45-AUG Orange County Law. 22

Orange County Lawyer
August, 2003

Special Feature
Three Angles on "Punitive Damages"

*22 THE "NINE-MONTH" RULE AND PUNITIVE DAMAGES FOR HEALTH CARE PROFESSIONALS

Aashish Y. **Desai** [FNa1]

Health care professionals enjoy great benefits in litigation. While most litigators are familiar with the limitations on jury awards for non-economic damages, few understand the draconian constraints on punitive damages. Plaintiffs are not allowed to simply allege punitive damages against health care professions, even if they are claiming fraudulent conduct. Under Code of Civil Procedure [CCP] § 425.13, a motion to include punitive damages must be brought within two years after the complaint is filed or not less than nine months before the matter is first set for trial, whichever is earlier. The motion has both substantive and procedural parts. The so-called "nine-month" procedural rule appears to be mandatory and is frequently utilized by defense counsel to avoid the imposition of punitive damages. Because the California Supreme Court has broadly interpreted the impact of CCP § 425.13 in Central Pathology Service Medical Clinic Inc., v. Superior Court, 3 Cal.4th 181, 832 (1992), medical malpractice practitioners must be vigilant in bringing such motions.

The "nine-month" rule is particularly tricky because the statute articulates that the motion must be brought within nine months of when the case is first set for trial. Under fast track rules, most cases are set for trial at the initial status conference and therefore a plaintiff may only have a few months to bring forward evidence to successfully include punitive damages. The confluence of fast track rules upon CCP § 425.13 creates at best a trap for the unweary and at worst a clever game of "gotcha" by defense counsel. But there is a rarely utilized option for those caught in the statutory time trap-- legal impossibility. If discovery of the information needed to file this motion could not reasonably be ascertained before the nine month cut-off, plaintiffs should consider the value of filing the motion anyway, arguing the doctrine of legal impossibility.

In Looney v. Superior Court, 16 Cal.App.4th 521, 20 Cal.Rptr.2d 182 (Second District, Division 3, 1993), the court balanced the underlying purposes of § 36 (trial setting preference statute) and § 425.13, and granted an exception to § 425.13 where it would be impossible for the plaintiff to comply with the time restraints due to the granting of a motion for a preferential trial date. In Looney, the defendants' essential response to the petitioners' dilemma was that while the result is "perhaps unfortunate," petitioners were nonetheless required to meet the nine-month limitation period; and "since it was clearly impossible" for them to do so, they "lost their punitive damage claim." Id. at 534. The court rejected this position stating that "such a result would be clearly unjust and unfair." Id. at 534. It went on to say that "[t]he harsh and unjust result urged by defendants is not supported by the one case--Brown v. Superior Court, 224 Cal.App.3d 989 (1990)--upon which they rely." Id. at 535.

The appellate courts have been particularly sensitive to this timing problem. In Brown v. Superior Court, 224 Cal.App.3d 989 (1990), the court stated: "We recognize it may be possible to begin trial in less than nine months after filing the complaint, arguably rendering compliance with section 425.13 impossible." 224 Cal.App.3d at 994. While the Brown court ultimately did not allow the plaintiff's claims for punitive damages, it did not address the problems of balancing competing statutory rights, i.e., recognizing that rights granted under the liberal discovery and amendment statutes can only be enjoyed at the expense of the loss or impairment of the benefits of § 425.13. The conflict is particularly exacerbated in many cases because plaintiff's counsel do not have an ability to make an informed choice at the initial Trial Setting Conference of whether to press for an expedient trial or hope for a claim for punitive damages, i.e., the factual background to insert the fraudulent allegations often do not become clear until after the expiration of the nine-months rule!

To quote from Goldstein v. Superior Court, 42 Cal.App.4th 1635 (1996), "if in fact a plaintiff, by virtue of the quick trial setting practices of 'fast track' courts, is placed in a position where she cannot reasonably comply with the narrow time limits set out in section 425.13, then surely the court must

retain the inherent power and authority to make an appropriate order to avoid injustice or unfairness." 42 Cal.App.4th at 1645 (emphasis supplied). Goldstein actually enunciated a five-factor test for determining legal impossibility: 1) plaintiff was unaware of facts or evidence necessary to make a proper motion more than ninth months prior to the first assigned trial date; 2) plaintiff made diligent, reasonable and good faith efforts to discover the necessary facts or evidence to support such a motion; 3) after assignment of the trial date, plaintiff made reasonable, diligent and good faith efforts to complete the necessary discovery; 4) plaintiff filed his or her motion under § 425.13 as soon as practicable after completing such discovery (but in no event more than two years after the filing of the initial complaint); and 5) defendant will suffer no surprise or prejudice and will be given every reasonable opportunity to complete all necessary discovery. In most cases where the plaintiff was genuinely caught by surprise, the five factors should be met.

