U.S. Court of Appeals Docket No. 08-17742

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

G. CLINTON MERRICK, Jr.,
Plaintiff/Appellee,

vs.

THE PAUL REVERE LIFE INSURANCE COMPANY, *et al.*,
Defendants/Appellants.

Appeal from the United States District Court
for the District of Nevada
No. 2:00-cv-00731-JCM-RJJ

BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS IN SUPPORT OF G. CLINTON MERRICK, JR. AND IN SUPPORT OF AFFIRMANCE

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United States v. South-Eastern Underwriters Association,
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OTHER AUTHORITIES

2008 Insurance Department Resources Report, Tables 3 and 28,
http://www.naic.org/store_pub_naic_state.htm#dept_resources..........................8

A.M. Best's Rating Center, http://www3.ambest.com/ratings/advanced.asp. 13

A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*,
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Ariz. Rep. David Lujan (2/24/2009),
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Catherine M. Sharkey, *Punitive Damages as Societal Damages*,
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General Accounting Office, *Insurance Regulation: Common Standards and Improved Coordination Needed to Strengthen Market Regulation* at 25 (2003), http://www.gao.gov/new.items/d03433.pdf..9

Kirk Pasich, *Determining the Financial Condition of an Insurance Carrier* No. 3 Ins. Coverage L. Bull. 1 (2007). 13

Mark Boozell, The Professional Insurance Agents Insurance Foundation, *Future of the Business Disciplines, Regulation and Oversight of the U.S. Insurance Marketplace* at 5 (2009), http://www.pianet.com/doc/FutureOfRegulation.pdf......................................7, 8

National Conference of State Legislatures, *State Budget Update: July 2009* (2009), http://www.ncsl.org/documents/fiscal/StateBudgetUpdateJulyFinal.pdf. 8

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(c) and 26.1, amicus curiae United Policyholders states:

United Policyholders has no parent or subsidiary corporations. No publicly held corporation owns more than 10 percent of its stock.

AUTHORITY TO FILE AMICUS CURIAE BRIEF

Pursuant to Federal Rule of Appellate Procedure 29(a) and 29(c)(3), United Policyholders states that all parties have consented to the filing of this Brief of amicus curiae United Policyholders.

INTEREST OF THE AMICUS

United Policyholders ("UP") is a non-profit 501(c)(3) consumer organization with eighteen years of experience helping to solve insurance problems related to catastrophic events. Donations, foundation grants, and volunteers fuel the organization. UP's Board of Directors includes the former Washington State Insurance Commissioner and the former Chief Justice of the Arizona Supreme Court. UP's staff and 200+ volunteers and advisors interact daily with commercial and residential insureds nationwide.

UP's programs help insureds resolve large loss claims relating to property, health, and disability policies; help promote insurance and financial literacy; and advance insureds' interests in courts, legislatures, and the media. UP's Executive Director participates in the proceedings of the National Association of Insurance Commissioners ("NAIC") as an official consumer representative. A UP representative currently chairs a Consumer Advisory Task Force created by California's Insurance Commissioner.

INTRODUCTION

Businesses and individuals depend upon the financial security that insurance policies provide. Insurance is integral to the fabric of our economy and important to the peace of mind and financial security of the people and businesses who rely upon it. Insurers have a natural temptation to avoid paying claims because doing

so is a drain on profits. For these reasons, a decades-long body of case law governs the integrity of the products that insurers sell and imposes duties upon them often higher than imposed on their commercial peers.

Safeguards must be retained to keep insurers' legitimate profit motive balanced with their customers' legitimate interests. The civil justice system and the remedy of punitive damages have long served as an important and effective means for maintaining that balance.

The combination of the drive for increased corporate profits with the computerization of claims handling makes bad faith behavior by insurers both more common and more difficult to detect. Incremental cheating buried in automatic claims handling protocols is easier to implement and almost impossible for state regulators to find, let alone prosecute. Regulators play an important role with regard to many important insurance issues. But they lack sufficient resources effectively to police insurers with regard to claims handling.

As a result, experienced private civil litigators with the skills, means, and financial resources are necessary to enforce society's existing laws and to protect insureds. Their main tool is their ability to obtain punitive damage awards when insurers abuse their vulnerable customers. The private tort system and the threat of ***meaningful*** punitive damage awards thus play an essential role in regulating their conduct in a manner consistent with their quasi-public societal function.

Insurers and their business allies seek to elevate portions of recent Supreme Court authority that focus upon ratios of punitive to compensatory damages to erect a shield protecting them from meaningful punitive damage awards, even on these few occasions when a sufficiently well-funded plaintiff catches them in a pervasive course of wrongful conduct. The Supreme Court, however, did not intend–and case law does not require–that courts myopically focus upon ratios in derogation of all other considerations that evaluate the gravity and breadth of a defendant's wrongdoing.

