IN THE
SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 67 MAP 2005

ERIE INSURANCE EXCHANGE,

Appellant

v.

JEAN A. HOLLOCK,

Appellee

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

Appeal from the Opinion and Order of the Superior Court filed January 22, 2004, Affirming the Order of the Court of Common Pleas of Luzerne County Entered January 23, 2002, No. 6790C, 1999

Of Counsel:
Evan M. Tager
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, N.W.
Washington, DC 20006-1101
(202) 263-3240

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5537

MAYER, BROWN, ROWE & MAW LLP
Patricia H. Becker
Attorney I.D. No. 73837
1909 K Street, N.W.
Washington, DC 20006-1101
(202) 263-3366

Attorneys for Amicus Curiae Chamber of Commerce of the United States of America

SEPTEMBER 15, 2005

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

Amicus curiae Chamber of Commerce of the United States of America ("the Chamber") respectfully submits this brief in support of the Defendant-Appellant, Erie Insurance Exchange ("Erie").

INTEREST OF THE *AMICUS CURIAE*

The Chamber is the world's largest business federation, representing an underlying membership of more than 3 million businesses and organizations of all sizes. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. A central function of the Chamber is to represent the interests of its members in important matters before the state and federal courts, legislatures, and executive branches. To that end, the Chamber has filed *amicus* briefs in numerous cases that have raised issues of vital concern to the nation's business community.

The Chamber's members are profoundly concerned that the management of punitive damages by the nation's courts be sound and fair. In *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), the Supreme Court provided significant guidance about how to ensure the constitutionality of punitive damages awards. The construction and application of *State Farm* by state courts of last resort will greatly affect the future administration of punitive damages in this country. Accordingly, the Chamber has a strong interest in participating as an *amicus* in this case.

SUMMARY OF ARGUMENT

I.

The federal constitution's Due Process Clause, as interpreted by the Supreme Court, requires that conduct upon which a punitive award is predicated be "similar" to the conduct giving rise to the underlying cause of action. Here, the underlying cause of action was an action under 42 PA. CONS. STAT. ANN. § 8371 (1998) for Erie's allegedly bad-faith handling of an

insurance claim (which Erie paid before the Section 8371 action was initiated); in regard to this underlying cause of action, the trial court found that Erie, among other things, delayed in processing the claim and set an unreasonably low reserve. When it came to imposing punitive damages, however, the trial court relied in large part upon Erie's clearly ***dis***similar (allegedly) wrongful conduct as a litigant during that very Section 8371 action. In any event, the trial court violated Erie's due process rights by failing to give Erie adequate notice that it intended to base liability for and the amount of punitive damages on Erie's litigation conduct. Erie's first notice came in the trial court's opinion imposing the disproportionate $2,800,000 punitive award. For either of these reasons, the award must be vacated.

II.

A.

The Superior Court was unclear as to the standard of review it was employing in reviewing the $2,800,000 punitive award for excessiveness under the federal constitution. The Supreme Court's decisions in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), and *State Farm* require that both federal and state appellate courts exercise *de novo* review of a lower court's ***application*** of the *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996), guideposts to the facts, while deferring to the lower court's ***purely factual findings*** unless those findings are clearly erroneous.

B.

Review of the instant punitive award under the *de novo* standard powerfully demonstrates that, even aside from the trial court's improper reliance upon Erie's conduct as a litigant during the Section 8371 action, the $2,800,000 punitive award is grossly and unconstitutionally excessive under *BMW* and *State Farm*. The trial court did not even address the *BMW* guideposts,

and the Superior Court's analysis of them was incomplete and erroneous. As to the first guidepost, Erie's conduct implicated at most one of the five reprehensibility factors identified by the Supreme Court in *State Farm*, and thus falls at the lower end of the reprehensibility spectrum. Moreover, the trial court placed significant reliance upon a forbidden factor, Erie's wealth. As to the second guidepost, the 10:1 ratio of punitive to compensatory damages also points in favor of the conclusion that the punitive award is grossly excessive. Given the low reprehensibility of Erie's conduct and the substantial amount of the compensatory damages ($278,825), faithful application of the guidance provided by the Supreme Court in *State Farm* dictates that the maximum constitutionally permissible ratio is 1:1. As to the third guidepost, the punitive award is a whopping ***560*** times the most analogous civil penalty — $5,000 per violation under the Unfair Insurance Practices Act. That is still another indication that the $2,800,000 exaction is grossly excessive. Accordingly, the punitive award must be reduced to no more than $280,000.

ARGUMENT

I. A PARTY'S CONDUCT DURING A BAD-FAITH ACTION MAY NOT BE INVOKED TO SUPPORT EITHER IMPOSING PUNITIVE DAMAGES OR INCREASING THE AMOUNT OF PUNITIVE DAMAGES.

The Chamber, which monitors punitive damages decisions across the country, is particularly well-suited to address the federal constitutional prohibition — acknowledged by Judge Klein in his dissenting opinion below (*Hollock v. Erie Ins. Exchange*, 842 A.2d 409, 422-23 (Pa. Super. Ct. 2004)) — against using a party's litigation conduct to justify imposing liability for (or increasing the amount of) punitive damages for the claim-handling conduct that gave rise to the litigation. Because it is not clear whether the trial court would have imposed punitive damages but for Erie's litigation conduct, the Court should remand with instructions to reconsider punitive liability and, if necessary, the amount of punitive damages.

A. The Due Process Clause Precludes Reliance Upon An Insurer's Litigation Conduct To Establish Liability For, Or Increase The Amount Of, Punitive Damages For The Underlying Claim-Handling Conduct.

