Keating, 465 U.S. 1, 10 (1984) (in passing the Arbitration Act, "Congress declared a national policy favoring arbitration . . . [that] mandated the enforcement of arbitration agreements"); See also Wilko, 346 U.S. at 439 (Frankfurter, J., dissenting) ("[t]here is nothing in the record . . . to indicate that the arbitral system . . . would not afford the plaintiff the rights to which he is entitled.") The recent opinions of Mitsubishi, Moses H. Cone, and Southland lend well-founded support for Justice Frankfurter's dissenting language in Wilko.

35. Moses H. Cone, 460 U.S. at 24-25. See also Southland Corp., 465 U.S. at 10-16 (Congress did not intend to limit Arbitration Act to only federal court jurisdiction).

36. Mitsubishi, 473 U.S. 614; Byrd, 470 U.S. 213; Southland Corp., 465 U.S. at 2-3 (holding preempted state laws invalidating arbitration clauses otherwise valid under Arbitration Act); Moses H. Cone, 460 U.S. at 2 (holding a federal district court's stay of federal suit seeking arbitration under § 4 of Arbitration Act improper); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 396 (1967) (holding that where one party to a contract containing an arbitration clause claims fraud in the inducement of the contract generally, the claim must be settled in arbitration according to the terms of the arbitration clause).

37. Byrd, 470 U.S. at 218 (emphasis in original).


tury, English courts had upheld jury verdicts that exceeded the plaintiff's actual physical harm. As early as 1763, an English court employed the term "exemplary damages" in the case of *Huckle v. Money,* to recognize that a jury could return a valid monetary award in excess of actual damages.

The first American enunciation of the theory of punitive damages occurred in a 1791 case of breach of promise to marry, when damages were awarded "for example's sake." Currently, all but four states—Louisiana, Massachusetts, Nebraska, and Washington—endorse punitive damages as a proper component of the common law. And all of these four states have statutory exceptions to the proscription on this practice.

Civil awards of punitive or exemplary damages have been generally justified by four rationales, or policy objectives. First, a majority of jurisdictions recognize that the primary purpose of punitive damages is to punish flagrant wrongdoers, and to deter them and others from repeating the offense. The second rationale is that punitive or exemplary damages afford a plaintiff recovery in excess of the amount necessary to compensate for proven loss or injury. To justify such a recovery, the aggrieved party is generally required to demonstrate that the conduct complained of was willful, wanton, malicious, oppressive, or reckless.

See generally K. REDDEN, PUNITIVE DAMAGES 161-556 (1980) (providing a detailed discussion of the standards employed by various courts in the assessment of punitive damages).

41. 95 Eng. Rep. 768 (C.P. 1763).
42. Correll v. Colbaugh, 1 N.J.L. 90 (1791).
45. Punitive or exemplary damages afford a plaintiff recovery in excess of the amount necessary to compensate for proven loss or injury. To justify such a recovery, the aggrieved party is generally required to demonstrate that the conduct complained of was willful, wanton, malicious, oppressive, or reckless. See D.DOBBS, REMEDIES 205 § 3.9 (1973). See generally K. REDDEN, PUNITIVE DAMAGES 161-556 (1980) (providing a detailed discussion of the standards employed by various courts in the assessment of punitive damages).
47. J. GHIRDI & J. KIRCHUR, supra note 43, § 4.14 & n.1 (citing cases and statutes from 36 states and the District of Columbia). As a noted torts expert has stated: The idea of punishment, usually does not enter into tort law, except in so far as it may lead the courts to weigh the scales somewhat in favor of the plaintiff's interest in determining that a tort has been committed in the first place. In one rather anomalous respect, however, the ideas underlying the criminal law have invaded the field of torts. Where the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime, all but a few courts have permitted the jury to award in the tort action "punitive" or "exemplary" damages, or what is sometimes called "smart money." Such damages are given to the plaintiff over and above
Nitive damages are mere monetary awards that supplement compensatory damages. The third rationale is that punitive awards offer an element of revenge both to the injured party and to society as a whole. The fourth rationale is that punitive awards will promote justice by providing an incentive to pursue causes of action where the damages are nominal, but where the defendant's behavior subjects society to substantial risks.

It is nearly impossible to generalize as to the guidelines under which punitive damages are imposed from jurisdiction to jurisdiction. Most jurisdictions focus on the nature of the defendant's conduct, rather than the nature of the plaintiff's harm. Nevertheless, the range of culpable conduct varies from state to state in almost indecipherable degrees. Most jurisdictions adhere to the rule that actual or compensatory damages are a prerequisite to an award of punitive damages. Most jurisdictions require that punitive damages bear a "reasonable relationship" to the compensatory damages awarded. Many jurisdictions authorize the trier of fact to consider the defendant's wealth in assessing punitive damages. These generalizations are anything but precise, and numerous other jurisprudential variables could be identified. Perhaps the Fifth Circuit best summarized punitive damage standards: "The term [punitive damages] is too loose, vague, indefinite, and uncertain; and its meaning often varies from state to state, court to court, and jury to jury. It is a chameleon of the law—changing its hue to the color of the situa-

the full compensation for his injuries, for the purpose of punishing the defendant, of teaching him not to do it again, and of deterring others from following his example.


51. See Long, supra note 46, at 879, 881 (for examples of various state conduct requirements ranging from "oppression, fraud, or malice" to "mere caprice").


