B234271

COURT OF APPEAL
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THOMAS NICKERSON,
Plaintiff and Appellant,
vs.
STONEBRIDGE LIFE INSURANCE COMPANY,
Defendant and Respondent.

AMICUS CURIAE BRIEF OF UNITED POLICYHOLDERS

Appeal from the Superior Court of Los Angeles County
Honorable Mary Ann Murphy, Judge Presiding
Superior Court Case No. BC405280

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Interest of Amicus Curiae United Policyholders

United Policyholders—a non-profit 501(c)(3) organization founded and based in California—is an information resource and voice for insurance consumers in all 50 states. Donations, foundation grants, and volunteer labor support its work. United Policyholders is interested in this case because erosion of the deterrent function of punitive damages by drastic reductions in jury awards saps needed deterrence—harming the insurance consumers that United Policyholders represents.

United Policyholders operates key programs: *Advocacy and Action* (advocating pro-consumer laws and public policy), *Roadmap to Recovery*™ (disaster recovery and claim help), *Roadmap to Preparedness* (financial literacy, disaster insurance, and preparedness). United Policyholders hosts a library of tips, sample forms, and articles on commercial and personal-line insurance products, coverage, and the claims process at www.uphelp.org.

State insurance regulators, academics, and journalists across the nation seek United Policyholders' input on insurance and related legal matters. In fact, for 6 years in a row, United Policyholders been appointed as a consumer representative to the National Association of Insurance Commissioners.

Preliminary Statement

Insurance surrounds us. Americans who drive cars, operate businesses, and borrow money to buy homes all purchase insurance. Moreover, as California homeowners and business operators know, when a loss occurs, reliable insurance is the difference between recovery and ruin. But from drafting insurance contracts to paying claims, insurers have the upper hand. The goals of insurer and insured are in constant tension—with insurers seeking profits and insureds seeking economic safety. To balance those conflicting goals, courts impose higher duties on insurers than they impose on many other businesses. Because administrative regulators and public pressure have not curbed insurance-industry abuses, the threat of *meaningful* punitive-damage awards helps stop overreaching by economically powerful insurance companies.

On the other hand, insurance companies have obligations that arise from their unique status as purveyors of a vital, quasi-public service. The California Supreme Court has held that insurers supply "services affected with a public interest" and must as a consequence "take the public's interest seriously, where necessary placing it before their interest in maximizing gains and limiting disbursements."[1] The U.S. Supreme Court has also repeatedly recognized the special connection between insurers and the public interest.[2]

Punitive damages advance the public interest by providing reasonable deterrence against intentional and egregious misconduct by insurers. When insurers can mathematically calculate the downside risk of denying valid claims (as ratio-based punitive damages allows)—and balance that risk against the upside gain of increased profits—punitive damages lose their deterrent value and become a mere business cost. This case is important because it asks this Court to reaffirm that punitive damages can do more than just punish. They can also effectively deter.

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[1] *Egan v. Mut. of Omaha Ins. Co.*, 24 Cal.3d 809, 820, 620 P.2d 141, 146 (1979) (citations and internal punctuation omitted).

[2] *See, e.g.*, *Granholm v. Heald*, 544 U.S. 460, 482-83 (2005) (State regulation of insurance is in the public interest.); *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co*., 282 U.S. 251, 257 (1931) ("The business of insurance is so far affected with a public interest that the State may regulate the rates and likewise the relations of those engaged in the business.").

Legal Argument

1. To deter effectively, punitive damages must be balanced—neither too large nor too small.

The impassioned rhetoric on punitive damages—and the distracting talk of ratios and mathematical formulas—obscures the goal of deterrence. Punitive damages can deter a defendant by persuading it that repeating the wrongful conduct is too costly.[3] And they can deter others by persuading them that undertaking and continuing conduct similar to the conduct that led to the award of punitive damages is too costly.[4] Effective deterrence teaches that the chance of gain must not be worth the risk of the foreseeable punishment.[5] Otherwise, a jury's well-considered punishment for the wrongful conduct is

[3] Thomas B. Colby, *Clearing the Smoke from Philip Morris v. Williams: The Past, Present, and Future of Punitive Damages*, 118 Yale L.J. 392, 474 (2008) (Punitive damages regulate broadly and serve societal interests through "optimal deterrence.").

