

DRAFT
FOR DISCUSSION ONLY

MODEL PUNITIVE DAMAGES ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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MODEL PUNITIVE DAMAGES ACT

With Comments

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1 **MODEL PUNITIVE DAMAGES ACT**

2 **SECTION 1. DEFINITIONS.** In this [Act]:

3 (1) "Compensatory damages" means an award of money, including a nominal amount, to
4 compensate for a legally recognized injury, but does not include an award solely to punish, deter,
5 or make an example of an actor.

6 (2) "Person" means an individual, corporation, limited liability company, business trust,
7 estate, trust, partnership, association, joint venture, government, governmental subdivision,
8 agency, or instrumentality, or any other legal or commercial entity.

9 (3) "Punitive damages" means an award of money solely to punish, deter, or make an
10 example of an actor.

11 **Reporter's Notes/Comments**

12
13 The definitions in this section are the same substantively as in the original draft dated
14 December 2, 1994. The Conference Style Committee suggested some stylistic changes which I
15 adopted in this section as well as throughout the Act. However, there was no intention to change
16 the substance of the definitions that remained.

17
18 At our Atlanta meeting, I indicated to you that I would redraft what is now Section 5,
19 which details the standards of culpability for punitive damage awards, and in the process of
20 doing that I would incorporate the substance of the definitions for "intent" and "wanton" in
21 Section 5. Thus, I removed those definitions from this section, as they are no longer needed. The
22 substance of the definitions are now contained in Section 5 [Alternative A].

23
24 You also instructed me to draft an alternative Section 5, utilizing the language from HR
25 10, the bill introduced in the 104th Congress to reform product liability law. That version is set
26 out as Section 5 [Alternative B]. I will have more to say about the differences between
27 [Alternative A] and [Alternative B] when I get to that section.

28
29 **SECTION 2. CIVIL CLAIMS FOR PUNITIVE DAMAGES.**

30 (a) Except as otherwise provided in subsection (b), this [Act] governs any claim for
31 punitive damages that may be awarded in a civil action under the law of this State.

32 (b) This [Act] does not apply to a claim for punitive damages that may be awarded under

1 [insert cross-references to statutes or other laws].

2 [(b) This [Act] does not apply to an action governed by another statute establishing or
3 limiting the amount of punitive damages, or prescribing procedures for the award of those
4 damages.]

5 **Reporter's Notes/Comments**

6
7 I redrafted subsection (a) to make it clear that this Act does not authorize awards of
8 punitive damages in any state that enacts it, but merely prescribes some requirements for
9 assessing, reviewing, and otherwise fine-tuning the law already in existence under which
10 punitive awards may be made. For example, one would have to look to the state law to determine
11 if a punitive award might be available in a breach of contract situation as compared to tort. This
12 Act is not intended to drastically change the basic law of any enacting state which authorizes
13 punitive damages, except as may be determined in Chicago or at subsequent meetings. As you
14 aware, Joe Willis has sent out a memo in accordance with King Hill's instructions suggesting
15 some areas where we might consider making substantive changes. We are to take that up in
16 Chicago at our next meeting, as I understand it.

17
18 Subsection (a) is all that existed in the December 2, 1994 draft. A concern was raised at
19 our Atlanta meeting that we did not want to preempt all procedures, limits, or other refinements
20 in the law of punitive damages that might otherwise exist in a state. Therefore, I was instructed
21 to draft something like what now appears in subsection (b). I have given you two versions. At
22 lines 5-7, the first version would require that specific cross-references to other statutes or laws be
23 inserted. This would make it clear just what other law we did not want to preempt or affect.
24 The second version (found at lines 8-10) is more indefinite. There are no specific cross-
25 references and there may be some question as to what other laws are to be left alone. I copied
26 this provision, I think, from the Iowa statutes. It is not one that I recommend because I think it is
27 poor legislative drafting not to identify the specific laws that one has in mind, if that is possible.
28 This type of drafting is problematic and I would hope that you would concur that the first version
29 at lines 5-7 is the preferable route to follow.

30
31 **SECTION 3. PLEADING AMOUNT FOR PUNITIVE DAMAGES.** A pleading may
32 not contain a monetary figure for the amount of any punitive damages sought.

