

Public Policy and Coverage for Exemplary Damages

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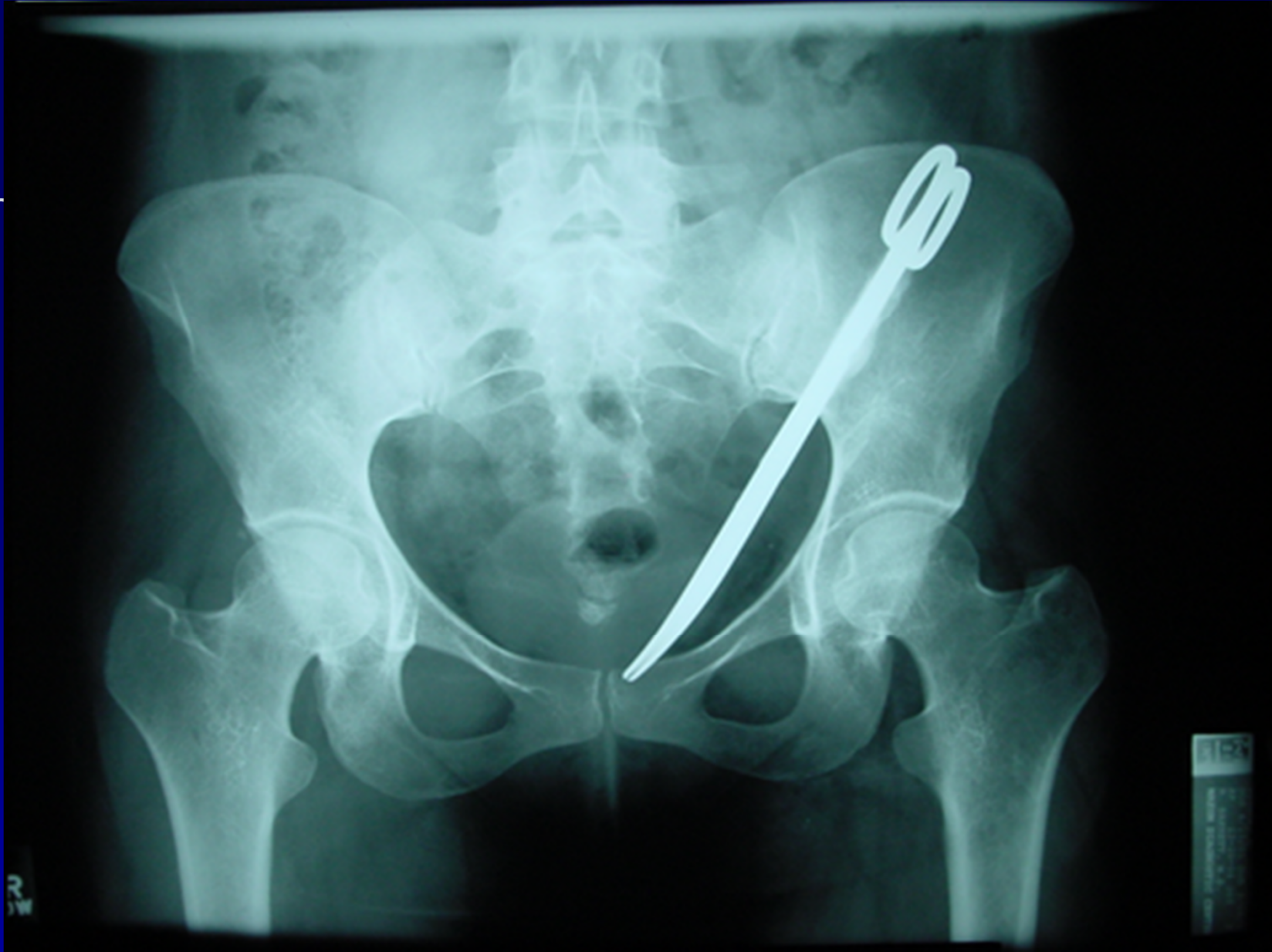
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Public Policy & Exemplary Damages

- Exemplary (Punitive) Damages Under Texas Law
- *Fairfield Insurance Co. v. Stephens Martin Paving, LP*
- Public Policy Considerations for Determining Coverage
- Practical Application



Exemplary Damages

- "Exemplary damages" means any damages awarded as a penalty or by way of punishment but not for compensatory purposes. Exemplary damages are neither economic nor noneconomic damages. Exemplary damages includes punitive damages.

