

Defending Insurers From Punitive Damages Claims

BY FORREST S. LATTA

INTRODUCTION

If asked to name the most dangerous lawsuit to defend—the one with the highest risk of punitive damages in the largest average amount—one might guess product liability or medical malpractice or perhaps another sort of serious personal injury. The true answer, however, is a surprise. The Rand Corporation, in a study completed in late 1997, found that the most consistently dangerous case, as measured by both the size and frequency of punitive damages, is the first-party insurance tort claim involving sales fraud or unpaid insurance benefits.

This *should* come as *no* surprise. For years, the plaintiffs' bar has been teaching new arguments for portraying insurers in the worst possible light, as well as new techniques for pushing the jury's hot buttons. Some enterprising plaintiffs' lawyers even have spun their message into novels and movies, while others entice law office visitors with settlement checks framed on the wall like big game hunters displaying stuffed heads of their victims.

Of course, it hasn't always been this way. A dozen years ago, first-party insurance tort claims were defended like contract actions. The defense consisted of the company's employees who testified about what they did. If the employees were called by the plaintiff as "adverse witnesses" (a now common tactic), the company was left to appear before the jury as if it had *little or no defense*, which is precisely what the plaintiff's attorney wanted (the plaintiff also wanted to make the jury deliberate as soon as possible after he or she rested). As these tactics evolved and spread among plaintiffs' attorneys, defendants were slow to catch on and often played right into their hands.

Fortunately, many clients and defense counsel are developing a better understanding of the preconceptions and psychological motivations that shape a jury's decision in punitive damages claims

against insurance companies. We recognize that while jurors arrive at the courthouse with an instinctive knowledge and understanding of doctors or product manufacturers, they rarely understand and appreciate how insurance works. They don't know why there are people such as "underwriters" who rescind policies, or "claim adjusters" who deny claims. In fact, many jurors have certain preconceptions and expectations formed by bad experiences with their own insurer, or perhaps they have read newspaper reports or seen a movie in which an insurance company is the heavy. It is no wonder that insurance companies enter the trial with almost a presumption of guilt and a depressingly low juror popularity rating.

It seems obvious that insurance companies can no longer risk treating a first-party insurance tort claim involving punitive damages like a simple contract action—sufficing with a minimalist approach and hiding defensively behind the simplistic view that the plaintiff *does* have the burden of proof. At its heart, an insurance tort case is essentially a *product liability* case. About the only difference is that the product is made of paper. It is mass-produced and sold, and the plaintiff alleges that it malfunctioned by not paying a claim, or it is defectively designed. As with a mechanical product, the jury needs assistance in developing at least some understanding of the context of the claim, along with an appreciation for insurance companies and their products. Otherwise, the defendant may be in serious trouble.

For the insurer on trial, expert witnesses are needed to put the jury in a classroom mode. It is no longer enough for the insurer to simply address technical legal issues, such as emphasizing that the plaintiff has the burden of proof, and hope for the best. Times have changed and the stakes are too high. Insurance is still a wonderful old product that can be proudly defended. It continues to serve an essential function in our society. Insurance companies do not deserve the hammering they have had to endure from plaintiffs' counsel.

PUNITIVE DAMAGES EXPLOSION

The growth of punitive damages "shock verdicts" cannot be easily explained. There probably is some truth to suggestions that it is partly due to changing social values: a growing belief among Americans that they are "entitled," or deserve revenge or "payback"; fading notions of personal responsibility; and simple greed. There is also a snowball effect, that encourages the filing of more and more punitive claims.

No one ever said insurance companies were popular, but it appears that the typical juror's attitude toward them is very bad.



Forrest S. Latta is a shareholder in the Mobile, Alabama law firm of Pierce, Ledyard, Latta & Wasden, P.C. In his practice, he concentrates on business, product liability, insurance, and appellate litigation. Mr. Latta is a member of the Product Liability Advisory Council, serves on the Board of Directors of the Alabama Defense Lawyers Association, and is vice-chair of the Life, Health, and Disability Committee of the Defense Research Institute.

