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Medicine and Law

Effie V. Bean Cozart

The law and legal issues related to medicine and health care financing are ever changing. In this issue of *TortSource*, the TIPS Medicine and Law Committee provides feature articles on three timely topics. Edward Beitz addresses the significance of punitive damages when only a small percentage of juries award punitive damages in medical negligence cases. Kevin Cottone explains what lawyers and insurers who are "responsible reporting entities" under recent federal legislation must do to determine whether a claimant is a Medicare beneficiary and the new obligations required of them as of January 2010. Louise Derevlany examines assisted outpatient treatment and its legal requirements and discusses how assisted outpatient treatment investigations will not be impeded by HIPAA.

This issue also includes a Trial Tip by Greg Cesarano about how a lawyer's courtroom behavior can affect the outcome of a trial, and an informative Legislative Update by Robert Ferm on the ongoing health care reform debate in Congress. Janine Smith tells us about the TIPS Law in Public Service Committee's gardening project at Josue Homes in San Diego; Marlene Heyser recaps the TIPS events at the Del from our fall meeting in Coronado, California; and Tony Cabassa provides a preview of San Juan, Puerto Rico, the venue for the Section's spring meeting. ❖

Effie V. Bean Cozart is an attorney with Butler, Snow, O'Mara, Stevens and Cannada, PLLC, in Memphis, Tennessee, and is a member of the TortSource *editorial board. She can be reached at effie.cozart@butlersnow.com.*

Punitive Damages in Medical Negligence Cases
The Bark versus the Bite

Edward F. Beitz

For attorneys who do not spend their billable day filing or responding to complaints for professional malpractice, the terms "punitive damages" and "health care" probably sound foreign to one another, and perhaps a little contradictory. After all, punitive damages are intended to punish and deter, to reform the defendant and dissuade the kind of behavior or actions that brought about the lawsuit. Typically, a claim for punitive damages is only presented to a jury when there is evidence of reckless and egregious behavior or intentional and wanton conduct: the kind of behavior that deserves harsher measures than the award of ordinary compensatory damages. Think of a chemical manufacturer that poisons a local river by illegal dumping or a pharmaceutical company that buries test results that may negatively impact the bottom line. The practice of medicine, on the other hand, is generally understood to be the science of healing and preventing disease. Doctors and nurses are looked to for help and assistance. For most people, doc-

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Illustration by Andrew O. Alcala