Tex. Civ. Prac. & Rem. Code § 41.001(5)

Standard

- Clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from: (1) fraud, (2) malice, or (3) gross negligence.

Tex. Civ. Prac. & Rem. Code 41.003(a)

Malice

- “Malice” means a specific intent by the defendant to cause substantial injury or harm to the claimant

Tex. Civ. Prac. & Rem. Code 41.001(7)

Gross Negligence

- “Gross negligence” means an act or omission:
 - Which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to other; and
 - Of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

Tex. Civ. Prac. & Rem. Code § 41.001(11)

Exemplary Damages

- NOT satisfied by evidence of ordinary negligence, bad faith, or a deceptive trade practice
- Jury must be unanimous in finding liability for and the amount of exemplary damages
- Burden of proof may not be shifted to defendant

Tex. Civ. Prac. & Rem. Code § 41.003(b), (d)

Exemplary Damages

- Must be specific as to a Defendant
- No Joint Liability
- No Liability for Criminal Acts of Others
- Except in Certain Circumstances, Conduct of Employees will Not Result in Punitive Liability for the Employer

Tex. Civ. Prac. & Rem. Code 41.005, 41.006

Exemplary Damages

- Factors in Assessing Amount:
 - The nature of the wrong;
 - The character of the conduct involved;
 - The degree of culpability of the wrongdoer;
 - The situation and sensibilities of the parties;
 - The extent to which such conduct offends a public sense of justice and propriety; and
 - The net worth of the defendant

Tex. Civ. Prac. & Rem. Code 41.011

Answer the following question only if you unanimously answered “Yes” to Question No. 3. Otherwise, do not answer the following question.

You must unanimously agree on the amount of any award of exemplary damages.

Question No. 4

What sum of money, if any, if paid now in cash, should be assessed against JPMorgan and awarded to Jo Hopper as exemplary damages, if any, for the conduct found in response to Question No. 3?

“Exemplary damages” means an amount that you may in your discretion award as a penalty or by way of punishment.

Factors to consider in awarding exemplary damages, if any, are—

1. The nature of the wrong;
2. The character of the conduct involved;
3. The degree of culpability of JPMorgan;
4. The situation and sensibilities of the parties concerned;
5. The extent to which such conduct offends a public sense of justice and propriety; and
6. The net worth of JPMorgan.

Answer in dollars and cents, if any.

Answer: \$ 2,000,000,000.00

Exemplary Damages Cap

- An amount not to exceed the greater of
 - (1) (A) two times the amount of economic damages;
 - Plus (B) an amount equal to any noneconomic damages found by the jury, not to exceed \$750,000;
 - or (2) \$200,000

Tex. Civ. Prac. & Rem. Code 41.008(b)

Punitive Damages Coverage Grant

SECTION I – COVERAGES

COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

Coverage Grant

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages.

Coverage Grant

However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply. We may, at our discretion, investigate any offense and settle any claim or "suit" that may result.

Coverage Grant

SECTION V – DEFINITIONS

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

Exclusion

INTENTIONAL ACT EXCLUSION

2. Exclusions

This insurance does not apply to:

a. Expected or Intended Injury

“Bodily injury” or “property damage” expected or intended from the standpoint of the insured. This exclusion does not apply to “bodily injury” resulting from the use of reasonable force to protect persons or property.

History of Punitive Damage Coverage

In the past, Coverage was allowed for punitive damages- *Ridgway v. Gulf Life Ins. Co.*, 578 F.2d 1026 (Fifth Cir. 1978)

This changed in 2008

Fairfield Case

Fairfield Ins. Co v. Stephens Martin Paving, LP 248 S.W.3d 653 (Tex. 2008)

Review of a Workers Compensation/
Employers liability policy covering
gross negligence resulting in death.

