DEFENDING PUNITIVE DAMAGE CASES – TIPS FROM THE TRENCHES

INTRODUCTION

Defending a punitive damages case is like walking a tight rope over a pool of alligators to grab a pot of gold: rewarding if you are successful, but painful if you fail. Twenty-seven years of trying, winning, and losing punitive damages cases brings a perspective not found in the classroom.

Many commentators have suggested that concerns regarding punitive damages are overblown, citing statistics indicating that such damages are awarded in less than 6% of all cases (a 2010 Cornell Law School Study cites the figures as between 3-5%), and that most of those cases involve individual v. individual rather than insurers and other corporations. However, these low figures are misleading in that they do not take into account the fact that punitive damages are not sought (or even available) in all cases; awards in cases where punitive damages were requested in the complaint occurred in 35.5% of such cases. In addition, studies also suggest that juries take seriously the instruction that punitive damage awards be sufficiently large to "punish and deter" the allegedly tortious conduct. Since most of our clients are insurance companies, and juries lack the knowledge and training to distinguish between statutory reserves and other forms of assets in calculating the "wealth" of an insurance company defendant, it is virtually inevitable that the potential punitive damage award in some insurance bad faith cases will approach or exceed the constitutional limits set forth in *State Farm Mutual Automobile Ins. Co. v. Campbell,* 538 U.S. 408 (2003).

A second disturbing trend is the increasing willingness of judges and other non-jury triers of fact to award punitive damages. Of note, in 2008 an arbitrator (a retired California State Court judge) awarded $8.4 million in punitive damages (out of a total award of slightly over $9 million) against a health insurance company. Earlier this year, a Nevada judge denied summary judgment with respect to the punitive damages claim in a case where the "egregious" conduct was the insurer's failure to pay the undisputed portion of an uninsured motorist policy while it continued to investigate the claim. The Court held that the fact that the insured's medical bills had been submitted to a collection agency, an action over which it had no control, made the company's actions "look particularly arbitrary and callous."

I. PRE-TRIAL STRATEGY

A. Law & Motion

Our usual practice is to attack the punitive damage allegations by way of motion. Motions to dismiss (federal court) or Demurrers (California and some other state courts) are rarely successful, except in cases where the plaintiff has neglected to allege tort claims or has sued the wrong party, and even in those instances leave to amend is usually granted. However, summary judgment motions on punitive damages have a higher success rate. It is one thing to allege reprehensible conduct; it is another to provide proof that such conduct occurred. In addition, where the law & motion judge is also your trial judge, summary judgment motions provide an opportunity to begin educating the court regarding the high bar set for plaintiff by the Supreme Court and to preview any potential post-trial motion for JNOV. We have yet to determine a valid reason not to file a summary judgment motion on punitive damages.

Punitive damages are only available in cases where the defendant is guilty of outrageous conduct; in bad faith cases the allegations usually involve callous disregard of the insured's interests, fraud, or denial of a clear liability case in order to improve profits. Successful summary judgment motions emphasize facts that support the conclusion that the insurer's claim handling and decision, or other challenged conduct, was reasonable, and the lack of conduct by the insurer beyond a good faith dispute of the claim or reasonable business practice.

Plaintiffs often use the theme of "corporate greed" to justify seeking punitive damages. In our experience, insurers have not done a good job of establishing that the business of insurance is to *pay* claims, not to deny them. It is startling to see judges accusing insurers who pay billions of dollars annually to policyholders of having a "parsimonious claims granting history." The plaintiff's bar has been much better at using claims statistics against insurers than insurers have been at using them to support their defenses. Demonstrating a corporate philosophy of service to policyholders; corporate principles of good claims handling; internal policies and procedures designed to improve service to policyholders; and substantial annual payments to policyholders may help to place the claims dispute at issue into its actual context.

B. Development of Trial Themes

A common mistake we have seen defense lawyers make is failing to identify and develop a consistent theme for defense of the punitive damages claim until after the close of discovery. This means that the evidence obtained in discovery shapes the defense of the claim rather than the other way around. Of course, as anyone who

recently watched Ken Burns' documentary on Prohibition is aware, stiff-necked adherence to a theme in light of developing evidence to the contrary is a recipe for disaster. It is still important, however, to develop your strategy for defending against the punitive damages aspect of the case at the outset of the lawsuit, including a trial theme that supports your argument that your client acted in good faith. (The plaintiff's lawyer certainly has a theme for the case prior to undertaking discovery.) Typical defenses include:

- The decision was made in good faith;
- The insured withheld information that could have made a difference;
- A third party's action impacted the claims decision;
- The insured was a sophisticated consumer;
- The insured's damages are not substantial;
- The insured manipulated the process;
- The decision was an honest mistake made without intent to harm;
- The Company regrets the error and has taken steps to make sure that it will not happen again.

