

Tobacco Trial Sheds Light On Punitive Damages Process

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On Oct. 25, 2016, a Florida jury ruled against R.J. Reynolds and awarded nearly \$8.8 million in compensatory damages to a Florida man for the smoking-related death of his wife, and also found Reynolds potentially liable for punitive damages. See Konzelman v. R.J. Reynolds Tobacco Co., Case No. 2008-CV-019620 (Fla. Cir. Ct.).

The next day, in what is sometimes referred to as a “Phase II” proceeding, the same jury awarded \$20 million in punitive damages against Reynolds. The case provides some relatively rare insight into a Phase II punitive damages trial, and the unique challenges and considerations such proceedings present for defendants.



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Bifurcation of Punitive Damages

At trial, determinations regarding punitive damages are sometimes “bifurcated,” or tried separately, from other issues. In some jurisdictions, this is mandated by law.[1]

In other jurisdictions, it is done at the request of a defendant pursuant to statute or decisional law.[2] And in others, it is done at a party’s request and at the court’s discretion (or *sua sponte*) pursuant to applicable procedural rules governing separate trials.[3]

The most commonly used methods of bifurcation are “full” or “complete” bifurcation and “amount-only” bifurcation. Under the former, the jury determines the defendant’s liability for, and the amount of, any compensatory damages in Phase I, and the defendant’s potential liability for, and the amount of any, punitive damages in Phase II.

Under the latter approach, the jury determines the defendant’s liability for, and the amount of, any compensatory damages, and the defendant’s potential liability for punitive damages, in Phase I. Then, in Phase II, the jury determines the amount of any punitive damages it chooses to award.

The primary rationale of bifurcation is that it avoids prejudice to defendants by limiting the admission of evidence relevant only to punitive damages, in particular evidence regarding a defendant’s financial condition or other bad acts, to Phase II. In theory, bifurcation also provides defendants with an opportunity to present mitigating evidence that likewise may not be relevant to the underlying issues of liability.

In practice, however, even where bifurcation is provided for by statute, very little, if any, guidance exists concerning exactly what Phase II should look like, or what evidence is appropriate.

The Konzelman Case

The Konzelman case was tried using amount-only bifurcation. According to reporting by Courtroom View Network, Reynolds' primary defenses in Phase I were that the decedent was well aware of the dangers of smoking but chose to do it anyway, and that she should have discovered her alleged smoking-related disease sooner, rendering her case barred by the statute of limitations.[4]

After being found liable in Phase I for compensatory damages and potential punitive damages, the focus of Reynolds' presentation in Phase II shifted to mitigation — that is, attempting to persuade the jury that no, or only low, punitive damages were warranted.

In that vein, Reynolds stressed that it was a fundamentally changed company committed to transparency and subject to stringent regulation by the federal government such that the misconduct at issue could and would never be repeated.[5] Reynolds also stressed that it had already paid massively for its misconduct pursuant to its Master Settlement Agreement with the various states.[6]

The plaintiff, on the other hand, argued in Phase II that Reynolds' misconduct was not merely negligent but intentional, and that Reynolds only changed its behavior in response to widespread litigation.[7] Ultimately, the jury awarded \$20 million in punitive damages, which was more than double the compensatory damages, and significantly greater than the \$14 million requested by the plaintiff.

Lessons Learned

The Konzelman case provides a relatively rare — and extremely useful — glimpse into the workings of an actual Phase II punitive damages proceeding. Indeed, because so few cases ever proceed to a Phase II, most discussion of bifurcation is purely theoretical.

Some of the unique challenges and considerations presented by bifurcation — and illustrated by Konzelman — are discussed below.

To bifurcate or not?

In some states, like Georgia, bifurcation of punitive damages is automatic. In most states, however, even where bifurcation is otherwise mandatory, a defendant must request it. Thus, the threshold question is whether to do so.

More has been written and said on the question of whether and when to bifurcate punitive damages, and in what fashion, than can be fully addressed in this space.

On some level, however, it boils down to balancing 1) the desire to prevail on liability in Phase I by kicking the proverbial punitive damages evidence “can” — things like net worth, other bad acts and other evidence relevant, if at all, only to punitive damages — “down the road” to Phase II, with 2) the risk that by doing so, if the case does proceed to Phase II, the amount of any punitive damages awarded may be higher than what would have been awarded in a unified trial.

There is no one-size-fits-all solution to this quandary. First and foremost, a defendant should consider

whether there is a punitive damages evidence “can” in the first place — that is, is there substantial and prejudicial evidence likely to be used at trial that is arguably relevant only to punitive damages?

If there is not, then bifurcation may serve no beneficial purpose. If such evidence does exist, however, then the defendant must decide whether “kicking the can” to Phase II will appreciably improve its chances of prevailing on liability in Phase I.

If so, then it may be worth risking a potentially higher punitive damages award down the road for a better shot at prevailing outright on compensatory and/or punitive liability.

Who tries Phase II?

