NO. 14-05-00860-CV

IN THE FOURTEENTH COURT OF APPEALS

FOR THE STATE OF TEXAS

AVCO CORPORATION, TEXTRON LYCOMING RECIPROCATING ENGINE DIVISION OF AVCO CORPORATION, DEFENDANT-APPELLANT,

v.

INTERSTATE SOUTHWEST LTD., PLAINTIFF-APPELLEE.

On Appeal From The 278th District Court of Grimes County, Texas
Trial Court Cause No. 29,385

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

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INDEX OF AUTHORITIES

Page(s)

CASES

INDEX OF AUTHORITIES – Cont'd

INDEX OF AUTHORITIES – Cont'd

INDEX OF AUTHORITIES – Cont'd

INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("Chamber") is the nation's largest federation of business companies and associations, with an underlying membership of more than 3,000,000 businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing amicus briefs in cases involving issues of national concern to American business.

Because the fair administration of punitive damages long has been a concern of the business community, the Chamber regularly files amicus briefs in cases involving such awards. *See Philip Morris USA Inc. v. Williams*, No. 05-1256, 2006 WL 2153777 (U.S.), filed July 28, 2006; *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994). One issue about which the Chamber is particularly concerned is the promiscuous imposition of punitive liability. Failing to confine punitive damages to a narrow range of cases involving exceptionally reprehensible conduct both burdens businesses and discourages innovation to the detriment of consumers. The Chamber wishes to have its views heard because it regards this case as an extreme example of the kind of unfettered imposition of punitive liability that serves no valid social

purpose and that can serve only to encourage the transformation of ordinary business disputes into bet-the-company punitive damages wars.[1]

ISSUE PRESENTED FOR REVIEW

Amicus will address the question whether a misrepresentation by one large business to another large business in the course of a dispute over the cause of the failure of a component that one of them designed and the other forged rises to the level of egregious misconduct necessary to support the imposition of punitive damages under Texas law.

STATEMENT OF FACTS

In 1995, Appellant, Lycoming Reciprocating Engine Division of AVCO Corporation ("Lycoming"), an aircraft engine manufacturer, reached a contract with Interstate Forging Industries, Inc. ("IFI") to forge crankshafts for propeller-driven aircraft engines though May 2000. D. Ex. 31. This contract, called the Master Supply Agreement ("MSA"), required the crankshafts to conform to Lycoming's specifications and be "free from defects in material and workmanship." *Id.* at 7. The MSA also provided that IFI would indemnify Lycoming against damages resulting from manufacturing defects in the crankshafts (*id.* at 9-10), but that Lycoming would indemnify IFI against damages resulting from certain engine design defects (*id.* at 9). Lycoming and IFI executed a "Second Addendum" to the MSA in 2001, retroactive to May 2000, which renewed the supply arrangement through May 2005. D. Ex. 196.

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1 Pursuant to TEX. R. APP. P. 11(c), *amicus* states that no party or entity other than *amicus* made a monetary contribution to the preparation or submission of this brief.

This case involves a dispute about the cause of 18 failures of Lycoming 540 series engines equipped with model 707 crankshafts forged by IFI in 1999. 22 RR 139-51, 188-202; D. Exs. 714, 715, 716, 722, 723. While the first of these failures was discovered in May 2000 (D. Exs. 722, 723) – before the Second Addendum was executed – it took over two years for the parties to investigate. Ultimately, Lycoming took the position that the cause of the failures was overheating during the forging of the crankshaft (4 RR 180); IFI took the position that the failures were caused by a design defect in the crankshaft itself (12 CR 6166).

The Federal Aviation Administration ("FAA") also investigated the crankshaft failures. 30 RR 241-42 (Lycoming's offer of proof); D. Ex. 660 (not admitted). While that investigation was ongoing, Lycoming agreed to recall all turbo-charged 540 series engines with model 707 crankshafts forged by IFI during a certain time period. 22 RR 181-200; D. Exs. 244, 306, 314. After investigating for two years following the recalls, the FAA specifically found that the design of the 707 crankshaft was adequate. D. Ex. 660 at 6 (not admitted). It ultimately produced a 148-page report on the subject, which was made public in January 2005. 30 RR 253-54 (Lycoming offer of proof); D. Ex. 660. That report concluded that IFI's overheating of the crankshafts during forging was the source of the crankshaft failures. D. Ex. 660 at 137 ("The honeycomb feature

was caused by overheating the billet at Interstate prior to forging."); *see also id.* at 7, 102, 119.[2]

