

CLIENT ALERT

Ohio Supreme Court Grants \$32.5 Million Punitive Damages in Challenge to Benefit Denial and Review Process

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On December 20, 2002, the Ohio Supreme Court levied a damage award for \$32.5 million - including \$30 million in punitive damages - against Anthem Blue Cross and Blue Shield ("the Plan") and its parent company, Anthem Insurance Companies, Inc. ("AIC"), for breach of contract and bad faith. *Dardinger v. Anthem Blue Cross & Blue Shield*, 97 Ohio St. 3d ___, 2002-Ohio-7113. In granting the largest punitive damages award in Ohio history, the Court was harsh in describing the defendants' handling of the case of Esther Dardinger, a Central Ohio woman who died of brain cancer in 1997.

A key legal issue on appeal was whether AIC had waived its ability to contest liability findings against it, even though its involvement in the patient's coverage was limited to the appeals review process. The Court rejected AIC's argument, finding that at trial the Plan and AIC had presented their defense as if they were a unitary actor. Although the Court did not discuss it, that conclusion by the Court may have had a significant financial impact, since the court ultimately felt a limiting principle under Ohio law in assessing punitive damages should be the annual profits of AIC. Since AIC as the parent presumably had higher overall profits than the Plan subsidiary, the liability finding against AIC may perhaps have enabled the Court to reach a higher punitive damages result.

In October 1996, Esther Dardinger was diagnosed with metastatic brain tumors that had spread from her breast. Radiation therapy did not shrink the tumors. In March 1997, Dr. Herbert Newton, director of neuro-oncology at the James Cancer Hospital and Solove Research Institute at the Ohio State University began treating Mrs. Dardinger. Dr. Newton and the neuro-oncology tumor board at Ohio State recommended that Mrs. Dardinger undergo intra-arterial chemotherapy ("IAC") to shrink her tumors. IAC is a procedure where chemotherapy is delivered to brain tumors through an arterial catheter threaded through the artery closest to the tumor and into the brain. This allows doctors to deliver substantially higher doses of chemotherapy directly to the tumors without subjecting the rest of the body to the toxicity of the drugs. Each treatment costs approximately \$10,000. Mrs. Dardinger had three IAC treatments between April and June 1997. Her tumors shrank significantly after the first two treatments. She was scheduled to have a total of twelve IAC treatments.

Anthem had initially approved Mrs. Dardinger's IAC treatments and Anthem paid for the first three. But days before her fourth treatment, a professional consultant and board-certified oncologist hired by Anthem returned from being out of town. According to the Court, after spending ten minutes reviewing the initial request for approval of treatment, the consultant recommended that Anthem decline payment for the treatment as experimental. The consultant did not inquire about the success of the first three treatments when he recommended denial of payment.

Mrs. Dardinger and Dr. Newton appealed the denial. Over the next four months, while Mrs. Dardinger's health declined, the grounds on which Mrs. Dardinger was told the IAC treatment was denied changed from Anthem's perception that IAC was an experimental procedure to Anthem's claim that it did not have all of the requisite medical records to make a determination, the Court stated.

After waiting three months, Mrs. Dardinger opted to try conventional intravenous chemotherapy, which Anthem would pay for, to treat her tumors. Anthem finally sent the appeal to its AIC parent in Indianapolis. The reviewing doctor did not receive from Anthem the medical literature Dr. Newton had submitted describing the use of IAC for treatment of metastatic brain tumors, nor did he have Mrs. Dardinger's medical records showing her response to the initial IAC treatment.

Ms. Dardinger died on November 7, 1997, thirteen months after being diagnosed with metastatic brain tumors. One day after her funeral, the letter from Anthem denying the appeal of its decision arrived at the Dardinger house. Her widower sued Anthem and AIC for breach of contract, breach of fiduciary duty, and breach of duty of good faith.

Rather than act as separate defendants, with separate counsel and defense strategies, AICI and Anthem had filed everything jointly, the Supreme Court declared. The two companies answered the complaint together, filed a motion for summary judgment together, and filed jury instructions together. In the motion for summary judgment, they wrote that they "shall be deemed to be a single entity and shall be called 'Anthem'," the Court said. According to the Supreme Court, AICI made no lack of privity argument in response to the breach of contract claim during the trial phase. During the trial, the Court noted that AICI and Anthem were represented by the same attorney who referred to the clients during his opening statement only as "Anthem." It was not until the motion for a judgment notwithstanding the verdict that AICI tried to distinguish itself from Anthem, the Supreme Court said. The trial judge ruled that AICI had waived this argument, and the Supreme Court agreed.

The jury returned a finding of liability against Anthem and a \$51.5 million award, including \$49 million in punitive damages. The Supreme Court reduced this amount to \$30 million, which it said was in line with punitive damage limitations under Ohio law, using percentage of a company's yearly profits as a guiding principle. AIC had net profits in 1998 of \$172 million. The punitive damages are approximately one-sixth of that amount. It is not clear what outcome would have resulted as regards absent the waiver the Court found. It might have been liable on certain counts in any event.

The only dissent in the Court's opinion came on the issue of whether and how the punitive damages should be divided. The majority awarded \$10 million to the widower, used the remainder to pay all litigation fees, and then awarded the remainder of that amount to establish the Esther Dardinger Fund for cancer research at the James Cancer Hospital at Ohio State University. Two justices dissented from that award, saying the Court was not empowered to create such a fund.

Ms. Dardinger's coverage was not under an employee benefit plan subject to the ERISA law, so the ERISA limitations on damages in benefit denial matters were not pertinent.

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