THE ABSENCE OF A SHOWING OF A "COURSE OF CONDUCT" AS A DEFENSE TO PUNITIVE DAMAGES (MUST THE CARRIER BE A RECIVIDIST OR IS BEING A FIRST TIME OFFENDER SUFFICIENT?)

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I. INTRODUCTION

An increasingly popular defense tactic we have observed in bad faith insurance actions is the use of a motion for partial summary judgment to challenge the plaintiff's right to seek punitive damages. These motions, more often than not, are predicated on the legal theory that punitive damages are unavailable unless a corporate policy to commit bad faith acts is demonstrated. More specifically, the defense contends that the plaintiff has not produced sufficient evidence of the insurer's handling of other similar claims, and therefore is unable to show that the bad faith acts committed against the insureds are the product of an established company policy. The defendant insurer then

goes on to argue that absent such evidence of "company policy" or "course of conduct" punitive damages are barred.

These defense arguments misstate California law in two respects. First, it is not, nor has it ever been, the law in California that punitive damages can be awarded only in those instances where a company policy to commit bad faith acts is demonstrated. Second, it is not necessary for the plaintiff to produce evidence of other claims in order to establish an inference that the mistreatment of the plaintiff in the case at bar was pursuant to a corporate policy. Whether the acts complained of were consistent with a company policy is a factor relevant in determining the quantum of punitive damages, but it is not necessary to demonstrate a company policy in order to be eligible for punitive damages. This is an extremely important distinction sometimes missed by trial judges.

It has been our observation and experience that by stitching together case quotations taken out of context, defense counsel have been able to present arguments which, on the surface, can create the impression that punitive damages are unavailable unless evidence of the mistreatment of other claimants pursuant to a company-wide policy is presented. Therefore, a thorough analysis and understanding of the statutory and case law in this area is warranted.

II. PUNITIVE DAMAGES ARE BASED ON EITHER AN INTENT TO INJURE OR A "CONSCIOUS DISREGARD" OF THE RIGHTS OF OTHERS.

A plaintiff's right to seek punitive damages is established by Civil Code section 3294 which states, in pertinent part, "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in

addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." The statute defines "oppression" as "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." "Fraud" is defined as an "intentional misrepresentation, deceit or concealment of a material fact" made with the intent to cause injury. "Malice" is defined as either "conduct which is intended by the defendant to cause or injury" or "despicable conduct carried on" with a "willful and conscious disregard" for the rights of others.

In sum, Civil Code section 3294 authorizes punitive damages under two general fact patterns: (1) where the defendant has committed an act with the intent to harm the plaintiff; or (2) where the defendant has acted with "conscious disregard" for the rights of others. See Hughes v. Blue Cross of Northern California, (1989) 215 Cal.App.3d 832, 846, 263 Cal.Rptr. 850, 858. Importantly for the purposes of this article, no where does Civil Code section 3294 require that a defendant (corporate or otherwise) be guilty of a series of acts against several victims before punitive damages become appropriate. On the contrary, punitive damages against an insurer may be established by either demonstrating that the insurer and its agents intended to harm the plaintiff, or that they acted in "conscious disregard" of the plaintiff's rights. While evidence of a corporate policy may certainly help prove either of these two elements, such evidence is certainly not required nor is it the only way conduct justifying punitive damages can be established. Such conduct (ie. corporate policy) can also be relevant on other issues which are beyond the scope of this article such as the requirement of authorization, ratification or managerial capacity.

A. Intentional Conduct.

Evidence that an insurer defendant "act[ed] with the intent to vex, injure, or annoy" the plaintiff is sufficient to support an award of punitive damages. Neal v. Farmers Ins. Exchange, (1978) 21 Cal.3d 910, 922, 148 Cal.Rptr. 389, 395. As defined by Civil Code section 3294, conduct taken with the intent to harm the plaintiff constitutes "malice", and "fraud" is an "intentional" misrepresentation by the defendant made with the "intention" to cause the plaintiff harm.

In the bad faith context, it is important to keep in mind the distinction between "bad faith" (technically the breach of the implied covenant of good faith and fair dealing) and punitive damages and that the defendant's intent to commit the acts constituting bad faith is not a sufficient "intent" upon which to base punitive damages. A breach of the implied covenant of good faith and fair dealing is, ultimately, a breach of contract, and "a simple breach of contract, no matter how willful and hence tortious, is not ground for punitive damages." Tomaselli v. Transamerica Ins. Co., (1994) 25 Cal.App.4th 1269, 1286, 31 Cal.Rptr.2d 433, 443. The intent required to justify punitive damages for acts of bad faith is the intent not merely to breach the insurance contract, but to harm the plaintiff in so doing. In reality, however, almost any denial of benefits will cause harm to the insured, therefore, the same evidence will normally be subject to two interpretations, one supporting punitive damages and one not.

