Jury Verdicts in Insurance Bad Faith Cases

J. Clark Kelso & Kari C. Kelso

INSTITUTE FOR LEGISLATIVE PRACTICE
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Chapter 1
Executive Summary

The Legislature has passed a bill that would create a statutory cause of action in favor of a third-party claimant against an insurance company for unfair claims settlement practices. SB 1237 (Escutia). Legislative consideration of measures to modify the tort system always generate a great deal of attention from interested parties on all sides of every issue. As a matter of strict policy, the Institute for Legislative Practice does not support or oppose any legislation. Instead, the Institute hopes to facilitate deliberation by presenting nonpartisan, analysis of issues that are raised by pending bills.

In this report, we present background information regarding the development of the law regarding insurance company liability for breach of the covenant of good faith and fair dealing and for unfair claims settlement practices (Chapter 2, Section A). This background provides the context for considering proposals to create similar liability in favor of third-party claimants and for our statistical analysis of insurance bad faith verdicts in California from 1991 to 1999 (Chapter 2, Section B).

Under current law, an insured can recover in tort or contract against his or her insured for breach of the covenant of good faith and fair dealing (this is a "first-party claim"). In such a case, the insured can recover economic loss (even if it exceeds the policy limits), emotional distress damages, and punitive damages (among other things). An insured can assign to a third-party claimant his or her claim against the insurance company, but the assignment is limited to recovery of the economic damages. An insured may not assign his or her claim for emotional distress or punitive damages.

A review of insurance bad faith verdicts in California from 1991 to 1999 reveals that punitive damages constitute 77% of all the damages imposed by juries against insurance companies for breach of the covenant of good faith and fair dealing. Punitive damages were awarded in 42% of the cases (which is substantially higher than the 4-6% rate of punitive damages in all civil litigation). When a jury decides to award punitive damages, the mean punitive award is $16,655,895, and the median punitive award is $2,816,000.

Both the prevalence of punitive damages in insurance bad faith cases and the very large punitive awards are cause for some concern and further inquiry. It is of course not possible to determine the reasons for the frequent and high awards solely by examining jury verdict reports. One hypothesis is that insurance companies engage in a substantial amount of improper claims settlement practices that justifies the imposition of substantial punitive awards. Another hypothesis is that juries are unable consistently to apply the vague standards regarding the measure of punitive damages. A third hypothesis is that juries are biased against insurance companies and are too quick to impose punitive damages and, when imposed, set punitive damages at too high a number.

None of these hypotheses can be verified based solely upon the data collected for this report. A more searching inquiry is necessary to test these hypotheses, involving perhaps interviews with jurors, a close review of insurance bad faith cases, and controlled experiments (e.g., using repetitive moot courts). Until that type of further inquiry can be conducted, we are left simply with the conclusion that an insurance company which goes to trial in an insurance bad faith case stands about an even chance of having the judgment include punitive damages, and the punitive award, if any, is likely to be substantially in excess of the economic loss (and usually above $1,000,000).

Chapter 2
Insurance Bad Faith: Theory and Practice

A. A Brief History of the Law Regarding Insurance Bad Faith Claims

1. The Insured's Contract Remedy for Breach of the Covenant of Good Faith and Fair Dealing

The story of insurance bad faith claims begins with the Supreme Court of California's decision in *Comunale v. Traders & General Insurance Co.*, 50 Cal.2d 654 (1958). The plaintiffs were injured by the defendant's insured in an automobile accident. The insurance policy had limits of liability in the sum of $10,000 for each person injured and $20,000 for each accident. The insurance company refused to defend the action on the ground that the truck the insured was driving at the time did not belong to him. The insured retained counsel to represent him. On the second day of trial, the plaintiffs indicated they would settle the case for $4,000, and the insured communicated this offer to the defendant, explaining that he did not have enough money to effect the settlement. The insurance company refused to settle, and the trial proceeded to judgment in favor of one of the plaintiffs for $25,000 and in favor of the other plaintiff for $1,250.

