

**THE OHIO SUPREME COURT'S RULING IN *DARDINGER* v. *ANTHEM*:
DOES IT SIGNAL A NEW TREND IN APPROACHES TO PUNITIVE
DAMAGE AWARDS AGAINST MANAGED CARE ORGANIZATIONS?**

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I. INTRODUCTION¹

It's no secret that lawsuits against managed care organizations have become more prevalent in recent years and that these suits occasionally result in "shock verdicts," involving catastrophic punitive damage awards. Most of the shock verdicts against managed care organizations in recent years have been awarded to individual insureds whose health plans are not governed by ERISA and who allege injury or death due to the managed care organization's refusal to preauthorize benefits for potentially life saving medical treatment on experimental or investigational grounds.² The majority of these shock managed care verdicts have been overturned or reduced considerably on appeal, and then settled for a small fraction of the original award.³ However, the Ohio Supreme Court's recent ruling in *Dardinger v. Anthem Blue Cross and Blue Shield, et al.*, demonstrates that courts are not always willing to drastically reduce punitive damages awards in these cases.

In *Dardinger*, the jury awarded \$49 million in punitive damages to the widower of a woman who died of cancer allegedly due to the denial of experimental treatment by Anthem Blue Cross and Blue Shield (hereinafter "Anthem") and its parent company, Anthem Insurance Companies, Inc. ("AICI"). *While the Ohio Supreme Court did reduce the amount of the punitive damages award from \$49 million to \$30 million, it took the unprecedented step of reallocating (on its own initiative and without statutory authority) the majority of the reduced punitive damages award to the state sponsored cancer treatment facility which had treated Dardinger.* The Ohio Supreme Court ruled that the plaintiff could only retain \$10 million of the award and directed the remainder of the award and statutory interest (after subtracting attorneys' fees and costs) to the establishment of a cancer research fund in the deceased's name at Ohio State University. This paper discusses the Ohio Supreme Court's ruling in *Dardinger* and its implications for managed care organizations.

II. THE FACTS OF THE *DARDINGER* CASE

In October 1996, Esther Dardinger was diagnosed with metastatic brain tumors, which had spread from her breast. In March 1997, her treating physician recommended that she undergo intra-arterial chemotherapy ("IAC") in order to shrink the tumors.⁴ From April 1997 to June 1997, Mrs. Dardinger received three IAC treatments. The treatments were reportedly effective in

¹ The information contained in this paper is derived strictly from the court opinions and public articles.

² For instance, in March 1999, a California jury awarded \$4.5 million in compensatory damages and \$116 million in punitive damages to the widow of a cancer patient in *Goodrich v. Aetna U.S. Healthcare of California, Inc.* The plaintiff in *Goodrich* alleged that Aetna had wrongfully refused to cover experimental medical treatment that her husband needed to battle a rare form of stomach cancer. In 1993, in *Fox v. Health Net*, a California jury awarded close to \$89 million in punitive damages to the deceased plaintiff and her family for Health Net's refusal to pay for high dose chemotherapy with autologous bone marrow transplant treatment of breast cancer.

³ In *Fox*, the \$89 million verdict was reduced on appeal and the parties eventually settled for an undisclosed amount rumored to be between \$5 and \$10 million. Likewise, *Goodrich* reportedly settled for less than 25% of the \$120 million award.

⁴ IAC delivers chemotherapy to brain tumors by means of an arterial catheter threaded through whichever artery is feeding the area of the brain where the tumor is located. The purpose of IAC is to deliver substantially higher doses of chemotherapy directly to the affected tumors without subjecting the rest of the person's organs to the toxicity of the drugs.

shrinking the tumors, relieving her pain, and alleviating her symptoms. After approving and paying for the first three treatments of a planned 12-treatment program, Mrs. Dardinger's health insurer, Anthem, declined to authorize benefits for further IAC treatments under her health insurance policy on the grounds that the treatment was experimental for her condition. Anthem advised Mrs. Dardinger that it had erred in approving the first three IAC treatments. Prior to Mrs. Dardinger's first IAC treatment, Anthem sought the coverage opinion of a professional consultant and board-certified oncologist. Because that physician was unavailable, Anthem's local medical director precertified the first IAC treatment. Two of Anthem's nurses then precertified the second and third IAC treatments. When the fourth treatment was proposed, the consultant board-certified oncologist considered the precertification request and recommended that it be declined on experimental grounds. He based his decision in part on the failure of the treating physician to supply scientific literature to demonstrate that the IAC treatment was non-experimental in the treatment of brain metastases.

