Lawlor: A Roadmap for Limiting Punitive Damages

A recent Illinois Supreme Court decision offers relief to some companies on the wrong end of a punitive damages judgment. The ruling makes it easier for businesses that are only vicariously liable to obtain substantial remittitur from a large punitive damages award.

By Eric J. Muñoz

Whether punitive damages can be assessed against a company where the underlying liability is imposed vicariously is often a concern to business defendants in litigation. Although the issue is easily overlooked early in a case, defense counsel may want to develop their case with an eye toward limiting their client's exposure to punitive damages.

A decision late last year from the Illinois Supreme Court, *Lawlor v. North American Corp. of Illinois*,[1] offers guidance to companies seeking to limit their exposure to punitive damages where the company's underlying liability is alleged to be vicarious. The *Lawlor* decision marks the second time in the last three years the supreme court has sharply reduced a punitive damages award in the vicarious liability context based on factors that militated against an oversized punitive damages award. This is an emerging trend in Illinois case law that defense counsel should monitor.

Lawlor facts and lower court rulings

From 1998 until her separation from the company in 2005, the plaintiff Kathleen Lawlor worked as a commission-based salesperson, selling customized corporate-branded promotional items for the defendant North

1. 2012 IL 112530, 983 N.E.2d 414.

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American Corporation of Illinois (NAC). Before she left NAC, Lawlor interviewed for a sales position with a competitor. Eventually, Lawlor quit NAC and went to work for the competitor.

Afterwards, NAC conducted an investigation to determine whether Lawlor had violated her non-competition agreement. Through its outside counsel, NAC hired an investigator (Probe) to conduct this investigation. NAC provided the investigator with Lawlor's date of birth, address, home and cell phone numbers, and social security number.

Using this information, Probe engaged another investigative entity (Discover) to obtain Lawlor's home and cell phone records. The evidence showed that Discover pretended to be Lawlor to obtain her phone records from the telephone company, and that NAC knew that Discover obtained these personal phone records without her authorization.

Lawlor sued NAC for unpaid commissions and for a declaration that her noncompetition agreement was unenforceable. When she learned about NAC's investigation, Lawlor amended her complaint to allege the tort of "intrusion upon seclusion" against NAC based upon the conduct of Discover in using pretext to obtain Lawlor's phone records.[2] In a counterclaim, NAC asserted a claim for breach of fiduciary duty for Lawlor's role in allegedly directing business to one of NAC's competitors and for allegedly sharing confidential sales information to a competitor.

After a six day trial, the jury returned a verdict for Lawlor on her intrusion upon seclusion claim and awarded her $65,000 in compensatory damages and $1.75 million in punitive damages. The court directed a verdict in NAC's favor on Lawlor's commission claims.

The basis of tort liability against NAC was found to be vicarious as the jury, in special interrogatories, expressly found that NAC's outside investigators (Discover and Probe) were acting as NAC's agents when they obtained Lawlor's private information about her telephone calls. The trial court entered judgment in favor of NAC on its counterclaim finding that Lawlor breached her duty of loyalty by disclosing confidential business information to NAC's competitor and by attempting to steer an existing NAC customer to the competitor.

The parties filed post-trial motions. In relevant part, the trial court reduced the punitive damages award from $1.75 million to $650,000. The trial court reasoned that while the telephone records were "wrongfully obtained on a number of occasions" by the outside investigators, the amount of punitive damages reached by the jury "shocks the judicial conscience."[3]

The trial court noted that the investigation which ultimately gave rise to the intrusion upon seclusion claim "was done to protect [NAC's] business" and not out of "any motive to enrich [NAC] at the expense of Kathy Lawlor."[4] Additionally, the trial court determined that, while the investigators' actions in obtaining the records were "wrongful," the plaintiff herself was not made "financially vulnerable."[5]

On appeal, the appellate court reinstated the jury's punitive damages award of $1.75 million in favor of Lawlor. It also affirmed the jury's finding of agency between NAC and its outside investigators. Finally, the court set aside the judgment for NAC on its counterclaim, concluding that there was insufficient evidence to sustain NAC's claim for breach of fiduciary duty against Lawlor.

The supreme court's ruling

On appeal to the Illinois Supreme Court, NAC argued that the evidence was insufficient to support the jury's determination that its outside investigators, Probe and Discover, were acting as its agents in collecting Lawlor's personal phone records. The Court disagreed and concluded that there was sufficient evidence to support the finding of agency. Regarding the punitive damages award, however, NAC argued that the appellate court's reinstatement of the $1.75 million award should have been set aside completely or, in the alternative, should have been reduced to a sum equal to the plaintiff's actual damages of $65,000.

Although the supreme court refused to reverse the punitive damages award outright, it nevertheless agreed with NAC to sharply reduce the award to an amount equal to the plaintiff's actual damages. The court's rationale is worth a closer look.

