No. 08-17742

IN THE

United States Court of Appeals for the Ninth Circuit

G. CLINTON MERRICK, Jr.,

Plaintiff-Appellee,

v.

THE PAUL REVERE LIFE INSURANCE COMPANY, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court for the
District of Nevada, in Case No. 00-00731-JCM-RJJ
United States District Judge James C. Mahan

BRIEF FOR *AMICUS CURIAE*
THE CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA
IN SUPPORT OF APPELLANTS AND REVERSAL

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H St. N.W.
Washington, D.C. 20062
(202) 463-5337

JONATHAN S. FRANKLIN
TILLMAN J. BRECKENRIDGE
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania, Ave., N.W.
Washington, DC 20004
(202) 662-0200

July 13, 2009

Counsel for *Amicus Curiae*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(c) of the Federal Rules of Appellate Procedure, *amicus* states as follows:

The Chamber of Commerce of the United States of America has no parent corporation, and no subsidiary corporation. No publicly held company owns 10% or more of its stock.

STATEMENT REGARDING CONSENT

Pursuant to Fed. R. App. P. 29(a), all parties have consented to the filing of this Brief for *Amicus Curiae* for The Chamber of Commerce of the United States of America.

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest federation of businesses, representing over three million companies as well as state and local chambers and industry organizations all over the country. It is the voice of business, fighting for free enterprise before all branches of government. An important function of the Chamber is to represent

the interests of its members by filing *amicus curiae* briefs involving issues of national concern to American business.

Few issues are of more concern to American business than those pertaining to the fair administration of punitive damages. The Chamber regularly files *amicus* briefs in significant punitive damages cases, including numerous cases in which the United States Supreme Court and this Court have addressed such issues during the past 20 years. The Chamber and its members have a substantial interest in the procedures courts employ in punitive damages cases and in the process by which trial and appellate courts evaluate jury awards of punitive damages. The Chamber believes that its familiarity with the law of punitive damages can be of assistance to the Court not just in resolving the issues raised in this appeal, but also in more broadly addressing the requirements imposed by due process to protect defendants from unconstitutionally excessive punitive damages awards.

INTRODUCTION

This case demonstrates the need for courts to restrain unconstitutionally excessive punitive damages, both by employing procedures that prevent arbitrary jury actions beforehand and by exercising searching and meaningful review of punitive awards after a verdict is returned. The court below did neither. It skewed the playing field in advance by, among other things, preventing the jury from fully evaluating all evidence bearing on defendants' culpability, and by allowing

plaintiff's counsel to suggest that the jury award a patently unconstitutional amount of punitive damages. It then compounded that error by failing to meaningfully evaluate the excessiveness of the jury's award in light of the other penalties that could be—and in fact were—imposed for this kind of conduct, as well as the true ratio of compensatory to punitive damages.

As a direct result of the trial court's errors, the jury awarded $60 million in punitive damages, which is six times the original jury's punitive award that was reversed on appeal and more than 36 times that jury's still-standing $1.65 million compensatory damages award. And when the time came for an exacting review by the trial court to bring the punitive damages into conformity with the Constitution, the trial court instead effectively shirked that duty.

Outlandish punitive awards of this sort are of great concern to the Chamber and its members. Punitive awards in the tens or hundreds of millions of dollars are all-too-common in the states comprising this Circuit, and those awards are characterized by very high multiples of compensatory to punitive damages in cases, like this one, involving an individual plaintiff and a business defendant. *See* Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform*, 33 J. Legal Stud. 1, 5-8 (2004) (noting numerous punitive awards exceeding $100 million in states comprising the Ninth Circuit). The mere specter of such crippling exactions affects the willingness and ability of companies to do

business in this Circuit. The Chamber therefore urges this Court to reverse, or at least substantially reduce, the awards in this case and impose meaningful constraints on runaway punitive awards, by ensuring that trial courts both follow fair procedures prior to the jury's deliberation and engage in exacting review afterwards.

ARGUMENT

I. THE TRIAL COURT'S PRE-VERDICT ERRORS IMPROPERLY SLANTED THE JURY'S CONSIDERATION OF PUNITIVE DAMAGES.

A. The Jury Should Have Been Able To Consider All Evidence Bearing On the Defendants' Culpability.

As appellants have explained, the trial court's order allowing a retrial limited to the amount of punitive damages violated this Court's direction in the first appeal to conduct a retrial on punitive liability, not just the amount of punitive damages. But in addition, by precluding appellants from presenting all available evidence bearing on their level of culpability, the court also violated appellants' fundamental right to a fair trial.

Under the Seventh Amendment, a partial new trial may be conducted only if "the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." *Gasoline Prods. Co., Inc. v. Champlin Ref. Co.*, 283 U.S. 494, 500 (1931). In *Gasoline Products*, the Supreme Court reversed an order directing a partial retrial on compensatory damages alone, holding that a

new trial was required on all issues because the amount of damages was "so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial." *Id*. at 500-01.