This litigation began before that report issued. Interstate Southwest Ltd. ("ISW") – a sister company of IFI – filed suit in the 278th District Court of Grimes County, Texas, on April 23, 2003. This suit was "primarily defensive" in nature, as ISW sought to obtain a declaratory judgment that it was not required to indemnify Lycoming under the MSA for damages resulting from the defective crankshafts. *AVCO Corp. v. Interstate Sw., Ltd.*, 145 S.W.3d 257, 266 (Tex. App. – Houston [14th Dist.] 2004, no pet.); *see also* 38 CR 20979-80.[3] In its fifth amended petition, ISW alleged (evidently for the first time) that Lycoming had fraudulently induced IFI to enter into the Second Addendum because Lycoming "knew its crankshafts were under-designed and this was the cause of the crankshaft failures." 12 CR 6166. At the close of its case, ISW amended its petition to allege that Lycoming committed fraud during its investigation of the cause of the crankshaft failure by stating that overheating during forging caused the crankshaft failures. 11 CR 6105-08.

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2 The trial court excluded this report from evidence. The Chamber fully supports Lycoming's argument that it was reversible error to exclude the FAA report. We find it unfathomable that a jury would be allowed to determine a defendant's responsibility to pay punitive damages (and to award close to $100 million) while being prevented from seeing this highly exculpatory evidence.

3 On May 22, 2003, Lycoming filed an indemnity action in Pennsylvania state court, but that suit was stayed first by an anti-injunction order that this Court subsequently reversed and then by IFI's bankruptcy filing on September 18, 2004.

Following trial, the jury found Lycoming liable for fraud and awarded ISW $1.7 million for increases in insurance premiums, $2.2 million in expert fees, and $4.8 million in attorneys' fees. 11 CR 5734, 5737, 5738, 5742. Finding that there was clear and convincing evidence of fraud or malice and that Lycoming had procured a document by deception, the jury also awarded $86,394,763 in punitive damages. 11 CR 5739-41, 5751.

SUMMARY OF THE ARGUMENT

Punitive damages have a long and venerable history in Texas. One fairly constant aspect of that history is the limitation of punitive damages to cases involving highly egregious misconduct. This limitation is apparent in the early Texas punitive damages cases, as well as in modern decisions such as *Transportation Insurance Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994), which clarify the very demanding nature of the punitive damages standard. If there was any doubt on this score, the Texas legislature eliminated it by amending the punitive damages statutes (TEX. CIV. PRAC. & REM. CODE ANN. §§ 41.001, 41.003 (Vernon 1997)) to restrict the availability of punitive damages even further.

Courts in Texas and elsewhere have strongly cautioned against the overuse of punitive damages, and for good reason: Watering down the standard for punitive liability increases the risk that defendants will be deprived of property arbitrarily or erroneously, unfairly stigmatizes defendants who do not deserve it, reduces the utility of punitive damages as a deterrent of truly reprehensible conduct, and risks deterring a substantial amount of legitimate business behavior.

In allowing punitive damages in this case, the district court abandoned Texas's policy of limiting this remedy to cases involving exceptionally egregious misconduct.

With the acquiescence of the district court, the plaintiff in this case – a corporate entity that operated a forging plant – converted a routine commercial dispute between it and one of its customers – a manufacturer of airplane engines – into a massive punitive damages case. Both companies were represented by counsel throughout the dispute, which was refereed by the FAA. That agency, which is charged by Congress with investigating precisely these kinds of issues, ultimately resolved the dispute in *defendant's* favor. The case thus bears no resemblance to the kinds of cases in which punitive damages first arose or the ones in which modern-day courts have deemed punitive damages necessary and appropriate – typically those involving malicious acts of violence or the oppression or deceit of comparatively helpless individuals. Instead, it is an extreme example of the kind of promiscuous overuse of punitive damages that has caused the Texas Legislature and courts to rein in this very severe and powerful remedy.

To allow punitive damages in this case would open the floodgates for punitive damages in a broad swath of business disputes. If a company that is represented by counsel and has every opportunity and incentive to verify for itself the assertions of its contractual partner may be rewarded with over $80 million in punitive damages, surely every other business that finds itself in a dispute with a contractual partner will be emboldened to cry "fraud" or "malice" and seek punitive damages. To avoid this unbridled expansion of the punitive damages remedy and its attendant harmful consequences, the Court should reverse the award of punitive damages.