Automatic imposition of a single or low-double digit ratio as a limit on punitive damage awards encourages well-funded insurers to compare the maximum dollar risk of denying valid claims across its platform of insureds as a matter of generally-applied company procedures to the anticipated increased profits such procedures will generate. An economically rational insurer has less and less financial incentive to act in good faith as its wrongful profits increase in relation to the amount of actual damages to any one individual if it knows that such a maximum ratio will protect it no matter how wrongful its conduct or wealth may be. Such callous calculations are the logical outcome of a system in which punitive damages lack a real world deterrent function because arbitrary caps are imposed upon them. Our economy and population rely too much upon insurance for insurers to be allowed so to operate.

An arbitrarily determined ratio limitation upon punitive damages to a level that is not painful for the defendant in light of its wealth, revenues, and wrongfully obtained profits will defeat the deterrent effect that is one of the twin historical goals of punitive damages. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981) ("Punitive damages…are…intended to…punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct."); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) ("[Punitive damages] are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.").

ARGUMENT

I. PUNITIVE DAMAGE AWARDS THAT ONLY SLAP AN INSURER ON THE WRIST WILL FAIL TO DETER REPREHENSIBLE BEHAVIOR.

A. The Unique Role and Quasi-Public Nature of the Business of Insurance Warrant the Punitive Damages Against Appellants That the District Court Allowed

Insurers have a unique role in the efficient operation of our society. The public nature of insurance invests them with a position of trust with respect to their insureds. As the California Supreme Court stated:

> [I]nsurers' obligations are…rooted in their status as purveyors of a vital service labeled quasi-public in nature. Suppliers of services affected with a public interest must take the public's interest seriously, where necessary placing it before their interest in maximizing gains and limiting disbursements…[A]s a supplier of a public service rather than a manufactured product, the obligations of insurers go beyond meeting

> reasonable expectations of coverage. The obligations of good faith and fair dealing encompass qualities of decency and humanity inherent in the responsibilities of a fiduciary.

Egan v. Mut. of Omaha Ins. Co., 620 P.2d 141, 146 (Cal. 1979) (ellipses in original) (citations omitted). This recognition of the special nexus between the business of insurance and the public interest has been recognized by the United States Supreme Court for almost 80 years.[1]

The District Court's post-trial fact findings detail Appellants' horrific conduct, preying upon vulnerable insureds solely to maximize profits. *Merrick v. Paul Revere Life Ins. Co.*, 594 F. Supp. 2d. 1168 (D. Nev. 2008). No reason exists to burden this Court by repeating these findings here. Insurers that ignore the law and abandon the principles of good faith and fair dealing–in the persistent manner that the District Court found Appellants did–do great harm to the public welfare. In those situations, meaningful punitive damage awards are justified to temper the behavior of a member of this quasi-public industry.

[1] *See, e.g.*, *Cal. State Auto. Ass'n Inter-Ins. Bureau v. Maloney*, 341 U.S. 105, 109-10 (1951) (insurance has always had special relation to government); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 415-16 (1946) ("[insurance] business affected with a vast public interest"); *Robertson v. California*, 328 U.S. 440, 447 (1946); *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 540 n.14 (1944) ("evils" in the sale of insurance "vitally affect the public interest"); *Osborn v. Ozlin*, 310 U.S. 53, 65 (1940) ("Government has always had a special relation to insurance."); *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251, 257 (1931) ("The business of insurance is so far affected with a public interest that the State may regulate the rates and likewise the relations of those engaged in the business.").

Punitive damage awards that financially "hurt" defendants such as Appellants are needed to deter them from the temptations of bad faith behavior. Otherwise, they have no financial incentive to change their conduct—conduct that will be profitable if courts limit punitive damage awards to trivial levels ***in comparison*** *to* their ill-gotten gains and net worth. Even Appellants concede that that the Supreme Court continues to recognize the importance of deterrence in the equation for assessing punitive damages. Appellants' Opening Brief, 48, 49.

Appellants invite the public, and thus the courts, to hold them to very high standards of propriety. Their marketing materials assert: "[W]e are proud of what we do, we accept responsibility for our actions, and we learn from our experiences."[2] Appellants assure potential customers that "[w]e are an organization built on openness, trust, professionalism, respect for others and, above all, integrity." *Id.* Advertisements like this (think also of Travelers' umbrella or Prudential's rock) aim to attract potential customers by creating a sense of security. Insurers that tout their propriety must pay for their past misdeeds in amounts that will deter future misconduct.

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[2] Unum "Vision and values" Web Page, http://www.unum.com/AboutUs/VisionAndValues.aspx.

B. Meaningful Punitive Damages Awards Promote Self-Regulation and Are Crucial Because the Regulatory Framework Favors Insurers

State regulation of insurers alone cannot deter bad faith behavior. For this reason, the private tort system accompanied by the prospect of meaningful punitive damages play an important role in the self-regulation of insurer conduct.

