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PUNITIVE DAMAGES IN CALIFORNIA ARBITRATION
AFTER Baker v. Sadick: A PROPOSED STATUTORY REFORM*

I. INTRODUCTION

Binding arbitration is a dispute resolution process in which contracting parties agree to submit their dispute to an arbitrator for final determination. The binding nature of arbitration is vital to its effectiveness as a substitute for litigation. The rights of contracting parties to sue in court are voluntarily and permanently forfeited in exchange for a swifter, private and less expensive determination of their claims, allowing for many possible remedies.

Until recently, punitive damages were not awarded in California arbitration proceedings. The California Court of Appeals' decision in Baker v. Sadick, however, permitted arbitrators to award punitive damages. Baker reinforces California's legislative and judicial policies favoring punitive damage recoveries using arbitration as an alternative dispute resolution process.

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2. An "arbitrator" is an impartial person chosen by the parties to resolve a dispute between them. The arbitrator is vested with the power to make a final determination concerning the issue(s) in controversy, bound only by his or her own discretion, and not by rules of law or equity. S. GIFIS, LAW DICTIONARY 15 (1975).

3. Comment, supra note 1, at 314. See R. COULSON, BUSINESS ARBITRATION—WHAT YOU NEED TO KNOW 17 (1980).

4. For examples of the advantages of arbitration, see infra text accompanying notes 26-46.

5. In common usage "punitive damages" refers to "compensation in excess of actual damages; a form of punishment to the wrongdoers and excess enhancement of the injured..." S. GIFIS, LAW DICTIONARY, supra note 2, at 52.

6. The term "award" is used in this comment to differentiate between arbitral decisions (awards) and judicial judgments.


8. See CAL. CIV. CODE § 3294 (West 1970 & Supp. 1987) (providing for punitive dam-
The test articulated in *Baker* for determining whether punitive arbitral awards are appropriate is not a sufficient substitute for statutory guidelines. Because punitive damages are usually quite severe, criminal and civil courts provide procedural safeguards to protect litigants from possible excessive and/or unwarranted punishment. Arbitration, however, has no inherent procedural safeguards to protect parties against punitive damage claims.

The threat of punitive damage awards without safeguards may be too risky for some contracting parties. The future success of arbitration as a fair and just substitute for adjudication is threatened if litigants choose not to submit to arbitration or are forced into an inherently unfair dispute resolution process. Relatively minor change in California's General Arbitration Act can rectify this potential problem and preserve binding arbitration as a viable dispute resolution alternative.

California and Federal policy suggest increased reliance on arbitration for resolving disputes. Accordingly, this comment compares the advantages and disadvantages of arbitration, and contrasts the policy arguments for and against punitive damages. The comment then presents and scrutinizes the California Court of Appeals decision in *Baker*, the only California case to uphold an arbitrator's award of punitive damages. An analysis of the lack of procedural safeguards in the Act indicates the need for a statutory proposal to limit the chances of unwarranted and/or excessive punitive damage awards in arbitration proceedings. Therefore, statutory amendments are proposed to add safeguards where punitive damages are awarded against defendants arbitrating under the Act. In particular, amendments would empower arbitrators with the authority to enforce dis-

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*See also infra* notes 140-45 and accompanying text.

9. *See Note, Criminal Safeguards and the Punitive Damages Defendant, 34 U. Chi. L. Rev. 408, 426-29 (1967) [hereinafter P.D. Defendant]. For examples of severe fines, see *infra* note 139 and accompanying text.

10. *See generally P.D. Defendant, supra* note 9, at 408-35 (advocating procedural safeguards for punitive damage defendants: the right to jury trial, the right to confront adverse witnesses, the right to assistance of counsel, protection against excessive fines by judicial review, and strong burdens of proof for plaintiffs).

11. *See infra* notes 51-68 and accompanying text.

12. *See infra* notes 190-91 and accompanying text.

13. *See infra* note 189 and accompanying text.

14. *See infra* note 191 and accompanying text.


16. *See infra* notes 17-25 and accompanying text.
covery procedures, provide for a mandatory panel of three arbitra-
tors, and require a majority panel decision on punitive damage
claims.

II. BACKGROUND

A. Arbitration

The use of arbitration as an alternative form of dispute resolu-
tion is favored at both state and federal levels. Support is indicated in
policy statements dictated by lawmakers and the courts.

1. California Public Policy

The California Legislature encourages the use of arbitration as
an alternative means of dispute resolution. The Legislature's posi-
tion is illustrated by a modern arbitration statute enforcing agree-
ments to arbitrate existing and future controversies. California
courts also maintain a strong judicial policy favoring arbitration be-
cause arbitration is often less expensive and more expeditious than
litigation, and it relieves court congestion. The California Supreme
Court acknowledged in Madden v. Kaiser Foundation Hospitals that
there have been changes in policy and attitude favoring arbitration.

2. Federal Policy

California's pro-arbitration policy is strengthened by a concur-
rning federal policy. The United States Supreme Court held in

18. Id. See also AMERICAN ARBITRATION ASSOCIATION, ARBITRATION & THE LAW, 147 app. (1984) (listing all modern arbitration statutes) [hereinafter AAA].
20. 17 Cal. 3d 699, 552 P.2d 1178, 131 Cal. Rptr. 882 (1976). The court reversed the order of the lower court denying enforcement of an arbitration provision and ordered the court to grant a motion to compel the arbitration in a medical malpractice dispute where plaintiff's health plan contained an arbitration clause.
21. Id. at 706, 552 P.2d at 1182, 131 Cal. Rptr. at 886. The court stated, "decisions confirm the self-evident fact that arbitration has become an accepted and favored method of resolving disputes. . . ." Id.
Southland Corp. v. Keating that the states can no longer force parties to go to court when contracting parties have agreed to arbitrate claims if the contract involves interstate commercial transactions. The reason for maintaining such an adamant federal policy towards arbitration is most eloquently expressed by Chief Justice, Warren Burger:

One thing an appellate judge learns very quickly is that a large part of all litigation in the courts is an exercise in futility and frustration. The anomaly is that there are better ways of resolving private disputes, and we must in the public interest move toward taking a large volume of private conflicts out of the courts and into the channels of arbitration.

California law, federal law and legal authorities recognize the viability of arbitration as a substitute for litigation. An overview of the advantages and disadvantages of arbitration lends support to the degree of recognition given to the process. The comparison also highlights situations where disadvantages could override the benefits of the process in the near future.

3. Advantages of Arbitration

The advantages of arbitration make it a useful substitute for traditional litigation. Generally, arbitration's primary benefit to society is that it reduces court overcrowding. Also, the use of expert decision makers, particularly in commercial disputes, is advantageous compared to judges and juries. Speedier proceedings, often at lower costs, are usually not afforded by litigation. Finally, hearings are private and arbitration offers more remedial options than litigation.

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23. 465 U.S. 1 (1984). The United States Supreme Court overruled a California Supreme Court decision holding that statutory claims were not arbitrable.
28. See H. HART & A. Sachs, supra note 27, at 340. See also infra text accompanying notes 42-46.
29. See H. HART & A. Sachs, supra note 27, at 343.
In particular, arbitration proceedings are often presided over by experts in particular commercial fields. The selection of arbitrators is the choice of the contracting parties. The parties either independently appoint industrial or commercial specialists with technical knowledge, or they agree to abide by the decisions of trade associations. Business persons appreciate a result which fairly reflects customs of the trade.

A private forum is of equal importance to the business world. Confidentiality is critical to participants in arbitration who take comfort in knowing that reputations will not be damaged through unfavorable publicity. Moreover, a private proceeding fosters an environment where disputants with ongoing relationships can rectify disagreements speedily, preserving friendliness and good will.

