
IN THE SUPREME COURT OF PENNSYLVANIA

13 WAP 2022 & 14 WAP 2022

The Bert Company d/b/a
Northwest Insurances Services

Plaintiff/Appellee,

v.

Matthew Turk, William Collins,
Jamie Heynes, David McDonnell, First National
Insurance Agency, LLC, First National Bank, and FNB Corporation,

Appeal of: Matthew Turk, First National Insurance Agency, LLC,
First National Bank, and FNB Corporation.

Defendants/Appellants.

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

Appeal from Orders of the Superior Court of Pennsylvania entered May 5, 2021 at 817 WDA 2019 and 975 WDA 2019, Affirming the Judgment of and Dismissing as Moot the Cross-Appeal from the Court of Common Pleas of Warren/Forest County, Pennsylvania entered June 3, 2019 at A.D. 260 of 2017.

Of Counsel:

Jonathan D. Urick
Tyler S. Badgley
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Robert L. Byer (25447)
Ryan F. Monahan*
DUANE MORRIS LLP
30 South 17th Street
Philadelphia, PA 19103
(412) 497-1083

**Not admitted to practice in
Pennsylvania; admitted to
practice in New York only.*

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
INTEREST OF AMICUS CURIAE.....	1
INTRODUCTION.....	3
ARGUMENT	4
I. The Court Should Adopt Clearer Guidelines Regarding the Imposition of Punitive Damages.	4
A. The United States Supreme Court Has Provided General Guideposts for the Imposition of Punitive Damages.	6
B. This Court Should Adopt Brighter Guidelines Consistent With Other Courts to Address Excessive Punitive-damages Awards.	12
1. The Court should adopt a presumption of unconstitutionality when punitive damages are more than nine times the compensatory damages.....	13
2. The Court should recognize that no more than a one-to-one ratio of punitive to compensatory damages is appropriate when compensatory damages are “substantial.” ...	16
II. The Court Should Reject the Superior Court’s Consideration of “Potential Harm” and Calculation of the Punitive-to-Compensatory Damages Ratio.	20

A.	The Court Should Limit Considerations of Potential Harm to Exceptional Cases.....	20
B.	The Court Should Adopt a ‘Per-Judgment’ Approach to the Calculation of the Punitive-to-Compensatory Damages Ratio.....	22
	CONCLUSION.....	25
	CERTIFICATES OF COMPLIANCE.....	26

TABLE OF AUTHORITIES

Cases

<i>Advocat, Inc. v. Sauer,</i> 111 S.W.3d 346 (Ark. 2003)	23
<i>Alabama River Group, Inc. v. Conecuh Timber, Inc.,</i> 261 So.3d 226 (Ala. 2017)	14
<i>Bardis v. Oates,</i> 119 Cal. App. 4th 1 (2004)	23
<i>BMW of North America, Inc. v. Gore,</i> 517 U.S. 559 (1996)	<i>Passim</i>
<i>Boerner v. Brown & Williamson Tobacco Co.,</i> 394 F.3d 594 (8th Cir. 2005)	17
<i>Exxon Shipping Co. v. Baker,</i> 554 U.S. 471 (2008)	<i>Passim</i>
<i>Honda Motor Co., Ltd. v. Karl L. Oberg,</i> 512 U.S. 415 (1994)	6, 10
<i>Horizon Health Corp. v. Acadia Healthcare Co., Inc.,</i> 520 S.W.3d 848 (Tex. 2017)	22
<i>Luri v. Republic Servs., Inc.,</i> 953 N.E.2d 859 (Ohio Ct. App. 2011)	24
<i>Merchants FoodService v. Rice,</i> 286 So.3d 681 (Ala. 2019)	14
<i>Merrick v. Paul Revere Life Ins. Co.,</i> 594 F. Supp.2d 1168 (D. Nev. 2008)	22

<i>Nardelli v. Metro. Grp. Prop. & Cas. Ins. Co.</i> 277 P.3d 789 (Ariz. Ct. App. 2012).....	18-19
<i>Olson v Brenntag N. Am., Inc.</i> , No. 190328/2017, 2020 WL 6603580 (N.Y. Sup. Ct. 2020).....	23-24
<i>Pac. Mut. Life Ins. Co. v. Haslip</i> , 499 U.S. 1 (1991)	5-6, 16, 19
<i>Payne v. Jones</i> , 711 F.3d 85 (2d Cir. 2013).....	6, 15, 18-19
<i>Phillips v. Garrison Prop. & Cas.</i> , No. 2:19-cv-01727-JEO, 2020 WL 3118415 (N.D. Ala. May 12, 2020).....	14
<i>Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists</i> , 422 F.3d 949 (9th Cir. 2005)	22
<i>Saccameno v. U.S. Bank Nat’l Assn.</i> , 943 F.3d 1071 (7th Cir. 2019)	17
<i>Simon v. San Paolo U.S. Holding Co., Inc.</i> , 113 P.3d 63 (Cal. 2005).....	13-14
<i>State Farm Mut. Auto. Ins. Co. v. Campbell</i> , 538 U.S. 408 (2003)	<i>Passim</i>
<i>Thistlethwaite v. Gonzalez</i> , 106 So.3d 238 (La. Ct. App. 2012).....	18
<i>TXO Production Corp. v. Alliance Resources, Corp.</i> , 509 U.S. 443 (1993)	21