When the Dardingers learned in June 1997 that Anthem was denying coverage for further IAC treatments, they appealed. During the pendency of her appeal, Mrs. Dardinger elected to undergo alternative chemotherapy treatment to avoid burdening her family with the cost of continued IAC treatments.

Pursuant to the health insurance contract, *Anthem had 120 days to resolve the appeal*. The parties disagreed over whether or not Mrs. Dardinger's health care providers and health insurance agent communicated the urgency of Mrs. Dardinger's circumstances to Anthem. The appeal was submitted to Anthem on August 5, 1997. Anthem began processing the appeal, but closed its file due to the lack of sufficient medical records. Apparently, Anthem did not request any medical records at that time, or inform the Dardingers of any deficiency with their appeal. When Mrs. Dardinger's physicians discovered in late September 1997 that Anthem had closed the appeal file pending receipt of additional medical records, they sent the records to Anthem by October 3, 1997. The appeal was forwarded to a physician reviewer in AICI's Medical Policy Division who, on October 27, 1997, determined that Mrs. Dardinger's IAC treatment was experimental for the treatment of metastatic brain cancer. The physician reviewer made that determination after a review of less than 30 minutes. At trial, the physician reviewer acknowledged that Anthem had not supplied him with the following documentation: (1) certain medical literature about IAC and the treatment protocol that Mrs. Dardinger's treating physician had provided to Anthem; (2) Mrs. Dardinger's medical records and her MRI scans and reports; and (3) her treating physician's letters regarding her positive response to the IAC treatments. Anthem's physician reviewer reportedly testified that the medical records were unnecessary for the resolution of the appeal, as the relevant question was whether the procedure was experimental.

Unfortunately, while her appeal was pending, Mrs. Dardinger's condition rapidly deteriorated and she died on November 6, 1997 at the age of 49. Anthem's decision on Mrs. Dardinger's appeal arrived at the Dardingers' house on November 11, 1997, one day after Mrs. Dardinger's funeral. At trial, her treating physician testified that Mrs. Dardinger would have lived an additional eight months to two years, maybe longer, had she continued with the IAC treatments. He also testified that she would have likely died from other systemic disease, such as lung or liver failure, rather than from the brain tumors.

III. *DARDINGER* CASE HISTORY

A. Trial Court and Ohio Court of Appeals Decisions

Mr. Dardinger sued Anthem and AICI, alleging breach of the health insurance contract and bad faith, among other causes of action dismissed before trial. At the close of the trial, the jury found in favor of Mr. Dardinger, awarding him \$1,350 in health benefits due under contract, \$2.5 million in emotional distress and other compensatory damages for bad faith, and \$49 million in punitive damages.

Anthem and AICI appealed the trial court's judgment, arguing, among other things, that: (1) AICI could not be held liable for breach of the insurance contract because AICI owed no contractual duty to Mrs. Dardinger, unless Anthem became financially unable to pay for the Dardingers' claims; (2) the trial court should have granted a new trial in light of the unconstitutionally excessive amount of the punitive damages award; and (3) the trial court erred in admitting highly inflammatory evidence that was irrelevant, incompetent and/or misleading, including the personal salaries of the defendants' executives and the number of complaints filed against the defendants with the Ohio Department of Insurance. Additionally, AICI argued that a major factor in the jury's large punitive damages award was the admission of evidence of AICI's annual financial reports.⁵ The Court of Appeals for the Fifth District of Ohio agreed that Anthem and AICI were separate entities that owed separate duties to the Dardingers, and that AICI was merely a guarantor of the contract between Anthem and the Dardingers. As such, the appellate court ordered a new trial on the issue of damages. Mr. Dardinger appealed that ruling to the Ohio Supreme Court.

B. Ohio Supreme Court Decision

1. Rejection of AICI's Lack of Contractual Privity Defense

The Ohio Supreme Court determined that AICI had failed to distinguish itself from Anthem and to establish the lack of privity between AICI and the Dardingers throughout the trial. The court reached this decision even though, in its Answer, AICI had denied ever insuring the Dardingers. The court ruled that AICI had waived this defense, and that, in any event, Mr. Dardinger could have otherwise sought to pierce the corporate veil in light of the trial court's finding that Anthem was "so dominated and controlled [by AICI] that it [was] no more than a paper existence." Accordingly, the court reinstated the jury verdict against AICI.