Commercial disputes usually require speedy resolution to preserve or diminish the negative impact on contractual time schedules. Arbitration proceedings are most often shorter than the judicial process because appeals are strictly limited and arbitrators' decisions are generally final. Finality coincides with most parties' desire to avoid extensive appellate adjudication and also relieves court congestion.

edies include: liquidated, consequential or punitive damages; discovery; attorneys' fees; interest; interim relief; specific performance; or other equitable remedies.

32. Id. at 13. See also infra note 77 and accompanying text.
33. R. COULSON, supra note 3, at 9. Textile and construction industries are examples of fields with trade associations which depend heavily on arbitration to resolve disputes.
34. H. HART & A. SACHS, supra note 27, at 342.
35. R. COULSON, supra note 3, at 7.
36. Id.
37. H. HART & A. SACHS, supra note 27, at 341.
38. A sophisticated statistical analysis of the overall length of arbitrations is not presently available. However, the AAA did a recent nationwide survey of the last 400 construction cases taken prior to its annual National Construction Industry Arbitration Committee Meeting. From 1982 to 1986, fifty-five percent of the surveyed cases that ended with awards took an average of 200 days (6 1/2 months) from filing to completion. Report prepared by the American Arbitration's Department of Case Administration for National Construction Industry Arbitration Committee Meeting (Oct. 30, 1986).

By comparison, for approximately fifty percent of 948 comparable cases disposed of by the federal courts between July 1, 1983 and June 30, 1984, the median time from filing to disposition was 9 months. Seventeen months was the median time of disposition for the two percent that went to trial. Lyons, Arbitration: The Slower, More Expensive Alternative?, 7 AM. LAW. No. 1, at 107, 110, Jan.-Feb. 1985. See also Comment, supra note 1, at 314.
39. See H. HART & A. SACHS, supra note 27, at 347. See infra notes 85-109 and accompanying text.
40. Comment, supra note 1, at 315. See also R. COULSON, supra note 3, at 7.
Not only does arbitration save time, but it also is often less expensive than litigation.\textsuperscript{42} Informal technical procedures and evidentiary rules reduce arbitration costs for all parties.\textsuperscript{43} As a result of decreased costs,\textsuperscript{44} there is increasing access to a dispute resolution mechanism for poorer members of society.\textsuperscript{45} Arbitration is particularly less expensive for losing parties because excessive jury awards are eliminated.\textsuperscript{46}

California's legal community supports the aforementioned advantages.\textsuperscript{47} However, an increasingly controversial advantage of arbitration is the broad variety of remedies available; the range of relief even exceeds that which is available to the courts.\textsuperscript{48} Under the Commercial Arbitration Rules of the American Arbitration Association, "any remedy or relief which the arbitrator deems just and equitable and within the scope of the agreement of the parties," is available in arbitration.\textsuperscript{49}

4. Disadvantages of Arbitration

There are several problems inherent in common arbitration.\textsuperscript{50} As outlined below, the first disadvantage of arbitration is that it lacks precedent. Second, judicial review is severely limited. Third, informal evidentiary procedures circumvent accurate award determinations. Finally, several other safeguards existing in civil proceedings are absent in arbitration.

Arbitration proceedings often do not provide precedential value.\textsuperscript{51} Arbitrators are not required to submit written opinions,\textsuperscript{52} even though in some instances precedents are desirable and necessary.
sary. Precedent creates authoritative foundations for judging future conduct. Issues which would have immediate effects on society necessitate precedential rulings because society requires an "irreducible minimum of certainty" to operate efficiently.

Critics of binding arbitration feel that the absence of judicial review is more problematic than lack of precedent. Since mistakes of law are unreviewable, excessive punitive damage awards may be enforced although legally unwarranted. Courts can only correct mistakes in the arbitration process. Determinations regarding evidence sufficiency do not fall into this category, and thus are non-reviewable. Absence of review in situations where evidence does not substantiate the punitive award may contradict the Constitutional right to appeal as applied in criminal law.

The disadvantage of limited judicial review is particularly relevant considering the lack of formality in arbitration proceedings. Arbitrators admit practically any type of evidence, and discovery is not customary in arbitration. Even where arbitrators have the power to order discovery, their ability to enforce such discovery orders is highly questionable. Lack of formal procedural safeguards, such as enforceable discovery and technical evidentiary rules, makes the issue of non-reviewability critical because the flexibility of the

53. Mentschikoff, supra note 41, at 709. Instances involving insurable risk must have guidance as to the determination of all such cases. Examples of such guidance are: 1) requiring that consideration move from the beneficiary of a letter of credit to the issuer; 2) not requiring a check to contain an unconditional promise to be negotiable; and 3) determining that F.O.B. means free on board. Id.
54. Id.
55. Id. But see R. COULSON, supra note 3, at 26 (arguing that precedents can be dangerous "because they identify targets for the losing party to attack." Id.).
56. Workable Rule, supra note 22, at 287. In this comment, "legally unwarranted awards" refers to those awards which are made but cannot be legally substantiated.
57. See R. COULSON, supra note 3, at 27. Examples of mistakes in the arbitration process include acts of arbitrator misconduct, arbitrators exceeding authority, or failure to meet statutory requirements of due process.
58. Id.
59. Comment, supra note 1, at 310. See also Belli, Punitive Damages: Their History, Their Use & Their Worth in Present-Day Society, 49 UMKC L. REV. 1, 8 (1980) ("[b]ecause punitive damages serve to punish, they must be considered penal; fundamental constitutional criminal safeguards therefore must be applied fully." Id.).
60. See R. COULSON, supra note 3, at 17.
61. Id. at 17, 19 ("[t]he general rule is to hear everything that will clarify the issues. . . ." Id.).
62. Id. at 23.
63. AAA, supra note 18, at 49. Whether arbitrators may enforce discovery orders through sanctions for failure to comply remains largely unanswered because few cases discuss arbitrator-compelled disclosure and commentators have not reached a consensus on the topic of discovery and arbitration.
arbitration system does not provide a check on unwarranted and/or excessive punitive damage awards.

In addition to the lack of precedent, restricted judicial review and informal evidentiary procedures, arbitration requires no formal pleadings. All that is required is a statement of the nature of the dispute and a possible answering statement. Ordinarily there are no pretrial motions or examinations allowed.

In contrast to the safeguards existing in civil courts, common arbitration has no inherent procedural safeguards. In addition to judicial review, civil courts afford defendants five basic procedural safeguards that arbitration generally does not: (1) formal pleadings; (2) pretrial procedures (motions, discovery and examinations); (3) trial by judge or jury; (4) technical evidentiary rules; and (5) decisions according to the rules of law.

5. California Arbitration

California has attempted to rectify the total absence of procedural safeguards through its General Arbitration Act. California allows for limited pretrial procedures in certain instances. Arbitrators may issue subpoenas and take depositions for use as evidence, but deposed information may not be used for discovery purposes. Discovery procedures are enforced to the same extent as in civil courts only when there is an agreement to arbitrate "any dispute... arising out of or resulting from any injury to, or death of a person caused by the wrongful act or neglect of another."

Judges and juries are not part of the arbitration system. Arbitrating parties are only entitled to a hearing and notice of the hear-

64. Ladimer & Solomon, Medical Malpractice Arbitration: Laws, Programs, Cases, 653 Ins. L.J. 335, 336 (1977) (comparing courts to arbitration systems in general).
65. Id.
66. Id.
67. See generally Appendix.
68. Ladimer & Solomon, supra note 64, at 336.
70. Id. at § 1282.6.
71. Id. at § 1283.
72. Id. at § 1283.1(a).
73. The Act provides:

(d) The parties to the arbitration are entitled to be heard, to present evidence and to cross-examine witnesses appearing at the hearing, but rules of evidence and rules of judicial procedure need not be observed. On request of any party to the arbitration, the testimony of witnesses shall be given under oath.

