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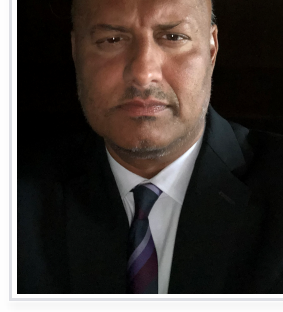
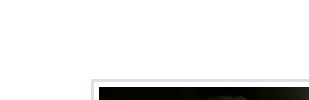
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Jun. 4, 2003

# Procedural Rule Shouldn't Bar Meritorious Punitive Claims

**While most litigators are familiar with the limitations on jury awards for noneconomic damages in medical-malpractice cases, few understand the constraints on punitive damages.****Aashish Y. Desai**Desai Law Firm PC  
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## Attachments

While most litigators are familiar with the limitations on jury awards for noneconomic damages in medical-malpractice cases, few understand the constraints on punitive damages.

Health care professionals enjoy great benefits in such litigation. Plaintiffs cannot simply allege punitive damages against health care professionals, even if they are claiming fraudulent conduct. Instead, Code of Civil Procedure Section 425.13 requires plaintiffs to bring a motion for punitive damages within two years after they file the complaint or not less than nine months before the court first sets the matter for trial, whichever is earlier.

The so-called "nine-month" rule appears to be mandatory, and defense counsel frequently uses it to avoid the imposition of punitive damages. Because the California Supreme Court has interpreted Section 425.13 broadly in *Central Pathology Service Medical Clinic Inc. v. Superior Court*, 3 Cal.4th 181 (1992), practitioners must be vigilant in bringing such motions.

The nine-month rule is particularly tricky because the statute articulates that the plaintiff must bring the motion within nine months of when the case initially is set for trial. Under fast-track rules, most cases are set for trial at the initial status conference. Therefore, a plaintiff may have only a few months to bring forward evidence of punitive damages.

The confluence of fast-track rules upon Section 425.13 creates a trap for the unwary and a clever game of "gotcha" for defense counsel. But a rarely utilized option exists for those caught in the statutory time trap - legal impossibility.

If discovery of the information needed to file the motion reasonably could not be ascertained before the nine-month cutoff, then plaintiffs should consider the value of filing the motion anyway and arguing legal impossibility.

In *Looney v. Superior Court*, 16 Cal.App.4th 521 (1993), the court balanced the underlying purposes of Section 36 (the trial-setting preference statute) and Section 425.13 and granted an exception to Section 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.

The *Looney* defendants' response to the petitioners' dilemma was that while the result is "perhaps unfortunate," the petitioners nonetheless had to meet the nine-month limitation period; and "since it was clearly impossible" for them to do so, they "lost their punitive damage claim."

The court rejected this position, stating that "such a result would be clearly unjust and unfair." 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."

The appellate courts have been particularly sensitive to this timing problem. The *Brown* 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."

While *Brown* ultimately did not allow the plaintiff's claims for punitive damages, it also did not address the problems of balancing competing statutory rights, i.e., recognizing that rights under the liberal discovery and amendment statutes can be enjoyed only at the expense of the loss or impairment of the benefits of Section 425.13.

The conflict is exacerbated in many cases because plaintiffs' counsel cannot make an informed choice at the initial trial-setting conference as to whether to press for an expedient trial or hope for a claim for punitive damages. The factual background to insert the fraudulent allegations often does not become clear until after the expiration of the nine-month 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."

*Goldstein* enunciated a five-factor test for determining legal impossibility: The plaintiff was unaware of facts or evidence necessary to make a proper motion more than ninth months prior to the first assigned trial date; the plaintiff made diligent, reasonable and good-faith efforts to discover the necessary facts or evidence; after assignment of the trial date, the plaintiff made reasonable, diligent and good-faith efforts to complete the necessary discovery; the plaintiff filed the motion under Section 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 the 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.

There is precedent for the judicial recognition of an implied exception to an otherwise-mandatory statute where specific enforcement of the literal language would require performance of an impossible, impracticable or futile act.

For example, before the codification of the principle set out in Code of Civil Procedure Section 583.340(c) (tolling of statute of limitations when bringing action to trial is impossible, impracticable or futile), the Supreme Court recognized that same principle as an implied exception to the mandatory five-year dismissal provisions of former Section 583(b). Although that former statute provided that the five-year deadline could be avoided only by the written stipulation of the parties, the court "made an effort to 'set reality above artificiality'" in applying the former provisions. *Moran v. Superior Court*, 35 Cal.3d 229 (1983).

The reasoning behind the exception was simple: Because the purpose of the five-year rule was to prevent avoidable delay for too long a period, the exception ensured that a plaintiff's case would not be arbitrarily cut off after five years. Indeed, the essence of *Looney* is that the law should not place a plaintiff in an impossible situation by an overly strict construction of Section 425.13.

The next step is demonstrating the sufficiency of the evidence for a likely imposition of punitive damages. The threshold showing in a Section 425.13 motion is a "prima facie" demonstration that the defendant acted with fraud, malice or oppression.

The court must grant a Section 425.13 motion unless it concludes that the allegations made, or evidence adduced in support of the claim, are insufficient as a matter of law to support a punitive damages claim. *College Hosp. v. Superior Court*, 8 Cal.4th 704 (1994).

The *College Hospital* court analyzed the "substantial probability" requirement under Section 425.13. The court reasoned that the Legislature had no intention of limiting damages against medical practitioners to only the most compelling punitive-damages claims, since the Legislature had the means to make that purpose unmistakably clear. Nor did the Legislature intend to change the substantive elements of punitive damages 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.

Pursuant to *College Hospital's* analysis, trial courts may not "weigh the merits" of the claim or consider the probability of its outcome at trial. Rather, the court must determine whether the plaintiff has demonstrated that he or she possesses a legally sufficient claim that is "substantiated" by admissible evidence.

The *College Hospital* court concludes that the gravamen of Section 425.13 is that a plaintiff may amend his complaint to allege punitive damages if the facts asserted are legally sufficient to support a punitive-damages claim and the evidence provided reveals the actual existence of a triable claim. The court noted that this test was largely consistent with the "prima facie" approach formulated by the Courts of Appeal.

Therefore, the real question is whether a plaintiff has presented a triable punitive-damages claim against a health care professional under Civil Code Section 3294, which outlines the requirements for a punitive-damages claim. While some have argued that a plaintiff must meet the "clear and convincing" burden before the court allows an amendment under Section 425.13, this analysis is incorrect.

Under Code of Civil Procedure Section 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 (1998).

Given the rationale of *Looney* and the recognition of *Brown* and *Goldstein* that a plaintiff should not suffer unfairly because of 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 on the strictly procedural rational of the nine-month rule.

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