<i>Walker v. Farmer Ins. Exch.</i> , 153 Cal.App.4th 965 (Cal. Ct. App. 2007).....	18
<i>Williams v. ConAgra Poultry Co.</i> , 378 F.3d 790 (8th Cir. 2004)	17, 19
Other Authorities	
Ashley Stamegna, <i>The Missing Civility in Civil Damages: A Proposed Guidelines Structure for Calculating Punitive Damages</i> , 106 C.N.L.L.R. 1897 (2022).....	10
Benjamin J. McMichael, Viscui, W., <i>Bringing Predictability to the Chaos of Punitive Damages</i> , AZ. S. L. J. at 30 (Forthcoming 2022), http://ssrn.com/abstract=3991214	11
Cass R. Sunstein, et al., <i>Punitive Damages: How Juries Decide</i> (2002).....	11
U.S. Chamber Institute for Legal Reform, <i>101 Ways to Improve State Legal Systems: A User’s Guide to Promoting Fair and Effective Civil Justice</i>	15
Pennsylvania Rule of Appellate Procedure 531(a)(2).....	1
<i>The Ratio Guidepost in the Lower Courts</i> , 5 BUS. & COM. LITIG. FED. CTS. § 56:55 (4th ed. 2020).....	23
U.S. Chamber Institute for Legal Reform, 2019 <i>Climate Survey: Ranking the States, A Survey of the Fairness and Reasonableness of State Liability Systems</i>	11
United States Constitution	3, 5, 7

INTEREST OF AMICUS CURIAE¹

The Chamber of Commerce of the United States of America (“Chamber”) is the world’s largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of their members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the Nation’s business community.

Many members of the Chamber and the broader business community are concerned with the inconsistent imposition of punitive damages on businesses across the nation. Businesses, which are frequently defendants in litigation, have a strong interest in consistent and fair guidelines that would assist lower courts in determining the appropriateness of punitive damages

¹ Pursuant to Pennsylvania Rule of Appellate Procedure 531(a)(2), nobody other than the Chamber and its counsel paid for or authored the brief in whole or in part.

in certain circumstances and, assuming punitive damages are in fact appropriate, the fair amount to be imposed. The Chamber believes that this case presents an important opportunity to address those issues in Pennsylvania. The Chamber has an important interest in ensuring that Pennsylvania adopts fair and consistent guidelines for punitive damages, which are excluded from insurance as a matter of law in Pennsylvania.

INTRODUCTION

This case provides an important opportunity for the Court to establish guidelines for the imposition of punitive damages. Absent such guidelines, lower courts and juries will continue to award unpredictable, excessive, and unconstitutional punitive damages in violation of the due process clause of the United States Constitution. The United States Supreme Court's current guidelines, which ask courts to broadly consider reprehensibility, potential harm, and comparable civil penalties, only take courts so far, and punitive damages continue to be excessive and unpredictable, even when courts apply these guidelines.

In accordance with the United States Supreme Court's guidance and the Court's power to regulate punitive damages as a common-law remedy, the Court should adopt two further limitations on the imposition of punitive damages. First, the Court should follow other courts that have established a presumption of unconstitutionality against punitive-damages awards that are over nine times the compensatory-damages award. Second, the Court should hold that the appropriate award of punitive damages should decrease as compensatory

damages increase, and thus a ratio of 1:1 between punitive and compensatory damages represents the outer limits of due process when the compensatory damages in a case are already substantial.

These limitations only go so far if trial and intermediate appellate courts are permitted to use “potential harm” as a post-hoc justification for excessive penalties and craft their own methods of calculating the ratio between punitive and compensatory damages in multi-defendant cases. The Court should limit considerations of potential harm to exceptional cases and adopt a per-judgment approach in cases that involve joint and several liability and multiple members of the same corporate family. The Superior Court erred when it apportioned punitive damages to each defendant, but kept compensatory damages aggregated and justified the excessive penalty through a *sua sponte* consideration of potential harm.