This Court, in *United Air Lines, Inc. v. Wiener*, 286 F.2d 302 (9th Cir. 1961), followed suit in a case involving punitive damages. There, the Court reversed an order allowing separate trials on liability and damages in consolidated aircraft crash cases where punitive (exemplary) damages were at issue. Employing reasoning that is equally applicable to this case, the Court explained that the *Gasoline Products* rule applied because "where parties are asking for exemplary damages which depend upon the degree of culpability of the defendant, they are required to establish by their evidence their contentions as to the degree of negligence." *Id*. at 306. Because of this overlap between the evidence required to evaluate punitive damages and the evidence required to evaluate the underlying negligence, the Court held that "under the circumstances presented by this appeal the issues of liability and damages, exemplary or normal, are not so distinct and separable that a separate trial of the damage issues may be had without injustice." *Id*. Other circuits have reached similar conclusions. *See, e.g., Burke v. Deere & Co.*, 6 F.3d 497, 513 (8th Cir. 1993) ("[E]ven if we agreed that the evidence supports submission of the case on the question of punitive damages . . . a retrial to

a new jury on that issue alone would be improper because the issues underlying compensatory and punitive awards are inextricably intertwined."); *Spence v. Bd. of Educ.*, 806 F.2d 1198, 1201 (3d Cir. 1986) ("The liability and damage issues are further intertwined in this case because the plaintiff is seeking punitive damages from the defendants. In order to prove that the defendants' conduct warranted punitive damages, plaintiff would have to present to the jury all the facts leading up to defendants' decision to transfer her. Thus, the liability and damages issues are not so easily separable as plaintiff suggests.").

Unlike compensatory damages, which are not necessarily dependent on the same evidence underlying compensatory liability, liability and amount of punitive damages are always inextricably intertwined because they will always rely on substantially overlapping evidence. Liability for punitive damages requires the jury to find that reprehensible conduct occurred. *See, e.g.*, Nev. Rev. Stat. § 42.005 (plaintiff must prove "oppression, fraud, or malice" by the defendant to be awarded punitive damages). And the amount of punitive damages awarded always depends on the degree of reprehensibility. *White v. Ford Motor Co.*, 500 F.3d 963, 974 (9th Cir. 2007) (under Nevada law, amount of punitive damages awarded should be based on "'the reprehensibility of the conduct of the defendant'" (citation omitted)); Ninth Cir. Model Civil Jury Instruction 5.5 ("in considering the

amount of any punitive damages, consider the degree of reprehensibility of the defendant's conduct").

Accordingly, the same evidence that establishes or rebuts the existence of reprehensible conduct will also establish or mitigate the degree of reprehensibility. Reprehensibility depends on, among other things, (1) whether the harm was physical or economic, (2) whether the defendant's conduct showed "indifference to or a reckless disregard of the health or safety of others," (3) whether the plaintiff was financially vulnerable, (4) whether there were repeated violations, and (5) whether "the harm was the result of intentional malice, trickery, or deceit, or mere accident." *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003). Evidence tending to rebut each of these factors also rebuts a claim that a defendant's conduct was oppressive, fraudulent, or malicious. So any defendant in a trial where punitive damages is at issue will use substantially the same evidence to defend against both liability and the magnitude of the award.

For these reasons, under *Gasoline Products* and *United Air Lines*—as well as this Court's directions in the first appeal—liability and amount of punitive damages should not have been tried separately because the issues are inextricably intertwined. But even if the amount of damages could have been retried separately from liability—as sometimes occurs with compensatory damages—a fair trial could be possible only if the second jury is allowed to consider all evidence

relevant to the defendant's degree of culpability. For example, in *Watts v. Laurent*, 774 F.2d 168, 181 (7th Cir. 1985), an erroneous jury instruction on compensatory damages necessitated remand for a new trial. Expressly noting "the possibilities for injustice inherent in new trials devoted only to damages," the court established procedures to "avoid, or at least minimize" that constitutional violation. *Id*. (citing *Gasoline Products*). Specifically, the court held that the parties must be able "to present to the second jury whatever evidence . . . from the liability phase of the trial may be regarded as relevant in any way to the question of damages" and directed that "there shall be a strong presumption that evidence from the liability phase may be relevant in some way to damages." *Id*.

The trial court here failed to follow such procedures. Having ignored this Court's instruction to retry punitive liability, and having failed to ensure defendants' constitutional right to such a retrial, the court compounded the violation by preventing defendants from presenting all evidence relevant to the degree of their culpability on the ground that the evidence had already been presented to a different jury in the liability phase. The court excluded any evidence that it believed was "contrary to, or may cause confusion with" the previous jury's findings that defendant UnumProvident "acted in bad faith" or "acted with oppression, fraud, or malice" CR418:1-2 (motion in limine requesting exclusion of any evidence that contradicts or causes confusion with the prior jury's

findings); CR464:2 (order granting motion). That ruling granted plaintiff's request to exclude any evidence suggesting that defendants had a "reasonable basis" for terminating Merrick's benefits, that they did not "intend[] . . . to cause injury to" Merrick, or that they did not "engage[] in an intentional misrepresentation, deceit, or concealment of a material fact." CR418:1-2.

