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Punitive Damages: Strategies for Trial and Appeal; Statutory and Constitutional Boundaries

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1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Punitive Damages in Personal Injury Litigation

Procedural and Strategic Considerations

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Substantive Punitive Damages Standards – Choice of Law

- State law on punitive damage differs.
 - Some states do not allow punitive damages at all.
 - Some states allow punitive damages only when authorized by statute, or for specified causes of action.
 - Some states allow punitive damages only when compensatory damages are insufficient to make plaintiff whole.
 - New Jersey and Utah do not allow punitive damages in cases in which drug or device was approved by FDA unless plaintiff can show fraud on the FDA.
 - Some states prohibit or limit serial punitive awards for the same conduct.
 - Many states have imposed caps on punitive damages.

Substantive Punitive Damages Standards – Choice of Law

- May apply law of state where the defendant does business, where the plaintiff resides or where the injury occurred.
- “Depacage” – Different issues in case may be governed by different rules.
- Forum state’s procedures apply.
 - There can be tricky questions about whether certain issues relating to punitive damages are procedural or substantive.

State Procedural Rules

- Defendant entitled to bifurcation upon request.
- Plaintiff must make showing on punitive liability before discovery of financial information is allowed.
- Plaintiff may not plead punitive damages in initial complaint; must first make separate factual showing after discovery.
- Court must conduct post-verdict review of the amount of punitive damages.
- A percentage of the award is paid to the State
 - Usually applies only if there is a final judgment and not in the event of settlement.

Discovery

- Defendants
 - Object to overbroad discovery into unrelated accidents or conduct.
 - Attempt to defer or limit discovery of financial information.
 - Designate witnesses who can testify about company conduct, regulatory compliance, or other punitive-specific topics.
- Plaintiffs
 - Seek discovery relating to all elements of punitive damages under applicable state law, such as involvement by managing agents.
 - Seek discovery relating to veil-piercing, etc.

Motions for Summary Judgment

- Motion for summary judgment on punitive liability.
 - No punitive liability for particular claims.
 - No evidence/insufficient evidence of punishable conduct.
 - No evidence/insufficient evidence of involvement by managing agents of corporation.
- Motion for summary judgment on liability of parent company
 - Later allows exclusion of parent-company finances.
- Not needed for preservation; some possible disadvantages

Bifurcation/Trifurcation

- Several Ways to Bifurcate or Trifurcate
 - Compensatory liability and damages/punitive liability and punitive damages
 - Compensatory liability/punitive liability/compensatory and punitive damages
 - Compensatory liability, punitive liability, compensatory damages/punitive damages
 - Compensatory liability and punitive liability/compensatory and punitive damages

Bifurcation/Trifurcation

- Reasons a defendant might favor bifurcation or trifurcation
 - Defers admission of conduct evidence until after jury has determined causation and other plaintiff-specific issues.
 - Prevents evidence of defendant's wealth from influencing jury's resolution of other issues.
 - Makes it unnecessary for defendant's counsel to present a defense on damages until after liability has been determined.
 - Enables defendant's counsel to present a more effective case on amount of punishment if and when that becomes necessary.

Bifurcation/Trifurcation

- Reasons a plaintiff might favor bifurcation or trifurcation
 - If defense counsel have not developed a substantial presentation for Phase II (or III), that phase will be limited to evidence and argument about the defendant's wealth.
 - While deferring conduct evidence should make it easier for a defendant to win on liability for the underlying tort, if the defendant loses, the evidence may have a greater impact (and result in a higher punitive award) when introduced later.
 - If not properly instructed, the jury might inflate compensatory damages to punish the defendant and then add additional punitive damages during the second (or third) phase.

Motions in Limine

- Motion to preclude defendant from invoking advice-of-counsel defense if it has withheld relevant documents as privileged.
- Motion to exclude or limit evidence of defendant's financial condition.
- Motion to exclude evidence of dissimilar conduct or accidents.
- Motion to preclude plaintiff from seeking a specific amount of punitive damages or, at a minimum, an award that would be presumptively unconstitutional if awarded.
- Motion to preclude plaintiff from suggesting wealth-based measures of punitive damages.

Motions in Limine

- Motion to bar plaintiff from requesting punishment for harm to non-parties or punishment sufficient to alter defendants' out-of-state or nationwide conduct.
- Motion to exclude evidence or references to defendant's corporate status or out-of-state residence.
- Motion to exclude other arguments designed to appeal to passion and prejudice:
 - “Golden rule” arguments, community safety, etc.
 - Comparisons to other wrongdoers

Defense Evidence

- Compliance with government regulations or industry standards
- Reliance on advice of counsel
- Post-injury remedial measures or other changes in company policies
- Benefits of the conduct in question (Wright Medical)
- Prior verdicts/number of other cases
- Inability to pay a large punitive award
- Evidence that large punitive award will affect shareholders (like pension funds) and innocent employees, rather than the individuals who committed the misconduct.

Plaintiff's Evidence

- Financial information
 - Some jurisdictions require evidence of financial condition; most others allow it.
 - Evidence may show the ability to pay a punitive damages award and the profits from the allegedly wrongful activity.
- Repeated misconduct
 - Failure to correct misconduct notwithstanding prior sanctions.
- Number of people exposed to risk of harm.
- Noncompliance with government regulations or industry standards.