53. See Ellis, Fairness and Efficiency in the Law of Punitive Damages, 56 S. Cal. L. Rev. 1, 58 (1982); Sales & Cole, supra note 50, at 1117, 1145.

54. See K. Redden, supra note 45, at 61; Ellis, supra note 53, at 54.

55. See Long, supra note 46, at 880-83; Sales & Cole, supra note 50, at 1130-54.
tion on which it may be used."  

Not surprisingly, punitive damages have come under harsh attack in recent years. Many commentators perceive that the claims for, and awards of, punitive damages increased greatly in the past few years. Critics also perceive that the size of awards has grown steadily, and that an ever larger number of verdicts can properly be described as excessive. In reality, punitive awards have grown in size and absolute number, but have not grown in relative frequency.

An array of arguments has been advanced against the theoretical underpinnings of punitive damages. Perhaps the strongest criticism is that punitive damages do not serve their ostensible goals, and are no longer needed. First, critics note that the compensatory damages concept was broadened long ago to include total compensation, including tangible and intangible, direct and indirect harm. This has made compensation a less than viable justification for the imposition of punitive damages. To the contrary, punitive damages now often simply provide a windfall to the plaintiff. Second, many

57. See, e.g., Carsey, The Case Against Punitive Damages: An Annotated Argumentative Outline, 11 FORUM 57 (1975); Duffy, Punitive Damages: A Doctrine Which Should Be Abolished (Def. Research Inst., 1969); Ellis, supra note 53, at 76-78; Ghiardi, The Case Against Punitive Damages, 8 FORUM 411 (1972); Long, supra note 46 at 888-89; Sales & Cole, supra note 50;
59. See also Sales & Cole, supra note 50, at 1154 & n.167 (and cases cited therein).
60. The total amount awarded in 1980-84 was six times greater than in 1975-79 in the Circuit Court of Cook County (Cook County) and twice as much in the San Francisco Superior Court (San Francisco). The size of a typical punitive award also increased, from $20,000-$30,000 before 1980 to $50,000-$60,000 after 1980, representing a doubling in San Francisco and nearly four-fold increase in Cook County. Finally, the size of the largest awards also increased, especially in Cook County. As to the number of punitive awards, between 1975 and 1985 the number increased by 67% in Cook County and 53% in San Francisco. However, this "increased number" still represented a very small number and proportion of cases: 50 cases in San Francisco and 65 in Cook County from 1980-84, representing only 8% of trials and 14% of plaintiff's verdicts in San Francisco and only 4% of trials and 6% of plaintiff's verdicts in Cook County. More important, despite the increase in absolute number, the relative frequency of punitive awards, in proportion to the number of trials and number of plaintiff's verdicts, remained almost unchanged over the entire 25-year period, in both jurisdictions. Peterson, Sarma & Shanley, Punitive Damages: Empirical Findings 8-45 (Rand Institute 1980).
63. Commentators have posited that it is difficult to understand why, when the sufferer of a tort has been fully compensated for his suffering, he should recover anything more. And it is equally difficult to understand why, if the tortfeasor is to be punished by exemplary damages, the damages should go to the compensated sufferer,
commentators argue that the punishment rationale is inappropriate for civil litigation, and that punitive damages should be confined to criminal law.64 Third, critics contend that the availability of liability insurance to cover punitive damage awards vitiates the punishment and deterrence rationales.65 And, at least one commentator believes that the public justice rationale is rarely applicable.66

A final and cogent objection to punitive damages is that with no meaningful standard available for the assessment of punitive damages, the size of the award can be expanded to fit the pleasure of judges and juries,67 with inadvertent harm to society at large. First, if insurance companies pay the damages, society is ultimately penalized since, theoretically, all insurance premiums will increase to absorb the insurance companies' cost of punitive damages.68 Second, if conduct which is potentially of social benefit is deterred by the threat of punitive damages, society would again be the loser.69 Third, the extremely burdensome cost of discovery in punitive damage trials, coupled with the fear of unfair or outrageous jury awards, often compels defendants to settle meritless cases,70 which weakens the judicial system and results in an unfair and inefficient transfer of wealth.

Regardless of the shortcomings of punitive damages, courts continue to award them in an attempt to meet the recognized social and exemplary goals.71 Punitive damages are often awarded in (1) tort actions, when injury occurs to the person,72 property,73 or in the

and not to the public in whose behalf he is punished. K. REDDEN, supra note 40, § 7.5(E), at 624-25. Bass v. Chicago & N.W. Ry., 42 Wis. 654 (1877). See also, Casey, supra note 5.

64. See Long, supra note 46, at 884-89; Sales & Cole, supra note 50, at 1159. Both commentators note that civil parties are being subject to quasi-criminal penalties without the procedural safeguards afforded under criminal law.

65. A majority of jurisdictions have judically declared that punitive damages are insurable. Ellis, supra note 53, at 71; Morrissey, Punitive Damages—Insurability, 25 TRIAL LAW GUIDE 257 (1981).

66. Long, supra note 46, at 889.

67. Yet, as Dobbs points out, the court can reduce punitive awards, with or without any mention of the reasonable ratio rule. Also, new trials can be ordered as to punitive awards. Dobbs, supra note 46, § 3.9, at 211 n.42.