B. Acts Taken With "Conscious Disregard".

As noted by the appellate courts, "[p]unitive damages for failure to pay or properly administer an insurance claim are ordinarily . . . based on 'malice' or

'oppression', rather than on the third possible ground for the award, 'fraud'". Tomaselli, *supra*, 25 Cal.App.4th at 1286, 31 Cal.Rptr.2d at 443. In the bulk of the reported cases concerning insurance bad faith issues, the plaintiff relied on evidence that the insurer acted with a "conscious disregard" for his or her rights. "Conscious disregard" has been characterized as actions which demonstrate an "extreme indifference to the plaintiff's rights, a level which decent citizens should not have to tolerate." Flyer's Body Shop Profit Sharing Plan v. Ticor Title Ins. Co., (1986) 185 Cal.App.3d 1149, 1154, 230 Cal.Rptr. 276, 278. "In order to justify an award of punitive damages on this basis, the plaintiff must establish that the defendant was aware of the probable dangerous consequences of his conduct, and that he willfully and deliberately failed to avoid those consequences." Taylor v. Superior Ct., (1979) 24 Cal.3d 890, 895-896, 157 Cal.Rptr. 693, 696. Though the above accurately reflects the reported cases, the seasoned practitioner should not ignore fraud since a misrepresentation, or a deceit, or a concealment is not unheard of in your average claims file. Also, bear in mind that in some cases intent may be simpler to prove than "despicable" conduct, and more understandable to the average juror.

One avenue to establish that the insurer acted with a conscious disregard of the insured's rights (although not the only one) is to show that the bad faith actions at issue were "firmly grounded in established company policy". Neal, *supra*, 21 Cal.3d at 923, 148 Cal.Rptr. at 396. One method of demonstrating a company policy is to provide evidence of other claims where similar bad faith tactics occurred. For example, in Moore v. American United Life Ins. Co., (1984) 150 Cal.App.3d 610, 197 Cal.Rptr. 878, the

plaintiff introduced evidence of how two other similar claimants were treated in order to establish that the defendant had a policy of using deceptive tactics. It should be noted that these line of cases spawned the discovery rights as reflected in the leading case of Colonial Life & Acc. v. Superior Court, (1982) 31 Cal.3d 785, 183 Cal.Rptr. 810.

It is not necessary, however, to provide evidence of other claims in order to demonstrate a company policy. On the contrary, a jury is entitled to infer that an objectionable company policy exists merely from the evidence presented in regard to the case before it. For example, in Neal, *supra*, the Supreme Court noted that portions of the Farmers Insurance claims manual created an inference that the bad faith acts at issue were "firmly grounded in established company policy", even though (as the dissent pointed out) there was no evidence that the adjustors at issue relied on the cited passages from the claims manual as justification for their conduct. *Cf.* 21 Cal.3d at 923, 148 Cal.Rptr. at 396, *with* 21 Cal.3d at 936, 148 Cal.Rptr. at 404 (Richardson, dissenting). Similarly, in Hughes, *supra*, the appellate court concluded that "the jury could reasonably infer" that the inadequate claims practices demonstrated in the case before it "were all rooted in established company practice" even though no evidence pertaining to any other claims was presented. 215 Cal.App.3d at 847, 263 Cal.Rptr. at 858. The appellate court in Campbell v. Cal-Gard Surety Services, Inc., (1998), 62 Cal.App.4th 563, 571, 73 Cal.Rptr.2d 64, 68, likewise concluded that the jury could reasonably infer a company practice of not paying claims from the defendant's mishandling of the plaintiff's claim.

In sum, let us reemphasize that it is not necessary to proffer evidence of company

policy to demonstrate that an insurer has acted with a "conscious disregard" of the plaintiff's rights. Furthermore, a jury can infer the existence of an objectionable "company policy" solely from the evidence of the handling of the single claim at issue; it is not necessary to proffer evidence relating to the administration of other claims. Ultimately, the existence of a company policy in regard to the defendant's bad faith tactics is primarily relevant in regard to the quantum of punitive damages, not the plaintiff's eligibility for them. As the United States Supreme Court has stated, "[E]vidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure defendant's disrespect for the law. [Citation.] Our holdings that a recidivist may be punished more severely than a first time offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance." BMW v. Gore, (1996) 517 U.S. 559, 576-577, 116 S.Ct. 1589, 1599-1600.

III. PUNCTURING THE DEFENSE BUBBLE

The clear law in this area, however, has not dissuaded defense firms from moving to strike punitive damages allegations under the false reasoning that no "corporate policy" has been established. In our experience, these arguments have been founded on taking quotations from a few decisions, notably Tomaselli v. Transamerica Ins. Co., *supra*, and Mock v. Michigan Millers Mut. Ins. Co., (1992) 4 Cal.App.4th 306, 5 Cal.Rptr.2d 594, and then presenting these quotations to the court in a misleading fashion and without the appropriate context. These two decisions, however, when fully

analyzed, actually support the proposition that bad faith acts occurring within a single claim can support a punitive damages award even where there is no evidence of an objectionable company policy.