Vicarious liability does not preclude punitive damages. Relying on the supreme court's decision in *Mattyasovszky v. West Towns Bus Co.*,[6] NAC argued that the issue of punitive damages should not have gone to the jury in the first instance. In *Mattyasovszky*, the court rejected punitive damages against a bus company whose bus driver was involved in an accident killing a minor passenger, noting that the "punitive and admonitory justifications for the imposition of punitive damages are sharply diminished in those cases in which liability is imposed vicariously."[7]

The supreme court in *Lawlor*, however, rejected NAC's reliance on *Mattyasovszky* and held that "punitive damages could properly be awarded against a principal because of an act by an agent, *inter alia*, if the principal authorized the doing and the manner of the act."[8] The Court found evidence that NAC "authorized the manner in which investigators obtained Lawlor's phone records."[9]

If the conduct is motivated by legitimate business interests and not vendetta or animus, the company will be on much surer footing in reducing punitive damages.

A guide to punitive-damages reduction. Although the court refused to set aside the punitive damages judgment in its entirety, it reduced the amount from $1.75 million to $65,000, which equaled the compensatory damages award. Why?

Relying on its recent decision in *Slovinski v. Elliot*,[10] where it remitted a $2 million punitive damages award to $81,600, the court determined that a constellation of mitigating factors converged to support substantial reduction in the punitive damages awarded. These

2. *Id.* at ¶ 6, 983 N.E.2d at 418.
3. *Id.* at ¶ 26, 983 N.E.2d at 422.
4. *Id.* at ¶ 26, 983 N.E.2d at 423.
5. *Id.*
6. 61 Ill.2d 31, 330 N.E.2d 509 (1975).
7. *Id.* at 36, 330 N.E.2d at 512.
8. *Lawlor*, 2012 IL 112530, at ¶ 56, 983 N.E.2d at 430.
9. *Id.*
10. 237 Ill.2d 51, 927 N.E.2d 1221 (2010).

factors, described below, should be part of any comprehensive defense litigation strategy.

A legitimate business investigation. The court observed that although NAC was guilty of the tort of "intrusion upon seclusion,"[11] its actions in obtaining its former employee's phone records were done "as part of a legitimate investigation into a possible violation of a noncompetition agreement," and "not out of any animus toward Lawlor."[12] As the court explained, the company's investigation "concerned a private dispute which did not implicate any general public policy."[13]

Thus, to the extent a tort defendant, like NAC in the *Lawlor* case, undertakes a course of conduct that, while done tortiously, is meant to protect and/or preserve company assets – and not to personally harm the plaintiff – a court may be more likely to view the matter as falling "on the low end of the scale of punitive damages, far below those cases involving a defendant's deliberate attempt to harm another person."[14]

Tort defendants increase their chances of relief under *Lawlor* if they can show their conduct limited in scope.

No evidence that the company had an "intentional, premeditated scheme to harm" the plaintiff. The court noted "there was no evidence presented to the jury that North American had an intentional, premeditated scheme to harm Lawlor."[15] This factor in the court's analysis seems to go hand-in-hand with the presence of a legitimate business interest: if a company is acting to protect a legitimate business interest, then it is unlikely to be pursuing an intentional, premeditated plan to hurt the plaintiff.

Importantly, even though it appeared that the plaintiff failed to offer evidence of intentional, premeditated conduct designed to harm the plaintiff, it would seem prudent for defense counsel in any event to elicit from a corporate representative affirmative testimony that at no time were the company's actions motivated or guided by any intentional, premeditated scheme to deliberately harm the company's former employee.[16]

"Other factors" showed the limited scope of the company's investigation. The court stated that "other factors" militated in favor of a reduced punitive damages award. They centered on the limited scope of NAC's investigation into Lawlor and reinforced the private nature of the company's inquiry.

Here, the court noted that plaintiff's phone records were "only viewed internally by a handful of North American's employees" and were not "distributed outside the company" or "used for any purpose other than to determine if Lawlor had contact with one of North American's customers."[17] Clearly, NAC's apparent decision to keep the investigation confidential and limited to ascertaining whether its non-competition agreement had been violated clearly benefited NAC in the court's eyes. Thus, to assert the *Lawlor* safe harbor, a company's good faith, private investigation into employee malfeasance should be just that: private, focused and confidential.

The evidence showed "limited harm" to plaintiff. Looking at the totality of the evidence, the court identified several facts showing the negligible harm that plaintiff actually experienced as a result of her employer's intrusion upon her seclusion. She was able to begin new employment with the competitor firm "within months of voluntarily leaving North American."[18] Although plaintiff "vomited, experienced anxiety, and had periods of sleeplessness," the court observed that plaintiff "never sought medical or psychological treatment" and that in fact "there was no evidence of any alteration in her normal daily activities or that she missed work."[19]

A dissenting opinion filed by Chief Justice Kilbride takes issue with the majority's broad conclusion that plaintiff experienced "limited harm" and that there was "no evidence of any alteration in [Lawlor's] normal daily activities."[20] For example, the dissent noted evidence that after learning that her private telephone records had been obtained, plaintiff suffered from feelings of "paranoia," "nervousness" and "unusual stress."[21] The plaintiff as husband testified that Lawlor experienced "headaches a lot more, cold sores [and] a lot of stress-related stomach issues."[22] The dissent further noted that the plaintiff enhanced certain security features on her phone and changed the locks to her house.[23]

The dissent's take on damages, however, did not win the day. The majority view appears to be that harms described by the plaintiff as proximately occasioned by a company's tortious acts will probably be insufficient to overcome a *Lawlor*-type defense.

