S213873

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

THOMAS NICKERSON,

Plaintiff and Appellant,

vs.

STONEBRIDGE LIFE INSURANCE COMPANY

Defendant and Respondent.

After a Decision by the Court of Appeal, Second Appellate District, Division Three, 2nd Civil No. B234271
Los Angeles Superior Court, Case No. BC405280

AMICUS BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF THOMAS NICKERSON

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to California Rule of Court 8.208, United Policyholders certifies that it is a non-profit organization that has no shareholders. As such, *amicus* and its counsel certify that *amicus* and its counsel know of no other person or entity that has a financial or other interest in the outcome of the proceeding that the *amicus* and its counsel reasonably believe the Justices of this Court should consider in determining whether to disqualify themselves under canon 3E of the Code of Judicial Ethics.

Dated: July 2, 2014

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SHARON J. ARKIN

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ISSUE FOR REVIEW

Is an award of attorney's fees, under *Brandt v. Superior Court* (1985) 37 Cal.3d 813 properly included as compensatory damages where the fees are awarded by the jury, but excluded from compensatory damages when they are awarded by the trial court after the jury has rendered its verdict? (Court's January 15, 2014 Order Limiting Issues).

INTRODUCTION

Amicus curiae United Policyholders ("UP"), a non-profit consumer organization, respectfully submits the following brief in support of plaintiff and appellant Thomas Nickerson ("Nickerson") in his appeal of the reduction of the punitive damages awarded against defendant and respondent Stonebridge Life Insurance Company ("Stonebridge").

The trial court and the appellate court relied on *State Farm Mut. Ins. Co. v. Campbell* (2008) 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 for the proposition that a punitive damages award should *generally* not exceed a single-digit multiplier when compared to compensatory damages even though both courts acknowledged the reduced amount would not serve the purpose of deterrence. But the *Campbell* court and this Court have confirmed that rule *does not apply* in a case like this one, involving institutional bad faith conduct and low compensatory damages. (*Campbell*, at 425, *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 582, 116 S.Ct. 1589, 134 L.Ed.2d 809, *Simon v. San Paolo U.S. Holdings Company, Inc.* (2005) 35 Cal.4th 1159, 1185-1185, 29 Cal.Rptr.3d 379, 113 P.3d 63 ["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*.'"].)

As discussed below, one component of the compensatory damages awarded in the case included the *Brandt* fees. That component – whether determined by a jury or the court in a post-trial proceeding – are properly included in the punitive damages ratio

calculation because they represent a measure of compensatory damages incurred by a policyholder. The only distinction between an award of such damages when made by the trial court or when made by the jury is *procedural* rather than *substantive*. As this Court confirmed in *Brandt*, having the issue determined by a trial court after a jury's finding of bad faith serves judicial economy – and, indeed, Stonebridge *stipulated* to having the judge determine those damages after trial. There is no logical basis for distinguishing between an award of such damages – and *Brandt* fees *are* damages, pure and simple – when the trial court rather than the jury determines their amount.

As the U.S Supreme Court has established, allowable punitive damages awards must bear some reasonable relationship to the amount of compensatory damages. (*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 582, 116 S.Ct. 1589, 134 L.Ed.2d 809; *State Farm Mut. Ins. Co. v. Campbell* (2008) 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585.) Those cases also established that a defendant is entitled to the due process protections guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution in the assessment of punitive damages. Those protections require review of punitive damages awards to ensure that they are "the product of the jury's 'rational decision-making' and are not 'tainted by passion, partiality, or prejudice.'" (Stonebridge's Answer Brief, p. 1, citing to *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 18-20, 111 S.Ct. 1032, 113 L.Ed.2d 1.) But Stonebridge has produced no evidence of irrational decision-making, passion, partiality or prejudice at the trial level. Stonebridge, instead, relies on abstract policy arguments and purely academic and inapplicable *procedural* rather than *substantive* distinctions.