70. Sales & Cole, supra note 50, at 1156-57.

71. See generally K. REDDEN, supra note 40, at 74-148 (punitive damages as they apply to tort actions).

72. Injury to the person includes automobile accidents, products liability, wrongful death, intentional torts, defamation, and medical malpractice. See K. REDDEN, supra note 40, § 4.2(A), at 72-99.

73. Injury to property includes trespass, conversion, common-law copyright, nuisance, and seizure of property by a secured party. See K. REDDEN, supra note 40, § 4.2(C), at 101-09.
commercial setting;74 (2) special duty relationships;75 and (3) vicarious liability situations.76 In order to minimize the disadvantages of punitive damages, courts have historically limited the situations in which they will be awarded. Traditionally, courts reserved punitive damages as a tort remedy for bad faith, fraud, and oppressive and willful conduct.77 For many years, courts adhered to the general rule that punitive damages may not be assessed for breach of contract.78 Although rare, in recent years courts have awarded punitive damages in contract actions.79 In many instances, courts have used tort-based theories to avoid the general rule and strike a middle ground.80

74. Injury in the commercial setting includes trademark infringement and unfair competition, and interference with business relations and employment. See K. Redden, supra note 40, § 4.2(B), at 99-101.

75. See K. Redden, supra note 40, § 4.4.

76. See K. Redden, supra note 40, § 4.5.


79. Only a few jurisdictions have explicitly recognized that breach of contract may give rise to a claim for punitive damages. See, e.g., Adams v. Whitfield, 290 So. 2d 49, 51 (Fla. 1974); Vernon Fire & Casualty Ins. Co. v. Sharp, 316 N.E.2d 381, 384 (Ind. Ct. App. 1974) (punitive damages may be awarded against an insurer where conduct indicates needless disregard of the consequences, malice, gross fraud, or oppressive conduct); Isagholian v. Carnegie Inst. of Detroit, 51 Mich. App. 220, 214 N.W.2d 864 (1974) (punitive damages in a contract case are proper if defendant acted recklessly, negligently, or maliciously).

80. For example, where a promisor's conduct is sufficient to give rise to a cause of action for breach of contract and at the same time serves as the basis for an independent cause of action for willful tort, courts in Texas and a number of other states award punitive damages to the injured promisee. See, e.g., Nicholas v. Miami Burglar Alarm Co., 339 So. 2d 175, 178 (Fla. 1976) (punitive damages allowed where breach is attended by some intentional wrong, such as insult, abuse, or gross negligence); Grisom v. Greener & Sumner Constr., 676 S.W.2d 709, 711 (Tex. Ct. App. 1984) (independent tortious conduct constituting more than an oppressive and malicious breach of contract may support punitive damages); Simpson, supra note 78, at 287-88; Strausberg, supra note 78, at 226-51; Sullivan, supra note 78, at 236-40.

Led by the South Carolina courts, a few jurisdictions have espoused the broader view that "when . . . breach of contract is accompanied by fraudulent act . . . the defendant may be made to respond in punitive as well as compensatory damages." Welborn v. Dixon, 70 S.C. 108, 115, 49 S.E. 232, 234 (1904); see Simpson, supra note 78, at 226-29; Sullivan, supra note 78, at 229-36. This rationale has been employed to justify awards of punitive damages against securities and commodities brokers for various acts of fraud and misconduct associated with customer's investments. See, e.g., Kotz v. Bache Halsey Stuart, Inc., 685 F.2d 1204, 1207 (9th Cir. 1982) (punitive damages allowed where broker acted with deliberate and reckless disregard of his obligations to his client); Miley v. Oppenheimer, 637 F.2d 318, 329 (5th Cir. 1981) (punitive damages granted where conduct malicious, wanton or oppressive). See also Brown v. Coates, 253 F.2d 36, 39 (D.C. Cir. 1958) (punitive damages against a real
As one commentator has opined, the trend toward setting a higher standard of conduct in commercial affairs has opened the way for punitive damages in contract actions whenever malicious or wrongful conduct is presented. Nevertheless, the same factors that have led commentators to criticize punitive damages in the judicial setting have led the courts to resist the application of the doctrine in the arbitration setting. By the same token, the beneficial goals of punitive awards are equally well served in arbitration. More importantly, the Supreme Court's pro-arbitration stance favors the inclusion of punitive damages as an arbitration remedy, in order to most fully compensate the injured party and punish the wrongdoer.

III. PUNITIVE DAMAGES IN ARBITRATION

A. Pre-Willoughby: Hostility To Punitive Arbitration Awards

1. Early Treatment

From 1952 to 1974, the rule of Publishers Association v. Newspaper & Mail Deliverer Union governed punitive awards in arbitration. In Publishers' Association, the New York Appellate Division vacated an award of $5,000 in punitive damages assessed against a striking union under a collective bargaining agreement that expressly permitted arbitral punishment. The appellate division recounted the wealth of judicial precedent denying punitive damages in contract actions, and noted that this precedent represented a strong "public and legal policy." The majority believed that enforcing the arbitral penalty would be similar to upholding a contractual liquidated damages provision that was disproportionate to actual damages. Most importantly, the court stated that the arbitrators did not possess the authority to award punitive damages

естate broker for breach of trust); Vale v. Union Bank, 88 Cal. App. 330, 151 Cal. Rptr. 784 (1979) (affirming an award of compensatory and punitive damages against a bank for breach of duties in connection with a trust agreement involving a pension and profit-sharing plan for employees of plaintiff law firm).

