Nos. 06-16285 and 06-16350

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRETT D. LEAVEY,

Plaintiff-Appellant/Cross-Appellee,

v.

UNUM PROVIDENT CORPORATION; PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY,

Defendants-Appellees/Cross-Appellants.

On Appeal From The United States District Court
For The District Of Arizona, No. CV-02-02281-PHX-SMM

DEFENDANTS-APPELLEES/CROSS-APPELLANTS' CROSS-APPEAL REPLY BRIEF

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I. Punitive Liability

Leavey asserts that this is a "paradigm case for punitive damages" (Plaintiff/Appellant's Reply/Answering Brief ("LAB") 37) and that "it is hard to conceive of a more egregious case of economic trickery and deceit" (LAB27). But the district court disagreed, very nearly granting judgment for defendants on punitive damages and observing at the close of the evidence that it was a "quantum leap" from the facts of this case to the type of evil conduct required for punitive damages (DER387-88).[1] Leavey's hyperbolic rhetoric is a distraction from the central fact that he hopes the Court will overlook: Defendants have paid Leavey continuously from the time he filed his claim to this day. This lawsuit is about an ambiguous letter that Leavey interpreted to be categorically terminating his benefits six months hence. Yet during those six months, he never once contacted defendants either to ask whether that was what they intended or to seek reconsideration of the decision he assumed they had made. There is compelling evidence that, had he done so, defendants would have explained that they would stop his benefits only if he had actually recovered by the end of the six-month period. *See* Defendants-Appellees/Cross-Appellants' Answering Brief and

[1] Leavey compares this case to *Hangarter v. Provident Life & Accident Insurance Co.*, 373 F.3d 998 (9th Cir. 2004), but the district court rejected that comparison, finding that "the facts of this case are materially different from the facts of *Hangarter*" (CR277:4).

Opening Cross-Appeal Brief ("DOB") 15-18 & n.9. Indeed, that is exactly how defendants handled the claim.

The poorly worded letter that defendants sent to Leavey might be enough to justify a finding of bad faith, but that is as far as it gets him. The record does ***not*** clearly and convincingly prove that defendants intended to stop paying Leavey's claim regardless of whether he actually recovered.[2]

A. Arizona's punitive-liability standard is exceptionally strict.

Leavey cites a 1984 Arizona Court of Appeals decision for the proposition that a willful failure to pay a claim suffices for punitive damages under Arizona law. LAB36. But that decision pre-dates the Arizona Supreme Court's adoption of the "evil-mind" requirement in *Linthicum* (*see* DOB 24-25) and hence is not a controlling statement of Arizona law.

Linthicum and the other cases we cited in our opening brief show that Arizona appellate courts regularly reverse punitive awards even while upholding findings of bad faith. Indeed, the case that Leavey cites threw out a punitive award in a situation that is remarkably analogous to this case. *See Farr v. Transamerica Occidental Life Ins. Co.*, 699 P.2d 376, 383 (Ariz. Ct. App. 1984). In *Farr*, the

[2] Although Leavey asserts that certain sentences in the letter brook "no ambiguity" (LAB5), when read as a whole, the letter ***is*** ambiguous (DER166-68), and all of the extrinsic evidence confirms that defendants did ***not*** intend to terminate Leavey's benefits (DOB15-18 & n.9).

insurer sent the plaintiff an ambiguous letter regarding the need for further information before the claim could be paid. *Id.* at 379. Rather than trying to clarify the letter, the plaintiff sued. *Id.* at 379-80. After the lawsuit had been filed, the insurer obtained the relevant information and paid the claim. *Id.* at 380. The court concluded that there was sufficient evidence to support the bad-faith verdict, but found that, "[d]istilled, what happened here amounted to bungling and negligence." *Id.* at 385. The court recognized that "[the] letter was ambiguous," and "[i]nstead of resolving the question by inquiry, [plaintiff] sought out a lawyer." *Id.* Accordingly, it held that "[t]he award for punitive damages must be set aside." *Id.* So too here.

Leavey's attempt to distinguish the other insurance-bad-faith cases in which the Arizona Supreme Court reversed punitive awards—*Linthicum*, *Gurule*, and *Filasky*—is entirely circular: He points out that the Arizona Supreme Court concluded that there was no clear and convincing evidence of an evil mind in those cases, and asserts that there is such evidence here. But consideration of the underlying bad-faith conduct in those cases demonstrates that if ***that*** conduct cannot support an award of punitive damages, then neither can the much less egregious conduct here. *See* DOB25-26.

B. Arizona's punitive-liability standard was not satisfied here.

In our opening brief (at 27-37), we explained why the district court's three reasons for upholding punitive liability were misguided. Leavey complains that we limited our discussion to those three grounds (LAB39), but when push comes to shove he relies predominantly on the same three contentions in defending the district court's ruling. Neither those grounds nor the other miscellaneous allegations of misconduct scattered throughout Leavey's brief suffice to justify the finding of punitive liability.

