No. S213873

In the Supreme Court of the State of California

THOMAS NICKERSON,

Plaintiff and Appellant,

vs.

STONEBRIDGE LIFE INSURANCE COMPANY,

Defendant and Respondent.

ANSWER BRIEF ON THE MERITS

After A Decision By The Court Of Appeal
Second Appellate District, Division Three, Case No. B234271

Appeal From A Judgment And Order Denying JNOV
Of The Los Angeles County Superior Court, Case No. BC405280
Honorable Mary Ann Murphy

*Margaret M. Grignon (SBN 76621)
Zareh A. Jaltorossian (SBN 205347)
REED SMITH LLP
355 South Grand Avenue, Suite 2900
Los Angeles, CA 90071-1514
Telephone: 213.457.8000
Facsimile: 213.457.8080

Attorneys for Defendant and Respondent
Stonebridge Life Insurance Company

TABLE OF CONTENTS

TABLE OF CONTENTS
(CONTINUED)

TABLE OF CONTENTS
(CONTINUED)

Page

TABLE OF AUTHORITIES

Pages

Cases

TABLE OF AUTHORITIES
(CONTINUED)

Pages

Statutes

Other Authorities

I.

INTRODUCTION

As the Court's formulation of the question presented in this case recognizes, the dispositive inquiry here is not whether the trial court or the jury decides the amount of the attorney fees under *Brandt v. Superior Court* (1985) 37 Cal.3d 813 (*Brandt*), but whether evidence of those damages is presented to the jury before it renders its punitive damages verdict. As we demonstrate, review of an award of punitive damages must be based only on the evidence that was presented to the jury. The purpose of the review of punitive damages awards mandated by the Due Process Clause is not, as plaintiff Thomas Nickerson argues, simply to ensure that the defendant has received notice of sanctionable conduct and the severity of the possible punishment. Rather, the fundamental purpose of due process review is to ensure that punitive damages awards are the product of the jury's "rational decisionmaking" and are not tainted by passion, partiality or prejudice. (*Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 18, 20 (*Haslip*).) Only evidence that was presented to the jury properly has a role in that inquiry.

As applied to this case, this rule means that where a jury was unaware that the plaintiff had been awarded additional compensation in the form of *Brandt* attorney fees, those fees cannot be weighed in the ratio of punitive to compensatory damages. This is the only conclusion that comports with the United States Supreme

Court's long line of punitive damages cases, this Court's own punitive damages jurisprudence, the uniform California Court of Appeal decisions on this issue, the California jury instructions regarding the relationship between harm and punitive damages, and the defendant's due process rights. Because the Court of Appeal based its review of the jury's punitive damages award on the evidence the jury heard, this Court should affirm the judgment.

When a court reviews a punitive damages award under the Due Process Clause, it is concerned with whether that award was tainted by jury irrationality, bias, or other improper motivations. The due process review thus is *of* the jury's punitive damages award. The concern for rationality is no less pronounced when it comes to the relationship between the punitive damages award and the plaintiff's harm. Indeed, this focus on juries' motivations and decisionmaking was reflected in the Supreme Court's analysis of the ratio guidepost in *BMW of North America v. Gore* (1996) 517 U.S. 559 (*Gore*). In *Gore*, the Supreme Court made clear that the punitive damages award was constitutionally impermissible under the ratio guidepost because it was "500 times the amount of [the plaintiff's] *actual harm as determined by the jury*." (*Id.* at p. 582, italics added.)

This Court's own punitive damages jurisprudence is fully consistent with that approach. In explaining the nature of the de novo review of punitive damages awards mandated by the Supreme Court, this Court has made clear that a reviewing court

must defer to the trier of fact's factual determinations. Those determinations, this Court has said, form "the factual basis for [appellate courts'] constitutional analysis of the punitive damages award." (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1172 (*Simon*).) To review a punitive damages award on the basis of evidence that was not presented to the jury would thus be inconsistent with the purpose of the review mandated by the Due Process Clause and fail to give proper deference to the jury's role as trier of fact. Such evidence is simply irrelevant to the due process inquiry as outlined by *Simon*.