For example, after its review of the law governing bad faith punitive damage claims, the Tomaselli court observed, "[W]e note there was no showing that the inadequacy of appellant's claims administration was part of a course of conduct. No evidence was introduced as to appellant's handling of other claims. This is not a case, therefore, in which punitive damages are warranted to punish for the maintenance of evil policies which damage the public in general." 25 Cal.App.4th at 1288, 31 Cal.Rptr.2d at 445. Following that conclusion, the court inquired further to determine whether the "specific practices" at issue in the plaintiff's claim "[add] up to malice, oppression or despicable conduct." Id. Even though the Tomaselli court did not find conduct worthy of punitive damages in the matter before it, the fact that it analyzed the specific conduct of the defendant at all establishes that specific instances of bad faith conduct can support a punitive damage award, even absent evidence of a company policy.

Similarly, the appellate court in Mock found "no evidence of an established insurer practice of ignoring an insured's claim or subsequent inquiries about it." 4 Cal.App.4th at 330, 5 Cal.Rptr.2d at 608. After concluding that no objectionable company policy was established, the appellate court concluded that whether the specific conduct at issue justified the imposition of punitive damages depended on "what reasonable inferences the jury draws from its review of all the evidence." Id. Although it ultimately reversed and remanded the punitive damages issue due to improper jury

instructions, the Mock expressly declined the defendant's invitation that it rule that punitive damages were unavailable as a matter of law. See 4 Cal.App.4th at 338, at n.36, 5 Cal.Rptr.2d at 614.

Therefore, both the Tomaselli and Mock decisions, despite declining to approve the punitive damages awards before them, stand for the proposition that punitive damages can be based on acts of specific conduct even without evidence of a company policy underlying the bad faith acts. These holdings are consistent with the language of Civil Code Section 3294, which does not call for a course of conduct as a prerequisite to punitive damages We have found only one instance where a appellate court has squarely addressed the contention that a company "course of conduct" is a necessary prerequisite for punitive damages. That decision rejected the attempt to limit punitive damages to instances where a company policy was shown, although the decision was later reversed on other grounds. See Cates Construction, Inc. v. Talbot Partners, (1997) 53 Cal.App.4th 1420, 62 Cal.Rptr.2d 548, *reversed on other grounds by* 21 Cal.4th 28, 86 Cal.Rptr.2d 855. Citing the Tomaselli decision, the defendant argued that evidence of "established policies or practices of bad faith claims handling" were necessary to warrant the imposition of punitive damages. 62 Cal.Rptr.2d at 566. The Second District rejected this argument, correctly pointing out that "[e]vidence of policies and practices is often cited by appellate courts reviewing punitive damages in insurance bad faith cases but it is not required." Id. (citations omitted).[1]

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[1] The California Supreme Court later reversed this decision on the grounds that the bad faith breach of a surety construction bond could not lead to tort or punitive damages; therefore, the Supreme Court never got to the

IV. THE LESSONS TO BE LEARNED

It is not the intent of this article to suggest that "course of conduct" evidence be ignored or that its presence not be actively sought through aggressive discovery. However, certain cases may not support such effort or carriers (much to your shock no doubt) may not be forthcoming with "the goods" ie. the material and information suppressed in their files. You can also effectively use the fact that most carriers will affirm their conduct as reflecting conduct that they would repeat again and again as part of their defense that their actions were not in bad faith in the first instance.

As we learned in the popular book "The Rainmaker", even the novice lawyer can get a spectacular result when an insurance company denies thousands of dollars in benefits directly resulting in the death of the insured and, in doing so, falsifies evidence and records and fraudulently denies benefits and calls the widow "stupid, stupid, stupid" in writing when denying the claim. But what about the challenging cases calling for real lawyering when the benefits and compensatory damages are small and the case appears to lack strong emotional impact? How do you point out to jurors that it is the "small cheat" multiplied a thousand times which is the true widespread cancer in the industry?

As this article points out a single case can create an inference of company policy. To prevent the jury from making such an inference, the industry has made a concentrated effort to rely on the judiciary for protection by misstating the law and thereby raising the bar.

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issue whether there was sufficient evidence to support the punitive damages awarded.

You can counteract these approaches with a clear understanding of the law and to additionally master the methods available to meet even a narrow definition of the law. In addition, through the creative use of the company claims manuals, the underlying claims file and adjustor testimony you can knock down the career criminal masquerading as the first time offender.

V. CONCLUSION

What we have dealt with here is the tip of the insurance defense iceberg. There are a number of motions you will have to endure including motions, for example, surrounding the higher burden of proof for punitive damages or the attack that the conduct was neither authorized, ratified and/or committed by a renegade low level employee.

There are two things as insurance carrier fears the most: one, a strong insured willing to fight and in the hands of a competent consumer attorney and, most importantly, a jury of their peers, which explains why they fight so hard to win their cases on motions, and avoid hearings on the merits.