

Strategies for Minimizing the Likelihood of a Punitive Damages Verdict

Chad R. Hutchinson, Partner, Butler Snow LLP, Ridgeland, Mississippi

Unpredictability is a reason most insurers generally do not cover punitive damage awards. That same unpredictability scares clients and adjusters and, if we are honest, they scare us lawyers too. Unless you have a magical ability to rewind time and recreate the facts, practitioners should employ clear, focused and intentional strategies throughout the course of the litigation to minimize punitive damage awards. This paper will address some of those strategies.

First Things First

No matter the facts, establish and maintain credibility with the judge and the jury. There is no substitute. Do not mess this up. You cannot win it back. One way to establish credibility is to preemptively tell the jury upfront that your case has bad facts and explain those facts to them. Do not “sugarcoat” it. Let the jury know they will hear from witnesses or see documents that will make them seriously question your client’s actions. For example, if the case is about a product that has been recalled or an employee who was simply asleep at the wheel, attempt to weave those facts into your voir dire if possible to inoculate the jury and, by all means, make sure your opening statement addresses these facts head on. As a practice tip, consider telling the jury about any bad facts during the middle of your opening statement. While you do not want a jury to dwell on them, you do want the jury to recall that you “came clean” and explained what the trial is about.

Weave It In

Immediately after the fact investigation, go ahead and articulate your defense theme of the case. For example, your theme may be that the product was approved by FDA as safe and effective and has been on the market for the last twenty years. Maybe your theme is that there are benefits of having products available that save lives. Maybe your theme is that a “complication” is not a “defect.” Whatever that theme may be, make an effort to weave it into the litigation at every turn. Make sure that every company witness who will be deposed knows to use that theme as a “home base” during their deposition and, where appropriate, weave that theme into their answers. And then, for safe measures, consider doing a redirect examination of your own witnesses to reinforce that theme again. Do not wait until the end of discovery and then roundtable your case themes to determine what “sounds good” – by that time it’s simply too late.

Corporations Employ Real People Too

One of the Plaintiff bar’s favorite tricks is to portray corporate defendants as cold, impersonal, greedy conglomerates of faceless people. You must defeat that impression and any “David v. Goliath” overtures by immediately personalizing your client. Begin that process in voir dire. Do not introduce your client as “Company X” but, instead, you represent “The men and women” or “The doctors, scientists and engineers” who depend on Company X for their job. In addition, strongly consider having a company witness attend every day of trial which will eliminate the “And they didn’t care enough to

have one person come down here for this trial” argument. It is harder for a jury to award punitive damages against a company who was represented by an employee who sat at the counsel table during the entire trial. Accordingly, defense counsel should identify at the very beginning of the litigation who should be the company witness for trial.

Stipulations That Help

Most judges love stipulations, especially if they will reduce the number of witnesses and, ultimately, the length of the trial. Use that to your advantage. Proactively discuss with opposing counsel about entering into a stipulation regarding your client’s sales units, revenue, and even net worth. That stipulation will ultimately be read to the jury. This way, Plaintiff’s counsel will not have another shot at your witnesses and documents to establish (or reinforce) bad facts. And if Plaintiff’s counsel will not agree, make sure that the judge knows you have offered this stipulation. A little pressure on opposing counsel from the judge sometimes will go a long way.