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Plaintiff's attorneys often include in their complaints a claim for punitive damages[1] in addition to compensatory damages. This allegation allows them, in the discovery process, to request information concerning the defendant's financial worth. Such a request, through interrogatories, document productions, or depositions, would be irrelevant but for the punitive damages claim because a defendant's wealth has nothing to do with a defendant's culpability for a compensatory damage claim.[2] This information is relevant, however, for the punitive damage claim because in order for the jury to achieve the purpose in awarding punitive damages—to punish the defendant and deter others from similar conduct[3]—the

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1. These damages are awarded to the plaintiff when the defendant's conduct has been outrageous. *See* RESTATEMENT (SECOND) OF TORTS § 908(2) (1979) ("Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others."). The basis for these damages is often statutory. *See, e.g.*, Leidholt v. District Court, 619 P.2d 768, 770 n.1 (Colo. 1980), where the court explained:

> In Colorado, a claim for punitive damages must be predicated upon section 13-21-102, C.R.S. 1973, which provides: "In all civil actions in which damages are assessed by a jury for a wrong done to a person, or to personal or real property, and the injury complained of is attended by circumstances of fraud, malice, or insult, or a wanton and reckless disregard of the injured party's rights and feelings, the jury, in addition to the actual damages sustained by such party, may award him reasonable exemplary damages."

Id.

2. *See, e.g.*, Leidholt v. District Court, 619 P.2d at 770 ("It is too plain for cavil that the interrogatories in issue would not be relevant if punitive damages were not in issue. It has long been established as a principle of tort law that in suits involving the assessment of compensatory damages, evidence of a defendant's financial status is inadmissable.").

3. *See, e.g.*, Campen v. Stone, 635 P.2d 1121, 1123 (Wyo. 1981) ("The design of punitive damages is deterrence through public condemnation . . . ."); Leidholt v. District Court, 619 P.2d at 770 ("The purpose of punitive damages is . . . to punish the defendant and to deter others from similar conduct in the future"); Cox v. Theus, 569 P.2d 447, 450 (Okla. 1977) ("The theory is the punishment of the offender, for the general benefit of society. The imposition of this type of damages seeks to act as a restraint to the transgressor.").

jury must know what amount of money taken away from this particular defendant will "hurt."[4]

Thus, in this era of liberal discovery, it appears that financial information regarding a defendant should be easily discoverable. Nevertheless, potential abuses exist. For example, take the situation where a computer software company ("Company A") sues a former employee and his new company ("Company B") for misappropriation of trade secrets. Company A includes in its complaint a claim for punitive damages so that during the discovery process Company A can request the disclosure of the financial worth of Company B and the former employee. Company B would complain that this request is an attempt to gain access to business records where disclosure would be detrimental.[5] The employee would assert that this request intrudes into his personal affairs unnecessarily.[6] Both defendants would also maintain that complying with this request would entail unwarranted cost and inconvenience.[7] Finally, both defendants would allege that the request is being used to harass and coerce them to settle an otherwise unmeritorious

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4. *See, e.g.*, Leidholt v. District Court, 619 P.2d at 770 ("[I]n determining the amount which should be awarded as punitive damages, the severity of the defendant's wrong, as well as the extent of the defendant's assets, must be considered to ensure that the award will punish the defendant."); Bryan v. Thos. Best & Sons, Inc., 453 A.2d 107, 108 (Del. Super. Ct. 1982) ("[E]vidence concerning the financial condition of a defendant is necessary . . . so that a jury might arrive at an award that will properly punish the defendant.").

5. *See, e.g.*, Breault v. Friedli, 610 S.W.2d 134, 139 (Tenn. Ct. App. 1980) ("We are aware that in some cases, a plaintiff, a competitor for instance, might be tempted to include in a lawsuit a frivolous allegation of conduct supporting punitive damages with the ulterior purpose of compelled disclosure of defendant's finances."); Richards v. Superior Court, 86 Cal. App. 3d 265, 267, 150 Cal. Rptr. 77, 80 (1978) ("[T]here is usually the potential that untoward disclosure of the information obtained may [bring] damage to the discloser in the competitive business arena.").