As the United States Supreme Court observed in *State Farm*, "[t]he reprehensibility guidepost [of the constitutional excessiveness inquiry] does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance." 538 U.S. at 424. Rather, evidence counts toward the "reprehensibility" that justifies a punitive award only when it bears a specific nexus to the conduct underlying the plaintiff's claim. *See id.* at 422-23 ("A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business."); *Atkinson v. Orkin Exterminating Co.*, 604 S.E.2d 385, 391 (S.C. 2004) (evidence is inadmissible in punitive damages proceedings if it fails "the 'similarity' analysis conducted in *Campbell*"); *cf. Perez Librado v. M.S. Carriers, Inc.*, No. CIV.A. 3:02-CV-20950-D, 2004 WL 1490304, *5 n.9 (N.D. Tex. June 30, 2004) (*State Farm* prohibits consideration of deficient "safety controls that were independent from the acts that arguably caused the accident"); *Utz v. Johnson*, No. CIV.A.04-CV-0437, 2004 WL 2850077, *3 (E.D. Pa. Dec. 9, 2004) ("In this case, the issue is whether the defendant acted reprehensibly when he punched Plaintiff in the face. That is the alleged misconduct. Whether Defendant got into verbal disputes with his peers on other occasions adds little to the discussion."); *Webb v. CSX Transp., Inc.*, 615 S.E.2d 440, 450 (S.C. 2005) (ordering retrial of punitive damages because "much of the evidence * * * of acts unrelated to [railroad] crossing safety in South Carolina admitted in this trial is not constitutionally permissible under *Campbell*").

Not surprisingly, many courts have held that punitive damages cannot be used to punish a defendant for litigation misconduct. *See Ostano Commerzanstalt v. Telewide Sys., Inc.*, 794 F.2d

763, 768 (2d Cir. 1986) (holding that trial court's finding that defendant "fabricated evidence and introduced this false evidence at trial as genuine * * * might well justify the imposition of sanctions, [but] alone does not justify the award of punitive damages"); *James v. Powell*, 19 N.Y.2d 249, 260-61 (1967) (similar); *FDIC v. British-Am. Corp.*, 755 F. Supp. 1314, 1329 (E.D.N.C. 1991) ("Punitive damages are available when *the underlying conduct on which the lawsuit is premised* is willful, wanton, egregious, or the like. They are not intended to redress misconduct occurring during the litigation process. Such misconduct is properly redressed through the Federal Rules of Civil Procedure.") (emphasis in original).

There is no dispute that the trial court relied in large part on Erie's conduct during the litigation in determining liability for and the amount of the punitive damages award. *See, e.g.*, Finding of Fact ¶ 155 ("This Court finds * * * that Erie engaged in a deliberate attempt, both in the depositions and in their trial testimony, to obfuscate the issues at trial, including evading answers to questions, deliberately failing to review documents and file materials in order to feign ignorance, contradicting their sworn deposition testimony, and providing testimony that defies logic and credibility."); Conclusion of Law ¶ 80 ("The Court finds that the totality of the deposition testimony of Erie's representatives and conduct at trial is further evidence of bad faith and a continuation of the pattern of Erie's bad faith conduct which began with the handling of Ms. Hollock's UIM claim . * * * The testimony of most Erie employees (some of whom held positions of considerable importance within the company) is found to be a blatant attempt to undermine the truth finding process of this Court.").

The trial court nowhere found, as *State Farm* requires, that Erie's litigation conduct was "similar" to its conduct in handling the underlying UIM claim. Even if the trial court's reference to the litigation conduct as a "continuation of the pattern" of Erie's underlying conduct could be

construed as a finding of similarity, there is no basis for such a finding. Indeed, the trial court's own description of the two types of conduct makes their ***dis***similarity clear. Erie's (mis)conduct in handling the claim included "challenging the causation and severity of Jean Hollock's injuries * * * [without] a reasonable basis" (Conclusion of Law ¶ 32); engaging in an "unfounded and an ill motivated attempt to justify * * * the setting of the $30,000 reserve" (*id.* ¶ 35); "fail[ing] to investigate Plaintiff's claim within a reasonable time frame" (*id.* ¶ 38); "failing to disclose the correct underinsurance coverage of $500,000" (*id.* ¶ 44); "fail[ing] to make a reasonable offer of settlement" (*id.* ¶ 50); taking "inconsistent positions with respect to handling of the first party and underinsured portions of the claim" (*id.* ¶ 68); and failing to "re-review[] the reserves" (*id.* ¶ 70).

By contrast, according to the court, Erie's (mis)conduct during the litigation consisted of "a blatant attempt to undermine the truth finding process of this Court[,]" — specifically, "an intentional attempt to conceal, hide or otherwise cover-up the conduct of Erie employees in the handling of the *Hollock* claim." *Id.* ¶ 80. That Erie was allegedly attempting in the bad-faith litigation to "cover-up" its underlying claim-handling conduct simply does not mean that the "litigation cover-up" bears any similarity to the underlying conduct for purposes of *State Farm*; to conclude otherwise would be to deprive the similarity requirement of any meaning. If Erie did engage in misconduct during the bad-faith litigation, the remedy should be a court-ordered sanction (or even, in the extreme, a perjury prosecution of the allegedly dissembling witnesses), not imposition of punitive damages in violation of *State Farm*.

To be sure, there may be scenarios when an insurer, during the pendency of a bad-faith action, continues to engage in bad faith ***in its capacity as insurer*** outside the context of the trial. We do not contend that such conduct is irrelevant to liability for and amount of punitive damages

in the bad-faith action. But when the insurer acts only ***in its capacity as a litigant*** during the bad-faith action, its litigation conduct may not constitutionally be used to justify either imposing punitive damages or increasing the amount of punitive damages. *See, e.g.*, Tina M. Oberdorf, *Bad Faith Insurance Litigation in Pennsylvania: Recurring Issues Under Section 8371*, 33 DUQ. L. REV. 451, 468 (1995) ("[H]olding the insurer liable under Section 8371 for bad faith that has nothing to do with the special fiduciary relationship is unfair, unnecessary, and has no statutory foundation."); *Slater v. Liberty Mut. Ins. Co.*, No. CIV. A. 98-1711, 1999 WL 178367, *2 n.3 (E.D. Pa. Mar. 30, 1999) (insurer may be "liable [under Section 8371] for bad faith conduct *arising in the insurer-insured relationship* which happens to occur during the pendency of an action") (emphasis added). Here, there can be no denying that Erie acted as a litigant, not an insurer, during the pendency of the bad-faith action: One year before Hollock filed her bad-faith action, Erie paid Hollock the full limits of her UIM policy, thereby fulfilling its duty as insurer under the policy.

In short, as Judge Klein concluded in his dissenting opinion below, "Erie's actions during the bad faith trial [are] * * * irrelevant * * * to its actions in handling the underlying UIM claim." 842 A.2d at 423. The trial court's reliance on such conduct in imposing punitive damages on Eric therefore violated the U.S. Constitution as explained in *State Farm*.