Courts in California and a number of other states have recognized causes of action for "breach of the covenant of good faith and fair dealing," and on this basis have awarded punitive damages, damages for mental anguish, and other forms of relief not generally available in contract actions. See generally Bourhis, Recognition and Recovery for Bad Faith Torts, 18 TRIAL 37 (1982); Kornblum, Recent Cases Interpreting the Implied Covenant of Good Faith and Fair Dealing, 30 INS. DEF. L.J. 411 (1981); Louderback & Jurika, Standards for Limiting the Tort of Bad Faith Breach of Contract, 16 U.S.F. L. Rev. 187, 190-206 (1982); Sullivan, supra note 78, at 240-44.

83. Id.
84. Id. at 501-02, 114 N.Y.S.2d at 402-03.
85. Id. at 505, 114 N.Y.S.2d at 406.
86. Id. at 506, 114 N.Y.S.2d at 407.
Punitive Damages in Arbitration

because the New York arbitration statute allowed only claims which "may be the subject of an action," and the court reasoned that the penalty provision was unenforceable under any proper theory of law.

Twenty-two years later, the issue of punitive arbitration awards reached the New York Appellate Division again in Associated General Contractors v. Savin Brothers, with a different result. The Savin court upheld an arbitrator's award of $104,000 (three times the maximum loss that Savin might have sustained), reasoning that the elimination of the "subject of an action" language from the New York statute rendered Publishers' Association distinguishable. By viewing the Publishers' Association decision as relying solely on the "subject of an action" language, the Savin court was able to freely balance the public policy favoring arbitration and the public policy voiding penalties, finding the former to be weightier. Through somewhat dubious reasoning, the Savin majority clouded the issue of whether punitive damages could be awarded in arbitration. Chief Judge Breitel's strong dissent laid the groundwork for the eventual triumph of his position in Garrity v. Lyle Stuart, Inc.

Although Publisher's Association and Savin were both New York Appellate Division cases, they were representative of the common law nationwide. As the first state to enact a statute encouraging arbitration, New York has been a pioneer in the development of arbitration law, providing guidance for other states both because of the wealth of precedent it produces and because statutes in other jurisdictions have been modeled upon the New York legislation.

2. Garrity: Prohibition of Punitive Arbitration Awards

Garrity v. Lyle Stuart, Inc. was the first case to hold unequivocally that punitive damages may not be awarded in arbitration under a modern arbitration statute. In Garrity, a prominent author

87. Id. (citing N.Y. Civ. Prac. L. & R. § 1448 (Mck. 1963)).
88. Id.
90. Id.
91. Id. at 141-42, 356 N.Y.S.2d at 380.
92. Id. at 142, 356 N.Y.S.2d at 380.
93. A student commentator has stated that Publisher's Association and Savin are irreconcilable. Note, Punitive Damages in Arbitration: The Search for a Workable Rule, 63 CORNELL L. REV. 272, 282-83 (1978).
94. 36 N.Y.2d at 959, 335 N.E.2d at 860, 373 N.Y.S.2d at 556 (Judges Jasen and Gabrielli joined the dissent).
96. See generally M. DOMKE, COMMERCIAL ARBITRATION §§ 4.01-4.03 (1984) (discussion of arbitration statutes and federal arbitration law).
97. 40 N.Y.2d at 354, 353 N.E.2d at 793, 386 N.Y.S.2d at 831.
sued her publisher for fraudulent inducement and "gross" underpayment of royalties, as well as for various "malicious" acts. Garrity's contract contained a broad arbitration provision. The arbitration panel awarded Garrity $45,000 in compensatory damages and a further $7,500 in punitive damages. The New York Court of Appeals, in a 4-3 decision, vacated the award of punitive damages.

Citing Publishers' Association, Judge Breitel's opinion for the Garrity majority enunciated a sweeping rule: "An arbitrator has no power to award punitive damages, even if agreed upon by the parties . . . ." At the root of the Garrity doctrine is the notion that freedom to contract does not include the freedom to impose penalties. If parties may not agree to punish, and the sole source of an arbitrator's power is the agreement, then the arbitrator has no grounds upon which to levy punitive sanctions.

The public policy expressed in Garrity, which the court believed was "of such magnitude as to call for judicial intrusion to prevent its contravention," was supported by several rationales. First, the court noted that punitive damages have not been awarded in breach of contract actions on a historical basis. Second, the court reasoned that allowing arbitrators to award punitive damages would "amount to an unlimited draft upon judicial power," thereby displacing courts as the arbiters of social justice. Third, the court observed that the absence of guidelines for arbitral awards, coupled with the limited range of judicial supervision, might result in unpredictable and uncontrollable awards. Fourth, the court theorized that one party could obtain an unfair advantage through manipulation of the arbitrator. Finally, the court speculated that punitive arbitration awards would erode confidence in the arbitral process and discourage its use.

