

Commentary**A Green-Eyed Monster?****Punitive Damages And Attorney Fees****By****Robert Gray Palmer**

[Editor's Note: Robert Gray Palmer is a partner in the law firm of Palmer Volkema and Thomas in Columbus, Ohio. Mr. Palmer was the lead plaintiff's attorney in the landmark Ohio bad faith denial of benefits suit against Anthem titled *Dardinger v. Anthem Blue Cross & Blue Shield*, 97 Ohio St.3d 77, 2002-Ohio 7113, discussed below. Mr. Palmer concentrates his practice in insurance bad faith, medical malpractice and other plaintiff's tort litigation. Responses to this commentary are welcome. Mr. Palmer can be reached at rgpalmer@pvtlaw.com. Copyright 2003 Robert Gray Palmer.]

Most people agree that wrongdoers should be punished appropriately for their transgressions. Criminals are routinely fined and jailed. Other than the more and more frequent "perp-walks" by corporate America CEOs, in the civil arena, punitive damages are the longstanding judicial tool for punishment and deterrence of conduct that is willful, reckless or done in conscious disregard of another's rights.

But, why, some ask, should an individual plaintiff get a "windfall"¹ of millions of dollars? And, why, should the lawyers get paid so much?

Businesses will be adversely affected. Well, isn't that what is supposed to happen? If the only way to reach corporate consciousness is through adverse impact on the bottom line, a transgressing business should feel enough economic pain to atone for those already committed and to foster deterrence of future similar bad acts.

Ohio Supreme Court Makes History

In *Dardinger v. Anthem Blue Cross & Blue Shield*, 97 Ohio St.3d 77, 2002-Ohio 7113 (Editor's Note: See 3/28/03, Page 3), the Supreme Court of Ohio made history. Based on the judicial development of punitive damages through the common law, the court re-affirmed Ohio's long standing jurisprudence of awarding punitive damages in appropriate cases and then created an unprecedented "alternative distribution" system for divvying up the punitive damages award.

Esther Dardinger was an insured under her husband's health insurance with Anthem.² Esther's breast cancer was under control. In the spring of 1997, she was diagnosed with metastatic breast cancer in her brain.

Cancer treatment by intra-arterial chemotherapy ("IAC") at The Ohio State University Comprehensive Cancer Center ("The James") was working. Esther was to have 12 consecutive, monthly IAC treatments, each of which cost about \$10,000. Anthem approved the first three, but denied the fourth because it claimed IAC was "experimental/investigational."

Without IAC, Esther's tumors grew back rapidly. The appeal sat, was literally "shredded" and was bungled over the next four months at which point Esther died. With full treatment, Esther would likely have lived up to two years with good quality of life.

\$49 Million In Punitives Awarded

It was 9:24 p.m. on a football Friday night in Newark, Ohio, the county seat of Licking County, which is home to about 146,000 citizens, more than a third of whom live in unincorporated areas. After seven hours of deliberation, on Sept. 24, 1999, a unanimous jury of eight awarded Bob Dardinger, as executor of Esther's estate, \$2.5 million compensatory damages and \$49 million punitive damages against Community Insurance Company (Anthem's Ohio subsidiary) and Anthem Insurance Companies, Inc. (Anthem's Indiana parent company) for the companies' bad faith conduct. The jurors ranged in age from 23 to 70-something, gender (five women and three men) and occupation (vice president of regional bank [female foreperson] to student).

Testimony At Trial

At trial, Bob Dardinger, asked why he filed this case, told the jury: "Because I knew that my wife felt very strongly that Anthem was wrong and that, if I didn't, I would in essence be condoning what they did and that's not what she was about."³

Esther believed that Anthem would change its mind and approve the remainder of her treatments. What Esther didn't know was that Ben Lytle, then CEO of Anthem, did not include expensive palliative cancer treatments as part of the purpose of his "health improvement company"⁴. In his view, treatments for people with terminal illnesses, like cancer, were a waste of time and money — as he told the jury ". . . in the long run it doesn't make any difference And all it does . . . is create false hopes, and . . . chew up a lot of people's time and effort and money."⁵

The *Dardinger* court, which detailed the facts over nearly 20 pages of its opinion, summed it up this way:

{¶166} For all of Anthem's obsession with process, the actual review of Esther's file took less than 30 minutes. The final letter outlining the reasons for the rejected appeal claimed that Anthem's "Appeals Committee" had reviewed appeal. They tried to hide the fact from Bob Dardinger that one person ultimately made the decision, and he spent less than a half-hour deciding it.