The insured did not pay the judgment, and the plaintiffs recovered a judgment up to the policy limits from the insurance company in a suit brought pursuant to Insurance Code § 11580(b)(2) (which permits a direct action by a judgment creditor against an insurance company up to policy limits). [1] The plaintiffs then obtained an assignment from the insured of the insured's rights

[1] Section 11580 of the Insurance Code provides that certain policies "insuring against losses . . . (b) . . . shall not be . . . issued or delivered to any person in this state unless it contains all the following provisions: . . . (2) A provision that whenever judgment is secured against the insured or the executor or administrator of a deceased insured in an action based upon bodily injury, death, or property damage, then an action may be brought against the insurer on the policy and subject to its terms and limitations, by such judgment creditor to recover on the judgment."

against his insurance company, and the plaintiffs sued the insurance company upon that assignment to recover the excess portion of the judgment.

The court unanimously held that an insured has a claim against his or her insurance company for breach of the covenant of good faith and fair dealing if the insurance company wrongfully declines to defend and refuses to accept a reasonable settlement within the policy limits. The law implies in *every* contract a covenant of good faith and fair dealing that neither party will do anything which will insure the right of the other to receive the benefits of the agreement. The court explained the application of the covenant in the insurance context as follows:

> "The insurer, deciding whether a claim should be compromised, must take into account the interest of the insured and give it at least as much consideration as it does to its own interest. . . . When there is a great risk of a recovery beyond the policy limits so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured's interest requires the insurer to settle the claim. Its unwarranted refusal to do so constitutes a breach of the implied covenant of good faith and fair dealing." *Id*., 50 Cal.2d at 659.

Having recognized the existence of a claim, the court then turned to the question of what damages the plaintiff might recover. The issue in *Comunale* was whether the insured could recover damages in excess of the policy limits. Arguably, since the policy limits indicated the insurance company's maximum exposure on the contract, damages for breach of contract should have been limited to the policy limits. The court rejected this contention. It reasoned that "[t]he policy limits restrict only the amount the insurer may have to pay in the performance of the contract as compensation to a third person for personal injuries caused by the insured; *they do not restrict the damages recoverable by the insured for a breach of contract by the insurer*." *Id*., 50 cal.2d at 659 (emphasis added).

The measure of damages for breach of contract is found in Section 3300 of the Civil Code, which provides as follows:

> "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code,

> is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

The court found that "[a] breach which prevents the making of an advantageous settlement when there is a great risk of liability in excess of the policy limits will, in the ordinary course of things, result in a judgment against the insured in excess of those limits." *Id*., 50 Cal.2d at 660-61. Accordingly, the court held that "an insurer, who wrongfully declines to defend and who refuses to accept a reasonable settlement within the policy limits in violation of its duty to consider in good faith the interest of the insured in the settlement, is liable for the entire judgment against the insured even if it exceeds the policy limits." *Id*., 50 Cal.2d at 661.

Having held that a cause of action existed in favor of the *insured* for the entire judgment, the court turned to the question of whether the insured could *assign* that cause of action to the plaintiff in the underlying suit. Based on long-standing precedent, the court held that the cause of action was assignable, notwithstanding a provision in the insurance contract that purported to preclude assignment absent the insurer's consent. *Id*., 50 cal.2d at 661-62.

In summary, *Comunale* endorsed a *contract* cause of action that could be asserted by the insured against his or her insurance company for breach of the implied covenant of good faith and fair dealing and permitted the insured to recover as damages the full amount of an underlying judgment in excess of the policy limits. That contract cause of action was assignable to third-party claimants.

2. The Insured's Tort Remedy for Breach of the Covenant of Good Faith and Fair Dealing

The next significant case in the development of the law was *Crisci v. Security Insurance Company of New Haven*, 66 Cal.2d 425 (1967). Rosina Crisci owned an apartment building. One of her tenants was injured when a tread on a wooden staircase gave way. The tenant sued Mrs. Crisci and claimed damages in the amount of $400,000. Mrs. Crisci's general liability insurance policy had a limit of $10,000. The tenant ultimately offered to settle for $10,000, but the insurance company refused, indicating that it was willing to pay only $3,000 for the tenant's physical injuries and nothing for her claimed emotional injuries. A jury awarded the tenant $100,000. The insurance company paid $10,000 of the judgment, and the tenant entered into a settlement with Mrs. Crisci which included an assignment of her cause of action against her insured for breach of the covenant of good faith and fair dealing.