3. The Post-Garrity—Pre-Willoughby Period

Although Garrity was severely criticized, it was frequently followed for the proposition that punitive damages are not available

98. Id. at 356, 353 N.E.2d at 794, 386 N.Y.S.2d at 832 (emphasis added).
99. "The law does not and should not permit private persons to submit themselves to punitive sanctions of the order reserved to the State. The freedom of contract does not embrace the freedom to punish, even by contract." Id. at 360, 353 N.E.2d at 797, 386 N.Y.S.2d at 834.
100. Id. at 355, 353 N.E.2d 794, 386 N.Y.S.2d at 832.
101. Id. at 356, 353 N.E.2d 795, 386 N.Y.S.2d at 833.
102. Id. at 357, 353 N.E.2d 796, 386 N.Y.S.2d at 834.
103. Id.
104. Id.
105. Id.
in arbitration.\footnote{107} However, even though \textit{Garrity} represented the majority rule, many courts acted contrary to the \textit{Garrity} rule, compelling arbitration of punitive damage claims along with other types of controversies within the scope of the arbitration agreement.\footnote{108} Although these decisions failed to directly address the appropriateness of punitive damages in arbitration, they indicated dissatisfaction with, or confusion over the \textit{Garrity} ruling. At least two state appel-


late courts went further, however, and held that an arbitration panel has the authority to award punitive damages, although neither court discussed *Garrity*. At the same time, the First Circuit upheld an arbitral award despite its conclusion that the award was punitive in nature.110

The first clear break from the *Garrity* rule occurred in *Willis v. Shearson/American Express, Inc.*111 The *Willis* case involved a customer-brokerage agreement to arbitrate any controversy arising out of transactions between the parties. The customer complained of fraud and breach of fiduciary duty. He requested punitive damages. The customer opposed the brokerage firm’s request for arbitration, fearing that the arbitrators would apply New York law (as required in the arbitration clause), and therefore apply the *Garrity* rule and deny him punitive damages.

The court, however, applied the Federal Arbitration Act, because the agreement between the parties evidenced a transaction in interstate commerce.112 Thus, the court was able to distinguish *Garrity* on the ground that it restricted the power of arbitrators only under New York state law, not federal law.113 Although the arbitration clause did not refer to punitive damages, the court concluded that the broad language of the arbitration provision included claims for punitive damages since public policy did not prohibit arbitrators from resolving issues of punitive damages and any doubts concerning the scope of arbitration should be resolved in favor of arbitration.114

B. Willoughby: The Confirmation Of Punitive Arbitral Awards

The seminal case for the validity of punitive arbitral awards is *Willoughby Roofing & Supply Co., v. Kajima International Inc.*115 In *Willoughby*, the Willoughby Roofing Company entered into a construction contract with the general contractor, Kajima International, Inc. Following acceptance of Willoughby’s bid, Kajima materially altered the specifications to such an extent that the comple-

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109. Grissom v. Greener & Sumner Const., Inc., 676 S.W.2d 709, 711 (Tenn. Ct. App. 1984) (because the arbitration agreement expressly allowed punitive damages, there was no basis for modifying an arbitration award which included punitive damages); Bishop v. Holy Cross Hosp. of Silver Spring, 44 Md. App. 688, 690, 410 A.2d. 630, 632 (1980) (under the health care malpractice claim statute, arbitration panel has authority to award punitive damages).
110. Cadillac Automobile Co. of Boston v. Metro Auto Salesman Local Union No. 122, 588 F.2d 315, 316 (1st Cir. 1978).
112. Id. at 823.
113. Id.
114. Id. at 824.
115. 598 F. Supp. 353 (N.D. Ala. 1984), aff’d, 776 F.2d 269 (11th Cir. 1985).
tion cost was substantially higher than at the time of bidding. Although Willoughby Roofing Company had gone to considerable expense in preparing to fulfill the contract, Kajima cancelled the contract and engaged another subcontractor when Willoughby Roofing Company sought to renegotiate a new contract. Willoughby Roofing Company filed suit in state court, seeking compensatory and punitive damages, while Kajima obtained a stay of the proceedings pending arbitration based upon a broad arbitration clause in the contract.116 The arbitration panel awarded the Willoughby Roofing Company $41,091 in compensatory damages and $108,909 in punitive damages, based upon a finding of “willful misrepresentation of material fact.”117

"The Willoughby court applied federal law and federal policy contained in the Federal Arbitration Act118 because the construction contract was a transaction involving interstate commerce to which the policies and provisions of the Arbitration Act apply.119 Even though the parties to the contract agreed that Alabama law should govern the resolution of issues submitted to arbitration, the court found that “‘federal law governs the categories of claims subject to arbitration’ and the ‘resolution of issues concerning the arbitration provision’s interpretation, construction, validity, revocability, and enforceability.’”120 For this reason, the trial court distinguished Garrity, which restricted the power of arbitrators only under New York law, not federal law.

The Willoughby court held that the standard arbitration clause was broad enough to empower the arbitration panel to award punitive damages.121 To arrive at this conclusion, the court initially noted that the strong federal policy favoring arbitration requires the liberal construction of arbitration agreements.122 Since arbitrators have broad remedial powers to fashion a remedy,123 the court continued, the specific remedy need not be authorized by the arbitration agreement.124 Rather, the court stated, any limitation upon the arbitrator’s broad remedial powers should be clearly and expressly stated in the arbitration agreement.125 The court concluded that since the arbitration agreement in Willoughby did not expressly

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116. Id. at 355-56.
117. Id. at 354-55.
120. Id. (emphasis omitted) (quoting Willis v. Shearson/American Express, Inc., 569 F. Supp. 821, 824 (M.D.N.C. 1983)).
121. Id. at 357.
122. Id.
123. Id. at 357-58.
124. Id. at 357.
125. Id. at 358.
prohibit arbitrators from awarding punitive damages, the arbitration panel should be empowered to award such damages where appropriate.\textsuperscript{126}