B. Even If Litigation Misconduct Could Be Considered In Determining Punitive Liability Or The Amount Of Punitive Damages, The Trial Court Violated Erie's Due Process Rights By Not Providing Adequate Notice That Litigation Misconduct Was Going To Be Considered In This Case.

Even if the Court were to conclude that a litigant could be found liable for punitive damages (or have the amount of those damages increased) on the basis of its litigation conduct, the manner in which Erie's litigation conduct was injected into ***this case*** violated Erie's federal due process rights. Hollock's complaint, filed in October 1999, alleged that Erie engaged in bad faith only in regard to its conduct between March 1996 (when Hollock provided Erie notice of an underinsured motorist (UIM) claim) and October 1998 (when Erie paid in full the $500,000 awarded to Hollock by the arbitration panel on her UIM claim). At no point during the litigation of Hollock's bad-faith action did she amend her complaint to allege that Erie's conduct during the litigation was further evidence of bad faith. Nor did the trial court provide Erie with any notice that it intended to rely on Erie's litigation conduct to support the punitive award. As a consequence, Erie was deprived of the opportunity to explain why its litigation conduct did not warrant enhancing the punitive award. Erie's first inkling that it would be punished for its litigation conduct came when the trial court issued its decision on January 7, 2002.

This procedure violated Erie's federal due process rights. As the Supreme Court explained in *BMW*, "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice * * * of the conduct that will subject him to punishment * * *." 517 U.S. at 574. This principle mandates, at the very least, that a defendant be given notice that its litigation conduct may subject it to a punitive award, and an opportunity to respond to any allegations regarding that conduct.

II. AN APPELLATE COURT MUST EMPLOY THE *DE NOVO* STANDARD IN REVIEWING A PUNITIVE AWARD FOR EXCESSIVENESS UNDER THE DUE PROCESS CLAUSE.

The Superior Court's opinion below is somewhat unclear as to what standard the court was applying in reviewing — for excessiveness under the federal constitution — the $2,800,000 punitive damages award imposed by the trial court. The majority first indicated that it found "no abuse of discretion" (842 A.2d at 420) in the trial court's punitive award, and then stated that it was required to undertake "further review of the award to determine whether it comports with the Due Process Clause of the Fourteenth Amendment to the United States Constitution." *Id.* The majority did not, however, specify the standard governing such "further review." The majority's approach is further obscured by the fact that there really was no lower court decision to review on the specific matter of federal Due Process: the trial court never applied the *BMW* guideposts or otherwise addressed whether the punitive award is unconstitutionally excessive. The dissenters (Judges Klein and Hudock), by contrast, explicitly addressed the standard of review, urged adoption of the *de novo* standard, and concluded that the $2,800,000 punitive award is unconstitutional under this standard. *Id.* at 424-25.

State Farm makes inescapably clear that state appellate courts (no less than federal appellate courts) must employ the *de novo* standard in reviewing a punitive damages award for excessiveness under the federal constitution. Moreover, as in *Cooper Industries,* there is every reason to conclude that the erroneous standard made a difference: As we discuss in Section II.B., under a correct application of the three *BMW* guideposts, the $2,800,000 punitive award is unsustainable.

A. State Appellate Courts Must Employ The *De Novo* Standard In Reviewing A Punitive Award For Excessiveness Under The Federal Constitution.

In *Cooper Industries*, the Supreme Court held that a federal district court's resolution of a constitutional challenge to the amount of a punitive award must be reviewed *de novo*. 532 U.S. at 431. What that means is that appellate courts must take a completely independent look at the ***application*** of the three *BMW* guideposts to the facts of the case. *Id.* at 440. At the same time, however, "it of course remains true that the Court of Appeals should defer to the District Court's findings of fact unless they are clearly erroneous." *Id.* at 440 n.14.

Though *Cooper Industries* arose from the lower federal courts, *State Farm* arose from state court; in holding *Cooper Industries* applicable in that context, the Supreme Court removed any doubt that state appellate courts, no less than federal appellate courts, must review *de novo* the constitutionality of a punitive damages award — which is to say, must engage in an independent application of the *BMW* guideposts to the facts of the case. *See State Farm*, 538 U.S. at 418 ("*Cooper Industries* * * * mandate[s] appellate courts to conduct *de novo* review of a trial court's application of [the *BMW* guideposts] to the jury's award."). The Supreme Court made clear that *de novo* review is a requirement of procedural due process, explaining that "[e]xacting appellate review ensures that an award of punitive damages is based upon an application of law, rather than a decisionmaker's caprice." *Id.* (internal quotation marks omitted).

Not surprisingly, in the wake of *State Farm*, state appellate courts have uniformly embraced the *de novo* standard of review. *See, e.g., Union Pac. R.R. Co. v. Barber*, 149 S.W.3d 325, 347 (Ark.) ("A [*BMW v.*] *Gore* analysis is to be undertaken by the appellate court *de novo*."), *cert. denied*, 125 S.Ct. 320 (2004); *Simon v. San Paolo U.S. Holding Co.*, 113 P.3d 63, 70 (Cal. 2005) ("In deciding whether an award of punitive damages is excessive under *State*

Farm and its predecessors, we are to review the award de novo, making an independent assessment [of the three guideposts]."); *Daka, Inc. v. McCrae*, 839 A.2d 682, 697 (D.C. 2003) ("appellate courts must 'conduct *de novo* review of a trial court's application of [the guideposts] to the jury award'") (quoting *State Farm*, 538 U.S. at 418) (alteration in original); *Stroud v. Lints*, 790 N.E.2d 440, 443 (Ind. 2003) (similar); *Wolf* v. *Wolf*, 690 N.W.2d 887, 894 (Iowa 2005) (similar); *Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 53 (Ky. 2003) (similar); *Bocci v. Key Pharms., Inc.*, 76 P.3d 669, 672-73 (Or. Ct. App. 2003) (similar); *Bunton v. Bentley*, 153 S.W.3d 50, 54 (Tex. 2004) (similar); *Atkinson*, 604 S.E.2d at 390 (similar).

B. The Superior Court's Failure To Apply *De Novo* Review Was Prejudicial Because A Proper Application Of The *BMW* Guideposts Would Compel The Conclusion That The $2,800,000 Punitive Award Is Unconstitutionally Excessive.