The trial court awarded Mrs. Crisci $91,000 (plus interest) in economic damages resulting from the insurance company's unwarranted refusal to settle, and an additional $25,000 for mental suffering. The $91,000 award was consistent with *Comunale*. However, the award of $25,000 for mental suffering created the issue of whether damages for mental suffering could be recovered in a cause of action against an insurance company for breach of the covenant of good faith and fair dealing.

The court noted that language in the *Comunale* opinion had indicated that the cause of action for breach of the covenant of good faith and fair dealing "'sounds both in contract and tort.'" *Id*., 66 Cal.2d at 432 (quoting *Comunale*, 50 Cal.2d at 663). Drawing upon this language, the court in *Crisci* unanimously endorsed a *tort* cause of action against an insurance company for breach of the covenant of good faith and fair dealing.

The measure of damages in torts is set forth in Civil Code § 3333 as follows:

> "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could hav ebeen anticipated or not."

The court explained in *Crisci* that, "[i]n accordance with the general rule, it is settled in this state that mental suffering constitutes an aggravation of damages when it naturally ensues from the act complained of, and in this connection mental suffering includes nervousness, grief, anxiety, worry, shock, humiliation and indignity as well as physical pain." *Id*., 66 Cal.2d at 433. The court held that mental distress damages could be recovered by an insured against an insurance company for tortious breach of the covenant of good faith and fair dealing. *See also Gruenberg v. Aetna Insurance Co.*, 9 Cal.3d 566 (1973) (reaffirming right to recovery emotional distress damages).

Although the issue was not before the court in *Crisci*, by holding that the cause of action arose in tort, the court clearly made punitive damages available in appropriate insurance bad faith cases under Civil Code § 3294(a), which now provides as follows:

> "In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

See Silberg v. California Life Ins. Co., 11 Cal.3d 452 (1974) (approving recovery of punitive damages for bad faith refusal to settle).

3. The Third-Party Claimant's Right to Sue for Breach of the Covenant of Good Faith and Fair Dealing

Since the insured clearly had a cause of action in tort for breach of the covenant of good faith and fair dealing, and the insured could easily assign that claim to the third-party claimant in the underlying lawsuit, the issue naturally arose whether the third-party claimant had a claim for breach of the covenant in the *absence* of an assignment by the insured. The court first addressed this issue in *Murphy v. Allstate Insurance Co.*, 17 Cal.3d 937 (1976). The third-party claimant had received only partial satisfaction of her judgment against the insured tortfeasor, and the plaintiff sought the remainder from the insurance company for refusing to settle within policy limits. There was no allegation that the insured had assigned to the third-party claimant the insured's claim against his insurance company.

The court unanimously held that the insurance company's duty under the covenant of good faith and fair dealing runs *only* to the insured (i.e., the person with whom the insurance company had contracted). The court explained that "[t]he duty to settle is implied in law *to protect the insured* from exposure to liability in excess of coverage as a result of the insurer's gamble on which only the insured might lose." *Id*., 17 Cal.3d at 941 (emphasis added). The court further noted that "[t]he insurer's duty to settle does not directly benefit the injured claimant. In fact, he usually benefits from the duty's breach. Instead of receiving an award near policy limits, he stands to obtain judgment exceeding policy coverage." *Id*. The court rejected the argument that the third-party claimant was also a third-party beneficiary under contract law principles, reasoning that "[a] third party should not be permitted to enforce covenants made not for his benefit, but rather for others. He is not a contracting party; his right to performance is predicated on the contracting parties' intent to benefit him." *Id*., 17 Cal.3d at 944. Accordingly, the court held that an insurance company does *not* owe a duty to settle directly to a third-party claimant.

The court noted that an insured can assign his or her cause of action to the third-party claimant pursuant to *Comunale* and other cases. However, the court held that the assignment was limited to the *economic loss* suffered by the insured (i.e., the amount of the excess judgment). Citing precedents denying the assignability of "personal tort cause[s] of action," the court held that the insured could *not* assign his or her claims for emotional distress or punitive damages to the third-party claimant. *Id*., 17 Cal.3d at 942.

After *Murphy*, the law provided that an insured could recover in tort or contract against his or her insured for breach of the covenant of good faith and fair dealing, and that an insured could assign to a third-party claimant only his or her economic damages (which essentially means the contract damages were assignable, but the tort damages were not assignable). Thus, third-party claimants could recover excess judgments if the insured was willing to assign his or her claim, but the third-party claimant could not recover damages for the insured's emotional distress or punitive damages.