States have had primary responsibility for regulation of insurance since 1945. *See* 15 U.S.C. § 1011. State insurance departments, however, cannot catch or remedy all insurer misconduct given the vast range of their duties and their limited and shrinking resources.

Insufficient funding and the resulting limited enforcement abilities hamper the ability of state regulators to enforce the powers they are granted. Even the national interest group for insurance agents (the "PIA") concedes that this regulatory power "is exercised sparingly" and that "state insurance departments are often significantly underfunded."[3] For example, Nevada budgeted less than $7 million to regulate the entire business of insurance during 2007-2008.[4] Moreover, prospects for significant future growth in Nevada's regulatory

[3] Mark Boozell, The Professional Insurance Agents Insurance Foundation, *Future of the Business Disciplines, Regulation and Oversight of the U.S. Insurance Marketplace* at 5 (2009), http://www.pianet.com/doc/FutureOfRegulation.pdf ("Boozell").

[4] Nevada Department of Administration, *2009-2011 Executive Budget*, http://budget.state.nv.us/budget_2009_11/budget_book/2009-2011%20Executive%20Budget.pdf, B&I-8, P. 1084.

infrastructure appear grim because of Nevada's 2009 budget deficit of $1.23 billion (31.6% of its general fund).[5]

This persistent lack of funding leaves insurers fairly free to do as they wish in terms of bad faith claims handling because the regulators are overwhelmed. The Nevada Division of Insurance received 2,389 consumer complaints and 30,766 consumer inquiries in 2008 that were handled by a full-time equivalent workforce focusing on consumer affairs totaling one supervisor, six investigators, and zero support staff.[6] Similarly, the Arizona Insurance Department this year suffered severe budget cuts that had a "drastic impact" on the Consumer Affairs Division, where seven employees handle 45,000 consumer complaints and inquiries each year.[7]

Contrast the diminished power of the regulators with the omnipresent influence of the insurance industry, with its massive lobbying efforts and dollars. Even the PIA concedes that regulators "can be subject to political preferences for less regulation." Boozell, at 5. Large insurers with billions of dollars in assets

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[5] National Conference of State Legislatures, *State Budget Update: July 2009* (2009), http://www.ncsl.org/documents/fiscal/StateBudgetUpdateJulyFinal.pdf. UP will provide the statistical data or policy studies attributed to Internet sources at the request of the Court or parties.

[6] NAIC, *2008 Insurance Department Resources Report*, Tables 3 and 28, http://www.naic.org/store_pub_naic_state.htm#dept_resources.

[7] Letter from Christina Urias, Dir., Ariz. Dep't. of Ins., to Ariz. Sen. Jorge Garcia,. & Ariz. Rep. David Lujan, (2/24/2009), http://www.strongerarizona.com/documents/letters/2.11.09%20Dept.%20of%20Insurance.pdf.

lobby state legislators and regulators. Insureds' lobbyists, on the other hand, are generally limited to modest non-profit consumer organizations such as UP.

Moreover, state regulators typically address improper insurer behavior, when they are able to do so, case-by-case rather than seeking to correct general practices statewide. In 2003, the United States General Accounting Office authored a report addressing Congress' concern "that the current system of insurance regulation does not provide consistent consumer protection."[8] The report stated that "few states have formal programs for [insurance] market analysis, and examinations are used inconsistently and in some cases infrequently."

Faced with a regulatory system that is at best overstretched and at worst compromised, an insured's last resort against insurer bad faith is to file suit. In such cases, the tort system generally–and the threat of punitive damages in particular–must stand in the shoes of regulators to protect the public interest. The tort system must ***meaningfully*** punish and deter those few that get caught acting in bad faith to engorge their coffers, as the District Court found Appellants did here. But deterrence will be nigh impossible to achieve given the wealth and hoped-for profits of tortfeasors such as Appellants if wrongdoers can rely upon arbitrarily selected ratios of punitive to compensatory damages as an automatic cap. Yet that

[8] General Accounting Office, *Insurance Regulation: Common Standards and Improved Coordination Needed to Strengthen Market Regulation* at 25 (2003), http://www.gao.gov/new.items/d03433.pdf.

is exactly what Appellants and its Amicus, the Chamber of Commerce (the "Chamber"), ask the Court to impose here.

C. Meaningful Punitive Damages Are Necessary to "Level the Playing Field" and Deter Insurers from the Temptation to Deceive their Insureds

Public policy considerations ought to encourage the imposition of punitive damages sufficient ***in fact*** to deter dishonest behavior by insurers given that their products are so infused with the public interest. Moreover, honorable insurers that do ***not*** pursue monetary gain at all costs will be competitively disadvantaged if courts effectively shield persistent wrongdoers from meaningful punitive damage awards. The allowance of punitive damage awards unrestricted by an arbitrary, inflexible maximum ratio to actual damages will thus reinforce the self-regulation of insurers and reduce the need for state regulatory intervention. Compensatory damages alone cannot sufficiently deter bad faith conduct any more than can regulatory agencies.