The selection of witnesses and documents, and the formulation of a discovery plan, will be significantly impacted by which of these themes you decide to adopt as your defense. Your themes obviously must be consistent with the facts. Our experience has been that, if you choose as your theme the insured's sophistication and lack of substantial damages, the close of discovery is too late to decide the change the theme to the insurer's regret of the error and ameliorative steps. Alternatively, if you commence discovery without knowing which of these themes you will use at trial, you may not develop sufficient evidence to assert convincingly any of them.

Remember that your theme for defending the punitive damages case assumes that the contract was breached, so simply relying on your contract defenses to address the punitive damage claims is not enough to protect your client against this exposure.

C. Discovery

1. Paper Discovery

Everyone propounds and responds to written discovery in these cases as a matter of course. With respect to the punitive damages case, you can expect to receive some form of plaintiff's counsel's closing argument as an interrogatory response. This can be useful if you are not sure of plaintiff's punitive damage theme, but it generally will not help you develop the evidence you need to address the theme. Make your interrogatories very pointed - focus on discovering *who* has information, *which*

documents plaintiff relies on, and *when* and *where* important events plaintiff relies on occurred. Do not use interrogatories that give plaintiff's counsel the opportunity to write a script for plaintiff to mimic at his or her deposition. Interrogatories should inquire as to all doctors, other health practitioners and counselors plaintiff has visited and attach an authorization to release records to be executed for each one.

2. Depositions

Depositions of the plaintiff (and where appropriate the plaintiff's spouse) are much more helpful in defending these allegations. Examples of the type of questions that may provide useful information are:

- Was anyone at the insurance company rude or disrespectful to you?
- Other than not paying the claim, is there anything else my client did that you feel was unfair or unreasonable?
- Has your financial situation improved over time?
- Were you given a fair opportunity to speak with people at the insurance company regarding this situation?
- Did you ask any questions about your claim that were not answered?
- Did anyone apologize to you for the delay in handling your claim?
- Are you working in any capacity? Doing volunteer work? Performing household chores or childcare? Driving? Running errands?
- Did you have any questions about the contract that the insurance company did not answer?
- Did you withhold any information about your illness/disability/pre-existing conditions from the insurance company?
- Other than not having the insurance benefits, have you lost any other money that you attribute to my client's handling of your claim?

If you get harmful answers to all of these questions, you will know that the plaintiff has a strong prima facie case for punitive damages. Alternatively, if you obtain helpful answers to at least some of these questions, you are on your way to convincing the trier of fact that the harm is at most limited to contract damages.

Defending the depositions of your own clients can be a minefield. Even the brightest and most capable claims handlers are not used to the interrogation tactics of plaintiff's counsel. In the past, we were taught to object vigorously to every question that was arguably improper, and to limit as much as possible the information provided. In one case, the level of acrimony between counsel in the deposition rose to the level

where the deponent (a claims supervisor) filed her own disability claim alleging extreme stress and depression! Breaks were sometimes necessary in order to avoid physical altercations. Ultimately, however, this strategy did not significantly improve the defense of the punitive damages case and sometimes played into the hands of plaintiff's counsel arguing that the defendant was engaged in a cover-up of bad corporate behavior.

As a result, we now recommend to claims handling personnel that they treat depositions as an opportunity to have a discussion with the insured and with the jury. As with any public relations position, any hint of anger, fear or antagonism will be interpreted as defensiveness and an attempt to hide improper motives. We encourage claims handling witnesses to be patient, open, and forthright. Importantly, we encourage them not to be afraid to acknowledge the possibility that they might have made a mistake, provided that they also attempt to explain why they came to the decision they did and the evidence they relied upon. We also try to limit the number of objections and instructions we provide during the deposition, in order to avoid the appearance of evasiveness and over protectiveness.

Defending executive level depositions involves a different skill set. Successful executives are driven, hardworking decision makers who are not used to having their motives questioned. They are also highly intelligent, and therefore less susceptible to suggestion. As with claims handlers, it is important to emphasize to executives the need to resist the urge to respond to counsel's accusations and insinuations with outrage or anger. The executive's role is to explain the balancing of factors involved in running a successful insurance company. The factors include, but are not limited to, the reliance of policyholders on payment of claims; the importance of the company's reputation for fairness and honesty in attracting new policyowners and keeping existing ones; the stockholders' interest in the company's financial success; the requirements imposed by state insurance departments that the company make reasonable efforts to ferret out and resist fraudulent claims; the statutory requirements with respect to claims handling practices; and the regulators' requirements regarding financial soundness and viability. Explaining these issues in the context of a proceeding where an attorney is accusing the executive of condoning the denial of valid claims in order to increase profits is challenging, but the effort is vital to the defense of the punitive damages claim. Here it is important to object when plaintiff's counsel attempts to interrupt the witness's answers.