Three years later, in *Royal Globe Ins. Co. v. Superior Court*, 23 Cal.3d 880 (1979), the court held, by a 4 to 3 vote, that a third-party claimant could sue an insurance company directly for a violation of subdivision (h) of Section 790.03 of the Insurance Code which prohibits insurers from engaging in certain unfair claims settlement practices. A *Royal Globe* claim sounded in tort, and the third-party claimant could recover from the insurance company damages for economic loss in excess of policy limits, emotional distress suffered by the third-party claimant, and punitive damages. Almost ten years later, the court overruled *Royal Globe*, holding in *Moradi-Shalal v. Fireman's Fund Insurance Cos.*, 46 Cal.3d 287 (1988), by a 7 to 2 vote, that the court had erred in its interpretation of Section 790.03 of the Insurance Code and that Section 790.03 did *not* create a tort cause of action in favor of the third-party claimant.

Royal Globe and *Moradi-Shalal* were statutory interpretation cases. The court in both cases focused its primary attention upon the language and history of the relevant statutory provisions. In *Moradi-Shalal*, the court devoted some effort to reviewing criticisms of *Royal Globe* and contentions that *Royal Globe* had created "adverse social and economic consequences." *Moradi-Shalal*, 46 Cal.3d at 301. Those criticisms included concerns that *Royal Globe* encourages two lawsuits by the injured claimant, encourages unwarranted settlement demands by claimants, may result in escalating insurance costs to the general public, and creates a serious conflict for the insurer who must protect the interests of its own insured while trying to avoid adverse claims from the third-party claimant against the insured. *Id*., 46 Cal.3d at 301-02. The court reviewed these criticisms not to second-guess the Legislature's judgment, but only to assist the court in deciding whether the court should continue to follow *Royal Globe* even if *Royal Globe* had been wrongly decided as a matter of statutory interpretation. The court expressly noted that "we are not in a position to verify the accuracy of each of" the criticisms leveled at *Royal Globe*. *Id*., 46 Cal.3d at 301.

As a result of *Moradi-Shalal*, the law now stands essentially as it did after *Murphy v. Allstate Insurance Co.* That is, an insured can recover in tort or contract against his or her insured for breach of the covenant of good faith and fair dealing (a "first-party" claim), and an insured can assign to a third-party claimant only his or her economic damages. A third-party claimant does *not* have a direct action against an insurance company for breach of the covenant of good faith and fair dealing.

B. Proposed Statutory Liability for Third-Party Claims

1. General Considerations

The law of torts has been one of the major systems used by government both to provide compensation for injuries and to achieve the right amount of deterrence (i.e., enough deterrence to reduce risky or wrongful conduct, but not so much deterrence that the defendant's cost of avoiding injuries rises to unproductive levels). An award of damages *compensates* the plaintiff for some or all of the injuries suffered. By requiring the defendant to pay those damages, the law secures a measure of *deterrence*, encouraging the defendant and others who are similarly situated to reduce unreasonably risky or wrongful behavior.

One of the central challenges for the tort system has been to determine the optimal level of compensation to satisfy society's dual interests in seeing that the plaintiff is adequately reimbursed for losses suffered and that the defendant is appropriately deterred. The general measure of tort damages – which permits recovery "for all the detriment proximately caused" by the defendant's wrongful conduct (Civ. Code § 3333) – serves both of these interests. Compensation "for all the detriment proximately caused" is designed to ensure that the injured person is neither under-compensated nor over-compensated. In addition, economic theory indicates that requiring the defendant to pay compensatory damages generally achieves the right amount of deterrence. *See* Richard A. Posner, *Economic Analysis of Law*, p. 143 (2d ed. 1977) ("As it happens, the right amount of deterrence is produced by compelling negligent injurers to make good the victim's losses. Were they forced to pay more . . . some economical accidents might also be deterred; were they permitted to pay less than compensation, some uneconomical accidents would not be deterred.").