Next, the Willoughby court carefully analyzed, and rejected the theoretical underpinnings of the Garrity doctrine. First, the court rejected Garrity's fear of the displacement of the judicial system, noting that "the very purpose of the [Arbitration] Act was to overrule longstanding judicial precedent which declared . . . arbitration to be contrary to public policy as displacing the functions of the courts."\textsuperscript{127} Second, the Willoughby court observed that arbitral awards would further the purposes of punitive damages as effectively as judicial awards.\textsuperscript{128} Moreover, the Willoughby court reasoned that an arbitrator's practical sensibilities and experience in the relevant field would often put him in a better position than a judge to discern appropriate punitive awards.\textsuperscript{129}

Finally, the Willoughby court found the Garrity concern with the superior party's manipulation of arbitrators unpersuasive on two grounds: (1) the Arbitration Act provides a check on fraudulent activities,\textsuperscript{130} and (2) "the possibility of an occasional abuse of power is no grounds for an absolute bar on the award of punitive damages by arbitrators."\textsuperscript{131}

Thus, the Willoughby court's rationale for allowing punitive damages was based, in a large part, upon the negative practical effects of precluding arbitrators from awarding punitive damages. The Willoughby court noted that where a claim for punitive damages is made, "the Garrity rule . . . would require two trials—one before the arbitrator and a separate judicial trial on essentially the same

\textsuperscript{126} Id. at 357.
\textsuperscript{127} Id. at 362-63 (citing Southland v. Keating, 465 U.S. 1, 13 (1984)).
\textsuperscript{128} Id. at 363.
\textsuperscript{129} Id.
\textsuperscript{130} Id. at 362. The Arbitration Act provides for vacation of an arbitral award "[w]here the award was procured by corruption, fraud, or undue means" or where there was "evident partiality or corruption" in the arbitrators. 9 U.S.C. § 10(a),(b) (1970).
\textsuperscript{131} Willoughby, 598 F. Supp. at 362.
facts—obviously a wasteful exercise.”132 The Willoughby court stated that consequently the rule “would undermine the chief advantages and purposes of arbitration” in relieving congestion in the courts and in achieving a quick, inexpensive dispute resolution.133 By submitting a dispute to arbitration, the court hypothesized, a plaintiff might unwittingly forfeit the right to punitive damages because of the res judicata effect of arbitration awards.134 Moreover, even if the punitive damage claim were not barred, a party could decide to forego its claims rather than endure the difficulty and expense of a separate trial on punitive damages. “Merely by agreeing to arbitrate,” the Willoughby court stated, “a defendant could escape the mandatory sanction of punitive damages that the law would otherwise impose,” and thereby thwart the public policy underlying punitive damages.135

In conclusion, the Court noted that in some instances arbitration may be “less desirable than a full judicial trial.”136 The Willoughby court stated, however, that once the parties have agreed to arbitrate “all claims” and have vested the arbitrator with the power to grant “any remedy,” they should suffer the consequences of their bargain.137 Put simply, Willoughby teaches that if parties to an arbitration agreement wish to exclude the issue of punitive damages from arbitration, they should so specify in the arbitration agreement.138

C. Post-Willoughby: The Trend In Favor Of Punitive Damages

Since the watershed Willoughby ruling, courts have had the opportunity to directly address the issue of the awardability of punitive damages in arbitration in five cases. The overwhelming weight of authority is to allow punitive damages in arbitration; indeed, only one post-Willoughby case has failed to follow the Willoughby rule.

In Shaw v. Kuhnel & Associates, Inc.,139 the plaintiff brought an action for breach of contract and fraud, seeking punitive damages. The New Mexico Supreme Court, in dicta, stated, “We also determine that an arbitrator should not be given authority to award

132. Id. at 364 (citing Note, Punitive Damages In Arbitration: The Search For a Workable Rule, 63 CORNELL L. REV. 272, 299 (1978)).
133. Id. at 364 (citing Ultracashmere House, Ltd. v. Meyer, 664 F.2d 1176, 1179 (11th Cir. 1981)).
134. Id. at 363. At least one court has barred a claim for punitive damages even though the arbitrators were not permitted to grant them. United States Fidelity & Guar. Co. v. DeFluiter, 456 N.E.2d 429, 432 (Ind. Ct. App. 1983).
136. Id. at 364.
137. Id.
138. Id. at 365.
139. 102 N.M. 607, 698 P.2d 880 (Sup. Ct. 1985).
punitive damages. This power is reserved to the courts."\footnote{40} The Shaw court did not mention Willoughby, discuss Garrity, or address the issue of punitive damages in arbitration any further. It appears that the court merely tagged its brief repudiation of punitive arbitral awards to the opinion without intent to make law or, at the least, without much thought. Clearly, Shaw is a backwater in the stream of well-reasoned case law following the Willoughby rule.

