IN THE
SUPREME COURT OF THE UNITED STATES

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

CURTIS B. CAMPBELL and INEZ PREECE CAMPBELL.

Respondents.

On Writ of Certiorari to the

Utah Supreme Court

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amicus will address the following question: Whether a court violates fundamental principles of due process and commits constitutional error by allowing a punitive damages award to stand or be enhanced based on out-of-state conduct that was legal in the state in which the conduct took place, and was entirely unrelated and dissimilar to the conduct which gave rise to a plaintiff's punitive damages claim?

INTEREST OF THE AMICUS CURIAE

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. Many of its supporters are policy holders who would be adversely impacted by the award of excessive punitive damages against insurance companies and the consequent increase in premiums such excessive awards would cause. WLF regularly appears before federal and state courts promoting economic liberty, free enterprise principles, and a limited and accountable government. WLF's Legal Studies Division also publishes monographs and other publications on these topics.[1]

In particular, WLF has devoted substantial resources over the years through litigation and publishing to promote civil justice reform, including tort reform and opposing excessive punitive damages and attorneys' fee awards. WLF appeared as *amicus curiae* in *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *BMW of N. America, Inc. v. Gore*, 517 U.S. 559 (1996); *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); and *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). In addition, WLF has published numerous articles regarding punitive damages. *See e.g.*, Arvin Maskin, et al., *A Punitive Damages Primer: Legal Principles and Constitutional Challenges* (Washington Legal Foundation 1994); Victor E. Schwartz, et al., *Multiple Imposition of Punitive Damages: The Case For Reform* (Washington Legal Foundation Working Paper No. 50, 1992); Stephen M. Turner, et al., *Punitive Damages Explosion: Fact or Fiction?* (Washington Legal Foundation Working Paper No. 50, 1992); Victor E. Schwartz,

[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution to the preparation and submission of this brief.

Punitive Damages: Should the Constitution of the United States Provide Boundaries (Washington Legal Foundation Legal Backgrounder, 1989); Theodore B. Olson and Theodore J. Boutrous, *The Constitutionality of Punitive Damages* (Washington Legal Foundation Legal Backgrounder 1989). Excessive and unpredictable punitive damages are ultimately harmful to the economy, workers and consumers.

WLF believes that it can bring a broader perspective on the issues presented in this case which will assist the Court in deciding this case in such a way as to give clearer guidance to courts on the imposition of punitive damages awards.

By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief.

STATEMENT OF THE CASE

Amicus curiae is, in the interest of brevity, omitting any detailed statement of the facts of this case. *Amicus* adopts by reference the statement of facts set forth in Petitioners' Brief.

In short, Plaintiffs' action against State Farm arose from State Farm's handling of claims by third-parties against its insured, Mr. Campbell, following an automobile accident in which Mr. Campbell was involved. State Farm concluded that Mr. Campbell was not responsible for the accident, and thus contested liability, declining to settle the claims. Ultimately, however, a jury found Mr. Campbell to be the sole cause of the accident, rendering judgments against him in excess of his insurance policy limit. In accordance with Mr. Campbell's wishes, State Farm appealed. After these judgments were affirmed on appeal, State

Farm promptly paid them in full. Mr. Campbell therefore never incurred any monetary liability because of State Farm's decision to contest the case.

Before the judgments had been affirmed, attorneys for the Plaintiffs in the underlying suit persuaded Mr. Campbell that they would not seek satisfaction of the judgments against Mr. Campbell personally, if he agreed to bring a bad-faith failure to settle action against State Farm, and assign to them 90% of any recovery. Mr. Campbell agreed, and commenced this action against State Farm.

During the trial of this bad-faith action, over State Farm's objection, Plaintiffs were permitted to introduce massive amounts of evidence of dissimilar conduct engaged in by State Farm, from which Plaintiffs argued that because State Farm had engaged in reprehensible conduct in the past, its conduct against Mr. Campbell was also likely reprehensible in this case, and that the reprehensibility of State Farm's past conduct justified an enhanced, indeed, enormous, punitive damages award. Under this theory, Plaintiffs introduced evidence of conduct that was entirely lawful in the state where it occurred, conduct that occurred entirely outside the state of Utah, with no impact on Utah citizens, and acts of State Farm affiliates which were separate legal entities from State Farm, over a period of two decades. Specifically, Plaintiffs were permitted to introduce evidence of alleged conduct by State Farm as disparate as: the company's specification of non-original equipment manufacturer (non-OEM) parts for repair of its insureds' vehicles; first-contact settlements (settlements reached at the first meeting between the adjuster and the insured); the use of independent medical examiner doctors; the use of appearance allowances (monetary payments in lieu of expensive cosmetic repairs); the use of market surveys when settling total loss claims; the entry into a high-low agreement in a

