



Ashley Dang

KENT PINCIN

Financial-condition discovery – Don't wait until trial!

DISCOVERY OF A DEFENDANT'S FINANCIAL CONDITION IS ESSENTIAL TO PROVING PUNITIVE DAMAGES, AND DOING IT EARLY CAN PREVENT DEFENDANTS FROM SHIELDING ASSETS AND CREATE SETTLEMENT LEVERAGE FOR PLAINTIFFS

In many personal-injury and employment cases, plaintiffs may seek not only compensatory damages (e.g., medical bills, lost wages, pain and suffering, emotional distress) but also punitive damages or other enhanced damages intended to punish wrongdoing and deter future misconduct. A critical but often overlooked component in pursuing punitive damages is a defendant's financial condition: Without proof of the defendant's ability to pay, punitive damages may be illusory or unsustainable. There are scores of unpublished appellate opinions reversing punitive-damages awards based on the plaintiff's failure to prove the defendant's financial condition at the time of trial.

In California, despite its relevance, financial-condition discovery has traditionally been treated with caution. Thus, plaintiffs typically wait until phase two of a bifurcated trial – after the jury finds malice, oppression, or fraud – to obtain financial-condition evidence. Because punitive damages are tried separately, courts often restrict disclosure until liability is established, leaving plaintiffs with limited time to gather meaningful evidence of a defendant's ability to pay.

In this scenario, plaintiffs often obtain financial-condition evidence by serving expedited document subpoenas, eliciting trial testimony from corporate representatives, and examining financial documents such as balance sheets, profit-and-loss records, or other ability-to-pay documents ordered for immediate production by the court.

But waiting until phase two of a bifurcated trial to obtain financial-condition evidence poses several disadvantages: Plaintiffs face severe time pressure, receive only limited financial records, and may be unable to meaningfully analyze complex data and documents.

Defendants may conceal or restructure assets before disclosure, and incomplete evidence risks undermining or reversing any punitive-damages award on appeal.

Thus, obtaining financial-condition information early during pre-trial discovery to sustain a punitive-damages award can dramatically reshape the value, strategy, and outcome of personal injury and employment cases, but they are only effective when grounded in concrete evidence of the defendant's ability to pay. California's unique statutory scheme – Code of Civil Procedure section 3295, subdivision (c) (section 3295(c)) – strictly prohibits plaintiffs from obtaining pretrial discovery of a defendant's financial condition unless they first obtain a court order by demonstrating a “substantial probability” of prevailing on a punitive-damages claim.

While this requirement imposes an additional evidentiary burden on plaintiffs, it also creates a powerful strategic opportunity. Successfully obtaining pretrial financial-condition discovery not only strengthens the legal foundation necessary to sustain punitive damages, but also significantly increases settlement leverage, reduces the risk of post-verdict reversal, and prevents defendants from manipulating or dissipating assets before trial.

In both personal injury actions involving malicious conduct and employment cases alleging discrimination, harassment, or retaliation, financial transparency can illuminate the true punitive exposure and meaningfully influence negotiations. For plaintiffs, a well-supported pretrial financial condition motion is far more than a procedural hurdle. It is a critical tool for maximizing case value, ensuring enforceable judgments, and promoting accountability for wrongful conduct.

What is financial-condition discovery – Code of Civil Procedure section 3295

Section 3295(c) is the primary governing statute for pretrial discovery regarding a defendant's profits or financial condition. It provides that a plaintiff may not obtain pretrial discovery of a defendant's financial condition *unless* the plaintiff shows upon a noticed motion a substantial probability of prevailing on a punitive-damages claim. Only after the court grants the motion may discovery be conducted, and the court may impose protective orders to limit scope, timing, or dissemination.

The California Court of Appeal has interpreted the words “‘substantial probability’ to mean ‘very likely’ or ‘a strong likelihood.’” (*Jabro v. Superior Court* (2002) 95 Cal.App.4th 754, 758.) Under Evidence Code section 500, the allocation of burden of proof and fundamental fairness require the plaintiff, rather than the defendant, to provide financial-condition evidence prior to a punitive-damages award. (*Adams v. Murakami* (1991) 54 Cal.3d 105, 108-09.) Therefore, it is the plaintiff's responsibility to ensure that they have sufficient evidence of a defendant's ability to pay to present to the jury.

