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S213873

SUPREME COURT OF CALIFORNIA

THOMAS NICKERSON,

Plaintiff and Appellant,

v.

STONEBRIDGE LIFE INSURANCE COMPANY,

Defendant and Appellant.

2d Civil No. B234271

(Los Angeles County
Super. Ct. No. BC405280)

SUPREME COURT
FILED

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Deputy

REPLY TO ANSWER TO PETITION FOR REVIEW

After a Decision by the Court of Appeal
Second Appellate District, Division Three

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*William M. Shernoff #38856
Howard S. Shernoff #263556
Travis M. Corby #268633
SHERNOFF BIDART
ECHEVERRIA BENTLEY LLP
600 South Indian Hill Boulevard
Claremont, CA 91711
Telephone: (909) 621-4935
Facsimile: (909) 625-6915

Jeffrey Isaac Ehrlich #117931
THE EHRLICH LAW FIRM
16130 Ventura Boulevard, Suite 610
Encino, CA 91436
Telephone: (818) 905-3970
Facsimile: (818) 905-3975

Attorneys for Appellant and Cross-Respondent
Thomas Nickerson

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Claremont, CA 91711
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Facsimile: (909) 625-6915

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THE EHRLICH LAW FIRM
16130 Ventura Boulevard, Suite 610
Encino, CA 91436
Telephone: (818) 905-3970
Facsimile: (818) 905-3975

Attorneys for Appellant and Cross-Respondent
Thomas Nickerson

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INTRODUCTION

Nickerson seeks review because neither the policy-proceeds rule nor the *Brandt*-fee rule should be a feature of California bad-faith law. Although these rules are applied in the name of federal due process, they cannot be justified by any requirement derived from the due-process clause. Stonebridge admits in its answer to Nickerson's petition that the policy-proceeds rule is not based on due-process principles.

So Stonebridge tries to invent a new state-law justification for the policy-proceeds rule. The trouble is that the policy-proceeds rule masquerades as a due-process requirement, which California courts apply to evaluate whether a punitive damage award is too large to comport with federal due process limits on punitive-damage awards. If the rule is not rooted in the due-process clause, then courts should not be relying on it for that purpose, and this Court should step in and stop the practice.

In reality, there is no principle of state or federal law that requires that insurance-policy proceeds be ignored when punitive-damage awards are reviewed. The second of the due-process "guideposts" prescribed by the U.S. Supreme Court requires consideration of the harm that the defendant's conduct caused. When the insurer's tortious conduct consists of withholding the policy proceeds from its insured, the loss of those proceeds is the essence of the harm that the insured suffers. Excluding them from the due-process analysis is baffling because they are the one category of damages that the defendant insurer *knows* it will inflict when it wrongly denies coverage.

The *Brandt*-fee rule is problematic for the same reason, because *Brandt* fees represent part of the harm that a bad-faith plaintiff has suffered as a result of the insurer's tortious conduct. This is true regardless of whether the *Brandt* fees were calculated by the jury or by the trial court in post-trial proceedings. This Court has already explained that in some cases the "harm" that reviewing courts consider when evaluating punitive-damage awards is distinct from the damages that the jury awarded. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1173.)

The purpose of *de novo* judicial review of punitive-damage awards is not to determine whether the amount that the jury awarded was correct or even to find the "right" amount of punitive damages. It is to fix the point beyond which any award of punitive damages is excessive. (*Simon,* 35 Cal.4th at p. 1188.) In performing this task a reviewing court is not constrained to consider only what the jury considered.

For example, in *Boeken v. Philip Morris Inc.* (2005) 127 Cal.App.4th 1640, 1703, the court included in its evaluation of the maximum punitive-damage award the fact that the defendant had been subjected to a second punitive-damage award three years after the verdict. That information was obviously not available to the jury. Stonebridge cannot articulate any logical reason why a reviewing court should not take a post-verdict *Brandt*-fee award into account when evaluating the harm suffered by the plaintiff.

