No. 01-1289

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 AND ALLIED EDUCATIONAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amici will address the following question: Whether a court violates fundamental principles of due process and commits constitutional error by allowing the reprehensibility of conduct for which punitive damages are sought to be determined based on a defendant's nationwide business practices over a twenty-year period that are entirely unrelated and dissimilar to the conduct which gave rise to the plaintiff's claim?

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INTEREST OF THE AMICI 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. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993); and *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). In addition, WLF has published

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

numerous articles regarding punitive damages. *See, e.g.*, Arvin Maskin, *et al.*, *A Punitive Damages Primer: Legal Principles and Constitutional Challenges* (Washington Legal Found. Monograph, 1994); Victor E. Schwartz, *et al.*, *Multiple Imposition of Punitive Damages: The Case For Reform* (Washington Legal Found. Working Paper No. 50, 1992); Victor E. Schwartz, *Punitive Damages: Should the Constitution of the United States Provide Boundaries* (Washington Legal Found. Legal Backgrounder, 1989); Theodore B. Olson & Theodore J. Boutrous, *The Constitutionality of Punitive Damages* (Washington Legal Found. Legal Backgrounder 1989). Excessive and unpredictable punitive damages are ultimately harmful to the economy, workers and consumers.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of law, including law and public policy. AEF has appeared as amicus curiae before the U.S. Supreme Court in numerous cases as co-amicus with WLF that are relevant to this case, including *BMW of N. Am. Inc. v. Gore* and *Pacific Mut. Life Ins. Co. v. Haslip.*

WLF and AEF believe that they 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.

STATEMENT OF THE CASE

Amici curiae are, in the interest of brevity, omitting any detailed statement of the facts of this case. Amici adopt by reference the statement of facts set forth in Petitioner's Brief.

In short, this action 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 judgment 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, Plaintiffs were permitted, over State Farm's objection, to introduce

massive amounts of evidence of dissimilar conduct allegedly engaged in by State Farm to justify an enormous punitive damages award. This evidence consisted of out-of-state conduct, much of which was entirely lawful where it occurred, unrelated to the bad faith claim at issue in the case, and dissimilar out-of-state 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 of Florida hurricane insurance coverage by a separate State Farm entity; and other widely disparate acts, with no conceivable nexus to Mr. Campbell's claim against State Farm in this case.

The court permitted introduction of these non-probative, unrelated acts on the ground that they were evidence of State Farm's "consistent way of doing business for the last twenty years," *Campbell v. State Farm Mut. Auto Ins. Co.*, 2001 UT 89, 2001 Utah LEXIS

170, at *50 (Sup. Ct. Oct. 19, 2001), a scheme "to meet corporate fiscal goals by capping payouts on claims company wide." *Id.* at *9-10. This purported "scheme" conceivably encompassed every corporate act -- legal or illegal -- taken by this large corporation, and its affiliates, over a period of twenty years as long as, 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 conduct that occurred out-of-state, was unconstitutionally excessive. The Utah Supreme Court rejected State Farm's arguments and reinstated the $145 million punitive damages award.

SUMMARY OF ARGUMENT

Permitting the reprehensibility of a defendant's conduct at issue in a case to be assessed based upon evidence of completely unrelated acts, over a period of decades, will not provide notice sufficient to deter future conduct, one of the principal objectives of punitive damages. Here, the Utah courts imposed an extraordinary sanction on State Farm for its failure to

settle a third-party claim against its insured and for potentially subjecting the insured to a verdict in excess of his policy limits, in large part based on conduct completely unrelated to the bad faith claim at issue in the case. A corporate defendant would be at a loss to know which of the numerous, unrelated acts over a twenty-year time period caused the jury to impose such a significant punitive damages award. Thus, the award provides no notice of the acts a defendant should avoid if it wants to ensure that it will not be subjected to the same punishment in the future.