That was error. Almost any evidence bearing on the degree of reprehensibility of defendants' conduct—a critical component of any determination as to the amount of punitive damages—would also bear on whether it had acted maliciously at all. To defend themselves on remand, defendants needed to give the jury the entire story so that the jury could determine whether defendants barely crossed the line or went far beyond it. To make that determination, the jury needed to weigh the evidence of bad faith and malice against the evidence that Merrick had a borderline case for benefits that a reasonable insurance company might deny or at least challenge. The trial court denied the jury that opportunity and the resulting prejudice is clear. The first jury, which heard both sides of the claim processing story, awarded $10 million in punitive damages even though it had been improperly instructed in Merrick's favor. On the other hand, the second jury awarded six times that amount after defects in the jury instructions were corrected. The difference in the evidence considered obviously made a difference in the result. Having heard only one side

of the story, the second jury found a higher degree of reprehensibility than the first jury did.

Accordingly, the trial court erred in not ordering a retrial on all issues pertaining to punitive damages. But at a bare minimum, the court violated defendants' right to a fair trial by precluding the jury from hearing relevant evidence bearing on defendants' degree of culpability.

B. The Trial Court Improperly Allowed Merrick To Propose An Unconstitutional Punitive Damages Amount.

The trial judge further erred by allowing plaintiffs' counsel to suggest that the jury award the patently unconstitutional amount of $147,000,000. The Chamber disagrees with this Court's holding in *White v. Ford Motor Co.*, *supra*, that jurors need not be instructed that punitive damages must bear a reasonable relationship to compensatory damages, but that holding is the law in this Circuit. This inability to instruct jurors on the constitutional bounds of punitive damages awards makes it imperative for courts to prevent plaintiffs' counsel from affirmatively misleading jurors by suggesting that they award an unconstitutional amount.

Studies have confirmed that, given the unique characteristics of punitive awards, when juries determine the amount of such damages, "[t]he plaintiff's demand makes a great deal of difference. Other things being equal, high requests produce high awards." Cass R. Sunstein et al., *Punitive Damages: How Juries*

Decide 30 (2002). The reason is rooted in the unique nature of punitive damages. Even with compensatory damages, it has been found that "[t]he more you ask for, the more you get." Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask For, The More You Get: Anchoring in Personal Injury Verdicts*, 10 Applied Cognitive Psychology 519 (1996). But punitive damages are even more susceptible to these "anchoring" effects, where jurors determine their awards by adjusting from suggested amounts. Unlike compensatory damages, punitive awards are not readily reducible to mathematical calculations based on objective evidence of actual damage. Therefore, jurors lacking other numerical criteria will commonly determine punitive amounts by adjusting from the amount suggested by plaintiffs' counsel.

Studies show that "[t]he dollar amounts that are requested by plaintiffs in their closing arguments to the jury have a dramatic effect on the size of punitive damages awards: the higher the request, the higher the awards." Sunstein, *supra*, at 62. For example, researchers in Nevada, where this case arose, conducted a series of mock trials to determine punitive damages in a hypothetical case. *See* Reid Hastie et al, *Juror Judgments in Civil Cases: Effects of Plaintiff's Requests and Plaintiff's Identity on Punitive Damages Awards*, 23 Law & Hum. Behav. 445 (Aug. 1999). When the researchers varied only the amount of punitive damages requested by plaintiffs' counsel while leaving every other factor constant, they

found that the median amount awarded by the mock jurors rose in rough proportion to the increase in the amount requested. *Id*. at 454. In fact, of all the variables tested, which included whether the parties were local or out-of-state, "only the plaintiff's request had statistically reliable effects." *Id*. It was found that "[t]he power of the plaintiff's request [was] particularly impressive" given that the mock jurors were also presented with extensive data on the defendant's financial status. *Id*. at 457.

This problem might have been ameliorated if trial courts were required, as a matter of federal constitutional law, to instruct juries that their awards must comply with the guideposts established by the Supreme Court in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), which would cabin their discretion. But this Court held in *White* that the Constitution imposes no such requirement. Nor is it sufficient simply to instruct juries that counsel's arguments are not evidence, because studies have shown that "[j]udges' instructions that arguments by the plaintiff's lawyer are not evidence did not eliminate [the] effect" of counsel's suggestions. Sunstein, *supra*, at 62. And it is likewise insufficient to rely upon a defendant's ability to suggest competing amounts. The defendant will generally advocate *no* punitive damages, and obviously cannot suggest any lower amount in an effort to counterbalance an outrageous request by the plaintiff. By contrast,

there is virtually no upper limit on plaintiffs' counsel's request, other than perhaps the defendant's total net worth.

Thus, under the "anchor-and-adjust" strategy jurors typically employ to determine punitive amounts, the plaintiffs' suggested amount will form the "anchor" for the deliberations, and higher suggested amounts will tend to produce higher awards. Hastie, *supra*, at 449. That is exactly what happened here. In the first trial, plaintiffs' counsel did not request that the jurors award a specific amount of punitive damages, and the jury awarded $10 million in punitive damages on top of a $1.65 million compensatory award. But in the second trial, counsel urged the jurors to award $147 million and they responded with a massive $60 million award.