ARGUMENT

I. Texas Appellate Courts Have Consistently Restricted Punitive Damages To Highly Egregious Conduct.

There is a long common-law history allowing punitive damages – often called exemplary or vindictive damages – as a remedy for highly egregious tortious conduct. Surveying that history, Justice O'Connor explained: "In the past, such awards 'merited scant attention' because they were 'rarely assessed and likely to be small in amount.' When awarded, they were reserved for the most reprehensible, outrageous, or insulting acts. Even then, they came at a time when compensatory damages were not available for pain, humiliation, and other forms of intangible injury. Punitive damages filled this gap." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 61 (1991) (O'Connor, J., dissenting) (citations omitted).

Punitive damages were particularly difficult to recover in Texas. In most early Texas cases in which punitive damages were allowed, the defendant had flouted the law. For instance, in *Cook v. Garza*, 9 Tex. 358, 1853 WL 4202 (1853), the Court allowed punitive damages for "forcibly dispossessing the plaintiff" of his home, stating that:

> The evidence showed a premeditated, willful trespass, committed under circumstances of aggravation and outrage which called for exemplary damages. The conduct of the defendants evinced a spirit of insubordination to law, a determination to accomplish their purpose irrespective of the rights of the plaintiff and regardless of the consequences. It was characterized by such acts of lawless violence and oppression as rendered it a proper case for the giving of damages, not merely to compensate, but to punish. There were in evidence no extenuating circumstances.

Id. at *1, *3. Likewise, in *Champion v. Vincent*, 20 Tex. 811, 1858 WL 5406 (1858), the court permitted punitive damages after the defendant maliciously slaughtered the plaintiff's hogs, explaining:

> [T]his was not a bare technical trespass; it was committed deliberately, in willful violation of the plaintiff's rights, in a manner and under circumstances of aggravation, showing a violent, reckless and lawless spirit; and in such cases the law allows damages beyond the strict measure of compensation, by way of punishment and for example's sake. There was nothing to justify or palliate the act; it was just such an act as necessarily tends to violence and breaches of the peace, and neighborhood animosities; which destroy the harmony, peace and good order of society; and was eminently a case for damages by way of punishment and prevention.

Id. at *5 (citations omitted); *see also Cole v. Tucker*, 6 Tex. 266, 1851 WL 3979, at *3 (1851) (noting that punitive damages might be available if plaintiff could prove that a landowner, "with the deliberate purpose to harass and oppress, should throw down the fence of another and drive his cattle and horses into his [neighbor's] cultivated land").

In addition, the plaintiff was almost always an individual (rather than a business or other organization) who was unable to protect himself from the defendant's intentional misconduct. *See, e.g.*, *Champion*, *supra*; *Cook*, *supra*; *Cole*, *supra*; *see also Flanagan v. Womack*, 54 Tex. 45, 1880 WL 9362 (1880) (defendant assaulted plaintiff); *Kolb v. Bankhead*, 18 Tex. 228, 1856 WL 5110 (1856) (defendant willfully cut plaintiff's timber); *Graham v. Roder*, 5 Tex. 141, 1849 WL 4070 (1849) (fraudulent sale of land to individual). *See generally* Victor E. Schwartz et al., *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 BROOK. L. REV. 1003, 1007-08 (1999) ("As in England, punitive damages in colonial America (and through the

nineteenth and well into the twentieth centuries) were available only in a comparatively small class of torts – the 'traditional intentional torts.' These included: assault and battery, libel and slander, malicious prosecution, false imprisonment, and intentional interferences with property such as trespass and conversion, malicious attachment, or destruction of property, private nuisance, and similar wrongful conduct.") (footnotes and citations omitted).

Punitive damages served as a means to ensure that the victim would not resort to violent self-help. *See Champion*, 1858 WL 5406, at *5; *see also* Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 521-22 (1957) ("Tort law is based in part upon a recognition that satisfaction of this impulse [for revenge] will help preserve the peace by discouraging self-help. The vindictive nature of exemplary damages was frankly avowed in two early decisions conceding that one purpose of large awards was to prevent dueling.") (citing *Merest v. Harvey*, 128 Eng. Rep. 761 (C.P. 1814), *Grey v. Grant*, 95 Eng. Rep. 794 (C.P. 1764), and other sources); *Alcorn v. Mitchell*, 63 Ill. 553, 1872 WL 8247, at *1 (1872) (granting punitive damages against a defendant who spat in the plaintiff's face in public, because "the public tranquility may be preserved by saving the necessity of resort to personal violence as the only means of redress").