ARGUMENT

I. The Court Should Adopt Clearer Guidelines Regarding the Imposition of Punitive Damages.

The fundamental question underlying constitutional review of punitive-damages awards for excessiveness is “whether [the] particular award is greater than reasonably

necessary to punish and deter.” *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991). When “a more modest punishment ... could have satisfied the State’s legitimate objectives,” then a reviewing court should reduce the award to that amount and “go[] no further.” *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419-20 (2003); *see also BMW of North America, Inc. v. Gore*, 517 U.S. 559, 584 (1996) (“The sanction imposed ... cannot be justified ... without considering whether less drastic remedies could be expected to achieve [punishment and deterrence].”).

If a court “goes further,” it violates the due process clause of the U.S. Constitution, which “prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.” *State Farm*, 408 U.S. at 416. This prohibition stems from “[e]lementary notions of fairness enshrined in our constitutional jurisprudence,” which “dictate that a person receives fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.” *BMW*, 517 U.S. at 574; *cf. Exxon Shipping Co. v. Baker*, 554 U.S. 471, 513 (2008) (recognizing “the need to protect against the possibility ... of [punitive-damages] awards

that are unpredictable and unnecessary, either for deterrence or for measured retribution.”).

“[P]unitive damages pose an acute danger of arbitrary deprivation of property,” *State Farm*, 538 U.S. at 417 (quoting *Honda Motor Co., Ltd. v. Karl L. Oberg*, 512 U.S. 415, 432 (1994)), and can “run wild,” *Haslip*, 499 U.S. at 18, if left unchecked. Courts, therefore, have “an obligation to ensure that [punitive-damages] awards for intangibles be fair, reasonable, predictable, and proportionate.” *Payne v. Jones*, 711 F.3d 85, 93 (2d Cir. 2013) (citing *Exxon*, 554 U.S. at 471)).

A. The United States Supreme Court Has Provided General Guideposts for the Imposition of Punitive Damages.

The United States Supreme Court has addressed the constitutionality of punitive damages in three seminal decisions.

In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), a jury returned a verdict finding BMW liable for compensatory damages of \$4,000 and punitive damages of \$4,000,000, upon a finding that BMW’s policy to not disclose damage to new cars if the repair cost did not exceed 3 percent of the suggested retail price constituted malicious fraud. 517 U.S. at 564. The Alabama

Supreme Court affirmed the decision, but reduced the award to \$2 million because the jury calculated the punitive damages based on non-disclosure in all states, not just Alabama. *Id.* at 567.

In concluding that the award against BMW was still “excessive” in violation of the due process clause of the United States Constitution, the U.S. Supreme Court established “three guideposts” to assess the constitutionality of a punitive-damages award: (1) “the degree of reprehensibility of” the misconduct; (2) “the disparity between the harm or potential harm suffered by” the plaintiff and the actual punitive-damages award; and (3) “the difference between this remedy and the civil penalties authorized or imposed in comparable cases.” *Id.* at 575. The U.S. Supreme Court specifically eschewed a “mathematical formula” because, in certain circumstances, a higher ratio may be justified “if, for example, a particularly egregious act has resulted in only a small amount of economic damages” or “the injury is hard to detect or the monetary value of the noneconomic harm might have been difficult to determine.” *Id.* at 582-83.

The U.S. Supreme Court next addressed punitive damages in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), in which a jury awarded \$1 million in compensatory damages and \$145 million in punitive damages against State Farm for bad faith, fraud, and intentional infliction of emotional distress when it refused to settle a wrongful death claim for the policy limit. *Id.* at 413-14. The U.S. Supreme Court “decline[d] again to impose a bright-line ratio which a punitive-damages award can exceed.” *Id.* at 425. It noted, “however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process” and that “an award of more than four times the amount of compensatory damages might be close to the line of constitution impropriety.” *Id.* Although a ratio could exceed four-to-one, the U.S. Supreme Court reiterated such an award should be reserved for “a particularly egregious act [that] has resulted in only a small amount of economic damages,” for injuries that are “hard to detect” or “the monetary value of noneconomic harm” might be difficult to determine. *Id.* (quoting *BMW*, 517 U.S. at 582-83).

Finally, the Court in *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), addressed punitive-damages awards in the maritime context acting as a common-law court, but drew from its due-process jurisprudence. Exxon pleaded guilty to violations of the Clean Water Act, the Refuse Act, and the Migratory Bird Treaty Act, requiring it to pay \$25 million in fines and \$100 million in restitution. *Id.* at 479. In subsequent consolidated civil actions, the jury was instructed on punitive damages in accordance with the guideposts set forth in *BMW* and awarded \$5 billion against Exxon. *Id.* at 481. In recognizing the shortcomings of its guideposts, the Court stated that “[t]he real problem [in punitive-damages awards], it seems, is the stark unpredictability of punitive awards. Courts of law are concerned with fairness as consistency, and evidence that the median ratio of punitive to compensatory awards falls within a reasonable zone, or that punitive awards are infrequent, fails to tell us whether the spread between high and low individual awards is acceptable.” *Id.* at 499. The U.S. Supreme Court, applying maritime law and thus acting as a common-law court, chose to adopt a 1:1 ratio as a “fair upper limit” in maritime cases to guard against this unpredictability. *Id.* at 514.