The Court of Appeal decisions that have addressed this issue are consistent with the approach of *Simon* as well as the United States Supreme Court cases. Citing the language in *Gore* that the evidence of harm relevant to the due process inquiry is the "actual harm as determined by the jury," the Courts of Appeal have uniformly refused to allow post-verdict evidence of harm to enter into the ratio analysis.

Reviewing a punitive damages award based on evidence the jury never heard also would violate a defendant's right to present "every available defense" against a claim for punitive damages. (*Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353 (*Williams*).) Consistent with that right, in making an award of punitive damages, a California jury is required to consider whether there is a "reasonable relationship between the amount of punitive damages and [plaintiff's] harm . . . that [defendant] knew was likely

to occur because of [his/her/its] conduct." (CACI No. 3947.) A defendant therefore has the right, in the punitive damages phase of a trial, to present to the jury its position regarding the significance and meaning of the compensatory damages in relation to the appropriate amount of punitive damages. In other words, a defendant has a due process right to try to limit its punitive damages liability *on the basis* of the evidence of harm. A defendant can only exercise that right when the evidence of harm was evidence the jury heard.

Evidence of harm the jury never heard thus must be excluded from review of a punitive damages award. Although plaintiff emphasizes that courts apply the *Gore* guideposts de novo, plaintiff misconceives the nature and purpose of that review. The de novo review is *of the jury's punitive damages award.* It is designed to expose punitive damages awards that are the product of irrationality. Courts, therefore, do not conduct de novo review of punitive damages or determine the constitutional maximum in the abstract, divorced from the evidence the jury heard. By definition, the constitutional maximum in a case is the constitutionally permissible amount in the circumstances of that particular case, as established by the evidence that was presented to the jury. (*Simon, supra,* 35 Cal.4th at p. 1172.) The due process problems entailed in the type of review plaintiff advocates, that is, a review completely untethered from the evidence the jury heard, confirms the need for the evidentiary constraints on de novo review.

In sum, to allow courts to review punitive damages awards on the basis of evidence the jury never heard and the defendant never had an opportunity to address in the punitive damages phase of a trial would be inconsistent with the nature of the constitutional review and subvert a defendant's due process right to present every available defense. Because the Court of Appeal's exclusion of the *Brandt* fees from the punitive damages ratio therefore was correct, its decision should be affirmed.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. Plaintiff Claims Benefits For Necessary Treatment Of A Covered Injury

Plaintiff purchased a hospital confinement indemnity policy from Stonebridge that entitled him to $350 per day for each day of hospital confinement resulting from "necessary treatment" for a "covered injury." (Opn. 2-3.) The policy defined "hospital confinement" as "being an inpatient in a Hospital for the necessary care and treatment of an Injury." (Opn. 3.) The policy further provided that Stonebridge could use "Peer Review Organizations or other professional medical opinions to determine if health care services" were medically necessary, consistent with professionally recognized standards of care with respect to quality, frequency, and duration, and provided in the most economical and medically appropriate site for treatment. (Opn. 3.)

When plaintiff broke his leg in an accident on February 11, 2008, he was taken to a Veterans' Administration hospital, where he remained until his discharge 109 days later on May 30, 2008. (Opn. 4-5.) After his discharge, plaintiff submitted a claim for policy benefits. (Opn. 5.)