California arbitration; the practices of an entirely separate State Farm company in evaluating earthquake damage in California, the prospective cancellation by a separate State Farm entity of Florida hurricane insurance coverage, and other widely disparate acts, with no conceivable nexus to Mr. Campbell's third-party claim. Indeed, the majority of these acts were specifically authorized by state statutes and regulations. The court permitted introduction of these non-probative, prejudicial allegations on the grounds that they were evidence of State Farm's "consistent way of doing business for the last twenty years," a nationwide scheme "to meet corporate fiscal goals by capping payouts on claims company wide." This purported "scheme," could conceivably encompass every corporate act -- legal or illegal -- taken by this massive corporation, and its affiliates, over a period of twenty years if, under Plaintiffs' theory, it was related to the corporation's desire to make a profit.

The jury rendered a verdict for the Plaintiffs, awarding $1.4 million and $1.2 million for emotional distress to Mr. and Mrs. Campbell respectively, $911.25 to cover legal expenses, and $145 million in punitive damages. The trial court remitted the emotional distress damages to $1 million, and the punitive damages award to $25 million.

State Farm appealed, arguing that the punitive damages award, founded on evidence of dissimilar and out-of-state conduct, was unconstitutionally excessive. The Utah Supreme Court rejected this argument, relying at least in part on the dissimilar conduct Plaintiffs had presented, and reinstated the $145 million punitive damages award.

SUMMARY OF ARGUMENT

[TO BE INSERTED]

ARGUMENT

0. THE PUNITIVE DAMAGES AWARD IN THIS CASE VIOLATED DUE PROCESS BECAUSE STATE FARM DID NOT HAVE ADEQUATE NOTICE OF THE CONDUCT WHICH COULD SERVE TO ENHANCE A PUNITIVE DAMAGES AWARD

a. The Wide Range Of Dissimilar Prior Conduct Over A Period Of Decades Could Not Provide State Farm With Adequate Notice Of The Alleged Reprehensibility Of The Conduct For Which Punitive Damages Were Sought In This Case

In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), this Court explained that: "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." 517 U.S. at 574. In this case, these elementary notions of fairness were jettisoned, because State Farm was subjected to punishment for conduct which it had no reason to believe was sanctionable, conduct which was lawful, and conduct which it had no reason to believe would be relevant or admissible in a punitive damages trial.

During the trial of this bad-faith action, over State Farm's objection, Plaintiffs were permitted to introduce massive amounts of evidence of dissimilar conduct engaged in by State Farm, including conduct that was entirely lawful, conduct that occurred entirely outside the state of Utah, with no impact on Utah citizens, and acts of State Farm affiliates which were separate legal entities from State Farm, over a period of two decades. And, although Mr. Campbell's claim was a *third-party* claim, the court permitted the jury to consider numerous,

wide-ranging examples of State Farm's handling of *first-party* claims.[2] The circumstances of these various first-party claims were not only completely unrelated to Mr. Campbell's third-party claim against State Farm in this case, but were completely unrelated to one another, a true motley crew of unconnected allegations. Thus, Plaintiffs were permitted to introduce testimony about State Farm's lawful use of non-OEM parts for repair of its insureds' vehicles; settlements reached at the first meeting between the adjuster and the insured; the use of independent medical examiner doctors; the use of appearance allowances; the use of market surveys when settling total loss claims; the entry into a high-low agreement in a California arbitration; the practices of an entirely separate State Farm company in evaluating earthquake damage in California, the prospective cancellation by a separate State Farm entity of Florida hurricane insurance coverage, and other widely disparate acts, with no conceivable nexus to Mr. Campbell's third-party claim. The Court justified introduction of these allegations, even in the absence of proof that the conduct alleged was illegal in the state in which it occurred, on the grounds that they were evidence of State Farm's "consistent way of doing business," to minimize costs and enhance profits, and thus cast light upon whether or not State Farm's decision not to settle in this case was mercenary and reprehensible. A punitive damages award based on such boundless inquiry into the lawful business practices of a corporation, and its affiliates, over a period of decades, was an egregious violation of State Farm's due process rights, because State Farm was provided with no