Finally, Nickerson has also sought review of a more general question concerning punitive damages – whether reviewing courts are constrained to limit the ratio of punitive-to-compensatory damages when they believe the resulting award will be too small to have any deterrent effect on the defendant. The issue is not, as Stonebridge tries to frame it, whether the size of a punitive-damage award should be dictated by the defendant's wealth. Rather, the issue is whether due process can force the State to impose an award lower than the minimum amount needed to have any deterrent effect.

ARGUMENT

A. Stonebridge's attempt to defend the policy-proceeds and *Brandt*-fee rules illustrates the muddled state of insurance bad-faith law and the need for this Court to clarify it

1. Stonebridge admits that the policy-proceeds rule is not justified by federal due-process considerations

Stonebridge acknowledges that the federal due-process clause is agnostic about the type of claims for which punitive damages can be imposed. (Answer at 14, 15.) In fact, Stonebridge expressly concedes that, from a due-process standpoint, California would be free to impose punitive damages in breach-of-contract actions. (*Id.* at 15.)

Stonebridge recognizes that this means that the policy-proceeds rule cannot be justified on due-process grounds, so it tries to redefine the rule as nothing more than an application of the ban on punitive damages in breach-of-contract cases imposed by Civil Code section 3294, subdivision (a). (Answer at 11, 12 [arguing that the rule is codified at Civil Code § 3294, subd. (a)].) Having conceded that the rule is based on due-process principles, it pivots, arguing that "The fact that federal due process may not mandate substantive constraints on punitive damages does not diminish the force and effect of those constraints as a matter of California law." (Answer at 15.)

What Stonebridge overlooks is that the courts that have formulated and applied the policy-proceeds rule have done so as part of their due-process review of the punitive-damage awards in the cases before them. In each case — *Textron,*[1] *Major,*[2] and here — the rule was applied in the court's application of the second due-process guidepost referenced by the U.S. Supreme Court in *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 418, and *BMW of North America v. Gore* (1996) 517 U.S. 559, 575.)

Major illustrates this when it states: "The *Textron* court reasoned that, because punitive damages cannot be awarded for a

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[1] *Textron Financial Corp. v. National Union Fire Ins. Co. of Pittsburgh* (2004) 118 Cal.App.4th 1061, 1084, disapproved on other grounds in *Zhang v. Superior Court* (2013) 57 Cal.4th 364.

[2] *Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1224.

breach of contract, contract damages are irrelevant to, and must be excluded from, the analysis of the ratio guidepost." (*Major*, 169 Cal.App.4th at p. 1224, citing *Textron*, 118 Cal.App.4th at p. 1084.)

The rule therefore purports to be a part of the way that courts evaluate whether punitive-damage awards in bad-faith cases comport with due process. Stonebridge's admission that the rule actually has no due-process warrant shows that the rule should not continue to be applied.

2. There is no state-law justification for the policy-proceeds rule, which confuses "tort damages" with "extra-contractual damages"

Even as a matter of state law, the policy-proceeds rule cannot be justified because it improperly equates extra-contractual damages with "tort damages," instead of treating extra-contractual damages as a subset of tort damages. Stonebridge seeks to justify the rule by arguing that "[b]ecause the policy proceeds represent purely contractual damages, [Civil Code] section 3294 does not permit them to serve as a predicate for punitive damages." (Answer at 14.)

But the policy proceeds do not represent "purely contractual damages" when they have been awarded in a bad-faith action. A policyholder who succeeds in proving bad faith will have necessarily established that the contract was breached. This is because one of the elements of a bad-faith claim is the insurer's withholding of benefits that are due under the contract. (*See, e.g.*, *Major,* 169 Cal.App.4th at p. 1209.) As a result, the policy proceeds that were withheld from the policy holder represent an element of tort damages, which include "the amount which will compensate for all the detriment proximately caused thereby." (Civil Code § 3333.) The proceeds are therefore not "purely contractual" in a bad-faith case.

Stonebridge counters that "[j]ust because a plaintiff prevails on both a contract claim and a tort claim does not mean that the damages that were specifically awarded under the contract claim *are attributable to the tortious conduct.*" (Answer at 16, italics in original.) While this might be true in the abstract, it is not true in insurance bad-faith cases where the insurer's tortious conduct was unreasonably withholding the policy benefits.

