

35.00

PUNITIVE DAMAGES

35.01 Punitive/Exemplary Damages--Willful and Wanton Conduct

In addition to compensatory damages, the law permits you under certain circumstances to award punitive damages. If you find that [(Defendant's name)] conduct was [fraudulent] [intentional] [willful and wanton] and proximately caused [injury] [damage] to the plaintiff, and if you believe that justice and the public good require it, you may award an amount of money which will punish [(Defendant's name)] and discourage [it/him/her] and others from similar conduct.

In arriving at your decision as to the amount of punitive damages, you should consider the following three questions. The first question is the most important to determine the amount of punitive damages:

1. How reprehensible was [(defendant's name)] conduct?

On this subject, you should consider the following:

- a) The facts and circumstances of defendant's conduct;
- b) The [financial] vulnerability of the plaintiff;
- c) The duration of the misconduct;
- d) The frequency of defendant's misconduct;
- e) Whether the harm was physical as opposed to economic;
- f) Whether defendant tried to conceal the misconduct;
- g) [other]

2. What actual and potential harm did defendant's conduct cause to the plaintiff in this case?

3. What amount of money is necessary to punish defendant and discourage defendant and others from future wrongful conduct [in light of defendant's financial condition]?

[In assessing the amount of punitive damages, you may not consider defendant's similar conduct in jurisdictions where such conduct was lawful when it was committed.]

The amount of punitive damages must be reasonable [and in proportion to the actual and potential harm suffered by the plaintiff.]

Notes on Use

This instruction should be given in conjunction with IPI 14.01 when punitive damages could be awarded. The U.S. Supreme Court has provided direction to courts for instructing a jury on punitive damages in cases, culminating with *State Farm v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003).

The phrase “financial vulnerability” comes from *State Farm and BMW of North America v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). By context, it appears that the jury should also be permitted to consider other vulnerabilities if such evidence is in the record.

In identifying factors to consider concerning defendant's reprehensibility, the U.S. Supreme Court did not limit other factors the jury may consider. If appropriate, and if additional factors are present in the evidence, the court may instruct the jury to consider them.

“Financial condition” is bracketed because it is not necessary for a defendant's financial condition to be in evidence for a jury to award punitive damages. *Deal v. Byford*, 127 Ill.2d 192, 204, 130 Ill.Dec. 200, 537 N.E.2d 267 (1989); *Ford v. Herman*, 316 Ill.App.3d 726, 734-735, 249 Ill.Dec. 942, 737 N.E.2d 332 (5th Dist. 2000).

The next to last paragraph should be used only in those cases like *State Farm* where conduct that may give rise to punitive damages in the forum state may be lawful in other states. There must be a basis in the evidence of such extra-jurisdictional conduct and its lawfulness to warrant the inclusion of this bracketed paragraph.

The idea of proportionality of the punitive award to the compensatory award is expressed in *State Farm v. Campbell* and *BMW v. Gore*. The Court did not specify what “in proportion” means. The Court refused to approve a punitive award that was 145 times the compensatory award. *State Farm, supra* at 429. The Court included language favoring a single digit multiplier. (“Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in the range of 500 to 1 ... or, in this case, 145 to 1,” *State Farm, supra* at 425.) See *Mathias v. Accor Economy Lodging*, 347 F.3d 672 (7th Cir. 2003); *Philip Morris USA v. Williams*, 340 Or. 35 (2005), *cert. granted*, 126 S.Ct. 2329 (2006), *judgment vacated*, 127 S.Ct. 1057 (2007). Instructing a jury concerning “proportionality” was not mandated or prohibited by *State Farm* or by Illinois case law. Whether the bracketed language concerning “proportionality” should be included in the instruction should be decided on a case by case basis.