There is another aspect of the discussion that has been neglected by the parties: The public policy importance of not only imposing punitive or exemplary damages on insurers, but on imposing *an amount of punitive damages sufficient to have a deterrent effect*. As this Court noted 35 years ago, "'[A]s a supplier of a public service rather than a manufactured product, the obligations of insurers go beyond meeting reasonable expectations of coverage. The obligations of good faith and fair dealing encompass qualities of decency and humanity inherent in the responsibilities of a fiduciary. Insurers hold themselves out as fiduciaries, and with the public's trust must go private responsibility consonant with that trust." (*Egan v. Mutual of Omaha Ins. Co.* 24 Cal.3d 809, 820, 169 Cal.Rptr. 691, 620 P.2d 141.)

The principles articulated in *Egan* are even more critical today. Insurance is not a luxury. It is a daily necessity. Not only is automobile insurance and health insurance now mandated by law, the practical reality is that house fires, thefts, illness, earthquakes, wildfires, tornados, hurricanes, and floods occur with greater frequency every year. Families spend their hard-earned money to buy insurance as a hedge against disaster, calamity, illness and death. The deliberate and calculated refusal of an insurer to provide the benefits promised under a policy converts calamity into catastrophe.

The wrongful refusal to pay first party insurance claims is like a rock dropped into a lake: The ripples are felt far and wide. If policyholders cannot rely on the protection they have bought, the consequences to the policyholder, the economy and even the taxpayers reverberate across society: Policyholders are left destitute and without the means to return to their prior economic stability; the economy suffers every time a family

is rendered homeless, jobless and uncompensated; taxpayers have to make up the shortfall in medical care and disaster relief.

That is why insurance companies that have a business practice of denying legitimate claims to enhance their own bottom line must be most seriously punished and deterred. And the importance of that deterrence is exponentially increased where the insurer engages in a corporate-wide, institutional policy of deliberately denying covered claims. There are not only societal costs in failing to rein in institutional insurance bad faith, but the human cost as well. Punitive damages are an important way that the courts – and society – have to teach by example and deter insurers so that they, and other insurers, will honor the public's trust.

STATEMENT OF INTEREST

United Policyholders ("UP") was founded in 1991 as a non-profit organization dedicated to educating the public on insurance issues and consumer rights. UP is a voice and information resource for insurance consumers in all 50-states, based on San Francisco, California. UP is tax-exempt as §501 (c)(3) entity. UP is funded by donations and grants from individuals, businesses, and foundations. UP does not sell insurance or accept financial contributions from insurance companies. (www.uphelp.org).

Through a Roadmap to Recovery™ program United Policyholders helps individuals navigate the insurance claim process and recover fair and timely settlements. Through an Advocacy and Action program, UP works with public officials, other non-

profit and faith-based organizations and a diverse range of entities – including insurance producers, insurers and trade associations to solve problems related to claims and coverage. UP's Executive Director Chairs the California Department of Insurance Consumer Advisory Task Force, and has been appointed for six consecutive terms as an official consumer representative to the National Association of Insurance Commissioners.

A diverse range of policyholders throughout California communicate on a regular basis with UP, which allows us to provide important and topical information to courts via the submission of *amicus curiae* briefs in cases involving insurance principles that are likely to impact large segments of the public and business community.

UP's amicus brief was cited in the U.S. Supreme Court's opinion in *Humana v. Forsyth*, 525 U.S. 299, 314 (1999), and its arguments have been adopted by this Court in *TRB Investments, Inc. v. Fireman's Fund Ins. Co*., 40 Cal.4th 19 (2006) and *Vandenberg v. Super. Ct.*, 21 Cal.4th 815 (1999). UP has filed *amicus* briefs on behalf of policyholders in over 300 cases throughout the U.S. UP filed an *amicus* brief when the present case was before the Court of Appeal.