In *that* type of bad-faith case (which includes this case, *Textron,* and *Major*), the policyholder's tort damages necessarily include the policy benefits that the insurer tortiously refused to pay — i.e., the policy proceeds. This point is illustrated in *Amerigraphics, Inc. v. Mercury Cas. Co.* (2010) 182 Cal.App.4th 1538, 1557-1558, where the court held that the jury's unitary award of the policy proceeds represented "tort" damages that supported a punitive-damage award.

Amerigraphics cannot be squared with *Textron, Major,* or this case because it would have come out differently if the court had applied the policy-proceeds rule. Since the policy proceeds were the only damages recovered by the plaintiff in *Amerigraphics*, the entire compensatory award was "contract damages." Thus, the policy-proceeds rule would have required that the punitive-damages award be struck.

Stonebridge labors to harmonize *Textron, Major,* this case, and *Amerigraphics.* It formulates a theory that when the contract and tort damages are "entirely separate and clearly delineated" the policy proceeds cannot be treated as tort damages if they were awarded on a breach-of-contract claim. It notes that in *Textron* the trial was conducted in phases, and the policy proceeds were awarded in the first phase for breach of contract, while the extra-contractual damages were awarded in the second phase. And it points out that here the trial court directed a verdict for Nickerson on his breach-of-contract claim before the bad-faith claim was submitted to the jury.

Major does not really fit Stonebridge's theory because both the breach-of-contract and bad-faith claims went to the jury at the same time. But Stonebridge notes that the jury awarded the policy proceeds on the breach-of-contract claim and awarded extra-contractual damages on the bad-faith claim.

Stonebridge argues that the "clear delineation" between the policy proceeds and the extra-contractual damages means that the policy proceeds were not attributable to the insurer's tortious conduct in this case, *Textron,* and *Major*. This simply is not so. In each of those cases the tortious conduct was the insurer's refusal to pay the policy proceeds, and therefore the policy proceeds were recoverable as tort damages.

What Stonebridge has discovered is the rule that, regardless of the number of legal theories a plaintiff advances, an item of damages can only be recovered once. (*Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1158.) As a result, there is little point in including the same item of damages in two places on the verdict form. (*See, e.g., Walker v. Signal Companies* (1978) 84 Cal.App.3d 982, 995 [jury's award of $5,000 for breach of contract was duplicative of award for fraudulently inducing contract, so judgment could only include one award].)

For this reason courts and parties in bad-faith cases are loath to have the jury award the same item of damages in two places on the verdict form. But this does not mean, for the purposes of due-process review of the resulting punitive-damage award, that the policy proceeds were necessarily contract damages that should not be considered.

Once the jury finds that the insurer has committed a tort by withholding the policy proceeds, then it is proper for a reviewing court to view those proceeds as part of the harm suffered by the policyholder, even if they were not awarded — as they could not be — a second time in the bad-faith cause of action.

Stonebridge posits that it is theoretically possible that, in some cases, an award of policy proceeds might not be attributable to the insurer's tortious conduct. But it provides no illustrations of how this could be possible in a bad-faith case like this one (or like *Textron* or *Major*), where the bad faith was the failure to pay the claim. Indeed, its "delineation" argument makes sense only when the plaintiff prevails on a contract claim yet fails to prove bad faith. In such a case, there are no tort damages to compute. But where bad faith is proven any attempt to delineate damages contradicts the very notion, formulated by this Court, of bad faith as a tortious breach of contract. (*See Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 574.)

Instead of having a categorical rule that always results in the policy proceeds being excluded from consideration, it would make more sense for the courts to deal with the type of case that Stonebridge speculates might exist when such a case presents itself.

As already noted above, this Court recognized in *Simon* that the due-process analysis under the second guidepost focuses on harm, not necessarily on the damages awarded. (*Simon*, 35 Cal.4th at p. 1173.) Where a verdict has been structured so that the policy proceeds are determined by the jury on a breach–of-contract claim and the extra-contractual damages are decided on a bad-faith claim, reviewing courts should still be allowed to consider the lost policy proceeds as part of the harm suffered by the policyholder that is attributable to the insurer's tortious conduct.