1. The IMEs

Leavey says that there is "overwhelming evidence" that defendants tried to improperly influence the IME process, but the only "evidence" he cites is the conclusory testimony of his paid-for "bad-faith expert," Mary Fuller. LAB40-42. We already have shown that there is nothing inappropriate about an insurer either using the referral letter to identify the concerns that it would like the IME physician to address or asking follow-up questions after an initial IME report.[3] DOB28-31. Regardless of the merits of Fuller's unsupported opinions, her *ipse*

[3] Leavey claims that Dr. Stonnington "confirm[ed] that Defendants sought to and did influence the IME process in a highly egregious manner." LAB42. During her deposition, Dr. Stonnington simply agreed with Leavey's counsel that the referral letter was "slanted" in that it focused on defendants' concerns rather than laying out a comprehensive picture of the claim. *See* DER380. As Dr. Stonnington explained at trial (*id.*), and as we have shown (DOB28-29), there is nothing inappropriate about a letter that is "slanted" in that way. Dr. Stonnington never said or implied otherwise.

dixit is not clear and convincing evidence that the IMEs were driven by an evil mind—especially because all of defendants' claim representatives and both independent physicians said that there was nothing unusual or inappropriate about the referral letter, the documentation sent to the physicians, or the follow-up from Dr. Brown. *See* DOB27-32.

More fundamentally, Leavey's claim of improper influence in the IME process misses the mark because neither IME physician gave an opinion that supported denying Leavey's claim. What both IME physicians found—in their original reports (DER130-51) and, in more detail, in their follow-up reports (DER156-61)—was that Leavey was currently disabled but ***could*** get better ***if*** he chose to pursue effective treatment (which they were skeptical he would do). Defendants accepted those opinions. As their letter to Leavey said, "there appears to be an impairment at this time from a psychiatric standpoint," but "with appropriate care and compliance with treatment recommendations, you should be able to return to work." DER167.

2. The confusion about the PACE system

We have pointed out that the closure of Leavey's claim on the PACE computer system had nothing to do with whether defendants intended to resume payments at the end of the six-month advance period ***if*** Leavey still had not recovered. DOB32. Leavey does not dispute that.

We also have explained why years later the claim representatives erroneously assumed that, because there was no "reopen date" in the PACE system, the claim must never have been closed and then reopened on the system. DOB32-34. Leavey implies (LAB43-44) that Jeff Johnson contradicted Gregory Breter's testimony that the "reopen" field in the PACE system does not populate unless there is an actual break in benefits—which never happened here. Contrary to Leavey's insinuation, Johnson said only that there ***is*** a "reopen" field; he did ***not*** say that there should be a reopen date for every claim that has been closed and reopened (even if there was no break in benefits) or that this field should have been populated for Leavey's claim. *See* DFER4-8.[4] Leavey tried to manufacture such testimony with a question that is a variant of "When did you stop beating your wife?" Without ever asking Johnson if he knew why there was no reopen date for Leavey's claim, Leavey's counsel asked: "Do you know who took that off?" LAB43 (citing Tr. 708 (DFER8)). When the district court ordered Johnson to respond "yes or no" over defendants' objection, Johnson said: "I don't know." *Id.*

In short, there is no evidence that the claim representatives lied about whether the claim had been closed on the system; they simply were unaware of the break-in-benefits rule for the "reopen" field.

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[4] "DFER__" refers to Defendants' Further Excerpts of Record.

3. The "bad company" evidence

Leavey claims to have "exposed the baselessness of Defendants' 'nexus' argument" (LAB42), but the only "nexus" he identifies other than the roundtable review is the debunked "biased IME" theory discussed above (LAB20-21). The two other aspects of the claim that he mentions (LAB21) have nothing to do with the prefabricated "bad-company" case. We address the merits of those two allegations in the next section.

As for the roundtable—which was the only "nexus" found by the district court—Leavey cannot dispute that the recommendations ensuing from it were entirely reasonable and were documented in the claim file. *See* DOB36-37. Instead, he complains that defendants did not take roll or keep minutes at the meeting. LAB20. But the law does not demand such records. It requires documentation of claim-handling decisions, and there is no question that defendants satisfied that requirement.[5]

4. Leavey's miscellaneous allegations

In his opening brief, Leavey claimed that defendants told the IME physicians to focus on returning Leavey to dentistry "regardless of whether that

[5] Leavey's assertion that defendants' claim manual required further documentation (LAB20 & n.57) is false. As Gregory Breter explained, the documentation in Leavey's file complied with the claim manual in place at the time and it was not until 2003 that a more formal documentation procedure was established. DFER14-16.

was medically appropriate." LOB10-11. We showed that claim to be false. DOB37-38. Abandoning this point, Leavey now says that defendants' letter to ***him*** "misleadingly" focused on his return to dentistry. LAB23 (referenced on LAB44). But that letter expressed defendants' belief that with effective treatment Leavey ***could*** return to dentistry. There was nothing "misleading" or inappropriate about that.