Consequently, timing on bringing this motion is important. Plaintiffs should bring this motion after discovery has established facts suggesting malice, fraud, or oppression, and well before trial allowing time for financial discovery if granted. But not so early that the evidence is underdeveloped.

Situations where plaintiffs should strongly consider filing a motion

- Cases where punitive-damages or statutory-enhanced damages are significant and likely. For example, in personal injury cases where a parallel criminal case exists and the defen-

dant has already been found guilty or pleaded guilty to an intentional tort (e.g., assault and battery).

- Cases where a defendant has claimed that there are no assets, no insurance, or an ability to pay any award for plaintiff.
- Complex corporate defendants. Parent/subsidiary, shell companies, or entities with intercompany transactions where uncovering financials could reveal hidden resources.
- Employment cases with systemic wrongdoing. For example, wage theft, repeated violations, retaliation, discrimination, especially when deterrence and punitive awards could change corporate behavior. Also, consider filing a motion where the employer defendant is claiming an undue hardship as an affirmative defense in a disability, retaliation and/or wrongful termination case. An undue hardship defense requires the defendant to prove that an accommodation would be significantly difficult or expensive, including a look into the defendant's ability to pay for the accommodation. (See CACI 2545.)
- Cases likely to settle if defendant perceives risk of exposure. Particularly when defendants are risk-averse, have public reputations, or would prefer confidentiality over protracted litigation.

Privacy protections and tax-return privilege

California recognizes a strong constitutional right to privacy in personal and corporate financial information. (California Constitution, Article 1, Section 1.) Section 3295(c) was enacted in order to “protect defendants from being pressured into settling non-meritorious cases in order to avoid divulging their financial privacy in civil discovery.” (*Jabro, supra*, 95 Cal.App.4th at p. 757.)

Because of the heavy protections afforded to financial information, which a defendant will surely rely upon in any opposition, it is important to emphasize

that the goal of the motion is not for the court to implicate the traditional factfinding process or provide an order making a determination on the merits of the claim or any defense thereto. Rather, the emphasis must be that section 3295, subdivision (c) is a discovery statute; thus, it is being used as a discovery vehicle to obtain critical information in advance of trial. (*Id.* at p. 759.)

The California Supreme Court has held that tax returns are presumptively privileged, but the privilege is not absolute. (*Schnabel v. Superior Court* (1993) 5 Cal.4th 704, 720-721.) Despite this, in practice, courts rarely compel tax returns even after granting section 3295(c) motions.

Scope of admissible discovery after motion is granted

“[T]here is no one particular type of financial evidence a plaintiff must obtain or introduce to satisfy its burden of demonstrating the defendant’s financial condition.” (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 194.) “While ‘there is no rigid formula and other factors may be dispositive especially when net worth is manipulated and fails to reflect actual wealth,’ net worth is often described as ‘the critical determinant of financial condition.’” (*Farmers & Merchants Trust Co. v. Vanetik* (2019) 33 Cal.App.5th 638, 648.) As net worth is a metric too susceptible to manipulation to be the sole standard, “there should be some evidence of the defendant’s actual wealth, but the precise character of that evidence may vary with the facts of each case.” (*Soto, supra*, 239 Cal.App.4th at 194-195.)

Evidence of defendant’s income, standing alone, is not “meaningful evidence” in evaluating a defendant’s financial condition when determining punitive damages by the court. (*Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 607.) “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, 681.) “Without evidence of the actual

total financial status of the defendants, it is impossible to say that any specific award of punitive damage is appropriate.” (*Kelly v. Haag* (2006) 145 Cal.App.4th 910, 915.)

Although the inquiry is fact dependent, plaintiffs should request the following in discovery upon a successful section 3295(c) motion:

- Net worth/balance sheets.
- Current assets and liabilities.
- Liquidity, profit margins, cash flow, and credit capacity.
- Income statements.
- Bank accounts and investment portfolios.
- Real property holdings.
- Insurance coverage (though often already discoverable).
- Business valuations.
- For corporations: annual reports or financial statements. Corporate structure, including parent companies, subsidiaries, shell entities, or interconnections.