Motion for Judgment as a Matter of Law on Punitive Damages

- Before case is submitted to the jury, the defendant should move for judgment as a matter of law with respect to punitive liability.
- Failure to do so risks waiving the right to challenge sufficiency of the evidence of punitive liability post-verdict and on appeal.

Jury Instructions—drafting considerations

- Always start with the state pattern, but don't feel beholden to it.
- Any “special” instructions should be drafted as narrowly as possible.
- Pay particular attention to preservation issues, including limiting instructions for evidence that has been admitted over objection.
- For unsettled legal issues, be sure to propose alternative instructions if the primary request is denied.

Jury Instructions—topics for defendants to include

- Plaintiff does not have the right to recover punitive damages.
- Jury need not award punitive damages even if it has found that the defendant engaged in punishable conduct.
- Purposes of punitive damages are to punish defendant for egregious misconduct and deter defendant and others from committing similar misconduct in the future.
- Punitive damages should be awarded only if defendant's conduct is so egregious that compensatory damages are insufficient to punish and deter.

Jury Instructions—topics for defendants to include (cont.)

- May not punish defendant for injuries to people other than plaintiff.
- May not punish defendant for impact of its conduct in other states.
- May punish only for conduct that harmed the plaintiff, not unrelated bad conduct.
- Punitive damages must bear reasonable relationship to compensatory damages/potential harm that was likely to occur.
- Defendants should request instruction that punitive damages must be proven by clear and convincing evidence even in states in which that standard has not yet been adopted.

Closing Argument

- To avoid waiver, counsel must object promptly to improper argument.
 - Appeals to anti-corporate bias (“corporations have no soul”).
 - Xenophobic references (“send a message back to Tokyo”).
 - Request for specific amount of punitive damages or excessive amount of punitive damages.
 - Suggestion that amount of punitive damages be based on defendant’s profits or revenues during trial or other arbitrary period.
 - Suggestion that punitive damages will go to charity
 - Assertion that plaintiff is gold digger.
- Move for a mistrial if a particular argument violates an in limine ruling or is too egregious to be cured.



Verdict Forms

- Careful thought should be given to structuring the verdict form.
- Consider whether to request separate findings for each prerequisite for punitive liability.
- Consider whether to ask for separate awards for different claims and for different members of the same corporate family.

Application of Any Cap

- Court should apply cap before entering judgment on verdict.
- Plaintiffs should preserve challenge to constitutionality of the cap if the issue is unresolved.
- Other possible open questions:
 - Does cap apply per defendant/per plaintiff/per case?
 - Are attorneys' fees treated as compensatory damages?

Post-verdict Motions—JNOV or Excessiveness

- In most jurisdictions, it is necessary to raise sufficiency challenges to the finding of punitive liability and excessiveness arguments in post-verdict motions in order to preserve them for appeal.
- Potential subjects:
 - Evidence is insufficient to support punitive liability.
 - Evidence of punitive liability is against the weight of the evidence.
 - Punitive damages excessive under common law and due process clause.
 - Jury was animated by passion and prejudice.

Post-verdict Motions—New Trial

- New-trial motions are not always necessary to file in order to preserve arguments for appeal (so long as they were preserved during trial).
- Often worth filing anyway if there is a chance of success.
- But be wary of filing motions that serve no purpose other than to give the judge an opportunity to shore up hastily-thought-out rulings.
- Potential subjects:
 - Errors in jury instructions
 - Improper admission of evidence
 - Evidence of dissimilar conduct
 - Evidence of harm to non-parties
 - Evidence of wealth

Due Process Challenge to Amount of Punitive Damages

- *BMW, State Farm, and Cooper Industries* discuss three guideposts for assessing whether an award of punitive damages is excessive
 - the degree of reprehensibility of the defendant's conduct;
 - the ratio of the punitive damages to the actual or potential harm to the plaintiff;
 - the disparity between the punitive award and the civil penalties applicable to comparable conduct.
- The court does not defer to the jury's assessment of punitive damages but conducts a *de novo* review.

Reprehensibility Guidepost

- Supreme Court has identified several non-exclusive factors for assessing the degree of reprehensibility of the defendant's conduct.
 - Whether the injury was physical or economic;
 - Whether the defendant recklessly disregarded health or safety;
 - Whether the target of the misconduct was financially vulnerable;
 - Whether the misconduct involved repeated actions or was an isolated incident;
 - Whether the conduct was malicious or merely accidental.

Ratio Guidepost

- Double-digit ratios presumptively unconstitutional.
- Ratios of 3:1 or less are frequently affirmed.
- “When compensatory damages are substantial, ... a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.”
- Trends:
 - Fewer high-ratio cases.
 - More 1:1 cases.
 - More cases involving very large compensatory damages awards.

Ratio Guidepost

- Lots of open questions regarding calculation of ratio:
 - When should potential harm be included in denominator?
 - Should attorneys' fees and prejudgment interest be included in denominator?
 - Should compensatory damages awarded for other claims be included in denominator?
 - How should ratio be calculated when there are multiple plaintiffs or defendants?

Comparable Fines Guidepost

- Must compare punitive damages to fine that realistically could be imposed for the same or similar conduct.
- Helpful to introduce evidence of actual fines imposed by relevant regulatory authority.
- Most courts have held that when the conduct is not subject to a fine, this guidepost can be ignored; some have held that it's an indication that a high punitive award is unjustified.



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