As noted, the trial court did not even address the *BMW* guideposts. The Superior Court purported to do so, but gave no indication that its application of those guideposts was *de novo*. Indeed, the manner in which it (mis)applied each of the guideposts suggests that it did not. Under a proper application of the guideposts, there can be no doubt that the $2,800,000 punitive award here is unconstitutionally excessive.[1]

1. Erie's conduct was not sufficiently reprehensible to justify a seven-figure sanction.

The first guidepost is "the degree of reprehensibility of the defendant's conduct." *State Farm*, 538 U.S. at 419 (internal quotation marks and citation omitted). Put succinctly, "punitive damages may not be grossly out of proportion to the severity of the offense." *BMW*, 517 U.S. at 576 (internal quotation marks omitted).

---

[1] As shown in Point I, the trial court's reliance on Erie's litigation conduct was improper under *State Farm*; to the extent the punitive award rests on that conduct, it is unsustainable for that reason as well.

In *State Farm*, the Supreme Court instructed lower courts to consider five factors when measuring the degree of reprehensibility of the defendant's conduct: (i) whether "the harm caused was physical as opposed to economic"; (ii) whether "the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others"; (iii) whether "the target of the conduct had financial vulnerability"; (iv) whether "the conduct involved repeated actions or was an isolated incident"; and (v) whether "the harm was the result of intentional malice, trickery, or deceit, or mere accident." 538 U.S. at 419. Importantly, the Court added, "[t]he existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." *Id.* Here, only one of the five reprehensibility factors (financial vulnerability) is arguably present. Accordingly, assuming *arguendo* that Erie's conduct crossed the threshold for punitive liability at all, it surely did so only barely and hence falls on the far low end of the reprehensibility spectrum.

First, there can be no denying that Erie did not inflict physical injury on Hollock. Nor did Erie do anything to exacerbate the physical injury that she suffered in her 1992 car accident. The trial court acknowledged that "Erie paid [without challenge] the Plaintiff's medical bills and wage losses, including the medical bills and wage losses relative to the April 1993 ulnar surgery * * *" (Conclusion of Law ¶ 68), found that Erie's delay in paying the UIM claim caused Hollock "financial hardship and the emotional and psychological toll of testifying at the arbitration" (*id.* ¶ 72), but nowhere found that she suffered ***physical*** harm as a result of Erie's conduct. Neither the trial court nor the Superior Court addressed this factor, which points toward the conclusion that the punitive award is unconstitutionally excessive. *See Bach v. First Union Nat'l Bank*, No. 04-3899, 2005 WL 2009272, at *9 (6th Cir. Aug. 22, 2005) ("Although Bach

attempts to argue that the harm caused in this case was both physical and economic because of the resulting emotional distress, this is not the sort of physical injury the *State Farm* case contemplates, and thus, the first factor is not present.").

Second, there is no basis for a finding that Erie's conduct toward Hollock "evinced an indifference to or a reckless disregard of the health or safety of others." *State Farm*, 538 U.S. at 419. Again, neither the trial court nor the Superior Court addressed this factor, which points toward the conclusion that the punitive award is unconstitutionally excessive. *See, e.g., Bach*, 2005 WL 2009272, at *9.

Third, assuming *arguendo* that Hollock may be considered to be financially vulnerable, the important inquiry for purposes of this factor is whether Erie intentionally targeted her for claim mishandling ***because*** she was financially vulnerable. *See BMW*, 517 U.S. at 576. To be sure, not all courts agree with this limitation (*see Bach*, 2005 WL 2009272), but there is no denying that the mere happenstance that a plaintiff is financially vulnerable is insufficient basis for treating the tort that injured that person as being especially reprehensible. Hence, the cases that have treated financial vulnerability as a material aggravating factor tend to be ones in which the defendant knowingly and deliberately took advantage of the plaintiff's vulnerability. *See, e.g., Neibel v. Trans World Assurance Co.*, 108 F.3d 1123, 1126, 1132 (9th Cir. 1997) (finding scheme to prey on "Joe Lunch Buckets" sufficiently reprehensible to justify a $500,000 punitive award); *Life Ins. Co. of Ga. v. Johnson*, 701 So.2d 524, 526-29 (Ala. 1997) (holding $3 million punitive award constitutional where defendant engaged in a pattern of selling worthless Medicare supplement policies to "elderly, uneducated, single black women").

In any event, the mere fact that Hollock was financially vulnerable in no way distinguishes her from the plaintiffs in *State Farm* — a case in which the Supreme Court

indicated that a punishment equal to compensatory damages was likely the constitutional maximum. *See* 538 U.S. at 429. As the Supreme Court emphasized in *State Farm*, "[t]he existence of any one of [the reprehensibility] factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award." *Id.* at 419.

Fourth, Hollock adduced no evidence that Erie mishandled any claim other than her own. The Superior Court misunderstood this factor in holding that it supports the punitive award. That Erie engaged in "repeated acts of reckless indifference ***toward Hollock***" (842 A.2d at 421; emphasis added) does not establish that Erie was a recidivist (which involves repeated wrongdoing ***toward others***). As the Third Circuit recently explained:

> The "repeated conduct" alleged in [*State Farm v.*] *Campbell* related to the insurer's nationwide claims handling practices across thousands of claims, not to the series of unreasonable decisions various State Farm employees made in handling the Campbells' specific claim. Here, the District Court improperly considered the various stonewalling tactics employed by [the insurer] in processing [the insured's] claim to satisfy the "repeated conduct" reprehensibility subfactor of *Gore* and *Campbell*.

Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co., 399 F.3d 224, 232 (3d Cir. 2005); *accord Bach*, 2005 WL 2009272, at *9 ("It appears that the Supreme Court has interpreted this factor to require that the similar reprehensible conduct be committed against various different parties rather than repeated reprehensible acts within the single transaction with the plaintiff."); *Simon*, 113 P.3d at 76 ("although San Paolo Holding's conduct could be characterized as more than a single isolated incident, as the evidence showed deceptive conduct by King spanning several weeks, the tortious act on which liability was based was a single false promise (or set of promises) made in the letter of intent, and ***no evidence indicated [that] King had acted similarly toward other potential buyers***") (emphasis added); *Park v. Mobil Oil Guam, Inc.*, No. CVA03-001, 2004 WL 2595897, at *13 (Guam 2004) ("Although the wrongful acts committed against

Park spanned several years and therefore may be considered 'repeated actions,' the Supreme Court cases refer to the frequency of *past* similar conduct of the defendant in question, similar to a repeat offender status in a criminal case.") (emphasis in original).

