Britany M. Engelman
ENGELMAN LAW, APC

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2019 Issue

Don't let phase two faze you

BEING PREPARED TO PRESENT FINANCIAL EVIDENCE REGARDING THE DEFENDANT IN THE PUNITIVE-DAMAGES PHASE

I recently found myself in an unusual position in trial. I was wrapping up the cross-examination of a corporate executive that had gone very well, and it was only then that I realized, "We actually have a good shot at getting punitive damages here. I think we have successfully shown malice, oppression, or fraud; and the jury seems very receptive."

One day later, the jury came back with a verdict in phase one. Sure enough, it found that both of the corporate bad actors had engaged in their conduct with malice, oppression or fraud. It was lunchtime, and phase two regarding valuing the punitive damages award was starting in 90 minutes. Here are all the things about phase two that I wish I had known more about before that moment.

Civil Code section 3294 is the body of law that allows for punitive damages in California. In general, punitive damages are always rooted in some form of moral culpability versus pure negligence. Examples of civil cases that may lend themselves to punitive damages awards are fraud, sexual assault; car accidents with an aggravating factor of intoxication; and torts in which malice is an element.

Plan early to discover evidence of financial condition

If early on in your case you feel that the potential for punitive damages is strong, you may want to consider starting the process of gathering evidence of the defendants' financial condition. If you propound financial discovery, the defendant will almost certainly seek a protective order from the court. The protective order will be granted under Civil Code section 3295, subdivision (a) unless the plaintiff prevails on her motion

See Engelman, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2019 Issue

under Civil Code section 3295, subdivision (c). In order to conduct formal financial/net worth discovery before trial, Civil Code section 3295, subdivision (c) requires plaintiffs to file a motion with the court before the defendant is required to respond to such discovery.

To prevail on a motion to conduct financial discovery, plaintiffs must prove there is a "substantial probability" that they will prevail on a punitive-damage claim. This may be a tough mark to hit early in litigation when most key issues are still in dispute. But it may be worth bringing the motion if you feel the facts of your case will likely warrant a punitive-damages award.

In deciding whether or not to bring a pre-trial motion to conduct financial discovery, you will have to weigh the pros and cons of revealing some of your trial strategy and argument to opposing counsel. It is possible that you may tip your hand in attempting to convince the court of the likelihood of a punitive-damage award, and instead, allow opposing counsel to prepare his or her witnesses for arguments that would not otherwise have been anticipated. So, the decision of whether or not to file a motion to conduct pre-trial financial discovery must be made on a case-specific basis.

When to file motions for financial discovery

Here are some specific factual examples of when you may want to consider filing a pretrial motion to conduct financial discovery under Civil Code section 3295, subdivision (c):

1. When there is a smoking-gun document that both sides are aware of that clearly establishes malice, oppression or fraud (e.g., a text message exchange between two corporate officers discussing ratification of another officer's sexual harassment because terminating him would be financially detrimental for the company);

2. When there is a legally obtained video or audio recording proving that a defendant intentionally destroyed incriminating evidence;

3. When a corporate defendant's officer falls on the sword at her deposition, and admits to conduct that is malicious, oppressive and/or fraudulent (e.g., CEO admits to falsifying documents regarding the stated reason for plaintiff's termination to cover up the true reason for termination which was her disdain for older workers).

If, after weighing the evidence, you decide not to file a pre-trial motion to conduct financial discovery, under Civil Code section 3295, subdivision (c), you can still subpoena documents regarding a defendant's financial net worth for delivery at trial. Examples of such documents would be financial statements; profit/loss statements; tax returns, etc. Be mindful, however, that the court may not be willing to order the defendant to produce such evidence at trial after the discovery cut-off date has passed. So be sure to subpoena these documents early.

Clear and convincing evidence

Although a motion for pre-trial financial discovery requires plaintiff to prove there is a "substantial probability" that she will prevail on a punitive damage claim, and although in order to recover compensatory damages in a civil case plaintiff must only prove that the way she presents the evidence is more likely right than wrong – in order to actually recover punitive damages, plaintiff must prove malice, oppression or fraud by "clear and convincing evidence."