The interests of policyholders – and thus the interests of UP – is to assure that insurance companies treat their policyholders fairly. Imposition of punitive damages is the most effective deterrent to prevent insurance companies from engaging in bad faith claims handling practices. Because the issue in this case addresses the deterrent *effect* of punitive damages, it deals squarely with issues that go to the heart of UP's advocacy interests.

STATEMENT OF FACTS

Although the parties' briefs provide a superficial summary of the basic facts, those recitations do not adequately reflect the evidence of Stonebridge's egregious misconduct or the impact it had on Mr. Nickerson.

As described in the Court of Appeal's decision, Mr. Nickerson was a Marine veteran. (*Nickerson v. Stonebridge Ins. Co.* (2013) 169 Cal.Rptr.3d 629, 634). As the result of a snowmobile accident in 1997, he became a quadriplegic. (*Ibid.*) He relies on a wheelchair and worked since 2000 as a live-in caretaker for other veterans in exchange for free rent. (*Ibid.*)

Mr. Nickerson was seriously injured on February 11, 2008, when he fell from the wheelchair lift on his van to the pavement: He suffered a comminuted displaced fracture of his right tibia and fibula and was put in a full leg splint extending from his upper thigh to his toes. (*Ibid.*)

He also suffered substantial complications from the injuries, "including heterotopic ossification (formation of bone in a joint), bruising, swelling, blistering, infection and a risk of gangrene" as well as a risk of blood clots. (*Ibid.*) Because he was a veteran, he was able to obtain treatment at the Veteran's Hospital, without charge. (*Ibid.*)

Although the evidence demonstrated that he was confined to a hospital bed until February 29, he was not approved to sit in a wheelchair until nearly a month later, i.e., March 24, and could not tolerate sitting for even two hours at a time until May 9. (*Id.*, at

635.) His physician determined that he was not stable and ready to return home until May 19. (*Id.*) At that point, however, because of the splint, which held his entire leg rigidly straight, he was unable to maneuver into his home bathroom without a special part for his wheelchair. (*Ibid.*) After that part was obtained, Mr. Nickerson was discharged on May 30. (*Ibid.*)

Stonebridge issued a policy to Mr. Nickerson which provided payment directly to him (not payment to medical providers) for hospital confinement in the amount of $350 per day. (*Id.*, at 633.) Under the policy, Mr. Nickerson was "free to use the funds in any manner" he wanted. (*Ibid.*) The coverage requirements under the policy only required that he be "'an inpatient in a hospital for the necessary care and treatment of an Injury.'" (*Ibid.*) Such "necessary treatment" was defined under the policy as "medical treatment which is consistent with currently accepted medical practice" which is "a valid course of treatment recognized by an established medical society." (*Id.*, at 634.) The policy also required that the treatment be "provided in the most economical and medically appropriate site for treatment." (*Ibid.*)

Mr. Nickerson timely submitted a claim and a medical authorization. (*Id.*, at 635.) Stonebridge responded by sending him another authorization form purportedly required by the VA hospital. (*Ibid.*) Rather than engendering another delay, Mr. Nickerson traveled to the VA hospital, obtained his records himself and sent them to Stonebridge. (*Ibid.*) Stonebridge did not acknowledge receipt of those records, and instead sent the authorization form again, requiring that it be signed and returned and closed his file until

the information was received. (*Ibid*.) Mr. Nickerson signed the form and returned it. (*Ibid*.)

Nearly four months after Mr. Nickerson submitted his claim, and only after he had contacted the California Department of Insurance, Stonebridge sent his file for a medical peer review. (*Ibid*.) Stonebridge could have – but did not – authorize the peer review committee to contact the treating physicians. (*Ibid*.) Not surprisingly, that report marched in lockstep with Stonebridge's interests and concluded that Mr. Nickerson was eligible to transfer to a less acute care environment because there was no evidence of any need for additional acute hospitalization. (*Ibid*.) Stonebridge relied on that report to limit Mr. Nickerson's benefits to the period of February 11-29 instead of paying for the full 109 days he was hospitalized. (*Id*., at 636.)