Over time, the circumstances in which Texas courts permitted punitive damages evolved, but the requisite degree of egregiousness did not lessen. Misconduct still had to be highly reprehensible – several degrees from the norm – before punitive damages could be awarded. As one court of appeals explained, "[f]rom the earliest Texas cases in which exemplary damages were recognized [such as *Graham v. Roder* and *Cole v. Tucker*], ex-

traordinarily reprehensible conduct has been required. . . . Except for some fluctuations in the definition of 'gross negligence,' culminating in the Supreme Court's decision in *Burk Royalty Co. v. Walls*, 616 S.W.2d 911 (Tex. 1981), the prerequisites are essentially the same today." *City of Ingleside v. Kneuper*, 768 S.W.2d 451, 454-55 (Tex. App. – Austin 1989, writ denied) (citations omitted);[4] *see also Am. Home Assurance Co. v. Safway Steel Prods. Co.*, 743 S.W.2d 693, 703 (Tex. App. – Austin 1988, writ denied) ("[M]ost [punitive damages] awards have been founded on willful or malicious conduct of the defendant."); Patricia F. Miller, *2003 Texas House Bill 4: Unanimous Exemplary Damage Awards and Texas Civil Jury Instructions*, 37 ST. MARY'S L.J. 515, 529 (2006) ("During the late nineteenth and early twentieth century, the Texas Supreme Court's definitions of gross negligence placed a substantial burden upon a plaintiff seeking punitive damages where, because of the demanding standard, no appellate court in Texas ever upheld a punitive damages award [until *Burk Royalty*].") (citations and internal quotation marks omitted).

Nowhere is the demanding nature of the Texas punitive damages standard more apparent than in *Transportation Insurance Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994). In *Moriel*, an injured worker was awarded compensatory and punitive damages against a worker's compensation insurer for its alleged bad-faith delay in paying his medical bills. The Texas Supreme Court granted review "to clarify the standards governing the imposi-

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4 These "fluctuations" were eradicated by the Texas Supreme Court's subsequent decision in *Moriel*.

tion of punitive damages in the context of bad faith insurance litigation." *Id.* at 12. The Court started with a discussion of the purpose of punitive damages, stating that they "are levied against a defendant to punish the defendant for outrageous, malicious, or otherwise morally culpable conduct." *Id.* at 16. "The legal justification for punitive damages is similar to that for criminal punishment," the court explained, and therefore, "like criminal punishment, punitive damages require appropriate substantive and procedural safeguards to minimize the risk of unjust punishment." *Id.* at 16-17. Continuing the comparison to criminal law, the court pronounced: "*Our duty in civil cases*, then, like the duty of criminal courts, is to ensure that defendants who deserve to be punished in fact receive an appropriate level of punishment, while at the same time *preventing punishment that is excessive or otherwise erroneous*." *Id.* at 17 (emphases added).

The Court then turned to the "bad faith" context specifically, explaining:

> It is as important to maintain the distinction between punishment and compensation in the context of bad faith as it is in the remainder of tort law. The reason the law of torts recognizes compensation, rather than punishment, as its paramount objective is that civil punishment can result in overdeterrence and overcompensation. *Every tort involves conduct that the law considers wrong, but punitive damages are proper only in the most exceptional cases. Unless bad faith is accompanied by aggravated conduct by the insurer, then compensatory damages alone are the proper remedy.*

Id. at 18 (emphasis added).

The Court next tried "to articulate the distinction between simple and aggravated bad faith" by shedding further light on the elements of gross negligence. *Id.* at 18-19. The Court noted that some lower courts since *Burk Royalty* had watered down the defini-

tion of gross negligence. *Id.* at 21. It clarified that "the test for gross negligence 'contains both an objective and a subjective component'" and that proving each of these elements is very demanding. *Id.* at 21-22. "Subjectively, the defendant must have actual awareness of the extreme risk created by his or her conduct. Objectively, the defendant's conduct must involve an 'extreme degree of risk,' a threshold significantly higher than the objective 'reasonable person' test for negligence." *Id.* at 22 (citations omitted).

Finally, turning to procedure, the Court "emphasize[d] that courts of appeals must carefully scrutinize punitive awards to ensure that they are supported by the evidence." *Id.* at 31. It noted that, although there were good reasons to adopt the "clear and convincing evidence standard for punitive damages," it was not ready to require that standard of proof as a matter of Texas common law. *Id.* at 31-32.