B. Stonebridge Partially Denies Plaintiff's Claim On The Basis Of A Peer Review Report

Stonebridge requested and received information from the hospital where plaintiff was treated and forwarded plaintiff's file to a peer review organization to assess whether the duration of plaintiff's confinement was consistent with the policy terms with respect to medical necessity, justified by recognized standards of care, and provided in the most economical and medically appropriate site for treatment. (Opn. 6.) The submittal form included a box that could be checked if Stonebridge required a phone consultation between the peer reviewer and plaintiff's treating physician. (*Ibid.*) Stonebridge did not check the box. (*Ibid.*)

The peer review report stated that, by February 29, 2008, plaintiff's injuries had improved sufficiently that plaintiff could have been transferred to a rehabilitation center or home with a caregiver. (Opn. 6.) Based on this assessment, Stonebridge notified plaintiff in a September 10, 2008 letter that his hospitalization was considered "necessary treatment" for his accident only through

February 29, 2008. (Opn. 7.) Stonebridge sent plaintiff a check for that period of hospital confinement. (*Ibid.*)

Plaintiff's treating physician at the hospital wrote to Stonebridge explaining plaintiff's extended hospitalization was due to his pre-existing paraplegia, the limitations of the Veteran Administration health care options, and plaintiff's home conditions. (Opn. 7.) In a letter dated October 10, 2008, Stonebridge responded that it was not changing its decision because the physician had not indicated that hospitalization in an acute care setting was required as of March 1, 2008. (*Ibid.*) Stonebridge did not provide the treating physician's letter of explanation to the peer reviewer for re-evaluation of the claim. (Opn. 15.)

C. Plaintiff Sues For The Difference, The Court Awards Contract Damages, The Jury Awards Emotional Distress And Punitive Damages, And The Parties Stipulate To *Brandt* Fees

Plaintiff sued Stonebridge for breach of the insurance contract as well as for breach of the implied covenant of good faith and fair dealing based on Stonebridge's alleged failure to pay the full policy benefits. (Opn. 2, 8.) Plaintiff claimed he was entitled to additional policy proceeds of $31,500. (*Ibid.*)

The case proceeded to jury trial. At the close of his case, plaintiff moved for directed verdict on his breach of contract

cause of action. (Opn. 8.) The trial court granted the motion and awarded plaintiff $31,500 in contract damages. (*Ibid.*)

The jury was initially deadlocked on the amount of emotional distress damages to award plaintiff on his bad faith cause of action. The trial court permitted a second round of closing arguments in an effort to break the deadlock. The jury then returned a verdict awarding plaintiff $35,000 in emotional distress damages on the bad faith cause of action. (Opn. 8-9.) In addition, the jury found that although Stonebridge had not acted with malice or oppression, it had committed fraud. (Opn. 9.) In the punitive damages phase, the jury awarded plaintiff $19 million in punitive damages—a ratio of 543:1. (*Ibid.*)

Prior to the trial, the parties had stipulated that the trial court would determine the amount of *Brandt* fees. (2 AA 300.) Following the trial, plaintiff filed a motion for attorney fees, seeking $537,285 in fees. (2 AA 307.) Stonebridge opposed the motion on the ground that plaintiff's *Brandt* fees were limited to the 40% contingent fee plaintiff had agreed to pay his attorneys in the retainer agreement. (2 AA 345.) Plaintiff conceded the issue, and the parties stipulated to *Brandt* fees in the amount of $12,500. (Opn. 9-10; 2 AA 409, 457-458.) No evidence regarding the claim for, or amount of, *Brandt* fees was presented to the jury.

The trial court granted Stonebridge a conditional new trial with a remittitur of $350,000. Plaintiff did not accept the remittitur and appealed. (Opn. 10.)

D. The Court Of Appeal's Decision

In a 2-to-1 decision, the Court of Appeal affirmed the jury's punitive damages finding but reduced the punitive damages to their constitutional maximum of $350,000. (Opn. 29.) In determining the maximum amount of punitive damages constitutionally allowable under the due process clause to be $350,000—a 10:1 ratio between the punitive damages and the $35,000 compensatory tort damages—the majority applied the three due process guideposts set out in *Gore*. (Opn. 13.) The majority also applied the reprehensibility factors to the evidence in the case in concluding that Stonebridge's conduct was sufficiently reprehensible to justify an award of punitive damages. (Opn. 14.)

