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Winning punitive damages for bad faith

A guide from voir dire through closing statement

I've had the good fortune of trying a wide variety of cases over the years. I've tried everything from bad-faith cases, to personal injury, employment, medical malpractice, premises liability, etc. There is a fundamental difference when trying a negligence case versus an insurance bad-faith case. In a negligence case, whatever the allegation is about what the defendant did wrong, they usually didn't *intend* to cause the harm that occurred. But in a bad-faith case, you're not saying that the company did something negligently. Rather, you're coming into court saying that the company cheated your client; acted with malice, oppression and fraud. Simply put, this wasn't just an "oops," this was something far worse. It was something intentional.

Recognizing this difference is the first step to presenting, and then winning, a punitive-damage award. There are a number of issues to cover in a bad-faith case from voir dire and leading up to closing argument. But in this article, I'm just going to focus on dealing with the topic of punitive damages from the beginning of trial to the end.

Voir dire

You can never expect a jury to return with a punitive-damage verdict in a bad-faith case unless you've prepared them to do so during voir dire. As with all issues that you cover in voir dire, you want to get jurors to open up about how they really feel about the concept of punitive damages. Don't be afraid to ask open-ended questions even if you might get answers that you weren't hoping to get. Letting the jurors express themselves in their own words is the only way that you'll truly get the honest answers you want. As my old college roommate used to say, "You have two ears and one mouth, so you should listen twice as much as you speak." This is especially true during voir dire.

Before getting to the jurors' feelings about punitive damages, I like to build

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up to it by asking a series of questions like the following:
Q: Mr. Jones, do you think that sometimes people simply make honest mistakes and really didn't mean to cause harm?
A: Sure, of course they do. We're all human after all and humans make mistakes.
Q: And do you think that sometimes people don't just make mistakes, but they might do things with a bad motive to benefit themselves and in the process cause harm to others?
A: I'm sure that happens too.
Q: Do you think that sometimes, people do things to try to cheat other people out of money for their own benefit?
A: Well, yeah, you hear about that all the time.
Q: Do you think that as a society we ought to treat those two types of conduct differently? In other words, conduct which is an honest mistake that causes harm versus dishonest conduct that causes harm?
A: Sure, if the evidence proves that.

I like to open up this dialogue with other jurors with questions like, "How do you feel about that?"; "What are your thoughts?"; "Do you agree or disagree?" etc. At this point, you'll find that most people will agree with the basic concept that people can cause harm to others both honestly and dishonestly. You'll also find that most people will agree with the notion that honest and dishonest conduct should be treated differently.

Now you have prepared the jurors for a discussion about punitive damages. Inevitably, there will be some jurors who have heard or read about punitive damages and have negative feelings about it. For example, I've had more than one juror describe their understanding of punitive damages as "Isn't that where the plaintiff gets a big windfall?" To help get jurors to understand the concept of punitive damages, I like to refer to them as "penalty damages" or "punishment damages." I ask questions like:
* "Ms. Smith, what do you think about a system that allows for civil penalty damages if the conduct was dishonest, and not just an honest mistake?"
* "Mr. Jones, what do you think about a system that allows for civilly prosecuting dishonest conduct in cases like this?"
* "Ms. Evans, do you think that we as a society should punish dishonest conduct? If so, why?"

One of the things I've noticed in the past several years is that jurors, generally speaking, are more receptive to the concept of punitive damages. I've found this to be true even in conservative jurisdictions. I think the reason is because most jurors have heard about corruption cases where people have cheated other people out of money. I bring up examples like, Bernie Madoff, Charles Keating, Jeffrey Skilling, and Enron to get jurors thinking about it. Examples like these bring up the notion that sometimes greed causes people and/or corporations to do bad things and in the process cause harm to others.

In a bad-faith case, the purpose of punitive damages is to punish and deter dishonest conduct. Ultimately, the goal in voir dire is to have jurors who are open to awarding punitive damages if they find the evidence establishes dishonest conduct. The jury should also understand that the purpose of punitive damages is not to compensate, but to punish and deter.

Opening statement

We all know that opening statement is the time to tell your client's story. It's a time to showcase why the defendant's conduct was wrong and to demonstrate the harm that your client suffered. After telling my client's story and showcasing the bad conduct of the insurance company, I make it a point to explain that there are two purposes to the case. The first purpose of the case is to compensate my client and to make up for the harm caused. I then talk about the damages that I intend to prove and the basis for those damages. But in a bad-faith case, you can't stop there. I also talk about the second, and more important, purpose of the case: to make sure this conduct is punished and never repeated. In a bifurcated trial, I explain at the end of the opening statement that we will be looking for a finding of malice, oppression or fraud, so that the jury can get to the second phase to address what the appropriate punishment should be.