2. Punitive Damages Analysis

The Ohio Supreme Court addressed the following issues with respect to the jury's punitive damages award: (1) whether the award was "grossly excessive" and in violation of the federal

⁵ Mr. Dardinger was permitted to introduce, among other things, AICI's 1998 Annual Report, which reflected a net income of \$172 million from AICI's consolidated operations, including its subsidiaries in all 50 states. In comparison, Anthem's annual net income was a mere fraction of AICI's net income.

Due Process Clause; (2) whether the award was excessive under Ohio law; and (3) whether remittitur was appropriate.

a. Constitutionality

As to the issue of the constitutionality of the *Dardinger* punitive damages award, the court applied the three factors set forth by the United States Supreme Court in, *BMW v. North America, Inc. v. Gore*: (1) the reprehensibility of the defendant’s conduct; (2) the disparity between the harm to the plaintiff and the award; and (3) a comparison of the punitive damage award to civil or criminal penalties available in similar cases.

First, the court evaluated the *degree of reprehensibility of the defendant’s conduct* and concluded that Anthem’s and AICI’s conduct reached the level of reprehensibility sufficient to warrant an “historic punitive damages award.” In an emotional opinion, the court compared the defendants’ conduct to cancer, stating: “[l]ike the cancer, Anthem relentlessly followed its own course, uncaring, oblivious to what it destroyed . . . [t]he ruination of life was just a side effect. . . The jury could easily find that a pervasive corporate attitude existed with the defendants to place profit over patients.” The court criticized the Anthem/AICI “bureaucracy” for denying payment for the requested treatments without demonstrating any interest in knowing whether the treatments were actually effective in treating Mrs. Dardinger. The court commented on how Anthem created hope for the Dardingers by approving the first three IAC treatments, but then “snatched” their hope away by denying benefits for any future treatments.

The court based its finding that Anthem’s and AICI’s conduct was reprehensible on the following: the delays in handling the Dardinger appeal; the closure of the appeals file without advising anyone or requesting the allegedly necessary medical records; the fact that the appeal was ultimately decided by one person, in less than 30 minutes, without the benefit of all of the records the defendants had insisted were necessary; and the fact that the reasons for the denial of benefits changed over time. The court also charged Anthem and AICI with knowledge that authorizing payment for the treatment of brain tumors was an urgent matter, finding unpersuasive their counsel’s argument at trial that no one indicated the request was urgent.

The court then addressed the second *Gore* factor concerning the disparity between the harm suffered by the plaintiff and the amount of the punitive damages award. The court found that *the jury’s award (which was approximately a 20-to-1 ratio) did not exceed constitutional bounds.*⁶

With respect to the third *Gore* factor, which compares the punitive damage award to civil or criminal penalties authorized or imposed in similar cases, the court noted that Ohio’s unfair and deceptive practices act authorizes the revocation of a health insurer’s license to engage in the business of insurance. The court explained that the loss of Anthem’s license to engage in the business of insurance in Ohio would be a more catastrophic punishment than the award in the instant case. The court also noted that, in accordance with the purpose of the *Gore* test, Anthem and AICI had sufficient notice that they would be facing a potentially large punitive damages

⁶ The court also noted its decision to allow a 6250-to-1 punitive to compensatory damages ratio in *Wightman v. Consolidated Rail Corporation*, but, in that case, the ratio was less relevant due to the egregiousness of the act at issue and the uncommonly low economic damages awarded.