Clear and convincing evidence is "evidence indicating that the thing to be proved is highly probable or reasonably certain. This is a greater burden than the preponderance of the evidence, the standard applied in most civil trials, but less than evidence beyond a reasonable doubt, the norm for criminal trials." (Black's Law Dictionary, 7th Edition). The reason for this elevated standard of proof is, again, because punitive damages are not actual damages suffered by the plaintiff. Rather, punitive damages are designed such that the plaintiff recovers damages "for the sake of example and by way of punishing the defendant." (Civil Code section 3294.) Alas, if the civil court system is going to punish a defendant, it is logical that an elevated burden of proof would be required in order to do so.

Distinction with federal practice

Unlike in state court, in federal court there is no requirement that a plaintiff prove up the defendant's financial condition or ability to pay punitive damages, so long as the claim arises out of federal law. However, if a state claim is at issue in federal court, the federal court must apply state law. This will likely mean that the requirement to prove financial condition will be upheld even in federal court where the underlying claim arises from state law. Government entities are immune from punitive damages under both federal and state law.

Officer, director or managing agent

Importantly, punitive damages are not typically awarded based on the conduct of just any person or employee. When the defendant is a company, the conduct that is being examined for purposes of punitive damages must be that of an officer, director or managing agent. While "officer" or "director" status is usually easy to discern from the person's job title and/or business card; "managing agent" is vague. CACI 3946 provides guidance in stating that an employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decision making such that his or her decisions ultimately determine corporate policy.

If your client has a claim for punitive damages, be sure to ask questions at the time of deposition that clearly establish that the bad actor was an officer, director or managing agent at the time of the incident. The main criteria for determining whether an employee is a "managing agent" is independent authority in corporate decision making. With that in mind, when you depose the employee whom you will seek to prove is a managing agent, you should consider asking questions such as the following:

See Engelman, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2019 Issue

• "What role did you play in drafting the company handbook/policies?"
• "Prior to terminating plaintiff, were you required to get approval for the decision from anyone else within the company?"
• "You'd agree that it was solely your decision to terminate the plaintiff three days after she told you she was pregnant?"

If the bad actor in your client's case is not an officer, director or managing agent, a corporate defendant/employer my still be liable for punitive damages if it can be proven by clear and convincing evidence that the employer ratified or authorized the wrongful conduct for which punitive damages are awarded. This, like most aspects of proving punitive damages will be very fact-specific.

Malice, oppression or fraud

Proving malice, oppression or fraud is a threshold consideration to getting a punitive damages award. Importantly, a plaintiff need only prove malice, oppression or fraud. Proving all three is not necessary. Civil Code section 3294, subdivision (c) defines "malice," "oppression" and "fraud" as follows:

"Malice" means:
• Conduct which is intended by the defendant to cause injury to the plaintiff, or
• Despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

"Oppression" means:
• Despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

"Fraud" means:
• An intentional misrepresentation, deceit, or concealment of a material fact known to the defendant,
• Made with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

Differences between bifurcated and single-phase trials

This article has examined "phase two" of a jury trial wherein "phase two" refers to the issue of proving up punitive damages, solely. However, it is possible that the trial will not be bifurcated as to punitive damages but go forward in one single phase.

CACI 3940 (individual defendant), CACI 3943/3945 (entity defendant), and CACI 3947 (both individual and entity) speak to punitive damages wherein the trial is not bifurcated.

CACI 3941, 3942, 3944 (individual defendant) and CACI 3946, 3948, 3949 (entity defendant) speak to punitive damages wherein the trial is bifurcated.

If the trial is bifurcated as to punitive damages, here is how the jury will typically be asked to render its decision on the verdict form:

Phase 1 verdict form

After making its award for compensatory damages, the jury is asked to answer questions about whether the defendant engaged in the conduct with malice, oppression or fraud. If yes, the jury may be asked to determine whether the bad actor was an officer, director or managing agent, and/or if the corporate defendant ratified the conduct.

Phase 2 verdict form

Once the jury determines "yes" to the questions listed above, the phase two verdict form will generally simply ask, "What amount of punitive damages do you award plaintiff?"