Punitive damage awards against insurance companies tend to be disproportionately large, compared to the compensatory award. While California, Texas, and Alabama have long had a reputation for large punitive awards, the trend is national. A recent DRI study observed significant growth in punitive awards in five of the largest metropolitan areas (New York, Chicago, Kansas City, Denver, and Houston) since 1990 which "cannot be explained merely by inflation." Williams, "Another Look at Punitives: A Survey of 1990s Punitive Damages Verdicts," May 1995 *For The Defense* 26.

The danger of first party insurance tort claims was underscored recently in a study prepared by the Rand Corporation. *Punitive Damages in Financial Injury Jury Verdicts*, by Erik Moller, Nicholas M. Pace, and Stephen J. Carroll (Institute for Civil Justice, Santa Monica; call [310] 451-7002). The study surveyed a database of jury verdicts in the states of California, New York, and Alabama, as well as the urban centers of St. Louis, Cook County (Chicago), and Harris County (Houston) during a recent ten-year period. Those jurisdictions, according to Rand, encompassed approximately a quarter of the U.S. population in 1995. They also are reputed to be among the most hostile to corporate defendants.

The Rand study found that most punitive damages did not go to plaintiffs who were victims of serious injury or death. Instead, more than half were in "financial injury" cases, which arise from contractual or consumer relationships. Moreover, the amount of punitive damages in financial cases *doubled in less than ten years*. Insurance-related claims stood out: they had the highest ratio of punitive damages to compensatory damages.

The Rand study found that, in the jurisdictions surveyed, punitive damages were awarded in one-seventh of all financial injury cases; in California the rate was one-fifth. The average of punitive awards surveyed (excluding those in Alabama) varied from \$2.1 million to \$7.9 million. The mean award for all jurisdictions except Alabama was \$5.2 million. In Rand's estimate, punitive damages stemming from alleged financial injury amounted to \$2.3 billion in 1990-1994, nearly twice the total for the previous five years.

In Alabama, Rand found financial injury verdicts accounted for over 80 percent of all damages awarded during 1992-1997. The mean award was well above \$500,000, and the ratio of punitive to compensatory damages was over 5-to-1. "These data," according to Rand, "suggest that in Alabama punitive damages are awarded more often and are higher in any given case relative to compensatory damages than in the other jurisdictions in our database."

These findings have important implications. For instance, the Rand study noted the increase in punitive damages has a direct bearing on the "mix" of cases being filed in jurisdictions where financial injury claims are so enriching. In other words, plaintiffs and their attorneys mimic the big winners by filing even *more* financial injury claims.

This trend also produces a shadow effect upon settlements involving defendants in similar cases. The Rand study suggested that cautious business managers tend to assess litigation risks by focusing upon the highest ten percent of punitive awards, which Rand pegged as \$6.2 million overall. This fixation on worst-case scenarios, Rand observed, causes managers "to go to great lengths to avoid exposing their companies to very large financial losses." The result is bigger settlement pay-outs and, more importantly, an overly cautious approach to business activity (or non-activity) that stifles creativity by being too concerned about risk.

Where does this leave the defense lawyer and client who to-

gether face the daunting task of defending such cases? It is no assignment for either the overzealous or fainthearted. While the plaintiff's attorney must know that the defendant is prepared to go to trial, the "cowboy" mentality can be as dangerous, if not more so, than the cautious approach. The hard task for the defense lawyer is to build a case that gives the client a reasonable set of options—either to try the case with a decent chance of winning, or to settle for an acceptable sum. Such results can be achieved only through an aggressive, creative approach that considers all of the psychological factors that motivate jurors and, more importantly, includes a strategy for addressing them.

PUNITIVE DAMAGES PSYCHOLOGY

It is possible to make some general observations about the psychological battleground on which insurance tort actions, including those involving punitive claims, are fought. Here are some basic points for defense counsel to bear in mind.