33 **Reporter's Notes/Comments**

34
35 The December 2, 1994 draft contained the language from the Federal Rules of Civil
36 Procedure regarding notice pleading. I was instructed to remove that language from Section 3
37 and I did. What you now have is a simple statement regarding the ad damnum clause. As I
38 originally pointed out, many states now prohibit the use of monetary figures in pleadings,
39 particularly with regard to claims for punitive damages, but also sometimes with regard to
40 compensatory damages. In any event, there is no substantive change in the section other than the

1 deletion of the language about the petition containing a "short and plain statement showing that
2 the claimant is entitled to an award of punitive damages."
3

4 **SECTION 4. DISCOVERY.**

5 (a) A mere allegation of a claim for punitive damages does not authorize discovery of the
6 wealth, financial condition, or ability to respond in damages on behalf of the party from whom
7 punitive damages are sought. A claimant for punitive damages must first obtain approval for
8 such discovery from the court in which the claim is pending by showing prima facie that a party
9 may be liable for punitive damages under Section 5. The showing may be made by affidavit,
10 deposition, or testimony. If the court permits discovery, it may enter orders to protect the
11 confidentiality of the information or avoid undue prejudice to the party from whom the damages
12 are sought.

13 (b) This section does not preclude discovery pertaining to the liability of a party.

14 **Reporter's Notes/Comments**

15
16 The December 2, 1994 draft did not contain a specific section dealing with problems of
17 discovery. Thus, this section is new. It attempts to balance the rights of claimants and defendants
18 by requiring that there be some showing that there is a colorable claim that might succeed for
19 punitive damages before a claimant is permitted to delve into such matters as wealth, financial
20 condition, etc. On the other hand, it does not prevent a claimant from engaging in discovery if
21 that type of evidence is relevant to liability as compared to the amount of any award. A claimant
22 may engage in discovery regarding wealth, financial condition, and the like without first
23 obtaining approval from the court if that evidence bears on whether or not the defendant may be
24 liable. However, if such evidence only is relevant with regard to the amount of any punitive
25 award, prior approval for such discovery must be obtained from the court.
26 All that is required is a prima facie showing and this may be done in a variety of ways, as
27 suggested in the statute. These are not the exclusive ways.
28

29 The court probably already has the power to enter protective orders and the like, but the
30 statute makes it clear.
31

32 **[Alternative A]**

33 **SECTION 5. LIABILITY FOR PUNITIVE DAMAGES.**

34 (a) To award punitive damages, the trier of fact must find by clear and convincing

evidence that the defendant:

(1) caused serious harm to a claimant and:

(i) wanted to cause the harm;

(ii) knew that the harm would or was substantially certain to result; [or]

(iii) knew that there was a high probability that the harm would result; [or]

[(iv) had reason to know of facts that would lead a reasonable person to realize that the conduct created a high probability that the harm would result;] and

(2) acted for malicious, evil, dishonest, or other despicable reasons.

(b) In deciding whether to award punitive damages, the trier of fact shall consider whether it is necessary to:

(1) discourage similar behavior by the defendant or others in like situations;

(2) deprive the defendant of any unjustified pecuniary gain derived from the conduct in question; or

(3) impose an appropriate punishment on the defendant.

[Alternative B]

SECTION 5. LIABILITY FOR PUNITIVE DAMAGES.

(a) To award punitive damages, the trier of fact must find by clear and convincing evidence that the defendant:

(1) specifically intended to cause serious personal injury, or

(2) acted with a flagrant indifference to the rights of the claimant and an awareness that the conduct is highly likely to result in serious personal injury.

(b) In deciding whether to award punitive damages, the trier of fact shall consider whether it is necessary to:

- 1 (1) deter similar behavior by the defendant or others in like situations;
- 2 (2) deprive the defendant of any unjustified pecuniary gain derived from the
- 3 conduct in question; or
- 4 (3) impose an appropriate punishment on the defendant.

5 **Reporter's Notes/Comments**

6

7 As indicated in the notes to Section 1, I incorporated the substance of the definitions

8 regarding "intent" and "wanton" in Alternative A. Alternative A essentially tracks the

9 Restatement of Torts, Second. There was some discussion about the operative terms. For

10 example, the term "desired" was used in what is now line 5 and the term "realized" in lines 6 and

11 8. I changed those terms to "wanted" and "knew," respectively. There are other terms that might

12 do just as well or possibly even better, but I think these terms most closely capture the substance

13 of the Restatement and that is what I was attempting to do in Alternative A. These terms may be

14 contrasted with those used in Alternative B, which I will talk about in a moment.