Fifth, although the trial court found that Erie engaged in some deceptive conduct — specifically, that Erie's adjuster misled Hollock's attorney John Nardone "into believing that the correct coverage was $250,000" by "fail[ing] to respond to Mr. Nardone's specific coverage request" (Finding of Fact ¶ 45) — to call a mere failure to respond to a customer's request for information "deceit" is to render this factor useless as a means of distinguishing highly reprehensible conduct from conduct that barely supports an award of punitive damages. And even if the adjuster's unresponsiveness does qualify as deceit, the Supreme Court has explained that "the omission of a material fact may be less reprehensible than a deliberate false statement." *BMW*, 517 U.S. at 580. Certainly, the adjuster's failure to respond to the attorney's inquiry is far less egregious than the affirmative misrepresentations involved in *State Farm* itself. There, "[t]he trial court found that State Farm's employees altered the company's records to make Campbell appear less culpable [to third parties whom Campbell had injured in a car accident]." 538 U.S. at 419. In addition, the company falsely assured him and his wife that "their assets were safe, that they had no liability for the accident, that [State Farm] would represent their interests, and that they did not need to procure separate counsel." *Id.* at 413.

2. Application of the ratio guidepost compels the conclusion that the punitive award is unconstitutionally excessive.

In *State Farm*, the Supreme Court undertook to provide lower courts with more detailed guidance regarding the ratio guidepost than it had supplied in previous cases. Specifically, the Court stated that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process"; reiterated that a punitive award of

four times compensatory damages generally "might be close to the line of constitutional impropriety"; indicated that, though "not binding," the 700-year-long history of double, treble, and quadruple damages remedies (*i.e.*, rations of 1:1 to 3:1) is "instructive"; and explained that, although a higher ratio may be permissible when "a particularly egregious act has resulted in only a small amount of economic damages," "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S. at 425. Applying these guidelines to the facts of the case before it, the Court observed that, even though State Farm's conduct was "reprehensible" and "merit[ed] no praise" (*id.* at 419-20), "a punitive damages award at or near the amount of compensatory damages" — *i.e.*, a 1:1 ratio — was likely the constitutional maximum. *Id.* at 429.

Although the Supreme Court declined "to impose a bright-line ratio which a punitive damages award cannot exceed" (*id.* at 425), the decision nonetheless suggests that the maximum permissible ratio generally is a function of two variables — the degree of reprehensibility of the conduct and the amount of compensatory damages — with the legislatively established penalty for comparable conduct serving as an additional check. The maximum permissible ratio is directly related to the former and inversely related to the latter. In other words, for any particular degree of reprehensibility, as the compensatory damages increase, the maximum permissible ratio decreases. And for any particular amount of compensatory damages, the lower on the reprehensibility spectrum the conduct falls, the lower the constitutionally permissible ratio.

Beyond these general parameters, the following more specific framework is fairly discernible from *State Farm*.

First, ratios in excess of 9:1 are presumptively unconstitutional. *State Farm*, 538 U.S. at 425. Such ratios generally will be permissible only if the compensatory damages are "small"[2] ***and*** the defendant's conduct is "particularly egregious." *Id.*[3]; *see also Bains*, 405 F.3d at 776 (observing that a punitive/compensatory ratio in excess of 9:1 is permissible only when "'a particularly egregious act has resulted in only a small amount of economic damages'" and that because $50,000 is "substantial," not "small," "[t]he controlling Supreme Court authority therefore implies a punitive damages ceiling in this case of, at most, $450,000 (nine times the compensatory damages)—not anywhere near the $5,000,000 (100 times the compensatory damages) that was awarded by the jury") (quoting *State Farm*, 538 U.S. at 425); *DeNofio v. Soto*, No. CIV.A. 00-5866, 2003 WL 21488668 (E.D. Pa. June 24, 2003) (observing that *State Farm* sets single-digit limit on ratio of punitive to compensatory damages); *McClain v. Metabolife Int'l, Inc.*, 259 F. Supp. 2d 1225, 1231 (N.D. Ala. 2003) ("As this Court reads *State Farm*, if the ratio of punitive to compensatory damages exceeds 9 (the highest possible single digit), a red flag goes up. This is the most potent ingredient in the witch's brew.").

---

[2] Although the precise definition of "small" is an open question, it is certainly clear that the compensatory damages award of $278,825.90 here is not "small." *See BMW*, 517 U.S. at 582-83 (discussing exception for cases in which "a particularly egregious act has resulted in only a small amount of economic damages," while giving no indication that $4,000 award in case before it qualified for that exception); *Bains LLC v. ARCO Prods. Co.*, 405 F.3d 764, 776 (9th Cir. 2005) ($50,000 is "substantial," not "small"); *Jones v. Sheahan*, No. 99 C 3669, 2003 WL 22508171, at *16 (N.D. Ill. Nov. 4, 2003) (stating in civil rights case in which injured prisoner was awarded $25,000 in compensatory damages that "this case does not strike us as one where compensatory damages are so low that a double-digit multiplier of punitive damages might be permissible"); *cf. Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003) (upholding 37:1 ratio in case in which two plaintiffs received $5,000 compensatory awards because the conduct was "outrageous but the compensable harm done was slight and at the same time difficult to quantify because a large element of it was emotional").

[3] The Supreme Court also left open the possibility that "a higher ratio *might* be necessary where 'the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.'" *State Farm*, 538 U.S. at 425 (quoting *BMW*, 517 U.S. at 582) (emphasis in original). Neither of those circumstances is present here.

Second, the *State Farm* Court appeared to view 4:1 as an outside limit for most cases — even those involving conduct of high reprehensibility. Although its discussion of the ratio guidepost may allow room for a ratio between 4:1 and 9:1 when the conduct is highly reprehensible ***and*** the compensatory damages, though not "small," are also not "substantial," 4:1 (or even 3:1) will generally be the constitutional maximum when one or both of those features is absent. Put another way, a ratio of up to 3:1 or 4:1 may be constitutionally permissible if either (i) the conduct is highly reprehensible and the compensatory damages are "substantial" or (ii) the conduct is of moderate reprehensibility and the compensatory damages are neither "small" nor "substantial."