3. There is no due-process justification for the *Brandt*-fee rule

Many of the considerations that undermine the policy-proceeds rule also apply to the *Brandt*-fee rule. *Brandt* fees are not attorney's fees awarded as attorney's fees; they are awarded as part of the plaintiff's compensatory damages. (*Brandt v. Superior Court* (1985) 37 Cal.3d 813, 817 ["These fees must be distinguished from attorney's fees *qua* attorney's fees . . . what we consider here is attorney's fees recoverable as damages . . . .].)

Brandt fees are therefore clearly part of the harm that the plaintiff incurs in bringing a successful bad-faith claim. *Major* held that they are properly considered in the due-process analysis. (*Major*, 169 Cal.App.4th at p. 1225.) This consideration should not depend on whether they were awarded by the jury or awarded by the judge after the verdict.

As explained above, Stonebridge's thesis — that reviewing courts cannot take into account any post-verdict information in evaluating the size of punitive-damage award —is disproved by *Boeken v. Philip Morris Inc.*, 127 Cal.App.4th at p. 1703. There, the reviewing court actually reduced the punitive-damages ratio based on a second punitive-damage award that had been entered against the defendant several years after the jury verdict in the case under review. If a reviewing court can properly take this kind of information into account as part of the due-process analysis, it can surely consider a *Brandt*-fee award made by the trial court and included in the very judgment it is reviewing.

Stonebridge relies on four cases to justify the *Brand*-fee rule: *Amerigraphics, BMW v. Gore, Bardis v. Oates* (2004) 119 Cal.App.4th 1, 17-18, and *Simon*. None of these cases explains why a *Brandt*-fee award made by the trial court post verdict should not be included in a reviewing court's consideration of the harm done to the plaintiff. Although *Amerigraphics* holds that *Brandt* fees can be considered only if they are awarded by the jury, its conclusion is pure *ispe dixit*, devoid of any explanation or analysis. (*Id.*, 182 Cal.App.4th at p. 1565.) The court in this case followed *Amerigraphics* on this point, without any additional analysis.

Stonebridge tries to supply a rationale, arguing that the U.S. Supreme Court has directed that punitive damages "should be based on 'the actual harm as determined by the jury.'" (Answer at 18, citing *BMW v. Gore*, 517 U.S. at p. 582.) But the phrase that Stonebridge plucks from *Gore* was not prescribing any sort of rule. Instead, the Court was just making an observation about the relative size of the punitive-damage and compensatory-damage awards.

The full sentence says, "The $2 million in punitive damages awarded to Dr. Gore by the Alabama Supreme Court is 500 times the amount of his actual harm as determined by the jury." (*Id.*) There is simply no directive in this sentence that says that damages awarded by the trial court after the verdict must be excluded from any due-process consideration of a punitive-damage award. Nor can Stonebridge point to any other portion of the decision in *Gore,* or to any other Supreme Court decision, that purports to state such a rule.

The actual rule that the Court described in *Gore,* as explained above, focuses on a comparison of the *harm* that the plaintiff suffered and the punitive damages imposed. (*Gore,* 517 U.S. at p. 580.) *Brandt*-fees awarded by the trial court clearly satisfy this standard.

Bardis v. Oates did state that the denominator for the punitive-damage ratio should be the damages awarded by the jury, and it rejected the plaintiff's suggestion that the denominator should be augmented by other elements — such as the attorney's fees incurred, or harm to a "hypothetical plaintiff" or to other parties. (*Id.,* 119 Cal.App.4th at p. 17.)

Brandt fees are fundamentally different from those items because they are real damages that are awarded to the plaintiff. And the *Bardis* opinion relies on the same snippet from the *BMW v. Gore* that Stonebridge cites, which does not actually prescribe a legal rule.