These concerns militate in favor of precluding counsel from suggesting any amount of punitive damages. The jury's "anchor" would then likely be the amount of compensatory damages, which would be adjusted (either downward or upward) in a manner consistent with *BMW*. But at a bare minimum, counsel should not be allowed to do what was done in this case: advocate an amount of punitive damages that would be patently unconstitutional if awarded. Due process of law requires, at a minimum, that counsel not urge juries to violate the law. For example, it would clearly violate the Due Process Clause (among other laws) for counsel to urge jurors to award a white plaintiff more damages than a black

plaintiff. It should similarly be impermissible for counsel to suggest that jurors award an amount of punitive damages that would violate the Constitution.

But that is what happened here. Counsel urged the jury to award $147,000,000 even though that amount—almost 50 times the harm to the plaintiff under the most generous measure—could never pass muster under *BMW* and its progeny. And counsel achieved the desired effect, with the jurors imposing a lower—but still massive—sum.

II. THE PUNITIVE DAMAGES ARE UNCONSTITUTIONALLY EXCESSIVE.

A. The Trial Court Failed Meaningfully To Evaluate The Excessiveness Of The Punitive Damages.

Although the trial court purported to evaluate the *BMW* factors in its order resolving defendants' post-trial motion, its selection of a nine-to-one ratio of compensatory to punitive damages as the "minimally necessary" amount, ER36, failed to apply those factors in a meaningful way. It cited this Court's conclusion that a single-digit ratio higher than four-to-one "might" be constitutional even where economic damages are significant. ER34 (citing *Baker v. Exxon Mobile Corp.*, 490 F.3d 1066, 1093 (9th Cir. 2007)). But it failed to justify its selection of a nine-to-one ratio given the reprehensibility of appellant's conduct as compared to the conduct in other cases, and given that the penalties imposed by other decisionmakers for the *same* conduct have been dramatically lower. It was not

sufficient for the court to note that appellant's conduct was reprehensible, for *all* conduct warranting punitive damages will be reprehensible to some degree. To justify a nine-to-one ratio—which is at or near the far outer limit of what the Constitution allows—both the reprehensibility of the conduct and the civil penalties for similar conduct must also be at or near their outer limits. As appellants have shown, neither is true in this case.

While awards with higher than single-digit ratios are almost always unconstitutionally excessive, the obverse is not true. The mere fact that a substantial award, either as imposed or remitted, involves a single-digit ratio does not render that award constitutional. There is no "mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991). While a one-to-one ratio is a general "outermost limit" when compensatory awards are substantial, *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2626 (2008); *State Farm*, 538 U.S. at 425, the limit for any particular award may well be lower, in light of the magnitude of the award, the degree of reprehensibility, the actual harm to the plaintiff, and comparative civil penalties. A very large punitive award on top of a very large compensatory award, even where the ratio is single-digit, will raise more serious due process concerns than a small punitive award on top of a small compensatory award where the ratio is high. A $90 punitive award on top of

a $10 compensatory award is hardly momentous even though the ratio is nine-to-one. But the award in this case—$52,789,530 as compared to harm of no more than $2,932,751.71 (even as miscalculated by the court)—raises extremely serious concerns. As the Supreme Court has held, even a $2 million dollar punitive award—a tiny fraction of the awards in the present cases—is "tantamount to a severe criminal penalty." *BMW*, 517 U.S. at 585.

In light of those concerns, it was not sufficient for the trial court to say that the conduct was reprehensible and therefore justified a ratio at or near the general constitutional maximum. In order to sustain such an award, both the reprehensibility of the conduct and the penalties for other similar conduct must also be at their maximum as compared to other cases. As shown below and by appellants in their brief, neither is true in this case.

B. Comparing The Punitive Damages Award Here With Other Penalties For The Same Conduct By The Same Company Establishes Its Excessiveness.

When evaluating the excessiveness of the punitive awards, the trial court should have fairly weighed the civil penalties and punitive damages awards already assessed against defendants for the same conduct. A jury may award punitive damages only for conduct causing injuries to the plaintiff. *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007). The plaintiff cannot recover for injuries inflicted on "strangers to the litigation." *Id*. Yet comparing the jury's $60 million

award and the trial court's modestly-reduced $52 million award with two other penalties defendants have faced for the same conduct shows that the award is far larger than amounts deemed appropriate to penalize harm to others for the same institutional conduct, and does not remotely compare with the "the civil or criminal penalties that could be imposed for comparable misconduct." *BMW*, 517 U.S. at 583. There is no need to speculate in this case as to what those penalties could be, for we already know what they were.

The insurance regulators of 48 states conducted a review of defendants' claims handling procedures to identify any systemic problems. ER903-04. After finding certain problematic operations, the regulators entered into a Regulatory Settlement Agreement with the Unum companies that imposed a $15 million fine covering all 48 states. ER918-20. And in *Leavey v. Unum Provident Corp.*, Nos. 06-16285 & 06-16350, 2008 U.S. App. LEXIS 21144 (9th Cir. Oct. 6, 2008), this Court affirmed the district court's remittitur of the jury's punitive damages award for substantially the same institutional practices for which punishment was sought and imposed in this case. *Id*. at *7. In *Leavey*, the plaintiff obtained a compensatory damages award of about $2 million and the jury awarded $15 million in punitive damages. *Id*. at *5-7. The trial court reduced the punitive damages award to $3 million after determining that the 7.5-to-one punitive damages ratio was unconstitutionally excessive. *Id*. at *7. This Court affirmed,

holding that the trial court "arrived at the constitutional maximum when it determined the amount of punitive damages." *Id*. It explained that the harm involved was economic and not physical, the 7.5:1 ratio was too high, and "there was a large disparity between the punitive damages award and the civil penalties authorized or imposed in comparable cases." *Id*.