Comment

Where punitive damages may be assessed, they are allowed in the nature of punishment and as a warning and example to deter the defendant and others from committing like offenses in the future. *Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 186, 23 Ill.Dec. 559, 384 N.E.2d 353 (1978); *Loitz v. Remington Arms Co.*, 138 Ill.2d 404, 415-416, 563 N.E.2d 397 (1990); *Mattyasovszky v.*

West Towns Bus Co., 61 Ill.2d 31, 35, 330 N.E.2d 509 (1975).

The Illinois Supreme Court established that a reviewing court would “not disturb an award of punitive damages on grounds that an amount is excessive unless it is apparent that the award is a result of passion, partiality or corruption.” *Deal v. Byford*, 127 Ill.2d 192, 204, 130 Ill.Dec. 200, 537 N.E.2d 267 (1989). There were no clear guidelines in Illinois for determining when a punitive damages award was excessive. *Hazelwood v. Illinois Central Gulf R.R.*, 114 Ill.App.3d 703, 711, 71 Ill.Dec. 320, 450 N.E.2d 1199 (4th Dist. 1983). Relevant circumstances that a reviewing court should consider in determining whether a punitive damage award is excessive are to include the nature and enormity of the wrong, the financial status of the defendant, and the potential liability of the defendant. *Deal v. Byford*, *supra* at 204, citing *Hazelwood v. Ill. Cent. Gulf R.R.*, *supra* at 712-713.

In a series of cases beginning in 1989, the U.S. Supreme Court squarely faced the question of what constituted an excessive punitive damage award. *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994); *BMW of North America v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996); *Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003).

In *BMW v. Gore*, *supra*, the Court declared that constitutional principles embodied in the due process clause of the 14th Amendment required that reviewing courts use three “guideposts” to determine whether a punitive damage award is excessive:

- (1) the degree of reprehensibility;
- (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damage award;
- (3) the difference between the punitive damage award and the civil penalties authorized or imposed in comparable cases.

BMW v. Gore, *supra*; *State Farm v Campbell*, *supra*; *Int'l Union of Operating Eng'rs, Local 150 v. Lowe Excavating Co.*, 327 Ill. App. 3d 711, 765 N.E.2d 21, 262 Ill. Dec. 195 (2002) and cited in *Turner v. Firststar Bank, N.A.*, 363 Ill.App.3d 1150, 1163, 300 Ill.Dec. 927, 845 N.E.2d 816 (5th Dist. 2006). Of these guideposts, “the most important indicium of the reasonableness of a punitive damage award is the degree of reprehensibility of the defendant's conduct.” *BMW v. Gore*, *supra* at 575. “Reprehensibility” is a quality the Supreme Court asks reviewing courts to recognize through careful consideration of the following factors:

- (1) Whether the harm caused was physical as opposed to economic;
- (2) Whether the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others;

- (3) Whether the target of the conduct had financial vulnerability;
- (4) Whether the conduct involved repeated actions or was an isolated incident; and
- (5) Whether the harm was the result of intentional malice, trickery, deceit or mere accident.
International Union of Operating Engineers, Local 150 v. Lowe, supra.

While any punitive damages imposed should reflect the enormity of the tortfeasor's offense, *BMW*, 517 U.S. at 525, the second guidepost--the disparity between the actual or potential harm suffered and the punitive award--reminds the reviewing court that the award should not be "grossly out of proportion to the severity of the offense," *Id.* citing *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). The Court has indicated its reluctance "to identify concrete constitutional limits on the ratio between the harm, or potential harm, to the plaintiff and the punitive damage award," *State Farm*, 538 U.S. at 424, citing *BMW*, 517 U.S. at 582. While refusing a "bright line ratio" above which punitive damages cannot exceed, the Court did suggest that "few awards exceeding single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm*, 538 U.S. at 425.