Systemic abuse can go on for years, as the District Court found here. *Merrick*, 594 F. Supp. 2d. at 1187 (D. Nev. 2008). The disproportionate power that insurers wield in litigation accompanied by insufficient regulatory enforcement creates perverse incentives for cheating insureds that must be counterbalanced with a ***real*** threat of punitive damages that will haunt, dissuade, and deter.

Seminal academic work suggests that the optimal level of punitive damages increases as the chances of detection and punishment decrease, so that the eventual recovery compensates for all the instances when the insurer went unpunished. A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 888-89 (1998) (the likelihood of escaping liability should be the multiplier for punitive damages). In other words, "[i]f a tortfeasor is 'caught' only half the time he commits torts, then when he is caught he should be punished twice as heavily in order to make up for the times he gets away." *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003).

The literature focuses upon the problem of tortfeasors escaping liability and avoiding costs imposed upon others. Compensatory damages may be too low, plaintiffs may face structural disadvantages in lawsuits, or some of the tortfeasor's harmful conduct may be hidden. Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 Yale L. J. 347, 366-67 (2003) ("Sharkey").

The punitive damages system must convince a wrongdoer that believes it will on balance gain from its reprehensible behavior that its luck will eventually run out—and that it will be held accountable for all its past misdeeds and then some. In an efficient market, the judicial system imposes punitive damages to instill the knowledge that a wrongdoer must internalize the costs it imposes on others. Sharkey, at 363-64.

Though the doctrine of punitive damages may imprecisely combine its focus upon deterrence with the separate need to compensate the victim, deterrence is an irreducible part of the punitive damages system as it stands today. *Ciraolo v. City of New York*, 216 F.3d 236, 245 (2d Cir. 2000) (Calabresi, J., concurring) (twin goals of deterrence and retribution are often conflated), *cert. denied*, 531 U.S. 593 (U.S. Nov.13, 2000) (No. 00-428)[9]; Sharkey, at 363-64 ("punitive" damages is a misnomer that allows retribution to overshadow the "very significant justification" for punitive damages that deterrence represents). Both judges and commentators have suggested disaggregation of the deterrent and retributive aspects of punitive damages to highlight the justice system's critical interest in deterrence. *Ciraolo*, 216 F.3d at 246; Sharkey, at 389 (the deterrence-related "societal compensatory component already lurks within the existing morass of punitive damages").

Punitive damage awards also put the enforcement power directly into the hands of the wronged consumers rather than regulators. An insured is more likely than regulators efficiently to detect fraud or bad faith because her own interests are at stake. Though not all wronged insureds will sue, a state has a legitimate interest to empower those who do with the right to collect punitive damages that will ***in fact*** compel an insurer to take notice. A punitive damage award must be sufficient

[9] *Ciraolo* reversed the trial court's punitive damage award because of limitations upon suits against municipalities. UP cites *Ciraolo* for the erudite public policy discussion by Judge Calabresi, former dean of the Yale Law School.

in size to deter an insurer from committing similar reprehensible acts to the plaintiff ***and*** to society through a course of dealing that damages others in the same way as it did the victim. Otherwise, such conduct would be left unchecked and leave the insurer with a windfall.

Appellants are so well capitalized that anything less than the damages awarded here would amount to a pinprick. The insurance and credit rating agency A.M. Best ranks an insurer's financial health according to its so-called "policyholders' surplus" (the insurer's assets above its liabilities to its insureds). Best ranks Appellants in its second-highest category of ***$1.5-$2 billion***.[10] According to Richard Stewart, former NAIC president and Chief Financial Officer for the Chubb Group of Insurance Companies, a change in the policyholders' surplus is the most important yardstick to measure the bite of a punitive damage award.[11] A change in an insurer's policyholders' surplus of up to 10% caused by a single payment of punitive damages would likely have little impact on the insurer and "leave [the insurer] in a position to do exactly the same business…in the same

[10] A.M. Best's Rating Center, http://www3.ambest.com/ratings/advanced.asp (search for "UnumProvident" or "Provident Life & Accident" in search field). Best also ranks Appellants as "excellent" in the category of "financial strength."

[11] Testimony of Richard Stewart, *Northrop Corp. v. Am. Motorists Ins. Co.*, No. C 710 571 (Cal. Los Angeles County Super. Ct.), Transcript at 2517 (July 13, 1993), settled on appeal ("Stewart Testimony"), *quoted in* Kirk Pasich, *Determining the Financial Condition of an Insurance Carrier*, 6 No. 3 Ins. Coverage L. Bull. 1, 2-3 (2007) (available on Westlaw). Copies of this testimony are also available upon request.

old way tomorrow that [it] did yesterday." Stewart Testimony at 2522. An award of over 10% of Appellants' policyholders' surplus would amount to over $150 million, leagues beyond the awards here.