Shortly after *Moriel* was decided, the Texas Legislature raised the burden of proof to clear and convincing evidence. *See* Act of April 11, 1995, 74th Leg., ch. 19, § 1 (codified at TEX. CIV. PRAC. & REM. CODE ANN. § 41.001-.013 (Vernon 1997)). It also folded *Moriel*'s definition of gross negligence into the definition for malice, thus allowing "malice" to be proven by either "a specific intent by the defendant to cause substantial injury to the claimant" – a very high standard[5] – or "an act or omission" meeting both the "subjective" and "objective" tests from *Moriel*. *Id.*; *see also* J. Stephen Barrick, Moriel *and*

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5 *See, e.g.*, *United States v. Bailey*, 444 U.S. 394, 405 (1980) ("specific intent" is a well-defined common-law concept corresponding with "purpose" to cause a certain consequence; it is more exacting than "general intent," which requires only "knowledge" of a risk).

the Exemplary Damages Act: Texas Tag-Team Overhauls Punitive Damages, 32 HOUS. L. REV. 1059, 1061-63 (1995). These changes restricted the availability of punitive damages even further. *See, e.g.*, *Hartford Cas. Ins. Co. v. Powell*, 19 F. Supp. 2d 678, 682 (N.D. Tex. 1998) ("[T]he [1995 version of the] Texas [punitive damages] statute requires, at the least, proof of conduct that is closely akin to an intention to harm.").

II. Courts In Texas And Elsewhere Have Taken Substantial Steps To Curtail The Overuse Of Punitive Damages.

In *Moriel*, the Texas Supreme Court cautioned that overusing punitive damages leads to "overdeterrence and overcompensation." 879 S.W.2d at 18. Especially because "the proceeds become a private windfall," it is the "duty" of appellate courts in civil cases to "prevent[] punishment that is excessive or otherwise erroneous." *Id.* at 17.

The United States Supreme Court has agreed, stating that "[i]t should be presumed [that] a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003).

Numerous state supreme courts also have expressed similar sentiments. The Illinois Supreme Court, for instance, recently acknowledged that "[b]ecause of their penal nature, punitive damages are not favored in the law, and the courts must take caution to see that punitive damages are not improperly or unwisely awarded." *Tri-G, Inc. v. Burke, Bosselman & Weaver*, Nos. 99584, 99595, 2006 WL 1702282, at *23 (Ill. June 22, 2006)

(not yet released for publication) (internal quotation marks omitted). Likewise, the Mississippi Supreme Court recently explained that "Mississippi law does not favor punitive damages; they are considered an extraordinary remedy and are allowed with caution and within narrow limits." *Bradfield v. Schwartz*, 936 So. 2d 931, 936 (Miss. 2006) (internal quotation marks omitted). And the Wyoming Supreme Court has warned that "[p]unitive damages are not a favorite of the law and are to be allowed with caution within narrow limits. Since the purpose of punitive damages is not to compensate a plaintiff, but to punish a defendant and deter others, such damages are to be awarded only for conduct involving some element of outrage, similar to that usually found in crime." *Weaver v. Mitchell*, 715 P.2d 1361, 1369 (Wyo. 1986) (citation omitted).

Indeed, the California Supreme Court found the disfavored nature of punitive damages to be so thoroughly interwoven in our legal fabric as to be "universally recognized." *Dyna-Med, Inc. v. Fair Employment & Housing Comm'n*, 743 P.2d 1323, 1330 (Cal. 1987); *cf. Henderson v. Sec. Nat'l Bank*, 72 Cal. App. 3d 764, 392 (1977) ("[Punitive damages] are not favored by the law and they should be granted with the greatest of caution; they will be allowed only in the clearest of cases.") (citations omitted). The list of cases opining on the need to prevent the overuse of punitive damages goes on and on. *See, e.g.*, *Palmisano v. Toth*, 624 A.2d 314, 318 (R.I. 1993); *Minnesota-Iowa Television Co. v. Watonwan T.V. Improvement Ass'n*, 294 N.W.2d 297, 311 (Minn. 1980).

These courts have recognized that it is better to let a defendant go without punishment than for punitive damages to be awarded erroneously:

> [J]ust as we agree that it is better to acquit a person guilty of a crime than to convict an innocent one, we cannot deny that, given that the injured party has been fully compensated, it is better to exonerate a wrongdoer from punitive damages, even though his wrong be gross or wicked, than to award them at the expense of one whose error was one that society can tolerate and who has already compensated the victim of his error.

Travelers Indem. Co. v. Armstrong, 442 N.E.2d 349, 362 (Ind. 1982); *see also Nat'l Bank of Commerce v. McNeill Trucking Co.*, 828 S.W.2d 584, 589 (Ark. 1992) (Dudley, J., concurring) ("If punitive damages are improperly awarded, the defendant suffers far more than a plaintiff does if the jury incorrectly fails to give him a windfall."). As the Arizona Supreme Court proclaimed, "[w]hen punitive damages are loosely assessed, they become onerous not only to defendants but the public as a whole." *Linthicum v. Nationwide Life Ins. Co.*, 723 P.2d 675, 681 (Ariz. 1986) (en banc).