In Baker v. Sadick,\footnote{41} the California Court of Appeals affirmed an arbitrator's award of $300,000 in punitive damages in a medical malpractice case. Dr. Sadick claimed on appeal that the award of punitive damages violated California law and public policy. The Baker court disagreed, stating that public policy, at least in California, favored arbitration.\footnote{42} The court rejected Dr. Sadick's further argument that arbitration will be discouraged if arbitrators can award punitive damages, because fearful litigants may limit the scope of the arbitration clause to exclude punitive damages from arbitration.\footnote{43} The court thought it most important that arbitration be placed on equal footing with judicial proceedings.\footnote{44} The court stated: "Arbitration serves as a \textit{substitute} for proceedings in court. As a substitute, arbitration would not be encouraged by a decision which effectively holds a claim, which may otherwise be asserted in a court of law, may not be asserted in arbitration."\footnote{45}

In Rodgers Builders, Inc. v. McQueen,\footnote{46} the North Carolina Court of Appeals held that a punitive damage claim was arbitrable under the state's arbitration statute. In Rodgers, the plaintiff had been employed to construct a housing project for the defendant corporation. The construction contract contained a "broad-form" arbitration clause. The plaintiff filed a claim for fraud, unfair and deceptive trade practices and misrepresentation, and requested arbitration. The plaintiff was awarded $407,259 in full settlement of all claims.\footnote{47}

The plaintiff contractor then sought to enforce the award in state court and filed an amended complaint seeking punitive damages. The defendant moved for, and was granted, summary judgment on the ground of \textit{res judicata}. The Rodgers court affirmed the summary judgment and rejected plaintiff's contention that the punitive damage claim was not arbitrable, stating: "We detect no public
policy in this State prohibiting the arbitration of claims for punitive damages which fall within the scope of an arbitration agreement . . . . We conclude that such claims are arbitrable and that the agreement here is sufficiently broad to empower the arbitrators to award punitive damages.”148

In In re Costa and Head (Atrium), Ltd.,149 the Supreme Court of Alabama also followed the Willoughby doctrine. In Costa and Head (Atrium), Ltd., a construction dispute arose between the general contractor and the owner of an office development project. The general contractor argued that his claim for punitive damages should not be submitted to arbitration. The court rejected that concept and, citing Willoughby, affirmed the award of punitive damages under the broadly drafted arbitration agreement.150

In State Farm Fire and Casualty Co. v. Wise,151 the Arizona appellate court upheld the arbitrator’s award of punitive damages against an automobile insurer. The court noted that the automobile insurance policy did not specifically exclude punitive damages from its uninsured motorist coverage, pursuant to which the insured filed the arbitration proceeding.

This evolution of jurisprudence in this area reveals the basic tension between the modern doctrine favoring arbitration and judicial perceptions of the inherent limitations of the arbitration process.152 Nevertheless, the case law reveals that the clear trend is to empower arbitrators to award punitive damages. However, the risks and criticisms of punitive damages as a general proposition apply with equal or greater force to punitive arbitral awards. These criticisms warrant a careful review of the dangers of punitive damages, and of the guidelines which may minimize these dangers.

IV. PROPOSED GUIDELINES FOR CONSIDERATION AND AWARD OF PUNITIVE DAMAGES IN ARBITRATION

In a recent study, a special committee of the American Bar Association noted fundamental problems in the law and practice of punitive damages in judicial proceedings.153 These concerns are magni-
fied in the arbitration setting because, as a general proposition, arbitrators are not as familiar with relevant legal standards and are subject to judicial review only on narrow grounds.\textsuperscript{184}

The following guidelines should allow arbitrators to do justice in each proceeding, while ensuring that punitive damages are awarded in a consistent and rational fashion. These guidelines echo some of the recommendations of the Special Committee's study (the "ABA Report"), and would add an element of uniformity to the award of punitive damages in the arbitration process.

To insure uniformity of punitive damage standards, the American Arbitration Association and self-regulatory organizations, such as the National Futures Association, the National Association of Securities Dealers, and the various securities exchanges, should adopt these guidelines.

A. Conduct/State of Mind

The ABA Report concluded that there are four major problems with the existing legal standards for the award of punitive damages in a judicial proceeding: first, the standards should be more consistent across state lines; second, the standards in some states are too loose and would allow an award of punitive damages upon finding the defendant's conduct to be little more than negligent; third, the standards should be tailored to the specific underlying causes of action; and fourth, the standards must be comprehensible to the finder of fact.\textsuperscript{185}

In order to award punitive damages, it should be established that the wrongdoer acted with fraud, malice, or, at the minimum, "conscious disregard or conscious indifference."\textsuperscript{185} The arbitrator should be persuaded that the state of mind of the defendant, while not necessarily deliberate or intentional, was characterized by more than carelessness.

To insure uniformity of conduct standards, the guidelines

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156. The ABA Committee Report recommended this standard. \textit{Id.} at 88. However, the Report noted that any single standard will unduly restrict punitive damages in some instances (for example, a threshold test that required malice, especially if actual malice is meant, would eliminate punitive damages in virtually every products case and would unduly restrict punitives to the true intentional torts, such as assault and battery. \textit{Id.} at 31) and might be overly \textit{permissive} in others (for example, it might cause a manufacturer to be exposed to punitive liability where it had put out a product with full awareness that some very small but very real risk was involved). No product is injury free, and thus the knowing sale of a product with some risk (let us assume what society would call an acceptable risk) should not be regarded as potentially punitive conduct. \textit{Id.}
should be adopted by the American Arbitration Association and apply to all their hearings.

B. Types of Claims: Commercial Cases

Claims for punitive damages in business and contract cases should be allowed if the wrongdoing or breach is intentional, without justification, and “special circumstances” exist, such as “unequal bargaining power” between the parties, a “fiduciary” relationship between the parties, an exchange rule, governmental regulation, business custom, or practice which the defendant’s conduct violates in letter or spirit, or the existence of high litigation costs disproportionate to the amount of the recovery.\(^{157}\)

The first part of this guideline—intentional breach without reasonable justification—is essentially a bad faith standard. However, the allowance of claims for punitive damages upon a showing of bad faith alone would result in the overdeterrence of socially useful commercial conduct.