6. *See, e.g.*, Luria Bros. & Co. v. Allen, 469 F. Supp. 575, 580 (W.D. Pa. 1979) ("Defendant's desire not to have each and every detail of their financial condition open to public scrutiny . . . is an understandable concern . . . ."); Breault v. Friedli, 610 S.W.2d at 139 ("[U]nder certain circumstances the privacy interests of the defendant outweigh the discovery rights of the plaintiff. It is difficult to justify compelled disclosure of personal finances when the allegations of conduct supporting punitive damages have no basis in fact."); Gierman v. Toman, 77 N.J. Super. 18, 23, 185 A.2d 241, 244 (1962) ("The obviously objectionable features of the present demand are invasion of a traditionally personal and private domain as well as the inconvenience of disclosing details.").

7. *See, e.g.*, Richards v. Superior Court, 86 Cal. App. 3d at 271, 150 Cal. Rptr. at 80 ("As a minimum, there is the time and expense necessary to the compilation of a complex mass of information unrelated to the substantive claim involved in the lawsuit and relevant only to the subject matter of a measure of damages which may never be awarded."); Gierman v. Toman, 77 N.J. Super. at 23, 185 A.2d at 244 ("Defendant, even when successful in litigation, absorbs unrecoverable costs and inconvenience.").

lawsuit.[8]

Courts have responded to defendants' requests for a protective order[9] prohibiting the discovery of financial information in four distinct ways. First, a few permit unhampered discovery.[10] Second, many leave it to the discretion of the trial judge to decide in what manner discovery should proceed.[11] For example, using this approach courts have allowed: only plaintiff's counsel to obtain the

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8. *See, e.g.*, Tennant v. Charlton, 377 So.2d 1169, 1170 (Fla. 1979) ("[T]he threat of such exposure might be used by unscrupulous plaintiffs to coerce settlements from innocent defendants."). *See also* Richards v. Superior Court of Los Angeles, 86 Cal. App. 3d at 272, 150 Cal. Rptr. at 81, in which the court stated:

> It seems a rare instance indeed that the potential of disclosure for purposes unrelated to the lawsuit or to persons other than counsel and their representatives serves any purpose except to give a tactical edge to the party who has obtained discovery of the information by allowing that party the benefit of pressure in settlement negotiations by threat or implication of disclosure.

Id. See also Doak v. Superior Court, 257 Cal. App. 2d 825, 832, 65 Cal. Rptr. 193, 198 (1968) ("The threat of having to place a dollar value on one's assets and to disclose that valuation to strangers may well serve as a powerful weapon to coerce a settlement which is not warranted by the facts of the case."); Rupert v. Sellers, 48 A.D.2d 265, 271, 368 N.Y.S.2d 904, 911 (1975) ("A rule permitting unlimited examination before trial of a defendant as to his wealth in a punitive damage action could . . . constitute undue pressure on defendants in such actions to compromise unwarranted claims.").

9. *See, e.g.*, FED. R. CIV. P. 26(c), which provides:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only upon specified terms and conditions, including a designation of the time and place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

Id. Almost all states have adopted this rule as part of their discovery procedures.

10. *See* State ex rel. Thesman v. Dooley, 270 Or. 37, 526 P.2d 563 (1974); Ruiz v. Southern Pacific Transp. Co., 97 N.M. 194, 638 P.2d 406 (1981); Thoresen v. Superior Court, 11 Ariz. App. 62, 461 P.2d 706 (1969); Lewis v. Moody, 195 So.2d 260 (Fla. Dist. Ct. App. 1967); American Benefit Life Ins. Co. v. Ille, 87 F.R.D. 540 (W.D. Okla. 1978); Holliman v. Redman Dev. Corp., 61 F.R.D. 488 (D.S.C. 1973).