In translating this concept of proportionality, the Seventh Circuit of the U.S. Court of Appeals in *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 676 (7th Cir. 2003) held not only that "punitive damages should be proportional to the wrongfulness of the defendant's actions," but also that "the punishment should fit the crime." Still, the Seventh Circuit avoided any semblance of rigid measurement by embracing the challenges that extreme examples of bad acts might pose to a jury. In other words, proportionality may be "modified when the probability of detection is very low (a familiar example is the heavy fines for littering) or the crime is potentially lucrative (as in the case of trafficking in illegal drugs)." *Id.*

Before *State Farm v. Campbell*, (2003), the Illinois Supreme Court last addressed the concept of proportionality in a 1989 decision, *Deal v. Byford*, 127 Ill. 2d 192, 204, 130 Ill.Dec. 200, 537 N.E.2d 267 (1989), where it said "There is no requirement that the amount of punitive damages imposed on a defendant bear any particular proportion to the size of the plaintiff's compensatory recovery." No subsequent pronouncement has been made by the Court. Nevertheless, the concept of proportionality as expressed by the U.S. Supreme Court has surfaced, relatively intact, in Illinois appellate decisions, such as *Turner v. Firststar Bank, N.A.*, 363 Ill.App.3d 1150, 300 Ill.Dec. 927, 845 N.E.2d 816 (5th Dist. 2006) (reducing punitive damages to an amount that would be less than the double-digit ratio between punitive and compensatory damages against which the *State Farm* Court cautioned); *Franz v. Calaco Development*, 352 Ill.App.3d 1129, 288 Ill.Dec. 669, 818 N.E.2d 357 (2nd Dist. 2004) ("While the amount to be awarded in punitive damages rests largely within the province of the jury, that "discretion" is not arbitrary or unlimited"); and *Hazelwood v. Illinois Central Gulf Railroad*, 114 Ill.App.3d 703, 713, 71 Ill.Dec. 320, 450 N.E.2d 1199 (4th Dist. 1983) ("recognizing that punitive damages are in the nature of a criminal sanction, we are simply saying that the punishment should fit the crime. An award which is disproportionate to the wrong serves none of the purposes of punitive damages and is excessive.").

The Illinois Supreme Court recently reduced a punitive damages award to a ratio of 11:1 from an Appellate Court remittitur of 75:1 in *International Union of Operating Engineers, Local 150 v. Lowe*, *supra*. The Court discussed the idea of proportionality and the *Mathias v. Accor Economy Lodging, Inc.*, *supra*, decision.

Cognizant of the fact that its admonishments were directed to reviewing courts, the U.S. Supreme Court has also indicated that vague instructions that merely inform the jury to avoid “passion or prejudice” do little to aid the decision maker in its task of assigning appropriate weight to evidence that is tangential or only inflammatory. *State Farm v. Campbell*, *supra* at 418. The Committee, in revising the jury instructions addressing punitive damages, sought to honor the three constitutional “guideposts” established by U.S. Supreme Court while simultaneously emphasizing that the ultimate determination as to the size of the penalty imposed must be dictated by the circumstances of each particular case. *Deal v. Byford*, 127 Ill.2d 192, 205, 130 Ill.Dec. 200, 537 N.E.2d 267 (1989). “Even though the assessment of punitive damages is not a purely factual finding, it is a 'fact sensitive' undertaking.” *Franz*, 352 Ill.App.3d at 1143, citing *Cooper Industries, Inc.*, 532 U.S. at 437. Room is to be left for relatively high punitive damage awards in situations where particularly loathsome acts resulted in but small amounts of measurable economic damages. *Turner*, 363 Ill.App.3d 1150, 1164, citing *State Farm*, 538 U.S. at 425.

The Committee formulated an instruction that incorporated the distinguishing factors of reprehensibility. Precisely which factor must be included in an instruction submitted to a jury is case specific and to be carefully weighed. For instance, the *State Farm* opinion suggests that the jury consider whether the harm was physical rather than economic, yet, experience allows that under certain circumstances an economic loss willfully created can be equally as devastating to a plaintiff. Regardless, in any punitive assessment, the degree of reprehensibility of the defendant's conduct must be the pivotal consideration.