II. THE SUBSTANTIAL PUNITIVE DAMAGE AWARDS AGAINST APPELLANTS DO NOT CONTRAVENE ANY CONSTITUTIONAL LIMITATION.

Appellants and the Chamber seek protection against supposedly arbitrary punitive damage awards by asking this Court itself to impose an arbitrary limit. They implicitly seek a limitation upon a state's legitimate interest in deterring Appellants, willful repeat wrongdoers who purvey a vital quasi-public service, from continuing their deleterious conduct. The combined punitive damages awards here of $50+ million–in light of Appellants' conduct, their net worth, their revenues, their quasi-public business, and their encouragement of their employees to put their profits far ahead of ***any*** duty to their insureds–is warranted to punish ***and*** deter their future bad faith conduct.

The remaining question is whether the awards are so "grossly excessive or arbitrary" that they violate substantive due process. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 409 (2003). They are not.

A. The Punitive Damage Awards Against Appellants Comport with U.S. Supreme Court Authority

The District Court factually concluded that awards smaller than it allowed would not deter Appellants based upon its extensive review of the record and

contemporaneous notes of the trials. *Merrick*, 594 F. Supp. 2d at 1190 & n.21. Even if the District Court's factual findings were clearly erroneous, the standard of review that Appellants acknowledge controls[12], no Supreme Court decision has rejected a punitive damage award on grounds that the ratio of punitive to actual damages did not comport with substantive due process when the defendant's conduct toward society was ***uniformly wrongful*** and was the ***same*** as done to the victim.

BMW of North America, Inc. v. Gore, 517 U.S. 559, 574-75 (1996), established the fundamental three-prong test for constitutionality of punitive damages. Courts must consider the reprehensibility of the tortfeasor's conduct; the ratio of punitive to compensatory damages; and civil or criminal sanctions for similar conduct. *Id.* Reprehensibility is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award." *Gore*, 517 U.S. at 575; *Campbell*, 538 U.S. at 419.

1. Reprehensibility

Key elements of reprehensibility include targeting a financially vulnerable victim, repeatedly committing bad faith conduct, and engaging in intentional malice, trickery, or deceit rather than mere accident. *Campbell*, 538 U.S. at 419.

[12] *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435 (2001).

Gore rejected a $2 million punitive damage award, noting that the dishonest car repainting scheme before it was not prohibited in many of the states where it took place and did not affect the cars' performance or safety features. 517 U.S. at 577-78. *Campbell* thereafter applied *Gore* to review the amount of punitive damages against an insurer that had refused to settle suits against its insured. The insurer had ignored clear evidence that the insured had caused a car accident. The insurer's refusal to settle led to a larger judgment against its insured that the insurer at first refused to pay. The Court held a $145 million punitive damages award to be unconstitutionally excessive. 538 U.S. at 419-20, 429.

Campbell stated that much of the evidence regarding the insurer's reprehensible nationwide business practices "bore no relation to…the type of claim underlying the Campbells' complaint." *Id.* at 415, 423-24. For example, the Court found that the insurer's investigations into private lives of its employees, though unsavory, could not add to the reprehensibility of its actions against its insured and thus were irrelevant to the analysis. *Id.* at 424. Moreover, like *Gore*, the conduct attacked in *Campbell* was not unlawful in many of the states where it occurred. *Id.* at 422. *Campbell* emphasized that the conduct to be deterred must be analogous to the conduct perpetrated against the plaintiff and uniformly wrongful. *Id.* at 422-23.

Campbell suggests that the purpose of punitive damages depends heavily upon the lower court's findings of fact and the similarity between the harm the

tortfeasor does to the plaintiff and to others. Academic literature has recognized that *Campbell* "has less relevance in the context of basing an augmented [punitive] award upon substantially similar misconduct to multiple parties in order to achieve optimal deterrence." Thomas C. Galligan, Jr., *Disaggregating More-Than-Whole Damages in Personal Injury Law: Deterrence and Punishment*, 71 Tenn. L. Rev. 117, 149 (2003). In other words, *Campbell* does not negate the importance of deterrence where many victims, including the plaintiff, were the targets of substantially similar reprehensible conduct.

Appellants suggest that all misconduct warranting punitive damages has been classified in a strict hierarchy of "reprehensibility." They imply that their conduct could have been even more reprehensible than it was by pointing to this Court's statement in *Zhang*[13] that a "gulf" in severity exists between the fraudulent business practices in *Campbell* and the racial discrimination there. But no simple and inflexible metric exists for ***always*** classifying one type of reprehensible behavior from another. Rather, decisions applying *Gore* and *Campbell* vary widely on the qualities of reprehensibility, demonstrating the absence of a uniform standard and that a highly fact-specific analysis is required.