Indeed, in *BMW v. Gore,* 517 U.S. 559 (1996), this Court made clear that fundamental principles of due process require that a defendant receive fair notice not only of the conduct that will subject him or her to punishment, but also of the severity of that punishment. Here, State Farm was categorically denied such fair notice. While this case had its origins in State Farm's alleged bad faith handling of *one* third-party claim against a single insured, it degenerated into a sprawling inquisition into all of State Farm's business practices over a twenty year time period, with acts not even tangentially related to the bad faith claim against State Farm in this case being considered by the jury in its evaluation of State Farm's conduct. Such unrelated, dissimilar acts were not probative of the reprehensibility of State Farm's alleged actions in this case, which should have been evaluated standing alone, rather than amidst the distracting clutter of irrelevant, dissimilar and unconnected acts. State Farm had no reason to expect that the Utah courts would permit introduction of such

disparate acts, unrelated to the facts of the case before the court, and thus had no fair notice of the enormous punitive damages award this unrelated evidence would spawn.

Finally, permitting a reprehensibility analysis to be based upon evidence of the broad "profit scheme" alleged by Plaintiffs impermissibly punishes a defendant for engaging in lawful business practices to reduce its costs. This is of particular concern to the insurance industry, which is plagued by billions of dollars of fraudulent claims annually, and should be permitted -- indeed encouraged -- to use lawful means to reduce such fraud, for its own financial security and in order to maintain the affordability of insurance policies for its insureds.

ARGUMENT

I. PERMITTING THE USE OF DISSIMILAR PRIOR ACTS TO ASSESS THE REPREHENSIBILITY OF A DEFENDANT'S CONDUCT IN A PARTICULAR CASE DOES NOT FURTHER THE DETERRENT OBJECTIVE OF PUNITIVE DAMAGES

One of the primary objectives of punitive damages awards is to deter the conduct for which the punitive damages were imposed. *See BMW of North Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996); *Pacific Mutual Life Ins. Co. 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, 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. *Gore*, 517 U.S. at 562. Plaintiff brought suit alleging that the failure to disclose the repairs made to his car constituted fraud under Alabama law. *Id.* at 563. The jury returned a verdict in plaintiff's favor, awarding $4,000 in compensatory damages, and $4 million in punitive damages. *Id.* at 565. After remittitur, the Alabama Supreme Court approved a punitive damages award of $2,000,000. *Id.* at 567.

After the jury award, BMW decided to change its policy, nationwide, to require full disclosure of repairs and repainting, regardless of how minor. *Id.* at 566. BMW's action, in response to the conduct which the jury found objectionable, 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, on notice that continuing to engage in such acts or policy may subject them to punitive damages awards in the future, may alter their conduct accordingly.

When, as in this case, 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 fuelled the punitive damages award. Accordingly, the defendant against whom the damages were awarded, and other companies, will 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 avoid if they want to ensure that they will not be subjected to similar punishment in the future.

For example, had the *Gore* Court, in assessing the reprehensibility of BMW's actions, permitted the jury to hear 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 any other company, would have known for what specific practice BMW was being so severely punished. Thus, they would not know what practice to change, and accordingly, may not have made *any* 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, the introduction of evidence of dissimilar, unrelated acts to judge the reprehensibility of a defendant's conduct should be prohibited, so that any punitive damages award will be based solely on the reprehensibility of the conduct at issue, thereby providing corporations with clear notice of the conduct that will subject it to punishment.

II. THE PUNITIVE DAMAGES AWARD IN THIS CASE VIOLATED DUE PROCESS BECAUSE STATE FARM DID NOT HAVE ADEQUATE NOTICE THAT ACTS OF DISSIMILAR CONDUCT COULD BE USED TO JUSTIFY A SIGNIFICANT PUNITIVE DAMAGES AWARD

In *Gore,* this Court stated 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 entirely unrelated business practices which it had no reason to believe would be relevant or admissible against it in an action in Utah involving a bad faith refusal to settle a third-party claim.