[2] Third-party claims are claims against an insured by persons who are not parties to the insurance contract. **[Cite].** First-party claims are claims by an insured for contractual benefits under his or her insurance policy. **[Cite].** There are significant legal and factual issues that differentiate an insurer's decision to try third-party claims brought against one of its insureds from an insurer's handling of first-party claims by its insureds for contractual benefits. **[Cite].**

notice of the almost limitless scope of the behavior which the jury would be permitted to consider in assessing punitive damages.

a. In Light Of *Gore*, State Farm Did Not Have Notice That Dissimilar Prior Conduct Could Properly Be Considered In Assessing Punitive Damages

In evaluating the punitive damages award at issue in *Gore*, this Court limited its examination of Defendants' prior conduct to the very conduct which had given rise to the suit: "The wrongdoing involved in this case was the decision by a national distributor of automobiles not to advise its dealers, and hence their customers, of predelivery damage to new cars when the cost of repair amounted to less than 3 percent of the car's suggested retail price." *Gore*, 517 U.S. at 562.

Only after carefully defining the conduct supporting the punitive damages award did the Court examine whether BMW had engaged in this conduct before. The Court did not examine, or even allude to, whether BMW had ever engaged in other acts of corporate misconduct. Rather, it remained focused on ascertaining whether BMW had repeatedly followed a policy of non-disclosure of repairs of "predelivery damage to new cars when the cost of repair amounted to less than 3 percent of the car's suggested retail price," *id.*, a focused inquiry which stands in stark contrast to the unbounded inquiry which was permitted in this case into all aspects of State Farm's, and its separate legal affiliates', wide-ranging, dissimilar conduct over two decades.

Following *Gore's* teaching, lower courts have consistently defined conduct deserving of punishment and have repeatedly held that only acts of misconduct sufficiently similar to the act for which punitive damages are being considered may be examined in

determining the reprehensibility of the act for which punitive damages are sought, and thus whether the punitive damages awarded is constitutionally excessive.

For example, in an action against an insurance company for bad faith refusal to settle within the policy limits, the jury was permitted to hear evidence that defendant's "treatment of [plaintiff] was but the tip of the iceberg. Below the surface lay a host of excess judgments *occurring under similar circumstances*. . . . The verdict in [the previous cases against the defendant] . . . painfully demonstrates how [defendant] followed *a blueprint* for bad faith in the process by which it exercised its power over settlements." *O'Neil v. Gallant Insurance Company*, 769 N.E.2d 100, 114 (Ill. App. 2002) (emphasis added). In assessing whether the insurance company's failure to settle was reprehensible, the court only looked at other almost identical cases in which the company's "policyholders suffered more than $10 million in excess judgements, the result of numerous lawsuits where policy-limit demands were cavalierly ignored." *Id*. Thus, the court limited the evidence to be considered in assessing reprehensibility to evidence of the insurance company's handling of other *third-party* claims. *See id.* ("There is a pattern to [defendant's] misconduct that pervades its handling of *third-party* claims") (emphasis added).

In contrast, the Utah trial court in this case permitted evidence of completely *unrelated* conduct engaged in by State Farm, and permitted introduction of voluminous evidence of *first-party* claims handled by State Farm, despite the fact that the case before it involved a third-party action. Moreover, the Utah courts completely ignored the fact that, unlike the insurance company in *Gallant*, which had exposed many of its insureds to millions of dollars in

excess verdicts, the excess verdict against Mr. Campbell was the *only* case in Utah in which a State Farm insured was exposed to the possibility of execution on an excess judgment.

Other courts have similarly restricted the jury to consideration of similar acts of misconduct in applying the reprehensibility prong articulated in *Gore*. *See, e.g., Montgomery Coca-Cola Bottling Company, Ltd. v. Golson*, 725 So.2d 996, 1001 (Ala. App. 1998) (emphasis added) ("[Plaintiff] presented substantial evidence from which a jury could have inferred that the employer *engaged in a distinct pattern* of harassing, coercing, intimidating, and ultimately discharging employees who had filed for, and received workers' compensation benefits . . . ."); *Register v. Rus of Auburn*, 193 F. Supp. 2d 1273, 1276 (M.D. Ala. 2002) (holding that the "intentional nature of the wrongful acts, as well as the allegation of a continuing *pattern* of fraud, properly increases the constitutional limits of punitive damages" and defining "pattern of fraud" narrowly to include the concealing of various charges to customer's accounts) (emphasis added).