The Committee is also of the opinion that current definitions of the term “willful and wanton” (14.01) and “proximate cause” (15.01) are plainly stated, well settled under current Illinois law and not inconsistent with the U.S. Supreme Court decisions. The instructions were designed to provide guidance to a jury that must determine whether punitive damages should be awarded at all; and if so, how to go about the process of evaluating the defendant's misconduct in light of their own experience and the facts of the case.

The Committee also considered the following cases: *Home Savings & Loan Ass'n v. Schneider*, 108 Ill.2d 277, 91 Ill.Dec. 590, 483 N.E.2d 1225 (1985); *Proctor v. Davis*, 291 Ill.App.3d 265 (1st Dist. 1997); *Heldenbrand v. Roadmaster Corp.*, 277 Ill.App.3d 664 (5th Dist. 1996).

35.02 Punitive/Exemplary Damages--Willful and Wanton Conduct--Corporate Defendant's Liability

[(Defendant's name)] is a corporation and can act only through its officers and employees. As to plaintiff's claim for compensatory damages against [(Defendant's name)], any act or omission of an officer or employee within the scope of his employment is the act or omission of the defendant corporation.

As to plaintiff's claim for punitive damages against [(Defendant's name)], a different rule applies. Punitive damages may be awarded against [(Defendant's name)] only (1) if you find in favor of plaintiff(s) and against [(Defendant's name)] under Count ___ of the complaint, and (2) if you find that, as to the act(s) or omission(s) giving rise to liability under Count ___, [[State condition (a), (b), (c) or (d)].] [one or (more) (both) of the following conditions (is) (are) proved:]

[(a)] [The corporation, through its management, authorized the doing and the manner of the act or omission] [; or]

[(b)] [The employee responsible for the act or omission was unfit, and the corporation was reckless in employing him] [; or]

[(c)] [The act or omission was that of a managerial employee who was acting in the scope of his employment] [; or]

[(d)] [The corporation, through its management or a managerial employee, ratified or approved the act or omission].

Instruction, Notes and Comment approved January 2007.

Notes on Use

This instruction should be given with IPI 35.01 in any case in which a submissible case for punitive damages has been made and such damages are sought against a corporate defendant.

Use the appropriate subparagraphs (a)-(d), depending on the facts of the case.

Additional agency instructions may be used as appropriate. *See* Chapter 50.

Comment

This instruction is based on the requirements of *Restatement (Second) of Torts*, Section 909 and the *Restatement (Second) of Agency*, Section 217C. Those sections have been cited in *Mattyasovszky v. West Towns Bus Co.*, 61 Ill.2d 31 (1975); *Deal v. Byford*, 127 Ill.2d 192, 130 Ill.Dec. 200, 537 N.E.2d 267 (1989); *Kennan v. Checker Taxi Co.*, 250 Ill.App.3d 155 (1st Dist. 1993); *Kemner v. Monsanto Co.*, 217 Ill.App.3d 188, 207, 160 Ill.Dec. 192, 576 N.E.2d 1146 (5th Dist. 1991); *Bryant v. Livigni*, 250 Ill.App.3d 303, 311, 188 Ill.Dec. 925, 619 N.E.2d 550

(5th Dist. 1993); *Abshire v. Stoller*, 235 Ill.App.3d 849, 857-859, 176 Ill.Dec. 559, 601 N.E.2d 1257 (1st Dist. 1992).

This instruction embodies the “corporate complicity” concept which is necessary for an award of punitive damages against a corporation. Mere proof of scope and course conduct of an agent is insufficient to impose punitive damages against a corporation. *Kemner v. Monsanto Co.*, *supra* at 208, discussed the error of giving a simple agency instruction (*IP*I 50.11) when corporate liability for punitive damages is at issue. *See also Kochan v. Owens-Corning Fiberglass Corp.*, 242 Ill.App.3d 781, 797-798, 182 Ill.Dec. 814, 610 N.E.2d 683 (5th Dist. 1993).