In *Hangarter*, for example, this Court held that a $5 million punitive damage award against Revere (an Appellant here) was warranted for bad faith termination

[13] *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1042-43 (9th Cir. 2003) *cert. denied*, 541 U.S. 902 (U.S. Mar.8, 2004) (No. 03-944).

of benefits. *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d, 998, 1013-14 (9th Cir. 2004). In *Bongiovi v. Sullivan*, 138 P.3d 443, 451-53 (Nev. 2006), the Nevada Supreme Court held that $250,000 was an appropriate punitive award against a doctor for slandering another doctor's practice. And this Court in *Zhang* held that a $2.6 million punitive award was constitutional for racial discrimination against a single employee. *Zhang*, 339 F.3d at 1045. These examples demonstrate that the reprehensibility prong of the mandated analysis is not amenable to easy categorization. Obviously, in some situations, insurer misconduct (*Hangarter*) can justify higher punitive damages than racial discrimination (*Zhang*) and slander (*Bongiovi*) will support less than either of them.

Campbell is not a factual proxy for every insurance bad faith case. Nor does it represent the most reprehensible conduct an insurer can commit. The Utah Supreme Court was held to have erred in its first *Campbell* decision because, unlike the facts here, its findings of reprehensibility were predicated upon practices totally ***unrelated*** to those perpetrated against the insured. *Campbell*, 538 U.S. at 423-24. Moreover, the insured was physically unharmed by the underlying incident. These facts contrast with situations as presented here where the targets of

the pernicious practices are disabled or injured[14] and the wrongful practices were substantially similar against all victims.

Scholars believe that the door remains open for courts to emphasize deterrence. Though "at first glance," it might appear that *Campbell* limits punitive damages to private retribution, this view is far too narrow. Sharkey, 113 Yale L. J. at 362. Sharkey notes that *Campbell* merely sought to prevent punitive damages from punishing conduct dissimilar to that which harmed the victim but contemplated punitive damages for harm to the "people of Utah" and the "State's general population" so long as such awards do not constitute double recovery to plaintiff on the existing compensatory damages. *Id.*

The punitive damages awards here meet the *Gore* and *Campbell* standards and effectuate deterrence. The District Court correctly held that punitive damages should be used as a deterrent and not mere retribution because Appellants had engaged in a scheme of similar reprehensible bad faith conduct against thousands of their insureds. To reach this conclusion, the District Court performed the highly fact-specific reprehensibility analysis *Campbell* requires and its findings must stand unless clearly erroneous.

[14] The already unequal bargaining power between insurer and insured is exaggerated further when the insurer denies coverage while an insured is disabled or otherwise vulnerable following a loss. *Buzzard v. Farmers Ins. Co.*, 824 P.2d 1105, 1109 (Okla. 1991).

Appellants cannot overcome the District Court's findings concerning reprehensibility, which far exceed the largely irrelevant proof in *Campbell*. Unlike *Campbell*, the District Court predicated its findings upon copious evidence of bad faith treatment of Merrick ***as well as*** thousands of other insureds (practices included targeting of subjective claims, use of independent medical examiners, and "round table reviews"). *Merrick*, 594 F. Supp. 2d at 1170-71, 1174.[15] Moreover, the District Court found that Merrick had experienced emotional distress (i.e., beyond mere economic harm), Appellants' deprivation of his benefits put the health and finances of Merrick and his family at risk, and Merrick was financially vulnerable when Appellants conducted their malicious acts. *Id.* at 1185-89.

2. Ratio Of Compensatory To Punitive Damages

The ratios of punitive to compensatory damages here are compatible with Supreme Court precedent. *Gore* stated: "[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula." 517 U.S. at 582. The high Court there concluded that "[i]n most cases, the ratio will be within a constitutionally acceptable range," but conceded that "breathtaking" ratios such as 500:1 where the punitive award is greatly in excess of

[15] Evidence of harm to others may be used in the analysis of how reprehensible the conduct was toward the plaintiff, so long as defendant is not being directly punished for harm done to non-parties. *Philip Morris, USA v. Williams*, 549 U.S. 346, 355(2007); *Hangarter*, 373 F.3d at 1014 n.11 (same).

the harm done, will "'raise a suspicious judicial eyebrow.'" *Id.* at 583 (citation omitted).

Campbell elaborated upon *Gore*:

> We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, ***few*** awards exceeding a single-digit ratio between punitive and compensatory damages, ***to a significant degree***, will satisfy due process.

538 U.S. at 425 (emphasis added).

The District Court adopted ratios against Appellants of 8.18:1 and 9:1, both falling within the single-digit range established by the Supreme Court for most punitive damages awards. *Id*. The District Court adopted the "rough framework" governing punitive damages ratios that this Court applied in *Planned Parenthood of Columbia/Willamette Inc. v. Am. Coalition of Life Activists*, 422 F. 3d 949, 962 (9th. Cir. 2005), *cert. denied*, 547 U.S. 1111 (U.S. May 1, 2006) (No. 05-1083).