15

16 I was instructed to add something from the Restatement that I purposely omitted in the

17 December 2, 1994 draft and to put it in brackets. You will find that language in lines 10-12 of

18 Alternative A.

19

20 Paragraphs (i) and (ii) of Alternative A track the definition of "intent" in the Restatement

21 of Torts, Second. Paragraphs (iii) and (iv) track the definition of "reckless" conduct in the

22 Restatement. In the December 2, 1994 draft I only included the substance that is now contained

23 in paragraphs (i), (ii), and (iii). The American College of Trial Lawyers Report noted that the

24 material in lines 10-12 sounds more like a negligence test and, in fact, holds someone liable for

25 inadvertent or ignorant conduct. The Report concluded that punitive damages should only be

26 permitted where the actor intends to cause the harm or is consciously indifferent to a very high

27 risk of harm that his conduct creates for a potential victim. In any event, you now have the full-

28 blown Restatement standards of culpability before you in the statute. The Restatement, and

29 naturally enough a number of jurisdictions, presently permit an award of punitive damages for

30 the type of conduct in paragraph (iv). You have to decide whether that is to be included or

31 omitted, assuming you adopt Alternative A, and that is why it is in brackets.

32

33 Alternative A also adopts some of the terms that we were discussing with regard to

34 motive or an additional requirement for an award of punitive damages. At lines 13-14 of

35 Alternative A, I substituted the terms "evil, dishonest, or other despicable reasons" for the term

36 "outrageous" that appeared in the December 2, 1994 draft.

37

38 I also deleted the statement in the December 2, 1994 draft that a punitive award may not

39 be based on mere negligence or extreme carelessness; as I also did with the language

40 emphasizing that even if there is sufficient evidence from which the trier of fact could make the

41 findings in subsection (a) that it still remained within the discretion of the trier of fact whether to

42 actually find that a punitive award is to be made. In lieu of these provisions, I drafted a new

1 subsection (b), as seen above. This provision attempts to emphasize what the jury must consider
2 in deciding the issue of liability in addition to any findings under subsection (a). Basically, it is a
3 more explicit requirement upon which the court should instruct the jury. It was thought in
4 Atlanta that this was a better approach than undertaken in the original draft.

5
6 At this point, let me say that subsection (b) is the same in Alternative A and Alternative
7 B. The difference in Alternative A and Alternative B comes about in subsection (a). Now let me
8 turn to those differences.

9
10 As I said earlier, Alternative A is an attempt to track the Restatement of Torts, Second.
11 Alternative B utilizes the language from HR 10. Some of the differences are obvious. One
12 difference is that Alternative A speaks of "harm" whereas Alternative B speaks of "personal
13 injury." The Committee needs to decide whether a punitive award may be made, for example, in
14 a case involving only property damage or pure economic loss. I am not sure that the words
15 "personal injury" actually make that distinction, but it is the language from HR 10 and it is not
16 defined in that bill. Nonetheless, Alternative A is probably broader and sweeps in more cases for
17 which an award of punitive damages may be available as compared to Alternative B. The reason
18 I chose the word "harm" in the December 2, 1994 draft and carried that forward in the current
19 draft is because I did not want to change the law anymore than we really thought necessary that
20 now exists in any particular state. In other words, I think Alternative A would let juries award
21 punitive damages as they presently are authorized under existing state law, whereas the language
22 in Alternative B may well be interpreted to curtail those awards in some states. This is an issue
23 we need to address and decide in Chicago.

24
25 The other obvious difference between Alternative A and Alternative B is in the use of
26 different terms defining the standard of culpability. I have already discussed the language from
27 the Restatement in Alternative A. Alternative B speaks of "specifically intended" and "flagrant
28 indifference" and "an awareness." I prefer the language of the Restatement because it is probably
29 a better summary of the law in most jurisdictions. The only issue with regard to the Restatement,
30 as far as I am concerned, is whether we pick up the language in brackets, which incorporates the
31 second prong of the definition of "reckless" conduct in restatement. In deciding this issue, you
32 may want to consider the case the of *Beauchamp v. Dow Chemical Company*, 398 N.W.2d 882
33 (Mich. 1986) in which the meaning of "intent" is explored. I have included an excerpt of the case
34 as an attachment to these materials.