11. *See* Martin v. Superior Court, 110 Cal. App. 3d 391, 167 Cal. Rptr. 811 (1980); Richards v. Superior Court, 86 Cal. App. 3d 265, 150 Cal. Rptr. 77 (1978); Luria Bros. & Co. v. Allen, 469 F. Supp. 575 (W.D. Pa. 1979); State ex rel. Kubatzky v. Holt, 483 S.W.2d 799 (Mo. Ct. App. 1972); Hughes v. Groves, 47 F.R.D. 52 (W.D. Mo. 1969).

information;[12] only plaintiff's counsel and the plaintiff to obtain the information;[13] and postponing discovery until sixty or ninety days prior to trial.[14] Third, many require the plaintiff to make some type of factual showing that a viable claim of punitive damages exists before allowing discovery.[15] Fourth, a few prohibit discovery until after a jury has found the defendant liable for punitive damages; this creates a split-trial procedure.[16]

In *Chenoweth v. Schaaf*,[17] a Pennsylvania federal court adopted the third approach. In this medical malpractice case, the plaintiff sought to discover the defendant doctors' financial circumstances on the basis of a "complaint [with] nothing other than statements, conclusive in nature."[18] The court acknowledged that this request was for relevant information due to the punitive damage claim.[19] However, the court refused to permit discovery because it would be improper to allow "inquiry into a particularly sensitive and perhaps irrelevant aspect of a defendant's life"[20] without "demonstrat[ing] to the court at least a real possibility that punitive dam-

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12. *See* Martin v. Superior Court, 110 Cal. App. 3d 391, 167 Cal. Rptr. 811 (1980); Richards v. Superior Court, 86 Cal. App. 3d 265, 150 Cal. Rptr. 77 (1978); Luria Bros. & Co. v. Allen, 469 F. Supp. 575 (W.D. Pa. 1979); Hughes v. Groves, 47 F.R.D. 52 (W.D. Mo. 1969).

13. *See* State ex rel. Kubatzky v. Holt, 483 S.W.2d 799 (Mo. Ct. App. 1979).

14. *See* Martin v. Superior Court, 110 Cal. App. 3d 391, 167 Cal. Rptr. 811 (1980); Cobb v. Superior Court of Los Angeles, 99 Cal. App. 3d 543, 160 Cal. Rptr. 561 (1979).

15. *See* Campen v. Stone, 635 P.2d 1121 (Wyo. 1981); Curtis v. Partain, 272 Ark. 400, 614 S.W.2d 671 (1981); Leidholt v. District Court, 619 P.2d 768; Tennant v. Charlton, 377 So.2d 1169 (Fla. 1979); Bryan v. Thos. Best & Sons, Inc., 453 A.2d 107 (Del. Super. Ct. 1982); Breault v. Friedli, 610 S.W.2d 134; Stern v. Abramson, 150 N.J. Super. 571, 376 A.2d 221 (1977) (dictum); Gierman v. Toman, 77 N.J. Super. 18, 185 A.2d 241 (1962); Chenoweth v. Schaaf, 98 F.R.D. 587 (W.D. Pa. 1983); Vollert v. Summa Corp., 389 F. Supp. 1348 (D. Hawaii 1975).

This is also the position taken by the Defense Research Institute. *See* Wall St. J., Nov. 12, 1984, at 27, col. 4.

16. *See* Cox v. Theus, 569 P.2d 447 (Okla. 1977); Rupert v. Sellers, 48 A.D.2d 265, 368 N.Y.S.2d 904 (1975).

17. 98 F.R.D. 587 (W.D. Pa. 1983).

18. *Id.* at 589.

19. *Id.* In the court's words:

> Under the liberal rules concerning discovery in federal court, such may be had concerning all items, relevant to the subject matter involved, so long as it is not privileged material. FED. R. CIV. P. 26(b)(1). For instance, were it previously determined that a defendant's conduct was such so as to allow the plaintiff to recover punitive damages, then, disclosure of the general net worth of said defendant is appropriate. On the other hand, should a complaint read solely in negligence, then the general net worth of the defendant is not discoverable because it would bear no relevance to that particular subject matter.

Id.

20. *Id.*

ages will be at issue" at trial.[21] In its decision, the court noted several conflicting Pennsylvania county court cases on this issue which it was not bound to follow.

This article agrees with the *Chenoweth* approach and argues that the question of the discovery of a defendant's wealth should be resolved after discovery on the merits is concluded. Then, the plaintiff must prove a prima facie case of a triable issue on the defendant's liability for punitive damages in a "mini-trial,"[22] before discovery is allowed. When allowed, the defendant should only be required to reveal his net worth and recent income tax returns to plaintiff's counsel and sometimes to the plaintiff as well. Only this procedure properly balances: the defendant's interest in privacy and avoiding inconvenience; the plaintiff's need to discover relevant information in time to either settle the case or prepare for trial; and the judicial system's concern in preventing the discovery process from being used for ulterior motives.