In Konzelman the same lawyer for Reynolds argued both Phases. While this may seem natural or obvious, defendants should always consider the potential benefits of using a new lawyer to argue Phase II.

For example, as discussed, one of Reynolds’ primary defenses in Phase I was that the decedent knew that smoking was dangerous. Indeed, according to reports, defense counsel argued in closing that she “would have had to be living under a rock not to know”[8] about the dangers.

There is an inescapable tension in having the same person who made this argument — that is, who effectively blamed the decedent — return in Phase II to effectively plead mercy with respect to punitive damages.

Such a dynamic is by no means unique to Konzelman. In tort litigation, defendants frequently seek to assign fault, whether for purposes of causation, comparative fault, or otherwise, to the injured party.

This strategy can be tremendously effective and result in outright victory or the apportionment of significant fault to the plaintiff. If the strategy is unsuccessful, however, it can make for an especially uncomfortable Phase II.

While there is no way to completely eliminate the peril or discomfort of a Phase II — indeed, it often means the jury has already found that the defendant acted recklessly or worse — a fresh face in the form of a new advocate may help ease the tension.

For example, whether or not part of the defendant’s Phase I strategy was to assign fault to the plaintiff, the tone in Phase II necessarily must be more conciliatory. A defendant must go from denying liability and shifting blame to accepting responsibility while still explaining why harsh punishment is not warranted.

A fresh face may nonverbally signal that the defendant “gets it” and help set the new tone. On the other hand, there is always a chance that new counsel in Phase II could be negatively interpreted by the jury.

In weighing whether new counsel for Phase II is the right call under the circumstances, a defendant should, in particular, consider 1) whether its Phase I defense entailed assigning fault to, or otherwise impugning, the plaintiff, and 2) whether during Phase I the court or jury appeared to take issue with the individual conduct of counsel, as opposed to simply the evidence pertaining to the defendant’s conduct.

Each of these considerations, and certainly both combined, weigh in favor of new counsel.

In order to give themselves the choice, defendants should seriously consider always having a contingency plan in place and potential Phase II counsel lined up in advance. If nothing else, having separate counsel available for Phase II allows lead defense counsel to focus exclusively on winning Phase I.

What comes in?

As discussed, even where bifurcation is provided for by statute, little guidance generally exists as to what Phase II should look like. Many state statutes enumerate factors juries may consider in awarding punitive damages, but they do not necessarily speak to what evidence actually may be admitted in Phase II.

Courts may be inclined to permit only further argument without taking further evidence, or to limit further evidence to information concerning the defendant's financial condition, which is admissible in some jurisdictions as a benchmark for the proper amount of any punitive award.

As such, defendants should be prepared to proactively seek the admission of mitigating evidence — that is, evidence demonstrating that the defendant is less culpable and undeserving of punishment beyond compensatory damages.

A key category of potential mitigating evidence is subsequent remedial measures. Such evidence is generally excluded in Phase I trials due to its potentially prejudicial effect, but it serves a different purpose in Phase II.

Having already been found liable in Phase I, a defendant may want the jury to know in Phase II that it has taken steps to fix the problem, meaning that no punishment or deterrence is necessary.

Relatedly, a defendant may want to show the jury that it is a changed company with different policies and procedures (and potentially even different employees and management) than existed at the time of the misconduct at issue. This is precisely the kind of evidence Reynolds argued during Phase II in Konzelman.

Conclusion

Although punitive damages are frequently sought, due to settlement or otherwise, relatively few cases proceed to an actual punitive damages trial proceeding. Therefore, it is important to study those cases that do, like Konzelman, and learn from them.

Perhaps the most important single lesson from such cases is that, while punitive damages proceedings may be relatively uncommon, they present tremendous financial and reputational risk — often magnitudes higher than compensatory trials — which absolutely demands advance consideration and contingency planning.

While a defendant that is prepared for Phase II may not always succeed in minimizing any punitive award, a defendant that is unprepared virtually guarantees an unfavorable outcome.

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[1] See, e.g., O.C.G.A. § 51-12-5.1(d).

[2] W. Va. Code § 55-7-29 (b) (upon request of defendant pursuant to statute); W.R. Grace & Co. v. Waters, 638 So. 2d 502, 506 (Fla. 1994) (upon request of defendant pursuant to holding of Florida Supreme Court).

[3] See, e.g., Masaki v. General Motors Corp., 780 P.2d 566, 570 n.1 (Haw. 1989) (pursuant to Haw. R. Civ. P. 42(b)).

[4] See <http://blog.cvn.com/jury-awards-8.7m-in-compensatory-damages-for-copd-death-trial-for-punitives-begin-against-rjr>

[5] See <http://blog.cvn.com/20m-in-punitives-slams-rjr-brings-total-verdict-to-29m-in-trial-over-smokers-fatal-copd>

[6] Id.

[7] Id.

[8] <http://www.law360.com/articles/854345/sailor-seeks-5m-from-rj-reynolds-over-wife-s-death>