Conversely, prior unrelated bad acts have been routinely withheld from the jury's consideration in a reprehensibility analysis. Such was the case in *Leab v. Cincinnati Ins. Co.*, No. Civ. A. 95-5690, 1997 WL 360903 (E.D. Pa. June 26, 1997), in which an uninsured motorist brought suit against an automobile insurance company, alleging bad faith in processing his insurance claim. The motorist's attempt to prove reprehensibility by introducing evidence of suits in which judgment had been entered against the insurance company was thwarted because of the dissimilar underpinnings of those prior lawsuits:

> [T]he court finds that there are significant differences between [the prior wrongdoing] and the instant action which constrain this court from concluding that [the insurance company] engaged in repeated instances of misconduct which it knew to be unlawful. Among other differences in [the previous cases], there were claims of fraud, malice, dishonesty, and substantial bad faith.

Id. at *13.

Similarly, in *Servino v. Medical Center of Delaware*, No. 94C-08-077-WTQ, 1997 WL 528037 (Del. Super. Mar. 4, 1997) (unpublished opinion), the plaintiffs were prohibited from proving reprehensibility in their case by resort to evidence of insufficiently similar prior conduct by the defendant. In *Servino*, the court correctly interpreted *Gore* as permitting evidence of prior misconduct to be used in a reprehensibility determination only if the prior misconduct is sufficiently similar to the conduct for which punitive damages are being sought. The evidence plaintiffs sought to offer did not meet that standard: while "evidence of multiple instances of misconduct is particularly relevant in determining whether the defendant's conduct is reprehensible enough to warrant punitive damages. . . . [Plaintiffs] . . . erroneously assume that they have already demonstrated that the [previous holding against the defendant] is just *such another relevant and comparable instance of misconduct*." *Id*. at *5 (emphasis added). Finding the prior bad conduct to be insufficiently related to the conduct for which plaintiffs sought punitive damages, it was properly withheld from the jury's consideration.

In light of this precedent, established by this Court in *Gore*, State Farm had no reason to suspect that evidence other than the results of a focused examination in to whether State Farm had refused, in bad-faith, to settle other third-party claims would be considered by a jury in determining whether to enhance any punitive damages award for the conduct at issue in this case. State Farm certainly had no conceivable advance

notice that the Utah courts would entirely disregard this Court's teaching in *Gore*, and permit completely unrelated, unsubstantiated allegations, and instances of lawful conduct, engaged in by State Farm and completely separate legal entities, over a period of twenty years, to be used against it to enhance punitive damages under the rhetoric that it constituted a "scheme" to make a profit. As such, the imposition of the astronomical punitive damages award in this case violated Due Process.

0. PERMITTING A PUNITIVE DAMAGES AWARD TO BE ENHANCED BY DISSIMILAR PRIOR LAWFUL ACTS DOES NOT PROVIDE NOTICE SUFFICIENT TO DETER UNLAWFUL CONDUCT

One of the primary objectives of punitive damages awards is to deter the conduct for which the punitive damages were imposed. *See Gore*, 517 U.S. at 568; *Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. 1, 21 (1991); David G. Owen, *Punitive Damages Awards in Product Liability Litigation: Strong Medicine or Poison Pill?: A Punitive Damages Overview: Functions Problem and Reform*, 39 VILL. L. REV. 363, 367 (1994). Thus, if a defendant has had punitive damages assessed against it in the past for certain conduct, it, and others who learn of the punitive damages penalty, are put on notice that, if they desire to avoid future punishment, they must refrain from the specific conduct which gave rise to the punitive damages award. This threat may deter them from engaging in conduct in which they otherwise may have engaged.

This effect was clearly illustrated in *Gore*. In that case, BMW had adopted a nationwide policy pertaining to new cars which were damaged in the course of manufacture or transportation. Under this policy, BMW permitted the cars to be repainted or repaired, and, if the repair costs did not exceed 3 percent of the suggested

retail price, BMW sold the car as new without telling the dealer -- and the ultimate consumer -- that the car had been retouched or repaired. Plaintiff brought suit alleging that the failure to disclose the repairs made to his car constituted fraud under Alabama law. The jury returned a verdict in plaintiff's favor, awarding $4,000 in compensatory damages, and $4 million in punitive damages. After remittitur, the Alabama Supreme Court approved a punitive damages award of $2,000,000.