Leavey asserts that Dr. Brown told Dr. Stonnington to "disregard the risk of relapse" when deciding whether Leavey was disabled. LAB23. However, the letter that he quotes simply asked Dr. Stonnington to clarify her earlier IME report by separately addressing the risk of relapse and any current functional limitations that might need separate treatment; it did not ask her to disregard either one. DER155. Leavey also claims that Dr. Brown "did not ask for a plan to 'alleviate' the risk of relapse." LAB23. But a treatment plan that would allow Leavey to return to dentistry necessarily is one that would alleviate his risk of relapse.

In his opening brief, Leavey asserted that defendants described the possibility that he never would return to dentistry as a "severe situation" for defendants. LOB11-12. We showed that he had mischaracterized the document in question. DOB38-39. Backpedaling, he now says that the document shows that defendants knew about his "significant" risk of relapse. LAB44-45. But defendants never denied that risk and indeed said as much in the letter they sent to

Leavey—also pointing out that with effective treatment he could reduce that risk. *See* DER167.

We also have shown that there was nothing inappropriate about the comment (by someone with no ongoing role in Leavey's claim) that ***if*** Leavey obtained his dental license but yet did not return to dentistry it likely would be a matter of personal choice rather than disability (because the dental board would not reinstate Leavey's license unless he could safely return to the profession). *See* DOB39. Leavey does not dispute that, but nevertheless contends that the comment is evidence of inappropriate pressure to close claims. LAB45-46. But making a true statement about a hypothetical situation in which benefits likely would not be due does not show any improper influence and certainly does not prove that defendants were handling Leavey's claim, which they consistently have paid and continue to pay, with an evil mind.

II. The Instructional Issue

A. The issue is preserved.

Leavey's preservation argument is based on a mischaracterization of the charge conference. During that conference, defendants informed the court that they intended to submit a written instruction on the reciprocal duty of good faith. DER342. They also suggested modifying the district court's proposed instruction on good faith, "just by clarifying where it says there is an implied duty of good

faith and fair dealing in every insurance policy, ***each party to the contract owes this duty to the other***." DER343 (emphasis added).

But defendants never had the opportunity to submit a proposed instruction because, at Leavey's suggestion (DER344), the court made a definitive ruling at the conference, stating: "[Defendants are] entitled to argue [the reciprocal duty], but I don't think it's the subject of a separate jury instruction … therefore, ***over the objections***, I'm not going to put that in there about the separate duties of good faith" (DER346 (emphasis added)).

Furthermore, contrary to Leavey's contention (LAB52), the grounds for the proposed instruction were sufficiently articulated below and were well understood by both the parties and Judge McNamee—who said that he anticipated this very issue. *See* DER342-46.

B. The instructions given were erroneous and misleading.

Leavey does not dispute that the instruction on the reciprocal duty of good faith that defendants intended to submit—but which the district court refused to consider—would have accurately stated Arizona law. *See* DOB41. He instead contends that the instructions that were given "neutral[ly]" articulated the reciprocal duty of good faith. LAB50-51. He is mistaken. The first instruction on the duty of good faith said that "[t]here is an implied duty of good faith and fair dealing in every insurance policy" and "plaintiff claims that the ***defendant[s]***

breached this duty, which is also known as [a] 'bad faith claim.'" DFER24 (emphasis added). That is not a "neutral" instruction, but one that casts the duty of good faith exclusively as something that defendants owed to Leavey. The remaining instructions on the topic reinforced that misconception by speaking only of defendants' alleged breach of their duty. DFER24-26. Hearing these instructions, the jury likely concluded that the only duty of good faith implied in an insurance contract runs from the insurer to the insured—and, accordingly, that defendants had been misrepresenting the law throughout the trial.

The fact that, as Leavey points out (LAB49), defendants' counsel tried valiantly in his closing arguments to convince the jury that defendants had not been misrepresenting the law only emphasizes the prejudice that defendants suffered. Defendants should not have had to convince the jury of the applicable law. Regardless, counsel's efforts could not alleviate the very real possibility that the jury would see that the district court had said a great deal about defendants' duty to Leavey but not a single word about Leavey owing a duty to defendants and take the district court at its word when it told them that "[y]ou must follow the law ***as I give it to you***, whether you agree with it or not" (DFER19-20 (emphasis added)).

In any event, an instruction is not adequate simply because it is vague enough that it does not "rule out" the relevant legal principle. On the contrary, the court is charged with affirmatively and clearly instructing the jury on the law. *See*,

e.g., *Blassingill v. Waterman S.S. Corp.*, 336 F.2d 367, 368 (9th Cir. 1964) ("a party is entitled to have [its] theory of the case presented to the jury by proper instructions, if there be any evidence to support it") (internal quotation marks omitted). Leavey would not have been satisfied—and would have been entitled to relief—if the district court had instructed the jury that some contracts include an implied duty of good faith (a "neutral" instruction) but told the parties to argue whether an insurance policy is such a contract. The district court's error in this case is no less real because it is defendants who were prejudiced.