Planned Parenthood stated that a ratio of 4:1 is a "good proxy" for the limits of constitutionality in situations where compensatory damages are significant but the behavior not particularly egregious. *Id.* It recognized that a single digit ratio greater than 4:1 might be constitutional in situations (as presented here) with significant economic damages and more egregious behavior. *Id.* That latter statement was predicated upon *Zhang*, 339 F.3d at 1043-44, and *Bains LLC v. Arco Products Co.*, 405 F.3d 764, 776-77 (9th Cir. 2005). Those decisions had held that

ratios of between 6:1 and 9:1 are appropriate in instances of racial discrimination. The District Court correctly determined that Appellants' actions fall into the latter tier and the proper ratios were 8:18:1 and 9:1. *Merrick*, 594 F. Supp. 2d. at 1191.

Appellants' argument that *Zhang* imposes an impermeable ceiling on punitive damage ratios is unfounded. *Zhang* held only that the racial discrimination there merited a 7:1 ratio and was more severe than the insurer's actions in *Campbell*. *Zhang*, 339 F.3d at 1043-44. *Zhang* did not hold that ***all*** cases of insurer misconduct merit a lower punitive damages ceiling than ***all*** cases of racial discrimination. No such rigid hierarchy of ratios has ever been adopted. Appellants' actions were far more egregious than those of the insurer in *Campbell*. Nor does the evidence supporting punitive damages and the District Court's findings suffer from the infirmities found to exist in *Campbell*, most notably harm to others unlike the harm to the victim.

The District Court also correctly assessed punitive liability separately for each Appellant, rather than by allowing them to divide a single award based upon a single multiplier. *Bell v. Clackamas County*, 341 F.3d 858, 867 (9th Cir. 2003) ("[T]he trial court should evaluate the degree of reprehensibility of each of the defendant's misconduct individually, as opposed to *en grosse*."). *Planned Parenthood* stated that "we accept the ratios…arrived at by comparing each plaintiff's individual compensatory damages and punitive damages awards ***as to***

each defendant." 422 F.3d at 962 (emphasis added). *Planned Parenthood* rejected the notion that "total compensatory damages recoverable by each plaintiff should be compared with the total punitive damages awarded to that plaintiff" because this approach distracts from each particular defendant's conduct and fails to account for different degrees of reprehensibility between defendants. *Id.* at 960.

To be sure, the facts of *Planned Parenthood* were very complex. But that decision in any event is not analogous to those presented here because of the presence of multiple plaintiffs, some of whom were awarded extremely low compensatory damages. Moreover, the *Planned Parenthood* defendants could not even pay the compensatory awards [*Id.* at 953], so dividing a single punitive award between them made sense. In contrast, the combined compensatory and punitive awards here represent a tiny fraction of either Appellant's wealth.[16]

Even *if* the two punitive damages awards are conflated, the combined ratio is not so excessive when viewed through the prism of the facts here so as to have crossed the River Styx into the realm of the unconstitutional. *Campbell* stated no more than that "***few***" awards exceeding a single-digit ratio between punitive and compensatory damages "***to a significant degree***" will satisfy due process—not that

[16] The argument the Chamber asserts that the two Appellants are "really" just one company is precisely opposite what affiliated companies make when one gets sued for the tort of the other. They effectively argue that the corporate structure that Appellants chose should be ignored this one time apparently only because it suits their purposes here. The District Court correctly analyzed their conduct separately and determined what each contributed to the despicable conduct.

no awards would. *Campbell*, 538 U.S. at 425 (emphasis added). The combined ratio of total compensatory damages to total punitive damages here amounts to 17.1:1, not 145:1 as in *Campbell*.

Even this assumed 17.1:1 ratio meets *Campbell*'s constitutional test given the District Court's fact findings regarding Appellants' abhorrent behavior and the importance of incentivizing an insurer to refrain from such systemic conduct. Put otherwise, a 17:1 ratio does not exceed a single digit award ***to a significant degree*** such that due process can be said to have been violated. In any event, this case is one of the ***few*** where such an award would be proper even if that ratio is characterized as "significantly" in excess of a single digit. Moreover, the facts here fully rebut any presumption of unconstitutionality even for this higher ratio.[17]

Finally, this Court has recognized post-*Campbell* that wealth remains an appropriate consideration when reviewing a punitive damages award. *White v. Ford Motor Co.*, 500 F.3d 963, 976 n.10 (9th Cir. 2007). Here, the District Court found:

> [T]he amounts awarded by the jury are less than 0.45% of UnumProvident's net worth…and less than 2.4% of Revere's net worth.

[17] *Cf.*, *Cassillas-Diaz v. Palau*, 463 F.3d 77, 86 (1st Cir. 2006) (upholding post-*Campbell* a 10:1 ratio and referring favorably to its pre-*Campbell* and post-*Gore* decision that had upheld a 19:1 ratio, citing *Romano v. U-Haul Int'l.*, 233 F.3d 655, 673 (1st Cir. 2000), *cert. denied*, 534 U.S. 815 (U.S. Oct. 1, 2001) (No. 00-1700)).