Mr. Nickerson appealed that decision. The appeal was supported by his treating physician's statement that although the acute symptoms were resolved by March 1, Mr. Nickerson "*could not have been discharged safely at that time*" and he was not cleared for wheelchair use until March 24 and, even then, had to keep his leg extended at all times in order to allow healing. That restriction was not lifted until May 5. (*Ibid.)*

Stonebridge responded that the doctor's letter did not change its decision because there was no indication that hospitalization in an acute care setting was required. (*Ibid*.) The problem with that denial, of course, is that nowhere in the policy did it require that the hospitalization had to be in an "acute care setting" in order to qualify for benefits. (*Ibid*.)

Stonebridge's adjuster acknowledged at trial that she did not believe that the VA hospital kept patients unnecessarily hospitalized, conceded that the claim fell within the policy's coverage and not within any exclusion and that the VA hospital – because it provides free treatment to veterans – was the most economical site for Mr. Nickerson's treatment. (*Id*., at 637.) Despite these admissions, both the adjuster and Stonebridge's vice-president of claims testified that *the claim would be handled the same way today*. (*Ibid*.)

And the evidence at trial also demonstrated that *for years* Stonebridge has pursued an institutionalized corporate practice of depriving California policyholders of money due them under an insurance policy which purportedly guaranteed cash payments to policyholders who were admitted to a hospital or emergency room. (*Id*., at 643-644.) The Court of Appeal called Stonebridge's conduct a "deceitful practice," concluding that "Stonebridge's goal from the outset," (*Id.*, at 645 and fn. 6), was to use a "hidden 'Necessary Treatment' limitation to deny" policyholders what it owed under the plain language of the insuring clause and exclusions. (*Id*., at 643.)

While marketing a policy purportedly guaranteeing cash payments for all insureds who were hospitalized or admitted to emergency rooms, "Stonebridge limited the scope of its promise of coverage by burying it in the definition of 'Necessary Treatment,' which constitutes a concealment designed to increase Stonebridge's profits by depriving policy holders of their policy benefits." (*Id*., at 645.) This deceitful practice was so obviously unlawful that the trial court issued a

directed verdict against Stonebridge, a ruling Stonebridge did not even bother to appeal. (*Id*., at 643.)

This was coupled with an institutionalized "bad-faith claims-handling practice" that involved "intentionally concealing material information from the claims' functional decision-maker so as to limit the amount Stonebridge would have to pay out on its policies." (*Id.,* at 645, and fn. 6.) Stonebridge conceded below that this bad-faith claims handling practice "was authorized at the corporate level." (*Id*., at 643.)

The Court of Appeal termed Stonebridge a "recidivist" that has a "business practice" of using the same scheme it applied to Mr. Nickerson to deprive other Californians out of their insurance proceeds – at least 225 other insureds to date. (*Id*., at 642-643, and fn. 4.) This conclusion was based on evidence which Mr. Nickerson managed to document notwithstanding Stonebridge's largely successful efforts to conceal evidence of the scope and profitability of its deceitful practice by intentionally violating two court orders to produce such evidence. (*Id*., at 637.)

Nevertheless, the Court of Appeal stated that "Stonebridge clearly placed its interest above that of its insured and repeatedly profited both from the sale of such unlawful insurance policy clauses to Nickerson and others, and from its wrongful claims-handling practices. Indeed, Stonebridge did not appeal from the jury verdict of liability on bad faith cause of action. Manifestly, the denial of coverage here was the result of a practice repeatedly utilized, and not an isolated incident." (*Id*., at 643.)

The adjuster who handled Mr. Nickerson's claim and her supervisor, as well as the vice-president of the claims department confirm that they would handle the claim the same way. All three admitted to participating in the company's incentive compensation program and received regular bonuses ranging from $5,000 to $20,000 based on the financial goals of the company and the claims department. [RT 102/8-104/18; RT105/2-105/11].