Leavey argues in the alternative that it would have been error to instruct the jury that the duty of good faith runs in both directions because he "had no legal duty to contact [defendants] before initiating the action." LAB53. He cites no authority for that proposition—for good reason. Whether Leavey breached his duty of good faith by filing suit first and asking questions later (indeed, never) was a question for the jury. But the jury was effectively precluded from answering that question by the district court's refusal to instruct the jury that Leavey had such a duty.

Finally, Leavey contends that no instruction on the reciprocal duty of good faith was warranted because a plaintiff's breach of such a duty is contractual in nature and therefore is not a defense to a bad-faith claim against an insurer, which sounds in tort. LAB53-55. He cites no Arizona law for that proposition. Nor does

he explain what point there would be to recognizing a reciprocal duty of good faith if the jury can't be told about it. Indeed, even assuming *arguendo* that the Arizona Supreme Court would agree with the out-of-state cases that Leavey cites, that does not mean that the insured's duty of good faith is irrelevant: As we discussed in our opening brief (at 42-43), Leavey's duty of good faith was relevant to both punitive liability and the amount of compensatory and punitive damages. Leavey ignores that point, preferring simply to repeat his assertion that there is no such thing as comparative bad faith. *See* LAB55.

III. Excessive Non-Economic Damages

Contrary to Leavey's contention (LAB57), a seven-figure compensatory award for the emotional distress experienced by someone who never went a day without his disability benefits but simply worried for several months that he might lose them (yet never contacted defendants to either clarify their intention or request reconsideration) ***should*** shock this Court's conscience. There is no logic to a "compensatory" award that gives someone the equivalent of 20 years of his average salary (*see* DOB4)—about half of a lifetime's work—for six months of concern about his future finances but no actual financial hardship.

A. Leavey's attempt to justify the award misrepresents the record.

It is only through a series of misrepresentations and strategic omissions—many of which were twice rejected by the district court (*see* CR274:16; CR277:4-5)—that Leavey can hope to support this outsized award.

First, Leavey claims that at the time he received the denial letter he had been off of Vicodin for two years (LAB57), but fails to mention that this was because—against all of his original doctors' instructions—he had been on another narcotic, methadone (*see* DFER10).

Leavey implies that the denial letter sent him into an emotional tailspin (LAB58), but he made no such claim at trial, and the only evidence he cites is his physician's testimony that he was "devastated and confused" and "depress[ed]" during the first visit immediately after receiving the letter (DFER1-2). Neither the doctor nor Leavey testified that those emotions continued, and the only enduring emotional distress that the district court found was financial anxiety. *See* CR274:16.

Leavey says that "he had to change apartments and pursue any kind of work he could find." LAB58. But he never went a day without his benefits and already was looking for work before he received the letter. *See* DOB46 n.18. Indeed, the district court explicitly rejected this argument because Leavey never suffered actual financial hardship. CR274:16.

Leavey asserts that he "could not even hold down menial jobs" because of his "now devastated condition." LAB58. But there is no evidence whatever that the letter caused a lasting "devastated condition," and the only job Leavey tried before he stopped working for good was selling cars—a position he says he left not because he was in a "devastated condition" but simply because it "wasn't something that I was cut out to do" (DFER11-13). At trial, Leavey never argued that defendants caused his difficulties obtaining work (*see* CR274:16), and it is too late to do so now.

Impermissibly citing to his own pleading as if it were evidence, Leavey claims that his suffering was demonstrated by an "emotional break down on the stand." LAB61-62 (citing CR275:4 n.2). This Court should ignore that improper argument—as did the district court in its order following the pleading that Leavey has cited (*see* CR277:4-5).

Leavey also again tries to connect defendants to his self-inflicted hand injury and relapse, which occurred months after he received the denial letter, based simply on post hoc *ipse dixit*. LAB58. But at trial, Leavey never said that it was defendants' letter that caused him to decide to break his hand and relapse. *See* DER240. And on appeal he makes no effort to address either his affirmative

burden of proving causation or those precedents we have cited that rejected similarly attenuated emotional-distress claims.[6] *See* DOB48-50 (citing cases).

Leavey's only affirmative argument is that there is "no evidence of any other stressor" that could have caused his brief relapse months after he received the denial letter. LAB61. On the contrary, Leavey's disappointing failure to obtain any work even though he had a DDS and a recent MBA, a visit with his parents in Illinois (which had resulted in relapses in the past **(***see* DER38, 266-68)), or his recent withdrawal from methadone each would be enough to explain this relapse. Furthermore, given Leavey's history of frequent relapses by means of intentionally injuring his hand (*see* DOB50-51) and his refusal to participate in effective abstinence-based treatments (*see* DOB8-11), no further explanation for this relapse is needed. Indeed, Leavey continued to relapse periodically up through trial (*see* DOB50-51) and, even today, has not recovered sufficiently to hold down a paying job (*see* DER286-87). Regardless, even if there were no other explanation for this relapse in the record, that would not be enough to carry Leavey's burden of affirmatively proving that it was defendants' letter that somehow caused these harms. *See, e.g.*, *Barrett v. Harris*, 86 P.3d 954, 963 (Ariz. Ct. App. 2004)

[6] Leavey asserts that defendants were required to object to his closing argument to preserve this aspect of our excessiveness challenge (LAB62), but the case he cites says no such thing.