Here, the same reasoning applies. The harm here was economic and not physical; the ratio, even as the trial court miscalculated it, is nine-to-one; and the award far surpasses any comparable civil penalty that could be or was assessed. The $52 million punitive damages award is about three-and-a-half times the nationwide civil penalty defendants paid for the same alleged institutional practices. It is over 17 times the punitive damages paid to another individual for the same institutional conduct in *Leavey*, and the difference between the punitive-to-compensatory damages ratios in the two cases is equally stark.

This disparity shows that the jury and judge in this case punished defendants far more harshly than necessary to remedy the conduct directed only at Merrick. Evidence establishing injury to others and repeated misconduct is admissible to show reprehensibility. *Philip Morris*, 549 U.S. at 355. But the trial court must ensure that "the jury will ask the right question, not the wrong one" when evaluating this evidence. *Id*. When the jury does ask the wrong question, courts must correct the error. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532

U.S. 424, 441 (2001) (appellate courts must give a "thorough, independent review" to punitive damages awards); *Morgan v. Woessner*, 997 F.2d 1244, 1257 (9th Cir. 1993) (trial court must review jury's punitive damages award carefully and record its reasoning).

The trial court, however, made no attempt to rectify this error. Rather, it presumed that a nine-to-one ratio was appropriate as a matter of Nevada state policy based solely on a 1988 Nevada Supreme Court case—which predates virtually all relevant U.S. Supreme Court authority on appropriate punitive damages ratios—approving "punitive damage ratios approaching 30:1," and the state legislature's choice not to include insurance bad faith among the claims subject to punitive damages caps. ER38. The trial court wholly ignored the fact that Nevada had punished defendants for the very same behavior by joining 47 other states in assessing a $15 million penalty against UnumProvident. Nevada's share of that $15 million is not in the record, but under any reasonable apportionment, that share would still be dwarfed by the $52 million punitive damages award.

Even if there were no example of civil penalties awarded, the trial court still erred by resorting to conjecture about legislative intent or out-of-date precedent on very different facts, rather than comparing this case to other similar cases. *See Mendez-Matos v. Municipality of Guaynabo*, 557 F.3d 36, 55 (1st Cir. 2009)

(where a legislature does not address civil penalties for particular conduct, it is appropriate to compare the award at issue with awards permitted in similar cases). Here, there was a contemporary comparable case involving the same conduct, and other actions against the same defendants for the same conduct, where the punitive damages awards ranged between nothing and $7 million. *See* Appellants' Br. 35-36. Accordingly, a simple comparison of the punitive damages award here with civil penalties and punitive damages awards in other cases for the same conduct reveals that this award is a gross outlier.

"Exacting appellate review ensures that an award of punitive damages is based upon an 'application of law rather than a decisionmaker's caprice.'" *State Farm*, 538 U.S. at 418 (citation omitted). The trial court in this case failed to engage in an exacting review, and instead modestly reduced the award to a ratio of nine-to-one without engaging in any meaningful comparison with other similar cases and penalties. This Court should exercise the required level of review and reverse, or at least substantially reduce, the trial court's award.

C. The Trial Court Impermissibly Doubled The Punitive Damages Award By Separately Evaluating The Maximum Award Ratio For The Two Defendants.

In addition, the trial court's use of the total compensatory damages against each of the two defendants when calculating the applicable punitive damages ratio for each defendant violated due process by double-counting the compensatory

damages. This resulted in an unconstitutional ratio of punitive damages to compensatory damages of 18-to-one. The trial court started with a total compensatory award of $2.9 million.[1] ER37. It then multiplied that number by nine—the maximum constitutionally-allowable ratio under its reasoning—and ruled that the maximum allowable punitive damages amounted to $26 million. ER37, 40. But instead of recognizing that $26 million is the total allowable punitive damages for the *entire* case, the court applied that number separately to each defendant. As a result, Merrick was awarded over $50 million. The trial court's method was wrong. It "assumes an impossibility . . . because it posits that each defendant will ultimately pay the full compensatory damages award." *Grabinski v. Blue Springs Ford Sales, Inc.*, 203 F.3d 1024, 1026 (8th Cir. 2000).