Practice pointers in light of *Lawlor*

Although not phrased as such, the court appears to be fashioning a type of affirmative defense to claims for punitive damages based on business-related torts committed in the good faith pursuit of "legitimate business interests." Although a successful *Lawlor* defense may not entirely remove the issue of punitive damages, it may greatly reduce the net damages assessed against a defendant.

Thus, *Lawlor* provides helpful guidance to litigants facing the prospect of punitive damages due to the tortious conduct of an agent or employee, especially where plaintiff's damages can be fairly characterized as "limited." Counsel wishing to take advantage of a *Lawlor*-type "defense" to punitive damages should consider the following issues.

Conduct should be business oriented, not overtly personal or vindictive. At some level most actions taken by or on

11. *Lawlor* is also notable because it marks the first time the Illinois Supreme Court has declared "intrusion upon seclusion" an actionable tort under Illinois law. *Lawlor*, 2012 IL 112530, ¶¶ 34-35.
12. *Lawlor*, at ¶ 62, 983 N.E.2d at 432.
13. *Id.*
14. *Id.*
15. *Id.*
16. It is not difficult to imagine cases where the at-issue conduct is deemed personal and gratuitous in nature and therefore not entitled to judicial remittitur on punitive damages. For example, in *1212 Restaurant Group, LLC v. Alexander*, 2011 IL App (1st) 100797, 959 N.E.2d 155, a workplace harassment and wrongful termination case, the First District rejected the employer's arguments for a reduction in punitive damages in part because the offensive comments were not only made "at various times in front of various people" but were intended "to humiliate, embarrass and cause distress." 2011 IL App (1st) 100797, ¶ 64, 959 N.E.2d at 172.
17. *Lawlor*, 2012 IL 112530, at ¶ 63, 983 N.E.2d at 432.
18. *Id.*
19. *Id.*
20. See generally *Lawlor*, at ¶¶ 82-90, 983 N.E.2d at 435-37 (Kilbride, J., dissenting).
21. *Lawlor*, at ¶ 82, 983 N.E.2d at 436.
22. *Id.* at ¶ 90, 983 N.E.2d at 437.
23. *Id.* at ¶¶ 85-86, 983 N.E.2d at 436.

behalf of business organizations involve and affect individuals personally. However, if it can be fairly said that the corporate conduct being scrutinized is motived by legitimate business interests and not vendetta or animus, then the company will be on much surer footing. If, however, it is established that the company's actions were motivated by an "intentional, premeditated scheme to harm" an employee, that may tip the scales the other way.

Conduct should be private, focused, and confidential. Tort defendants increase their chances of relief under *Lawlor* if they can show the limited scope of their conduct. Thus, in *Slovinski*, the defamatory comments were made only once in a July 1996 meeting, and only to those in that meeting.[24] And in *Lawlor*, the plaintiff's phone records were seen by only "a handful" of company employees involved in the investigation and not distributed outside the company.[25]

Limited compensatory damages may lead to limited punitive damages. In *Lawlor*, the Court concluded that, while plaintiff experienced some physical and emotional side effects (for which she sought no medical or psychological treatment), she was able to continue working at another company "within months" of leaving NAC.[26] Likewise, in *Slovinski*, the jury found no damages for loss of reputation, or lost wages. Moreover, although plaintiff established emotional distress, there was no evidence of physical damage or medical treatment, nor any evidence showing plaintiff missed work or any alteration in plaintiff's normal daily activities.[27] Such conclusions help build a powerful *Lawlor* defense.

Assert *Lawlor* relief by way of affirmative defense? Counsel who seek to limit their client's punitive damages exposure must consider how and when to plead this issue procedurally. For example, a *Lawlor* defense may be akin to contributory negligence, which is an affirmative defense and, if established, can reduce the plaintiff's recovery.

Thus, if a *Lawlor* defense is treated like an affirmative defense, it will have to be pled early in the answer or reply.[28] Counsel may also consider waiting until discovery is completed before asserting a *Lawlor* defense. This is because a party may not know whether he has a legitimate *Lawlor* defense until after discovery is completed. Also, waiting until discovery is completed may have the benefit of "locking" the plaintiff into a settled discovery record.

Conclusion

The *Lawlor* "legitimate business interest" defense offers sensible limits to excessive punitive damage awards. No corporate defendant found guilty of a tort because of the actions of an agent or employee wants to face the imposition of punitive damages. However, *Lawlor* (and its predecessor, *Slovinski*) at least gives defendants guidance in seeking remittiturs to inflated punitive damage judgments. ■

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24. *Slovinski*, 237 Ill.2d at 64, 927 N.E.2d at 1228.
25. *Lawlor*, 2012 IL 112530, at ¶ 63, 983 N.E.2d at 432.
26. *Id.*
27. *Slovinski*, 237 Ill.2d at 64, 927 N.E.2d at 1228.
28. Cf. 735 ILCS 5/2-613(d).