Part I explains the shortcomings of the following approaches: unfettered disclosure; allowing a trial judge to fashion a protective order to each individual case; and, preventing disclosure until a jury decides the merits of the punitive damage claim. Part II outlines the proposed standard, including a discussion of the following: what type of prima facie showing of the defendant's liability for punitive damages the plaintiff should make; when this showing should be made during the period for discovery; how detailed the disclosure should be; and, what additional precautions should be taken after disclosure.

I. The Inadequate Alternatives

A. *During the Discovery Period*

1. Unfettered Access

A few courts have ordered the defendant to disclose his financial records upon the plaintiff's request during the discovery period, without proof of the validity of the punitive damage claim or restricting who will have access to such information once disclosed.[23] In *State ex rel. Thesman v. Dooley*,[24] for example, the plaintiff sued the defendant for fraud and deceit, and included a punitive

21. *Id.*
22. Leidholt v. District Court, 619 P.2d at 772 (Lohr, J., dissenting).
23. *See supra* note 10.
24. 270 Or. 37, 526 P.2d 563 (1974).

damage claim in his complaint. The Oregon Supreme Court denied the defendant's contention that a prima facie showing of punitive damages must be made before the defendant's financial worth, as shown through income tax records and business balance sheets, should be disclosed. Rather, the court held that the plaintiff could inquire into the defendant's financial status at the time of the defendant's deposition. It reached this conclusion because the evidence was material and relevant to the plaintiff's punitive damage claim. In addition, the requested procedure would impede judicial economy by "requiring the plaintiff to prove his case twice."[25]

However, the Oregon Supreme Court, like other courts allowing unfettered access of a defendant's wealth based on its relevance, was not presented with the objection that the discovery would unduly delve into the defendant's personal affairs, cause unwarranted inconvenience, or be a use of the discovery process for ulterior motives.[26] When defense attorneys concede relevance and argue, for example, that "consideration must be given to the defendant's right to privacy and his right to protection from harassment,"[27] courts universally provide some form of protection.[28]

The Oregon court is the only court which allows unhampered access to a defendant's financial worth, using the additional rationale that requiring a prima facie showing of the punitive damage claim would waste judicial resources by mandating a separate hearing. This point is of minor significance. First, the potential for abuse is so evident that whatever inefficiency results from this rule is worth the alternative of forcing defendants to disclose confidential information on the basis of a "naked allegation"[29] of punitive damages. Indeed, the Arkansas Supreme Court took this privacy interest to a near-constitutional level when it required the plaintiff to prove a prima facie case of a legal right to punitive damages before permitting discovery.[30] That court stated: "[N]o doubt our rules were designed to improve and expedite trials, but not at the expense of

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25. *Id.* at 566.

26. *See, e.g.*, Lewis v. Moody, 195 So.2d at 261 (Fla. Dist Ct. App. 1967) ("The defendant does not object to the interrogatories on the basis . . . that they seek unwarranted financial details and tend to embarrass and harass him. Respondent's contention is that no pretrial discovery as to financial worth should be permitted because such evidence will not be relevant . . . .").

27. Bryan v. Thos. Best & Sons, Inc., 453 A.2d at 108 (Del. Super. Ct. 1982).

28. *See, e.g., id.*; Leidholt v. District Court, 619 P.2d at 768.

29. Bryan v. Thos. Best & Sons, Inc., 453 A.2d at 108 (Del. Super. Ct. 1982).

30. Curtis v. Partain, 272 Ark. 400, 614 S.W.2d 671 (1981).

basic fundamental rights."[31] Second, the inefficiency argument is exaggerated because time and expense would not be expended in those cases where the plaintiff, after completing discovery on the merits, declined to attempt to make the prima facie showing because it would be futile.[32] Third, if the standard for such a showing is not one of proof of a legal right to punitive damages, but merely one of a triable issue, the time expended to prepare and present such a case would not be as great.

