

The LITIGATOR



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ISSUE 5

The Assault of the Punitive Damage Award

Over the last year, not only has the United States Supreme Court¹ directed the judiciary to severely limit the consumers ability to win or retain a large punitive damage award, but now the Schwarzenegger administration has successfully launched its own assault on such awards, "taking" 75% of each such award to the state coffers. The new law, which will automatically be repealed on July 1, 2006, affects the plaintiff the most, dramatically seizing three-fourths of the jury's punitive damage verdict rendered in favor the plaintiff, in addition to decreasing the attorney fee recovery. This article explains the new law and how it will, in practical terms, affect a punitive damage verdict.

Punitive damages are awarded against a defendant that is found by clear and convincing evidence to be guilty of malice, oppression, or fraud - despicable conduct that kills, injures, or results in financial fraud against consumers. We have been told the purpose behind the punitive damage award is to deter and protect the public from recidivism of malicious or fraudulent acts which victimizes the plaintiff. The justification provided the new law which takes substantial sums of money from the already victimized plaintiff is "extraordinary and dire budgetary needs" in the state of California.

The new law is Civil Code section 3294.5, and it has an effective date of July 1, 2004 to July, 2006. In summary it provides:

Seventy-five percent of all final² punitive damage awards shall be paid to the State³ after costs (not including attorneys' fees) have been paid, twenty-five percent to the plaintiff or plaintiffs. Of the 25 % to plaintiff, the contingency attorney fees are to be paid. The attorney is also entitled to 25 % of the proceeds seized by the State. These funds will be provided after the attorney applies for the compensation, allowing the State to delay payment until July 1 of the next fiscal year.

To fully understanding the effect of this new law, it is useful to use hypothetical numbers. Prior to the "seizure act", if a jury awarded \$12.1 million against a large corporation who knowingly marketed a dangerous product which was responsible for maiming numerous individuals, including the plaintiff, and the attorney fee contract provides for 40% of the verdict, and the punitive damage award standing alone minus the costs is \$12 million, the plaintiff would receive \$7.2 million and the attorney, \$4.8 million. Under the seizure act, if the attorney is awarded the full 25% from the State by the fiscal year following the plaintiff's punitive damage award, the monies will be allotted as follows: Plaintiff: \$1.8 million; Attorney \$3.45million, and the State \$6.75 million.

The law specially provides the jury may not be informed that any portion of a punitive damages award will be paid to the government, and no argument or inference

may be made to a jury that a punitive damages award would result in a windfall to the plaintiff or plaintiffs. However, a juror or jurors independent knowledge of the governments seizure fund will not effect a verdict. Therefore, we should all make individual efforts to educate the public on the new law.

It should be noted the Governor initially proposed a "one punitive damages award per defendant" provision. It is inconceivable that anyone trying to protect the public from corporate abuses would suggest such a law. To put the proposal into context, imagine our criminal laws providing that an individual may only serve prison time for

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Check out our web page at:
www.s-c-a.org

The Assault of the Punitive Damages Award

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the first offense. Once the individual serves his or her sentence, any new offense will not be punished by a prison term, only restitution to the victim.

The seizure act is only the beginning of an orchestrated attack on the civil justice system. We, as plaintiff's attorneys, need to educate our clients, families and friends as to the effect of this new law and ensure other similar laws are not passed. Hopefully, the seizure act will only have a two year life, and it will be the last of such laws passed in California.

Footnotes

¹*State Farm Mutual Ins. Co. v. Campbell* (2003) 538 U.S. 408, 123 S. Ct. 1513.

²actions filed after July 1, 2004 and finally adjudicated, including the resolution of all mandatory or discretionary appeals, the resolution of any motion for attorney's fees on appeal and any appeals therefrom, and the issue of final remittitur, prior to the date this section ceases to be operative

³The Public Benefit Trust Fund has been created in the State Treasury, to be administered by the Department of Finance. The seized funds will be deposited into the Public Benefit Trust Fund to be available for annual appropriation and shall be used for purposes consistent with the nature of the award, *but in no case shall be used to fund the courts or judicial programs.* (Emphasis added) 

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Calendar of Events ...