(affirming JMOL because plaintiffs "failed to introduce sufficient evidence that [defendants'] acts and omissions proximately caused" plaintiffs' harm).

B. Comparison to other cases confirms that the non-economic damages remain excessive.

Leavey contends that, even without the self-inflicted hand injury and relapse, his financial anxiety and other emotional distress warrant $1,200,000. LAB62. Of course, the district court indicated that $200,000 of the reduced award was for the hand injury and relapse, so, if those injuries were not caused by defendants' conduct, $200,000 must be excised from the award. Moreover, notwithstanding Leavey's bald assertion, the remaining $1,000,000 is grossly excessive for Leavey's alleged emotional distress.

The district court selected the $1,000,000 figure because it believed that a single plaintiff was awarded that amount in *State Farm* and that Leavey's emotional distress was equivalent to that plaintiff's. CR274:16-17. We have shown that the court misunderstood both the amount of the award and the nature of the distress in *State Farm* (*see* DOB45-46), and Leavey does not deny that.

Instead, Leavey argues that it is impermissible to compare the emotional-distress award in this case with those in other bad-faith cases. LAB60. True, some courts do look askance at the practice. But at least as many courts—including those in Arizona—employ it. *See* Bennet E. Cooper, *et al.*, 8 ARIZ. PRAC. § 33:16 (2007); *Salinas v. O'Neil*, 286 F.3d 827, 830 (5th Cir. 2002); *Nairn v. Nat'l R.R.*

Passenger Corp., 837 F.2d 565, 568 (2d Cir. 1988). In any event, we urge the comparison merely as a reality check. It confirms what commonsense already suggests: $1,000,000 is shockingly excessive for short-term emotional distress about the ***possibility*** of losing insurance benefits.

In the alternative, Leavey accuses us of "cast[ing] too narrow a net by focusing only on 'reported Arizona bad-faith case[s].'" LAB60. Not so. In addition to citing the highest emotional-distress award in a published Arizona bad-faith case ($100,000), we cited both the highest emotional-distress award in a precedential bad-faith opinion from this Court ($200,000) and the $600,000 award to Mr. Campbell in *State Farm*, which is the highest award upheld in a precedential bad-faith case anywhere in the country. *See* DOB45-48.

Leavey ignores these analogous cases, instead "casting a net" that apparently catches only the very highest emotional-distress awards ever sustained in any type of case anywhere in the country. But the cases he cites only prove the shocking excessiveness of the award here.

The only Arizona case that Leavey cites involved an award of $1,500,000 for a plaintiff who was subjected to a medically unnecessary radiation treatment that increased his risk of leukemia from one out of 16,000 to one out of 33. That experience resulted in permanent post-traumatic stress disorder that manifested itself in "long-term … mental disturbance," including fear of death, nightmares,

cold sweats, sleeplessness, and impatience with his children and grandchildren, and required him to seek psychological counseling for anger and anxiety. *Monaco v. Healthpartners of S. Ariz.*, 995 P.2d 735, 739 (Ariz. Ct. App. 1999).

In another of Leavey's cases, a doctor and his wife each were awarded $1,120,000 for harassment by abortion protestors that "turned their lives into a hellish, torturous experience," caused them to "liv[e] in genuine fear for their lives for an extended period of time," and "permanently affected their life-style, their professional lives, their enjoyment of life, their personalities, their economic well-being, and their general emotional well-being." *Tompkins v. Cyr*, 202 F.3d 770, 783 (5th Cir. 2000); *see also S.W. Bell Tel. Co. v. Wilson*, 768 S.W.2d 755, 759-60, 763 (Tex. Ct. App. 1988) ($1,500,000 for mental anguish caused by a bill-collector's harassment, including fear of immanent death while being threatened with a gun).[7] The stunning difference between the genuine emotional devastation in these cases—corroborated by the testimony of family members and medical

[7] Leavey's other cases are unhelpful because they provide no information about the extent of the plaintiff's injuries and thus no basis for comparison with Leavey's award. *See Prozeralik v. Capital Cities Commc'ns, Inc.*, 635 N.Y.S.2d 913, 915 (App. Div. 1995); *Weathers v. Am. Family Mut. Ins. Co.*, 793 F. Supp. 1002, 1012 (D. Kan. 1992); *Ricci v. Key Bancshares of Me.*, 662 F. Supp. 1132 (D. Me. 1987). In any event, the fact that there may be a few outliers cannot suffice to justify every subsequent award lest "[o]ne excessive verdict … become[] precedent for another still larger one," resulting in an "[u]nbridled" "upward spiral." *Consorti v. Armstrong World Indus., Inc.*, 72 F.3d 1003, 1010 (2d Cir. 1995), *vacated and remanded on other grounds*, 518 U.S. 1031 (1996).

professionals—and Leavey's self-described temporary distress and financial anxiety confirms that the award here should shock the Court's conscience and be substantially reduced.