3. Medical Testimony

The other key area of discovery in punitive damage cases involves medical testimony. In our experience, you will have little to no ability to influence the testimony of medical professionals involved in the insured's treatment, whether the insured's physicians or the company's physicians. Fortunately, the bulk of this testimony will involve liability under the contract (*i.e.,* the level of impairment or the medical necessity of the treatment). For punitive damage purposes, the relevance of medical testimony generally involves the accusation that the insurer used a "defense doctor" with a history of finding no impairment to provide a favorable opinion after records review or an IME. We have found that these claims can be addressed by evidence of instances where the physician has supported the claimed impairment of an insured, or by citation to case law where the trier of fact found the physician's medical judgment to be sound. You should be aware, however, that if plaintiff can demonstrate a number of instances in which the physician has opined that the insureds were not impaired, this will affect the physician's credibility and will bolster the claim that the insurer had the express agenda of terminating the claim.

II. TRIAL

a. Pre-trial Motions

A motion *in limine* to preclude evidence of punitive damages is now a regular part of trial preparation, and is an important part of preserving the record for appeal. The theme should be consistent with the theme set forth in the summary judgment motion, but modified to address the Court's basis for the denial of the summary judgment motion.

Bifurcation is a harder question. Many jurisdictions allow bifurcation of the punitive damages case from the liability case, holding that a plaintiff may not present evidence relating to punitive damages unless and until the plaintiff has proven breach of contract and bad faith. For years, we routinely filed such motions, on the theory that we did not want the punitive damage evidence tainting the trial during the breach of contract phase. However, a number of defense trial lawyers have questioned this approach, believing that it simply provides the jury with a road map that leads to punitive damages. If your client is a household name, the jury may assume that its profitability is higher than it is and that its claim procedures do not include protections for the claimant that the company has put in place. If the jury finds that the contract was breached in phase one, it increases the likelihood that they will find bad faith in

phase two. Similarly, adverse judgments in the contract and bad faith phases increase the likelihood of a punitive damages award in phase three. As a result, some lawyers now assert that trying the entire case at once is more likely to result in a "compromise" verdict which excludes punitive damages. Our own experiences do not provide a definitive answer in this regard: our suggestion is that you consider this option carefully in the context of the facts of your case, rather than automatically bifurcating.

b. Trial Conduct

Jury selection is always critical in insurance bad faith cases. There are no special rules for jury selection in punitive damage cases as opposed to other insurance bad faith cases.

However, our experience has not supported the use of professional jury consultants. In every case we have tried that resulted in an adverse punitive damage award, our clients employed jury consultants to assist in selection of the jury panel. In our view, this underscores that fact that picking a jury is an art rather than a science; experienced trial counsel has at least as good a sense as a jury consultant as to what type of juror is most (and least) likely to respond to the attorney's presentation style and that of plaintiff's counsel. In light of the fact that much of trial work involves the attorney's ability to connect with the jury, the impact of the jury consultant is limited.

In terms of actually trying the punitive damage case, remember that the jury is being asked to determine whom to punish and for how much. If you position yourself as someone whom the jury wants to punish, you will increase your client's potential exposure, even if your witnesses perform well. To quote from a famous trial attorney, no matter what the provocation, try your best to keep your inner "Mongo" out of the courtroom. Conversely, you have to be natural in presenting the case: the jury will discern any effort to be preternaturally calm and controlled, and will wonder what you are trying to hide. Be pleasant, be professional, but be yourself.

You can expect that the plaintiff's attorney, while purporting to discuss merely what the evidence will show, will actually attempt to inflame the jurors by appealing to their love of the "little guy" and their prejudices against large corporations. You need to tell a story that is simple, straightforward, and (most importantly) supported by the evidence. You cannot controvert the fact that your client is a large insurance company: instead, emphasize the number of claims paid, the amount of money paid to claimants, and the unusual facts of the case at issue. Save the righteous indignation for another day: focus on the logical, the sensible, and the practical.

Closing argument in punitive damage cases is extremely challenging, because it can involve acknowledging fault but asking that your client not receive any punishment therefor. One of the worst arguments we have ever seen is quoted in a published opinion: the insurance company's attorney argued that the company should not be subjected to punitive damages because "just going through the trial was punishment enough." [Needless to say, this argument was not successful.] While any argument will ultimately turn on the applicable facts and law, the following concepts will often apply:

- The plaintiff has already been fully compensated for any and all harm s/he suffered;
- The amount sought represents a windfall;
- The size of the compensatory award sends a sufficient message to the insurer;
- The amount sought would impact the funds that the insurer maintains to pay claims to be brought by other policyholders;
- The insurer has already taken steps to address the wrongful conduct.

c. Post – trial

Post-trial motions generally turn on the sufficiency of the evidence, and/or ratio of the punitive damages to actual damages. If you have developed and placed into evidence the themes of your defense, the subject of your post-trial motion should be clear, and the key will be addressing the trial evidence that cuts against the theme. If not, your best bet is to raise as many issues as you can, hoping that at least one will catch the Court's attention and, if needed, support an appeal.

CONCLUSION

Defending a case with strong punitive damages potential is one of the defense attorney's most daunting challenges. Having a carefully thought out strategy from the outset, being nimble enough to adapt that strategy, taking the right discovery, working closely with your client's claims and executive personnel, filing well-crafted motions and trying the case with confidence and professionalism will help overcome this challenge.