Excessive reliance upon technical defenses. Cases are decided on a more instinctive level than we wish to acknowledge. The traditional lawyer approach places too much stock in technical defenses which the jury readily discounts. For instance, he or she may assign too much importance to the plaintiff's obligation to prove the claim; we raise this burden of proof as a shield as if we are the accused in a criminal trial. Jurors have an amazing ability to rationalize facts to fit the result they want to reach. They will ignore key documents that defense counsel would consider conclusive of a particular issue. It is important, therefore, to understand the jurors' inherent instincts and expectations and develop evidence to address them rather than rely upon narrow defenses that may be seen by the jury as overly technical or mechanical.

Be open and forthcoming with the jury. The jury, after hearing the plaintiff's story, will *expect* an explanation from you. Do more than is expected. Enter the trial with the goal of out-proving the plaintiff and helping the jury understand the context of the transaction. Tell the jury you want them to hear the plaintiff's story; you have reconstructed the transaction; you want them to be comfortable with the defendant's actions; you will show them everything—warts and all—what was done right and what was done wrong. The jury will be satisfied that the defendant's actions were without any malice, and that ultimately the defendant did what was necessary and right. If you, the defense counsel, are too afraid to be honest about your strengths and weaknesses, you need to settle. Let the jury know it can look to you for clear and honest explanations.

Battle of credibility. Almost every trial boils down to the question of which side the jury will believe and, thus, which side wins. An insurance company begins at a severe disadvantage. Jurors often are suspicious of big business—especially insurance companies—and they are susceptible to believing that some economic motive prompted the misconduct. To win, the defendant must be viewed by the jury as the more reliable source of truth. Defense counsel and every witness must be straightforward, without becoming defensive or glossing over the facts. If there are some ugly facts, they can be stated in a candid and non-defensive manner. Most jurors are offended if they perceive the insurer as a dissembler. The coverup is worse than the crime. By the same token, those same jurors are the most forgiving of a defendant who is honest about what went right and what went wrong.

The worthy plaintiff. The risk of punitive damages increases

when the plaintiff demonstrates character and values that are admired by the jury, coupled with evidence of disappointed expectations and heavy reliance upon the insurance product and the agent who sold it. Defense counsel must attempt to develop ways to help the jury see that the plaintiff should not receive a windfall award, without necessarily "attacking" the plaintiff.

The defensive insurer. The advice of leading communications consultants to companies in crisis situations also works in the courtroom: be positive in presenting your arguments and evidence. Speaking in negative terms, such as "we deny we committed any fraud or bad faith," is reminiscent of "I am not a crook." Such negatives actually trigger the opposite reaction from what you intended: you are a crook. When witnesses are on the defensive they look bad and are certainly not persuasive. Defense witnesses must demonstrate confidence, competence, and fairness in order to project a sense of worthiness. The facts and arguments should be expressed in positive terms, emphasizing what the company did right, using proven "good" words, and avoiding negative characterizations. Watch the recent movie, *The Rainmaker*, for a reminder of the danger of arrogance, condescension, pomposity, and self-importance.

The expectation gap. Punitive damages grow in the gap between certain juror expectations (nurtured by plaintiff's counsel) about what the defendant should have done and evidence about what actually occurred. This gap may result in frustration on the part of some jurors, and a desire to "punish" the defendant for not satisfying such expectations. By and large, institutional defendants such as insurance companies are held to a *standard of perfection* in dealing with consumers. The defendant must recognize this ideal, and develop evidence, arguments, and a method of presentation to deal with the gap between expectations and reality.

A dark business. Most jurors know very little about the insurance business and how it operates. They think if someone pays the required premiums, the company should pay any claim that person may have. They think of contracts as a bunch of fine print, designed to deprive worthy injured parties of their due. They don't believe the insurer should be allowed to rescind a policy, or deny a claim, especially when the coverage question is close. They easily develop the dark notion that the insurer's objective, as often as possible, is to avoid payment of benefits that the plaintiff purchased with hard-earned money. The defendant's lawyer must develop ways to educate the jury, to help it understand in positive terms how insurance works and how an insurance company operates. The lawyer must explain, in simple terms, the positive role of the company's employees who were involved and why it was necessary and right for the company to take the action it did. Turn on the light, so the jury can see what really happened.