Id. at § 1282.2(d) (West 1982 & Supp. 1987).
Hearings are conducted by a neutral arbitrator or a panel of arbitrators,\(^7^4\) as specified in the arbitration clause.\(^7^6\) If the parties have not agreed, the court will appoint a neutral arbitrator upon a party's petition.\(^7^7\) The Act also provides the right to have counsel present at the hearing.\(^7^8\)

Judicial evidentiary rules are generally not applied in arbitration proceedings.\(^7^9\) The arbitrator has sole discretion to determine evidential relevancy and materiality.\(^8^0\) At arbitration hearings, all relevant evidence may be admitted.\(^8^1\) The essence of arbitration requires that arbitrators be free from the "formality of ordinary judicial procedure."\(^7^8\) However, arbitrators may require conformity to

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75. The Act defines the powers and duties of a neutral arbitrator:

Unless the arbitration agreement otherwise provides, or unless the parties to the arbitration otherwise provide by an agreement which is not contrary to the arbitration agreement as made or as modified by all of the parties thereto:

(a) The arbitration shall be by a single neutral arbitrator.

(b) If there is more than one arbitrator, the powers and duties of the arbitrators, other than the powers and duties of a neutral arbitrator, may be exercised by a majority of them if reasonable notice of all proceedings has been given to all arbitrators.

(c) If there is more than one neutral arbitrator:

(1) The powers and duties of a neutral arbitrator may be exercised by a majority of the neutral arbitrators.

(2) By unanimous agreement of the neutral arbitrators, such powers and duties may be delegated to one of their number but the power to make or correct the award may not be so delegated.

(d) If there is no neutral arbitrator, the powers and duties of a neutral arbitrator may be exercised by a majority of the arbitrators.


76. An arbitration clause is a provision in a contract which represents a binding commitment by both parties to resort to arbitration in the event that a dispute arises about the meaning or application of the contract. R. COULSON, supra note 3, at 12.

77. CAL. CIV. PROC. CODE § 1281.6 (West 1982 & Supp. 1986). See infra note 202 and accompanying text.


79. See supra notes 60-63, 73 and accompanying text.

80. F. Sage & Co. v. Alexander & Oviatt Corp., 138 Cal. App. 476, 479, 32 P.2d 655, 657 (1934). This court of appeal decision denied a motion to vacate and confirmed the findings and award in an action to collect an unpaid balance on a contract because "[t]he arbitrators, sitting as a jury, were the sole judges of the weight to be given to [the] testimony." Id. See also supra note 75 and accompanying text.

81. Sapp v. Barenfeld, 34 Cal. 2d 515, 520, 212 P.2d 233, 237 (1949). In a construction dispute, the supreme court reversed a lower court order holding that respondents, having participated in informal hearings by arbitrators without objection to admission of evidence, could not attack the award.

82. Id. (quoting Canuso v. Philadelphia, 326 Pa. 302, 307, 192 A. 133, 136 (1937)).
civil rules of evidence, or the parties may so stipulate. Therefore, successful claims made in civil courts may be denied in arbitration proceedings and vice versa. An award of punitive damages based upon an arbitrator's sense of equity and justice may conflict with judicially established standards and still not be amenable to judicial review.

Arbitration awards are presumed final and binding on matters of fact and law unless otherwise expressly stated by the parties. Nevertheless, any party may petition the court to confirm, correct or vacate an award upon completing arbitration proceedings. An award correction is only made, however, when there is an evident error and the merits are not affected. A court will vacate an arbitral award upon certain grounds statutorily provided for in the Act, and upon a showing of gross inadequacy.

83. R. COULSON, supra note 3, at 19.
84. Case v. Alperson, 181 Cal. App. 2d 759, 761, 5 Cal. Rptr. 635, 636 (1960). The court of appeal confirmed an arbitration award in a contract dispute where parties to the arbitration agreement could expect to "reap the advantages that flow from the use of that nontechnical, summary procedure . . . " and also be bound by an award not subject to judicial review. Id.
87. The Act outlines grounds for correction of award:
Subject to Section 1286.8, the court, unless it vacates the award pursuant to Section 1286.2, shall correct the award and confirm it as corrected if the court determines that:
(a) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award; (b) The arbitrators exceeded their powers but the award may be corrected without affecting the merits of the decision upon the controversy submitted; or (c) The award is imperfect in a matter of form, not affecting the merits of the controversy.
Id. at § 1286.6.
88. The Act provides grounds for vacation of award:
Subject to Section 1286.4, the court shall vacate the award if the court determines that:
(a) The award was procured by corruption, fraud or other undue means;
(b) There was corruption in any of the arbitrators;
(c) The rights of such party were substantially prejudiced by misconduct of a neutral arbitrator;
(d) The arbitrators exceeded their powers and the award cannot be corrected.
quacy or excessiveness. Fraud or corruption of the arbitrators or of the parties in procuring an award is a basis for vacating the award. The following grounds are also sufficient: misconduct or partiality of an arbitrator, arbitrators exceeding powers established in the arbitration or submission agreement, and refusals to postpone hearings or hear material evidence. However, unsound reasoning is not sufficient to vacate an award, nor can an award be set aside for mistake of fact or law unless there is substantial prejudice to a party in the proceeding.

A court may order a rehearing in arbitration if the court vacates an award. Resulting awards or those which are not vacated have the status of a binding written contract between the parties. An award becomes enforceable in court once the parties petition the

without affecting the merits of the decision upon the controversy submitted; or

(e) The rights of such party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefore or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title.

Id. at § 1286.2.

89. See William B. Logan & Assocs. v. Monogram Precision Indus., 184 Cal. App. 2d 12, 16, 7 Cal. Rptr. 212, 215 (1960) (reversing lower court confirmation of an arbitration award which allowed extrinsic evidence to increase the amount in controversy).


91. Id. at § 1286.2(c).


94. Id. at § 1286.2(c).

95. See Los Angeles Local Joint Executive Board of Culinary Workers v. Stan's Drive-Ins Inc., 136 Cal. App. 2d 89, 94, 288 P.2d 286, 290 (1955) (affirming a judgment confirming an arbitration award in a union contract dispute stating that unsound reasoning ("uncertainty") may necessitate modification or correction but not reversal).


97. The Act contains a rehearing process:

If the award is vacated, the court may order a rehearing before new arbitrators.

If the award is vacated on the grounds set forth in subdivision (d) or (e) of Section 1286.2, the court with the consent of the parties to the court proceeding may order a rehearing before the original arbitrators. If the arbitration agreement requires that the award be made within a specified period of time, the rehearing may nevertheless be held and the award made within an equal period of time beginning with the date of the order for rehearing but only if the court determines that the purpose of the time limit agreed upon by the parties to the arbitration agreement will not be frustrated by the application of this provision.

CAL. CIV. PROC. CODE § 1287 (West 1982).

98. "An award that has not been confirmed or vacated has the same force and effect as a contract in writing between the parties to the arbitration." Id. at § 1287.6.
court for confirmation and a final judgment is ordered.\textsuperscript{99} Judgments are then subject to judicial review.