35
36 Finally, another major difference between Alternative A and Alternative B consists of the
37 fact that Alternative B does not go on to require that there be a malicious, evil, dishonest, or
38 other despicable reason for the conduct. In one way, the language from HR 10 may narrow the
39 cases in which a punitive award may be made, depending upon how you interpret the terms
40 discussed above, but in another way it may well broaden the number of cases because there is no
41 additional requirement of evil motive. Many jurisdictions today, and in increasing numbers, have
42 said that the mere commission of the tort is not sufficient to support an award of punitive
43 damages. There must be more, i.e., a bad motive. It is inherent in some types of torts that the
44 evidence showing mere commission also shows bad motive, but this is not true of all torts for
45 which an award of punitive damages may be available.

1 **SECTION 6. AMOUNT OF PUNITIVE DAMAGES.**

2 [(a)] If the trier of fact finds a defendant liable for punitive damages, it may award a fair
3 and reasonable amount in accordance with the purposes stated in Section 5(b). In deciding what
4 is fair and reasonable, the trier of fact must be instructed to consider the following factors as to
5 which relevant evidence has been admitted:

- 6 (1) the nature of defendant's conduct;
- 7 (2) the impact of defendant's conduct on others;
- 8 (3) the relationship between the claimant and defendant;
- 9 (4) the defendant's present and future financial condition;
- 10 (5) the amount of compensatory damages awarded;
- 11 (6) attorney's fees and the costs to the claimant of prosecuting the punitive
12 damage claim;
- 13 (7) any pecuniary gain the defendant derived from the conduct in question;
- 14 (8) any fines, penalties, or restitution paid by the defendant arising from the
15 conduct in question;
- 16 (9) any mitigating circumstances;
- 17 (10) the impact of the award on innocent persons; and
- 18 (11) any other factor relevant to the amount of the award.

19 [(b) Notwithstanding this section, an award of punitive damages authorized by another
20 statute of this state is subject to any limitation of amount or method of calculation established by
21 that statute.]

22 **Reporter's Notes/Comments**

23
24 Subsection (a) is substantially the same as in the December 2, 1994 draft with one
25 exception. The original draft required the trier of fact to find by clear and convincing evidence

1 the amount of any punitive award. The current draft omits this heightened burden of proof, in
2 accordance with the discussions at the Atlanta meeting. The remainder of subsection (a) is a
3 refinement, with a few additional factors added, of what you had before you in Atlanta.

4
5 Subsection (b) is some language suggested by Harvey Perlman. You will recall that in
6 Section 2 there was an attempt to cross-reference to other laws that may contain procedures,
7 methods of calculation, etc. that we did not want to preempt by virtue of our Act. I think what
8 Harvey is suggesting here is that any cross-reference might more appropriately be made at this
9 point in Section 6, and he may well be right. However, I thought that the Committee should
10 consider the ramifications of including it in Section 2 vis-a-vis Section 6 and that it would be
11 simple enough for us to decide where we wanted to handle the matter in Chicago. If we leave it
12 in Section 2, it might pick up matters other than those pertaining to the calculation of the amount,
13 whereas if we put it in Section 6 it will be limited to the amount of any award. That is just
14 something for you to consider.

15
16 **SECTION 7. LIABILITY OF EMPLOYER OR PRINCIPAL.** If an employee or
17 agent is liable for punitive damages under Section 5, the employer or principal may also be
18 subject to liability for punitive damages if [the trier of fact finds by clear and convincing
19 evidence that] the employee or agent was acting in the course and scope of the employment or
20 agency at the time of the wrongful conduct and the employer or principal authorized, participated
21 in, consented to, acquiesced in, or ratified the action of the employee or agent with knowledge of
22 its wrongful character; otherwise, an employer or principal is only liable for punitive damages if
23 the trier of fact finds the employer's or principal's conduct meets the requirements of Section 5.