award if they were found guilty of bad faith. For all of these reasons, *the Ohio Supreme Court held that the punitive damages award was not grossly excessive under the federal Constitution and did not violate Anthem's and AICI's due process rights.*

b. Excessiveness Under Ohio Law

Although the court concluded that the punitive damages award was not grossly excessive under the federal Constitution, the *court found that the award was excessive under Ohio law.* The court stated that the *purpose of punitive damages is not to compensate the plaintiff, but to punish the defendants and deter future similar conduct.* The court found that Anthem's and AICI's actions merited an historic punitive damages award. The court explained that the punitive damages award must be sufficient to persuade Anthem "to pay more attention to patient care; to install a system in which appeals are answered, and not purposely delayed; [and] to achieve a system where appeals move forward on their own merit, and are not dropped because Anthem has outlasted the patient in the waiting game." The court then asked if an appropriate punitive damages award could cure Anthem any more than doctors can cure cancer. The court stated that "[t]he bureaucracy would always be in place, but, like chemotherapy to cancer, an effective award can tame it, keep it from spreading, and minimize its harmful effects." The court further stated that, "like chemotherapy, an award must be at a level where [the award] does not create its own overriding problems." Noting that the largest punitive damages award in Ohio during the preceding decade was the \$15 million award in *Wightman v. Consolidated Rail Corporation*, the court deemed excessive the jury's award of between one-third and one-fourth of AICI's net profit in 1998. The court held that a punitive damages award doubling the award in *Wightman* would have been appropriate in this case, and consequently, reduced the \$49 million punitive damages award to \$30 million.

c. Remittitur and Redistribution of Reduced Punitive Damages Award

In examining the punitive damages award, the court declined to find that the jury had been influenced by passion or prejudice, and concluded that the jury had scientifically decided to take between one-third and one-fourth of AICI's annual income. The court explained that, although that award was not "shockingly wrong," *an award equal to one-sixth of the annual net earnings was more in line with Ohio's history of punitive damages awards and would be more appropriate.* Accordingly, the court imposed a remittitur of \$19 million, thereby reducing the punitive damages award from \$49 million to \$30 million.⁷

The Ohio Supreme Court explained that, *at the punitive-damages level, the societal element is the most important. It emphasized that a philosophical void exists between the reasons for awarding punitive damages and how those damages are distributed.* The court further stressed that the community makes the statement, while the plaintiff reaps the monetary award. The court noted that numerous states (not including Ohio) have enacted "split recovery" legislation aimed at dividing punitive damages awards between the plaintiffs and the state.⁸ The court concluded

⁷ The court also held that the statutory post-judgment interest on \$30 million should be added to the final award.

⁸ The following nine states have enacted such split-recovery statutes: Alaska, Georgia, Illinois, Indiana, Iowa, Montana, Oregon, Pennsylvania, and Utah.

that, since punitive damages stem from Ohio common law, Ohio courts play a central role in the distribution of punitive damages. As such, the court held that Mr. Dardinger should receive \$10 million in punitive damages,⁹ and the remaining \$20 million in punitive damages (less Plaintiffs' attorneys fees) should go to a cancer research fund, to be called the "Esther Dardinger Fund," at the James Cancer Hospital and Solove Research Institute at the Ohio State University.

In March 2003, the parties settled, with Anthem reportedly agreeing to pay approximately \$41 million (i.e. the award plus interest).

d. The Impact of the Ohio Supreme Court's Decision in *Dardinger*

The Ohio Supreme Court's ruling is unprecedented in that no court has ever, on its own initiative and without express legislative authorization, reallocated punitive damages from a victorious plaintiff to a state charity of the court's choosing. Unlike other states, the Ohio legislature has not passed a split-recovery statute authorizing such a measure. Accordingly, the *Dardinger* decision has been attacked as "judicial activism" and an unconstitutional "taking" of the plaintiff's property. Not surprisingly, numerous commentators have criticized the court's distribution of the award as usurping the state legislature's authority and fueling its social agenda by awarding punitive damages to the majority justices' preferred institution.

Because neither party appealed, it is unclear whether the United States Supreme Court would have sustained the Ohio Supreme Court's novel redistribution of the punitive damages.¹⁰ *The Dardinger ruling may signal a judicial trend among state courts toward redistribution of punitive damages which would likely result in larger punitive damages awards being sustained in the future.* It is unclear whether this potential trend might be tempered by the U.S. Supreme Court's subsequent decision on punitive damages in *State Farm Mutual Automobile Insurance Co. v. Campbell* (discussed below), which appears to place new limits on state court punitive damage awards.

e. The United States Supreme Court's Most Recent Pronouncement on Punitive Damages in *State Farm Mutual Automobile Insurance Co. v. Campbell*

The United States Supreme Court's April 7, 2003 decision in *State Farm Mutual Automobile Insurance Co. v. Campbell* is significant because it provides additional guidance on when state court awards of punitive damages will be deemed to violate federal due process and it appears to place new limits on state court punitive damage awards. In *State Farm*, the U.S. Supreme Court held that the Utah Supreme Court erred in sustaining a punitive damages award of \$145 million in a bad faith action against an auto insurer. The *State Farm* opinion is instructive. The Court followed the three guideposts it set forth in *Gore* for determining the reasonableness of a punitive damages award.