2. Granting the Trial Judge the Discretion to Fashion a Protective Order

Many courts hold that a defendant's wealth should be discoverable, but that courts should use their discretion in each particular case to limit the dissemination of that information so that there is minimal intrusion into a defendant's finances.[33] This approach conforms to the usual manner in which protective orders are given, leaving the burden of proof on the plaintiff. Courts have exercised this discretion in a number of ways.[34] In *State ex rel. Kubatzky v. Holt*,[35] for example, a Missouri appellate court held the defendant's answers to interrogatories concerning gross earnings, income tax returns, and net worth should be discoverable, but only the plaintiff and his counsel should have access to this information. This holding invalidated the trial court's protective order which would have kept the answers sealed until the defendant was found liable for punitive damages at trial. The appellate court reached this result by finding the defendant's privacy concern "subservient" to the need for discovery, particularly since the information would go no further than to the plaintiff and his counsel.

There is much merit in this approach of giving the trial court broad discretion to fashion protective orders. It is flexible, allowing the trial judge to create orders "appropriate for each individual case."[36] It creates judicial economy by not requiring a "mini-trial"[37] where the plaintiff must make a prima facie case for punitive damages. Additionally, it does not require a further set of interrogatories or other discovery device, after the plaintiff prevails

31. *Id.* at 674.
32. Rupert v. Sellers, 48 A.D.2d 265, 271, 368 N.Y.S.2d 904, 913 (1975).
33. *See supra* note 11.
34. *See supra* notes 12-14.
35. 483 S.W.2d 799 (Mo. Ct. App. 1972).
36. Leidholt v. District Court, 619 P.2d at 772-73 (Lohr, J., dissenting).
37. *Id.* at 772.

at the mini-trial.[38] Moreover, settlement negotiations may be stalled until this information is produced.[39] Finally, placing the burden of proof on the defendant makes sense for the purpose of proving inconvenience and cost in producing the information since it is the defendant who can best establish that fact.

Nevertheless, this discretionary approach has serious flaws. First, and most importantly, this rule assumes that many, if not most, of the inquiries concerning a defendant's wealth will not harass the defendant or be used for ulterior motives, such as coercing a settlement due to the threat of obtaining confidential business records. This assumption ignores the inherently private nature of financial information. It is simply not necessary that a defendant prove that disclosing this information would be intrusive. The fact that "causes of action for punitive damages have become very easy to allege,"[40] should mandate that the inherently private nature of financial information should have some degree of protection.

Second, trial judges vary in their perception of the means and importance of adequately protecting the defendant's confidentiality interest, due to their differences in values and competence. Thus, appeals of the trial judge's order will often be made,[41] and attorneys will "shop" for a more favorable judge. These concerns, and others stemming from the discrepancy among local trial judges, helped to influence the *Chenoweth* court to adopt a firm rule requiring a prima facie showing of punitive damages before permitting discovery of a defendant's wealth.[42]

Third, the purported gains in judicial economy, which pale in significance to protecting a defendant's privacy, are overstated. In order for a judge to fashion a protective order appropriate to each case he would have to conduct a hearing concerning the competing interests of the opposing parties. In addition, judicial resources would be spared when the plaintiff declined to make a prima facie showing because discovery on the merits proved it would be useless.

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38. *Id.*

39. *Id.*

40. Richards v. Superior Court, 86 Cal. App. 3d at 271, 150 Cal. Rptr. at 80 (1978). *See also* Wall St. J., Nov. 12, 1984, at 27, col. 4: "Punitive damage claims, which used to be reserved for defendants who acted recklessly or maliciously, are cropping up in more and more suits. Plaintiffs' lawyers who might have sued just to compensate for injury 10 years ago now routinely sue for punitive damages as well." *Id.*

41. *See, e.g.*, Martin v. Superior Court, 110 Cal. App. 3d 391, 167 Cal. Rptr. 811 (1980) (completely revising trial court's protective order).

42. *See* Chenoweth v. Schaaf, 98 F.R.D. at 589 (W.D. Pa. 1983).

Fourth, although it may seem that delaying the discovery of this information may delay settlement in those cases where the punitive damage claim is warranted, most cases are not settled until after discovery is concluded because only at that point do the parties know the strength of the plaintiff's case.