As a general rule, the merits of an arbitration proceeding are not reviewable in a trial court.\textsuperscript{100} A court will review the merits only if a submission agreement provides for an award made according to law\textsuperscript{101} or if a party raises the issue of illegality of the entire transaction.\textsuperscript{102} At this point, the court will also determine if any of the contract rights violate public policy.\textsuperscript{103} If a party is still not satisfied, the Act provides for appellate review.\textsuperscript{104}

The appellate court may only review the propriety of the arbitration proceedings,\textsuperscript{105} not the merits.\textsuperscript{106} It has been stated and restated that "every reasonable intendment must be indulged in favor of [an arbitration] award."\textsuperscript{107} As a result, appellate courts will not review contradictory evidence\textsuperscript{108} or improper testimonial claims.\textsuperscript{109}

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\textsuperscript{99} The Act states:

If an award is confirmed, judgment shall be entered in conformity therewith.
The judgment so entered has the same force and effect as, and is subject to all the provisions of law relating to, a judgment in a civil action; and it may be enforced like any other judgment of the court in which it is entered.

\textit{Id.} at § 1287.4.

\textsuperscript{100} Pacific Vegetable Oil Corp. v. C.S.T., Ltd., 29 Cal. 2d 228, 233, 174 P.2d 441, 448 (1946) (affirming a confirmation order of an arbitral award in a dispute arising from a shipping contract); Loving & Evans v. Blick, 33 Cal. 3d 603, 609, 204 P.2d 23, 26 (1986) (confirmation of arbitral award in contractor licensing dispute).

\textsuperscript{101} Cecil v. Bank of Am., 142 Cal. App. 2d 249, 251, 298 P.2d 24, 25 (1956) (affirming court order to disallow arbitration costs incurred pursuant to the arbitration agreement in a contract dispute).

\textsuperscript{102} Loving, 33 Cal. 2d at 609, 204 P.2d at 26.

\textsuperscript{103} Inter-insurance Exch. v. Bailes, 219 Cal. App. 2d 830, 836, 33 Cal. Rptr. 533, 537 (1963) (affirming judgment confirming arbitral award in favor of an insurer in automobile accident policy coverage dispute).

\textsuperscript{104} The Act provides for appealable orders:

(a) An order dismissing or denying a petition to compel arbitration;
(b) An order dismissing a petition to confirm, correct or vacate an award;
(c) An order vacating an award unless a rehearing in arbitration is ordered;
(d) A judgment entered pursuant to this title;
(e) A special order after final judgment.


\textsuperscript{105} Pacific Vegetable Oil, 29 Cal. 2d at 232-33, 174 P.2d at 448.

\textsuperscript{106} See Goossen v. Adair, 185 Cal. App. 2d 810, 822-23, 8 Cal. Rptr. 855, 863 (1960) (upholding modification and confirmation of an arbitral award which divided a broker's commission between realtors).


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In summary, there are virtually no procedural safeguards guaranteed in common arbitration. There are no formal pleading requirements or pretrial procedures. Trials are not presided over by judge or jury and rules of evidence are not required. Decisions are not necessarily made according to law, and the right of appeal is virtually non-existent in most cases. While California's General Arbitration Act provides some safeguards, such safeguards do not specifically deter unwarranted and/or excessive punitive damage awards as adequately as the procedural requirements in civil and criminal courts.

B. Punitive Damages

Punitive damages are extra, or penalty damages, awarded to a claimant in addition to compensatory damages, where the defendant's conduct has been either fraudulent, malicious or oppressive. The possibility of punitive damages awards to claimants is one of the major reasons eleven states have refused to pass modern arbitration acts. The ensuing discussion contrasts the public policy arguments supporting punitive damages with those used to prohibit punitive damage awards.

1. Public Policy Arguments Supporting Punitive Damage Awards

Punitive damages in civil litigation proceedings are awarded in appropriate circumstances in all but four states. Four general rationales are used to support punitive awards: revenge, deterrence and punishment, compensation, and the "private attorney general" approach.

111. See AAA, supra note 18, at 10. States with modern arbitration statutes include: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, and Pennsylvania. Id. at 147.
112. Comment, supra note 1, at 317-18 (these states are Louisiana, Massachusetts, Nebraska and Washington). See also Belli, supra note 59, at 4.
113. Belli, supra note 59, at 5.
114. Id. See also Comment, supra note 1, at 318. See generally Mallor & Roberts, Punitive Damages: Toward a Principled Approach, 31 HASTINGS L.J. 639, 641 (1980).
116. Mallor & Roberts, supra note 114, at 650. See also Belli, supra note 59, at 6.
The revenge element of punitive damages prevents "private retribution."\(^{117}\) The plaintiff achieves vindication and abstains from self-help by increasing the defendant's burden of damages.\(^{118}\) Although this perspective is often criticized, it has been a justification for punitive damages for over a century.\(^{119}\)

Deterring and punishing socially unacceptable behavior is the most common use for punitive damage awards.\(^{120}\) Such awards express a community's disapproval of socially unacceptable behavior by punishing the specific wrongdoer in an effort to deter him and others.\(^{121}\) The degree of unacceptable behavior, evidenced by the wrongdoer's state of mind, is one consideration in determining whether punitive damages are warranted.\(^{122}\)

An additional factor in discerning which conduct gives rise to punitive damages is whether another remedy already exists which achieves the goal of punitive awards.\(^{123}\) Punitive damages fulfill a compensatory function\(^{124}\) in cases where criminal remedies are rarely pursued.\(^{125}\) In these instances punitive damages function as a substitute and not a duplication of criminal prosecution,\(^{126}\) thus refuting the argument that punitive damages are an imposition of double punishment.\(^{127}\)

Claimants assume the "private attorney general" role in instances where it ordinarily would be too expensive to take action, leaving the deterrence objective unaccomplished.\(^{128}\) The availability of punitive damage awards encourages members of society to take legal action against wrongdoers whose conduct is usually not prosecuted.\(^{129}\) Potential recovery of more than ordinary damage awards is a big incentive to initiate proceedings to punish unacceptable

\(^{117}\) Belli, supra note 59, at 5.

\(^{118}\) P.D. Defendant, supra note 9, at 408 n.1.

\(^{119}\) Id. See Mallor & Roberts, supra note 114, at 650.

\(^{120}\) Belli, supra note 59, at 6. See generally Mallor & Roberts, supra note 114, at 641.

\(^{121}\) Comment, supra note 1, at 318.

\(^{122}\) Mallor & Roberts, supra note 114, at 651.

\(^{123}\) Id.


\(^{125}\) Mallor & Roberts, supra note 114, at 656 (examples of rarely prosecuted criminal violations include libel, slander, trespass, and technical batteries). See Note, The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages, 41 N.Y.U. L. Rev. 1158, 1175-76 (1966) [hereinafter Imposition].

\(^{126}\) Mallor & Roberts, supra note 114, at 656.

\(^{127}\) Id. at 655.

\(^{128}\) Id. at 649-50.

\(^{129}\) Id. See also Belli, supra note 59, at 6.
behavior.¹³⁰

2. Public Policy Arguments Against Punitive Damage Awards

The general consensus among commentators opposing punitive damages is that these awards, outside of criminal proceedings, are offensive to public policy.¹³¹ Critics condemn punitive damage awards in litigation and arbitration because of the penal nature of the remedy.¹³² They claim that punishment should be applied only to criminal violations and prosecuted only in the criminal arena.¹³³ Because double jeopardy principles are normally only applied to criminal law, they would not preclude subsequent civil actions.¹³⁴ Thus, wrongdoers may be subject to both criminal and civil damages.¹³⁵

Punitive damages can be a "windfall" for the civil plaintiff.¹³⁶ In addition, deterrence, the "primary objective of punitive awards," is often considered ineffective and thus eliminates the justification for awarding punitive damages.¹³⁷

A strong argument against punitive damage awards is that civil litigants should not be subject to punitive liability without the same constitutionally mandated procedural safeguards present in criminal proceedings.¹³⁸ The potential magnitude of the awards and their punitive origins are strong arguments for including safeguards, similar to those provided in civil and criminal law, in all arbitrations where punitive damages are claimed.¹³⁹