IV. Excessive Punitive Damages

A. Standard of review

Leavey calls "flat wrong" the straw-man position "that any time a jury returns a significant punitive damages award, [a defendant has] a constitutional right to have it trimmed." LAB17-18. Of course, we never have taken such a position, but have only invoked the exacting review required by the Supreme Court. And, far from the rare occurrence that Leavey implies it should be, this and other federal courts of appeals routinely reduce punitive awards when conducting that review.

Leavey contends that this Court must perform the "same analysis" when reviewing a punitive award for excessiveness as it does when reviewing a challenge to the sufficiency of the evidence supporting a liability verdict. LAB14-15. As this Court has held, however, although "[o]rdinarily appellate courts must defer to juries," "a hands-off appellate deference to juries, typical of other kinds of cases and issues, is ***unconstitutional*** for punitive damages awards." *In re Exxon Valdez*, 270 F.3d 1215, 1238-39 (9th Cir. 2001) (emphasis added); *accord Simon v. San Paolo U.S. Holding Co.*, 113 P.3d 63, 72 (Cal. 2005) ("[w]hile we defer to

express jury findings supported by the evidence, in the absence of an express finding on [a] question we must independently decide" whether a fact bearing on the excessiveness analysis has been proved) (emphasis added); *Aken v. Plains Elec. Generation & Transmission Co-op., Inc.*, 49 P.3d 662, 668 (N.M. 2002) (courts conducting a constitutional excessiveness review must "make an independent assessment of the record," which ***differs*** from "substantial evidence review" where "evidence is viewed in the light most favorable to the prevailing party and all inferences arising from the factual findings of a trial court are indulged in").

The Supreme Court itself has conducted this kind of independent review in its recent punitive damages decisions. In *BMW*, for example, the plaintiff's theory was that "BMW was palming off damaged, inferior-quality goods as new and undamaged, so that BMW could pocket 10 percent more than the true value of each car." Brief of Respondent, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996) (No. 94-896), 1995 WL 330613, at *17. Had the Supreme Court thought it appropriate to apply sufficiency-of-the-evidence review, it surely would have accepted this inference uncritically. Instead, it reviewed the record for itself and expressly found that "[t]here is no evidence that BMW acted in bad faith when it sought to establish the appropriate line between presumptively minor damage and damage requiring disclosure to purchasers." 517 U.S. at 576, 579.

Similarly, in *State Farm*, one of the dissenting Justices argued that "[e]vidence the jury could credit demonstrated that the [alleged bad-faith] program regularly and adversely affected Utah residents." 538 U.S. at 432 (Ginsburg, J., dissenting). But the six-Justice majority did not defer to presumed findings that the jury did not ***expressly*** make, instead concluding from its own independent review of the record that there was "scant evidence of repeated misconduct of the sort that injured [the plaintiffs]." *Id*. at 423.

There is good reason why the standard of review for liability findings is inappropriate in the excessiveness context. A verdict on liability necessarily encompasses a factual finding that each indispensable element of the cause of action has been established. Accordingly, this Court will uphold a liability finding so long as the record contains sufficient evidence for a reasonable jury to make that finding. By contrast, the jury's task in setting the amount of punitive damages does not typically involve determining whether particular facts have been proved. *See, e.g.*, *Aken*, 49 P.3d at 668. Indeed, here, as in most punitive damages cases, the jury was not instructed to find particular facts and was not asked to answer interrogatories that would reveal its reasons for imposing the amount that it did. Rather, it was asked essentially to make an impressionistic judgment about the amount of punishment to exact—after being urged to impose a punishment commensurate with defendants' substantial financial resources (DFER17-18).

Accordingly, the resulting punitive verdict is the legal equivalent of an ink blot, subject to various possible interpretations.

Because it is not possible to tell what facts (if any) the jury found in setting an amount of punitive damages or what relative weight it gave to any facts that may have been found, application of a sufficiency-of-the-evidence standard would result in deference being given to "phantom" factual findings. Such deference inevitably begets "false positive" determinations of whatever facts a plaintiff argues are sufficient to justify the award. To avoid that constitutionally troubling outcome and to comport with the examples set by the Supreme Court in *BMW* and *State Farm*, this Court must "independently decide" (*Simon*, 113 P.3d at 72) whether Leavey proved, by clear and convincing evidence, facts that would support the judgment.

B. The *BMW* Guideposts

1. Reprehensibility

Whatever the standard of review, the conduct at issue in this case falls at the low end of the reprehensibility spectrum. Leavey's claims to the contrary cannot be squared with the fact that the district court very nearly granted JMOL on punitive liability.