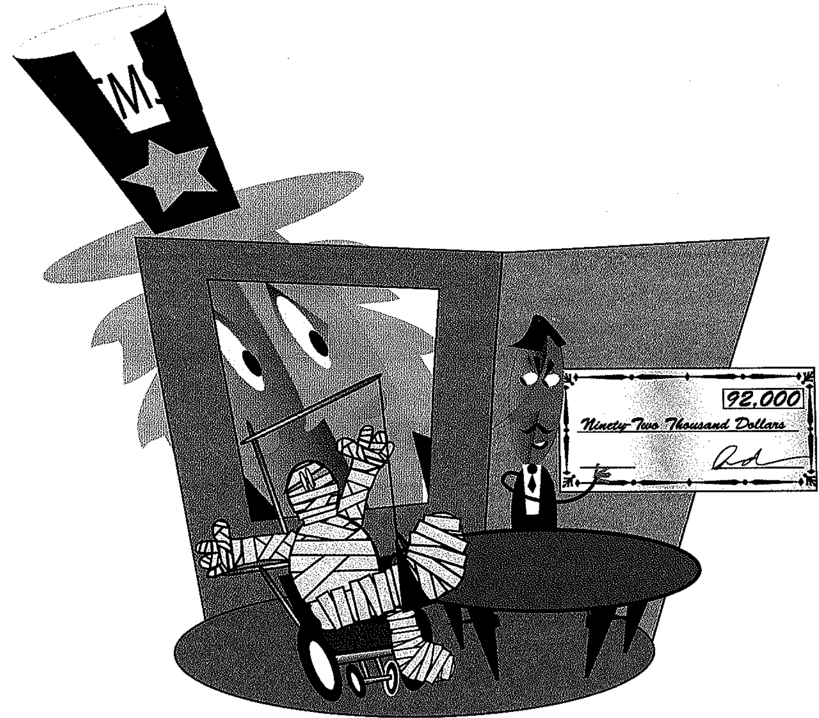

Illustration by Andrew O. Alcala

The New Medicare Act
Handling Medicare Claimants in the Future

Kevin C. Cottone

The Medicare, Medicaid and SCHIP Extension Act of 2007 represents a major effort by the U.S. Congress to protect the government's interest in personal injury claims involving Medicare beneficiaries. Simply stated, the purpose of the Act is to ensure that the federal government is repaid for the Medicare benefits paid on behalf of a beneficiary relating to a personal injury claim. Its impact is widespread, as the Act applies to insurers and self-insurers involved in any liability, no-fault, or workers' compensation claim. These insurers and self-insurers, referred to as responsible reporting entities (RREs) in the Act, must now determine whether a claimant is a Medicare beneficiary. If so, they must notify Medicare of the claim and, along with the claimant or plaintiff and his or her attorney, the RRE must ensure that Medicare's interest is protected at the time of judgment or settlement. The penalties under the Act for noncompliance are significant; they can include double

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Punitive Damages in Medical Negligence Cases: The Bark versus the Bite

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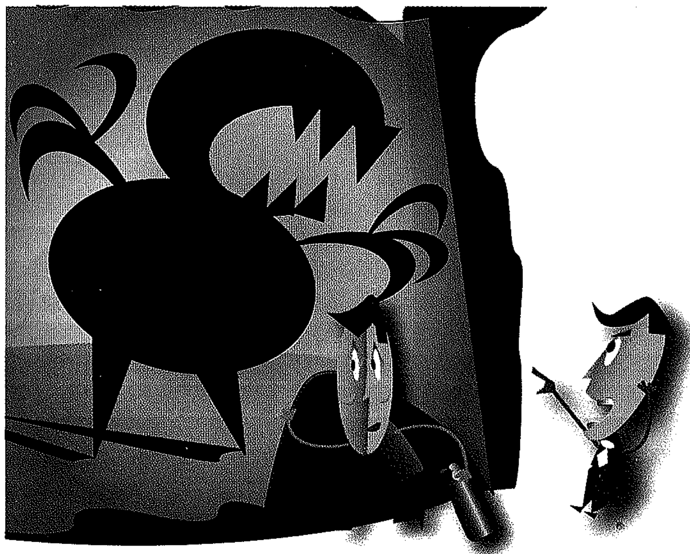
tors and nurses do not top of the list of people they want to see punished.

Certainly, suing your doctor is not a foreign concept in the United States. And yes, stories of physician or hospital error can frighten patients and lead to mistrust of the medical profession. But a negligence suit against a medical professional is initiated for the purpose of compensation and with the goal of making the injured party whole through money damages. It is generally understood that the health care provider was trying help the patient, even if that provider ultimately failed to conform to the standard of care. Accordingly, punitive damages are rarely awarded in a medical negligence trial.



Punitive Claims Still Have Significant Impact

Despite the fact that they are rarely awarded, punitive damages are frequently pursued in medical malpractice cases at the pleading stage. Regardless of the statistical reality for punitive awards against medical providers, plaintiffs attorneys understand the psychological threat and bargaining power these claims create. Defense counsel should be aware of the impact a punitive threat may have on their client's resolve and the importance of addressing these claims at the outset of a case.

This discussion will be aided with some statistical input from the Department of Justice, as it will put the fear and anxiety surrounding punitive damages within the appropriate "myth versus reality" spectrum. The most recent special report from the Bureau of Justice Statistics concerning civil bench and jury trials in state courts analyzed data from the nation's 75 most populous counties. According to that report, punitive damages were awarded to only 5 percent of all plaintiff *winners* in general civil trials in 2005. Taking into account the added fact that plaintiffs only prevailed in approximately 23 percent of all medical malpractice trials that year, the statistical danger of a punitive damages claim in medical malpractice litigation is relatively small.