Fairfield

- Sometimes punitive damages are covered, sometimes they are not

- Depends on a number of factors:
 1. Policy Language
 2. Public Policy and the freedom to contract

Fairfield

3. -Legislative intent
4. -Relative culpability of the parties, including the purpose of exemplary damages

All of these factors are weighed in assessing coverage

Fairfield

- Texas Public Policy Does Not Prohibit Coverage Under Workers' Compensation & Employer's Liability Insurance Policy
- Legislature authorized TDI to create a policy that provided coverage for exemplary damages in comp case
- No Broad Proclamation of Public Policy

Fairfield

- Statutes stating the purpose of exemplary damages and prescribing the manner in which they are assessed
- Other statutes allowing and disallowing insurance for punitive damages
- Administrative regulations of insurance
- Texas Courts' Treatment
- Treatment by other American jurisdictions

Fairfield - Other Jurisdictions

- 19 States Permit Coverage
- 8 States Permit for Gross Negligence but Not More Serious Conduct
- 11 States Permit for Vicarious Liability, But Not for Direct
- 7 States Generally Prohibit
- Remainder – Silent or Unclear

Fairfield and Public Policy

- Principle of law holding no subject can lawfully do that which has a tendency to be injurious to the public or against the public good
- Principle under which the freedom to contract or private dealings are restricted by law for the good of the community

Fairfield and Public Policy

- Texas has strong policy favoring freedom of contract
- What is the extent to which the insurance agreement frustrates public policy?

Fairfield- Statutes

- Chapter 41: Exemplary Damages are to Punish
 - Coverage Spreads Risk to Innocent Policyholders
 - Conflicts with Purposes of Chapter 41
- Health Care Providers
 - Initially, No Coverage by Statute
 - Endorsements by Board/Commissioner
- Guaranty Funds/Excess Liability Pools
 - Prohibited in Whole or in Part

Fairfield-Statutes

- Commercial Liability Insurers
 - Closed Claim Reports
 - Punitive Damages Factor Slightly in Settlement
- Concern of Legislature Appears to be Economic

Fairfield -Administrative Regs

- Standard form personal auto policies do not state
- Standard form homeowners' generally do not state
- Other policies have been held to cover punitive damages in the absence of an exclusion:
 - CGL and Umbrella;
 - Professional liability for-profit nursing home;
 - Umbrella policy; and
 - Commercial vehicle policy

Fairfield - Texas Courts

- Punitive Damages Assessed Against
 - Someone other than the insured;
 - An individual insured based on his own conduct, and
 - A corporate insured based on the conduct of its employees.

When Are Punitive Damages Covered

1. What does the Contract language say?
2. Any legislative, case law, or administrative regulations on the subject
3. Relative Equities of the Parties

Claims and Coverage

1. Compensation/Employer Liability-

Coverage because:

a. Intent of Policy

b. Intent of Law

c. Equities of the parties

2. Uninsured and Underinsured Motorists

– Against Public Policy because

Claims and Coverage

- a. Not clear under policy
- b. Not clear under the law
- c. Equity of the parties

- 3. Professional liability/Personal Automobile/Homeowners -Not Against Public Policy
 - a. Language of the policy
 - b. No legal prohibition

Claims and Coverage

c. Not against public policy

4. Commercial Liability- overwhelming factor besides policy is whether the punitive damages were assessed based on employee conduct that was or was not authorized, adopted, or participated in by company principals.

Claims and Coverage

- If the principals were involved, then coverage may be against public policy.
- If the principals were not involved, then probably no prohibition against coverage.
- Very much a case by case basis

Case Law Development and Considerations

- Contracts Must Be Respected and Not Unduly Restricted
- Punitive Damages are for Punishment
- Punitive Damages Coverage - Undesirable Cost to Insureds and to the Public
- Commissioner of Insurance – Broad Discretion to Determine
- Public Policy Changes Over Time