

NO. S213873

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IN THE SUPREME COURT OF CALIFORNIA

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THOMAS NICKERSON,  
*Plaintiff and Appellant,*

v.

STONEBRIDGE LIFE INSURANCE COMPANY,  
*Defendant and Respondent.*

After a Decision by the Court of Appeal,  
Second Appellate District, Division Three,  
Case No. B234271

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

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**AMICI CURIAE BRIEF OF AMERICAN TORT REFORM  
ASSOCIATION, NATIONAL ASSOCIATION OF MUTUAL  
INSURANCE COMPANIES, AND PROPERTY CASUALTY  
INSURERS ASSOCIATION OF AMERICA D/B/A IN CALIFORNIA  
AS ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES  
IN SUPPORT OF DEFENDANT-RESPONDENT**

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INDEX

	Page
QUESTION PRESENTED .....	1
STATEMENT OF INTEREST .....	1
STATEMENT OF THE CASE .....	1
INTRODUCTION AND SUMMARY OF THE ARGUMENT .....	2
ARGUMENT	
I.    DUE PROCESS REQUIRES PUNITIVE DAMAGES TO BE PROPORTIONAL TO THE PLAINTIFF'S HARM <i>AS DETERMINED BY THE JURY</i> .....	4
II.   ATTORNEYS' FEES SHOULD BE EXCLUDED FROM THE PUNITIVE DAMAGES RATIO CALCULATION, EVEN WHEN THE FEES ARE DETERMINED BY A JURY..	8
A.   U.S. Supreme Court Precedent Supports Excluding Attorneys' Fees From The Punitive Damage Ratio Calculation .....	9
B.   Public Policy Supports Excluding Attorneys' Fees From The Punitive Damage Ratio Calculus.....	12
CONCLUSION .....	16
CERTIFICATE OF COMPLIANCE .....	End
PROOF OF SERVICE .....	End

## TABLE OF CASES AND AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>Amerigraphics, Inc. v. Mercury Cas. Co.</i> (2010) 182 Cal.App.4th 1538 .....	3
<i>Bardis v. Oates</i> (2004) 119 Cal.App.4th 1 .....	9
<i>BMW of N. Am., Inc. v. Gore</i> (1996) 517 U.S. 559 .....	<i>passim</i>
<i>Brandt v. Superior Court</i> (1985) 37 Cal.3d 813 .....	<i>passim</i>
<i>Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.</i> (1989) 492 U.S. 257 .....	10
<i>Chasan v. Farmers Group, Inc.</i> (Ariz. Ct. App. Sept. 24, 2009) 2009 WL 3335341 .....	6
<i>Daka Inc. v. McCrae</i> (D.C. 2003) 839 A.2d 682 .....	12
<i>Exxon Shipping Co. v. Baker</i> (2008) 554 U.S. 471 .....	10
<i>Honda Motor Co., Ltd. v. Oberg</i> (1994) 512 U.S. 415 .....	5
<i>Pac. Mut. Life Ins. Co. v. Haslip</i> (1991) 499 U.S. 1 .....	<i>passim</i>
<i>Parrish v. Sollecito</i> (S.D.N.Y. 2003) 280 F. Supp. 2d 145 .....	12
<i>Philip Morris USA v. Williams</i> (2007) 549 U.S. 346 .....	7
<i>State Farm Mut. Auto. Ins. Co. v. Campbell</i> (2003) 538 U.S. 408, <i>on remand</i> (Utah 2004) 98 P.3d 409, <i>cert. denied</i> , 543 U.S. 874 (2004) .....	<i>passim</i>
<i>TXO Prod. Corp. v. Alliance Res. Corp.</i> (1993) 509 U.S. 443 .....	5
 <u>STATUTES</u>	
Ala. Code § 6-11-21 .....	10
Alaska Stat. § 9.17.020 .....	10
Cal. Civ. Code § 3294 .....	13
Cal. Code Civ. Proc. § 1021.5 .....	14