24 **Reporter's Notes/Comments**

25
26 The December 2, 1994 draft regarding liability of an employer or principal contained two
27 subdivisions. The first subdivision subjected the employer or principal to liability for punitive
28 damages if the employee or agent was found liable under Section 5 and the employer/principal
29 was implicated by authorizing, participating in, consenting to, acquiescing in, or ratifying the act
30 of the employee/agent, knowing of the wrongful character of the employee's/agent's conduct.
31 The second provision attempted to deal with a situation where the employer was reckless in
32 hiring. It was there that I used the full-blown definition under the Restatement of Torts, Second
33 for "reckless" conduct, thus broadening the exposure of an employer or principal beyond that in
34 what is now Section 5. On second thought, this may not be warranted and I eliminated the
35 second provision in the current draft. I also attempted to make it clear that an employer or
36 principal could be liable in his or her own right for engaging in conduct described in Section 5.
37 The one other change I made in this section pertains to the "course and scope of employment"
38 problem that was raised in Atlanta. You will notice that in the current draft it makes it clear that

1 the employee or agent has to be acting in the course and scope of the employment or agency
2 before the employer or principal may be held liable. I thought this was implicit in the December
3 2, 1994 draft, but, in any event, I made it explicit here.

4
5 Finally, it also occurred to me that there may be an issue worth discussing with regard to
6 the burden of proof under this section. Thus, you now have in lines 4-5 the bracketed language
7 "the trier of fact finds by clear and convincing evidence that." You need to decide whether it
8 should be retained or eliminated. Do you want a heightened burden of proof regarding the
9 liability of an employer or principal, to make it consistent with what we require under Section 5
10 if we were looking at the employer or principal acting in his or her own right?

11 12 **SECTION 8. TRIAL COURT REVIEW.**

13 (a) If the trier of fact awards punitive damages, the party against whom the award is made
14 may move the trial court under [the rules of civil procedure] to review the amount of the award
15 for the purpose of entering a judgment notwithstanding the verdict or requiring either a new trial
16 or remittitur. Upon hearing the motion, the trial court shall review the award to determine
17 whether the evidence supports the finding of liability under Section 5 and the amount of the
18 award under Section 6. If the court determines that the finding of liability under Section 5 is not
19 supported by clear and convincing evidence, it shall enter judgment for the movant. If the court
20 determines that the amount is not supported by the evidence in light of the factors the trier of fact
21 was instructed to consider under Section 6, the court shall grant a new trial unless the claimant
22 agrees to a reduction of the award as calculated by the court.

23 (b) If the court determines the amount of a punitive award is not supported by the
24 evidence, the court shall enter its findings and the basis for its decision in the record, including
25 the method employed to calculate the reduced award.

26 (c) An order granting a new trial is appealable at the time it is entered.

27 **Reporter's Notes/Comments**

28
29 This is a new section designed to require the trial court to conduct a meaningful review of
30 any award for punitive damages. A number of jurisdictions already have such procedures either
31 explicitly for punitive damage awards or as a general proposition in the rules of procedure.

1 However, the rule in most jurisdictions is that a order granting a new trial by the trial court is not
2 immediately appealable. This section makes such an order appealable.

3
4 **SECTION 9. MULTIPLE AWARDS FOR SAME ACT OR COURSE OF**
5 **CONDUCT.**

6 (a) If more than one judgment containing an award of punitive damages is entered against
7 a defendant for the same act or course of conduct, the defendant may petition a court of
8 competent jurisdiction in this State for a hearing to determine how much, if any, of the amount of
9 punitive damages previously paid by the defendant as a result of the same act or course of
10 conduct should be credited against any other judgment for punitive damages sought to be
11 enforced against the defendant in this State.

12 (b) In determining whether any credit should be allowed in a hearing under this section,
13 the court shall consider the purposes for which the punitive damages were awarded and any other
14 evidence offered by the petitioner regarding how the amounts of damages were calculated in the
15 cases in which the awards were made.

16 (c) Before or during a hearing under this section, the court may stay execution on the
17 judgment and enter other orders to avoid prejudice or unnecessary costs or delays while the
18 hearing is pending.

19 **Reporter's Notes/Comments**

20
21 In the December 2, 1994 draft, the material contained in the above section was included
22 as part of Section 7, which dealt with limits on punitive awards. I was instructed at the Atlanta
23 meeting to remove any monetary limit in the way of a cap or formula from the draft and I did so.
24 What remained in the original section dealt with multiple awards for the same act or course of
25 conduct. I have moved that material to what is now subsection (a) of Section 9, as set out above.
26 Subsections (b) and (c) are new, but do not work any real substantive change from what was
27 contemplated in the original draft. They just make clear what was already implicit.