Even accepting *arguendo* that defendants initially intended to terminate Leavey's benefits at the end of the six-month advance period, the fact remains that

defendants never did cut off his benefits. Arizona courts have recognized that, even when an insurer denies a claim in bad faith, it should not be punished when it has corrected that error by putting the insured back on claim. *See Farr*, 699 P.2d at 383.

In all events, Leavey's assertion that defendants' conduct "falls at the high end of the reprehensibility spectrum" (LAB18-19) is irreconcilable with this Court's statements that the protracted psychological torture and death threats in *Planned Parenthood* did not fall at the high end of the reprehensibility spectrum; that the intentional and systematic racial or ethnic harassment in *Zhang* and *Bains* fell only on the moderately high end of the spectrum; and that insurance-bad-faith cases are separated from these other more reprehensible torts by a "substantial" "gulf." DOB53-54.

In claiming that all five reprehensibility factors are implicated here, Leavey misinterprets the law, misrepresents the facts, or both.

Physical harm. Leavey accuses the district court of rejecting certain legal principles in concluding that the harm he suffered was almost exclusively financial or financial-related emotional distress. LAB26. But the district court twice rejected the very arguments that Leavey raises before this Court based not on a legal disagreement, but on its assessment of the actual injuries Leavey proved at trial. *See* CR274:20; 277:2-3. That factual assessment is entitled to deference and

should not "strike [the Court] as wrong with the force of a five-week-old unrefrigerated dead fish." LAB23 (quoting *Hayes v. Woodford*, 301 F.3d 1054, 1067 n.8 (9th Cir. 2002)).

Reckless disregard. The district court's finding of reckless disregard, on the other hand, should strike the Court as clearly erroneous. As we discussed above (at 1-2), the evidence that defendants intended to terminate Leavey's benefits at the end of the six-month advance period whether or not he had recovered was equivocal. Moreover, Leavey continues to ignore (LAB24) that the aggressive treatments that defendants encouraged him to get (and offered to pay for) were designed to ***overcome*** his current risk of relapse—something that many doctors and dentists with addiction problems are able to do. *See* DOB12-16. He also overlooks the fact that the insurer in *State Farm* perpetrated its tort with full awareness of the plaintiff's fragile condition (*see* 538 U.S. at 433-34 (Ginsburg, J., dissenting)), yet the Supreme Court gave no hint that it believed the reckless disregard factor to be implicated. The Court quite plainly did not contemplate that this factor would be employed in cases involving economic torts. *See id*. at 426 (majority op.) ("[t]he harm arose from a transaction in the economic realm, not from some physical injury or trauma").

Financial vulnerability. The district court found this factor to be present only because it explicitly rejected the construction of the factor urged by

defendants and later adopted by this Court. *See* DOB57. Leavey's attempt to defend the district court's legal error by manufacturing evidence that defendants' targeted his claim (LAB25) fails. The documents that he cites (Exs. 27-0005, 24-0002) have nothing to do with his claim and say nothing about exerting power over claimants by exploiting their financial vulnerability.

Repeated misconduct. As we have shown (*see* page 7, *supra*) and the district court found (CR274:14-15), the only connection between Fuller's bad-company evidence and this case was the roundtable review of Leavey's claim, which was manifestly reasonable. Without that nexus, Fuller's allegations are insufficient to support the court's finding that defendants engaged in repeated misconduct. As the Third Circuit has explained, "[b]y defining his or her harm at a sufficiently high level of abstraction, a plaintiff can make virtually any prior bad acts of the defendant into evidence of recidivism. The Supreme Court has therefore emphasized that the relevant behavior must be defined at a low level of generality." *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797 (8th Cir. 2004). So defined, the conduct in this case was not part of a pattern of like conduct. Leavey adduced no evidence that defendants ever handled another claim the way they handled his. Accordingly, this reprehensibility factor is not implicated here.

Malice, trickery, or deceit. Leavey accuses us of defending the district court's ruling by taking "the absurd position that findings the district court made in

connection with punitive liability … have no bearing on the reprehensibility factors." LAB26-27. As we have explained (*see* pages 20-23, *supra*), and this Court has held (*see Exxon Valdez*, 270 F.3d at 1238-39), the standard of review for excessiveness is much higher than for liability. Accordingly, it was not clear error for the district court to conclude, based on its independent excessiveness review, that there is no evidence of malice, trickery, or deceit on this record, notwithstanding its view that the evidence sufficed to support punitive liability.

And, although we "do not dispute that economic trickery and deceit counts" (LAB27), we ***do*** dispute that Leavey established trickery and deceit here—and the district court agreed. Accordingly, we have not "effectively concede[d] that the district court erred in failing to find this factor present" (*id.*).

2. Ratio

Leavey does not deny that his compensatory damages—even if further reduced, as we submit they must be—are "substantial." Nor does he dispute that his large awards for emotional distress and attorneys' fees impart substantial deterrence in their own right, making a large award of punitive damages unnecessary. *See* DOB66-69.