[4] Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 Buff. L. Rev. 103, 111 (2002) ("One of the most commonly accepted reasons to allow punitive damages is that such awards serve to deter the wrongdoer (specific deterrence) and other future wrongdoers (general deterrence) from engaging in harmful conduct.").

[5] Garrett T. Charon, *Beyond a Bar of Double-Digit Ratios:* State Farm v. Campbell'*s Impact on Punitive Damages Awards*, 70 Brook. L. Rev. 605, 633 (2004-2005) (The U.S. Supreme Court has "acknowledged that the generally acceptable ratios of punitive damages to compensatory damages may be stretched where particularly reprehensible conduct does not result in a large amount of economic damages.").

simply a cost of doing business that an undeterred defendant will shrug off.

But to deter, punitive damages must hit hard. They cannot hit so hard that they are an excessive fine or forfeiture.[6] But they must hit hard enough to persuade. A $100,000 punitive-damages award against a drunk commercial truck driver who caused a wrongful death would hit too hard if the truck driver only had $1,000 in assets and was so injured in the collision that future income is unlikely. The truck driver would never pay the punitive-damages award and a court would never enforce it. On the other hand, while a court would enforce a $100 punitive-damages award against that same truck driver, the truck driver—and the truck driver's peers—would regard it as a joke. Awards too large or too small deter no one.

When deterrence involves well-heeled corporate wrongdoers, the same concerns play out on a larger stage. In this case, for example, the defendant insurance company had a net worth of $368 million. The punitive-damages award was $19 million, equal to 5.163% of that net worth. That would grab attention and act as an effective

[6] *Adams v. Murakami*, 54 Cal.3d 105, 112, 284 Cal.Rptr. 318, 322 (1991) ("[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy.").

deterrent to that insurance company and to others similarly situated. Admittedly, a somewhat lower amount might have the same effect. But the trial court reduced the punitive-damages award to $350,000. That was 0.095% of the insurance company's net worth. Why would an award of less than 1/10 of 1% of net worth deter any company with a net worth of $368 million? This appeal concerns who can best answer that sort of fact-intensive, case-specific question.

2. The trier of fact is in the best position to weigh the evidence and decide how large a punitive-damages award must be to attain the goal of deterrence.

On a theoretical basis, judges can debate deterrence endlessly. At some point, an award of punitive damages will be so excessive that reasonable judges could only concur that the upper limit of reasonableness is shattered. For instance, in this case, if the jury had awarded $100 million in punitive damages, the goal of deterrence might founder on the reality of impairment of net worth and financial insolvency. But this case is not about punitive damages so shocking that reasonable judges would be compelled to step in, vacate the punitive-damages award, or reduce it—perhaps to a mere monetary slap on the wrist.

This case is a good example why judicial deference to juries and trial judges is as important as judicial deterrence of extreme wrongdoers. The punitive-damages range is between a trial-jury-awarded 5.163% of net worth and a trial-court-reduced 0.095% of net worth. Asking appellate judges to accept either figure is hard. Those judges have due-process concerns, and the award must be measured against those concerns.[7] But appellate judges are not factfinders. They do not sit through trials, listen to witnesses, sift the evidence, and discuss the merits of the size of the proposed punitive-damages award with other members of a full-time fact-finding panel. Appellate judges have a due-process review function but are ill-equipped to decide how large a particular punitive-damages award should be to provide effective deterrence. That is another reason to honor the traditional deference accorded to juries and trial judges—to the greatest extent that due process allows.