Many of the lower courts have reiterated and reinforced this precept. The Texas Court of Appeals, for example, held, in a fraud and malicious conversion case involving $200,082 in compensatory damages, that, "because there were sizable economic damages" and discovery sanctions against the defendant, "the circumstances and context of this case do not merit a ratio that exceeds four to one." *Cass v. Stephens*, 156 S.W.3d 38, 77 (Tex. App. 2004). The court then reduced the $5 million punitive award to $600,000, "find[ing] * * * a ratio of punitive to compensatory damages of three to one [to be] constitutionally permissible." *Id.*; *see also Textron Fin. Corp. v. Nat'l Union Fire Ins. Co.*, 13 Cal. Rptr. 3d 586, 605 (Cal. Ct. App. 2004) (reducing ratio from 60:1 to 4:1); *Diamond Woodworks, Inc. v. Argonaut Ins. Co.*, 135 Cal. Rptr. 2d 736, 762 (Cal. Ct. App. 2003) (reducing ratio from 33:1 to 4:1); *Taylor Woodrow Homes, Inc. v. Acceptance Ins. Cos.*, No. G029532, 2003 WL 21224088, at *5 (Cal. Ct. App. May 28, 2003) (reducing ratio from 17:1 to 3.4:1); *Waddill v. Anchor Hocking, Inc.*, 78 P.3d 570, 576 (Or. Ct. App. 2003) (reducing ratio from 10:1 to 4:1); *Harris v. Archer*, 134 S.W.3d 411, 449 (Tex. App. 2004) (reducing ratio from 7.4:1 to 4:1); *Chapa v. Tony Gullo Motors I, L.P.*, No. 09-03-568-

CV, 2004 WL 1902533 (Tex. App. Aug. 26, 2004) (reducing ratio from 8.7:1 to 4.3:1); *Park*, 2004 WL 2595897, at *12-16 (upholding reduction of 56:1 ratio to 3:1 where compensatory damages were $50,000 and defendant's "conduct was not 'a particularly egregious act'") (quoting *State Farm*, 538 U.S. at 425); *SAS & Assocs., Inc. v. Home Mktg. Servicing, Inc.*, No. 05-04-01297-CV, 2005 WL 1594402 (Tex. App. July 6, 2005) (affirming trial court's reduction of ratio from 26.4:1 to 3:1).

The federal courts, too, have found 4:1 to be the outer limit in most cases involving six-digit compensatory awards, no matter how egregious the misconduct. For example, in *Fresh v. Entertainment U.S.A. of Tennessee, Inc.*, 340 F. Supp. 2d 851 (W.D. Tenn. 2003), the court reduced a punitive award of $2 million to $717,610, where the plaintiff had received $179,402 in compensatory damages and medical expenses incurred as a result of an assault committed by the defendant's employees. Heeding *State Farm*'s discussion of the ratio guidepost, the court found "[t]he award in this case [to be] excessive when viewed as either a deterrent or punitive measure." *Id.* at 860. Given the "substantial amount of compensatory damages and medical expenses awarded in this case, a single-digit multiplier of four (4) appropriately complies with the constitutional limitations most recently set forth in *Campbell* * * *." *Id.* In *Young v. DaimlerChrysler Corp.*, No. IP 01-0299-C-M/S, 2004 WL 2538639 (S.D. Ind. Oct. 19, 2004), a case involving discrimination against a disabled worker, the court reduced a punitive award of $4.5 million to $300,000. The compensatory damages were $100,000, and the court concluded that, despite the "relatively high reprehensibility" of the defendant's conduct, a 3:1 ratio was the constitutional maximum.[4] *See also Waits v. City of Chicago*, No. 01 C 4010, 2003 WL 21310277 (N.D. Ill. June 6, 2003) (reducing 133:1 ratio to 3:1 where compensatory damages

[4] As a result of a $300,000 statutory cap on total damages, the plaintiff in *Young* ultimately received only $200,000 in punitive damages.

were $15,000). Indeed, the Eighth Circuit held that a 4:1 ratio was the "due process maximum" in a wrongful death case against the operators of a nursing home whose employees "failed to treat [the decedent's] lengthy constipation and ignored their duty to contact her treating physician despite numerous requests that they do so" and who were engaged in "a practice of careless and at times fraudulent charting of residents' condition[s]." *Stogsdill v. Healthmark Partners, L.L.C.*, 377 F.3d 827, 832 (8th Cir. 2004).

Third, when compensatory damages are "substantial" and the conduct is not at the high end of the reprehensibility spectrum, a ratio of 1:1 or below will generally be the most that is constitutionally permissible. *See State Farm*, 538 U.S. at 420, 429 (strongly suggesting that "a punitive damages award at or near the amount of compensatory damages" was the most that constitutionally could be permitted for intentionally deceitful conduct that the Supreme Court freely acknowledged was "reprehensible"); *see also Boerner v. Brown & Williamson Tobacco Co.*, No. 03-3557, 2005 WL 30394, at *6-*7 (8th Cir. Jan. 7, 2005) (holding that "a ratio of approximately 1:1 would comport with the requirements of due process" in case in which compensatory damages were "substantial" and conduct was deemed to be "highly reprehensible"); *Ceimo v. Gen. Am. Life Ins. Co.*, No. 03-16882, 2005 WL 1523445 (9th Cir. June 29, 2005) (unpublished) (affirming reduction of $79,000,000 punitive award to $7,000,000 where compensatory damages were $6,692,610.60); *Czarnik v. Illumina, Inc.*, No. D041034, 2004 WL 2757571 (Cal. App. Dec. 3, 2004) (reducing $5,000,000 punitive award to $2,196,934, the exact amount of compensatory damages). A 1:1 ratio also should generally mark the constitutional line when compensatory damages are neither "small" nor "substantial" and the conduct is on the lower end of the reprehensibility spectrum.