Appealing to ideals. The plaintiff offers the jury a simple, easy-to-understand ideal of doing good and punishing greedy insurance companies. The ideal of righting a wrong is far more attractive and motivating than helping an out-of-state insurance company

avoid a judgment. While the plaintiff is appealing to the jury's lofty instincts, the defendant often focuses only upon the narrow technical issue of liability. This is not a productive approach.

The defense must seek to counterbalance the plaintiff's appeal by expressing issues in terms that are larger than simply saving money on the claim. This requires searching for a sub-theme that appeals to a nobler purpose. For instance, the defendant might appeal to the ideals of personal responsibility (duty to read), the sanctity of a promise (contract), or the right of a contracting party to know the truth (false statements on applications for insurance). Describe the risks of making hard decisions, as when a claim is denied. People of good will, such as insurance agents and insureds, can disagree, and well-meaning people can make mistakes and erroneous decisions. See Houser, "Good Faith as a Matter of Law: The Insurance Company's Right to be Wrong," 27 Tort & Ins.L.J. 665 (1992). Another approach is to explain and convince the jury of its own vested interest in the risk-pooling concept and how it affects everyone.

An emotional powder keg. To inflame a jury and steer it to a particular position, it is first essential to create an emotionally charged atmosphere. A good plaintiff's lawyer will search for "flash-points" to antagonize defense counsel and the insurer into an overreaction whenever possible. This begins during the pre-trial discovery stage and carries over into trial. The purpose is to trigger non-verbal cues with the judge and jury that defense counsel (and his or her client) are defensive and afraid. These little brush fires may be about certain factual issues, or evidence, or discovery battles. A trial with several defendants, including a few insurance carriers, is an especially threatening situation. In these multi-party cases, defense counsel must be on guard against the plaintiff's "divide and conquer" approach that is detrimental to all defendants.

EARLY WARNING SIGNS

Knowing some of the factors that figure into the psychological battle in a tort insurance case involving financial injury, defense counsel can more easily understand certain scenarios that leave the insurance company at great risk—even when there appears to be nothing legally or technically wrong with the company's position! Here are some early warning signs that should alert counsel to possible problems; if not recognized and dealt with, these problems could lead to an award of punitive damages.

The insurance carrier's effort to avoid payment seems overly aggressive, intransigent, or out of proportion to the amount of the claim involved.

A bad agent history. Be aware of any complaints, reprimands, or licensing problems the agent or broker may have had in this or other states. Look for a history of unethical conduct, or any irregularities at the point when he or she sold the policy to the plaintiff.

An insurer's chain of errors and unexplainable conduct. Even if they are only ancillary to transaction at issue, errors com-

Most punitive damages did not go to plaintiffs who were victims of serious injury or death. Instead, more than half were in "financial injury" cases, which arise from contractual or consumer relationships.

mitted by the carrier in processing claims damage the company's credibility and create an unworthy image of recklessness or incompetence.

Failure to adhere to internal standards and procedures.

The jury will tend to judge the insurance company by its own standards, which are reflected in its internal procedure manuals and similar writings or memos. Inconsistency of this sort leaves a bad impression on the jury.

Insensitivity to plaintiff's problem, as shown by unreturned phone calls or mail. The plaintiff's lawyer will certainly highlight instances of his client being ignored or pushed around. The risk of punishment increases where injury is accompanied by insult.

Internal dissension. Documentation revealing internal disagreement, dissension, or criticism within the company ranks about whether the company should have acted the way it did in dealing with the plaintiff.

Excessive reliance upon technicalities. The jury will be negatively impressed by any showing that the insurance company relied on "the fine print" or interpreted its duty to an injured policyholder very narrowly.