Colo. Rev. Stat. § 13-21-102.....	10
Conn. Gen. Stat. § 52-240b.....	10
Fla. Stat. § 768.73 .....	10
Ga. Code § 51-12-5.1 .....	10
Idaho Code § 6-1604.....	10
Ind. Code § 34-51-3-4.....	10
Kan. Stat. § 60-3702 .....	10
Me. Rev. Stat. tit.28-A § 2-804(b) .....	10
Miss. Code § 11-1-65.....	10
Mo. Rev. Stat. § 510.265.1 .....	10
Mont. Code § 27-1-220 .....	10
Nev. Rev. Stat. § 42.005 .....	10
N.J. Stat. § 2A:15-5.14.....	10
N.C. Gen. Stat. § 1D-25 .....	10
N.D. Cent. Code § 32.03.2-11(4).....	10
Ohio Rev. Code § 2315.21 .....	10
Okla. Stat. tit. 23, § 9.1 .....	10
S.C. Code § 15-32-530.....	10
Tenn. Code § 29-39-104 .....	10
Tex. Civ. Prac. & Rem. Code § 41.008 .....	10

Va. Code § 8.01-38.1 ..... 10

**OTHER AUTHORITIES**

Mark A. Behrens *et al.*, *Calculating Punitive Damages Ratios With Extracompensatory Attorney Fees And Judgment Interest: A Violation of the United States Supreme Court’s Due Process Jurisprudence?* (2013) 48 Wake Forest L. Rev. 1295.....*passim*

E. Donald Elliott, *Why Punitive Damages Don’t Deter Corporate Misconduct Efficiently* (1989) 40 Ala. L. Rev. 1053 ..... 9

George L. Priest, *Punitive Damages and Enterprise Liability* (1982) 56 S. Cal. L. Rev. 123 ..... 9

Victor E. Schwartz *et al.*, *Reining In Punitive Damages “Run Wild”: Proposals for Reform By Courts And Legislatures* (2000) 65 Brook. L. Rev. 1003 ..... 9

### **QUESTION PRESENTED**

Is an award of attorney fees under *Brandt v. Superior Court* (1985) 37 Cal.3d 813, properly included [in a court's due process review of a punitive damage award] 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?

### **STATEMENT OF INTEREST**

*Amici* are organizations that represent insurers doing business in California and a civil justice reform organization that includes insurers. Presently, insurance bad faith actions in California are anomalous and problematic because this Court in *Brandt v. Superior Court* (1985) 37 Cal.3d 813, made a sharp break from tradition and held that attorneys' fees may be recovered by plaintiffs when an insurer tortiously withholds benefits. Separately, *amici* have long been concerned about excessive, irrational, and unpredictable punitive damage awards. This appeal has the potential to augment both problems because Plaintiff has asked the Court to adopt an approach for reviewing punitive damages that would include fee awards in the ratio calculus to significantly and improperly inflate such windfall awards in bad faith actions (and presumably in false arrest and malicious prosecution actions, where attorneys' fees are available too).

### **STATEMENT OF THE CASE**

*Amici* adopt Defendant-Respondent's Statement of the Case.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

In *Brandt*, this Court held that successful plaintiffs in insurance bad faith tort actions may recover attorneys' fees, as in actions for false arrest and malicious prosecution. 37 Cal.3d at 817-18. The Court departed from the traditional "American Rule" that each party to litigation should bear its own attorneys' fees. *See id.* at 821 (Lucas, J., dissenting). *Brandt* fees are highly problematic and rest on a weak foundation at best. *See id.* While the legitimacy of *Brandt* fees is not before the Court, the exceptional nature of attorney fee awards coupled with the extraordinary nature of punitive damages should lead to a restrained approach where attorney fee and punitive damages issues intersect, as here.

With respect to the question presented, the U.S. Supreme Court has unambiguously stated that due process requires punitive damage awards to be proportional to the plaintiff's "actual harm *as determined by the jury.*" *BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559, 582 (emphasis added). In the instant case, it is undisputed that Plaintiff Nickerson's *Brandt* attorneys' fee award was not determined by the jury, but by the trial court *after* the jury awarded punitive damages. Consistent with *Gore*, the trial court and Court of Appeal properly excluded the trial court's post-verdict

attorneys' fee award from the punitive damages ratio calculus.<sup>1</sup> This Court should affirm.