III. Strong Policy Reasons Support Restricting Punitive Damages To Exceptional Misconduct.

Both Texas courts and those elsewhere have identified several strong reasons for restricting the availability of punitive damages to exceptional misconduct. First, "'[p]unitive damages pose an acute danger of arbitrary deprivation of property.'" *State Farm*, 538 U.S. at 417 (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994)). "Although these awards serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding," and "'[j]ury instructions typically leave the jury with wide

discretion in choosing amounts . . . .'" *Id.*;[6] *cf. Moriel*, 879 S.W.2d at 16-17 ("The legal justification for punitive damages is similar to that for criminal punishment, and like criminal punishment, punitive damages require appropriate substantive and procedural safeguards to minimize the risk of unjust punishment."). When the misconduct is not highly egregious, the State's interest in punishing and deterring it is outweighed by the risk of an erroneous or excessive deprivation of property. *Cf. Armstrong*, 442 N.E.2d at 362; *Linthicum*, 723 P.2d at 681.

Second, because punitive damages are "quasi-criminal" in nature (*Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001); *Moriel*, 879 S.W.2d at 16-17)), they "can stigmatize the defendant in much the same way as a criminal conviction" (*Masaki v. Gen. Motors Corp.*, 780 P.2d 566, 575 (Haw. 1989)). *See also Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 458 (Wis. 1980) (punitive damages determination focuses on whether defendant's acts "fall[] within the 'certain classes of acts' for which

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6 As the United States Supreme Court noted, allowing consideration of the defendant's net worth increases the risk of arbitrary deprivation of property. *State Farm*, 538 U.S. at 417 ("'[T]he presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.'") (quoting *Honda Motor Co*, 512 U.S. at 432); *see also Haslip*, 499 U.S. at 43 (O'Connor, J., dissenting) ("Juries are permitted to target unpopular defendants, penalize unorthodox or controversial views, and redistribute wealth. Multimillion dollar losses are inflicted on a whim."); *Kansas City v. Keene Corp.*, 855 S.W.2d 360, 377 (Mo. 1993) (per curiam) (en banc) (Holstein, J., concurring) ("punitive damages have occasionally been abused by becoming a method for redistributing wealth rather than carrying out the functions for which punitive damages were designed"). Because Texas allows a jury to consider the defendant's net worth (*Lunsford v. Morris*, 746 S.W.2d 471, 472-73 (Tex. 1988) (orig. proceeding), *overruled on other grounds by Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992)), that is all the more reason Texas courts have to be careful before allowing punitive damages in a particular case.

stigma attaches and is a more serious allegation than the ordinary factual issue in a personal injury action"); *Kansas City v. Keene Corp.*, 855 S.W.2d 360, 378 (Mo. 1993) (per curiam) (en banc) (Holstein, J., concurring) (punitive damages "serve a function normally attributed to the criminal law" and as such "carry a stigma").

Expanding the spectrum of punishable conduct is a problem not only because businesses may face unjust stigma for what in reality was legitimate behavior, but also because doing so risks *decreasing* the stigma that rightly attaches to truly reprehensible conduct. As the Maine Supreme Judicial Court put it, extending punitive damages to non-heinous conduct would "dull[] the potentially keen edge of the doctrine as an effective deterrent of truly reprehensible conduct." *Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985); *see also Linthicum*, 723 P.2d at 681 (when punitive damages are "loosely assessed," their "deterrent impact is lessened"); *Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633, 657 (Md. 1992) (quoting *Linthicum* with approval); *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992) ("[A]warding punitive damages only in clearly appropriate cases better effects deterrence.").

Finally, because the threat of punitive damages greatly increases the cost of doing business, allowing non-exceptional conduct to be subject to punitive damages creates a grave risk that a substantial amount of legitimate business activity will be deterred, including the development of useful products. *See, e.g.*, *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part); *Loitz v. Remington Arms Co.*, 563 N.E.2d 397, 403 (Ill. 1990); Louis C. Lasagna, *The Chilling Effect of Product Liability on New Drug Development*, in THE

LIABILITY MAZE 336 (Peter W. Huber & Robert E. Litan eds., 1991); Richard J. Mahoney & Stephen E. Littlejohn, *Innovation on Trial: Punitive Damages Versus New Products*, 246 SCIENCE 1395, 1397 (1988) (correlating strict liability, huge jury awards, and punitive damages with declining production or development of contraceptives, vaccines, suitcase-size kidney dialysis units, and anesthesia machines).