Stonebridge does acknowledge that judicial review of a punitive-damage award may properly consider potential harm — which necessarily involves damages that were not included in the jury's award. But it claims that in *Simon* this Court held that potential harm is relevant only when the evidence is presented to the jury. Stonebridge cites page 1175 and 1176 of the *Simon* opinion, adding a parenthetical stating, "reviewing court considers potential harm on the basis of evidence presented at trial." (Answer at 21, n. 2.)

But there is nothing in *Simon* at these pages, or elsewhere, that supports the limitation that Stonebridge articulates. To the contrary, this Court stated, "we conclude that . . . uncompensated or potential harm may in some circumstances be properly considered in assessing the constitutionality of a punitive damage award." (*Simon,* 35 Cal.4th at p. 1166.) This Court further noted that "we must determine independently the relationship between the harm done plaintiff and the amount awarded in punitive damages." (*Id.,* 35 Cal.4th at p. 1174.)

Ultimately, in *Simon* the Court declined to consider potential harm because the defendant's fraud neither caused nor threatened to cause harm beyond the $5,000 reflected in the jury's verdict. (*Id.* at p. 1179.) But the Court's decision indicated that potential harm should be considered in those cases where the unrealized harm had been likely to result from the defendant's conduct, because the defendant would be on notice of the potential injuries from its bad acts. (*Id.* at p. 1177.)

Insurers in California know that if they tortiously withhold the proceeds that are owed to their policyholder and force the policyholder to file suit, then the policyholder's damages will include *Brandt* fees. There is accordingly no unfairness in considering *Brandt* fees as part of the due-process analysis, regardless of whether the amount of those damages is determined by a jury or by a court.

B. Nickerson does not claim that a defendant's wealth justifies constitutionally excessive punitive-damage awards; it is that the constitution does not limit punitive-damage awards to an amount too low to alter the defendant's conduct

This case is unique because both the trial court and the Court of Appeal concluded that the maximum punitive-damage award permitted by due process would be insufficient to deter Stonebridge from continuing to treat its insureds the way that it treated Nickerson. It therefore raises the issue of whether the due-process clause can prevent a state from imposing a punitive-damage award that is high enough to deter the defendant's wrongdoing.

Simon recognizes that the due-process limits that the Supreme Court adopted in *Campbell* and *Gore* may require a state "to partly yield its goals of punishment and deterrence." (*Simon,* 35 Cal.4th at p. 1187.) But full abdication is not necessary; the State's interest in achieving the maximum amount of deterrence is what must "partly yield." Maximum deterrence would be achieved by punitive awards that were so high that they might bankrupt the defendant. Due process does not permit this outcome. But nor does it require the other extreme – an award too low to achieve any deterrent effect.

This Court's discussion of the circumstances when a state's interest in deterrence might have to yield to due-process concerns explained that this result might be necessary in cases when there was a substantial compensatory-damage award, or in cases where the reprehensibility of the defendant's conduct was relatively low and the state's interest in punishing it and deterring its repetition was relatively slight. (*Id.*)

Those elements are not present here. The compensatory-damage award to Nickerson was modest. And the conduct that led to the punitive-damage award was highly reprehensible, as both the trial court and the Court of Appeal concluded. In fact, this case presents the kind of scenario that requires stern deterrence because it involves a low compensatory award that was nonetheless generated by widespread, or institutional, bad-faith conduct.

The Court of Appeal explained that Stonebridge "repeatedly relied on an unenforceable provision to deny coverage to its insureds" and that it "utilized the same bad-faith claim-handling practice against others that it used against Nickerson." (Typed Opn. at 18.) It also found that Stonebridge has a practice of obstructing communication between outside medical reviewers that it hires to deny claims and the doctors who treat its policyholders. (*Id.*) And it found that Stonebridge "repeatedly profited both from the sale of such unlawful insurance policy clauses to Nickerson and others, and from its wrongful claims-handling practices." (*Id.*)

These are institutional bad-faith practices that California has a substantial interest in deterring. Relying on this Court's opinion in

Johnson v. Ford Motor Co. (2005) 35 Cal.4th 1191, 1206-1207 n. 6, the opinion below recognizes that when a plaintiff can demonstrate that the defendant's improper conduct represents a business practice, that conduct is "more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature." (Typed Opn. at 19.) But even given Stonebridge's institutional practices and Nickerson's low compensatory award, the courts below felt that the maximum award that due process allowed would be only 1/10 of one percent of Stonebridge's net worth. (*See,* 1 AA 108.) At the same time, both courts recognized that this award was not large enough to stem the institutional conduct.

