LOS ANGELES
Daily Journal
www.dailyjournal.com

WEDNESDAY, JUNE 15, 2016

PERSPECTIVE

Punitive damages in bad faith cases can take into account attorney fees

By Stephen L. Raucher

More than 30 years ago, in *Brandt v. Superior Court*, 37 Cal. 3d 813 (1985), the California Supreme Court held that an insurer who has acted in bad faith may be held liable for attorney fees incurred by the policyholder to compel the payment of policy benefits. The Supreme Court has now clarified in *Nickerson v. Stonebridge Life Insurance Company*, 2016 DJDAR 5547 (June 9, 2016), that those attorney fees may properly be included in the calculation of punitive damages — even if the fees are assessed by the trial court following the jury's verdict.

The *Brandt* court made clear that attorney fees incurred to compel payment of policy benefits constitute an element of the plaintiff's compensatory damages, rather than an element of recoverable costs assessed in the normal course after trial. Accordingly, the determination of *Brandt* fees must be made by the trier of fact, unless the parties stipulate otherwise. However, the Supreme Court recognized that "a stipulation for a postjudgment allocation and award by the trial court would normally be preferable since the determination then would be made after completion of the legal services [citation], and proof that would otherwise have been presented to the jury could be simplified because of the court's expertise in evaluating legal services." Practitioners have generally taken the Supreme Court's suggestion to heart.

However, this practical approach created an unforeseen problem: where the fees have been deferred for post-trial determination by the trial judge, by which time the jury has already assessed punitive damages, how do those fees factor into the punitive damages equation, if at all? The *Nickerson* case illustrates the problem.

Mr. Nickerson, a paraplegic, broke his leg when he fell from the wheelchair lift on his van, suffering multiple fractures and leading to various complications. Nickerson was ultimately hospitalized for 109 days. Following his discharge, Nickerson sought benefits under a policy issued by Stonebridge Life Insurance Company. However, Stonebridge determined — without considering the views of Nickerson's treating physicians — that hospitalization had only been "medically necessary" for 18 days, paying him only $6,450. Nickerson then sued for breach of the insurance contract and bad faith.

Before trial, the parties stipulated that any determination of *Brandt* fees would be made by the trial court after the jury's verdict. Accordingly, no evidence regarding attorney fees was presented to the jury. Nickerson was awarded $31,500 in unpaid policy benefits, and the jury found that Stonebridge had acted in bad faith, awarding an additional $35,000 in damages for emotional distress, plus $19 million in punitive damages. The parties then stipulated to *Brandt* fees in the amount of $12,500.

The trial court granted Stonebridge's post-trial motion, reducing the punitive damages award to $350,000, or 10 times the emotional distress damages, refusing to include the $12,500 in *Brandt* fees in its calculation. The Court of Appeal affirmed, distinguishing *Major v. Western Home Ins. Co.*, 169 Cal. App. 4th 1197 (2009), which had found that Brandt fees may properly be considered "in determining if the ratio of punitive damages to the tort damages award is excessive," on the ground that the jury in *Major* had assessed the fees, rather than the trial judge.

The Supreme Court reversed. Reviewing recent case law setting due process limitations on punitive damages awards, the *Nickerson* court noted that the U.S. Supreme Court has established "the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award" as one of the guideposts (and the most relevant one here) that reviewing courts must consider in evaluating punitive damages awards. *BMW of North America Inc. v. Gore*, 517 U.S. 559, 575 (1996). The state high court provided its own gloss on this guidepost in *Simon v. San Paolo U.S. Holding Co. Inc.*, 35 Cal. 4th 1159 (2005), explaining that "ratios between the punitive damages award and the plaintiff's actual or potential compensatory damages significantly greater than 9 or 10 to 1 are suspect and, absent special justification ... , cannot survive appellate scrutiny under the due process clause."

The *Nickerson* court rejected Stonebridge's assertion that only evidence that was presented to the jury may have a role in a reviewing court's evaluation of the punitive-compensatory ratio. The court reasoned that the *Gore* guideposts are not framed as rules of trial procedure, but rather as "a set of rules for reviewing courts to apply in order to ensure that the state ultimately does not impose an award whose size exceeds constitutional limits." Moreover, the court noted that the other guideposts established in *Gore* touch on matters of which the jury could not have been aware — for example, the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Thus, the *Nickerson* court found that "there is no apparent reason why a court applying the second guidepost may not consider a postverdict compensatory damages award in its constitutional calculus." It remanded the case for further proceedings — presumably to add another $125,000 (10 times the stipulated *Brandt* fees) to Nickerson's judgment.

While the *Nickerson* case represents good news for policyholders, it does highlight important tactical decisions that their trial lawyers must still make regarding *Brandt* fees. As noted in the decision, had the jury heard evidence that Nickerson had suffered more harm (in the form of attorney fees) than what was presented, perhaps the jury would have punished Stonebridge even more harshly. On the other hand, perhaps the jury would have felt that awarding *Brandt* fees should have had a sufficient deterrent effect, leading to a lower punitive damages award. Or, in a permutation not referenced by the *Nickerson* court, a jury not presented with any evidence of *Brandt* fees might issue a punitive damages award in an amount less than 10 times the tort damages, in which case, absent a post-judgment additur, the policyholder would not be able to take advantage of fees awarded post-trial as part of the punitive damages calculation. Thus, while the *Nickerson* case certainly clarifies the interaction between *Brandt* fees and punitive damages in insurance bad faith cases, there are still a number of variables to be considered in litigating such cases.

Stephen L. Raucher *practices complex business litigation at Reuben Raucher & Blum in Westwood, with an emphasis on representing policyholders in insurance disputes. You can reach him at sraucher@rrbattorneys.com.*

STEPHEN L. RAUCHER
Reuben Raucher & Blum

RRB
REUBEN RAUCHER & BLUM PC
ATTORNEYS AT LAW

Reprinted with permission from the ***Daily Journal***. ©2016 Daily Journal Corporation. All rights reserved. Reprinted by ReprintPros 949-702-5390.