Although Mr. Campbell's claim involved allegations of State Farm's mishandling of a *third-party* claim in Utah, the court permitted the jury to consider numerous, wide-ranging examples of State Farm's handling of dissimilar *first-party* claims in other states.[2] The

[2] Third-party claims are claims against an insured by persons who are not parties to the insurance contract. *See Beck v. Farmers Ins. Exch.*, 701 P.2d 795, 798 n.2 (Utah 1985). First-party claims are claims by an insured for contractual benefits under his or her insurance policy. *See id.* 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. *See, e.g., id.* at 799-800.

circumstances of these various first-party claims were not only completely unrelated to Mr. Campbell's claim against State Farm, 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 bad faith claim against State Farm in Utah.

The Court justified introduction of these completely unrelated allegations on the ground 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 State Farm's decision not to settle the third-party claim against Mr. Campbell was mercenary and reprehensible. A punitive damages award based on such boundless inquiry into the 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 notice of the almost limitless scope of the behavior which the jury would be permitted to consider in assessing punitive damages.

In contrast, "[t]he wrongdoing involved in [Gore] 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. Neither the Alabama courts nor this Court even suggested examining other unrelated lawful acts BMW may have engaged in to evaluate the reprehensibility of the conduct for which punitive damages were sought against BMW in *Gore*. Rather, the courts focused solely on ascertaining whether BMW had 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.* As explained in Point I, *supra*, this finding sent clear notice to BMW, and others, of conduct that should be avoided if they wished to avoid similar awards in the future. *Gore's* focused inquiry stands in stark contrast to the unbounded inquiry that was permitted in this case into all aspects of State Farm's, and its separate legal affiliates,' wide-ranging, dissimilar conduct over two decades.

As in *Gore*, the court in *O'Neil v. Gallant Ins. Co.*, 769 N.E.2d 100 (Ill. App. 2002), in evaluating the reprehensibility of defendant's conduct, only considered evidence that would have put the defendant on notice

that its conduct could subject it to punishment. The *O'Neil* court found that the defendant should have been on notice that refusing to settle a third-party claim in bad faith, thereby subjecting its insured to an excess verdict, could subject it to punitive damages, because of other cases awarding punitive damages for such conduct. *Id.* at 109. Thus, the court found that other almost identical incidents in which the defendant had subjected policyholders to excess judgements because of its bad faith refusal to settle within policy limits could also properly be used to assess the reprehensibility of the defendant's conduct. *See id.* at 114-15.[3]

In contrast, in this case the Utah trial court permitted voluminous evidence of completely *unrelated* acts involving State Farm's handling of *first-party* claims, despite the fact that the case before it involved State Farm's actions in failing to settle a third-party claim against Mr. Campbell. 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 between 1980 and 1994 in which a State Farm insured was exposed to the possibility of execution on an

[3] *See also Montgomery Coca-Cola Bottling Co. v. Golson*, 725 So. 2d 996, 1000-01 (Ala. App. 1998) (permitting evidence of similar illegal conduct engaged in by defendant, where defendant was on notice that the conduct in which it engaged could subject it to punitive damages); *Register v. Rus of Auburn*, 193 F. Supp.2d 1273, 1276 (M.D. Ala. 2002) (evidence of identical wrongful acts probative of reprehensibility).

excess judgment. And, unlike the defendant in *Gallant*, State Farm was not on notice that the unrelated "other acts" evidence which was introduced could be admitted in this case to show the reprehensibility of State Farm's conduct towards Mr. Campbell and justify a significant punitive damages award.

And, following *Gore*, courts have routinely refused to allow prior unrelated conduct to be considered in determining the reprehensibility of the conduct in the case before it. For example, in *Leab v. Cincinnati Ins. Co.*, No. Civ. A. 95-5690, 1997 WL 360903 (E.D. Pa. June 26, 1997), 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. Med. Ctr. of Delaware, Inc.*, No. 94C-08-077-WTQ, 1997 WL 528037 (Del. Super. Mar. 4, 1997), the plaintiffs were prohibited from proving reprehensibility by resort to evidence of insufficiently similar prior conduct by the defendant. Indeed, the *Servino* court specifically 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. *Id.* at *5. 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 case against the defendant] is just *such another relevant and comparable instance of misconduct.*" *Id.* at *4-5 (emphasis added). Finding the prior conduct to be insufficiently related to the conduct for which plaintiffs sought punitive damages, the court withheld it from the jury's consideration. *Id.*