The law of tort remedies accounts for those situations where a compensatory award would be *insufficient* to achieve the right amount of deterrence by permitting an award of punitive damages. The ordinary measure of damages, which limits the plaintiff to a compensatory award, is premised on the assumption that the defendant did not deliberately injure the plaintiff and that the defendant is therefore likely to alter his or her behavior in response to an award of compensatory damages. However, it sometimes happens that one person deliberately injures another or deliberately exposes another to a substantial risk of serious injury. In these circumstances, the defendant may actually have calculated in advance the likely cost of paying a plaintiff his or her compensatory damages and decided to expose the plaintiff to the risk of injury notwithstanding the expense of compensatory damages. The defendant in these cases can be found to have acted with "oppression, fraud, or malice," thereby justifying an award of punitive damages "for the sake of example and by way of punishing the defendant." Civ. Code § 3294(a).

The tort system works by compensating injured persons adequately and promoting the right amount of deterrence. In theory, it functions as intended so long as liability is generally imposed in the right cases, the amount of compensatory damages roughly reflects the actual injuries caused by the defendant's conduct, punitive damages are imposed in appropriate cases, and the amount of punitive damages achieves an appropriate level of deterrence. Our public system of dispute resolution generally entrusts these decisions in tort cases to the jury, the right to which is expressly guaranteed by the California Constitution. *See* Cal. Const., Art. I, § 16 ("Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict."). As a result of this constitutional provision and our historic tradition of placing great reliance upon juries "to represent the community's wisdom, experience, values and common sense" (*see* J. Clark Kelso, *Final Report of the Blue Ribbon Commission on Jury System Improvement*, 47 Hastings Law Journal 1433, 1474 (1996)), it is appropriate to assume that the jury system is fulfilling its intended role and, consequently, that the tort system is functioning as intended, absent strong evidence to the contrary.

Accordingly, in deciding whether to create a new tort cause of action in favor of a third-party claimant against an insurance company for breach of the covenant of good faith and fair dealing or for engaging in unfair claims settlement practices, policy-makers should consider whether there is strong evidence (1) that the tort system will not work as intended because of one or more dysfunctions within the system (e.g., systematic over-compensation or excessive punitive damages), or (2) that the actual consequences of the tort system in practice (even assuming the system works as intended) threaten other important public interests (e.g., insurance protection at a reasonable cost), and the threat to those interests outweighs the benefits of the tort system's compensatory and deterrence characteristics.

2. Jury Verdicts in Insurance Bad Faith Cases

In order to assist policy-makers in determining whether the concerns of third-party claimants are best addressed through the tort system, we collected data from jury verdicts in insurance bad faith cases reported in Westlaw's database for the *California Jury Verdict Reporter*. We reviewed insurance bad faith cases dating from March 1991 to March 1999. After removing defendant-verdict cases and cases with missing data, we were left with a sample of 104 cases.

The sum of jury verdicts in all cases in the sample was $952,930,784. The sum of economic damages in all cases in the sample was $190,833,427, or 20% of the total verdict amount. The sum of punitive damages in all cases in the sample was $732,859,400, or 77% of the total verdict amount. [2]

The summary of descriptive statistics for the sample is as follows:

	N	Sum	Median	Mean	Trimmed Mean	Standard Deviation
verdict	104	952,930,784	1,100,000	9,162,796	3,340,763	42,859,555
economic	104	190,833,427	290,000	1,834,937	920,534	5,038,604
punitive	104	732,859,400	0	7,046,725	1,660,539	38,931,887

Table 1. Descriptive Statistics for Insurance Bad Faith Cases, 1991-1999.

The mean [3] for punitive damages is substantially higher than the mean for economic damages. In part, this reflects the effect of a number of very large punitive awards and the fact that the punitive damage sample is highly skewed in a positive direction. The skewness of the sample is evident from the very high

[2] The economic and punitive damages do not add up to 100%. The small difference is accounted for by awards for emotional distress, prejudgment interest and attorneys fees. These figures are not included in this report because the jury verdict reports do not appear to be particularly reliable in reporting these numbers, and their contribution to the total verdict amount is relatively small.

[3] The "mean" is a measure of the central tendency of a sample. It is the arithmetic average of the sample which is calculated by dividing the sum of the cases by the number of cases.

standard deviation [4] reported in Table 1. Looking at the data, the top five punitive damage awards were for $386,433,000, $77,000,000, $58,000,000, $28,000,000, and $25,000,000. But even when the upper and lower 5% of the sample is discarded, the trimmed mean [5] for punitive damages remains substantially higher than the trimmed mean for economic damages.