28
29 **[Alternate A]**

30 **SECTION 10. TRUST FUND FOR PUNITIVE AWARD.**

1 (a) Before entry of judgment, a defendant against whom an award of punitive damages
2 has been made may petition the court to order that all or part of the award be paid into court and
3 held in trust for the purpose of compensating claimants for losses the amounts of which are
4 established by settlement or judgment in other cases arising out of the same act or course of
5 conduct that gave rise to the punitive award in the pending case. The court may enter such an
6 order only upon a showing that it is likely that the assets or other financial resources of the
7 petitioner are inadequate to satisfy all the claims for compensatory damages that may arise from
8 the same act or course of conduct that gave rise to the punitive award in the pending case.

9 (b) If a court establishes a trust fund under subsection (a), it may make other orders
10 necessary to administer the fund, including appointing a trustee to invest the fund and administer
11 claims against the fund. The court may order that all or part of the expenses of administering the
12 fund be paid from the fund, from the claimants, or in any other manner the court determines to be
13 fair and reasonable.

14 (c) Upon a court's own motion or motion of trustee or person to whom the punitive
15 damages were originally awarded, the court may order that the trust be terminated upon a
16 showing that the purpose of establishing it has been satisfied. Upon termination, any remaining
17 funds must be paid to the original awardee.

18 [Alternative B]

19 **SECTION 10. TRUST FUND FOR PUNITIVE AWARD.**

20 (a) Before entry of judgment, a defendant against whom an award of punitive damages
21 has been made by the trier of fact may petition the court to establish a trust into which the award
22 may be paid. The court may order the establishment of a trust if the court finds a strong
23 probability that the defendant has been or is likely to be held liable to claimants other than the

1 plaintiff for:

2 (1) compensatory damages arising out of the same act or course of conduct that
3 gave rise to the punitive damage award in the pending case and the assets or other financial
4 resources of the petitioner will be inadequate to satisfy these claims; or

5 (2) punitive damages arising out of the same act or course of conduct that gave
6 rise to the punitive damage award in the pending case.

7 (b) If the court enters an order establishing a trust under subsection (a), the defendant
8 shall pay the award of punitive damages into the trust. Within 60 days of receiving the proceeds
9 of the award, the trustee shall pay to the plaintiff the greater of:

10 (1) 25 percent of the award and an amount equal to the plaintiff's attorney's fees
11 and costs of bringing the action; or

12 (2) 50 percent of the award.

13 (c) If the court orders a defendant to make a payment pursuant to subsection (a)(1) of this
14 section, the court may direct that all or part of the remaining proceeds of the trust be held for
15 payment of claimants sustaining compensatory losses the amount of which has been established
16 by settlement or judgment. If there are multiple claimants, the trustee may pay each claimant on
17 a pro rata basis.

18 (d) If the court orders a defendant to make a payment pursuant to subsection (a)(2) of this
19 section, the court may direct that all or part of the remaining proceeds of the trust be held for
20 payment of eligible claimants obtaining an award of punitive damages against the defendant by
21 settlement or judgment. A claimant is not eligible for payment from the fund under this
22 subsection unless:

23 (1) a court approves a settlement containing a provision for punitive damages and

1 the settlement expressly provides that payment may be satisfied from the fund, or
2 (2) an award of punitive damages results pursuant to a procedure that permitted
3 the defendant to disclose the availability of the fund to the trier of fact and the trier of fact finds,
4 in answer to a special interrogatory, that the award should be satisfied from the fund.

5 (e) If a court establishes a trust fund under this section, it may make orders necessary to
6 administer the fund, including appointing a trustee to invest the fund and administer claims
7 against the fund. The court may order that all or part of the expenses of administering the fund be
8 paid from the fund, from the claimants, or in any other manner the court determines to be fair
9 and reasonable.

10 (f) The court may establish a reasonable time limit for claims to be made against the fund
11 and on its own motion, or on motion of the trustee, may order the trust to be terminated upon a
12 showing that the purpose of establishing it has been satisfied. Upon termination, any remaining
13 funds must be paid to the original awardee.