Plaintiff in peril. Where the plaintiff demonstrates reasonable reliance and failed expectations, resulting in a perilous situation without any insurance coverage, punitive damages are more likely.

EARLY DEFENSIVE STEPS

At the first sign of a potential punitive claim, there are some steps the insurance company can take. It must become pro-active in eliminating or reducing the potential punitive exposure.

Review. Analyze all documents that will probably be discovered in the course of a lawsuit. The documents include claim and underwriting files, training materials, marketing materials, internal guidelines and procedure manuals, office memoranda and e-mail messages, agent/employee files, and prior complaints.

Interviews. Make a list of all persons who had any connection with the transaction or alleged injury at issue. Discuss the incident with each of these potential witnesses from beginning to end, asking the hard questions that will be faced in a lawsuit. These interviews should be conducted *in person* to evaluate the potential witness's appearance, demeanor, and credibility.

Repair. This author believes strongly that if something is wrong, it should be made right as soon as possible and without conditions. It is never too late and, furthermore, in my opinion, late action (even after suit is filed) is much easier to defend than no action. Consider paying the claim in full, correcting the policy, or otherwise giving the policyholder the benefit of the bargain. A "make whole" offer, no strings attached, can often blunt the spear of a punitive damages claim.

Audit. When the focus is on the alleged misconduct of an insurance agent, consider an audit of similar claims against the agent or of his or her book of business. Sometimes it is necessary to audit the entire sales operation for unauthorized marketing practices.

Consumer visits. Consider the need for personal visits with

affected insureds and other consumers to address any latent dissatisfaction that may lead to further litigation. This requires a lawyer who is skilled at listening and dealing with people, and who has the power to solve the problems that may surface.

Disciplinary action. Where misconduct or fraudulent activity is discovered, it may be appropriate to terminate, suspend, or reprimand an employee or agent. The company's curative action is one of the most important post-verdict review criteria cited by appellate courts in reviewing punitive damages claims.

Preemptive declaratory suit. Where litigation appears inevitable, consider taking the offensive. It is probably a good image to be seen as taking the initiative in seeking a court decision on whether the insurance company is obligated to the insured or other consumer. The company's counsel selects the venue, and it is correctly portrayed as seeking what is right rather than forcing the plaintiff to sue. Particularly in mass consumer

situations, a preemptive class action declaratory judgment suit could be a wise step by the defendant.

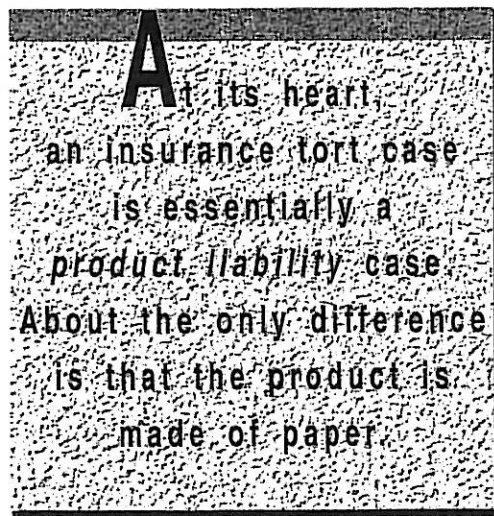
TRIAL PREPARATION

Many members of the plaintiffs' bar now bring to insurance sales/fraud litigation the resources that formerly were reserved for medical malpractice or product liability. Some have dropped their "accident" practice, preferring the easier money that is often available in consumer fraud and financial injury cases. They see a "plaintiff's opportunity" for high judgments, especially punitive damages, because of the more effective psychological appeals they can make to the jury, along with the low esteem in which insurance companies are held.