Punitive damages were awarded in 44 of the 104 cases. This is a 42% rate for awarding punitive damages, much higher than the widely reported 4-6% rate for punitive damages in all civil litigation. *See* Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 Wisconsin Law Review 15, 20-30 (1998) (reviewing the results of nine other studies of punitive damages).

The median, [6] mean and trimmed means reported in Table 4 include cases where no punitive damages were awarded. When those cases are excluded and we examine only those cases where punitive damages were awarded (N=44), the median punitive award is $2,816,000, the mean is $16,655,895, the trimmed mean is $6,508,116, and the standard deviation is $58,879,871.

It is clear from this data that punitive damages are the primary driving force in insurance bad faith litigation. It is also clear that the amount of punitive

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[4] "Standard deviation" is a measure of dispersion around the mean of a sample. In a normal distribution, 68% of cases fall within one standard deviation of the mean, and 95% of cases fall within 2 standard deviations of the mean. For example, if the mean verdict of a sample is $150, with a standard deviation of $20, 68% of the cases would be between $130 and $170 in a normal distribution, and 95% of the cases would be between $110 and $190 in a normal distribution.

[5] The trimmed mean figures are calculated after discarding the highest and lowest 5% of the sample. Trimmed means better reflect the central tendency of the data and are appropriate to use when a sample is highly skewed (and thus non-normal). The sample of damage judgments is highly skewed in a positive direction as a result of a small number of extremely large judgments (most of which consist of economic damages). The five highest total verdicts are $53,490,000, $30,000,000, $26,053,000, $21,789549, and $17,162,272. The five highest non-economic awards are $8,730,152, $7,500,000, $7,000,000, $6,000,000, and $5,900,000.

[6] The "median" is the value above and below which half the cases fall (i.e., the 50th percentile). The median is a measure of central tendency not sensitive to outlying values in a skewed sample.

damages are widely dispersed. This is not surprising since juries are given very little guidance regarding an appropriate amount to award for punitive damages. The *California Jury Instructions – Civil (8th ed.)* recommends the following instruction on punitive damages:

> "You must now determine whether you should award punitive damages against defendant for the sake of example and by way of punishment. Whether punitive damages should be imposed, and if so, the amount thereof, is left to your sound discretion, exercised without passion or prejudice. If you determine that punitive damages should be assessed against a defendant, in arriving at the amount of such an award, you must consider: (1) The reprehensibility of the conduct of the defendant; (2) The amount of punitive damages which will have a deterrent effect on the defendant in the light of defendant's financial condition; and (3) That the punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff." BAJI 14.72.2.

This instruction leaves juries with wide latitude in assessing punitive damages. It should be noted that we did not examine the verdicts in the sample to determine how many of the verdicts were reduced either by the courts or by the parties through settlement.

To explore whether there was any substantial difference in the assessment of punitive damages across different types of insurance and injuries, we divided the cases into the following categories:

1. Life insurance
2. Commercial-property
3. Workers' compensation
4. Fire
5. Earthquake
6. Liability
7. Homeowners
8. Uninsured/underinsured motorist
9. Automobile
10. Title

11. Disability
12. Health

The summary of descriptive statistics for the entire sample of 104 cases (which includes cases where no punitive damages were awarded) by insurance type is as follows:

		N	Median	Mean	Trimmed Mean	SD
Life	verdict	4	3,148,321	4,986,661	4,782,401	6,330,702
	eco	4	398,321	1,449,161	1,332,401	2,391,960
	punitive	4	2,500,000	3,000,000	2,944,444	3,559,026
Comm.	verdict	13	2,763,600	5,439,494	5,255,947	8,774,291
	eco	13	800,000	2,271,648	1,801,831	3,559,536
	punitive	13	0	3,014,000	1,793,333	7,719,485
Workers	verdict	3	2,610,000	3,079,947	--	3,042,266
	eco	3	300,000	713,280	--	885,478
	punitive	3	2,500,000	2,366,667	--	2,302,897
Fire	verdict	15	1,700,000	7,711,937	5,177,485	15,428,555
	eco	15	626,851	1,342,937	1,225,867	1,467,713
	punitive	15	0	5,983,333	3,425,926	14,958,677
EarthQk	verdict	6	1,779,984	2,794,593	2,674,682	3,257,567
	eco	6	106,500	377,432	316,591	726,330
	punitive	6	1,000,000	2,033,333	1,837,037	2,956,800
Liability	verdict	26	820,776	21,452,225	5,296,509	82,837,301
	eco	26	478,464	3,952,788	2,407,002	9,053,284
	punitive	26	0	17,068,577	2,130,342	75,552,043
Home	verdict	12	372,409	2,848,877	2,369,258	4,964,765