These three cases are instructive. First, although the Court avoided “bright-line ratios” or “mathematical formulas” in *BMW* and *State Farm*, it made clear that double-digit ratios are constitutionally suspect, and even a ratio of four-to-one may be the constitutional limit. *See BMW*, 517 U.S. at 582-83; *State Farm*, 538 U.S. at 425.

Second, although the guideposts are useful in describing the outer limits of the due process clause, they do very little to prevent “the stark unpredictability of punitive awards.” *Exxon*, 554 U.S. at 499. As the Supreme Court instructed in *State Farm*, “Jury instructions typically leave the jury with wide discretion in choosing amounts, and the 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.” *State Farm*, 538 U.S. at 417 (quoting *Honda*, 512 U.S. at 432).

This unpredictability driven by biases has persisted. *See Ashley Stamegna, The Missing Civility in Civil Damages: A Proposed Guidelines Structure for Calculating Punitive Damages*, 106 C.N.L.L.R. 1897, 1901-1902 (2022) (collecting studies identifying disparities in punitive-damages awards based on

bench versus jury trials, geographic region, trial type, and common ploys such as “the more you ask for, the more you’ll get”); *see also* Benjamin J. McMichael, Viscui, W., *Bringing Predictability to the Chaos of Punitive Damages*, *AZ. S. L. J.* at 30 (Forthcoming 2022), <http://ssrn.com/abstract=3991214> (arguing that blockbuster punitive damages have become more unpredictable over time); *id.* at 40 (proposing clear limitations on the imposition of punitive damages, such as limiting damages in cases that do not involve human death or injuries to 3:1); Cass R. Sunstein, et al., *Punitive Damages: How Juries Decide*, 240 (2002) (identifying “salient numbers, such as a plaintiff’s request for a specific dollar amount, [can] have a dramatic impact on [mock] jurors’ awards” of punitive damages, whether or not those numbers have a legitimate relationship to the appropriate punishment for the defendant’s conduct.”). Pennsylvania is not immune to this trend; according to the Institute for Legal Reform (an affiliate of the Chamber), Pennsylvania’s liability system ranks 39th amongst the states in its fairness and reasonableness, as perceived by U.S. businesses. *See* U.S. Chamber Institute for Legal Reform, *2019 Climate Survey: Ranking the States, A Survey of the Fairness and*

Reasonableness of State Liability Systems at 1-3 (Sept. 2019), available at <https://institutelegalreform.com/wp-content/uploads/2020/10/2019-Lawsuit-Climate-Survey-Ranking-the-States.pdf>.

And third, when afforded the opportunity to impose a “brighter-line” for punitive damages as a common-law court, the Court adopted a 1:1 ratio, which it viewed as “not too low” and comporting with due process because “a single-digit maximum is appropriate, in all but the most exceptional of cases[.]” *Exxon*, 554 U.S. at 514-15.

B. This Court Should Adopt Brighter Guidelines Consistent With Other Courts to Address Excessive Punitive-damages Awards.

Consistent with the U.S. Supreme Court’s guidance, courts across the United States have adopted two limiting principles that the Court should adopt here. First, the Court should adopt a presumption of unconstitutionality when punitive damages are more than nine times the compensatory damages. Second, when compensatory damages are “substantial,” as they are here, a ratio of one-to-one between punitive and compensatory damages is most appropriate.

1. The Court should adopt a presumption of unconstitutionality when punitive damages are more than nine times the compensatory damages.

The Court should adopt a presumption that double-digit ratios of punitive damages to compensatory damages are unconstitutional. *See Exxon*, 554 U.S. at 514-15. In particular, the Court should further recognize that a ratio of four-to-one represents the default constitutional limit in all but the “most exceptional of cases.” *Id.*; *see State Farm*, 538 U.S. at 425. Those “exceptional cases,” are limited to “noneconomic” cases that involve: (1) particularly egregious acts that have resulted in only a small amount of economic damages; (2) an injury that is hard to detect; or (3) noneconomic harm in which the monetary value may be difficult to determine. *BMW*, 517 U.S. at 582-83.