* * * * *

The ratio of punitive to compensatory damages in this case is 10:1, rendering the gross excessiveness of the award immediately apparent.[5] Even before any consideration of the (low) reprehensibility of the conduct and the (substantial) size of the compensatory award, it is clear that this case does not fit into either of *State Farm*'s exceptions to its single-digit rule; accordingly, without any further analysis of the record it is obvious that the ratio cannot exceed 9:1. *See* page 17, *supra*.[6]

Consideration of those two key factors, moreover, demonstrates that the applicable limit here is well below 9:1, and that even a ratio of 4:1 would be unconstitutionally excessive. As discussed above, there can be no question that Erie's conduct was on the low end of the

---

[5] The dissenting opinion below suggested that Erie's payment to Hollock of $500,000 on the underlying insurance policy should be included within the category of compensatory damages ***in this bad-faith*** action, which would yield a total compensatory award of $778,825, and a punitive-to-compensatory ratio of 3.6:1. *See* 842 A.2d at 424 (Klein, dissenting). Notably, the dissenting opinion found that even this lower ratio was unconstitutionally excessive and that the maximum permissible ratio here should be 1:1 given the relatively low reprehensibility of Erie's conduct, which represents nothing "other than the mishandling of one file." *Id.*

We disagree with the dissent's inclusion in compensatory damages of the insurance policy payment made by Erie entirely outside the context of this litigation. We submit that the majority opinion was correct on this point in considering as compensatory damages only the attorneys' fees, costs, and interest made available by 42 PA. CONS. STAT. ANN § 8371 (1998). *See* 842 A.2d at 413, 421-22; *see also Willow Inn*, 399 F.3d at 235 (holding in action under Section 8371 that compensatory damages for purposes of ratio analysis should include only "the attorney fees and costs awarded as part of the § 8371 claim").

[6] The Superior Court based its contrary conclusion largely on *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003). There, the U.S. Court of Appeals for the Seventh Circuit upheld two $186,000 punitive awards that were roughly 37 times the compensatory damages. *Id.* at 677-78. But that case involved both markedly smaller compensatory damages than this case ($5,000 per plaintiff as compared to $278,825) and a higher degree of reprehensibility (repeatedly and knowingly subjecting hotel guests to rooms infested with bed bugs). Accordingly, it is nothing more than a straightforward application of the Supreme Court's exception for cases in which "a particularly egregious act has resulted in only a small amount of economic damages." *State Farm*, 538 U.S. at 425 (internal quotation marks omitted). As discussed above, the present case does not satisfy either of the two conjunctive requirements for an exception to the single-digit presumption.

reprehensibility scale — satisfying at most one of the five reprehensibility factors. Erie's conduct is certainly no more egregious than the conduct in *State Farm* itself, where the insurer was found to have deliberately deceived two vulnerable senior citizens, exposing them to the risk of losing their home, and yet the Supreme Court suggested that a punitive award equal to the compensatory award (*i.e.*, a 1:1 ratio) would be the maximum permissible. 538 U.S. at 413, 419.

Moreover, as in *State Farm*, plaintiff's compensatory award "was substantial" and constitutes "complete compensation." *Id.* at 426; *see Willow Inn*, 399 F.3d at 236 ("Section 8371's attorney fees and costs provisions vindicate the statute's policy by enabling [the insured] to bring § 8371 actions alleging bad faith delays to secure counsel on a contingency fee."). Accordingly, when both the modest degree of reprehensibility and fully-compensating amount of compensatory damages are taken into account, it is clear that the maximum constitutionally permissible ratio is at or near 1:1.

The Eighth Circuit recently reached this precise conclusion in a case in which the defendant was held liable for racial harassment and the plaintiff was awarded $600,000 in compensatory damages and over $6 million in punitive damages. *Williams v. ConAgra Poultry Co.*, 378 F.3d 790 (8th Cir. 2004). The evidence was that the plaintiff's supervisor "regularly swore at him and berated him in front of other employees," that "he treated [the plaintiff] and other black employees with special scorn," that he and other employees "regularly used racially demeaning language around [the plaintiff]," that "there was a pervasive practice of using a double standard for evaluating and disciplining white and black employees," that "white managers were extended privileges, like travel at company expense, unavailable to black employees," and that "black employees were given shorter breaks than white employees." *Id.* at

795, 798. Nevertheless, the Eighth Circuit held that a 1:1 ratio of punitive to compensatory damages was required under *State Farm*, explaining:

> Mr. Williams' large compensatory award * * * militates against departing from the heartland of permissible exemplary damages. The Supreme Court has stated that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." Mr. Williams received $600,000 to compensate him for his harassment. Six hundred thousand dollars is a lot of money. Accordingly, we find that due process requires that the punitive damages award on Mr. Williams' harassment claim be remitted to $600,000.

Id. at 799 (citation omitted). Here, too, to paraphrase the Eighth Circuit, $278,825 "is a lot of money." Accordingly, if the conduct in *Williams* was not sufficiently egregious to warrant a ratio in excess of 1:1, the same necessarily is so in this case in which the conduct was not anywhere near as reprehensible.

The Third Circuit's decision in *Willow Inn* is also instructive. There, the compensatory damages (*i.e.*, attorneys' fees and costs) awarded in a Section 8371 action amounted to $135,000. The Third Circuit sustained a punitive award of $150,000 — "approximately a 1:1 ratio." 399 F.3d at 235. The court deemed this ratio to be "reasonable," concluding that this punitive award along with the significant compensatory award sufficed to fulfill "'[t]he obvious design of the Pennsylvania statute[:] first, to place [plaintiffs] in the same economic position they would have been in had the insurer performed as promised, by awarding attorney's fees as additional damages; and second, to punish [the insurer] for giving primacy to its own self-interest over that of the [insureds] by awarding punitive damages.'" *Id.* at 237 (quoting *Klinger v. State Farm Mut. Auto Ins. Co.*, 115 F.3d 230, 236 (3d Cir. 1997)) (third, fourth and fifth alterations in original). So too here, the even greater compensatory award ($278,825) and a roughly equal punitive award would satisfy the statute's goals without imposing an unconstitutionally

excessive punishment on Erie. The dissent below reached exactly this conclusion. *See* 842 A.2d at 424.

The Superior Court majority, by contrast, misunderstood *State Farm*'s framework for analyzing the ratio guidepost. First, the court erred in assuming that a ratio that "barely exceeds" the 9:1 ratio discussed in *State Farm* is therefore not necessarily unconstitutionally excessive; the court neglected *State Farm*'s explanation (which we summarized above at pages 18-20) that a 4:1 ratio is the outside limit for most cases — even those involving conduct of high reprehensibility, and that a 1:1 ratio is the maximum for cases involving a substantial compensatory award and a low to moderate degree of reprehensibility. Second, the Superior Court also erred in labeling the instant compensatory award "limited." There is, to our knowledge, no other case holding that a compensatory award of close to $300,000 is "small. And many cases hold that compensatory awards far lower than this were "substantial." *See* note 2, *supra*. Third, as also explained below (pp. 25-27), the court erred in relying upon Erie's "significant wealth" and in finding that Erie's conduct was high on the reprehensibility scale.