{¶167} Meanwhile, fed up, scared, and desperate, the Dardingers decided to go forward with the IAC treatments despite their costs. Anthem had worn them down as surely

as the cancer had. Like the cancer, Anthem relentlessly followed its own course, uncaring, oblivious to what it destroyed, seeking only to have its way. The ruination of a life was just a side effect.

{¶168} We agree with the trial court that “the jury could easily find that a pervasive corporate attitude existed with the defendants to place profit over patients” and that “the defendants disregarded the rights of their insured[s] in an effort to obtain higher profits.”

An Analysis Of The Punitive Damages

In Ohio, the tort of bad faith applies if an insurer denial of claims or processing of claims cannot be “reasonably justified.” *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552 (1994). Punitive damages may be also awarded in such cases to punish and deter certain tortious conduct, described as “a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm.” *Id.* at 558; *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 651; *Wightman v. Consolidated Rail Corp.*, 86 Ohio St. 3d 431 (1999).

The *Dardinger* court expressly found that the jury award of \$49 million in punitive damages was not excessive under the three guidelines of *BMW of North America, Inc. v. Gore*, 517 U.S. 559, *Dardinger* ¶176.⁶ Rather the court decided that the award was excessive under state law. It reasoned that the facts of *Dardinger* were twice as bad (since the central event was not accidental) as those in *Wightman* (a railroad crossing accident), where the court had affirmed \$15 million as the largest punitive award in Ohio. *Wightman* at 442. Thus it remitted the award to \$30 million. *Dardinger* ¶183. However, as the court said, “We have other conditions.” *Dardinger* ¶186.

No Societal Distribution Required

The court found that in punitive damages cases “the de facto party is our society, and the jury is determining whether and to what extent we as a society should punish the defendant.” *Dardinger* ¶187. Since there was a “philosophical void” between why punitive damages are awarded and how the award is distributed, such awards “making the most significant societal statements” are “the most likely candidates for alternative distribution.” *Dardinger* ¶188. Thus, apparently not all Ohio punitive damage awards require a societal distribution.

The court was careful to recognize the value of plaintiffs and their attorneys “moving forward with important societal undertakings” in which the plaintiff plays an important role and “might get involved in how the award is distributed.” *Dardinger* ¶189.

Interestingly, the court did not know that Bob Dardinger intended to give much of the award to The James. It did not know that he had assigned 30 percent of his award to charitable remainder trusts for that purpose. The court did not know because the concept of “alternative distribution” or what a plaintiff might do with a large punitive damage award was never briefed, or mentioned during oral argument.

The other remittitur conditions required that the corpus of \$30 million plus 10 percent simple interest from September 1999 (a total of nearly \$41 million when paid) would be divided by paying \$10 million to Bob Dardinger, paying the attorneys fees on the entire corpus plus interest pursuant to the contract between Bob Dardinger and his attorneys, and paying the balance to a judicially created "Esther Dardinger Fund" at The James for cancer research. *Dardinger* ¶190.

After discussions with The James, Bob Dardinger accepted the remittitur in February 2003. The "Esther Dardinger Fund" received about \$14.2 million dollars on March 28, 2003 for the creation of the "Esther Dardinger Neuro-Oncology Center," dedicated to research and treatment of cancer that affect the nervous system, such as Esther's brain tumors.

The Tort Reform Debate

One of the major platforms of tort reform both past and recent is limiting the possibility of a punitive damages award. Despite the fact that businesses may deduct any such payments from income⁷, and that such awards are taxable to plaintiffs⁸; in jurisdictions where the plaintiff's attorney fees are also taxable to the plaintiff⁹, the plaintiff's "windfall" may quickly turn into financial ruin. Many legislatures place caps on such awards and, some, require "alternative distribution" for every punitive damage award.

A constitutional challenge to Indiana Code §34-51-3-6 is pending before the Indiana Supreme court. *Cheatam v. Pohle*, 764 N.E. 2d 272 (Ind. Ct. App. 2002). In these kinds of statutes a percentage of the award is typically deferred to a Victims of Crime, Tort Victims or other state fund¹⁰. Attorney fees may be limited to the percentage to the plaintiff or simply "reasonable fees"¹¹ or, as done by the *Dardinger* court, determined on the entire award¹².

