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## **Arguing Punitive Damages in an HMO Bad Faith Case**

**As with any HMO bad faith case, obtaining a favorable verdict that includes punitive damages will depend largely on the individual facts of each case.**

When the ingredients of the case allow you to argue punitive damages before a jury, then there are certain things to keep in mind. This article addresses key points to raise with the jury during closing argument to obtain a favorable punitive damage verdict in an HMO case.

### 1. THE PURPOSE OF PUNITIVE DAMAGES

Before even beginning the punitive phase of the trial, you will know that the jury has already found that the HMO's conduct was either malicious, oppressive, or fraudulent. While you know that the jury thinks the HMO's conduct is really bad, you do not 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 HMO in your case, but also to the industry as a whole. The starting point is to make sure you explain the purpose of punitive damages.

#### A. You Represent The Public

It is important that the jury understand that the purpose of punitive damages is 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. 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 HMO'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 HMO abuses. This includes the members of the jury themselves, their children, your client, you, the judge, etc. The jury must understand the importance of their role in the punitive phase, which is to protect the public in the area of health care delivery.

#### B. Punitive Damages Serve As An Example or Warning

Undoubtedly, the jury will have read countless newspaper articles or television shows discussing HMO horror stories and the efforts for HMO reform. It is important that the jury understand that they have the power to send a warning to the HMO industry as a whole 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:

"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, 113 S.Ct. 2711, 2721 -- 2722, 125 L.Ed.2d 366) (emphasis added).

The punitive damages that the jury awards will not only send a message to your client's HMO on how it should do business in the future, but it will also serve as an example or a warning to other competing HMO's 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, etc. Just as the warning must be prominently displayed to have any impact in each of these examples, so too should the jury's punitive verdict be substantial enough to be prominently displayed to the HMO industry.

### C. The Deterrent Effect of Punitive Damages

Similar to the purpose of punitive damages to serve as a warning, the jury must also realize that punitive damages should act as a deterrent against future misconduct. Again, the jury's verdict should not only deter future wrongdoing by the defendant, but also by the HMO industry as a whole. Another effective jury instruction to establish this point is the following:

"The object of [punitive] damages is to deter the health care service plan 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 Production Corp. v. Alliance Resources Corp. (1993) 509 U.S. 443, 459, 463, 113 S.Ct. 2711, 2721 -- 2722, 125 L.Ed.2d 366) (emphasis added).

Before discussing the amount of punitive damages that are appropriate in your case, the jury should be made aware that the object of their punitive verdict is to deter the defendant, and the HMO industry, from putting profit interests ahead of members' healthcare. In this regard, the deterrent effect is no different than a lengthy prison term serves as a deterrent to the public against committing crime.

## 2. THE AMOUNT OF PUNITIVE DAMAGES

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. While the guidelines for the assessment of punitive damages vary to some degree in each state, they are generally the following: 1.) the reprehensibility of the defendant's conduct, 2.) the amount of punitive damages which will have a deterrent effect on the defendant in light of the defendant's financial condition; and 3.) the punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff.

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 to the jury. But in addition to these general guidelines, there are other authorities that speak more specifically to 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 HMO. 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).

Comparisons between an wrongdoing individual with a net worth of \$50,000 and a wrongdoing HMO with a net worth of \$10 billion should also be demonstrated for the jury. For example, a punitive award of five percent of the individual's \$50,000 amounts to \$2,500. Yet, the same five percent award of the HMO's \$10 billion amounts to \$500 million.

Finally, defense counsel will undoubtedly attempt to avoid or minimize the punitive damage award by arguing that a large punitive damage award will result in higher health care costs for everyone. To prevent this argument in the first place, a jury instruction such as the following may be given:

"The [HMO defendant] must pay any punitive damage award from its assets or profits and cannot pass any punitive damage award on to its members in the form of increased premiums or charges" (Evidence Code §352; Accounting Statement 84-1, November 26, 1984, State of California Department of Insurance; Health and Safety Code §1342.5).

An instruction such as this should preclude, or at least diffuse, any argument by the defense that the punitive award will result in higher premiums for all. It will also alleviate any concerns the jury may have about the impact their award will have on future premiums.

### 3. CONCLUSION

Obtaining a favorable verdict that includes punitive damages against an HMO is no easy task. Hopefully, this article provides some insights that you can use during closing argument in an HMO bad faith case.