

810.98 PUNITIVE DAMAGES - ISSUE OF WHETHER TO MAKE AWARD AND
AMOUNT OF AWARD.

NOTE WELL: Use this instruction in conjunction with claims for relief arising on or after January 1, 1996.¹ For claims for relief arising prior to January 1, 1996, use N.C.P.I.-Civil 810.93 or 810.94, as applicable.

ALSO NOTE WELL: Statutory limitations are placed on the amount of punitive damages that may be awarded in all cases (except driving while impaired offenses). N.C. Gen. Stat. § 1D-25(c) specifically directs that the statutory limitations "not be made known to the trier of fact through any means, including voir dire, the introduction into evidence, argument, or instructions to the jury." Thus, it would be error to do so. If the limitations are exceeded by the jury, "the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount." N.C. Gen. Stat. § 1D-25(b) (1996).

The *(state number)* issue reads:

"What amount of punitive damages, if any, does the jury in its discretion award to the plaintiff?"

You are to answer this issue only if you have answered the *(state number issue)* "Yes" in favor of the plaintiff.

Whether to award punitive damages is a matter within the sound discretion of the jury. Punitive damages are not awarded for the purpose of compensating the plaintiff for *his* [injury] [damage], nor are they awarded as a matter of right.

If you decide, in your discretion, to award punitive damages, any amount you award must bear a rational relationship² to the sum reasonably needed to punish the defendant for egregiously wrongful acts committed against the plaintiff[s] and to deter the defendant and others

from committing similar wrongful acts.³ In making this determination, you may consider only that evidence which relates to

[the reprehensibility of the defendant's motives and conduct]⁴

[the likelihood, at the relevant time, of serious harm (to the plaintiff or others similarly situated)]

[the degree of the defendant's awareness of the probable consequences of *his* conduct]

[the duration of the defendant's conduct]

[the actual damages suffered by the plaintiff]

[any concealment by the defendant of the facts or consequences of *his* conduct]

[the existence and frequency of any similar past conduct by the defendant]

[whether the defendant profited by the conduct]

[the defendant's ability to pay punitive damages, as evidenced by *his* revenues or net worth].⁵

Finally, if you determine, in your discretion, to award punitive damages, then you may award to the plaintiff an amount which bears a rational relationship to the sum reasonably needed to punish the defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts. That amount should be written in the space provided on the verdict sheet.

If, on the other hand, you determine, in your discretion, not to award the plaintiff any amount of punitive damages, then you should write the word "None" in the space provided on the verdict sheet.

1. N.C. Gen. Stat. § 1D-1 became effective January 1, 1996, displacing common law punitive damages. It applies to all "claims for relief arising on or after that date." 1995 N.C. Sess. Laws 514, § 5.

2. To meet due process requirements, jury discretion must be exercised "within reasonable constraints." *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 20, 113 L.Ed.2d 1, 46 (1991). The enactment of N.C. Gen. Stat. § 1D does not obviate the need for this constitutionally mandated standard. Pre-enactment cases also embraced this standard. See *Swinton v. Savoy Realty Co.*, 236 N.C. 723, 725, 73 S.E.2d 785, 787 (1953), overruled on other grounds, *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 229 S.E.2d 297 (1976) (stating that "it has been uniformly held with us that punitive damages may be awarded in the sound discretion of the jury *and within reasonable limits*" (emphasis added)) and *Baker v. Winslow*, 184 N.C. 1, 5, 113 S.E. 570, 572 (1922).

3. N.C. Gen. Stat. § 1D-35(1) (1996).

4. NOTE WELL: *In Phillip Morris USA v. Williams*, 549 U.S. 346, 166 L.Ed.2d 940 (2007), the United States Supreme Court observed that "[e]vidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible." *Id.* at 355, 166 L.Ed.2d at 949. The Court also "recognize[d] that conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few. And a jury consequently may take this fact into account in determining reprehensibility." *Id.* at 357, 166 L.Ed.2d at 951.

Notwithstanding, the Court held that "the Constitution's Due Process Clause forbids a [jury] to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation." *Id.* at 353, 166 L.Ed.2d at 948.

The Court concluded by recognizing a practical problem. That is, "[h]ow can we know whether a jury, in taking account of harm caused others under the rubric of reprehensibility, also seeks to punish the defendant for having caused injury to others?" *Id.* at 357, 166 L.Ed.2d at 951 (emphasis in original). Without proffering a specific solution, the Court directed that where the "risk of any such confusion occurring . . . is a significant one—because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury—a court, upon request, must protect against that risk. Although the States have some flexibility to determine what kinds of procedures they will implement, federal constitutional law obligates them to provide some form of protection in appropriate cases." *Id.* (emphasis in original).

The Pattern Jury Instruction Civil Subcommittee, after careful deliberation, has

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interpreted the foregoing to require, "upon request" and "in appropriate cases," that a limiting instruction, such as the following, be given: "Evidence which may tend to show that the defendant's conduct caused harm or created the risk of harm to the general public or to persons who are not a party to this lawsuit, if you find that the evidence does so show, may be considered by you only in your determination of the reprehensibility of the defendant's motives and conduct, and not for any other purpose. You may not award the plaintiff punitive damages in this case to punish the defendant for harm it may have caused to others that are not parties to this lawsuit."

5. N.C. Gen. Stat. § 1D-35(2).