Fact-finding and evidence-weighing belong to the duly-constituted factfinders—the jurors. Only in the most extreme case should the judiciary overturn the judgment of jurors who found the facts and weighed the evidence. In this case, for instance, the jurors

[7] *See*, *e.g.*, *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 424-25 (2003) ("There are no rigid benchmarks that a punitive damages award may not surpass, and ratios greater than those we have previously upheld may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages.") (citations and internal punctuation omitted).

obviously found that the insurance company's conduct was so unusually reprehensible that they should award large punitive damages. There is no other explanation for the verdict, given the modest compensatory-damages award. It is equally clear that the jurors regarded $19 million—a 5.163% net-worth award—as proper to both punish and deter. This jury, like other juries grappling every week with punitive-damages questions, complied with the principle that it should assess punitive damages "in an amount which, depending upon the defendant's financial worth and other factors, will deter [it] and others from committing similar misdeeds."[8]

Where there is supporting evidence of significant reprehensibility, as the jury plainly found here, an appellate court must defer as much as reasonably proper. Hundreds of years of legal tradition, and the stated intent of our national and state constitutional framers, require deference to a jury's factual findings and determinations on reprehensibility and on the amount of damages needed to deter similar future reprehensible conduct. Thus, the jury's reprehensibility and

[8] *College Hospital, Inc. v. Superior Court*, 8 Cal.4th 704, 712, 882 P.2d 894, 898 (1994).

punitive-damages fact findings receive substantial protection from appellate nullification.[9]

3. The U.S. Supreme Court's punitive-damages cases have not diluted the role of punitive damages in deterring wrongful conduct by those who intentionally misuse their power.

In 1989, this Court held that determining the "amount of any punitive damages award" is "exclusively the function of the trier of fact."[10] In the 2001 *Cooper Industries* case, the U.S. Supreme Court appeared to infringe on that principle when it held that appellate review of whether a punitive-damages award is consistent with due process does not implicate Seventh Amendment concerns, because a jury's award of punitive damages is not a finding of fact.[11] But limiting the Seventh Amendment's reach does not logically or realistically affect the deterrent value of punitive damages. Nor does it diminish the role of the jury in finding the facts on which the punitive-damages award is based.

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[9] *Acosta v. City of Costa Mesa*, 694 F.3d 960, 985 (9th Cir. 2012) (Where factual and legal claims rest on common facts, "the Seventh Amendment requires the trial judge to follow the jury's implicit or explicit factual determinations.") (citations and internal punctuation omitted).

[10] *Gagnon v. Continental Cas. Co.*, 211 Cal.App.3d 1598, 1602, 260 Cal.Rptr. 305, 306 (6th Dist. 1989).

[11] *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 (2001).

While some may assert that the paucity of empirical data on the impact of punitive damages suggests an absence of deterrence, the U.S. Supreme Court has repeatedly held that punitive damages provide "deterrence."[12] They are properly imposed to serve "legitimate interests in punishing unlawful conduct and deterring its repetition."[13] The goal of punitive damages is to "serve a broader function; they are aimed at deterrence."[14] Although there have been several Supreme Court cases raising punitive-damages issues in recent years, not one has questioned their deterrent value and effect.[15]

One of the few empirical works done on punitive damages, referenced by Professor Michael Rustad, involves a study undertaken by A.T. Kearney Associates, a consulting firm that tried to assess the im-

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[12] *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991).

[13] *BMW of North America Inc. v. Gore*, 517 U.S. 559, 568 (1996).

[14] *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (Punitive damages may be imposed as a deterrent.). *See also Philip Morris USA v. Williams*, 549 U.S. 346, 352 (2007) ("This Court has long made clear that punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition.") (citation and internal punctuation omitted).

[15] *See*, *e.g.*, *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008); *Philip Morris USA*, 549 U.S. 346 (2007); *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007).

pact of punitive-damages awards on business behavior.[16] The study found that of the more than 500 companies assessed, all responded at some level to punitive damages, with just under half responding fairly aggressively.[17]

The centuries-old tradition of letting juries exercise discretion in awarding punitive damages to punish despicable wrongs remains. As Justice Clarence Thomas explained in the 2009 *American Sounding* case—decided eight years after *Cooper Industries*—the jury's broad "discretion" to award punitive damages has been a part of English law since 1763, and of American law since 1794.[18] It is only when a jury awards punitive damages that are "grossly excessive or arbitrary punishments on a tortfeasor" that the federal due-process clause curbs the broad discretion that generations of state courts have entrusted to their juries.[19]

California appellate courts have deferred to jury determinations on the facts supporting the amount of punitive damages needed to de-

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[16] Michael L. Rustad, *How the Common Good is Served by the Remedy of Punitive Damages*, 64 Tenn. L. Rev. 793, 795 (1997).