¹³⁰ See Belli, supra note 59, at 6.
¹³¹ Garrity v. Lyle Stuart, Inc., 40 N.Y.2d 354, 353 N.E.2d 793, 386 N.Y.S.2d 831 (1976). See also Mallor & Roberts, supra note 114, at 644-45. These commentators do not always distinguish between punitive damage awards in arbitration proceedings and those in civil proceedings. This comment assumes that the arguments apply to both dispute resolution systems.
¹³² Comment, supra note 1, at 320.
¹³³ Mallor & Roberts, supra note 114, at 644.
¹³⁴ Imposition, supra note 125, at 1181.
¹³⁵ Id. See also Mallor & Roberts, supra note 114, at 645, 655.
¹³⁶ Comment, supra note 1, at 320. Punitive damages are a "windfall" for the plaintiff because strict compensation is considered the only just remedy and damages assessed for punishment purposes should be paid to the government. Id.
¹³⁷ Id.
¹³⁸ Id. See also Mallor & Roberts, supra note 114, at 644.
¹³⁹ P.D. Defendant, supra note 9, at 428 n.99. Examples of excessive fines leading to the commentator's suggestion that the right to jury trial and increased burdens of proof should always be present where penal judgments are made: $100 actual with $14,900 punitive damages, Bangert v. Hubbard, 127 Ind. App. 579, 126 N.E. 2d 778 (1955), and $1,250 actual with $25,000 punitive damages, Hall Oil Co. v. Barquin, 33 Wyo. 92, 237 P. 255, 276 (1925).
3. California's Punitive Damage Policy

California supports the legitimacy of punitive damage awards in litigation. The California Legislature maintains that punitive damages serve the important functions of deterring and punishing wrongdoers for engaging in socially unacceptable conduct.

California courts do not liberally award punitive damages, such damages are awarded only in “appropriate circumstances.” A California Court of Appeal recently extended the category of “appropriate circumstances,” to include medical malpractice arbitration awards. In Baker v. Sadick, the court concluded that “punitive damages which may be asserted in a court of law may also be asserted under [an] arbitration clause . . . where the issue is submitted by [the weaker party] or . . . with consent of both parties.”

C. Punitive Damages in Arbitration: Baker v. Sadick

The Baker court unanimously upheld an arbitration decision which awarded punitive damages against a doctor in a medical malpractice arbitration. The conflict arose out of an unsuccessful breast reduction surgery performed on Ms. Baker by Dr. Sadick. Plastic surgery was ultimately required to correct the effects of post surgery infection. The award of punitive damages was deemed ap-

140. The California Civil Code provides for “exemplary damages” as follows: “(a) In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.” CAL. CIV. CODE § 3294(a) (West 1970 & Supp. 1987) (enacted in 1872).

141. California has statutorily justified punitive damage awards in litigation for over 100 years. Id. See Comment, supra note 1, at 320. Courts have also readily supported this policy: “the purpose of punitive damages is to penalize [the wrongdoer's conduct] in the future.” Id. Wyatt v. Union Mortgage Co., 24 Cal. 3d 773, 790, 598 P.2d 45, 55, 157 Cal. Rptr. 392, 402 (1979); “[T]he principal purpose of punitive damages is to deter and punish. . . .” Id. Rosener v. Sears, Roebuck & Co., 110 Cal. App. 3d 740, 87 Cal. Rptr. 226 (1979). See Baker, 162 Cal. App. 3d at 629, 208 Cal. Rptr. at 683.

142. Comment, supra note 1, at 321.

143. Comment, supra note 1 at 313, 319, 322. See also Egan v. Mutual of Omaha Ins. Co., 24 Cal. 3d 809, 598 P.2d 452, 157 Cal. Rptr. 482 (1979) (punitive damages awarded to punish insurer for breaching the covenant of good faith and fair dealing when it failed to properly investigate insurance claims); Ferraro v. Pacific Fin. Corp., 8 Cal. App. 3d 339, 87 Cal. Rptr. 226 (1970) (punitive damages were awarded to deter corporate policy of repossessing automobiles despite bona fide claims of ownership by third parties).

144. 162 Cal. App. 3d at 627, 208 Cal. Rptr. at 682.

145. Id.

146. Id. at 631, 208 Cal. Rptr. at 684.

147. Id. at 621, 208 Cal. Rptr. at 678.

148. Id.
appropriate after analyzing four factors: (1) the "specific arbitration language of the arbitration agreement at issue . . . against the backdrop of the overall nature of arbitration agreements;" (2) the "scope of the arbitrator's powers;" (3) public policy arguments favoring arbitration; and (4) policy issues surrounding punitive damage awards.\textsuperscript{149}

In analyzing the first factor, the court of appeals found that to determine whether a dispute is covered by an arbitration agreement, arbitrators will look at the parties' intent in regard to "the usual and ordinary meaning of the contractual language and the circumstances under which the agreement was made."\textsuperscript{150} An analysis of the parties' intent requires determining whether the arbitration clause is broad or narrow.\textsuperscript{151} Broad arbitration clauses generally indicate an expectation, by all parties, that any and all disputes are covered in the arbitration clause and thus empower arbitrators to grant any remedy not expressly excluded.\textsuperscript{152} A narrow arbitration clause is used to strictly limit the scope of arbitration to issues "arising under the contract."\textsuperscript{153}

The Baker decision upholds a strong judicial preference for arbitration over litigation\textsuperscript{154} to resolve commercial disputes. This decision indicates that California courts are reluctant to review arbitrability\textsuperscript{155} determinations of specific agreements especially when the arbitration clause is broad.\textsuperscript{156} This reluctance to review arbitrability issues stems from the court's finding that parties have the "power to control the scope of arbitration by the terms of their agreement."\textsuperscript{157} The option to use a narrow arbitration clause and expressly exclude certain disputes from arbitration while maintaining the right to litigate those exclusions exists for all parties stipulated in the

\begin{itemize}
\item \textsuperscript{149} \textit{Id.} at 623, 208 Cal. Rptr. at 679.
\item \textsuperscript{150} \textit{Id.} at 624, 208 Cal. Rptr. at 679.
\item \textsuperscript{151} AAA, \textit{supra} note 18, at 20, 36-37 (distinguishing between broad and narrow arbitration clauses).
\item \textsuperscript{152} \textit{Id.} at 20. A typical broad arbitration clause is one in which the parties agree to arbitrate any dispute(s) "arising out of or relating to the contract." \textit{Id.}
\item \textsuperscript{153} \textit{Id.} at 21.
\item \textsuperscript{154} 162 Cal. App. 3d at 624, 208 Cal. Rptr. at 680. \textit{See also supra} notes 19-21, 23-25, and accompanying text.
\item \textsuperscript{155} The issue of arbitrability is whether or not a given dispute falls within the agreement to arbitrate. \textit{See Workable Rule, supra} note 22, at 278. Bankruptcy remains as one of the few areas of law where the courts summarily void arbitration agreements. Until recently, securities and anti-trust claims also fell into this category. Hollering, \textit{supra} note 30, at 19, 20, 23.
\item \textsuperscript{156} Baker, 162 Cal. App. 3d at 624, 208 Cal. Rptr. at 680.
\item \textsuperscript{157} \textit{Id.} at 630, 208 Cal. Rptr. at 684.
\end{itemize}
An analysis of the contracting circumstances under which the broad or narrow arbitration clause was drafted necessarily involves the issue of bargaining power between contracting parties. Three sub-issues require attention: (1) whether consent to the arbitration clause was voluntarily given by both contracting parties; (2) whether the terms were presented without an alternative; and (3) whether both parties had knowledge of the term in the case of form agreements. Parties cannot be made to submit issues to arbitration if they did not voluntarily agree in writing.