When liability is joint and several, the maximum total punitive damages should be determined by multiplying the total compensatory award by the appropriate punitive damages ratio. *Id*. Then, the total maximum punitive damages should be apportioned among the defendants according to each defendant's individual culpability as found by the jury. When the jury has not

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[1] The Chamber agrees with appellants that the trial court miscalculated the applicable compensatory award by including post-judgment interest and a 3.3 percent annual markup to bring the award "current," but for the purposes of this argument, the Chamber will assume that the trial court correctly calculated the total compensatory award.

apportioned compensatory damages among the defendants, the apportionment of punitive damages by the jury serves as a suitable proxy. *See, e.g., Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 422 F.3d 949, 963-64 (9th Cir. 2005) (apportioning reduced punitive damages award based on jury's apportionment of total punitive damages). This method prevents trial courts from double counting. And it properly ensures that the total punitive award will be in line with the total harm done to the plaintiff.

In recent years, this Court has consistently adhered to this method. *See Leavey*, 2008 U.S. App. LEXIS 21144, *7 (calculating punitive damages ratio based on comparing total compensatory damages with total punitive damages) (App. 3); *S. Union Co. v. Irvin*, 563 F.3d 788, 792 (9th Cir. 2009) (same); *Planned Parenthood*, 422 F.3d at 963-64 (same). For example, in *Southern Union*, 563 F.3d at 791-92, this Court twice calculated the punitive damages ratio based on the portion of the compensatory award allocable to the defendant that appealed rather than calculating the ratio using the entire compensatory damages award. Using that ratio, the Court reversed an unconstitutional punitive damages award, and then reversed the trial court yet again when the punitive damages award still came out too high after remand. *Id*. Similarly, in *Planned Parenthood*, 422 F.3d at 963-64, where there were multiple plaintiffs and multiple defendants, this Court issued a remittitur that first calculated the total available punitive damages to each plaintiff

by multiplying the maximum constitutionally allowable ratio by that plaintiff's compensatory award and then dividing the resulting amount proportionately among the defendants based on each defendant's proportional share of the unconstitutional punitive damages originally awarded to that plaintiff by the jury.

The trial court's double-counting of the compensatory damages is especially egregious in this case because the two defendants are part of the same corporate family. In other areas of the law, members of the same corporate family are incapable of conspiracy and are considered a single entity for the purposes of culpability for acting in concert when the entities (1) share "common ownership and discretion" and (2) do not compete with each other. *Thomsen v. W. Elec. Co., Inc.*, 680 F.2d 1263, 1266 (9th Cir. 1982). Here, ownership is inherently shared: defendant UnumProvident Corporation wholly owns the company that wholly owns defendant Paul Revere. For that reason, it is also clear that the two companies do not compete. "A parent and its wholly owned subsidiary have a complete unity of interest." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984) (parent and wholly-owned subsidiary cannot conspire to violate antitrust laws).

The trial court's findings of fact underscore the defendants' unity of interest. The court described a purported "scheme" developed by UnumProvident Corporation and implemented in Merrick's case by Paul Revere. ER22-24. The

court's findings do not identify any conduct independent of the "scheme" that would suggest independent punishable conduct by the subsidiary, Paul Revere. Yet the court gave "undue significance to the fact that [UnumProvident's] subsidiary is separately incorporated and thereby treat[ed] as the concerted activity of two entities what [was] really unilateral behavior flowing from decisions of a single enterprise." *Copperweld*, 467 U.S. at 766-67. Had Paul Revere been a division of UnumProvident rather than a subsidiary, there is no question that the maximum total punitive damages here would have been no more than $26 million (based on the erroneous nine-to-one ratio and the erroneous $2.9 million compensatory award calculation). There is no legal or logical reason for defendants to receive double punishment based solely on this corporate formality.

CONCLUSION

For the foregoing reasons, the Chamber respectfully requests that this court reverse the trial court's judgment and remand for a new trial on punitive damages liability, or in the alternative, significantly remit the trial court's unconstitutional punitive damages award.

Respectfully submitted,

/s/ Jonathan S. Franklin

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H St. N.W.
Washington, D.C. 20062
(202) 463-5337

Jonathan S. Franklin
Tillman J. Breckenridge
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania, Ave., N.W.
Washington, DC 20004
(202) 662-0200

July 13, 2009

Counsel for *Amicus Curiae*

CERTIFICATE OF COMPLIANCE WITH
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/s/ Tillman J. Breckenridge
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Charles McB. Sasser
COX, GAGE & SASSER
Suite 350
1011 E. Morehead St.
Charlotte, NC 28204

/s/ Tillman J. Breckenridge
Tillman J. Breckenridge

APPENDIX

LEXSEE 2008 U.S. APP. LEXIS 21144

BRETT D. LEAVEY, Plaintiff - Appellant, v. UNUM PROVIDENT CORPORATION; PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY, Defendants - Appellees. BRETT D. LEAVEY, Plaintiff - Appellee, v. UNUM PROVIDENT CORPORATION; PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY, Defendants - Appellants.

No. 06-16285, No. 06-16350

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

295 Fed. Appx. 255*; *2008 U.S. App. LEXIS 21144

May 16, 2008, Argued and Submitted, San Francisco, California
October 6, 2008, Filed

PRIOR HISTORY: [1]**

Appeal from the United States District Court for the District of Arizona. D.C. No. CV-02-02281-PHX-SMM, D.C. No. CV-02-02281-SMM. Stephen M. McNamee, District Judge, Presiding.
Leavey v. UNUM/Provident Corp., 2006 U.S. Dist. LEXIS 34810 (D. Ariz., May 26, 2006)

DISPOSITION: AFFIRMED.

