

PUNITIVE DAMAGES COVERED BY INSURANCE POLICY

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Nursing homes should read their insurance policies very carefully before making any out of pocket punitive damages payments.

Each week most attorneys in Ohio receive a copy of the Ohio State Bar Association Report (OBAR). This publication reproduces the decisions from lawsuits that have been decided around the state. About five years ago, the publication of *Sprosty v. Pearlview, Inc.* in the OBAR raised the awareness of attorneys in Ohio of the potential financial value of suing nursing homes. That case reinforced the former licensure statute Ohio Revised Code (O.R.C.) section 3721(I), which allowed for punitive damages to be awarded to a nursing home resident upon a showing that the resident received inappropriate or inadequate medical treatment or nursing care, without a showing of intent, malice, willfulness, or recklessness.

While the holding in the *Sprosty* case was not new law, it was significant because it broadly advertised to plaintiffs' attorneys what had up to that point been a fairly obscure part of Ohio nursing home law. Since that time the nursing home industry in Ohio has seen a very significant increase in lawsuits.

On December 7, 2001, the OBAR published the case of *The Corinthian v. Hartford Fire Insurance Company et. al*, which provides the next chapter in the *Sprosty* case. After the *Sprosty* estate was awarded punitive damages based on the violation of a resident right, The Corinthian sought recovery from its insurance carrier for those punitive damages. The Hartford and Twin City Fire Insurance Companies responded that it was against the law and public policy for them to insure against an award of punitive damages. The Court of Appeals in Cuyahoga County, however, determined that The Corinthian's insurance policy was broad enough to cover the punitive damage award.

The court held that it is not clear whether the statute that prohibits insurance carriers from insuring against punitive damages applies to health care facilities, including nursing homes. However, even if the statute did applied to nursing homes, it did not

cover the unique punitive damages awarded in the *Sprosty* case. The court held that the statute precludes insuring against punitive damages awarded based on an individual's malicious, willful, or intentional conduct. It does not preclude coverage for statutory punitive damages awarded without a finding of malice, intent, or ill will.

Indeed, the court went on to state that it could not discern any public policy reasons for not allowing insurance to cover such punitive damages. The court stated:

The public policy prohibiting the protection of insurance for punitive damages stems from the underlying assumptions that an individual should not be able to escape punishment for his or her intentionally malicious acts and that the deterrent effect of punitive damages would be diminished if tortfeasors can be indemnified against them.... These assumptions are not valid, however, where punitive damages are awarded pursuant to statute, without any finding of malice, ill will, or other culpability. "Punitive damages" that are not based on a finding of actual malice or any other state of mind are not punishment in any traditional sense. Likewise, there is little deterrent effect from "punitive damages" awarded without a finding of ill will or malice. Accordingly, indemnification for these special statutory punitive damages does not violate any public policy.

Although very interesting to those in the long-term care industry who have followed this case, this decision is of limited value to most nursing homes today. This is because effective July 7, 1998 the Ohio legislature revised O.R.C. section 3721.17(1) to require actual malice prior to an award of punitive damages. In addition, many insurance policies are and were written in a manner to carve out the award of punitive damages, whether based on malice or a statutory provision. However, for nursing homes that have judgments against them based on incidents that occurred prior to July of 1998, it is worth a close reading of their insurance policies prior to paying any punitive damage awards.

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