Since the arbitration agreement in *Baker* involved a standardized contract form, the court had to consider whether there was a notice problem to the "weaker party." The general rule is that any ambiguities in standard form agreements are "resolved against the draftsman." The *Baker* court concluded that when a punitive damage claim is submitted in an arbitration agreement by the weaker party or with consent of both parties, the claim will be upheld by a reviewing court.

The court then focused on the arbitrator and found that the scope of an arbitrator's powers are determined by the arbitration agreement. It was decided that if ambiguities are present in the scope of arbitration, they "are resolved in favor of coverage." Ar-

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158. Davis v. Chevy Chase Fin. Ltd., 667 F.2d 160, 164-65 (D.C. Cir. 1981) (holding that "[a] party who consents to the inclusion in a contract of a limited arbitration clause does not thereby waive his right to a judicial hearing on the merits of a dispute not encompassed within the ambit of the clause." Id.); *Willoughby Roofing*, 598 F. Supp. at 365. (The court held that the contract's arbitration clause was broad enough to empower the arbitration panel to award punitive damages and public policy did not prohibit parties from vesting the arbitration panel with authority to consider punitive damages claims in a dispute arising out of a breach of a roofing contract).


160. See *Baker* for an illustration of how the court addressed these same issues. 162 Cal. App. 3d at 625-27, 208 Cal. Rptr. at 681. See also infra text accompanying notes 161-63.

161. *Davis*, 667 F.2d at 165.

162. 162 Cal. App. 3d at 625-26, 208 Cal. Rptr. at 681. The court described the "weaker party" as the one who did not draft the arbitration agreement.

163. *Id.* at 625, 208 Cal. Rptr. at 681.

164. *Id.* at 627, 208 Cal. Rptr. at 681.

165. *Id.* at 623, 208 Cal. Rptr. at 679.

166. *Id.*
bitration awards will be vacated if the arbitrator exceeds the powers specified in the agreement, but arbitration agreements are construed liberally, and orders to vacate are rare.\textsuperscript{167}

In support of its decision, the appellate court relied on California’s strong public policy favoring quick arbitration settlements with minimal court interference.\textsuperscript{168} The court held that to be an effective substitute for litigation, arbitration remedies must not be more limited than what can be asserted in court.\textsuperscript{169} Thus, the California Court of Appeals chose not to follow other jurisdictions which hold, per se, that an arbitrator does not have the power to award punitive damages because it violates public policy.\textsuperscript{170} The decision in \textit{Baker} illustrates the California court’s refusal to rule \textit{ipso facto} that substituting arbitration for litigation would foreclose the remedy of punitive damages.\textsuperscript{171}

The appellate court concluded that public policy favors “arbitrated settlements of . . . claims, \textit{to the extent authorized by an appropriate arbitration clause}.”\textsuperscript{172} The “appropriate arbitration clause” standard, according to the court, results from balancing the four \textit{Baker} factors previously discussed. Arguably the \textit{Baker} decision creates a test to guide arbitrators in determining whether or not the “appropriate circumstances” exist for imposing penal liability. Implementing this test is the only existing safeguard to prevent arbitrary imposition of unwarranted and/or excessive punitive damages.

\section*{III. Analysis of the Problem}

California’s public policies advocating both arbitration and punitive damages make it plausible that punitive damage liability will be extended from medical malpractice cases to commercial arbitration situations.\textsuperscript{173} The problem with extending \textit{Baker} is that it is highly unlikely that the “appropriate arbitration clause” standard will be an effective safeguard against unjust penal liability.

\textsuperscript{167} Id.
\textsuperscript{168} Id. at 628, 208 Cal. Rptr. at 682.
\textsuperscript{169} Id.
\textsuperscript{170} Garrity, 40 N.Y.2d 354, 353 N.E.2d 793, 386 N.Y.S.2d 831 (1976). The New York court held that allowing arbitrators to award punitive damages would usurp the power of the courts to be the sole determiner of penal liability. Id.
\textsuperscript{171} 162 Cal. App. 3d at 630, 208 Cal. Rptr. at 684.
\textsuperscript{172} Id. (emphasis added).
\textsuperscript{173} Construction, textiles, maritime, real estate transactions, insurance, banking and retail sales are examples of commercial arbitration situations where punitive damage liability may be extended.
A. Inadequate Punitive Damages Standard

The "appropriate arbitration clause" standard is inadequate for three reasons. First, traditional substantive judicial standards for decision making cannot be imposed on the arbitration process without changing its flexible nature. Second, California legislation lacks clear guidelines for making fair punitive damage awards in arbitration. Third, the Baker decision implies that judicial review of punitive damage awards is illusory. The manner in which the aforementioned reasons create an inadequate punitive damages standard resulting in highly ineffective safeguards against unjust liability is explained in the following discussion.

1. Judicial Standards & Arbitration

The assumption that judge-made law will be followed in arbitration proceedings is too presumptuous. The primary guidelines for granting punitive damages in arbitration are discretionary principles of equity and justice. Statutory and common law do not require adherence to legal principles in arbitration. Furthermore, the fact that arbitration proceedings are private and opinions are rarely written, sometimes even discouraged, prevents arbitrators from relying on punitive damage standards used in other state arbitration proceedings, much less the standards used by courts.

2. Cumbersome Legislation

California legislation and judicially created law hinder fair punitive damage determinations. The judiciary's reluctance to interject itself into arbitration proceedings magnifies the lack of and need for discovery in large and/or complex arbitration disputes. The procedural structure of arbitration, as set out in the General Arbitration Act, should aid arbitrators in acquiring information for effective decision making. However, arbitrators cannot enforce discovery orders for disputes other than those involving death or injury by wrongful or negligent conduct. Enforceable discovery procedures are needed

174. See supra text accompanying note 84.
175. See supra text accompanying note 84.
177. Willenken, Discovery in Aid of Arbitration, 6 LITIGATION 16 (1980) (mentioning the Interim Report of the Maritime Law Association's Standing Committee on Arbitration which "noted a trend toward greater recognition of the need for discovery in large or complicated arbitrations." Id.).
to reduce the number of hearings\textsuperscript{179} and the risks attending inadequate development of facts at those hearings.\textsuperscript{180} Enforcement of such procedures will allow adequate development of facts, and therefore fair punitive damage calculations.

3. Judicial Review

An additional area of California law leaves arbitrating parties open to excessive and/or unwarranted penal sanctions without resort to judicial review. California Civil Code section 3294 allows punitive damages only for "the breach of an obligation not arising from contract" (i.e. where there is actual damage or injury).\textsuperscript{181} Section 3294 necessitates a finding of fraudulent, oppressive or malicious conduct.\textsuperscript{182} However, the area of law dealing with breach of contract accompanied by independent torts and/or fraudulent conduct is still unsettled.\textsuperscript{183} Court decisions are inconsistent\textsuperscript{184} and have resulted in increasing the defendant's scope of potential liability by extending the availability of punitive damages in contract cases on the theory that the wrong itself is not just a breach of contract but also a tort.\textsuperscript{185} 