[17] *Id*.

[18] *Atlantic Sounding Co., Inc. v. Townsend*, 557 U.S. 404, 409-10 (2009).

[19] *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003).

ter pernicious conduct. After all, "the function of deterrence will not be served if the wealth of the defendant allows [it] to absorb the award with little or no discomfort."[20] Thus, California appellate courts have largely confined themselves to determining whether, in light of the defendant's wealth and the gravity of the wrongdoing, the amount of the punitive-damages award exceeded the level necessary to punish and deter.[21] On occasion, that deference has led to affirming substantial punitive damages. For instance, in the 2012 *Bankhead* case, District One affirmed a punitive-damages award amounting to 37.5% of the defendant's net worth.[22]

Although some argue otherwise, the U.S. Supreme Court has never held that any mathematical formula or fixed ratio governs a jury's discretion on the amount needed to deter.[23] Similarly, this Court

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[20] *Neal v. Farmers Ins. Exchange*, 21 Cal.3d 910, 928 n.13, 148 Cal.Rptr. 389, 399 n.13 (1978).

[21] *See*, *e.g.*, *Rufo v. Simpson*, 86 Cal.App.4th 573, 620, 103 Cal.Rptr.2d 492, 525 (2nd Dist. 2001).

[22] *Bankhead v. ArvinMeritor, Inc.*, 205 Cal.App.4th 68, 83, 139 Cal.Rptr.3d 849, 861 (1st Dist. 2012), *review denied* (July 11, 2012).

[23] *See BMW of North America, Inc. v. Gore*, 517 U.S. 59, 582 (1996) ("[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula," and "[i]t is appropriate . . . to reiterate our rejection of a categorical approach."); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) ("We decline again to impose a bright-line ratio which a punitive damages award cannot exceed," and "there are no rigid benchmarks

has long held that the due-process limit on the proper amount of punitive damages "is inexact and affords considerable discretion to the trier of fact."[24] The California Supreme Court has explained that "special justification" can arise from "extreme reprehensibility or unusually small, hard-to-detect or hard-to-measure compensatory damages." That special justification could support punitive-damages awards that are "significantly greater" than 9 or 10 times the actual or potential compensatory damages.[25] How much "significantly greater" remains for the jury to determine, with judicial due-process oversight.

While the amount of the award may not be a factual finding that will always survive judicial review and adjustment, the jury's determination, based on weighing the evidence, is entitled to respect and, to the extent possible, reasonable deference. In this case, for instance, the jury's finding of fraud is a factual finding entitled to the usual safety from judicial intervention that such findings deserve, so long as the evidence supports them.

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that a punitive damages award may not surpass.").

[24] *Bullock v. Philip Morris USA, Inc.*, 198 Cal.App.4th 543, 563 n.9, 131 Cal.Rptr.3d 382, 398 n.9 (2nd Dist. 2011), *review denied* (Nov. 30, 2011).

[25] *Simon v. San Paolo U.S. Holding Co., Inc.*, 35 Cal.4th 1159, 1182, 113 P.3d 63, 77 (2005).

Also entitled to reasonable deference is the trial judge's decision that, after reduction to a 10:1 ratio, the punitive-damages award would not be sufficient to deter Stonebridge from repeating its wrongful, fraudulent, and intentional misconduct. But the trial judge's reduction creates a punitive-damages award of less than 1/10 of 1% of net worth. Thus, an award that would deter has transformed into an award that will not. Even worse, where—as in this case—the tortious conduct is institutional, the punitive-damages award should be in an amount sufficient to deter others, not just the tortfeasor.[26] But the trial judge evidently felt that caselaw constrained her to limit the award to 10 times the compensatory damages. That, then, is the error, for no such arithmetical constraint exists.