B. *The Split-Trial Procedure*

Two courts have stated that the defendant's wealth should not be disclosed until after the jury has rendered a special verdict that the defendant is liable for punitive damages.[43] These courts purportedly used different rationales to adopt this split-trial procedure. A lower New York court was concerned with protecting the privacy of defendants when plausible punitive damage claims could so easily be alleged.[44] It feared that defendants faced with disclosure would choose to "compromise unwarranted claims."[45] On the other hand, an Oklahoma court employed the questionable reasoning that since punitive damages benefit society by deterring conduct similarly outrageous, the plaintiff had only an "incidental personal interest" and not a "real interest" in obtaining such damages, so he could not engage in pretrial discovery of a defendant's wealth.[46] In reality, it appears this court was actually concerned with the defendant's privacy because the court noted the requested discovery was "based on an allegation, and not evidence to justify punitive damages."[47]

Although the split-trial procedure is based on legitimate concerns of the defendant's privacy, it is not the best solution to the problem. First, there would be a delay between the first trial on the merits of the punitive damage claim, and the second trial to assess the damages in light of the new information regarding the defendant's wealth. Some time would be needed for the plaintiff's lawyer to analyze and question the disclosed information and prepare his presentation to a jury.[48] If the delay were sufficiently long so that another jury had to be convened, the new jury would have to hear the evidence regarding the merits of the punitive damage

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43. *See supra* note 16.

44. Rupert v. Sellers, 48 A.D.2d at 271, 368 N.Y.S.2d at 911 (1975).

45. *Id.*

46. Cox v. Theus, 569 P.2d at 450 (Okla. 1977).

47. *Id.* at 499.

48. *See* Breault v. Friedli, 610 S.W.2d at 138 ("The split-trial procedure will inevitably be accompanied by a delay between the first and second trials. It will often be impossible to retain for the punitive damages trial the jury which sat in the first trial.").

claim in order to properly assess the damages[49]—a great waste of judicial resources that raises questions of fairness. Second, some states do not have established split-trial rules or procedure,[50] so adopting this discovery approach would create some temporary disorder before this approach could be used with effectiveness. Third, the procedure reduces the chance for settlement since the plaintiff is never aware of what he could possibly collect from the defendant before trial.[51]

II. The Proper Standard: Prima Facie Proof of a Triable Claim of Punitive Damages

The best procedure is to require the plaintiff to make a prima facie showing of the defendant's liability for damages before the plaintiff can discover the defendant's wealth. This was the approach suggested by a Pennsylvania federal court in *Chenoweth v. Schaaf*.[52] This practice accomplishes the following objectives: protects defendants from unwarranted intrusions into their private affairs;[53] prevents defendants from being unnecessarily inconvenienced and incurring expenses in producing the information;[54] precludes plaintiffs from using the discovery process for ulterior motives;[55] gives plaintiff's counsel all relevant information in time to settle the case or prepare for trial;[56] and, checks the inconsistency of trial judges by establishing a firm rather than discretionary standard.[57] Still, the mechanics of this approach needs to be clarified. Specifically, four questions need to be answered: what type of prima facie showing should be required; when should such a showing be made in the discovery process; how much detail con-

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49. *See* Restatement (Second) of Torts § 908(2) (1977) ("In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.").

50. *See* Breault v. Friedli, 610 S.W.2d at 138 ("[S]plit-trial proceedings are rarely used in non-criminal cases in Tennessee. There is no established rule or procedure governing their operation.").

51. *See id.* at 139 ("We wonder how the parties can make an intelligent effort to settle when one party is deprived of information on which damages are based.").

52. *See supra* notes 17-21 and accompanying text.

53. *See supra* note 6.

54. *See supra* note 7.

55. *See supra* notes 5 & 8.

56. *See* Breault v. Friedli, 610 S.W.2d at 140 ("[T]he plaintiff who meets the factual basis test will be able to obtain discovery in time for trial preparation and/or settlement negotiations.").

57. *See supra* notes 35-40 and accompanying text.

cerning the defendant's wealth should be disclosed; and, what other safeguards should be taken after disclosure is made. These questions are resolved below.