3. A comparison of the $2.8 million punitive award to available civil penalties likewise demonstrates that the award is grossly excessive.

The third *BMW* guidepost requires a comparison between "the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct." 517 U.S. at 583. The majority opinion below properly identified as "comparable" the $5,000-per-violation penalty imposed by the Unfair Insurance Practices Act, 40 PA. CONS. STAT. ANN. § 1171.11 (1999), but went on to justify a punishment ***560*** times that penalty on the ground that "upon a determination that the Act has been violated, the Commissioner may suspend or revoke the offender's license." 842 A.2d at 422.

That precise rationale was employed by the Utah Supreme Court — and summarily rejected by the U.S. Supreme Court — in *State Farm*. 538 U.S. at 428. As the dissent below pointed out, "absent proof of a pattern of this kind of behavior on the part of Erie, it is unlikely that the company would be suspended or that any significant fine would be imposed by the insurance department." 842 A.2d at 424 (Klein, J., dissenting). That observation is surely correct. Given the number of claims that are handled by insurers on a daily basis, an occasional adjudication of bad faith is inevitable for even the most respected of companies. If that were sufficient to warrant suspension of an insurer's license, Pennsylvania would soon confront an insurance crisis of enormous proportions.

Because the point of the third guidepost is to determine whether the defendant had fair notice of the extent to which it could be punished, the Superior Court majority's "speculat[ion]" that Erie could lose its license (*State Farm*, 538 U.S. at 428) is an inadequate basis for sustaining the $2.8 million exaction. The relevant comparator is the $5,000 maximum penalty for violations of the Unfair Insurance Practices Act. Because the punitive award bears no reasonable relationship to that maximum penalty, it is unconstitutionally excessive. *See, e.g.*, *Bains*, 405 F.3d at 777 ($5 million punitive award was excessive in relation to $300,000 civil penalty authorized under Title VII).

4. The Trial Court Placed Substantial Reliance Upon Erie's Wealth, Despite *State Farm*'s Admonition That Wealth Is An Impermissible Consideration In Imposing Punitive Damages.

Not only did both lower courts fail adequately to apply the three *BMW* guideposts, the trial court's substantial reliance upon Erie's wealth in setting the amount of punitive damages independently confirms that the award is unconstitutionally excessive. The trial court held that, "[g]iven Erie's expansive net worth (averaging $4.8 billion from 1996 through 2000 * * *), a significant punitive damage award is necessary in order to deter Erie from engaging in similar

conduct to other policy holders. * * * This Court finds that an award of $2.8 million in punitive damages is necessary to deter Erie from similar conduct. In rendering this award, the Court has considered * * * the financial condition of the Defendant." Conclusions of Law ¶¶ 97, 103.

The court's conclusion that a multi-million dollar punishment is necessary because of Erie's financial condition cannot be squared with the Supreme Court's holding that "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." *State Farm*, 538 U.S. at 427. *See also id.* (the defendant's wealth "bear[s] no relation to the award's reasonableness or proportionality to the harm").

That rule, while grounded in the federal Constitution's Due Process Clause, is also fully supported by economic theory. To put it simply, "[a] potentially liable [organizational] defendant will compare the benefits it will derive from an action that risks tort liability against the discounted present expected value of the liability that will be imposed if the risk occurs. Whether a[n organizational] defendant is wealthy or poor, this cost-benefit calculation is the same." K. Abraham & J. Jeffries, *Punitive Damages and the Rule of Law: The Role of the Defendant's Wealth*, 18 J. LEGAL STUD. 415, 418 (1989); *accord* A. Polinsky & S. Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 911 (1998); *see also, e.g.*, *Zazu Designs v. L'Oreal S.A.*, 979 F.2d 499, 508 (7th Cir. 1992) ("[C]orporate assets finance ongoing operations and are unrelated to either the injury done to the victim or the size of the award needed to cause corporate managers to obey the law. Net worth is a measure of profits that have not yet been distributed to investors. Why should damages increase because the firm reinvested its earnings?").

Even if corporate financial condition were relevant to deterrence, however, the Supreme Court has made clear that no punitive award can be "justified on the ground that it was necessary

to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal." *BMW*, 517 U.S. at 584. Here, as in *BMW* (in which the punitive damages were less than the $2.8 million exaction confronting Erie), "[i]n the absence of a history of noncompliance with known statutory requirements, there is no basis for assuming that a more modest sanction would not have been sufficient to motivate full compliance" with Erie's duties to its insureds. *Id.* at 584-85.

CONCLUSION

The judgment of the trial court should be vacated, and the Court should remand with instructions to determine whether Erie should be liable for punitive damages, and, if so, in what amount, without consideration of the litigation conduct.

Respectfully submitted,

MAYER, BROWN, ROWE & MAW LLP
Patricia H. Becker
Attorney I.D. No. 73837
1909 K Street, N.W.
Washington, DC 20006-1101
(202) 263-3366

Of Counsel:
Evan M. Tager
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, N.W.
Washington, DC 20006-1101
(202) 263-3240

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5537

Attorneys for Amicus Curiae Chamber of Commerce of the United States of America

PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa. R. A. P. 121:

Two copies, service by first class mail addressed as follows:

Timothy G. Lenahan, Esq. (570) 346-2097
Lenahan & Dempsey, P.C.
Suite 400 Kane Building
116 North Washington Avenue
P.O. Box 234
Scranton, PA 18501-0234
(Counsel for Appellee Jean A. Hollock)

Daniel B. Huyett, Esq. (610) 478-2000
Stevens & Lee, P.C.
111 North Sixth Street
P.O. Box 679
Reading, PA 19603-0679
(Counsel for Appellant Erie Insurance Exchange)

William H. Lamb, Esq. (610) 430-8000
Lamb McErlane PC
24 East Market
P.O. Box 565
West Chester, PA 19381-0565
(Counsel for Appellant Erie Insurance Exchange)

Dated: September 15, 2005

Patricia H. Becker