Because some of the top plaintiffs' lawyers are focusing on this area, a good result for the defense in a tough insurance sales fraud case is no accident. It requires creative, aggressive preparation rather than a "minimalist" approach. *This cannot be over-emphasized.* These cases are highly document-intensive and require a skilled eye to reconstruct every aspect of the transaction. Perhaps more importantly, they also require good witnesses. A DRI member in California once said very aptly: "If the truth does not have an effective spokesperson, the jury may well never hear the truth."

Witness selection. At a very early stage, begin meeting personally with potential witnesses. An advantage of such meetings is that you can identify which persons will be your key witnesses and discover which ones may present a problem. It is absolutely essential to find witnesses who make a good appearance and can explain what occurred in terms the jury will understand.

Witness preparation. This must begin early—not the day or week before a deposition. It is important that witnesses display a level of comfort and confidence that can be attained only by being fully conversant about the facts. Witnesses—especially those in the insurance business—must also become accustomed to discussing and explaining their connection to the disputed facts in terms a jury will understand and appreciate. Without this sort of practice, they will resort to "claims-speak" under the pressure of a deposition



or trial; their insurance office jargon may sound cold and artificial to the jury.

Videotape depositions. The task of witness preparation is more critical if a deposition is recorded on videotape. It is increasingly common nowadays for plaintiffs' attorneys to film many depositions and turn the trial into a *60 Minutes* style documentary that may last several days. Because of the taped presentation style, the defendant has no opportunity to cross-examine as would normally be allowed with live testimony. Thus, it may be advisable for defense counsel, after the plaintiff's attorney is finished, to conduct some direct examination on tape to establish context or additional facts that otherwise would not be revealed until much later, at trial. All or portions of the direct testimony may then be shown, within the plaintiff's case, under the evidentiary "Rule of Completeness," thereby reducing the effectiveness of plaintiff's counsel's strategy of showing endless one-sided videotape depositions.

A presentation explaining how insurance works. It is dangerous to let a jury decide an insurance case in a vacuum without understanding the context in which the issues arose. A presentation, perhaps a mix of tape and live, can be designed to close the gap between the jury's expectations and the reality of how insurance works. It is essential that the jury understand why insurance companies sometimes have to make hard decisions.

Expert witnesses. It often is helpful to have a witness, preferably a respected professional from the local community, who can vouch for the insurer's actions. A primary source for finding him or her would be the DRI Expert Witness Bank. Other sources include the local CLU chapter, a widely-known lecturer at insurance courses, an employee of the state insurance department, or an employee benefits expert. This may also provide a much-needed opportunity to address the demographic make-up of the jury.

A presentation about the "product". Any case involving sale of an insurance policy, or a claim decision, requires the jury to hear testimony about the policy. This is a foreign and seemingly technical concept to most jurors who, like lawyers, probably never read their own insurance policies. The defendant has a perfect opportunity to make the jury comfortable with the product. Put a witness on the stand who can explain the policy's provisions and help make the jury understand and be comfortable with certain written conditions that may, at first glance, seem unfair or harsh. This is another opportunity to present a strong company witness or local expert.

Review insurance department files. In litigation involving an insurance agent or broker, get every complaint and license file on the company and the agent. Most good plaintiffs' attorneys will. Do not rely solely upon what's in your own company files; make sure you see what the plaintiff's lawyer will see, and it is preferable to get there first.

Develop evidence of quality control. Descriptions of the insurance company's training and supervision programs are important in demonstrating the company's positive goals. This exercise, presented by an employee witness, will enable defense counsel to better illustrate the company's competence and professionalism.

It also gives you a chance to present another solid, trustworthy employee to the jury, and reinforces your argument that even if something went wrong it was not malicious or intended.

Develop corroborating evidence. If the case involves suspected fraud, such as an alleged misrepresentation by the agent, you must overcome the jury's instinctive belief that an insurance salesman would do or say anything to make a sale. The agent's credibility can be reinforced by corroborating evidence that the insurance product was presented fairly to the customer. Examples include testimony by others who accompanied the agent on sales calls, and other policyholders who will vouch that the same agent fully described the product to them. In one such case, an agent accused of "overselling" located persons whom he had called upon but who never purchased

a policy because the agent told them they really did not need additional insurance.