More broadly, this case presents this Court with an opportunity to adopt a uniform rule with respect to exclusion of attorneys' fees from the punitive damages constitutional calculus. As a practical matter, future plaintiffs in insurance bad faith tort cases (and false imprisonment and malicious prosecution actions) will likely insist on having the jury set attorneys' fees if this Court applies *Gore* and excludes post-verdict awards from the ratio denominator. The reason is that including attorneys' fee awards in "actual harm" damages can greatly inflate the punitive damages award by making a disproportionate punitive damages award seem less extreme. This approach, however, would be in tension with the U.S. Supreme Court's sustained efforts over the past two decades to address punitive damages "run wild," *Pac. Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 18, and this Court's preference for having *Brandt* fees awarded post-verdict.

A rule that attorneys' fees should be excluded from the punitive damages ratio calculation, even where such fees are determined by the jury,

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<sup>1</sup> See also *Amerigraphics, Inc. v. Mercury Cas. Co.* (2010) 182 Cal.App.4th 1538, 1565 (stating that trial court properly excluded *Brandt* fee award "since the *Brandt* fees were awarded by the court after the jury had already returned its verdict.").



would resolve this tension. This easy-to-apply bright-line rule finds support in U.S. Supreme Court precedent and is sound public policy. See Mark A. Behrens *et al.*, *Calculating Punitive Damages Ratios With Extracompensatory Attorney Fees And Judgment Interest: A Violation of the United States Supreme Court's Due Process Jurisprudence?* (2013) 48 Wake Forest L. Rev. 1295.

For these reasons, the Court should exclude *Brandt* fees from the punitive damages due process ratio calculus and affirm the decision below.

## ARGUMENT

### **I. DUE PROCESS REQUIRES PUNITIVE DAMAGES TO BE PROPORTIONAL TO THE PLAINTIFF'S HARM AS DETERMINED BY THE JURY**

In *BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559, the U.S. Supreme Court instructed courts to examine “the disparity between the actual or potential harm suffered by [the plaintiff] and his punitive damages award” as one of the now-familiar “guideposts” for determining whether a punitive damages award violates due process. *Id.* at 575; see also *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 418 (reaffirming *Gore* factors). The Court in *Gore* also stated that this comparison is to be based on those harms “as determined by the jury.” *Gore*, 517 U.S. at 582. Here, the trial court awarded Plaintiff Nickerson’s *Brandt* attorneys’ fee post-verdict – the award was not “determined by the jury.” The trial court and Court of Appeal, therefore, properly excluded the

post-verdict *Brandt* attorneys' fee award from the denominator in the *Gore/Campbell* punitive damages ratio calculus. This Court should affirm.

As the U.S. Supreme Court has explained, ensuring that a jury's award of punitive damages is the product of "rational decisionmaking" and not passion, prejudice, or partiality is the basic purpose of a due process review. *Haslip*, 499 U.S. at 20. A jury's punitive damage award must be "the product of collective deliberation based on evidence," *TXO Prod. Corp. v. Alliance Res. Corp.* (1993) 509 U.S. 443, 456-57, to address "the problem of arbitrary awards." *Honda Motor Co., Ltd. v. Oberg* (1994) 512 U.S. 415, 425, 431. The Court specifically established the *Gore/Campbell* ratio "guidepost" so that punitive damage awards would "bear a 'reasonable relationship'" to the harm inflicted on the plaintiff, *Gore*, 517 U.S. at 580, "as determined by the jury." *Id.* at 582.

*Campbell* is instructive. In that case, the justices threw out a \$145 million punitive damages award based on \$1 million in compensatory damages in an action alleging bad faith, fraud, and intentional infliction of emotional distress against an insurer. On remand, the Utah Supreme Court rejected the Campbells' claim that costs and attorney fees incurred in the action, as well as the excess portion of the verdict not covered by insurance, should be included as part of the denominator in calculating a ratio between compensatory and punitive damages. *See Campbell v. State Farm Mut. Auto. Ins. Co.* (Utah 2004) 98 P.3d 409, *cert. denied*, 543 U.S. 874 (2004).

