Pa. Supreme Court Evaluates Constitutional Parameters of a Jury's Punitive Damage Award

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This past July, the Pennsylvania Supreme Court evaluated the punitive damages exposure in insurance bad faith cases in the wake of its decision in *Bert v. Turk*, 298 A.3d 44 (Pa. 2023). The main question the court in *Bert* addressed was whether the appropriate ratio of punitive to compensatory damages in a case with multiple joint tortfeasor defendants should be calculated on a per judgment basis or a per defendant basis. It also reviewed whether the Pennsylvania Superior Court had erred in considering harm averted to the plaintiff, as opposed to actual harm suffered.

Insurers are not likely to be exposed to joint tortfeasor liability under the bad faith statute, 42 Pa.C.S. Section 8371, as the liability issue centers on an insurer's actions taken in relation to its insured (*Mohney v. American General Life Insurance*, 116 A.3d 1123, 1131 (Pa. 2015)). While the main question in *Bert* is not germane to the evaluation of exposure to punitive damages in bad faith cases, the opinion is nevertheless important to the insurance industry because it reviewed well-established constitutional principles and U.S. Supreme Court precedent against the backdrop of Pennsylvania jurisprudence concerning punitive damages. Moreover, the opinion in *Bert* creates a potential new argument that harm incurred and harm averted to a plaintiff could be presented in bad faith claims.

Punitive damages are available under Section 8371, along with interest, costs and fees. While it is well known that an insured has a clear and convincing standard of proving bad faith in order to recover such damages, it is lesser recognized that an insured does not have to prove outrageous conduct or evil motive to prove entitlement to punitive damages (*Rancosky v. Washington National Insurance*, 170 A.3d 364, 377 (Pa. 2017)). Clear and convincing evidence of a reckless disregard of a lack of reasonable basis is all that is needed, though each element of damages is discretionary. The court, or a jury in federal court, has discretion in awarding damages under the bad faith statute such that an insured might recover one or more of the statutory damages—interest, costs and fees, and punitive damages (*Grossi v. Travelers Personal Insurance*, 79 A.3d 1141, 1156 (2013)).

The facts presented to the Pennsylvania Supreme Court in *Bert* involved an insurance broker who attempted to surreptitiously take over a competing broker from the inside by

using employees who committed theft or misappropriation of trade secrets and engaged in unfair competition. Importantly, the burden of proving outrageous conduct under the Restatement (Second) of Torts, Section 908(2) had been met and the jury properly considered the extent of the harm that had been caused and intended to have been caused to the plaintiff, along with harm that had been averted. The Pennsylvania Supreme Court recognized in *Bert* that the U.S. Supreme Court precedent controls the analysis of whether a punitive damage award passes constitutional muster.

While the *State Farm* court also observed that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process," *State Farm*, 538 U.S. at 425, 123 S.Ct. 1513, again the high court did not explain what it meant by "a significant degree." Nor did it say that if a ratio exceeds single digits beyond that nebulous degree, it is unconstitutional. Rather, we view the observation to mean at most that such a ratio requires a closer examination of the justification for the punitive damages award. Borrowing a phrase from another context, a court should "raise a suspicious judicial eyebrow" at a punitive damages award that does not bear a reasonable relationship to the harm. At bottom, a punitive damages award that exceeds a single-digit ratio to a "significant degree" may trigger judicial suspicion, not a presumption of unconstitutionality.

The court in *Bert* ultimately approved of punitive to compensatory damage ratios ranging from 1.8 to 1 and 6 to 1 against the defendant broker, its parent companies and employee, siding with the plaintiff that the ratios should use the punitive damages assessed against each defendant as the numerator and the total compensatory award for each jointly and severally liable defendant as the denominator. With approval, the court cited other Pennsylvania bad faith cases where courts had used discretion in calculating punitive damage awards. For example, in *Hollock v. Erie Insurance Exchange*, 842 A.2d 409, 419 (Pa. Super. 2004), appeal granted, motion denied by 893 A.2d 66 (Pa. 2005), appeal dismissed, 903 A.2d 1185 (Pa. 2006), the trial court used a multiplier of 10 to award punitive damages against Erie Insurance in an underinsured motorist case. In *Grossi v. Travelers Personal Insurance*, 79 A.3d 1141 (Pa. Super. 2013), also an underinsured motorist claim, the court used a ratio slightly higher than five to one. Also of note is *Davis v. Fidelity National Title Insurance*, 2015 WL 7356286 (Pa. Super. March 18, 2015), which involved delay of a title insurance claim and a multiplier of four that was deemed constitutionally permissible.

Should the insurance industry discard its single digit ratio evaluation of potential punitive damages in bad faith actions? Certainly not! The intended harm that was used to support the punitive damages ratio in *Bert* is not a factor that will likely present itself in Section 8371 lawsuits. Most insurance bad faith cases involve a delay or a misinterpretation of contract language. Specific intent to cause harm would be highly unusual given that insurance adjusters and managers have arms-length relationships with insureds and are typically attempting to handle claims to the best of their ability, using their experience, company training and resources.

Interest, attorney fees and costs should fully compensate insureds for unpaid claims, and thus "harm thwarted" in an insurance bad faith case should not be an issue in assessing

punitive damages. The Superior Court's analysis as stated in *Hollock* continues to control: Under Pennsylvania law the 'size of a punitive damages award must be reasonably related to the state's interest in punishing and deterring the particular behavior of the defendant and not the product of arbitrariness or unfettered discretion.' *Shiner v. Moriarty*, 706 A.2d 1228, 1241 (Pa. Super. 1998). In accordance with this limitation, 'the standard under which punitive damages are measured in Pennsylvania requires analysis of the following factors: the character of the act; the nature and extent of the harm; and the wealth of the defendant.' See *Pioneer Commercial Funding v. American Financial Mortgage*, 797 A.2d 269, 290 (Pa. Super. 2002). See also, *Hollock v. Erie Insurance Exchange*, 842 A.2d 409, 419 (Pa. Super. 2004).

The *Bert* opinion will likely be touted for allegedly discarding the single digit ratio of punitive to compensatory damages for assessing exposure to punitive damages in a Section 8371 cause of action. However, the single digit ratio remains the customary standard, keeping in mind that a punitive damages award should bear a reasonable relationship to the harm, and the "harm averted" discussed in *Bert* is not likely relevant to Section 8371 exposure because the statutory damages are designed to fully compensate an insured for delaying or wrongfully denying a claim.

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