Common sense dictates that this low statistical percentage should deflate much of the force a punitive damages claim brings to medical cases, especially where the facts pled do not portray the type of egregious behavior and wanton conduct warranting a punitive award. However, dismissing these claims out-of-hand would overlook the unique realities concerning punitive awards in medical malpractice that stand separate and apart from civil litigation as a whole.

It should be recognized that, while punitive damages are only awarded in a small percentage of jury trials where punitive damages were both sought and a plaintiff's verdict rendered, the highest median punitive damages award for all negligent tort cases in 2005—$2.8 million—was in medical malpractice cases. Indeed, of the six medical trials sampled where punitive damages were awarded, the Department of Justice reported that five punitive damages verdicts exceeded $1 million.

Given this statistical analysis (available at www.ojp.usdoj.gov/bjs/pub/pdf/cbjtsc05.pdf), a defendant health care provider would understandably be concerned with the potential for a staggering award, no matter how unlikely, when he or she hears about awards in the million dollar range. And unlike compensatory damages, punitive damages are *not* insurable in a number of jurisdictions, including New Jersey, New York, Pennsylvania, and Massachusetts. In these jurisdictions and others, a defendant medical professional facing a punitive damages claim cannot rely on malpractice insurance to foot the bill, and the physician or other provider may have to satisfy the award out of his or her own pocket.

The potential for high awards, no matter how remote a possibility, makes a punitive damages claim an attractive prospect for plaintiffs attorneys in those jurisdictions where punitive claims are recognized. Even though these claims are only viable in the limited circumstances of the most egregious behavior—for example, where a dying patient's cries for help are repeatedly ignored—experienced plaintiffs counsel know that the threat of a punitive damages claim can shake a physician's resolve and significantly strengthen a plaintiff's settlement posture.

Address Punitive Claims at the Earliest Opportunity

Just as a good plaintiffs attorney must evaluate a case to determine if there is a good faith basis to assert a punitive damages claim, defense counsel must take these claims seriously, no matter how rarely punitive damages are awarded. For the reasons discussed above, it is in defense counsel's interest to dispose of a punitive damages claim as early in the litigation as possible. Extinguishing the threat of punitive damages can help a physician or nurse client relax without the threat of personal liability for a verdict. This will allow the defendant health care provider to be a stronger, clearer thinking advocate in defense of his or her own case.

However, a defense attorney's ability to address these claims at the outset of litigation may be limited in some jurisdictions. For example, the approach differs greatly depending on the side of the Delaware River where an attorney practices. In Pennsylvania, a fact-pleading jurisdiction, a claim for punitive damages can be addressed by way of preliminary objection in lieu of an answer. The validity of a punitive damages claim can be challenged on the facts *as pled*, and defense counsel may argue that the allegations do not raise the type of reckless, wanton, or willful conduct warranting a punitive damages award. Meanwhile, across the river, New Jersey attorneys practice in a notice-pleading jurisdiction, where complaints are not required to be fact intensive. New Jersey practice does not have a routine avenue to strike a punitive damages claim before the close of pleadings. Such claims are usually addressed by way of a summary judgment motion in the course of discovery.

Regardless of jurisdiction, the threat of punitive damages can have a significant psychological impact on medical malpractice litigants long before the case ever gets to trial. While the bark of a punitive damages demand may be far worse than its actual bite, these claims should be given careful consideration by counsel, and the issue should be raised and addressed as soon as possible. ❖

Edward F. Beitz is an associate in the Philadelphia office of White and Williams, LLP. He is a member of the firm's litigation department and health care group and focuses his practice on medical malpractice defense. He can be reached at beitze@whiteandwilliams.com.

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