Ironically, discovery requests are not enforceable in arbitrated contractual disputes and California court have been unsympathetic to pleas for exception due to extraordinary circumstances.\textsuperscript{186} It is

\begin{itemize}
\item \textsuperscript{179} Willenken, \textit{supra} note 177, at 18.
\item \textsuperscript{180} Id.
\item \textsuperscript{181} \textsc{Cal. Civ. Code} \textsection{} 3294 (West 1970 & Supp. 1987). See Mallor & Roberts, \textit{supra} note 114, at 660.
\item \textsuperscript{182} \textsc{Cal. Civ. Code} \textsection{} 3294 (West 1970 & Supp. 1987). See Mallor & Roberts, \textit{supra} note 114, at 661.
\item \textsuperscript{184} Inconsistencies are illustrated by the following opinions: In the landmark case of \textit{Seaman's}, the court recognized that a tort remedy is proper in commercial contracts where a party in bad faith denies the existence of a contract. \textit{Seaman's}, 36 Cal. 3d at 769, 686 P.2d at 1167, 206 Cal. Rptr. at 363. \textit{Koehrer} limited the \textit{Seaman's} decision where it noted that "while the court in \textit{Seaman's} stated it was not necessary to base its decision on the implied covenant of good faith and fair dealing [citations omitted], it is difficult otherwise to understand its repeated reference to 'good faith' and 'bad faith' and a number of commentators suggest that the decision must be understood as resting at least on one aspect of the implied covenant of good faith and fair dealing." \textit{Koehrer}, 181 Cal. App. 3d at 1170, 226 Cal. Rptr. at 829. In \textit{Multiplex}, the court held that not every breach of the implied covenant of good faith and fair dealing in a contract gives rise to a tort claim in addition to a contract claim. \textit{Multiplex}, 189 Cal. App. 3d at 925, 235 Cal. Rptr. at 12.
\item \textsuperscript{185} \textit{Seaman's}, 36 Cal. 3d at 769, 686 P.2d at 1167, 206 Cal. Rptr. at 363. See Sullivan, \textit{supra} note 159, at 248.
\item \textsuperscript{186} McRae v. Superior Court, 221 Cal. App. 2d 166, 171, 34 Cal. Rptr. 346, 349
\end{itemize}
reasonable to suggest, therefore, that arbitrators may have difficulty abiding by California Civil Code section 3294 if the courts make inconsistent rulings in the aforementioned area of contract law. Consequently, arbitrating parties could be increasingly exposed to severe punitive liability.

The Baker decision implies that parties who mutually agree to submit the issue of punitive damages to arbitration and subsequently have punitive damages awarded against them will have little if any chance for judicial review. The implication arises through the following reasoning. The Baker court found that broad arbitration clauses which are mutually agreed upon fulfill the "appropriate arbitration clause" standard.187 If the standard is met, the courts are more apt to defer to the Baker court's wisdom and deny review. The policy strictly limiting judicial review of arbitral awards,188 combined with deference to the "appropriate arbitration clause," makes it less likely that parties who mutually agree in broad arbitration clauses to submit the issue of punitive damages will receive judicial review. This result contradicts arbitration's goal of fairness, especially if there is a complex breach of contract dispute, not involving injury or death, where formal discovery procedures are not available.

In summary, serious injustices may occur if punitive damage awards in arbitration are extended without revising California law. Since punitive damage awards are a recent occurrence in California arbitration proceedings, arbitrators are relatively inexperienced at making such awards. The combination of very unsettled areas of contract law providing the basis for punitive damage liability, and an inability to enforce discovery of essential facts creates greater potential for inaccurate arbitration awards. Minimal rights to seek judicial review of these awards increases exposure to potentially excessive and/or unwarranted punitive damages.

B. Impact of Inadequate Punitive Damages Standard

Resolving the problems associated with the recent introduction of punitive damages in California arbitration proceedings requires mention of the impact on this alternative dispute resolution mechanism — and on society in general — if statutory procedural modifi-

(1963). The court refused to order a deposition because it would be incompatible with the established policy of settling arbitrations speedily if courts were permitted to interfere with arbitration.

187. See supra notes 149-72 and accompanying text.
188. See supra notes 56-59, 88-109 and accompanying text.
PUNITIVE DAMAGES

...cations are not made. Unwarranted and/or excessive punitive damage awards undercut the advantages associated with arbitration, such as reduced court loads and speedier resolution of disputes. Citizens may prefer to resort to civil litigation, where procedural safeguards exist, rather than resolving their disputes in an environment where the potential prevalence of unwarranted and/or excessive punitive damages awards is great.\textsuperscript{188}

An even more drastic result is the possibility, due to the private nature of arbitration, that unjust punitive damage awards will be indeterminable by reviewing courts.\textsuperscript{190} The fact that arbitration is more accessible, and usually costs less than litigation, increases the chance that poorer citizens may be forced into a process that is less fair than litigation due to insufficient procedural safeguards which cannot protect against undiscoverable punitive damage awards.\textsuperscript{191} The danger of such injustices could severely undermine arbitration as a viable alternative dispute resolution process. The efforts taken to assure adequate procedural safeguards exist in criminal and civil systems suggest that the legal community should consider the following proposal.

IV. PROPOSAL

Arbitration can remain an effective substitute for litigation. The following proposal is designed to maintain the distinct nature of the arbitration proceeding while making it fairer for parties when punitive damage claims are submitted.\textsuperscript{192} This proposal calls for instituting a two-tiered arbitration process.\textsuperscript{193} The existence of a punitive damages claim in the arbitration submission agreement determines

\textsuperscript{188} R. COULSON, supra note 3, at 13. Litigation emphasizes judicial review. The review process should correct mistakes. This procedure protects parties against excessive and/or unwarranted errors. Arbitrating parties rely on their selection of "impartial" and "wise" arbitrators to protect their interests because judicial review rights are waived. Parties choose arbitration instead of litigation because they prefer an informed award which is intended to be final. If the final result is excessive or unwarranted citizens may decide that the advantages of arbitration do not outweigh the disadvantages. \textit{Id}.

\textsuperscript{190} See MARKS, supra note 26, at 11.

\textsuperscript{191} \textit{Id.} at 9. Adjudication is widely criticized because exorbitant litigation costs tend to deny poorer citizens access to "the court-based, lawyer-dominated" traditional dispute resolution process. The results are often unfair when the more unfortunate society members do gain access because litigation favors wealthier litigants who can afford competent representation. \textit{Id}.

\textsuperscript{192} This proposal is not another attempt to create a "quasi-arbitration" process.

\textsuperscript{193} This two-tiered process is a conceptual scheme to ensure punitive damage submissions are set out for special attention in the arbitration process. There is no actual physical division between two types of arbitration. The special procedural safeguards for punitive damage defendants would be incorporated into existing legislation.
which tier parties will enter. Tier 1 is the "classic arbitration" proceeding for disputes not involving punitive damage claim submissions. Tier 2 is “classic arbitration” plus additional formalities to ensure necessary protections for those disputants submitting punitive damage claims. In this proposal, Tier 2 is identified as “contemporary arbitration.”

“Contemporary arbitration” requires several amendments to California’s General Arbitration Act. Civil Procedure Code sections 1283.1, regarding enforceable discovery procedures; 1281.6, determining the appointment of arbitrators; and 1282, establishing the powers and duties of neutral arbitrators are targeted for amendment as demonstrated below.

A key element of section 1283.1 is Civil Procedure Code section 1283.05, addressing the manner of taking depositions and discovery obtained in arbitration proceedings.194 Section 1283.05(b) gives arbitrators the power to enforce discovery procedures by imposing the same sanctions and penalties as are enforced in civil courts.195 Section 1283.1(a) incorporates all the provisions of section 1283.05 and makes them applicable to all arbitration agreements involving disputes where death or injury occur.196

The proposed amendment to section 1283.1 would empower arbitrators to enforce discovery procedures for disputes where parties submit the issue of punitive damages to arbitration. Proposed statutory language appears as follows within the context of the existing legislation:

§ 1283.1 Incorporation of section 1283.05 in Arbitration Agreements:

(a) All of the provision of Section 1283.05 shall be conclusively deemed to be incorporated into, made a part of, and shall be applicable to, every agreement to arbitrate any dispute, controversy, or issue arising out of or resulting from an injury to, or death of, a person caused by the wrongful act or neglect of another, as well as any dispute where punitive damages are claimed.197

Enforcement of arbitrator discovery orders would enhance ade-

195. Id.
196. Id. at § 1283.1.
197. Id. at § 1283.05 (West 1982 & Supp. 1987). (italics indicate the proposed addition).
quate development of facts.\textsuperscript{198} Facts could be accumulated and evaluated for their bearing on the punitive damages issue. Promoting more precise punitive damage figures would leave less chance for excessive awards. Arbitrating parties would also have increased burdens of proof, reducing the risk of unwarranted punitive damages liability.