The Supreme Court made some significant comments in applying the second *Gore* guidepost (i.e. that the punitive damages award be proportionate to the actual or potential harm suffered by

⁹ The court held that the amount of attorneys' fees should be determined based upon the contract between Mr. Dardinger and his attorney, and should be based upon the original amount of \$30 million plus statutory interest.

¹⁰ At least one state court has held split recovery statutes unconstitutional.

the plaintiff.) The Court found that the \$145 million punitive damage award exceeded federal constitutional limits because it was disproportionate to the harm suffered by the plaintiff. The plaintiff's damages consisted of 1½ years of emotional distress. For this emotional distress, the plaintiff was awarded \$1 million in compensatory damages. Under the precise circumstances of that case, the Supreme Court ruled that the 145 to 1 ratio of punitive to compensatory damages was excessive. Significantly, while the Court refused to adopt a "bright-line ratio which a punitive damages award cannot exceed," it held that, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process."

The punitive damages award in *Dardinger* was approximately 15 times the compensatory damage award and, consequently, exceeded a single-digit ratio. However, the Supreme Court emphasized that the plaintiff's harm in *State Farm* was economic as opposed to physical in nature, demonstrating that it might be more likely to sustain a higher ratio of punitive-to-compensatory damages where physical harm is involved. Accordingly, *the favorable State Farm punitive damages analysis may not be fully applicable to managed care cases against health insurers involving bodily injury such as the Dardinger case.* Not surprisingly, the Supreme Court did not comment on the constitutionality of a (1) state court's redistribution of punitive damages from a successful plaintiff to the state or (2) state "split recovery statutes."

Other aspects of the *State Farm* opinion are also noteworthy. After noting that the most important factor is the degree of reprehensibility of the defendant's conduct, the Court reviewed the factors relevant to the reprehensibility determination. The Court held that the \$145 million punitive damages award in *State Farm* was impermissibly based upon evidence of the insurer's *dissimilar conduct in other states.* While the Court recognized that a defendant's conduct in other states may sometimes be probative of its motive in a particular case, the Court held that, *to be admissible, such other conduct must be similar to the specific harm suffered by the plaintiff in the case at hand.* Absent such similarity, the Court indicated that the admission of evidence of other out-of-state conduct would result in impermissibly permitting one state to punish a defendant for conduct occurring in other states outside its jurisdiction, and would create the possibility of multiple punitive damage awards based on the same conduct.

IV. IMPLICATIONS AND CONCLUSION

The *Dardinger* ruling dramatically demonstrates that, even if a health insurer's "experimental" decision is correct under its policy (as Anthem's appears to have been) the health insurer may still be held liable for catastrophic punitive damages. As with earlier shock managed care verdicts, the *Dardinger* court held Anthem and AICI liable for *how the decision was made and communicated,* and how Mrs. Dardinger appeared to have been treated by Anthem. The Ohio Supreme Court's emotional opinion plainly demonstrates that courts and jurors alike are persuaded by plaintiffs' arguments that defendant health insurers promote a corporate attitude of placing profits over patients.

The risk of similar "shock" managed care verdicts in single plaintiff, non-ERISA denial of benefits cases would appear to be lower now than it was when Mrs. Dardinger's claim was handled in 1997 due to industry reforms brought about by legislation, litigation and public opinion. Less utilization review occurs now than in 1997. Moreover, the utilization review that

does occur is generally conducted on a more expedited basis. Further, many adverse utilization review decisions are now submitted to external review panels for consideration. In many states, compliance with the decision of an external review panel's decision serves as a defense in litigation and may even immunize the health insurer from punitive damages. Accordingly, it should be more difficult for plaintiffs to obtain similar shock managed care verdicts in the future. However, the pool of non-ERISA cases capable of generating catastrophic punitive damages awards is expanding with the continued judicial erosion of ERISA preemption, and the plaintiffs' bar has proven to be very creative in coming up with new managed care liability theories even as managed care practices continue to improve.