Defendants typically want to bifurcate trial-related matters whenever possible. Whether it's bifurcating liability from compensatory damages or compensatory damages from punitive damages, defendants overwhelmingly want to bifurcate. They tend to see this as a safeguard from the jury hearing about matters which could potentially bias it against the defendant or invoke sympathy for the plaintiff.

But when it comes to proving punitive damages, bifurcation can also be advantageous for the plaintiff insofar as if the jury gets upset enough, it has not one, but two chances to show that through its verdict – once in the compensatory award phase and again in the punitive damages award phase. Because once you make it to phase two in a bifurcated trial, you can feel pretty confident that the jury is going to award punitive damages; the question is just in what amount? Unlike in phase one, in phase two, the plaintiff's attorney is permitted to implore the jury to consider the wealth of the defendant and ask it to "send a message" strong enough to financially rattle the wealthy executives of the company. This can be a powerful tool.

And what if the sides disagree on bifurcation of punitive damages? A defendant is entitled to bifurcation if requested. (Civ. Code § 3205, subd. (d) ["The court shall, on application of any defendant" . . . .]

Limits on the amount of punitive damages?

While a plaintiff must specifically ask for punitive damages, Civil Code section 3295, subdivision (e) mandates that "no claim for exemplary damages shall state an amount or amounts." This means it is solely the jury's role to decide the amount of punitive damages.

Although there is no fixed standard for determining the amount of punitive damages, some states impose a cap on the amount of punitive damages that may be awarded. California is not one of those states. However, under the Due Process clause of the 14th Amendment, the award cannot be "grossly excessive or arbitrary."

In determining whether a punitive-damages award is grossly excessive or arbitrary, the court will usually look at the compensatory damages awarded to plaintiff to ensure that there is a reasonable relationship to same. The U.S. Supreme Court has held that "few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process." (*State Farm Mutual Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408.)

If the Court finds the punitive damages award to be excessive or arbitrary, it may reduce the award to a number that comports with a single digit multiplier of the compensatory damages award.

Informal discovery

When left with limited options, you can always "give it a Google." While

See Engelman, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2019 Issue

nothing is a true substitute for financial records, Google, and other internet sites contain a plethora of information; especially about publicly traded companies.

Companies love to brag about their own successes, so be sure to check out your defendant's own website for evidence of its financial condition. Such websites will likely contain bragging about recent victories, news story features, and successes. There are often links to interviews of the company's corporate executives wherein the financial successes of the company are touted.

Also, some defendants – like insurance companies – must file annual financial reports with their regulators. These reports are publicly available, and can provide a roadmap to the defendant's financial condition.

Have the right people in the courtroom

You can find all the best articles about the defendant's financial condition – but if you don't have the correct people included on your witness list and subpoenaed to trial to testify, you may not be able to lay a proper foundation to get the evidence considered by the jury. If you plan to introduce evidence from an interview given by a certain executive of the company, you must include that person on your witness list and provide a Notice to Appear to opposing counsel.

If you plan to explore the details of the balance sheet or profit/loss statement, be sure to request that the person who prepared it be present in the courtroom. Otherwise, you will have difficulty laying the foundation for the document and getting around the defense attorney's hearsay and other objections.

By way of illustration, if CEO Smith of ABC Company gave an interview to Fortune Magazine in the last six months about how the value of ABC Company has increased tenfold over the last three years to $1 billion dollars, and is projected to increase 20 fold within the next two years, this is great evidence of ABC's present financial condition. However, you cannot ask just any employee of ABC Company about this article and the statements that were made; you have to put CEO Smith on the stand and ask him about his own comments. Then you can confront him with his statements, and if he denies them, refresh his recollection with the article.

Parting words

Do not be afraid to ask for what you need in terms of financial information and documentation – the worst that can happen is the court disallows it and you are no worse off than you were before you asked.

Getting to phase two may not happen often – but when it does, you will want to be prepared.

Britany M. Engelman is the owner of Engelman Law, APC *in Beverly Hills, specializing in employment law and personal injury. She received her undergraduate degree from USC and her law degree from Southwestern Law School. Ms. Engelman is in her 14th year of practice and has been selected as a "Rising Star" by Super Lawyers from 2012 to 2019.*