Contract disputes involving complex issues would be dealt with fairly, decreasing the desirability of vacation petitions. Where the desire to vacate still exists, discovery would facilitate the dispute resolution process without slowing it down. Since appeals are taken from orders to vacate, when there is no rehearing in arbitration, findings of fact and law are made by the trial court.\textsuperscript{199} If the trial court is presented with the fruits of discovery from the arbitration proceeding, it will be less necessary to order discovery at a later date.

Section 1281.6 of the California Civil Procedure Code also requires amending. Currently this section allows arbitrating parties to designate the number and type of arbitrators in all proceedings.\textsuperscript{200} The provision states that any method stipulated in the arbitration agreement for appointing arbitrators shall be followed.\textsuperscript{201} In the absence of stipulation the court will make the appointment.\textsuperscript{202}

Under the proposed two-tiered system, this provision for appointing arbitrators would remain the same except in punitive damages cases. The addition to section 1281.6 should provide for a mandatory panel of three arbitrators in Tier 2 proceedings. Each side of the dispute shall have the right to appoint one arbitrator. The court, upon notice of the punitive damages claim, shall appoint the third arbitrator from a panel of volunteer members of the legal community. The proposed changes to section 1281.6 would appear in the following form:

\textbf{§ 1281.6. Appointment of Arbitrator}

(a) \textit{In all cases except where punitive damages claims are submitted}, [if] the arbitration agreement provides a method of appointing an arbitrator, such method shall be followed. If the arbitration agreement does not provide a method for appointing an arbitrator, the parties to the agreement who seek arbitration

\textsuperscript{198} See Willenken, \textit{supra} note 179, at 18.
\textsuperscript{199} CAL. CIV. PROC. CODE § 1291 (West 1982 & Supp. 1987). \textit{See also supra} text accompanying notes 97-109.
\textsuperscript{200} CAL. CIV. PROC. CODE § 1281.6 (West 1982 & Supp. 1987).
\textsuperscript{201} \textit{Id.}
\textsuperscript{202} \textit{Id.}
and against whom arbitration is sought may agree on a method of appointing an arbitrator and that method shall be followed. In the absence of an agreed method, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails to act and his successor has not been appointed, the court, on petition of a party to the arbitration agreement, shall appoint the arbitrator.

When a petition is made to the court to appoint a neutral arbitrator, the court shall nominate five persons from a list of persons supplied jointly by the parties to the arbitration or obtained from a governmental agency concerned with arbitration. The parties to the agreement who seek arbitration and against whom arbitration is sought may within five days of receipt of notice of such nominees from the court jointly select the arbitrator whether or not such arbitrator is among the nominees. If such parties fail to select an arbitrator within the five day period, the court shall appoint the arbitrator from the nominees.

(b) Where punitive damage claims are submitted, a mandatory panel of three arbitrators shall be chosen. Each party has the option to appoint one neutral arbitrator to the proceeding. The court shall nominate the third member of the panel from the legal community upon notice of the punitive damages claim. If any party fails to select an arbitrator within five days from submitting notice to the court that a punitive damages claim has been submitted, the court shall appoint the remaining arbitrator(s).²⁰³

Finally, this proposal suggests that section 1282 of the California Civil Procedure Code needs an additional provision for a majority decision on punitive damages claims. Section 1282 now provides that the arbitration proceeding be presided over by a single neutral arbitrator, unless otherwise proved by the arbitration agreement. Amendments to this language are indicated within the context of the statute below:

§ 1282 Exercise of Powers and Duties of Neutral Arbitrator

Unless the arbitration agreement otherwise provides, or unless the parties to the arbitration otherwise provide by an agreement which is not contrary to the arbitration agreement as made or as modified by all of the parties thereto or unless there is a punitive damages claim submission:

(a) The arbitration shall be by a single neutral arbitrator.

²⁰³. *Id.* (italics indicate the proposed addition).
(b) If there is more than one arbitrator, the powers and duties of the arbitrators, other than the powers and duties of a neutral arbitrator, may be exercised by a majority of them if reasonable notice of all proceedings has been given to all arbitrators.

(c) If there is more than one neutral arbitrator:
   (1) The powers and duties of a neutral arbitrator may be exercised by a majority of the neutral arbitrators.
   (2) By unanimous agreement of the neutral arbitrators, such powers and duties may be delegated to one of their number but the power to make or correct the award may not be so delegated.

(d) If there is no neutral arbitrator, the powers and duties of a neutral arbitrator may be exercised by a majority of the arbitrators.

(e) If there is a punitive damages claim in the submission agreement:
   (1) A mandatory panel of three arbitrators shall be assembled according to § 1281.6.
   (2) The powers and duties of a neutral arbitrator shall be exercised by a majority of the arbitrators.
   (3) The punitive damages award shall be made by a majority decision.\textsuperscript{204}

A mandatory panel of three arbitrators and a majority verdict requirement would prevent abuse of discretion by a single arbitrator. Protecting against bias or abuse of discretion is vital in proceedings where an award may exceed the severity of criminal punishment. The court appointed arbitrator will provide an analysis from a purely legal perspective. Arbitrators chosen by the parties will bring their own areas of expertise to the forum. Together, the three arbitrators should provide a reasonable determination of punitive damages with the aid of enforceable discovery. Each arbitrator would act as a check and balance against excessive and/or unwarranted damage calculations by the other.

V. CONCLUSION

California’s public policy favors arbitration as a substitute dispute resolution process to adjudication. The advantages of arbitration outweigh the disadvantages where punitive damages are not claimed. However, the fairness of the arbitration process breaks down where parties submit punitive damage claims. \textit{Baker} permits parties dam-

\textsuperscript{204} \textit{Id.} at § 1282. (italics indicates proposed addition).
age awards in medical malpractice arbitration proceedings. If *Baker* is extended to broader commercial arenas without additional legislative safeguards, such as those proposed in this comment, excessive and/or unwarranted arbitral awards are more likely to result.

Through legislative reform of California's General Arbitration Act, adoption of the proposed two-tiered arbitration concept should result in fairer consequences when punitive damages claims are submitted to arbitration. Punitive damage calculations will be more accurate with enforceable discovery procedures. A mandatory arbitration panel will ensure that the calculations are openly discussed and evaluated by three experts. The award arising from this process is less likely to be arbitrary and/or excessive. Thus, arbitration will remain a viable alternative dispute resolution process for commercial disputes.

*Erin Parks*
# APPENDIX

## PUNITIVE DAMAGES SAFEGUARD COMPARISON*

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<td>Technical evidentiary rules</td>
<td>Arbitrator judges relevancy &amp; materiality; No conformity to technical rules required</td>
<td>Same as Common Arbitration</td>
</tr>
<tr>
<td>Decision according to rules of law</td>
<td>Award according to justice &amp; equity</td>
<td>Same as Common Arbitration</td>
</tr>
<tr>
<td>Right of appeal</td>
<td>Award final</td>
<td>Limited Judicial Review</td>
</tr>
<tr>
<td>Public proceedings</td>
<td>Private proceedings</td>
<td>Same as Common Arbitration</td>
</tr>
</tbody>
</table>