Common limitations that plaintiffs should be wary of when requesting financial condition discovery:

- Requests must be narrowly tailored.
- Courts often require confidentiality/protective orders.
- Tax returns are often protected under the tax return privilege.
- Public companies may satisfy the requirement through public filings instead of intrusive discovery.
- Courts frequently order protective orders, in-camera review, and time limits on disclosures.

Why financial condition discovery matters

It is essential to proving punitive damages

Punitive damages in California require not only proof of malice, oppression, or fraud (Civ. Code, § 3294), but also proof of the defendant’s financial condition to establish the amount. (*Adams, supra*, 54 Cal.3d at 109.)

A punitive-damages award cannot stand unless the plaintiff introduces meaningful evidence of the defendant’s financial

condition. Without it, a jury award is likely to be reversed. (*Ibid.*)

It prevents defendants from shielding assets

Pretrial discovery procedures exist to prevent “the advantage the giant corporations ... otherwise have over the individual plaintiff” – e.g., discovery helps prevent defendants from hiding or shielding assets. (*Id.* at p. 122.)

It creates settlement leverage for plaintiffs

One of the most pragmatic and often underappreciated benefits of pretrial financial discovery is to inform settlement negotiations. Without knowledge of the defendant’s financial condition, both sides negotiate in the dark. Plaintiffs may undervalue their case, fearing an inability to collect a large award even if successful. Defendants may low-ball offers, betting that plaintiffs will accept modest settlements rather than risk getting stuck after trial with uncollectible judgments. Pretrial financial discovery levels the playing field.

When plaintiffs know the defendant’s assets, income streams, and insurance (if any), they can calibrate settlement demands more realistically. Financial-condition discovery tends to promote more purposeful discussions of settlement and can expedite resolution by settlement or by trial.

It encourages defendants to take misconduct seriously

Punitive damages serve the purpose

of deterrence and punishment but that “function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort.” (*Adams*, at p. 126.) Thus, pretrial financial condition discovery will encourage the defendant to take their misconduct seriously as the plaintiff will have information early on to determine the level of punitive damages to claim in relation to the wrongful conduct and the defendant’s wealth.

It ensures punitive damages are appropriate and survive appeal

An absence of financial-condition evidence “thwarts effective appellate review of a claim that punitive damages are excessive.” (*Id.* at p. 109.) Therefore, obtaining financial condition information early protects a punitive damages award through appeal that otherwise might be excessive.

It prevents trial by ambush

Lastly, as discussed above, if a plaintiff waits until phase two of a bifurcated trial to learn of a defendant’s financial information, the plaintiff is required to utilize expedited procedures in order to obtain the information. The plaintiff lacks adequate time to analyze complex records, prepare expert testimony, or challenge inaccuracies. This sudden disclosure undermines fairness, impedes meaningful assessment of punitive damages, and prevents informed strategic decisions, effectively disadvantaging the party entitled to seek full recovery.

Practical considerations for plaintiffs

Obtaining financial-condition information during the discovery phase of litigation, and well before trial, allows the plaintiff to adequately prepare to present in front of a jury his or her request for a certain punitive-damages award. To best prepare, plaintiffs should do the following:

- Develop the record first. Bring a section 3295(c) motion only after establishing a robust evidentiary foundation.
- Use detailed declarations. Judges expect specificity explaining why it is substantially probable or very likely that the plaintiff will prevail on a punitive-damages claim.
- In employment cases, tie the misconduct to corporate ratification.
- Request narrowly tailored discovery.

To sum, don’t wait until trial to learn of a defendant’s ability to pay. Build the record early by establishing facts that go to a punitive-damages claim, and file the motion!

Ashley Dang received her Juris Doctorate from Loyola Law School, Los Angeles in 2021. She works as an associate attorney with the Kent Pincin law firm in Redondo Beach, California. Her practice includes employment, personal injury, and mass tort matters.