A. *The Type of Prima Facie Showing Required*

Courts have used three standards for the type of prima facie showing required of the defendant's liability for punitive damages before discovery is allowed. These include: a legal right,[58] a triable issue,[59] and a factual basis.[60]

The intermediate standard, of a triable issue of punitive damages, seems preferable. The *Chenoweth* court used this standard by requiring proof of "a real possibility that punitive damages will be at issue" at trial.[61] Merely requiring a factual basis could be met too easily, and would therefore often allow an intrusion into the defendant's financial affairs when the plaintiff could not reasonably be expected to credibly bring the issue to trial. On the other hand, proof of a legal right might preclude discovery by a judge, when a jury would still hear the issue at trial. Moreover, this strict standard would prevent settlements before trial. Thus the standard which best balances the need of the plaintiff to obtain the information in advance of trial with the defendant's concern that there be a legitimate need for the information requested, is requiring the plaintiff to make a prima facie case of a triable issue of the defendant's liability for punitive damages in a "mini-trial."

B. *The Timing of Disclosure*

Most courts, including the *Chenoweth* court, do not address the question of when the plaintiff should have to make his prima facie case for punitive damages.[62] It is logical to assume, however, that

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58. *See* Curtis v. Partain, 272 Ark. 400, 403-04, 614 S.W.2d 671, 674 (1981); Stern v. Abramson, 150 N.J. Super. 571, 575, 376 A.2d 221, 223 (1977) (dictum); Gierman v. Toman, 77 N.J. Super. 18, 23, 185 A.2d 241, 244 (1962).

59. Campen v. Stone, 635 P.2d 1121, 1131 n.10, 1132 (Wyo. 1981) ("a viable claim/issue"); Leidholt v. District Court, 619 P.2d at 771 n.3 ("a triable issue" means "a showing of a reasonable likelihood that the issue will ultimately be submitted to the jury for resolution."); Bryan v. Thos. Best & Sons, Inc., 453 A.2d at 108 (Del. Super. Ct. 1982) ("[R]easonably likely that a triable issue as to defendant's liability for punitive damages exists . . . .").

60. Tennant v. Charlton, 377 So.2d at 1170 (Fla. 1979); Breault v. Friedli, 610 S.W.2d at 140; Vollert v. Summa Corp., 389 F. Supp. at 1351 (D. Hawaii 1975) ("claim for punitive damages is not spurious").

61. Chenoweth v. Schaaf, 98 F.R.D. at 589 (W.D. Pa. 1983).

62. *See, e.g.*, Campen v. Stone, 635 P.2d 1121 (Wyo. 1981); Bryan v. Thos. Best &

the opportunity for discovery of a defendant's wealth should not arise until after discovery on the merits is concluded. Otherwise, the plaintiff could make an early attempt to make a prima facie case without all of the pertinent evidence on the issue before the court. Additionally, the potential exists for harassing the defendant and wasting judicial resources through repeated attempts by the plaintiff to make the requisite showing.

It is important that appellate courts make this rule clear. For example, the Colorado Supreme Court only suggested that the mini-trial be held after discovery on the merits was completed,[63] allowing a lower appellate court to give a plaintiff multiple chances to prove his case during the discovery period.[64]

C. *The Details of Disclosure*

Courts disagree on how detailed the disclosure of the defendant's financial worth must be, after a prima facie case is made. Some maintain that a sworn statement of the defendant's net worth, accompanied by recent income tax returns, would be sufficient.[65] They point out that allowing the plaintiff to question the defendant about specific details of his finances would "constitute unnecessary harassment"[66] and create inconvenience and undue expense. The *Chenoweth* court went even further in dictum and maintained that it would prohibit discovery of a defendant's income tax returns because they "include[] more information than necessary for this inquiry," and it also would prohibit disclosure of questions relating to specific assets and liabilities.[67]

Although these courts have a legitimate concern in protecting the defendant, their position fails to adequately guard the plaintiff from the defendant making too conservative an estimate of his net worth.[68] Therefore, as the Florida Supreme Court has ruled, the

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Sons, Inc., 453 A.2d 107 (Del. Super. Ct. 1982).

63. Leidholt v. District Court, 619 P.2d at 771 ("Following discovery of the facts relating to the liability issues and the claim for punitive damages . . . .").