The court found that “fairly read, the Supreme Court’s opinion forecloses consideration of a compensatory damages number other than the \$1,000,000 awarded by the jury.” *Id.* at 419. The Utah Supreme Court also recognized that “the considerable attention given . . . to the issue of compensatory damages and the methodology for arriving at a constitutionally permissible ratio of compensatory to punitive damages convinces us that we would not be at liberty to consider a substitute denominator” that included the plaintiff’s costs and attorney fees. *Id.*<sup>2</sup>

Under Plaintiff Nickerson’s approach, however, the punitive award would be evaluated based, in part, on evidence the jury never considered. Consequently, approval of the jury-assessed punitive amount would be detached from the jury’s rational decisionmaking. This is precisely why the U.S. Supreme Court established the requirement that the ratio of punitive to actual harm damages only consider damages determined by the jury. *See Gore*, 517 U.S. at 580. Otherwise, judicial review of the punitive award would be irrational because it would lack a basis for evaluating whether the jury acted arbitrarily or irrationally.

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<sup>2</sup> *See also Chasan v. Farmers Group, Inc.* (Ariz. Ct. App. Sept. 24, 2009) 2009 WL 3335341 (excluding attorney fee award related to insurance bad faith claim because *Gore* “standard actually requires ‘the amount of. . . actual harm as determined by the jury’”) (quoting *Gore*, 517 U.S. at 582) (emphasis in original).

Plaintiff's approach would also deprive a defendant of its due process right "to present every available defense" to a component of damages affecting the total punitive award. *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353. If a plaintiff incurred substantial attorneys' fees relative to his or her actual harm, a jury aware of this fact might rationally decide to award a different amount of punitive damages than if the jury was unaware that the plaintiff could anticipate this additional recovery. A jury might do so, for instance, out of a belief that the availability of the *Brandt* fee lessened the need to punish the defendant and/or deter future wrongful conduct. See *Behrens et al., supra*, at 1321. This would directly impact the size of the jury-assessed punitive damage award. As the U.S. Supreme Court has wisely cautioned, when a defendant cannot raise such defenses, the "risks of arbitrariness. . . will be magnified." *Williams*, 549 U.S. at 354.

In addition, a *Brandt* fee awarded by a court in the absence of a jury's determination would impact the size of punitive damage awards by disguising those jury awards that are the result of passion or prejudice, such as "biases against big business." *Campbell*, 538 U.S. at 417. This danger is particularly acute where the jury-assessed punitive damage award exceeds a single-digit ratio. While the Supreme Court has declined to set a "bright-line ratio which a punitive damages award may not exceed," it has indicated that "few awards exceeding a single-digit ratio between punitive and compensatory damages. . . will satisfy due process." *Id.* at 425.

Inclusion of a post-verdict *Brandt* fee award into a ratio calculation would increase the constitutionally permissible upper limit of a punitive damage amount by producing a smaller ratio between punitive and actual damages. The effect could be to transform a biased and disproportionate jury award of punitive damages into a constitutionally permissible award.

**II. ATTORNEYS' FEES SHOULD BE EXCLUDED FROM THE PUNITIVE DAMAGES RATIO CALCULATION, EVEN WHEN THE FEES ARE DETERMINED BY A JURY**

If the Court follows *Gore* and holds that post-verdict *Brandt* attorneys' fee awards shall be excluded from the denominator in the *Gore/Campbell* punitive damages ratio, plaintiffs will adapt. They will insist on having the jury determine the attorneys' fees award to try to add the award to the ratio denominator and increase the ceiling of a constitutionally permissible punitive damage award. This outcome, however, would be in tension with this Court's statement in *Brandt* that "a stipulation for a postjudgment allocation and award by the trial court [of attorney fees] would normally be preferable." 37 Cal.3d at 819. It would also be in tension with the U.S. Supreme Court's efforts to rein in punitive damages "run wild." *Haslip*, 499 U.S. at 18.