Given this egregious institutional conduct, and Stonebridge's documented surplus of $368 million (*id.*, at 650), it was well within the jury's discretion and permissible constitutional parameters to impose $19 million in punitive damages on Stonebridge, especially in light of the minimal compensatory damages of less than $35,000 (not including *Brandt* fees and costs) involved in this case. The punitive damages imposed on Stonebridge by the jury amounted to 5% of Stonebridge's surplus – small punishment for the egregiously reprehensible and institutional misconduct perpetrated by Stonebridge on hundreds, if not thousands, of California insureds. It is well within this Court's power to protect California's consumers from Stonebridge's recidivist misconduct by including *Brandt* fees as compensatory damages in the ratio calculation.

ARGUMENT

INSURANCE COMPANIES THAT HAVE A BUSINESS PRACTICE OF NOT PAYING LEGITIMATE CLAIMS OF CALIFORNIA INSUREDS SHOULD BE DETERRED FROM ENGAGING IN SUCH REPREHENSIBLE CONDUCT

The purchase of insurance is not only a wise investment in today's modern world, it is often a compulsory one. California law mandates that drivers be minimally insured. (Veh.Code §§ 16020, 16021.) Federal law mandates the purchase of health insurance. (42 U.S.C. § 300gg-13.) Lenders contractually compel homeowners and other property owners to purchase property insurance. (See, e.g., *Ziello v. Superior Court (First Federal Bank of California)* (1995) 36 Cal.App.4th 321, 329, 42 Cal.Rptr.2d 251.)

Even before the existence of those compulsory insurance requirements, consumers purchased all types of insurance in order to protect their own financial interests in their lives, their health and their property. This Court acknowledged the reason for such purchases 35 years ago in *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 805, 819, 169 Cal.Rptr. 691, 695, 620 P.2d 141, 145: "The insured in a contract like the one before us does not seek to obtain a commercial advantage by purchasing the policy - rather, he seeks protection against calamity. As insurers are well aware . . . the purchase of such insurance provides peace of mind and security . . . ."

As the court in *Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136, 1148, 271 Cal.Rptr. 246 explained, "[i]nsurance contracts are unique in nature and purpose." "An insured does not," the court continued, "enter an insurance contract seeking profit, but instead seeks security and peace of mind through protection against calamity." (*Ibid*.) That "bargained-for peace of mind comes from the assurance that the insured will receive prompt payment of money in times of need."

As such, the *Love* court went on to confirm, "[i]f an insurer . . . could deny or delay payment of clearly owed debts with impunity, the insured would be deprived of the precise benefit the contract was designed to secure (i.e., peace of mind) and would suffer the precise harm (i.e., lack of funds in times of crisis) the contract was designed to prevent."

When insurers engage in bad faith claim denials (as the jury found in this case), the policyholder is entitled to recover all the damages caused by the insurer's tortious misconduct, including insurance policy benefits denied, consequential economic damages, emotional distress, and – under *Brandt* – attorney fees incurred in recovering the insurance policy benefits.

This Court has led the nation in recognizing that "…the insurers' obligations are . . . rooted in their status as purveyors of a vital service labeled quasi-public in nature. Suppliers of services affected with a public interest must take the public's interest seriously, where necessary placing it before their interest in maximizing gains and limiting disbursements . . . and with the public's trust must go private responsibility consonant with that trust.'" (*Egan v. Mutual of Omaha Ins. Co*. (1979) 24 Cal.3d 809,

820.) Stonebridge's discussion and the appellate court's analysis ignore the special context of the insurance relationship and the importance of deterrence as a component in the analysis of whether the jury's punitive damages verdict was constitutionally excessive.

This Court has frequently acknowledged the importance of punitive damages as a means of deterring unacceptable conduct and a state's constitutional freedom to protect the public. As this Court explained in *Johnson v. Ford Motor Company* (2005) 35 Cal.4th 1191, 1206, 29 Cal.Rptr.3d 401, 113 P.3d 82, "the court's analysis in *BMW, supra*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809, expressly affirms a state's constitutional freedom to use punitive damages as a tool to protect the consuming public, not merely to punish a private wrong." As such, "a proper award of punitive damages would be one 'supported by the State's interest in protecting its own consumers and its own economy.'" (*Ibid*.)