The judicial recognition of an implied exception to an otherwise mandatory statute is not without precedent where specific enforcement of the literal language would require performance of an impossible, impracticable or futile act. For example, prior to the codification of the principle set out in § 583.340(c), the Supreme Court had recognized that same principle as an implied exception to the mandatory five-year dismissal provisions of former § 583(b). Although that former statute expressly provided that the five-year deadline could be avoided only by the written stipulation of the parties, the Supreme Court "made an effort to 'set reality above artificiality'" in applying the former provisions. Moran v. Superior Court, 35 Cal.3d 229, 237, 673 P.2d 216 (1983), quoting from Christin v. Superior Court, 9 Cal.2d 536, 673 P.2d 205 (1937). The reasoning behind the exception was simple--since the purpose of the five-year rule was to prevent avoidable delay for too long a period, the exception insured that a plaintiff's case would not be arbitrarily cut off after five years. Moran, 35 Cal.3d. at 237. Indeed, the ***23** essence of Looney is that a plaintiff should not be placed in an impossible situation by an overly strict construction of § 425.13. Looney, supra, 16 Cal.App.4th at 537.

The next step in the process is demonstrating the sufficiency for relief based upon a likely imposition of punitive damages. The threshold showing that must be made in a § 425.13 motion is a "prima facie" demonstration that the defendant acted with fraud, malice or oppression with respect to his or her treatment of the plaintiff. A motion to add a claim for punitive damages pursuant to § 425.13 must be granted unless the court concludes that the allegations made, or evidence adduced in support of the claim, are insufficient as a matter of law to support a punitive damage claim. College Hospital v. Superior Court, 8 Cal.4th 704, 719-20, fn. 6 (1994). Our California Supreme Court in College Hospital analyzed the "substantial probability" requirement under § 425.13. The College Hospital Court reasoned that the Legislature had no intention of limiting trial against medical practitioners to only the most compelling punitive damage claims, since means were available to the Legislature to make that purpose unmistakably ***24** clear. Nor did the Legislature intend to change the substantive elements of punitive damage claims against health care providers or otherwise narrow the class of plaintiffs entitled to recover such damages. Therefore, the court concluded that it would interpret the section in a common sense manner consistent with its underlying purpose. See College Hospital at pp.716, 717.

Pursuant to College Hospital's analysis, trial courts are not authorized to "weigh the merits" of the claim or consider the probability of its outcome at trial. Rather, the court is to view whether the plaintiff has demonstrated that he or she possesses a legally sufficient claim which is "substantiated" by competent admissible evidence. College Hospital at p.719. The court concludes that the gravamen of § 425.13 is that a plaintiff may amend his or her complaint to allege punitive damages if the facts asserted are legally sufficient to support a punitive damage claim and the evidence provided reveals the actual existence of a triable claim. The College Hospital court concluded that this test was largely consistent with the "prima facie" approach formulated by the courts of appeal. College Hospital at p.719. Therefore, the real question is whether a plaintiff has presented a triable punitive damage claim under CCP § 3294 against a health care professional. While some have argued that the "clear and convincing" burden must be met before allowing an amendment under § 425.13, this analysis is incorrect. Under CCP § 3295(c), pretrial discovery of a defendant's financial condition is permitted if "the plaintiff has established that there is a substantial probability that the plaintiff will prevail" on the claim for punitive damages. See Weeks v. Baker & McKenzie, 63 Cal.App.4th 1128, 1151 (1998).

Given the rationale of Looney and the recognition of Brown and Goldstein that a plaintiff should not suffer unfairly due to matters beyond his or her control, trial courts should make equitable orders to avoid eviscerating a plaintiff's meritorious fraud counts, especially when the defense focuses upon the strictly procedural rational of the "nine-month" rule.

[FNa1]. **Aashish** Y. **Desai** is a Partner at Mower, Carreon & **Desai,** where his litigation practice emphasizes consumer class and collective actions, involving wage and hour issues, lender liability, securities fraud, and unfair business practices. He can be reached at **desai**@mocalaw.com.

END OF DOCUMENT