Only five days after the jury award, BMW changed its policy, nationwide, to require full disclosure of repairs and repainting, regardless of how minor. BMW's swift action, tailored to the conduct which the jury found to be reprehensible, clearly shows that the threat of future punitive damages awards can serve to send a strong message that a specific act or policy may invite future sanctions, or enhanced sanctions for repeated acts, and that corporations and actors may indeed heed this message and alter their conduct accordingly. *Gore* is thus an example of the deterrent function of punitive damages operating smoothly: the jury delivered an unequivocal message that undisclosed repairs to cars sold as new was a practice which could invite punitive damages, and, within days, BMW heeded the message, changed its policy, and the conduct sought to be deterred was in fact stopped.

When, however, multiple, dissimilar acts are permitted to be considered by a jury in determining punitive damages, the deterrence function of a punitive damages award is completely diluted and undermined. It is impossible to determine which of the numerous, disparate acts which the jury was permitted to consider primarily fuelled the enhancement of the punitive damages award. Accordingly, the defendant against whom

the damages were awarded, and other companies learning of the verdict, do not receive a clear signal as to what specific conduct -- of the widely disparate "other acts" which the jury was permitted to consider -- they must change to avoid similar enhanced punishment in the future. Thus, the defendant, or another company, may continue to engage in inappropriate conduct, from which a jury thought society should have been shielded, had the message intended to be sent by the prior punitive damages award not been diluted by the admission of evidence of other dissimilar acts.

For example, in *Gore*, had the court, in assessing the reprehensibility of BMW's actions, permitted evidence of other legal business practices in which BMW may have engaged, such as vigorous litigation of spurious claims against the company; a practice of buying quality parts at the most competitive price; a practice of using quality non-OEM parts for repairs, to reduce costs; efforts to employ the minimum number of salespeople necessary, to reduce unnecessary expense; plans to increase productivity by minimizing the company time which employees used for personal telephone calls and to conduct personal business; careful selection of locations of factories and showrooms to avoid paying inflated property prices; and misstating the amount of fuel the car consumed, in addition to the evidence of retouching or repainting new cars, it is highly unlikely that BMW, or anyone learning of an ensuing punitive damages award

would have known for what specific practice BMW was being so severely punished.[3] Thus, they would not know what practice to change, and accordingly, may not have made *any*

[3] Furthermore, permitting such conduct to be admitted in determining the reprehensibility of BMW's policy of not revealing that it had repainted or retouched cars would have violated BMW's Due Process rights, as such conduct would not have alerted BMW to the possibility that this policy was considered reprehensible, and subject to punitive damages award. Similarly, permitting the wide range of evidence which was permitted to be considered by the Utah courts against State Farm provided no notice to State Farm of the alleged reprehensibility of its failure to settle Mr. Campbell's claim.

changes to their business practices. Any "message" to be delivered by such a punitive damages verdict would be a needle in a haystack.

This problem has been explored by one commentator, who concludes that corporate behavior will only be changed if corporations are provided with information about specific predictability -- knowledge of what specific acts will give rise to a certain consequence, such as a punitive damages award -- as opposed to general predictability --knowledge that a general class of activity will give rise to a certain consequence.

> In the absence of information about the liability consequences of specific predictability, however, it is unlikely that the practices or modes of operation are going to be affected much. Thus, what are called general and specific deterrence might be associated with the availability of general and specific predictability. Information going to general predictability may deter a general class of activities; only information about the liability consequences of specific practices or modes of engaging in the activity is likely to enhance specific predictability and thereby shape the way the activity is conducted.

E. Donald Elliott, Why *Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 ALA. L. REV. 1053, 1058 (1989). Alternatively stated, allowing juries to assess each and every corporate act by a defendant could conceivably alert that defendant to the possibility of severe sanctions in every case in which it gets sued, but not to the details as to how to subsequently avoid those severe sanctions. Consequently, unless punitive damages provide specific predictability, narrowly delineating and clearly defining the conduct to be discouraged, an opportunity to provide notice as to what conduct is subject to punishment, and thus to efficiently deter sanctionable behavior, has been lost.