The second part of this guideline—a “special circumstances” test—requires proof of circumstances where compensatory damages are inadequate to recompense or punish. In each of these “special circumstances,” there is a need for an additional legal deterrent and punishment above and beyond compensatory damages.\(^{158}\) Allowing punitive damages in these instances is consistent with the underlying rationale of punitive damages: deterrence and punishment.

Requiring proof of “special circumstance,” in addition to bad faith, constitutes a logical and desirable limitation upon the availability of punitive damages in contract and commercial cases.

C. Burden of Proof

A plaintiff must be required to prove a punitive damage claim by “clear and convincing” evidence.\(^{159}\) A “clear and convincing” standard would ensure that punitive sanctions were sparingly awarded against those truly deserving of punishment. A “preponderance of evidence” standard runs the risk of punishing conduct not warranting “penal” damages. Because punitive damages are often economically crippling and socially stigmatizing, it is better to let several deserving defendants go without sanctions than levy punitive sanctions against one undeserving defendant.

\(^{157}\) ABA Committee Report, supra note 153, at 50, 88.

\(^{158}\) Id. at 50-57.

\(^{159}\) The ABA special committee report called for the “clear and convincing” burden of proof, noting that this is a standard often used in fraud cases, to which there is some analogy. Id. at 33, 88.
D. Bifurcation

Mandatory bifurcation of trials—whereby the compensatory portion of the case is tried first, and the punitive portion second—should not be implemented in arbitration hearings.\textsuperscript{160}

The advantages of mandatory bifurcation, barely discernable in a judicial proceeding, are practically non-existent in the arbitration setting. In the typical judicial proceeding, bifurcation avoids the confusion a jury may experience in deciding both compensatory and punitive issues at the same time.\textsuperscript{161} Bifurcation also eliminates the prejudice which may occur when evidence that is related only to punitive damages is introduced during the plaintiff's case in chief.\textsuperscript{162}

The role of an arbitrator, however, like that of a judge in a bench trial, is to sort through the evidence, taking into account what is proper without becoming prejudiced or confused by extraneous information. Thus, mandatory bifurcation is a superfluous rule: any potential prejudice or confusion may be avoided merely by providing the arbitrator with appropriate guidelines.

E. Amount and Judicial Review of Awards

In order to control excessive punitive damage awards, the Arbitration Act should be amended to allow an arbitrator to award up to three times actual damages, with any award over this amount subject to \textit{de novo} judicial review.\textsuperscript{163} A recent extensive study\textsuperscript{164} of punitive damages awards indicates that excessive punitive awards is a matter for concern in commercial\textsuperscript{165} suits.\textsuperscript{166} A 3:1 ratio "cap" would have subjected 30-35% of commercial cases awarding punitive damages to appellate review.\textsuperscript{167} Such an objective "cap" on punitive awards would provide an appropriate gauge for the assessment of punitive damages.

For example, if the verdict falls within the 3:1 limit, it would be

\begin{footnotesize}
160. \textit{Id.} at 88-89.
161. \textit{Id.} at 58.
162. \textit{Id.}
165. Commercial cases include claims for money damages for breach of contract, business torts, or unfair business practice. \textit{Id.} at 9 n.2.
166. The study's examination of personal injury, intentional tort and commercial compensatory to punitive damage ratios, relative frequency of awards, size of awards, and effect of the awards on an individual versus business defendants, indicate that the concern for excessive punitive awards is properly directed towards commercial cases. ABA Committee Report, \textit{supra} note 153, at 22-25 (citing Rand study).
167. \textit{Id.}
\end{footnotesize}
entitled to the normal judicial deference accorded to arbitration awards. The award would be subject to review by the standards set forth in the Uniform Arbitration Act, and the Federal Arbitration Act. If the verdict exceeded the 3:1 limit, the award would be subject to de novo review, and the plaintiff would be required to demonstrate the reasonableness of the award.

F. Disclosure of Financial Data

The defendant should be required to disclose financial data to the arbitrator to ensure that the punitive damage award is an appropriate punishment commensurate with the defendant’s wealth. The court should enter appropriate protective orders to prevent public disclosures of the financial data.

168. The Uniform Arbitration Act contains similar grounds for review and vacatur and, further, states that the fact that the relief granted by an arbitration award “was such that it could not or would not be granted by a court of law or equity” is not in itself sufficient grounds for judicial vacatur of the award. Id.


Same; vacation; grounds; rehearing: In either of the following cases the United States Court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration:

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, of either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

Id. § 10.

Section 11 provides:

Same; modification or correction; grounds; order: In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

Id. § 11.
Although most arbitration clauses provide for a final resolution of all disputes, arbitration proceedings have historically been unable to offer complete remedies. In upholding an arbitral award of punitive damages, the watershed *Willoughby* ruling tipped the balance in favor of the full administration of civil justice by arbitrators. The post-*Willoughby* jurisprudence represents a clear trend in favor of the award of punitive damages in arbitration.

Conscious of the inherent risks of punitive damages and the special concerns of punitive damage awards in the arbitration context, we have recommended changes in law and procedure that will allow arbitrators to do justice, while ensuring that punitive damages are awarded in a consistent and rational fashion.