The California Supreme Court adopted this presumption in *Simon v. San Paolo U.S. Holding Co., Inc.*, 113 P.3d 63 (Cal. 2005). The California Supreme Court made clear that “the court’s statement in *State Farm* that ‘few awards’ significantly exceeding a single-digit ratio will satisfy due process . . . establish[ed] a type of presumption: ratios between the punitive-damages award and the plaintiff’s actual or potential compensatory damages significantly greater than 9 or 10 to 1

are suspect and, absent special justification (by, for example, extreme reprehensibility or unusually small, hard-to-detect or hard-to-measure compensatory damages), cannot survive appellate scrutiny under the due process clause.” *Id.* at 77.

Similarly, in *Alabama River Group, Inc. v. Conecuh Timber, Inc.*, the Alabama Supreme Court established a ‘benchmark’ of a 3:1 ratio for punitive-to-compensatory damages. 261 So.3d 226, 275 (Ala. 2017). Although the Alabama Supreme Court refused “to identify any brightline numerical value” the Court found that, consistent with *BMW* “a remittitur to a 3:1 ratio of the punitive-damages award” is appropriate. *Id.* Since *River Group, Inc.*, Alabama courts have favorably relied upon that ‘benchmark’ to assess the reasonableness of punitive damages. *See, e.g., Merchants FoodService v. Rice*, 286 So.3d 681, 710-11 (Ala. 2019) (affirming punitive-damages award that was within 3:1 ratio); *Phillips v. Garrison Prop. & Cas.*, No. 2:19-cv-01727-JEO, 2020 WL 3118415 at *8 (N.D. Ala. May 12, 2020) (relying upon 3:1 ratio to permit plaintiff’s request to seek punitive damages that fell within range). These ‘brighter-lines’ are consistent with *State Farm*’s statement that a ratio of 4:1 is “close to the line of constitutional impropriety” and that, although

“not binding,” the long history of double, treble, and quadruple damages remedies (i.e., ratios of 1:1 to 3:1) is “instructive.” 538 U.S. at 425. These limits further guard against the “burdensome costs on society,” *Payne*, 711 F.3d at 94, excessive punitive damages awards impose. “Unchecked awards levied against significant industries can cause serious harm to the national economy.” *Id.*; see also U.S. Chamber Institute for Legal Reform, *101 Ways to Improve State Legal Systems: A User’s Guide to Promoting Fair and Effective Civil Justice* at 11 (Sept. 2019), available at <https://instituteforlegalreform.com/research/101-ways-to-improve-state-legal-systems-a-users-guide-to-promoting-fair-and-effective-civil-justice-sixth-edition-2019/> (“Jackpot verdicts and windfall awards . . . damage respect for and public confidence in the civil justice system.”).

Here, when calculated properly (as discussed in section II.B.), the damages exceed a double-digit ratio for all defendants. Moreover, this case does not fall into the categories of exceptional cases: The harm was economic, and the injury was readily discernible and compensable through a sizable award of compensatory damages. As such, a double-digit

punitive-damages award (let alone any punitive-damages award) was error.

2. The Court should recognize that no more than a one-to-one ratio of punitive to compensatory damages is appropriate when compensatory damages are “substantial.”

State Farm set a further limitation on punitive-damages awards: “When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.” *State Farm*, 538 U.S. at 425. The Court should recognize this limitation. As compensatory damages increase, the two rationales for punitive damages – to punish and to deter – become less compelling, since the compensatory-damages award *already* achieves those goals. An additional sizeable award, especially one that exceeds a 1:1 ratio, is “greater than reasonably necessary to punish and deter.” *Pac. Mut. Life*, 499 U.S. at 22. As such, as compensatory damages *increase*, the acceptable ratio between punitive and compensatory damages should *decrease*.

Courts across the United States have taken the U.S. Supreme Court’s guidance seriously and reduced punitive-damages awards to a 1:1 ratio when the compensatory damages

are deemed “substantial.” In *Saccameno v. U.S. Bank Nat’l Assn.*, for example, the United States Court of Appeals for the Seventh Circuit reduced a punitive-damages award of \$3 million to the size of the compensatory-damages award of \$582,000. 943 F.3d 1071, 1078 (7th Cir. 2019). In *Saccameno*, a mortgage service provider’s “atrocious record keeping” led to years of harassment of a mortgagee. *Id.* at 1091. The court nonetheless concluded that a one-to-one ratio is “the maximum permissible punitive-damages award” because it “punishes” the misconduct and is consistent with *State Farm’s* guidance when dealing with a “large total compensatory award.” *Id.*

Similarly, in *Boerner v. Brown & Williamson Tobacco Co.*, the court reduced the jury’s punitive award from \$15 million (3:1 ratio) to \$5 million (1.25:1 ratio), because the award “is excessive when measured against the substantial compensatory-damages award.” 394 F.3d 594, 603 (8th Cir. 2005); *see also Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004) (reducing to 1:1 ratio because “plaintiff’s large compensatory award . . . militates against departing from the heartland of permissible exemplary damages.”).