0. PERMITTING PUNITIVE DAMAGES TO BE ENHANCED BASED ON EVIDENCE OF A PLAN TO REDUCE EXPENSES THROUGH LAWFUL MEANS IMPERMISSIBLY PUNISHES CORPORATIONS FOR SIMPLY USING GOOD BUSINESS PRACTICES

In this case, Plaintiffs were permitted to introduce evidence of wide-ranging corporate conduct, on the grounds that such evidence was illustrative of State Farm's manner of conducting business to minimize costs and expenses and maximize profits, and thus probative of State Farm's nefarious motives in handling Mr. Campbell's claims.[4]

Permitting evidence of such an alleged "scheme," particularly one as broadly construed as in this case, which conceivably could encompass every effort taken to reduce unnecessary costs and expenses by any agent or employee of a corporation or its subsidiary, in the unlimited past, could cripple any private enterprise that aimed to realize a profit. Engaging in legal acts to minimize costs to improve profit margins is not against the law. In fact, it is the essence of the competitive free enterprise system in this

[4] If State Farm did engage in an alleged "scheme" to reduce costs and maximize profits by capping payouts on claims, the conduct at issue in this case does not fit within such a scheme. All of the first-party conduct introduced as part of the "scheme" allowed State Farm to cap its payouts by spending a sum certain to address the claims (*e.g.,* first-contact settlements, use of appearance allowances, and entry into a high-low agreement). No such certainty was obtained by State Farm deciding to contest liability in this third-party claim. Indeed, it would have been far more profitable to State Farm to have offered Mr. Campbell's policy limit of $50,000 to settle this case, than to pay for trial of the case, pay to appeal the judgment, and subject itself to the $145 million punitive damages award, and the emotional distress award ultimately entered.

country. **[cites]** Accordingly, that a company has sought to reduce its unnecessary costs and expenses cannot constitute a "scheme" sufficient to justify an enhanced punitive damages award.

This concern is especially heightened in the case of the insurance industry. State Farm has a critical obligation to its insureds to scrutinize the merits of claims which are filed. Fraudulent and non-meritorious claims plague the insurance industry. *See* Alan J. Levin and Charles F. Gfeller, *"Fraudulent Claims on the Rise – Creativity Too,"* The Recorder, June 26, 2002 (reporting that according to the National Insurance Crime Bureau, property/casualty insurance fraud costs Americans about $20 billion a year). Such fraud needlessly increases premiums for law-abiding insureds. *See id.* (stating that the average household paid between $200 and $300 in additional premiums annually due to insurance fraud). State Farm, therefore, should be afforded discretion to, within the bounds of the law, adequately investigate claims presented to it, and winnow out fraudulent or meritless claims which it has no obligation to pay, thereby controlling the cost of insurance for its insureds.

In this case, State Farm used the discretion to which it should be entitled to investigate the claim which had been brought against Mr. Campbell. The cause of the accident was hotly contested. State Farm concluded that Mr. Campbell was not at fault, and took the case to trial. In accordance with Mr. Campbell's wishes, State Farm appealed the verdict against him. When the verdict was affirmed on appeal, State Farm promptly paid the judgments against Mr. Campbell. Perhaps in retrospect, it appears that this claim should have been settled before trial, but, in the exercise of human discretion, some misjudgments are inevitable. And, notably, the excess verdict against Mr. Campbell was the *only* excess verdict case in Utah between 1980 and

1994 in which a State Farm insured was exposed to the possibility of execution on an excess judgment. The alternative to such discretion is to deny State Farm and other insurance companies the right to use independent judgment, and to require them to settle what may be frivolous or deceitful suits, in every instance where a plaintiff offers to settle at or below the insured's policy limits. Such a misguided practice would elicit an explosion of fraudulent and frivolous claims, increase insurance premiums for honest insureds, and deprive some of the financial ability to attain the security and peace of mind which insurance coverage provides. That would be neither good policy nor good law.

CONCLUSION

Permitting evidence of dissimilar, unrelated, lawful conduct to enhance a punitive damages award under the theory that it related to a "scheme" to make a profit violates due process because a defendant is provided with no notice as to what conduct may be used to enhance a punitive damages award against it, should it be sued. Indeed, as happened in this case, almost any corporate act engaged in by a company or its subsidiaries over a period of decades could be introduced as evidence of reprehensibility if it could be tied to the goal of making a profit. Moreover, such untethered awards do not provide the notice required to satisfy the deterrence objective of punitive damages. A corporation against whom such an award is assessed, or an entity learning of such an award, will not know which of the disparate acts motivated the imposition or magnitude of the award, thus will not know what acts to change to avoid such punishment in the future.

Accordingly, the Utah Supreme Court's decision to reinstate the $145 million punitive damages award based on entirely unrelated, dissimilar, out-of-state conduct that was

legal in the jurisdiction in which it took place should be reversed, and the case remanded for a new trial as to punitive damages.

Respectfully submitted,

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