Cross-examination of the adjusters

The most important evidence you can develop in a bad-faith case is during the cross-examination of the claims adjusters. Cross-examination of the defendant's witnesses is usually when the jurors are on the edge of their seats. This is especially true in bad-faith cases.

In every bad-faith case there is a dispute about the amount of money paid on the claim. Sometimes there's a dispute about coverage and nothing has been paid. Other times there is a valuation dispute and a claim of low-balling. Regardless, there is always that one final letter or e-mail from the adjuster that tells your client "We're done! You get nothing more!"

I like to cross-examine the adjuster with simple questions like the following:
Q: Sir, when you adjust a claim, do you want your policy holder to believe you when you communicate with them?
A: Of course.
Q: Do you want your policyholder to feel that you're telling them the truth?
A: Sure.
Q: Do you want your policyholder to have confidence in what you tell them?
A: Yes, I do.
Q: And, in this case, when you sent this letter telling my client that their claim was denied and would not be paid, what would have happened if my clients believed you?
A: Well, I guess we wouldn't be here.
Q: Right, the claim would have been closed and no payment would have been made, correct?
A: I believe that would be true.

Now, these are pretty simple concepts that really can't be disputed. After all, no adjuster is going to say that he/she does *not* want their policyholder to believe them. The reason I ask these questions is because if you get to the second phase, the jury will necessarily have found that the conduct was malicious, oppressive or fraudulent. During that time, you will be able to ask the jury the rhetorical question, "What would have happened if my client just believed and trusted their insurance company?" Well, the answer comes

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from the defendant's own witnesses: your client would have been cheated out of money they deserved.

Establishing ratification

In order to get to a second, punitive damage phase, you will need to prove that the conduct constituted "malice, oppression, or fraud" in phase I. (See, CACI 3946.) In addition, you will also need to prove one of the following:
1. That the conduct constituting malice, oppression, or fraud was committed by one or more officers, directors, or managing agents of defendant who acted on behalf of the defendant; or
2. That the conduct constituting malice, oppression, or fraud was authorized by one or more officers, directors, or managing agents of defendants; or
3. That one or more officers, directors, or managing agents of defendant knew of the conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred."

Going into trial, you need to identify the witness or witnesses that have the managerial capacity to establish ratification. In most cases it is either the immediate supervisor of the adjuster or that person's supervisor. Whoever the witness is, you need to establish ratification of the conduct in order to get to a second, punitive damage phase.

On cross-examination of the supervisor, you will want to first establish that given his/her role in the company, he/she has managerial capacity. Once that is established, you need to confirm ratification and approval of the claim. I usually ask questions like the following:
* "Sir, there is nothing that you thought the company did wrong in handling this claim, is that true?"
* "As the supervisor, you approve of the manner in which this claim was handled?"
* "In fact, this claim was handled in the manner in which the company strives to handle claims, is that true?"
* "There were no changes made to the company's claim-handling guidelines as a result of this claim, is that true?"
* "Any other insured of this company could expect to receive the same treatment that my client received in this claim, is that true?"
*"No one was reprimanded for work they did on this file, is that true?"

These questions establish not only ratification but also pattern and practice. Inevitably, in phase I, the company and its witnesses will vigorously defend their conduct and stand behind it. Of course, if the jury finds that the same conduct was malicious, oppressive or fraudulent and there is a second phase, this testimony will be very helpful to address the amount of punitive damages the jury should award.

The phase II trial

Trying cases is kind of like being in a boxing match. You're fighting every day and whether you think it's going well or not, you just don't know if you're ahead or behind on the jury's scoring card. That's why, like a boxer, no matter if you've had a good or bad day in trial, you shake it off and go into the next day to fight again.

But all of that changes when the jury has made a finding of malice, oppression or fraud and you find yourself now in phase II of the bifurcated trial. My partner and mentor, Mike Bidart, taught me early on that when you get to the second phase, you have to remember that the jury is on your side and has found, by clear and convincing evidence, that the insurance company's conduct was "despicable" or fraudulent. So, as Mike said to me, your demeanor needs to be like the heavyweight champion who is being interviewed after defending his title. You no longer need to be the aggressive fighter who is zealously arguing every issue. The jury has already found that the conduct is really bad, now it's the time to calmly reason with the jury about what to do about it. I remind the jury that we are doing this collectively, on behalf of society, to make sure this bad conduct is both punished, and more importantly, not repeated.