Expanding the availability of punitive damages causes particular problems in the aviation industry. As several commentators have noted, "the concept of punitive damages in aviation cases must be regarded as providing serious potential increased economic exposure for aircraft related insureds and, in certain states, their insurers." Stephen C. Kenney, *Punitive Damages in Aviation Cases: Solving the Insurance Coverage Dilemma*, 48 J. AIR L. & COM. 753, 767 (1983); *see also* Donald M. Haskell, *The Aircraft Manufacturer's Liability for Design and Punitive Damages: The Insurance Policy and the Public Policy*, 40 J. AIR L. & COM. 595, 619 (1974) ("As is evident from the erroneous jury verdicts for punitive damages returned against manufacturers in the last few years, aircraft manufacturers face very substantial financial exposure that was unheard of, in most cases, at the time the product was designed and manufactured.") (footnote omitted).

Indeed, even plaintiffs' lawyers have warned against the overuse of punitive damages in aviation cases. For example, although he believes strongly that punitive damages have an important role to play in aviation litigation, Lee Kreindler, past president of the International Academy of Trial Lawyers and the Aviation Law section of the American Trial Lawyers Association, believes just as strongly that they must be imposed with "extreme restraint." Lee S. Kreindler, *Punitive Damages in Aviation Litigation – An Essay*,

8 CUMB. L. REV. 607, 617 (1978). "If the right to punitive damages is asserted, it should be done correctly. It must be asserted on a group basis in order to benefit a group that has been victimized. Against a corporation it must be a case caused by corporate officials or the board of directors or at least ratified by them . . . ." *Id.* at 618. Otherwise, there might be severe harm to the aviation industry as a whole. *See id.* at 617 (discussing potential difficulties with respect to "insurability or premiums").[7]

* * *

If anything, these commentators' warnings understate the need for restraint in awarding punitive damages here. Their concern was excessive liability for punitive damages arising out of aviation accidents *causing injury to passengers* when it was not clear that the manufacturer behaved especially reprehensibly. This case, by contrast, is merely a dispute between two parties in the chain of distribution. Although at trial ISW invoked personal injuries to passengers who were killed in a crash caused by the crankshaft failure (*see, e.g.*, 34 RR 49-50)), it admits that the estates of the victims are not parties to this case and are not bound by its result (ISW Br. 42). All of the problems discussed above would be multiplied if, in addition to passengers, parties in the chain in distribution could recover punitive damages as well.

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7 Since these articles were written, Congress passed the General Aviation Revitalization Act of 1994, 49 U.S.C. § 40101 (1997), setting a new national eighteen-year statute of repose. While this Act addressed some problems caused by excessive tort suits, it did nothing to solve the problem posed by excessive punitive damages in aviation cases. *See, e.g.*, John H. Boswell & George A. Coats, *Saving the General Aviation Industry: Putting Tort Reform to the Test*, 60 J. AIR L. & COM. 533, 553-56, 562-66 (1994-95).

IV. This Is A Singularly Inappropriate Case For The Imposition Of Punitive Damages.

As Lycoming explains in its opening and reply brief, even accepting that ISW adduced sufficient evidence to support its underlying fraud claim, it did not prove fraud or malice, the prerequisites for punitive damages, by "clear and convincing evidence."[8] *See* Lycoming Br. 25-28; Lycoming Reply Br. 14-15. Instead of repeating Lycoming's arguments, we think it useful to take a step back and focus on the stark differences between the circumstances here and those in which punitive damages have, until now, been available in Texas.

This is a commercial dispute between two corporate entities in an arm's-length relationship. Each company has been represented by counsel and has had both the incentive and the means to protect its own interests. While ISW claims today that IFI would have acted differently had Lycoming disclosed the four engine failures that occurred before IFI signed the Second Addendum and admitted that the problem was not the result of

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8 It is beyond denial that the "clear and convincing" standard is a high one – which is precisely why the legislature amended the punitive damages to require this level of proof. *See, e.g.*, *Moriel*, 879 S.W.2d at 31 ("Clear and convincing evidence is 'that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.'") (quoting *State v. Addington*, 588 S.W.2d 569, 570 (Tex. 1979) (per curiam)); *Miller v. Yturria*, 7 S.W. 206, 209 (Tex. 1888) ("The expression, 'clear and convincing proof,' is a very strong one. . . . [It requires proof] with clearness and certainty."). This standard applies on appellate review too. *See Sw. Bell Tel. Co. v. Garza*, 164 S.W.3d 607, 622 (Tex. 2004) (because the underlying standard is stringent, appellate courts must apply "an elevated standard of review"). Reversal is required on the basis of legal insufficiency of the evidence if "no reasonable factfinder could form a firm belief or conviction that [Lycoming acted with fraud or malice]." *Id.* at 627.