And in *Payne v. Jones*, the Second Circuit reduced a damages award of \$300,000 to \$100,000 when the compensatory damages were \$60,000 “given the substantial amount of the compensatory award.” 711 F.3d at 103. The Second Circuit noted that “[h]ad the facts of the harm to Payne been such that the jury appraised his compensable loss at only \$10,000 based on the same conduct by Jones, and the jury had imposed a punitive award on Jones of \$100,000, we would not consider the punitive award excessive[.]” *Id.*

State courts have also reduced damages awards under the same principle. In *Nardelli v. Metro. Grp. Prop. & Cas. Ins. Co.*, for example, the Arizona Court of Appeals reduced punitive damages four times the compensatory damages to a one-to-one ratio based on the fact that “the jury’s \$155,000 compensatory-damages award was substantial.” 277 P.3d 789, 806-10 (Ariz. Ct. App. 2012); *see also Thistlethwaite v. Gonzalez*, 106 So.3d 238, 266-68 (La. Ct. App. 2012) (awarding damages with ratios of 1:1 and 3:1 for separate plaintiffs when compensatory award was “on the high end”); *Walker v. Farmer Ins. Exch.*, 153 Cal.App.4th 965, 974 (Cal. Ct. App. 2007) (reducing punitive damages to \$1.5 million, which was below compensatory damages of \$1.7

million because it is a “substantial sum” and “the deterrent role of punitive damages would not be eliminated.”)² All of these cases reflect a general rule that increased compensatory damages should decrease the size of any punitive-damages award, and when those damages are substantial, a ratio of 1:1 should represent the upper limit.

Here, Northwest Insurance is set to receive a compensatory-damages award of \$250,000, which falls in the range of other damage awards that courts have viewed as substantial. *See, e.g., Payne*, 711 F.3d at 103. (\$60,000); *Williams*, 378 F.3d at 799 (\$600,000 on harassment claim “is a lot of money”); *Nardelli*, 277 P.3d at 808 (\$155,000). The double-digit award goes far beyond what is “reasonably necessary to punish and deter,” *Pac. Mut. Life*, 499 U.S. at 22, and should be vacated or, alternatively, reduced to a maximum of \$250,000.

² Other federal and state courts have also relied upon a one-to-one punitive to compensatory damages ratio as the benchmark when the compensatory damages are “substantial.” A table listing cases can be found attached to this brief at [Appendix A](#).

II. The Court Should Reject the Superior Court's Consideration of "Potential Harm" and Calculation of the Punitive-to-Compensatory Damages Ratio.

The Superior Court committed two distinct errors as it sought to justify the imposition of an excessive punitive-damages award: (1) it used "potential harm" as a post-hoc justification for the size of the award; and (2) it adopted a "per-defendant" approach to calculating damages.

A. The Court Should Limit Considerations of Potential Harm to Exceptional Cases.

In *State Farm*, the U.S. Supreme Court mentioned "potential harm" in stating that the second guidepost measures "the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award." 538 U.S. at 418. Considerations of potential harm when calculating the ratio of compensatory-to-punitive damages present an "acute danger," *id.* at 417, to fair, consistent and predictable punitive damages awards, as it provides an opportunity for courts to 'boost' the denominator (compensatory damages) to reduce the difference between the compensatory damages award and punitive damages award, making the final ratio less shocking.

To avoid these concerns, the Court should first limit “potential harm” considerations to the rare cases where the actual harm is nominal or minimal because the defendant’s punishable conduct was thwarted. *See, e.g., BMW*, 517 U.S. at 581. Here, the damages the jury awarded were actual and substantial, so considerations of potential harm were unnecessary.

Second, the Court should reject potential harm considerations when they merely serve as post-hoc justifications of an excessive punitive-damages award. In *TXO Production Corp. v. Alliance Resources, Corp.*, 509 U.S. 443 (1993), Justice O’Connor in dissent noted that “in the abstract, punitive damages may be predicated on the potential but unrealized harm to the victim, or even on the defendant’s anticipated gain.” *Id.* at 484. Justice O’Connor clarified, however, that the use of potential harm cannot be an “after-the-fact rationalization” and it must be presented to the jury so that it can be the basis for any punitive-damages award. *Id.* at 484-85. Here, “potential harm” was not presented to the jury and the trial court made no such finding of potential harm. *See R.R. 33a* (finding that the hypothetical value of the businesses that

did not leave NWI is “unknowable”). As such, the Superior Court’s use of potential harm to justify an exceedingly high punitive damages award was entirely inappropriate and should be reversed.