The punitive-damage award made by the jury represented 5 percent of Stonebridge's net worth. Awards of this size or higher have been recognized as necessary to achieve a deterrent effect, particularly when the defendant is wealthy. (*Boeken v. Philip Morris Inc.* (2005) 127 Cal.App.4th 1640, 1701.) Stonebridge points to the statement in *Campbell* that "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." (*Campbell,* 538 U.S. at p. 427.) But Nickerson is not urging this Court to approve an "otherwise unconstitutional punitive damages award" based solely on Stonebridge's wealth.

Rather, as this Court has also recognized, the ultimate goal of punitive damages — deterrence — "will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort." (*Simon,* 35 Cal.4th at p. 1185.) And in *Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 427, that punitive-damage awards must be high enough to prevent defendants from treating them as a routine cost of doing business.

Without punitive-damage awards high enough to achieve some measure of deterrence, there will simply be no way to eradicate the type of institutionalized bad-faith claims-handling practices that Stonebridge was found to engage in. This Court should grant review to make clear that the Constitution allows a state to assess a punitive-damage award that is large enough to achieve its principal purpose.

CONCLUSION

This Court should grant Nickerson's petition to determine (1) whether California courts should continue to apply the policy-proceeds and *Brandt*-fee rules, and (2) whether due process forbids a state from imposing a punitive-damage award high enough to deter the wrongdoer.

Dated: November 8, 2013.

Respectfully submitted,
SHERNOFF BIDART
ECHEVERRIA BENTLEY LLP
THE EHRLICH LAW FIRM

By: Jeff I. E

Jeffrey Isaac Ehrlich
Attorneys for Appellant

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Dated: November 8, 2013.

Jeffrey Isaac Ehrlich

Nickerson v. Stonebridge Life Insurance Company
Supreme Court No. S213873
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Superior Court Case No. BC405280

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: 237 West Fourth Street, Second Floor, Claremont, CA 91711.

On **November 8, 2013,** I served the foregoing documents described as **REPLY TO ANSWER TO PETITION FOR REVIEW** on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

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

Executed on **November 8, 2013,** at Claremont, California.

Isabel Cisneros-Drake, Paralegal

Nickerson v. Stonebridge Life Insurance Company
Supreme Court No. S213873
Court of Appeal No. B234271
Superior Court Case No. BC405280

SERVICE LIST

Margaret M. Grignon, Esq. Raymond Yoon Kim, Esq. REED SMITH LLP 355 South Grand Avenue, Suite 2900 Los Angeles, CA 90071 Telephone: (213) 457-8000	Attorneys for Stonebridge Life Insurance Company
Mark Baute, Esq. Henry Chi-Jen Wang, Esq. BAUTE CROCHETIERE & WANG LLP 777 South Figueroa Street, Suite 4900 Los Angeles, CA 90017 Telephone: (213) 630-5000	Attorneys for Stonebridge Life Insurance Company
David Lawrence Abney, Esq. KNAPP & ROBERTS, P.C. Suite 181 8777 North Gainey Center Drive Phoenix, AZ 85258	Counsel for Amicus Curiae United Policyholders
Amy Bach, Esq. United Policyholders 381 Bush Street, 8th Floor San Francisco, CA 94104	Amicus Curiae
Clerk of the Superior Court Los Angeles Superior Court Hon. Mary Ann Murphy 111 North Hill Street Los Angeles, CA 90012	

Clerk, Court of Appeal
Second Appellate District, Div. 3
North Tower, Floor 2
300 South Spring Street
Los Angeles, CA 90013-1213

California Supreme Court
Clerk of the Court
350 McAllister Street
San Francisco, CA 94102

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