Merrick, 594 F. Supp. 2d. at 1190 n.21 (citations omitted). Considerations of wealth disconnected from arbitrarily imposed ratio limitations are pivotal if courts wish to deter wrongdoing perpetrated by large, wealthy corporations. This surely obvious fact is why Appellants and the Chamber so strongly seek to impose such a limitation upon punitive awards irrespective of Appellants' wealth, revenues, or ill-gotten gains. The degree to which the quantum of a defendant's wealth or ill-gotten gains can effectively be rendered almost or totally irrelevant by ratios linked to the amount of compensatory damages is what this appeal is truly about, notwithstanding how the arguments are framed.

3. Comparable Penalties

The final *Gore* guidepost compares civil statutory penalties for similar acts to the severity of the punitive award. Here, Nevada has expressed its public policy by exempting punitive damage awards for insurer bad faith from its statutory limitations upon them. Nev. Rev. Stat. § 42.005(2)(b); Nev. Rev. Stat.§ 42.007(2). Moreover, Nevada provides that an insurer may lose its license for bad faith conduct, a far heavier penalty than the punitive damages assessed here. Nev. Rev. Stat. § 686A.183(1)(b). The dollar cost to Appellants of revocation of their licenses is a realistic point of comparison given the District Court's findings that they engaged in widespread use of the same bad faith practices they employed

against Merrick. Such a comparison would surely dwarf the amount of punitive damages awarded here.

B. State Court Interpretations of *Campbell* and *Gore* Are Highly Instructive and Support the Award Against Appellants

Campbell gave lower courts broad guidelines about the proper limits upon punitive damages awards, knowing that cases so dramatically differ that the functions of deterrence cannot be necessarily confined to single-digit ratios in all instances. For example, the Utah Supreme Court, ***after*** remand in *Campbell*, made clear that it would not be bound by the U.S. Supreme Court's dicta that the insurer's actions "'likely would justify a punitive damages award at or near the amount of compensatory damages.'" *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 412 (Utah 2004) (citation omitted), *cert. denied*, 543 U.S. 874 (U.S. Oct. 4, 2004) (No. 04-116). It instead awarded a 9:1 ratio of punitive to compensatory damages. *Id*. at 420. Indeed, "[t]he judicial function is to police a range, not a point." *Mathias*, 347 F.3d at 678.

The California Supreme Court addressed *Campbell* in *Simon v. San Paolo U.S. Holding Co., Inc.*, 113 P.3d 63 (Cal. 2005). *Simon* reasoned that *Campbell* only suggested that ratios ***significantly*** greater than 9:1 or 10:1 are suspect and even then only subject to a presumption (not an immutable finding) of unconstitutionality. *Id.* at 77 n.7. Though *Simon* reduced the punitive damages

award there, it did so to a ratio of 10:1 in a case where the reprehensibility was relatively low. *Id.* at 76.

Equally important, *Simon* took guidance from the seminal California punitive damage case, *Neal v. Farmers Ins. Exch.*, 21 Cal.3d 910, 928 n.13 (Cal. 1978), which was not limited to any numerical ratio. *Simon*, 113 P.3d at 78. Citing *Neal*, *Simon* emphasized that "deterrence...will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort" and "[d]ue process does not preclude a state from using punitive damages for the purposes of deterrence." *Id*. at 78-79.

In another post-*Campbell* state decision, *Williams v. Philip Morris, Inc.*, 176 P.3d 1255, 1264 (Or. 2008), *cert. dismissed*, 129 S. Ct. 1436 (2009), the Oregon Supreme Court, after remand from the U.S. Supreme Court, reaffirmed "in all its particulars" its prior award of $79.5 million in punitive and $500,000 in compensatory damages, a nearly 160:1 ratio. The damages there stemmed from a decades-long campaign to deceive the public about the dangers of smoking. The U.S. Supreme Court declined to review the Oregon court's second *Williams* decision.

Campbell did not abolish all prior precedent regarding punitive damages. To the contrary, post-*Campbell* and *Gore* decisions that look backward to prior rulings inform the meaning behind the Supreme Court's reasoning in those later

cases. The punitive damage awards here are clearly justified and proper when viewed in the context of decisions such as *Cassillas-Diaz*, *Simon*, and *Williams.*

CONCLUSION

For the foregoing reasons and those set forth in Appellee's Answering Brief, United Policyholders respectfully requests this Court to affirm the ruling of the District Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. Proc. 29(c)(5), 29(d), 32(a)(7)(B)(i), and 32(7)(C)(i) amicus curiae United Policyholders states:

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,957 words in Times New Roman 14 point typeface, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Stephen N. Goldberg
Stephen N. Goldberg

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 13, 2009.

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