14 (g) The original awardee does not have standing in any other proceeding to challenge a
15 settlement or judgment that permits claims to be made against the fund.

16 **Reporter's Notes/Comments**

17
18 This section is new and is our first attempt to draft provisions permitting a punitive
19 damage award to be held in trust to pay subsequent claimants who obtain awards based upon the
20 same act or course of conduct that gave rise to the award in the pending case. There are two
21 alternatives for you to consider.

22
23 Alternative A leaves much more to the discretion of the court in comparison with
24 Alternative B. Thus, you have a basic choice to make as to whether you want to spell out in
25 detail what is to happen to any funds placed in trust. In addition, Alternative A deals only with
26 the situation where the subsequent claimants may not be able to satisfy awards of compensatory
27 damages because the award of punitive damages in the pending case may exhaust the defendant's
28 resources. In comparison, Alternative B deals with the additional situation where the subsequent
29 claimants may obtain an award of punitive damages. Thus, Alternative A only protects
30 subsequent claimants insofar as they receive compensatory damages, whereas Alternative B
31 would protect subsequent claimants who received both a compensatory and a punitive award.

1 Subsections (b) and (c) of Alternative A are the same as subsections (e) and (f) of Alternative A.
2 To compare the differences, you will want to look at subsection (a) of Alternative A and
3 subsections (a), (b), and (c) of Alternative B.
4

5 **[Alternate A]**

6 **SECTION 11. SEPARATE TRIALS.** In a trial involving a claim for punitive damages,
7 the court [pursuant to rules of civil procedure] may order a separate trial of any claim or issue in
8 furtherance of convenience or to avoid prejudice, preserving the right of trial by jury.

9 **[Alternative B]**

10 **SECTION 11. SEPARATE TRIALS.**

11 (a) In a trial in which a claim for punitive damages is made and evidence of wealth or
12 financial condition is to be offered, but the evidence is not relevant to any liability issue, the
13 court, upon motion by the defendant against whom the claim is made, [may][shall] bifurcate the
14 trial. [If the court bifurcates the trial] [During the first phase of the trial], the issues of liability for
15 compensatory and punitive damages must be determined and evidence of wealth or financial
16 condition is not admissible. The court [may] [shall] make separate findings regarding liability for
17 compensatory damages and any liability for punitive damages. If it is determined in the first
18 phase that punitive damages are to be awarded, evidence of the appropriate amount, including
19 evidence of wealth or financial condition if relevant, is admissible in the second phase of the
20 trial.

21 (b) If a claim for punitive damages and a motion for a bifurcated trial are made, the
22 claimant may show that wealth or financial condition is relevant to the issue of liability for
23 punitive damages. If the court so finds, the court [may][shall] bifurcate the trial by limiting the
24 first phase to a determination of whether the defendant is liable for compensatory damages and
25 the amount thereof. If [the court bifurcates the trial and] a finding of liability is made in the first

1 phase of the trial, liability for punitive damages and the amount thereof must be determined in
2 the second phase. During the second phase, evidence of wealth or financial condition if relevant,
3 is admissible. [In a jury trial pursuant to this subsection, the court shall inform the jury during the
4 first phase of the trial that a claim for punitive damages has been made, but that this issue may be
5 addressed in a second phase after the issue of liability for compensatory damages has been
6 decided.]

7 (c) In addition to the situations described in subsections (a) and (b), in any other trial
8 involving a claim for punitive damages a court upon good cause shown may order a separate trial
9 of any claim or issue in furtherance of convenience or to avoid prejudice, preserving the right of
10 trial by jury.

11 [Alternative C]

12 **SECTION 11. SEPARATE TRIALS.** In an action in which punitive damages are
13 sought, the court shall order that the claim for compensatory damages be tried first. If the
14 claimant prevails on the compensatory claim and sufficient evidence is received from which the
15 trier of fact could find a defendant liable under Section 5, the court shall submit the issue of
16 liability for punitive damages and the amount, if any, to the same trier of fact in a later
17 proceeding.