Before *Dardinger*, only the Supreme Court of Alabama had ventured, and only briefly, into "split recovery" or "alternative distribution" schemes without the benefit of legislation. Upon remand under *Gore* a year later, it reversed its position. *Life Insurance Company of Georgia v. Johnson*, 701 So. 2d 524 (1997).

Despite the very recent, ominous warning by Justice Ginsburg that the flexible guidelines of *Gore* are being converted "into instructions that begin to resemble marching orders" in her dissent in *State Farm Mutual Auto Ins. Co. v. Campbell*, 2003 U.S. LEXIS 2713 at*55, the *Campbell* majority allows for the unusual case, holding that "these ratios are not binding, they are instructive." *Id.* at *31. The majority also recognizes that the recidivist company is a special circumstance for which a harsher penalty is appropriate and proof by similar bad acts is permissible. *Id.* at *28. The court suggests that a one to one ratio, or at least a single digit ratio, is likely appropriate in most cases with a substantial compensatory award. *Id.* at *31-33.

If Awards Not Substantial, Effect Is Inconsequential

In the schemes purporting only to allow the wealthy due process, reality requires a deserving plaintiff, a persistent lawyer and the right facts to take on a Goliath. As the spate of legislation controlling punitive damages and the *Campbell* decision show, wrongdoers are well protected from juries who find their conduct reprehensible for which punishment is deserved and protection of society is warranted.

Fortunately, as in *Dardinger*, many jurisdictions will not close the courthouse to those who cannot afford legal representation except on a contingent fee basis. What's the bottom line on punishing those who deserve to be punished? If the awards are not substantial, the effect will be inconsequential.

In The Ohio State University's press release upon the funding of the Esther Dardinger Fund, Bob Dardinger was quoted as saying: "Nothing will bring Esther back, but ongoing research and treatment through the Esther Dardinger Neuro-Oncology Center at OSU might spare others from Esther's fate. I believe she would find this effort worthy."

Obtaining and keeping punitive damages, which were awarded for truly reprehensible conduct, is very worthy indeed.

ENDNOTES

1. For example, "Punitive damages are generally seen as a windfall to plaintiffs... Even assuming that a punitive 'fine' should be imposed after a civil trial, the penalty should go to the State, not to the plaintiff — who by hypothesis is fully compensated." *Smith v. Wade*, 416 U.S. 30, 59 (Rehnquist, J., dissenting in which Chief Justice Berger and Justice Powell joined).
2. Since Bob Dardinger was a governmental employee (a school teacher and coach), the Employee Retirement Income Security Act, 29 U.S.C. §1001 *et seq.* did not apply; however, even in ERISA plans, if the decision is medical in nature, state law bad faith, malpractice or other claims may now be pursued under the string of decisions including *Peagram v. Herdrich*, 530 U.S. 211 (2000); *UNUM Life Ins. Co. of American v. Ward*, 119 S.Ct. 1380 (1999); *Rush Prudential HMO Inc. v. Moran*, 122 S.Ct. 2151 (2002); *Cicio v. Vytra Healthcare*, 321 F. 3d 83 (2d Cir. 2003).
3. Bob Dardinger, Sept 21, 1999, Tr. 150.
4. Anthem's verbal logo in its Annual Report.
5. Lytle Video Deposition, p. 82, which was presented to the jury.
6. "We do not find the award to be shockingly wrong. We simply believe that a figure that equal one sixth of annual net earnings, that is more in line with the history of punitive damages in Ohio to be more appropriate." *Dardinger* ¶185.

7. Internal Revenue Code Sec 162(a); Priv. Ltr. Ruling 9 80-211, 1980-2C.B. 57(1980).
8. Internal Revenue Code Sec 104(a).
9. *E.g.* Priv. Ltr. Ruling 9809053 (Feb. 27, 1998); *Coady v. Commissioner*, 213 F.3d 1187 (9th Cir. 2000).
10. *E.g.*, Oregon §18.540 (2001), Missouri §537-675 R.S. Mo. (2001); Iowa §668A.1 (2002).
11. *E.g.* Georgia Code 735 ILCS 5/2-1207 (2002); Oregon, *supra*.
12. *E.g.* Alaska Stat. 09.17.020 (2002); Missouri, *supra*. ■