(Sacramento Consumer Attorney's Upcoming Activities)

TUESDAY, SEPTEMBER 14, 2004

Q&A Luncheon • Time: 12 Noon
Location: Mexico 70 (6601 Folsom Blvd.) • SCA Members Only

FRIDAY, SEPTEMBER 17, 2004

SCA Luncheon • "TBD" • Speaker: *C. Brooks Cutter, Esq.*
Time: 12 Noon • Firehouse Restaurant

WEDNESDAY, SEPTEMBER 22, 2004

Reception in Honor of Dave Jones
Time: 5:30 to 7:30 p.m. • 2515 Capitol Avenue
(Owen/Whitney Home)
Co-Hosted by Margaret Doyle, Allan Owen and David G. Lee

THURSDAY, SEPTEMBER 23 2004

SCA Problem Solving Clinic • "Internet Based Medical
Research" • Speaker: *David E. Smith, Esq.*
Time: 5:30 to 7 p.m. • Sacramento Courthouse

TUESDAY, OCTOBER 12, 2004

Q&A Luncheon • Time: 12 Noon
Location: Mexico 70 (6601 Folsom Blvd.) • SCA Members Only

TUESDAY, OCTOBER 28, 2004

SCA Problem Solving Clinic • "Managing a Solo Practice"
Speaker: *Jack Vetter, Esq.*
Time: 5:30 to 7 p.m. • Sacramento Courthouse

TUESDAY, NOVEMBER 9, 2004

Q&A Luncheon • Time: 12 Noon
Location: Mexico 70 (6601 Folsom Blvd.) • SCA Members Only

THURSDAY, DECEMBER 9, 2004

SCA Annual Meeting and Holiday Reception
Time: 5:30 to 7:30 p.m. • Location: Nine Doors at 815 11th Street
SCA Members Only

TUESDAY, DECEMBER 14, 2004

Q&A Luncheon • Time: 12 Noon
Location: Mexico 70 (6601 Folsom Blvd.) • SCA Members Only

TUESDAY, JANAUARY 25, 2005

SCA Seminar • "What's New In Tort and Trial: 2004 In Review"
Speakers: *Craig Needham, Esq. and Patrick Becherer, Esq.*
Time: 6:00 to 9:30 p.m. • Holiday Inn Capitol Plaza

SATURDAY, TBD, 2005

SCA Seminar • "Liens Update"
Speakers: *TBD*
Time: 9:00 a.m. to 12:30 p.m. • Location: TBD

*For reservations or more information on any of these events,
contact Debbie at 451-2366*

AD TO GO HERE

BY: MARGARET DOYLE, SCA PRESIDENT

Warning!

Be aware that we have been advised that some Defense firms are using the tactic of ex-parte communication with the Plaintiff's treating physicians. Recently, Ray Ball reported to me that he had a case where Dr. Michael Robbins had performed surgery on his client and had been her treating physician for some time. At deposition, Dr. Robbins testified that the MVA had nothing to do with the plaintiff's injury. Mr. Ball was confused because the injury was clearly the result of the MVA. Nonetheless, he hired Dr. Duffy who examined the plaintiff and then testified that Dr. Robbins was wrong.

It wasn't until after the case settled that Mr. Ball learned about the deception. Dr. Robbins' office called to have Mr. Ball pick up the records he had left at their office. When Mr. Ball opened the packet he found out it was the Defense that had left copies of all the client's prior records, medical reports and depositions. In addition, the package included three separate letters from Defense counsel verifying Dr. Robbins agreement and confirming telephone conference times regarding the case.

BEWARE!!!!



Deborah Ortiz

Running for State Insurance Commissioner in 2006

BY CURT NAMBA, PUBLIC APPOINTMENTS CHAIR

Senator Deborah Ortiz is a personal friend to many of us and has been a friend of consumers for many years, dating back to her days in the California Assembly. Senator Ortiz recently announced her intention to run for State Insurance Commissioner in 2006.

Deborah Ortiz was elected to the State Senate in November 1998 and re-elected in 2002. She chairs the Health and Human Services Committee and is a member of Insurance, Natural Resources, and Budget Committees.