COUNSEL: For BRETT D. LEAVEY, Plaintiff - Appellant: Danielle D. Janitch, Esquire, Attorney, Thomas Lee Hudson, Esquire, Attorney, OSBORN MALEDON, PA, Phoenix, AZ; Anita Rosenthal, Esquire, Attorney, Steven C. Dawson, Esquire, Attorney, DAWSON & ROSENTHAL, PC, Phoenix, AZ; Gregg H. Temple, Attorney, GREGG H. TEMPLE, PC, Phoenix, AZ.

For UNUM PROVIDENT CORPORATION, PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY, Defendants - Appellees: Ann-Martha Andrews, Esquire, Attorney, Stephen M. Bressler, Esquire, Partner, Scott Michael Bennett, Esquire, Attorney, LEWIS & ROCA, LLP, Phoenix, AZ; Carl John Summers, Evan M. Tager, Esquire, Attorney, MAYER BROWN LLP, Washington, DC.

JUDGES: Before: B. FLETCHER and RYMER, Circuit Judges, and DUFFY ** , District Judge.

** The Honorable Kevin Thomas Duffy, Senior United States District Judge for the Southern District of New York, sitting by designation.

OPINION

[*257] MEMORANDUM *

* This disposition is not appropriate for publication and is not precedent except as provided by *9th Cir. R. 36-3*.

Before: B. FLETCHER **[**2]** and RYMER, Circuit Judges, and DUFFY**, District Judge.

Plaintiff Leavey ("Leavey") appeals the district court's reduction of the jury's punitive damages award because it was constitutionally excessive. Defendants Unum Provident Corporation and Provident Life and Accident Insurance Company (collectively "Unum") cross-appeal, challenging the district court's failure to give a proposed jury instruction, the compensatory damages award, the denial of their motions for judgment

as a matter of law and for a new trial, and the punitive damages award. We have jurisdiction under *28 U.S.C. § 1291*, and we affirm.

(1) The district court did not abuse its discretion in declining to instruct the jury that under Arizona law the parties had a reciprocal duty of good faith. The district court's instruction that "[t]here is an implied duty of good faith and fair dealing in every insurance policy," coupled with Unum's own argument to the jury, allowed the jury to determine intelligently whether Leavey's alleged breach of his own duty of good faith rendered Unum's conduct more reasonable. *See Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1398 (9th Cir. 1984)*. This court's decision **[**3]** in *White v. Ford Motor Company, 500 F.3d 963 (9th Cir. 2007)*, is not to the contrary. In *White*, the court held that, in light of Nevada law's requirement that a jury determining a punitive damages award consider the reprehensibility of the plaintiff's conduct, the district court should have instructed a jury that was empaneled solely to determine punitive damages that a prior jury had found the plaintiff 40 percent responsible for the tort at issue. *Id. at 975*. However, not only has Unum failed to identify a similar requirement under Arizona law, but the jury here, because it also determined Unum's liability, could decide for itself--based on the given instruction and Unum's argument to the jury--whether Unum was less liable because Leavey had breached his own duty of good faith.

(2) The district court did not abuse its discretion in reducing the jury's $ 4 million compensatory damages award for non-economic damages to only $ 1.2 million and no further. There was evidence that during the six months following Leavey's receipt of Unum's letter announcing the closing of his claim, Leavey "felt a great deal of anxiety," was "devastated," "confused" and depressed, felt compelled to move **[**4]** into a cheaper apartment, and was subjected to "real discouraging" and "degrading" experiences trying to find and keep a job. In addition, Leavey testified that even after he was informed that his benefits would be continued he "still had [his] concerns" because he expected his benefits to be terminated again. We conclude that the $ 1 million award for Leavey's emotional distress, while generous, is supported by evidence in the record and does not "shock the conscience" of the court. *See Higgins v. Assmann Electronics, Inc., 217 Ariz. 289, 173 P.3d 453, 459 (Ariz. Ct. App. 2007)*; *see also Monaco v. HealthPartners of S. Ariz., 196 Ariz. 299, 995 P.2d 735, 742 (Ariz. Ct. App. 1999)* (holding that trial court did not err in denying remittitur of $ 1.5 million verdict and deferring to trial court's ruling "because its ruling is nearly always . . . more **[*258]** soundly based than ours can be" (internal quotation marks and citation omitted)).

The $ 200,000 award for Leavey's hand injury and relapse also is supported by the record and does not shock our conscience. *See Higgins, 173 P.3d at 459*. Regardless of how Leavey got the idea of injuring his own hand in order to obtain prescription drugs, a jury could have found that the **[**5]** anxiety and distress caused by Unum's letter drove Leavey to act on his idea and to relapse. Unum's argument that the causal connection between Unum's letter and Leavey's hand injury and relapse is too attenuated is without merit.

