

## FINPRO Focus—Novartis \$250 Million Punitive Damages Award: Why Employment Practices Liability Insurance Matters

Trials of employment class action lawsuits are very rare. This may explain why, in addition to the employment law bar, companies, their risk managers and employment practices liability (EPL) insurers have been captivated by the May 19, 2010, jury verdict in the case of *Velez v. Novartis Pharmaceuticals Corp.* The \$250 million punitive damages award in the *Velez* gender discrimination case is also the largest of such awards in the history of employment discrimination cases. Moreover, there is speculation that the overall award could exceed \$1 billion if each of the 5,600 class members is awarded up to \$300,000 (the statutory limit) in compensatory damages. While the verdict has raised or resurrected several issues, including, but not limited to, the scope of punitive damages awards and whether class certification of punitive damages awards are appropriate, the point of this **FINPRO Focus** is to briefly discuss the background of *Velez* and provide some guidance on the role of insurance in potentially mitigating the exposure associated with an EPL claim the magnitude of *Velez*.

### Background

*Velez* was filed in 2004 in the United States District Court for the Southern District of New York by current and former female employees of a U.S. subsidiary of Novartis AG (a Switzerland-based pharmaceutical company), who alleged that they were subjected to gender discrimination in their sales-related positions at the company in violation of Title VII of the Civil Rights Act of 1964. The plaintiffs alleged that they were paid

less than male employees, pregnant women were subjected to adverse employment decisions, complaints of sexual harassment were ignored and less qualified male employees were promoted over qualified women.

In July 2007, the court certified a class of 5,600 women. The case proceeded to trial in April 2010. At the end of trial, the jury awarded \$3.3 million in compensatory damages to the 12 named plaintiffs and determined that the plaintiffs were entitled to an award of punitive damages. As a result, plaintiffs' counsel asked the jury to award punitive damages in an amount equal 2 percent to 3 percent of Novartis' 2009 U.S. revenue, which the parties agreed was approximately \$9.5 billion. Hence, the \$250 million figure. Notably, the verdict does not include an estimated \$37 million in back pay requested by the plaintiffs, nor does it include what is certain to be staggering defense expenses or the class compensatory damages referenced above.

### The Role of Employment Practices Liability Insurance

Although Novartis has stated that it "strongly disputes" the verdict, the verdict is a game changer in many respects. For example, the verdict or any resulting settlement is likely to contribute to an increasingly litigious environment for employers, particularly as respects claims alleging gender and race discrimination.<sup>1</sup> Additionally, an already emboldened plaintiffs' employment bar is likely

<sup>1</sup> In this regard, in April 2010, in *Dukes v. Wal-Mart*, the Ninth Circuit upheld class certification of as many as 1.5 million women on the issue of injunctive relief but remanded the case to the lower court on whether the class should have been certified on the issue of punitive damages. In addition, the Obama Administration has been very outspoken about its intention and initiatives to protect employee rights and Congress is considering legislation—the Paycheck Fairness Act—that may eliminate the caps on compensatory and punitive damages.

to be even more so and employers are apt to be forced into higher settlements, more often simply to avoid protracted litigation as well as the reputational and financial risks associated with these claims. Therefore, companies are advised to remain vigilant in the implementation and enforcement of anti-discrimination/harassment policies and procedures. Having the policies or procedures in place may be insufficient.

The verdict is also a critical reminder of why employment practices liability insurance (EPLI) is important in managing EPL exposure, even for non-U.S. based companies doing business in the United States. The \$250 million award underscores the fact that punitive damages remain the largest exposure facing companies in EPL cases, with such damages being awarded in nearly 20 percent of all such cases. Punitive damages are also often a factor in settlement of cases, thus driving up the settlement value. While there are certain jurisdictions, such as New York and California, that prohibit insurance coverage for punitive damages, EPLI policies (subject to their terms, conditions and exclusions, as well as public policy constraints) are written to provide coverage for such damages. Similarly, the definition of loss under EPLI policies includes back pay, front pay, compensatory damages and defense costs incurred in defending EPL claims.<sup>2</sup> For clients in jurisdictions where punitive damages are uninsurable as a matter of public policy, Bermuda markets offer standalone EPLI policies that include punitive damages. Bermuda markets also offer punitive damages wrap policies that may fill the coverage gap in situations where the domestic EPLI carrier is prohibited from

insuring punitive damages. Finally, it is important that clients purchase adequate limits of liability (which, among several factors, is dictated by employee count) to maximize EPLI coverage in a class action such as *Velez*.

For more information about this topic, please contact Adeola Adele, Marsh's Employment Practices Liability Insurance Product Leader, at (212) 345-1724 or Adeola.I.Adele@marsh.com or your Marsh representative.

<sup>2</sup> EPL class action lawsuits tend to be extremely complex, document and witness intensive, and sometimes take several years to litigate. As such, defense costs in a class action lawsuit such as *Velez* can be upwards of \$75 million.

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