

Punitive Damages: What do I need to do, when and how do I prove it?

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

This article addresses general techniques that can be used in the closing argument of the punitive damage phase.

1. EXPLAIN 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 defendant's conduct was either malicious, oppressive, or fraudulent. While you know that the jury thinks the 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 defendant in your case, but also to the defendant's 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 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. 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 of protecting the public in the punitive phase.

B. Punitive Damages Serve As An Example or Warning

It is important that the jury understand that they have the power to send a warning to the defendant's 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:

"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 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. Just as these warning must be prominently displayed to have any impact in the examples given, so too should the jury's punitive verdict be substantial enough to be prominently displayed to the defendant's industry.

C. The Deterrent Effect of Punitive Damages

Similar to the purpose of punitive damages serving 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 defendant's industry as a whole. Another effective jury instruction to establish this point is the following:

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 faced with a defendant with a large net worth, comparisons between a wrongdoing individual, and the corporate defendant should be made. For example, if the defendant has a net worth of \$10 billion, that should be contrasted with an individual with a net worth of \$50,000 for the jury. A punitive award of five percent of the individual's \$50,000 amounts to \$2,500, which is not unreasonable. Yet, the same five percent award of the defendant's \$10 billion net worth amounts to \$500 million.

Finally, in an insurance bad faith case, 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 premiums or health care costs for everyone. To prevent this argument in the first place, a jury instruction such as the following may be given:

"The [insurance company 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 is no easy task. Hopefully, this article provides some insights that you can use during closing argument in the punitive damage phase.