IFI's overheating during forging (notwithstanding the FAA's later contrary conclusion), the fact remains that IFI *rejected* Lycoming's root-cause theory, conducted its own investigation of the cause of the problem, and concluded that Lycoming's design was the cause. *Cf. William B. Roberts, Inc. v. McDrilling Co.*, 579 S.W.2d 335, 339 (Tex. Civ. App. – Corpus Christi 1979, no writ) ("There cannot be actionable fraud in an arms length transaction when each of the parties are equally cognizant of the facts.").

ISW is thus nothing like the individual plaintiffs that traditionally have been permitted to recover punitive damages in Texas. And the alleged misconduct here bears no resemblance to the sort of deceitful, malicious, or oppressive conduct that the Texas courts have held to warrant punitive damages in prior cases.

Similarly, the reasons supporting the availability of punitive damages in Texas are not implicated here. The conduct is not the sort that, unless punished heavily through punitive damages, might cause an individual to resort to violent self-help. Nor are the stakes in a case like this too small to warrant litigation absent the availability of punitive damages. Finally, the conduct certainly is not so repugnant and despicable that punitive damages are necessary to ensure that it is never repeated by the defendant or others.

Moreover, unlike the historic cases that preceded the advent of the administrative state, as well as the modern Texas cases in which punitive damages have been allowed, the tort here occurred in the context of a dispute that was refereed impartially by an expert federal agency. The FAA used its extensive powers to investigate the cause of the

crankshaft failures and *ultimately agreed with the defendant*.[9] A lay jury has nowhere near the FAA's sophistication in getting to the bottom of such a complex, scientific dispute. Punitive damages simply are not necessary – and are potentially counterproductive – when federal authorities are already heavily involved in the situation and taking steps to resolve it.

Indeed, this case raises many of the concerns about the overbroad imposition of punitive damages discussed in Section III, *supra*. First, there is a high likelihood that the jury – deciding directly contrary to the FAA – got the result wrong and thus deprived Lycoming of its property erroneously. Second, because there is a high probability of error, it follows that Lycoming has been subjected to undeserved stigma. Finally, allowing punitive damages in a case like this surely blunts the usefulness of punitive damages as a deterrent: if this kind of seemingly innocuous behavior in the context of an arm's-length business relationship is enough to result in punitive liability (and a gargantuan award), then businesses will surely conclude that there is no realistic way to avoid punitive damages in business-against-business cases and will make less, not more, efforts to do so.

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9 *See* pp. 3-4, *supra*. *See generally* Robert Martin, *General Aviation Manufacturing: An Industry under Siege*, in THE LIABILITY MAZE, *supra*, at 488 ("[I]f the FAA questions a design or engineering analysis for a new product, or the modification of an existing product, the manufacturer is required to submit additional analysis or test data to support the design or concept for which approval is sought. If questions arise on the compliance of a design, a prototype, or a finished product with FAA regulations or directives, the manufacturer must develop and supply whatever information the FAA requires to support the product and its compliance with FAA standards.").

On the other side of the equation, there is little, if any, upside to allowing punitive damages here. If Lycoming was, in fact, responsible for the crankshaft failures – and indeed misled the FAA as ISW suggests (at 22) – the FAA has more than enough means to remedy the situation on its own, including imposing civil penalties and initiating criminal proceedings.[10] *See, e.g.*, Tom M. Dees, III, Comment, *They Are Trying To Take My License Away – What Do I Do Now? A Practitioner's Guide To Certificate Revocation & Suspension Defense Litigation*, 66 J. AIR. L. & COM. 261, 268 (2000) ("The FAA uses five different actions to enforce the Federal Aviation Act of 1958 and the Federal Aviation Regulations (FARs): (1) administrative actions, (2) reexaminations, (3) certificate actions, (4) civil penalties, and (5) criminal investigations. As an agency with a prosecutorial function, the FAA enjoys wide discretion to choose enforcement actions, as it deems appropriate for the particular facts each case presents.") (footnotes and citations omitted); *id.* at 270-87 (discussing the different types of actions). For these reasons, and those stated by Lycoming in its briefs, the punitive award in this case should be reversed.

CONCLUSION

This Court should reverse and render a take-nothing judgment on punitive damages.

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10 If made expressly, ISW's implicit argument that Lycoming deceived the FAA would be preempted. *See Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347-48 (2001). The result should be no different when the argument is left lurking under the surface.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

As required by TEX. R. APP. P. 6.3 and 9.5, I certify that on October 16, 2006, I served a true and correct copy of the foregoing Brief of Amicus Curiae United States Chamber of Commerce In Support of Appellant by first-class U.S. mail on:

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