	eco	12	124,000	159,820	149,947	171,662
	punitive	12	0	2,570,367	2,078,185	4,852,478
Unins.	verdict	8	680,000	1,407,439	1,316,415	1,585,376
	eco	8	57,000	171,564	135,071	336,305
	punitive	8	220,000	953,125	842,361	1,419,494
Auto	verdict	5	1,736,458	1,530,466	1,500,407	1,537,311
	eco	5	36,080	604,466	527,073	1,126,630
	punitive	5	1,000,000	920,000	916,667	903,881
Title	verdict	3	54,237	3,689,537	--	6,331,078
	eco	3	14,375	1,623,597	--	2,796,039
	punitive	3	0	1,725,000	--	2,987,788
Disab.	verdict	2	2,362,500	2,362,500	--	3,305,724
	eco	2	2,352,500	2,352,500	--	3,319,866
	punitive	2	--	--	--	--
Health	verdict	7	393,781	13,419,205	9,957,969	33,402,485
	eco	7	12,000	1,756,562	1,277,949	4,573,6723
	punitive	7	100,000	11,514,286	8,515,873	28,891,200

Table 2. Summary of Insurance Bad Faith Verdicts by Insurance Type from 1991-1999.

It does not appear from Table 2 that there is much difference between cases involving different types of insurance or injuries. First, the mean and trimmed mean awards in each category are well above $1,000,000 (and in two categories, liability and health, the means are above $10,000,000 because of several very large judgments). Second, the mean punitive damage award is substantially larger than economic damages award in many of the categories (i.e., life, workers compensation, fire, earthquake, liability, home, uninsured motorist, and health). Third, the average punitive award is usually above $1,000,000. The punitive effect thus appears to operate similarly over nearly all types of insurance bad faith claims.

Both the prevalence of punitive damages in insurance bad faith cases and the very large punitive awards are cause for some concern and further inquiry. It is of course not possible to determine the reasons for the frequent and high awards solely by examining jury verdict reports. One hypothesis is that insurance companies engage in a substantial amount of improper claims settlement practices that justifies the imposition of substantial punitive awards. Another hypothesis is that juries are unable consistently to apply the vague standards regarding the measure of punitive damages. A third hypothesis is that juries are biased against insurance companies and are too quick to impose punitive damages and, when imposed, set punitive damages at too high a number.

None of these hypotheses can be verified based solely upon the data reported above. A more searching inquiry is necessary to test these hypotheses, involving perhaps interviews with jurors, a close review of insurance bad faith cases, and controlled experiments (e.g., using repetitive moot courts). Until that type of further inquiry can be conducted, we are left simply with the conclusion that an insurance company which goes to trial in an insurance bad faith case stands about an even chance of having the judgment include punitive damages, and the punitive award, if any, is likely to be substantially in excess of the economic loss (and usually above $1,000,000).

There are any number of proposals that might soften the impact of punitive damages in insurance bad faith cases. One possibility, for example, is to limit punitive damages to three times economic damages. If this were done, based on the data in our sample, the sum of punitive awards would decrease from $732,859,400 to $232,375,666, a 68% decrease, and punitive damages would then constitute 55% of total damages. Limiting punitive damages to two times economic damages would further reduce the sum of punitive awards to $163,443,457 (a 78% reduction in punitive damages), and punitive damages would then constitute 46% of total damages. Other possibilities include redrafting the jury instruction on punitive damages to provide greater guidance, giving the trial judge greater authority to set the final punitive award (perhaps, for example, by making the jury's finding of punitive damages advisory only), or moving away from punitive damages entirely and creating some alternative measure of additional damages to achieve the necessary deterrence. By mentioning these alternatives, we do not intend to endorse them or to exclude other possibilities. As mentioned above, the data in this report is extremely limited in its ability to diagnose whether there is a problem with punitive damages in insurance bad faith cases and, if so, what the solution might be.