Mediation and other ADR procedures. Start this process as soon as possible. It opens the door to settlement discussions before problems are disclosed to the plaintiff. Even if unsuccessful, settlement talks serve as an informal discovery tool with regard to the plaintiff's theory and evidence; such knowledge helps defense counsel in evaluation and preparation.

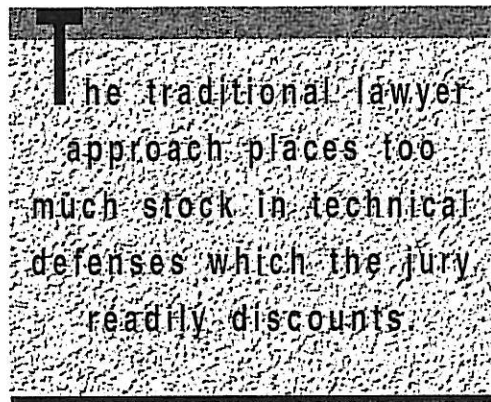
Focus groups. One of the most helpful tools for preparing a tort insurance case for trial is a focus group (in effect, a mock jury) session wherein the defense team can present different themes, evidence, and arguments to gauge jury acceptance. This can be surprisingly inexpensive. Invariably the focus group will help identify those facts and issues which are most persuasive, along with the bad facts that need more careful positive explanation. It also is helpful in evaluation. A word of caution, however: it is dangerous to use focus groups as a "predictor" of trial outcomes. The final verdict will always depend upon how the jury responds to the live witnesses.

PATTERN/PRACTICE EVIDENCE

In some jurisdictions, a plaintiff is permitted to discover and introduce evidence of "substantially similar" actions by the defendant to prove the existence of a pattern, scheme, or design to defraud the plaintiff and other consumers. Such evidence magnifies the insurance company's or its agent's failures to the point that a jury is given the impression the defendant is inherently dishonest. Responding to such discovery requests can be tremendously burdensome and expensive, not to mention that such discovery often leads to more lawsuits.

The battle over pattern/practice evidence has two fronts. First, the defendant is resisting the discovery and admissibility of such evidence under the applicable court rules. The defendant should also seek to discover from the plaintiff what "pattern and practice" evidence may have been collected by plaintiff's counsel independently. Plaintiffs' lawyers commonly share such information and often know more than the defense lawyers about the defendant's prior similar acts. Try to avoid being blindsided.

Second, the insurance company may need to have *rebuttal* evidence ready that will reveal the true pattern and practice of honest



dealing and satisfied customers, i.e., that it is a competent and reputable company with good policies and claims that are paid. Every business will have *some* dissatisfied customers, and the jury needs to recognize that insurance is no different. Rebuttal evidence can take a variety of forms, limited only by counsel's ingenuity and the extent of available data and resources.

Keep in mind that the plaintiff's so-called "pattern" evidence is essentially character evidence. Plaintiff counsel will fight your rebuttal evidence but the defendant (once the plaintiff has raised the issue) has the right to develop and present such evidence, which often can be presented effectively with visual aids in addition to live testimony from company employees, industry experts and, in some instances, other "happy" policyholders.

TRIAL STRATEGY SUGGESTIONS

The goal at trial is to build the jury's comfort level, not merely with your client's actions on the narrow legal issue, but with the company in general—its product, its people, and the way it does business. Without that comfort level, jurors will have difficulty adjusting their expectations in response to the defendant's evidence on the specific factual issue. Face the fact that the jury does not know how insurance works, and the company's action generally will sound cold and unfair. The plaintiff's lawyer knows this, and the defendant must work hard to give context, explain the positive goals and, at the same time, make the case interesting.