18 **Reporter's Notes/Comments**

19
20 There are three alternatives presented for Section 11. Alternative A simply leaves it to the
21 discretion of the trial court to decide whether the trial will be bifurcated or divided in some other
22 manner.
23

24 Alternative B provides, at the least, more guidance for the trial court and, at most, a
25 requirement that the trial be divided under certain circumstances. The bracketed language, for
26 example at lines 6-7, present the choice to you. If you delete the word "may" in brackets, then
27 you would also want to delete the words "If the court bifurcates the trial", while retaining the
28 words "During the first phase of the trial." In other words you need to make a choice whether
29 you want to command the judge to bifurcate the trial in the manner indicated in subsections (a)

1 and (b) or merely point the judge in that direction. Otherwise, the text of the section is
2 substantively the same as the December 2, 1994 draft.

3
4 Alternative C is a less sophisticated command to the trial court. It is not clear to me that
5 this would be a fair approach in all cases, but I was asked to draft such a provision at our Atlanta
6 meeting. It is here for your consideration. Perhaps I misunderstood how it was to be drafted.

7
8 **[SECTION [12]. CONSOLIDATION OF TRIALS.**

9 (a) If more than one action asserting a claim for punitive damages is filed in this State
10 against a defendant for the same act or course of conduct, a court [pursuant to rules of civil
11 procedure] may order:

12 (1) all of the actions consolidated for trial; or

13 (2) a joint hearing or trial of any or all the matters in issue in the actions.

14 (b) The court may make orders concerning any proceedings under subsection (a) to avoid
15 prejudice or unnecessary expense or delay.]

16 **Reporter's Notes/Comments**

17
18 This is the same provision that appeared in the December 2, 1994 draft. A question was
19 raised at the Atlanta meeting whether or not we really needed such a provision because most
20 states probably have provisions in their rules of civil procedure providing for consolidation.
21 Thus, I left it in this draft, but I put it in brackets to indicate that a state should consider adopting
22 this provision if the rules of civil procedure do not provide for consolidation.

23
24 **SECTION 13. INTEREST AND EXECUTION ON JUDGMENT PENDING**

25 **APPEAL.** Pending a timely appeal pursuant to [the rules of civil procedure] seeking a reversal
26 or modification of an award of punitive damages, interest does not accrue on and a judgment
27 creditor may not enforce the portion of the judgment for punitive damages.

28 **Reporter's Notes/Comments**

29
30 This is a new provision generated by discussions at our Atlanta meeting. However, it
31 goes a little beyond what was mentioned there. It was suggested in Atlanta that it is very costly
32 to buy a supersedeas bond for punitive damages and since these damages were not designed to
33 compensate anyone, the question was raised as to why there was any necessity to do this. What I
34 did was to basically suspend enforcement of the judgment for punitive damages during the time

1 an appeal is pending. The purpose is to obviate the need for a supersedeas bond.

2
3 It also occurred to me that there may not be a good reason to have interest accrue on that
4 portion of the judgment representing punitive damages. The damages are not designed to
5 compensate so there is no argument that the claimant has been out any money. However, in
6 periods of rapid inflation, the judgment debtor would benefit by delaying satisfaction of the
7 judgment. Note, however, that interest is suspended only during the time an appeal is taken under
8 the state rules of civil procedure. The section would not operate to suspend interest if the award
9 is in state court and review is sought by the United States Supreme Court. In any event, I thought
10 it is an idea to be considered right along with the problem of costs generated by an appeal. The
11 same would be true for a supersedeas bond.

12
13 **SECTION [14]. SHORT TITLE.** This [Act] may be cited as the Model Punitive
14 Damages Act.

15 **SECTION [15]. SEVERABILITY CLAUSE.** If any provision of this [Act] or its
16 application to any person or circumstance is held invalid, the invalidity does not affect other
17 provisions or applications of this [Act] which can be given effect without the invalid provision or
18 application, and to this end the provisions of this [Act] are severable.

19 **SECTION [16]. EFFECTIVE DATE.** This [Act] takes effect on
20 _____ and applies to all actions accruing on or after this date.

21 **Reporter's Notes/Comments**

22
23 There is an issue that needs to be considered about the effective date of the Act. The
24 question is whether the Act should apply only to causes of actions accruing after the effective
25 date of the Act or should it apply to any cause of action, the trial of which has not commenced
26 prior to the effective date of the Act. Perhaps there are other time frames to consider. In any
27 event, I adopted the language that appears to raise the issue for discussion at our Chicago
28 meeting.

29
30 **SECTION [17]. REPEAL.** The following acts and parts of acts are repealed:
31