The due-process review of *Campbell* and other U.S. Supreme Court cases imposes no mathematical-formula or fixed-ratio restraint

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[26] *See*, *e.g.*, *Johnson v. Ford Motor Co.*, 113 P.3d 82, 93 (Cal. 2005) ("California law has long endorsed the use of punitive damages to deter continuation or imitation of a corporation's course of wrongful conduct."); *Stevens v. Owens–Corning Fiberglas Corp.*, 57 Cal.Rptr.2d 525, 533 (App. 1996) ("The purpose of punitive damages is a public one—to punish wrongdoing and deter future misconduct by either the defendant or other potential wrongdoers."); *Egan v. Mutual of Omaha Ins. Co.*, 620 P.2d 141, 146 (Cal. 1979), *cert. denied*, 445 U.S. 912 (1980) (For insurers, the principal purpose of punitive damages is "to deter acts deemed socially unacceptable and, consequently, to discourage the perpetuation of objectionable corporate policies.").

on California courts under the facts as established in this case—and as will recur in other cases. As one commentator explained after reviewing the impact of federal precedent on California's punitive-damages principles and practices:

> California courts should resist blindly applying a fixed ratio of punitive damages to compensatory damages. The U.S. Supreme Court does not demand it, and California's interests are antithetical to it. When the facts of a case warrant a higher ratio, California courts should not hesitate to vindicate the state's legitimate interest in policing intentional egregious tortious conduct. California should continue to recognize that wealthy defendants should not be permitted to purchase the right to engage in despicable conduct or to profit from such conduct. True deterrence can only be achieved by an appropriate calculus—one that acknowledges that a defendant's own cost-benefit analysis can defeat the state's effort to proscribe harmful conduct.[27]

This is not revolutionary. After all, standard California jury instructions explain to jurors that, in view of a defendant's financial condition, they are to determine the amount necessary to discourage future wrongful conduct, cautioning that they may neither increase the punitive-damages award above an amount that is otherwise appropri-

[27] Kathleen S. Kizer, *California's Punitive Damages Law: Continuing to Punish and Deter Despite* State Farm v. Campbell, 57 Hastings L.J. 827, 888-89 (March 2006).

ate merely because a defendant has substantial financial resources nor impose an award that exceeds the defendant's ability to pay.[28]

Conclusion

Working under standard, clear jury instructions, California juries have routinely and properly exercised their considerable discretion in deciding the proper amount of punitive damages needed to deter future wrongful conduct. There are certainly judicial due-process restraints on that jury discretion. But California's appellate courts should continue to let juries determine the need for punitive damages and should continue to give deference to the factual findings of juries and trial judges regarding the amount of those damages. The presumption should be that juries and trial judges are acting reasonably and wisely in deciding the proper amount of punitive damages—unless exceptional circumstances justify tempering the traditional deference accorded to them. This case, however, is not one where this Court needs to temper that deference. Indeed, relatively few cases will be.

Dated: January 24, 2013.

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[28] Judicial Council of California Civil Jury Instructions, CACI Nos. 3945 and 3947 (as approved on Dec. 14, 2012).

Respectfully submitted,

UNITED POLICYHOLDERS

- and –

KNAPP & ROBERTS, P.C.

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Dated: January 24, 2013.

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Sherry Van Camp, Secretary

Nickerson v. Stonebridge Life Insurance Company
Appellate No. B234271, Superior Court Case No. BC405280

PROOF OF SERVICE

STATE OF ARIZONA, COUNTY OF PIMA:

I am employed in Pima County, Arizona. I am over the age of 18 and not a party to the within action; my business address is One South Church Avenue, Suite 900, Tucson, Arizona 85701.

On January 24, 2013, I served the foregoing document, described as **Amicus Curiae Brief of United Policyholders,** on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

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[XX] BY MAIL I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid at Tucson, Arizona in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

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[XX] (State) I declare under penalty of perjury under the laws of the State of Arizona that the above is true and correct.

Executed on January 24, 2013, at Tucson, Arizona.

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Sherry Van Camp, Secretary

Nickerson v. Stonebridge Life Insurance Company
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