(3) The district court did not err in denying Unum's renewed motion for judgment as a matter of law pursuant to *Fed. R. Civ. P. 50(b)* and did not abuse its discretion in denying Unum's motion for a new trial pursuant to *Fed. R. Civ. P. 59*. Viewing the evidence in the light most favorable to Leavey, as we must, *see White v. Ford Motor Co., 312 F.3d 998, 1010 (9th Cir. 2002), amended by 335 F.3d 833 (9th Cir. 2003)*, we conclude that the jury could have found that Unum acted not only in bad faith but also with an "evil mind." *Gurule v. Illinois Mut. Life & Cas. Co., 152 Ariz. 600, 734 P.2d 85, 86 (Ariz. 1987)*. There was evidence that Unum knew, in early 2001, that Leavey could not perform the duties of his occupation and that he was receiving appropriate care; that Unum nonetheless subjected Leavey's claim to a roundtable review, the sole purpose of which was to close expensive claims; that Unum sought to influence the opinions of independent medical examiners; that Unum misrepresented **[**6]** the opinions of those independent medical examiners in its letter to Leavey announcing the closing of his claim; and that Unum knew that Leavey was a vulnerable individual who suffered from anxiety and depression, was recovering from a serious drug addiction, and was at a high risk of relapse. Based on that evidence, the jury could have found that Unum acted with an evil mind because it "acted to serve [its] own interest, having reason to know and consciously disregarding a substantial risk that [its] conduct might significantly injure the rights of others." *Bradshaw v. State Farm Mut. Auto. Ins. Co., 157 Ariz. 411, 758 P.2d 1313, 1324 (Ariz. 1988)*. Accordingly, a jury could have found by clear and convincing evidence that Unum was liable for punitive

damages. *See Walter v. Simmons, 169 Ariz. 229, 818 P.2d 214, 225 (Ariz. Ct. App. 1991)*; *see also Merrick v. Paul Revere Life Ins. Co., 500 F.3d 1007, 1013-14 (9th Cir. 2007)* (affirming denial of new trial motion because jury could have found, based on similar evidence of improper claim-closing practices, that insurance companies' conduct constituted "fraud and malice" under Nevada law and thus warranted punitive damages).

(4) The district court did not err in reducing **[**7]** the jury's $ 15 million punitive damages award to $ 3 million. Applying the guideposts set forth in *BMW of North America, Inc. v. Gore, 517 U.S. 559, 574, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996)*, the court correctly concluded that the $ 15 million punitive damages award was constitutionally excessive: the compensatory award was substantial and constituted complete compensation, *see State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 426, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003)*; the emotional harm "arose from a transaction in the economic realm, not from some physical assault or trauma [and] there were no physical injuries," *id.;* Leavey presented "scant evidence of repeated misconduct of the sort that injured [him]," *id. at 423*; *cf. Philip Morris USA v. Williams, 549 U.S. 346, 127 S. Ct. 1057, 1064, 166 L. Ed. 2d 940 (2007)* ("Evidence of *actual harm* to nonparties can help to show that the conduct **[*259]** that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible." (emphasis added)); the ratio of the jury's punitive damages award to the reduced compensatory damages award was 7.5:1, *see State Farm, 538 U.S. at 425* (noting that "when compensatory damages are substantial" only a punitive award "equal to compensatory **[**8]** damages" may be acceptable); and there was a large disparity between the punitive damages award and the civil penalties authorized or imposed in comparable cases.

At the same time, the reduced punitive damages award--with a ratio of 1.5:1--was not constitutionally excessive. The Supreme Court has "decline[d] . . . to impose a bright-line ratio which a punitive damages award cannot exceed," *id.; see Hangarter v. Provident Life & Ace. Ins. Co., 373 F.3d 998, 1014 (9th Cir. 2004)* ("*State Farm's* 1:1 compensatory to punitive damages ratio is not binding, no matter how factually similar the cases may be."), and the ratio here fits within the "rough framework" for punitive damages discerned in *Planned Parenthood of Columbia/Willamette Inc. v. American Coalition of Life Activists, 422 F.3d 949, 962 (9th Cir. 2005)*. [1]

1 While the Supreme Court's recent decision in *Exxon Shipping Co. v. Baker, 554 U.S. , 128 S.Ct. 2605, 171 L. Ed. 2d 570 (2008)*, "review[ed] a jury award for conformity with maritime law, rather than the outer limit allowed by due process," *Id. at 2626*, the Court's statements in that case support the district court's decision to reduce the award here. The majority opinion in *Exxon* notes that "[a]lthough **[**9]** 'we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula,' we have determined that 'few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.'" *Id. at 2626* (quoting *BMW of North America, Inc. v. Gore, 517 U.S. 559, 582, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996)* and *State Farm Auto Ins. Co. v. Campbell, 538 U.S. 408, 425, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (9th Cir. 2003))*. The district court's reduction -- from a 7.5:1 ratio to a 1.5:1 ratio -- is consistent with the constitutional framework as described in *Exxon.*

Assuming, as Leavey contends, that the district court could reduce the jury's punitive damages award only to "the constitutional maximum," *see Leatherman Tool Group, Inc. v. Cooper Industries, Inc., 285 F.3d 1146, 1151 (9th Cir. 2002)*, we conclude that the court arrived at the constitutional maximum when it determined the amount of punitive damages.

AFFIRMED.