Further, "California law has long endorsed the use of punitive damages to deter continuation or imitation of a corporation's course of wrongful conduct, and hence allowed consideration of that conduct's scale and profitability in determining the size of award that will vindicate the state's legitimate interests. We do not read the high court's decisions, which specifically acknowledge that states may use punitive damages for punishment and deterrence, as mandating the abandonment of that principle." (*Id*., at 1207-1208.)

This Court also acknowledged in *Simon v. San Paolo U.S. Holdings Company, Inc.* (2005) 35 Cal.4th 1159, 1185, 29 Cal.Rptr.3d 379, 113 P.3d 63 that "[d]ue process

does not preclude a state from using punitive damages for the purposes of deterrence" and a court may, even under *Campbell* and *Gore*, "consider whether the level of punishment imposed is necessary to vindicate the state's legitimate interests in deterring conduct harmful to state residents." (*Ibid*.) And one consideration in that formulation is "'whether a lesser deterrent would have adequately protected the interests of [the state's] consumers.'" (*Ibid*.) Thus, "a court reviewing the jury's award for due process compliance may consider what level of punishment is necessary to vindicate the state's legitimate interests in deterring conduct harmful to [a state's] residents." (*Ibid*.)

Because deterrence of conduct exhibiting malice, oppression and fraud is a primary goal of the imposition of punitive damages in California, it is important to view Stonebridge's conduct in this case from an historical perspective in the insurance context.

Stonebridge has been an admitted insurer in California since 1961. (RJN, Ex. A.) It has therefore operated as an insurer in this state well before the development of California's first party insurance bad faith law, beginning with the decisions in *Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 89 Cal.Rptr. 78 and *Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 108 Cal.Rptr. 480, 510 P.2d 1032, and repeatedly approved by this Court in *Silberg v. California Life Ins. Co.* (1974) 11 Cal.3d 452, 113 Cal.Rptr. 711, 521 P.2d 1103, *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 148 Cal.Rptr. 582 P.2d 980, and *Egan v. Mutual of Omaha Ins. Co.* (1979) 21 Cal.2d 821, 169 Cal.Rptr. 691, 620 P.2d 141.

These reported decisions, and numerous others over the decades since California's original bad faith cases were decided, gave fair notice to Stonebridge not only of the

conduct which would subject it to a substantial punitive damages award, but the potential size of the award.

As a strong public policy-oriented state, California should reward good behavior and deter bad behavior. The record reflects, and Stonebridge does not dispute, that it acted deliberately in refusing to pay Nickerson's claim. The jury imposed punitive damages, the goal of which is to punish and deter wrongful conduct on the part of tortfeasors. Nonetheless, the trial court and the appellate court reluctantly reduced the punitive damages award and excluded *Brandt* fees from the ratio calculation, mistakenly believing a ratio of 10-1 was the maximum allowed under the U.S. Constitution while acknowledging that the reduced amount would not serve the purpose of deterrence.

The factual situation here – involving particularly reprehensible, institutional bad faith conduct and very low compensatory damages – takes this case out of the discussion in *Campbell* that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree will satisfy due process." (*Campbell*, at 425.) Despite that language, the *Campbell* court, like the *Gore* court before it, was careful to confirm that there *are* exceptions to that very broad rule: "'[T]here are no rigid benchmarks that a punitive damages award may not surpass.'" (*Campbell*, at 425, citing to and quoting from *Gore*, at 582; emphasis added.)