Instead, he argues that, under this Court's precedent, "the Due Process Clause does not entitle Defendants to a reduction of the jury's punitive award as it is already below a 9:1 ratio no matter how it is calculated." LAB29. That is the

"bright line constitutional maximum" argument that was appropriately rejected by the district court. Moreover, it is directly contradicted by the very case upon which Leavey relies: *In re Exxon Valdez*, 472 F.3d 600 (9th Cir. 2006). This Court determined that *Exxon Valdez* "fit into the second class of cases in the *Planned Parenthood* framework" because the compensatory damages were "substantial" and the conduct was "particularly egregious." *Id.* at 623. Nevertheless, it held that "the award should be toward the lower end of th[e] range" set by *Planned Parenthood* (*i.e.*, 4:1 to 9:1) and proceeded to ***reduce the ratio from 9:1 to 5:1***.[8] *Id.* at 623-25.

Here, because the compensatory damages are substantial and the conduct at issue is "not 'particularly egregious,'" this case fits into *Planned Parenthood*'s first class of cases. *Id.* at 623. Accordingly, a ratio of "***up to*** 4 to 1" is possible, but "lower single-digit ratios, even as low as 1 to 1, might mark the outer limits of due process" for some cases in this category. *Id.* (emphasis added). This is such a case. Indeed, because substantial awards for emotional distress and attorneys' fees have a material punitive effect, in cases such as this one even a 1:1 ratio exceeds the constitutional maximum. *See* DOB66-69.

[8] *Exxon Valdez* thus refutes Leavey's assertion that this Court never has disapproved of a single-digit ratio. *See* LAB17.

Leavey's argument that *Planned Parenthood* supports apportioning the punitive damages between the two defendants and then using the full amount of compensatory damages as the denominator for both defendants (LAB28) is simply wrong. First, in *Planned Parenthood* separate punitive awards were returned against each defendant. Here, a single award was imposed against both defendants jointly. That was consistent with Leavey's theory of the case, which treated the two defendants as alter egos in order to secure the admission of Fuller's bad-company evidence (which related primarily to UnumProvident) against both defendants. Second, as we discussed in our opening brief (at 67-68), although *Planned Parenthood* may have "endorsed" the multiple-ratio method that Leavey advocates (when there actually are multiple awards), in the end it did not ***use*** that method in reducing the punitive awards. Leavey does not deny that. Nor does he deny that he mischaracterized *Casillas-Diaz v. Palau*, 463 F.3d 77 (1st Cir. 2006), which is wholly irreconcilable with his argument for halving the ratio. *See* DOB68.

3. The legislatively established penalty for comparable conduct

Leavey does not dispute that this guidepost compels a substantial additional reduction of the punitive award if the relevant civil penalty is Arizona's $5,000 fine for improper claim handling. Instead, he persists in arguing that defendants had notice that they could lose their license for mishandling his claim. LAB29-30.

Unable to identify evidence that such a sanction ever has been imposed (for any conduct, let alone conduct similar to that at issue here), Leavey accuses the Arizona Director of Insurance of "an apparent lack of enforcement." LAB29. But whether the Department of Insurance has been perpetually asleep at the switch or simply has not yet seen conduct bad enough to impose the ultimate penalty is beside the point. The fact remains that nothing in the Department's actual fining practice gave defendants fair notice that they could be punished $4 million for a single instance of mishandling a claim.

Leavey's contention that "[l]eaving intact punitive damages awards like the one the jury assessed here is necessary to ensure [that insurers] comply with their good faith obligations" (LAB30) is nothing but speculation. Moreover, it ignores the fact that defendants' ongoing conduct already is subject to heightened scrutiny, with the possibility of significant penalties, under defendants' settlement agreement with various state insurance regulators.[9] *See* DOB70.

Finally, Leavey accuses us of "miss[ing] the point" of his disgorgement argument. LAB30. But the twenty-year-old disgorgement policy that he invokes is now unconstitutional under *State Farm* and *Philip Morris USA v. Williams*, 127

[9] We cited the settlement as evidence that defendants' conduct already is subject to intense regulatory scrutiny, making a private punitive deterrent unnecessary. Leavey's assertion that there is no evidence that defendants have complied with the settlement agreement (LAB31) is thus irrelevant.

S. Ct. 1057 (2007). It should go without saying that an unconstitutional punishment cannot give a defendant "fair notice … of the severity of the penalty that a State ***may*** impose" (*BMW*, 517 U.S. at 574 (emphasis added)).

Respectfully submitted.

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Case Nos. 05-16380 and 05-17059

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I hereby certify that on this 18th day of June, 2007, I served a total of six copies of the foregoing Defendants-Appellees/Cross-Appellants' Cross-Appeal Reply Brief by overnight delivery on Appellant/Cross-Appellee herein, two to each of the following addresses:

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