Here, State Farm had no reason to suspect that evidence other than the results of a focused examination into whether State Farm had refused, in bad faith, to settle other third-party claims would be considered by a jury in assessing the reprehensibility of the conduct at issue in this case. State Farm certainly had no conceivable advance notice that the Utah courts would permit completely unrelated acts 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 assess the reprehensibility of its decision not to settle the third-party claim brought against Mr. Campbell in Utah. As such, the imposition of an astronomical punitive damages award in this case based on such dissimilar and unrelated conduct violated due process.

III. PERMITTING THE INTRODUCTION OF UNRELATED ACTS TO EVALUATE THE REPREHENSIBILITY OF A DEFENDANT'S CONDUCT UNDER THE PREMISE THAT IT IS RELATED TO A "SCHEME" TO MAKE A PROFIT IMPERMISSIBLY PUNISHES A CORPORATION FOR COMPLETELY LEGAL BUSINESS PRACTICES

In this case, Plaintiffs were permitted to introduce evidence of wide-ranging corporate conduct, much of it completely legal, 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 supposed nefarious motives in deciding not to settle the third-party claim against Mr. Campbell within his policy limits.[4]

[4] If State Farm did engage in an impermissible "scheme" to reduce costs and maximize profits by capping payouts on claims, the conduct at issue in this case certainly would not have furthered that scheme. It would have been far more profitable for State Farm to have simply offered Mr. Campbell's policy limit of $50,000 to settle this case, thereby establishing with certainty the amount it would have to pay. Instead, State Farm's decision exposed the corporation to the uncertain cost of the trial of the case and appeal of any judgment, and subjected it to the jury's $145 million punitive damages award, and the emotional distress award ultimately entered.

Permitting a plaintiff unfettered discretion to introduce evidence based on such an amorphous "profit scheme," would allow the introduction of every effort -- legal or illegal -- taken by the defendant to reduce unnecessary costs and expenses by any agent or employee of a corporation or its subsidiary. However, attempts by a corporation to minimize its costs and improve profit margins are not against the law. *See Elma RT v. Landesmann Int'l Mktg. Corp.*, No. 98 Civ. 3662 (LMM), 2000 U.S. Dist. LEXIS 3540, at *15 (S.D.N.Y. Mar. 22, 2000) (desire to make a profit is "the lawful goal of nearly every business"). In fact, it is the essence of the competitive free enterprise system in this country. *See Becker v. Egypt News Co.*, 548 F. Supp. 1091, 1098 (E.D. Mo. 1982), *aff'd*, 713 F.2d 363 (8th Cir. 1983) (increasing profits is "a goal that is the basic fabric of business America."). Accordingly, the definition of a "profit scheme" applied here, which encompassed a significant amount of legal conduct by State Farm designed to hold down its costs, was entirely too broad, unfairly penalizing the company for seeking to reduce its unnecessary costs and expenses.

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.[5] Such fraud needlessly increases premiums for law-abiding insureds. *See* Levin & Gfeller, *supra* n.5 (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 third-party claims 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.

[5] *See* Alan J. Levin & 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); Patrick Q. Chance, "Gaining the Upper Hand: Fraud Detection & Investigation Software," *Claims* (March 1, 2002) (conservative estimates reflect $20 to $26 billion in property and casualty fraud annually, and $50 to $55 billion in health care fraud annually); James L. Garcia, "Using Technology to Fight Fraud," *Health Management Technology* (Jan. 2002) (fraudulent health care claims cost insurance industry more than $90 billion annually according to U.S. General Accounting Office).

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 merely files a case and 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

Amici respectfully submit that the Utah Supreme Court's decision to reinstate the $145 million punitive damages award against State Farm based on entirely unrelated, dissimilar, out-of-state conduct should be reversed, and the case remanded for a new trial as to punitive damages.

Respectfully submitted.

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