B. The Court Should Adopt a ‘Per-Judgment’ Approach to the Calculation of the Punitive-to-Compensatory Damages Ratio.

The Superior Court adopted a method for calculating the ratio between punitive damages to compensatory damages that took the total punitive damages imposed against a single defendant and measured it against the compensatory damages awarded to the plaintiff. (Op. 54-55.) Here, because there is only one plaintiff, the Superior Court effectively measured each defendant’s separate punitive-damages award against the total compensatory-damages award to obtain single-digit ratios for each defendant. (*Id.*)

The Superior Court correctly noted that courts have applied different calculations. Some have endorsed the Superior Court’s approach. *See, e.g., Horizon Health Corp. v. Acadia Healthcare Co., Inc.*, 520 S.W.3d 848, 858 (Tex. 2017); *Merrick v. Paul Revere Life Ins. Co.*, 594 F. Supp.2d 1168, 1190 (D. Nev. 2008); *Planned Parenthood of Columbia/Willamette, Inc. v.*

Am. Coal. of Life Activists, 422 F.3d 949, 960-61 (9th Cir. 2005). While other courts have taken a per-judgment approach endorsed by Appellants, which compares the total punitive-damages award to the total compensatory-damages award. *See, e.g., Olson v Brenntag N. Am., Inc.*, No. 190328/2017, 2020 WL 6603580, at *47 (N.Y. Sup. Ct. 2020); *Advocat, Inc. v. Sauer*, 111 S.W.3d 346, 363 (Ark. 2003); *Bardis v. Oates*, 119 Cal. App. 4th 1, 21 n.8 (2004).

Here, “when multiple defendants are members of the same corporate family and the compensatory award is joint and several, it is more appropriate to calculate a single ratio using the full compensatory award as the denominator and the total punitive awards as the numerator, as opposed to comparing each separate punitive award to the total award of compensatory damages.” *The Ratio Guidepost in the Lower Courts*, 5 BUS. & COM. LITIG. FED. CTS. § 56:55 (4th ed. 2020).

When a “case is not tried in a way that treat[s] . . . defendants separately, whether in terms of particular wrongful acts, relative culpability for conduct harming plaintiffs, or overall reprehensibility . . . the only appropriate method to calculate the punitives-to-compensatories ratio is to compare

total punitive and compensatory damages.” *Olson*, 2020 WL 6603580 at *47. That is exactly the case here. The compensatory-damages award is joint and several and is against multiple defendants of the same corporate family and an employee of that company. The Superior Court’s opinion makes evident that these entities were treated as a unit. *See* Op. 63 (“[T]here was ample evidence showing that the *First National Family’s* goal was to weaken NWI to the point it could no longer function.” (emphasis added)); Op. 66 (“By this May 5, 2017 meeting, the First National Family had clearly adopted Mr. Turk.”); *see also*, *Luri v. Republic Servs., Inc.*, 953 N.E.2d 859, 867 (Ohio Ct. App. 2011) (applying a per-judgment approach to punitive-damages awards because plaintiff “advanced a single-employer theory of liability to impute wrongdoing to multiple business entities”).

When calculated on the appropriate, per-judgment basis, the punitive-to-compensatory damages ratio is 11.2 and should be viewed as presumptively unconstitutional.

CONCLUSION

The Court should reverse the Superior Court's decision and vacate the award of punitive damages.

June 10, 2022

Jonathan D. Urick
Tyler S. Badgley
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

s/ Robert L. Byer

Robert L. Byer (25447)
Ryan F. Monahan*
DUANE MORRIS LLP
30 South 17th Street
Philadelphia, PA 19103
(412) 497-1083

*Counsel for Amicus
Curiae Chamber of United
States Commerce*

**Not admitted to practice
in Pennsylvania; admitted
to practice in New York
only.*

CERTIFICATE OF COMPLIANCE Pa. R.A.P. 127

I certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Robert L. Byer
Robert L. Byer (25447)
DUANE MORRIS LLP
30 South 17th Street
Philadelphia, PA 19103
(412) 497-1083

June 10, 2022

CERTIFICATE OF COMPLIANCE Pa. R.A.P. 2135

Pursuant to Pa.R.A.P. 2135, I certify that this Brief complies with the word-count limit set forth in Rule 2135. Based on the word-count function of the word processing system used to prepare the Brief, the substantive portions of the Brief (as required under Rules 531, and 2135(b), (d)), contains 4,266 words.