To provide a clear rule in California that comports with due process and that would not disturb the preference stated in *Brandt*, the Court should exclude attorneys' fees from the punitive damages ratio regardless of whether the fees are determined by the jury. Such a bright-line rule is

supported by the U.S. Supreme Court's punitive damages case law and sound public policy. *See Behrens et al., supra*, at 1297.

**A. U.S. Supreme Court Precedent Supports A  
Uniform Rule Excluding Attorneys' Fees  
From The Punitive Damage Ratio Calculation**

In the late 1970s and 1980s the size of punitive damages awards "increased dramatically." George L. Priest, *Punitive Damages and Enterprise Liability* (1982) 56 S. Cal. L. Rev. 123, 123.<sup>3</sup> By 1991, the U.S. Supreme Court in *Haslip*, 499 U.S. at 18, expressed concern that punitive damages had "run wild." *See also TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 500 (1993) (O'Connor, J., dissenting) (stating "the frequency and size of such awards have been skyrocketing"); Victor E. Schwartz *et al.*, *Reining In Punitive Damages "Run Wild": Proposals for Reform By Courts And Legislatures* (2000) 65 Brook. L. Rev. 1003. The Court "threw a lasso around the problem" in *Gore* by identifying three constitutional "guideposts" for courts to apply in reviewing a punitive damage award. *Bardis v. Oates* (2004) 119 Cal.App.4th 1, 19. A few years later, the Court in *Campbell* "tightened the noose considerably," *Bardis*, 119 Cal.App.4th

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<sup>3</sup> *See also* E. Donald Elliott, *Why Punitive Damages Don't Deter Corporate Misconduct Efficiently*, 40 Ala. L. Rev. 1053, 1061 (1989) (noting a "general trend toward awarding punitive damages more frequently and in larger amounts in recent years.").

at 19, cautioning that “in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.” *Campbell*, 538 U.S. at 425. These decisions and others from the U.S. Supreme Court (as well as limits in most states)<sup>4</sup> have restrained “skyrocketing”<sup>5</sup> punitive damages and improved the predictability and fairness of punitive awards.

The instant case threatens to undermine the spirit of the U.S. Supreme Court’s decisions and make California even less competitive by allowing plaintiffs to use attorneys’ fee awards as a lever to distort and substantially inflate punitive damage awards. *See Behrens et al., supra*, at 1322.

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<sup>4</sup> Most states either bar or limit punitive damages. Nebraska bars punitive damages on state constitutional grounds. Louisiana, Massachusetts, and Washington, and New Hampshire permit punitive damages only when authorized by statute. Michigan recognizes exemplary damages as compensatory, rather than truly punitive. Connecticut has limited what they call punitive recovery to the expenses of bringing the action. *See Exxon Shipping Co. v. Baker* (2008) 554 U.S. 471, 495. Caps exist in many other states. *See* Ala. Code § 6-11-21; Alaska Stat. § 9.17.020; Colo. Rev. Stat. § 13-21-102; Conn. Gen. Stat. § 52-240b; Fla. Stat. § 768.73, Ga. Code § 51-12-5.1; Idaho Code § 6-1604; Ind. Code § 34-51-3-4; Kan. Stat. § 60-3702; Me. Rev. Stat. tit.28-A § 2-804(b) (wrongful death); Miss. Code § 11-1-65; Mo. Rev. Stat. § 510.265.1; Mont. Code § 27-1-220(3); Nev. Rev. Stat. § 42.005; N.J. Stat. § 2A:15-5.14; N.C. Gen. Stat. § 1D-25; N.D. Cent. Code § 32.03.2-11(4); Ohio Rev. Code § 2315.21; Okla. Stat. tit. 23, § 9.1; S.C. Code § 15-32-530; Tenn. Code § 29-39-104; Tex. Civ. Prac. & Rem. Code § 41.008; Va. Code § 8.01-38.1.