- ***Phase II opening statement***

Phase II is really a mini trial in itself. Accordingly, I always give a short opening statement before the beginning of the second phase. Contrary to a lot of other lawyers, I'm not big on thanking the jurors, even after they have ruled in my client's favor on phase I. I'm not really sure why I don't like it but maybe it's because I've served on two juries myself and when the lawyer constantly thanked us during closing argument I just thought it was patronizing. So instead, I jump right into the purpose of the second phase. I will start off by saying something like this:

> Ladies & gentlemen, we have now completed phase I of this case with your verdict. As I stated, the purpose of the first phase was to compensate my client, and you've now done that. But we now leave my client, and the focus is now 100 percent on the defendant and its conduct. The purpose of this second, and most important, phase is to determine what we as a society are going to do about punishing this conduct, and making sure that it doesn't happen again. And this is a very, very serious and solemn proceeding. You have found the conduct of this company to amount to malice, oppression and fraud by clear and convincing evidence. That is the highest form of misconduct you can find in a civil case like this so, as you can imagine, this is a very serious proceeding to determine the appropriate punishment for this conduct.

I tell the jury that the only new evidence that they will hear is the financial condition of the insurance company. I explain that the second phase is so sacred that we are not even allowed to talk about the money the defendant has during phase I because we don't want it to in any way influence their decision about whether the conduct was malicious, oppressive or fraudulent. Simply put, we wanted a pristine and objective finding from them about the conduct, which we now have.

I usually finish the brief opening by letting the jury know that after they get the evidence of the worth of the insurance company, there will be closing arguments at which time I will be recommending an amount they should award to accomplish the purpose of punishment and deterrence.

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• ***Evidence of financial condition***

The only new evidence to present during the punitive-damage phase is of the company's financial condition. Getting the financial information of an insurance company is very simple because they are required to lodge that information with the Department of Insurance ("DOI"). I usually will obtain certified copies of at least five years of the company's financial statements filed with the DOI. Also, because the financial documents are certified by the DOI, they are self-authenticated.

Usually, I will have retained a forensic economist to explain what the numbers in the financial documents mean to the jury. While there are many ways to evaluate the financial condition of the company, the most common way is to look at the company's surplus. The documents obtained from the DOI will set forth the company's assets, liabilities and surplus. Notably, the liability will list not only the actual losses paid but also reserved losses so that the remaining surplus is net of even potential claims the company has reserved for future payments. Once the financial condition evidence is presented, it is time for the final closing argument.

• ***The phase II final closing***

While you know that the jury thinks the company's conduct was really bad by the second phase, you don't know what they are willing to do about it. It is your job as the trial lawyer to motivate the jury to "send a message", not just to the defendant in your case, but also to the insurance industry as a whole. The starting point is to make sure you explain the purpose of punitive damages which is twofold: to punish & deter. Cite to the jury instruction as follows:

> The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.

(CACI 3949)

It is important that the jury understand that punitive damages are designed to protect the public, which includes the members of the jury. One way to accomplish this task is to refer the jury back to the law. For example, in California, one powerful jury instruction is the following:

> The purpose of punitive damages is purely *a public one*. The *public's goal* is to punish wrongdoing, and thereby protect itself from future misconduct, either by the same defendant or other potential wrongdoers. In determining the amount of punitive damages to be awarded, you are not to give any consideration as to how the punitive damages will be distributed.

(*Adams v. Murakami* (1991) 54 Cal.3d 105, 110; *Neal v. Farmers Ins. Group* (1978) 21 Cal.3d 910, 928, fn 13) (emphasis added).

Thus, in the punitive phase, portray your role as being one of a public servant. You are advancing the "public's goal" which is, in part, to punish the defendant's misconduct. Ultimately, the jury should understand that their punitive verdict will protect not just an individual or some special-interest group, but rather, will protect everyone from future abuses. The jury must understand the importance of their role of protecting the public in the punitive phase.

It is important that the jury understand that they have the power to send a warning to the insurance industry that misconduct will not be tolerated by the public. The jury can do this by setting an example of the defendant. Again, one way to accomplish this is to refer back to the jury instructions, such as the following from the United States Supreme Court:

> In addition to actual or compensatory damages which you have already awarded, the law authorizes the jury to make an award of punitive damages in order to punish the wrongdoer for its misconduct or *to serve as an example or warning to others not to engage in such conduct*.

(*TXO Production Corp. v. Alliance Resources Corp*. (1993) 509 U.S. 443, 459, 463, emphasis added ("*TXO*").)