/s/ Robert L. Byer
Robert L. Byer (25447)
DUANE MORRIS LLP
30 South 17th Street
Philadelphia, PA 19103
(412) 497-1083

June 10, 2022

Appendix A
**Table of Cases Reducing Punitive-Damages Award
Because of Substantial Compensatory-Damages Award**

<u>Case</u>	<u>Result</u>
<i>Lompe v. Sunridge Partners, LLC</i> , 818 F.3d 1041 (10th Cir. 2016)	Reducing \$22.5 million punitive award against one defendant to amount of compensatory damages attributable to that defendant—\$1,950,000
<i>Burton v. Zwicker & Assocs.</i> , 577 F. App'x 555(6th Cir. 2014)	Affirming reduction of \$600,000 punitive award to \$350,000, the amount of compensatory damages
<i>Jones v. United Parcel Serv., Inc.</i> , 674 F.3d 1187 (10th Cir. 2012)	Reducing \$2,000,000 punitive award to amount equal to the \$630,307 compensatory award
<i>Morgan v. New York Life Ins. Co</i> , 559 F.3d 425 (6th Cir. 2009)	Vacating \$10,000,000 punitive award that was 1.67 times the compensatory award and remanding with instructions to enter remittitur to an amount not more than compensatory damages
<i>Méndez-Matos v. Municipality of Guaynabo</i> , 557 F.3d 36 (1st Cir. 2009)	Reducing \$350,000 punitive award to \$35,000, which

<u>Case</u>	<u>Result</u>
	equaled the compensatory damages
<i>Zakre v. Norddeutsche Landesbank Girozentrale</i> , 344 F. App'x 628 (2d Cir. 2009)	Affirming reduction of punitive award from \$2.5 million to \$600,000 where compensatory damages were approximately \$1.5 million
<i>Jurinko v. Medical Protective Co.</i> , 305 F. App'x 13 (3d Cir. 2008)	Reducing 3.13:1 ratio to 1:1 where compensatory damages and attorneys' fees totaled approximately \$2 million
<i>Bridgeport Music v. Justin Combs Publ'g</i> , 507 F.3d 470 (6th Cir. 2007)	Reversing punitive award that was 9.5 times the compensatory damages and holding that "[i]n this case where only one of the reprehensibility factors is present, a ratio in the range of 1:1 to 2:1 is all that due process will allow," <i>id.</i> at 487.
<i>Bach v. First Union Nat'l Bank</i> , 486 F.3d 150 (6th Cir. 2007)	Ordering reduction of punitive damages to no more than the \$400,000 compensatory damages

<u>Case</u>	<u>Result</u>
<i>DiSorbo v. Hoy</i> , 343 F.3d 172 (2d Cir. 2003)	Ordering remittitur of compensatory award to \$250,000 and remittitur of punitive damages from \$1,275,000 to \$75,000
<i>Nardelli v. Metro. Grp. Prop. & Cas. Ins. Co.</i> , 277 P.3d 789 (Ariz. Ct. App. 2012)	Reducing to a 1:1 ratio a punitive award that the lower court had already reduced from roughly 355:1 to 4:1, since the conduct was at most in “the middle range of the reprehensibility scale,” <i>id.</i> at 808 and the harm was only economic
<i>Hudgins v. Sw. Airlines Co.</i> , 212 P. 3d 810 (Ariz. Ct. App. 2009)	Reducing \$4 million punitive award to \$500,000 for each plaintiff, the amount of compensatory damages
<i>Sec. Title Agency, Inc. v. Pope</i> , 200 P. 3d 977 (Ariz. Ct. App. 2008)	Reducing \$35 million punitive award to \$6 million, the amount of compensatory damages
<i>Roby v. McKesson Corp.</i> , 219 P.3d 749 (Cal. 2009)	Holding that 1:1 was constitutional maximum in light of the “relatively low degree of reprehensibility and

<u>Case</u>	<u>Result</u>
	the substantial award of noneconomic damages”
<i>Walker v. Farmers Ins. Exch</i> , 153 Cal. App. 4th 965 (2007)	Reducing \$8.3 million punitive award to \$1.5 million, the amount of compensatory damages
<i>Weinstein v. Prudential Prop. & Cas. Ins. Co.</i> , 233 P. 3d 1221 Idaho 2010)	Reducing \$6 million punitive award to \$1.89 million, the amount of compensatory damages
<i>Thistlethwaite v. Gonzalez</i> , 106 So. 3d 238 (La. Ct. App. 2012)	Reducing punitive award to a 1:1 ratio, citing the high level of compensatory damages
<i>Guest v. Allstate Ins. Co.</i> , 2006 WL 6620226 (N.M. Ct. App. Oct. 27, 2006)	Reducing \$9 million punitive award to \$1,842,900, the amount of compensatory damages
<i>Burns v. Prudential Sec., Inc.</i> , 857 N.E.2d 621 (Ohio Ct. App. 2006)	Reducing punitive award from \$250 million to \$6.8 million where compensatory damages on tort claim were approximately \$6 million
<i>Mercedes-Benz USA, LLC v. Carduco, Inc.</i> , 562 S.W.3d 451 (Tex. App. 2016)	Reducing ratio from 7.5:1 to 0.04:1 where compensatory damages were \$15.3 million