<sup>5</sup> *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.* (1989) 492 U.S. 257, 282 (O’Connor, J., concurring and dissenting in part).

For example, if a jury awarded \$50,000 in actual damages and \$1 million in punitive damages, the resulting 20:1 ratio would far exceed the presumptive single-digit ratio limit expressed by the Court in *Campbell*. But, if the court added an additional \$200,000 in attorney fees to the compensatory damages denominator, the double-digit ratio drops to 4:1 and is less constitutionally suspect. *See id.* at 1296. A grossly disproportionate punitive damage award could, therefore, be manipulated into a proportionate award contrary to the Court's overarching goal of curbing excessive punitive awards.

Including attorneys' fees in punitive damages ratio calculations would also offend *Gore*'s requirement "that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." 517 U.S. at 574. As a practical matter, defendants would have no rational basis for assessing the maximum amount of punishment they could face if plaintiffs could increase the constitutionally permissible upper limit of a punitive damage award simply by increasing the amount of their recoverable attorneys' fees.

Taken together, the *Gore/Campbell* ratio guidepost analysis supports excluding *Brandt* fees from the calculation of a punitive damages ratio. Such a rule would be more consistent with the U.S. Supreme Court's due process goals of providing fair notice and curbing disproportionate punishment than a rule that establishes two separate analyses, with the



potential for wildly disparate outcomes, based on whether plaintiffs decide to insist that a jury determine the attorneys' fee so that it may be included in a ratio calculation.

**B. Public Policy Supports Excluding Attorneys' Fees From The Punitive Damage Ratio Calculus**

In examining the public policy of allowing a jury-assessed attorneys' fee to be included in a punitive damages ratio calculation, it is important to keep in mind that any attorneys' fee award is an extraordinary type of relief. Fee awards represent an exception to the traditional "American Rule" requiring parties to pay their own legal costs. Courts have viewed attorneys' fee awards as already including a "certain punitive element" which favors "a lesser rather than a greater award of punitive damages." *Daka Inc. v. McCrae* (D.C. 2003) 839 A.2d 682, 701 n.24 (rejecting inclusion of attorney fee award in punitive damage ratio analysis) (quoting *Parrish v. Sollecito* (S.D.N.Y. 2003) 280 F. Supp. 2d 145, 164.

In *Brandt*, 37 Cal.3d at 817, this Court characterized the attorney fee award as a recoverable economic loss proximately caused by a tort. But the action is quasi-contractual, as this Court has acknowledged the fee's

distinct transactional purpose “to obtain the rejected payment due on the insurance contract.” *Id.* at 819.<sup>6</sup>

Furthermore, courts and commentators have recognized that attorneys’ fee awards are readily distinguishable from other compensatory damages. *See, e.g.,* Behrens *et al., supra*, at 1319 (“Labeling attorney fees as ‘compensatory in nature’ mischaracterizes these awards and ignores the purposes underlying their recovery.”) (citation omitted). A defendant, for example, does not “inflict” attorney fees on a plaintiff by exercising its legal right to a fair defense. *See id.* at 1318. The amount of the fees incurred also has nothing to do with the severity of the plaintiff’s injury. It relates to the complexity of the litigation, the market for legal services in a given area, and the cost of the legal counsel the plaintiff chooses (which is a factor of the selected attorney’s experience and proficiency).<sup>7</sup>

Also, unlike other types of compensatory damages, an attorney fee does not need to be determined by a jury. The nature of the award is precisely why courts almost always award fees post-verdict, *see, e.g.,* Code

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<sup>6</sup> The quasi-contractual nature of insurance bad faith tort actions puts such cases in tension with Civ. Code § 3294, which provides that punitive damages are not available in breach of contract cases.

<sup>7</sup> Nickerson specifically recognizes that *Brandt* fees are difficult to forecast because “they will depend on the policyholder’s financial condition.” Pl. Brief at 26.

Civ. Proc. § 1021.5, and why this Court expressed a preference for the practice in *Brandt*.