The punitive damages that the jury awards will not only send a message to the defendant on how it should do business in the future, but it will also serve as an example or a warning to other competing companies that the public will not tolerate such misconduct. Give the jury examples of warnings they see everyday: if a swimming pool is too shallow, it should have a warning; if a product is dangerous, it should have a warning; if a floor is slippery, it should have a warning, etc. Warnings like these must be prominently displayed in order to have an impact. In your case, the punitive damage award will serve as a warning to other insurance companies and so it must be a meaningful amount to be prominently displayed to the industry.

I like to emphasize the second purpose of punitive damages which is deterrence. The jury's verdict should not only deter future wrongdoing by the defendant, but also by the industry as a whole. Another effective jury instruction to establish this point is the following:

> The object of [punitive] damages is to *deter the defendant and others* from committing like offenses in the future. Therefore, the law recognizes that to in fact deter such conduct, may require a larger fine upon one of larger means than it would upon one of ordinary means under the same or similar circumstances.

(*TXO,* 509 U.S. at p. 463, emphasis added).

Once the jury understands the "purely public" purpose of punitive damages, it is then time to turn to the amount of punitive damages to assess. The guidelines for the assessment of punitive damages include the following: 1.) how reprehensible was the conduct? 2.) is there a reasonable relationship between the amount of punitive damages and the harm? and 3.) in view of the financial condition of the defendant, what amount is necessary to punish and discourage future wrongful conduct? (See, CACI 3949)

Naturally, the evidence under each of these guidelines will largely depend on the facts of a given case as to the reprehensibility of the conduct, the defendant's financial condition, and the plaintiff's actual injury. These facts must be presented in evidence and then argued specifically to the jury. In addition to these general guidelines, there are other authorities that speak more specifically to

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the amount of punitive damages. Take the following jury instruction:

> In determining the amount of punitive damages to be assessed against a defendant, you may consider the following factors: One factor is the particular nature of the defendant's conduct. Different acts may be of varying degrees of reprehensibility, and *the more reprehensible the act, the greater the appropriate punishment*. Another factor to be considered is the wealth of the defendant. *The function of deterrence and punishment will have little effect if the wealth of the defendant allows it to absorb the award with little or no discomfort*."

(*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928) (emphasis added).

These jury instructions convey credibility to your argument on the amount of punitive damages the jury should award. In other words, the jury should be told that the law requires a greater punitive damage award where the conduct is particularly reprehensible, and that the law requires that the amount the jury awards in punitive damage must cause some financial "discomfort", in order to serve the public purpose of deterrence as discussed earlier. Naturally, determining what amount will cause the appropriate "discomfort" will depend on the financial condition of the defendant. This concept is further set forth in another jury instruction:

> The wealthier the wrongdoing defendant, *the larger the award of punitive damages needs to be* in order to accomplish the objectives of punishment and deterrence of such conduct in the future."

(*Adams v. Murakami*, (1991) 54 Cal.3d 105, 110) (emphasis added).

When asking for an amount of punitive damages, I like to remind the jury that this corporate defendant must be treated the same as an individual in the eyes of the law. I refer to the following instruction:

> A corporation, ABC Insurance Company, is a party in this lawsuit. ABC Insurance Company is entitled to the *same* fair and impartial treatment that you would give to an individual. You must decide this case with the *same* fairness that you would use if you were deciding the case between individuals.

(CACI 104) (emphasis added).

When arguing this instruction I tell the jury that we all know what it means to treat the defendant the "same." We don't treat them any worse, but we don't treat them any better either. We treat them the "same."

I ask the jury to consider that if instead of this insurance company that cheated my client out of money it was an individual who had a net worth of $100,000. What would they say? Well, it comes down to three things. First, we would say, "give the money back." I remind the jury that the purpose of phase I was just that; to give the money back to my client. The second thing we would say to that individual is "you're going to jail." Why? Because people who cheat other people out of money go to jail. It's called a white-collar crime. I tell the jury that we can't put a corporation in jail so, at least to that extent, we really can't treat them the same as an individual. The third and final thing we would say is that the individual must be punished with a penalty. Some penalty to make sure the misconduct is not repeated.

I explain that to an individual with a net worth of $100,000, a minor penalty of $5,000 or even $10,000 amounts to 5 percent to 10 percent of that person's net worth. Yet, that same 5 percent or 10 percent is a much greater amount to an insurance company that has a net worth/surplus in the millions or even billions. But, equating what a reasonable punishment would be to an individual, to what it would be to the insurance company, is treating the insurance company the "same" as an individual. No better and no worse.

Conclusion

Getting a punitive-damage verdict in a bad-faith case is not an easy task. It requires a great deal of preparation and organized thought before trial. Hopefully, this article will help you in dealing with the issue of punitive damages during the trial of a bad-faith case from start to finish.

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