This Court confirmed the existence of that exception in *Simon*, i.e., that where "a particularly egregious act has resulted in only a small amount of economic damages," awards exceeding – even far exceeding – the single-digit mulitplier may be appropriate. Further, in assessing the defendant's wealth as a factor, *Simon* also specifically noted that

“[i]n some cases the defendant’s financial condition may combine with high reprehensibility and a low compensatory damage award to justify an extraordinary ratio between compensatory and punitive damages.” (*Simon*, at 1186, internal quote marks omitted.) Thus, where the conduct is particularly reprehensible, the tort damages are small and the defendant is in a good financial condition, an “extraordinary ratio between compensatory and punitive damages” is necessary in order to provide a “‘meaningful deterrent’ to illegal conduct.” (*Simon*, at 1186-1187.)

The evidence in the record in this case completely distinguishes the facts in *Campbell*. *Campbell* involved large compensatory damages of $1 million, and no evidence of any institutional pattern and practice of bad faith. The evidence here, in contrast, involves very low compensatory damages (i.e., $35,000) and substantial evidence of a pattern and practice of institutional bad faith deliberately designed to increase the defendant’s profits. These facts not only support the jury’s punitive damages award but compel the conclusion that award was constitutionally valid because it was necessary in order to provide a “meaningful deterrent” to the type of conduct Stonebridge engaged in, including rewarding its claims personnel for lower payouts on policies. [*See, e.g.* RT 1898:16-1899:23.]

Even beyond the narrow *Brandt* fee issue, this case highlights a situation in which an insurer’s egregious, deliberate and intentional misconduct, perpetrated as a institutionalized corporate policy affecting many other insureds, over a number of years, and which deprived this seriously-injured and low-income veteran of desperately-needed

benefits, warrants imposition of punitive damages well beyond the “single-digit ratio” discussed.

The punitive damages imposed by the jury in this case should not have been reduced at all; but at the very least, the punitive damages ratio calculation should have included the attorney fees incurred by Mr. Nickerson in retaining counsel to recover his wrongfully-denied benefits[1].

Stonebridge contends that the due process protections guaranteed by the U.S. Constitution necessarily *require* that *Brandt* fees be excluded from the punitive damages calculations. On the contrary, in this circumstance, insurers’ inherent advantage - drafting contracts of adhesion and employing armies of lawyers - *requires* safeguards to prevent them from abusing that power so as to boost profits by engaging in unfair claim practices.[2] The knowledge that if they do abuse that power, they may get sued and be held liable for consequential damages - *including the policyholders' attorney fees* - is a critical safeguard to prevent them from exploiting their superior resources. As this Court noted in *Egan,* “the relationship of insurer and insured is inherently unbalanced: the adhesive nature of insurance contracts places the insurer in a superior bargaining position” and the imposition of additional protections “reflects an attempt to restore balance in the contractual relationship.” (*Egan, supra*, at 820.)

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1 Had this case been billed on an hourly basis the attorney fees claimed would have amounted to $537,285.00 (see Stonebridge's answering brief on the merits, page 8).

2 Allen Reames, *The Adhesion Contract of Insurance*, 5 Santa Clara L. Rev. 60 (1964).

A consumer's ability to recover attorney's fees incurred in collecting benefits that are improperly withheld is no different than other forms of compensatory damages and the right to recover other consequential damages resulting from an insurer's unfair claim practice or exploitation of superior resources. The fact that a court does the math to calculate those benefits is an appropriate mechanism for judicial efficiency, which is *procedural* in nature and not the basis for a *substantive* distinction.

Stonebridge relies heavily on *Amerigraphics, Inc. v. Mercury Cas. Co.* (2010) 182 Cal.App.4th 1538, 107 Cal.Rptr.3d 307 in its rationale for exclusion of the *Brandt* fees, because, as the courts in *Amerigraphics* and *Bardis v. Oates* (2004) 119 Cal.App.4th 1, 14 Cal.Rptr.3d 89 concluded, attorney fees are not "actual harm as determined by the jury." (Stonebridge's Answer Brief, p. 27.) Such statements are at directly odds with this Court's holding in *Brandt* as well as California insurance bad faith law. And excluding these damages could provide additional incentives for insurers to deny claims. Those courts stretched the "actual harm as determined by the jury" to a point of absurdity – effectively creating a distinction without a real difference.