For all of these reasons, an attorney fee award proximately caused by tortious conduct may be characterized as a transaction cost of the civil justice system. This transaction cost can and should be separated from a jury's award of damages for actual harm "suffered" by the plaintiff for purposes of the punitive damages ratio analysis. A uniform rule excluding attorneys' fee from the ratio calculation would ensure that litigation transaction costs, which are controlled to a certain extent by the plaintiff, do not arm a plaintiff with an instrument for manipulating punitive damage amounts.

Conversely, rejection of a uniform rule could introduce perverse new incentives in California for plaintiffs to inflate their attorneys' fees. Inclusion of a jury-assessed fee award into a punitive damages ratio calculation would provide an incentive for plaintiffs' counsel to increase legal costs to obtain a greater punitive damage award. *See Behrens et al., supra*, at 1323.

An additional policy consideration is how the inclusion of a *Brandt* fee in the calculation of a punitive damage ratio would impact the complexity of bad faith cases. As the Utah Supreme Court explained in its re-examination of *Campbell*, including attorney fees in punitive damages ratio determinations would invite "unnecessary conceptual and practical

complications to an already complex enterprise.” *Campbell*, 98 P.3d at 420. Having the jury determine attorneys’ fees “would substantially alter the manner in which trials are conducted” since “the issues of whether attorney fees are available to a party and the reasonableness of the requested fees are generally reserved for determination by the judge after the conclusion of the trial or other proceedings.” *Id.* “In almost every case,” the attorney fee “would require its own independent reprehensibility assessment using the *Gore* standards” because “[t]he manner in which a defendant conducts litigation bears a rational relationship to the conduct giving rise to the claim for punitive damages.” *Id.* These considerations led the court to conclude that such a practice “would inevitably lead to an unseemly and time-consuming appendage to the trial” and that “the interests of justice would be subverted by sidetracking the focus of a trial away from the central claims of the parties and onto issues relating to attorney fees and expenses.” *Id.*

A rule excluding *Brandt* fees from the calculation of a punitive damages ratio, regardless of whether they are determined by the jury, would remove these added litigation complexities. It would permit future trials to be conducted according to this Court’s preference in *Brandt*, whereby the parties want the trial court to expeditiously and economically determine attorney fee awards, without creating an avenue for collateral litigation and subsequent manipulation of the jury’s punitive award.

**CONCLUSION**

For these reasons, the Court should exclude *Brandt* fees from the punitive damages due process ratio calculus and affirm the decision below.

Respectfully submitted,



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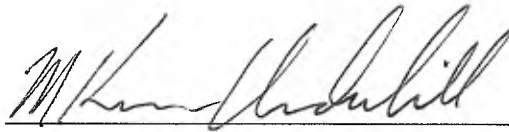
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Dated: June 30, 2014

**CERTIFICATE OF COMPLIANCE**

I, Kevin Underhill, an attorney duly admitted to practice before all courts of the State of California and a member of Shook, Hardy & Bacon L.L.P., counsel of record for *amici curiae*, certify that the foregoing complies with the requirements of Rules 8.520 and 8.204 of the California Rules of Court in that it was prepared in proportionally spaced type in Times Roman 13-point font, double spaced, and contains less than 14,000 words as measured using the word count function of "Word 2000."



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Dated: June 30, 2014

**PROOF OF SERVICE**

STATE OF CALIFORNIA            )

COUNTY OF SAN FRANCISCO)

I am a California resident over the age of 18 and not a party to this action. I filed an original and copy of the foregoing by hand delivery with:

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I also served a copy on the following by placing true and correct copies in sealed envelopes sent by U.S. Mail first-class mail, postage pre-paid, to:

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Second Floor, North Tower  
Los Angeles, CA 90013-1213

Hon. Mary Ann Murphy  
LOS ANGELES SUPERIOR COURT  
111 North Hill Street, Dept. 25  
Los Angeles, CA 90012-3014

A handwritten signature in black ink, appearing to read "Kevin Underhill", written over a horizontal line.

Kevin Underhill

Dated: June 30, 2014