Voir dire. Selecting the very best possible jury is crucial. The process of addressing the jury's expectations and preconceptions, and helping them see the insurer's action in positive terms, begins in *voir dire* and runs all the way through the jury instructions. There are many excellent articles and texts on the subject of jury selection in a punitive damages case. See, e.g., Cozen & Selleck, "Picking a Jury in a Punitive Damages Case," January 1988 *For The Defense* 13. Only two additional suggestions are offered here:

- (1) If possible, *find jurors with job experience in handling consumer complaints*; they will more easily relate to the defense viewpoint. On *voir dire*, develop questions to help potential jurors recognize that consumer complaints are common to all businesses, that competent businesses have unhappy customers, and that a dissatisfied customer does not necessarily mean the company was incompetent or malicious.
- (2) Identify jurors who have previous bad experiences with insurance companies. Don't allow them to "poison the well" by relating in front of other venire members their bad experiences. In a group venire setting (in those jurisdictions which allow it) defense counsel might ask, in a *single* question, for raised hands by those venire members who have had either a very good or a very bad experience with an insurance company. The response will be less damaging, and those members who responded may be questioned privately about their experience without poisoning the well.

Legal defenses. By no means does this author intend to suggest that legal defenses, such as burden of proof or failure to read, not be asserted. Hopefully, the defendant will have an arsenal of evidence to address technical issues. A strategy decision must be made, however, about which defenses should be emphasized. Legal defenses should be raised with the judge, of course, not the jury.

No matter what, present a case. It is risky to defend a tort

insurance case solely on legal issues, without giving the jury the context to at least understand the positive goal your client was pursuing. If your witnesses and evidence address only the narrow factual issue, and the plaintiff calls your employees as adverse witnesses, you may be left without a case to present when the plaintiff rests (which is precisely the plaintiff's objective). The jury will think you have no further defense, no matter how clearly a judge explains that your evidence has already been presented. This requires planning ahead for the situation in which the plaintiff totally co-opts your evidence on the narrow factual issue.

Motion in limine. If the defense has any suspicion that the plaintiff will attempt to introduce inappropriate evidence, block its admission through a motion *in limine*. However, sometimes a plaintiff's attorney will, in *voir dire*, opening statement, or while questioning a witness, try to get away with an improper reference that is objectionable and highly prejudicial. He or she wants the jury to hear the reference, followed by your objection, to make you look defensive and obstructive. The damage often is done regardless of whether the evidence is admitted.

Special verdict form. Where the case involves complex facts that are foreign to jurors, or susceptible to being ignored by them, it may be wise to prepare and submit a special verdict form with interrogatories to help focus the jury's deliberations on key factual issues. If the court allows such a special verdict form, your closing argument can be tailored around it. Also, for purposes of making any constitutional challenge to a punitive damages verdict, it is important that the verdict form contain separate findings for compensatory and punitive damages.

Constitutional defenses. Prior to jury deliberation, it often is important to reassert the constitutional defenses to punitive damages, such as the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Unless such arguments are reasserted, upon motion for directed verdict and every other juncture of the trial, they may be deemed waived. Furthermore, it is important that these defenses not be asserted casually, but rather with specific citation to the constitutional provisions and interpretive case law.

Punitive damage instructions. Defense counsel should consider, in the jury charge conference, submitting punitive damages instructions that incorporate recent United States Supreme Court due process guidelines.

FINAL OBSERVATIONS

The decision in *BMW of North America v. Gore*, 116 S.Ct. 1589 (1996), may mitigate some of the dangers associated with punitive damages in financial injury cases, but the hard task is to prevent the large award in the first place. For several years in states like Alabama, the goal often has been to keep the client out of the courtroom, avoiding altogether the threat of a catastrophic verdict. That requires building a defense strong enough either to win on summary judgment or afford the client the opportunity to settle on acceptable terms.

In the end, a successful defense will come only through developing evidence that will make a judge and jury comfortable with both the product and the insurance company and, most importantly, by helping them understand and appreciate the positive goal the company was pursuing, even if they disagree with its action vis-a-vis the plaintiff. Insurance is a product you can proudly defend, if you will defend it like the good product it is. ■