64. Savio v. Travelers Ins. Co., 678 P.2d 549 (Colo. Ct. App. 1983).

65. *See* Cobb v. Superior Court, 99 Cal. App. 3d 543, 160 Cal. Rptr. 561 (1979) (net worth only); Rupert v. Sellers, 48 A.D.2d 265, 368 N.Y.S.2d 904 (1975) (net worth and income tax returns for previous five years); Gierman v. Toman, 77 N.J. Super. 18, 185 A.2d 245 (1962) (net worth only).

66. Leidholt v. District Court, 619 P.2d at 771; Cobb v. Superior Court, 99 Cal. App. 3d at 551, 160 Cal. Rptr. at 566 (1979).

67. Chenoweth v. Schaaf, 98 F.R.D. 587, 590 (W.D. Pa. 1983).

68. *See* Tennant v. Charlton, 377 So.2d at 1170 (Fla. 1979), in which the court stated that:

We know from experience that one party frequently minimizes his financial ability to

plaintiff should be given "reasonable latitude" to ask questions about the disposition of the individual assets and liabilities mentioned in the net worth statement and income tax returns produced by the defendant.[69]

D. *Protection After Disclosure*

After the plaintiff establishes a right to discover the defendant's wealth at the mini-trial, the defendant should receive protection against public disclosure until the case goes to trial.[70] This rule enhances settlements and allows the plaintiff to prepare his case without unnecessarily invading the defendant's privacy. In addition, if the defendant can prove at the mini-trial that the plaintiff is a business competitor or would otherwise have reason to use the financial information to the defendant's detriment, the trial judge could prohibit the plaintiff from having access to the information and only give it to plaintiff's counsel.

> respond when it is an issue in a lawsuit, while the other party often has a tendency to inflate that same financial ability. Even under oath a party often seems to view another party's financial resources as great or small in direct proportion to the benefit which will accrue to that party. Thus, it is the height of naivete to suggest that a sworn statement of one's worth must be accepted as the final word on that important subject.

Id. (quoting with approval Donahue v. Herbert, 355 So.2d 1264, 1265 (Fla. Dist. Ct. App. 1978)).

69. *Id.* ("The whereabouts of assets disclosed by a recent income tax return, or shown on a recent financial statement furnished in another situation when the current litigation was not envisioned is very definitely appropriate inquiry as is the bona fides of the recent disposition of assets."); Lay v. Kremer, 411 So.2d 1347, 1349 (Fla. Dist. Ct. App. 1982) ("*Tennant v. Charlton* . . . held that a plaintiff was not required to accept on faith a defendant's financial statement but was entitled to discovery as a check on the defendant's credibility. . . . Of course, the trial court has discretion to protect Kremer from unduly vexatious discovery and to protect his secrets."); Medel v. Republic Nat'l Bank of Miami, 388 So.2d 327 (Fla. Dist. Ct. App. 1980). *See also* Breault v. Friedli, 610 S.W.2d at 140, in which the court held that:

> [T]he plaintiffs should be permitted to discover the net worth of the defendants and the income of each defendant for the last three years. In addition, plaintiffs are entitled to ask questions concerning individual assets and liabilities to the extent that the trial judge may determine that this is necessary to verify or impeach the general accuracy of the reported income and net worth of the defendants.

Id.

70. *See id.* at 140 ("If the court determines that the plaintiffs are entitled to disclosure, we prohibit the disclosure of this information to anyone beyond the immediate parties and counsel to this lawsuit until such time as this action is brought to trial."); Vollert v. Summa Corp., 389 F. Supp. 1348, 1351 (D. Hawaii 1975).

III. Conclusion

Pennsylvania courts and courts nationwide should establish a rule so that a defendant's wealth cannot be a matter that a plaintiff can expect to discover merely be alleging a claim for punitive damages. Otherwise, the defendant may be subject to harassment, inconvenience, expense, and coercion to settle an unmeritorious lawsuit. Although courts have used a variety of approaches to protect defendants, the best approach, like that used in *Chenoweth,* requires the plaintiff, after concluding discovery on the merits, to make a prima facie case of a triable issue of punitive damages before discovery is allowed.