Senator Ortiz is the author of the nationally recognized law protecting stem cell research in California and is also responsible for the State's landmark program guaranteeing college scholarships, Cal Grants, for students with good grades and financial need. Senator Ortiz has a strong commitment to public health. She has been an outspoken advocate for those facing catastrophic illness as well as their families and care givers. She has written legislation directing millions of dollars into cancer research and awareness programs.

In the area of public safety, Senator Ortiz wrote the Michelle Montoya School Safety Act which prohibits schools from hiring anyone convicted of a serious or violent felony and requires criminal background checks before employees are hired. While serving on the Sacramento City Council, Senator Ortiz authored the ordinance prohibiting the sale of firearms in neighborhoods and requiring gun dealers to register with the police.

Senator Ortiz has been a consistent supporter of consumers and their legal rights. This year, she is carrying CAOC-sponsored

legislation (SB 1368), which will permit an insured to authorize the insurance company to accept service on his or her behalf and require an insurer to provide the insured's last known address to the plaintiff if the insured does not consent to substitute service.

Senator Ortiz has supported the following bills that were part of CAOC's successful legislative program to protect your clients' rights: SB 688-extended the statute of limitations to two years and gave additional time to respond to summary judgment motions; SB 515-amended the anti-SLAPP statute to halt the disturbing trend of corporate misuse of the statute; AB 634-prohibited secret settlements in elder abuse cases; SB 331-clarified the "delayed discovery rule" in actions involving hazardous substances; and SB 333-conformed the uninsured motorist statute to the new 2 year statute of limitations. She has also supported efforts to ban pre-dispute binding arbitration and is a world-recognized leader in the area of mold prevention and safety.

Throughout her distinguished legislative career, Senator Ortiz has been a strong advocate for consumers, education, public health, the environment, and public safety. We can look forward to her same strong voice as Insurance Commissioner, reining in abuses by the insurance industry and making sure Californians have affordable and quality insurance.

Senator Ortiz has been a friend of consumers for many years and looks forward to our continued support in 2006!



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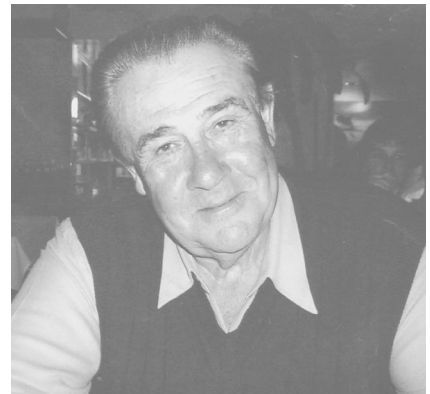


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President's Message

By Margaret Doyle

I had the great pleasure of delivering the more than \$6,000.00 we raised at our Spring Reception to the Sacramento Food Bank Services this afternoon. I was so very impressed by the work they do for our community.

Peter Berghuis, the Executive Director and Dorothy Mull the Special Events Coordinator met with me and Paul Wagstaff. They were so very grateful for our contribution to their organization and asked me to extend their gratitude to all of you who participated in this event. They are hoping we will consider doing it again next year! They were very impressed by the donation of more than \$6,000.00 and will put it to immediate use in our community.

While visiting, Peter Berghuis gave us a tour of their facility. I was truly overwhelmed by the number of programs and people they serve. The Sacramento Food Bank Services not only provides a food locker, but they also have a clothes closet, mother-baby program, computer clubhouse for children, parents learning and children's education center, a haven's program which focuses on building self-sufficiency and financial independence and a women's wisdom project which is an art is empowerment program for women in transition from abuse, poverty and mental illness. These are just some of the programs they support in our community and they have been doing so since about 1976.

I encourage all of you to continue to support this worthy cause either by donating money or used items. On behalf of the Sacramento Food Bank, I thank you for your support.

Summer is marching on and our educational programs continue...Our next Problem Solving Clinic will be held on Thursday, August 26th at 5:30 at the Courthouse. We will have the pleasure of welcoming our newest Board member, Wendy York and Eric Ratinoff. Both Wendy and Eric have had the privilege of attending the Jerry Spence Trial Seminar in Wyoming and they are going to share their experiences with us. The Liens Seminar scheduled for October has been postponed and will be rescheduled for early 2005. Please let us know if there are any topics you would like us to consider for either Luncheons or Problem Solving Clinics. Have a great Summer!



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