The absurdity in the distinction argued by the cases relied on by Stonebridge (i.e., that *Brandt* fees decided by the jury may be included in the ratio, but the *Brandt* fees decided by the judge may not) is demonstrated by this simple, but graphic example: If the parties to an insurance bad faith case elect to proceed by way of bench trial instead of a jury trial, then no matter how egregious the conduct, or how severe the damages, the court can *never* award *any* punitive damages because *all* the compensatory damages would be decided by the judge and thus, *none* of them could be included in the ratio.

That result is insupportable whether examined on the basis of logic, common sense or public policy.

Other jurisdictions have correctly allowed attorney fees to be included in the ratio multiplier. In *Clausen v. Icicle Seafoods, Inc.* (Wash. 2012) 272 P.3d 827 (en banc), the Washington Supreme Court allowed $387,558 in attorney's fees to be included in the multiplier. That court reasoned that attorney fees are compensatory in nature "in that those fees attempt to make [plaintiff] whole for the [tortfeasor's] actions in intentionally failing in its…duty to provide maintenance and cure." *Id.,* at 836.

Similarly, in *Quicken Loans, Inc. v. Brown* (W. Va. 2012) 37 S.E.2d 640, the West Virginia Supreme Court held that statutory attorney fees were "compensatory in nature" and should be included when evaluating whether a punitive damages award was excessive. (*Id.* at 665-66.) As that court reasoned: "consumer protection fee-shifting statutes were designed to be compensatory in nature." (*Ibid.*) An award of *Brandt* fees has the same purpose and effect.

Given the narrowness of the issue identified by this Court in granting review, at the very least, it is appropriate to include *all* the tort damages awarded, including the *Brandt* fees, in determining the constitutional validity of the punitive damages imposed in this case.

CONCLUSION

For the foregoing reasons, *amicus curiae* UP respectfully requests that this Court reverse the Court of Appeal's judgment that *Brandt* fees should be excluded in determining the appropriate ratio between compensatory damages and punitive damages.

The original Petition for Review in this case addressed a larger issue, i.e., whether a punitive damages ratio in excess of 10:1 is constitutionally permissible given the evidence in this trial. This Court originally granted review on those larger issues, but subsequently limited the issue to be considered to the *Brandt* issue.

United Policyholders believes it is critical that the larger issue regarding what punitive damage ratios are necessary for effective deterrence where an insurance company engages in institutional, systematic, long-term and on-going bad faith be considered. That issue is critically important for protection of the public and needs to be addressed. United Policyholders therefore respectfully requests that this Court reconsider its limitation of the issues under review in this case and that the Court request briefing on the merits of that larger issue, i.e., whether a ratio in excess of 10:1, is constitutionally permissible under circumstances such as those presented in this case.

Dated: July 2, 2014

THE ARKIN LAW FIRM

By: ________________________

SHARON J. ARKIN
Attorney for *amicus curie*
UNITED POLICYHOLDERS

CERTIFICATE OF LENGTH OF BRIEF

I, Sharon J. Arkin, declare under penalty of perjury under the laws of the State of California that the word count for this Brief, excluding Tables of Contents, Tables of Authority, Proof of Service and this Certification is 5389 words as calculated utilizing the word count feature of the Word:Mac 2008 software used to create this document.

Dated: July 2, 2014

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SHARON J. ARKIN

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 225 S. Olive Street, Suite 102, Los Angeles, CA 90012.

On **July 2, 2014**, I served the within document described as:

AMICUS BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF THOMAS NICKERSON

on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as set forth in the attached service list.

X **By Mail**: By depositing with the U.S. Postal Service on this day with postage thereon fully prepaid at Brookings, Or.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on July 2, 2014 at Brookings, Oregon.

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SHARON J. ARKIN

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