In analyzing the ratio between the punitive and compensatory damages, the majority concluded that the punitive damages as remitted by the trial court "comport[ed] with due process[.]" (Opn. 25.) The majority reasoned that because plaintiff's compensatory damages were relatively low, and taking into account Stonebridge's $368 million net worth, "a significant ratio of punitive to compensatory damages comport[ed] with due process." (Opn. 26.) The Court of Appeal agreed with the trial court that a 10:1 ratio was the constitutional maximum in this case.

The majority also held that the trial court did not err in failing to measure the punitive damages award against the *Brandt* fees. (Opn. 27.) "*Brandt* fees are not properly included in determining the compensatory damage award when they are awarded by the trial court after the jury awards punitive damages." (*Ibid.*)

In his dissenting opinion, Justice Croskey disagreed that there was substantial evidence of fraud to justify imposition of punitive damages. (Dis. Opn. 1.) Justice Croskey thus would have stricken the punitive damages award in its entirety. (Dis. Opn. 1, 6, 11.)

III.

ARGUMENT

A. Due Process Review Of Punitive Damages Awards Is Designed To Ensure That Such Awards Are The Product Of Juries' Rational Decisionmaking And Not Their Passions Or Prejudices

The United States Supreme Court's decisions establish that the Due Process Clause constrains the amount of punitive damages and requires judicial review of a jury's punitive damages award. The judicial review mandated by the Due Process Clause has its roots in the common-law method courts have employed when reviewing punitive damages awards for evidence of passion and prejudice. Consistent with that traditional method, the Supreme Court's cases make clear that the purpose of the judicial review of

punitive damages awards mandated by the Due Process Clause is to determine whether such awards are tainted by juries' irrationality, arbitrariness, bias, or other improper motives. For that reason, judicial review of punitive damages is necessarily based on the evidence that was presented to the jury. The Supreme Court also has made clear that a defendant has a due process right to present every available defense against a claim for punitive damages and has therefore disapproved deviations from traditional procedures that impinge that right.

1. Punitive Damages Awards Are Constrained By The Due Process Clause

In *Haslip*, the Supreme Court recognized for the first time that a jury punitive damages award can violate a defendant's rights under the Due Process Clause of the Fourteenth Amendment. In considering whether the Alabama jury's punitive damages award violated the defendant's due process rights, the Court explained that, "[u]nder the common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable." (*Haslip*, *supra*, 499 U.S. at p. 15.) The Supreme Court recognized that because the traditional common-law method for imposing punitive damages, and the availability of judicial checks on the size of such awards, gave

reasonable assurance of fair process, punitive damages are not *per se* unconstitutional. (*Id.* at pp. 16-17.)

The Supreme Court held, however, that punitive damages can violate a defendant's right to due process. The Court expressed concern that, in modern times, such awards had "run wild." (*Haslip*, *supra*, 499 U.S. at p. 18.) Because punitive damages are "quasi-criminal" penalties, "unlimited jury discretion" in the "fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." (*Ibid.*) The Supreme Court made it clear that a defendant has a Due Process Clause-based "interest in rational decisionmaking." (*Id.* at p. 20.) In reviewing a punitive damages award, therefore, an appellate court must ascertain whether there were "sufficiently definite and meaningful constraint[s] on the discretion of [the] factfinders in awarding punitive damages." (*Id.* at p. 22.) The Supreme Court approved the traditional procedures followed by the Alabama courts.[1]

---

[1] In *Haslip*, the Supreme Court concluded that such constraints were found in the content and specificity of the punitive damages instructions Alabama courts gave juries, the availability of post-trial procedures for scrutinizing punitive damages awards, including the various factors adopted by Alabama courts to ensure reasonableness—and the availability of review by the Alabama Supreme Court in accordance with "detailed substantive standards it has developed for evaluating punitive awards." (*Haslip*, *supra*, 499 U.S. at pp. 20-21.)

2. Punitive Damages Awards Violate The Due Process Clause When Juries Impose Them Arbitrarily, Irrationally, Or For Other Improper Motives

Two years after *Haslip*, in *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443 (*TXO*), the Supreme Court reaffirmed the due process limitations it had enunciated in *Haslip* and re-emphasized that due process review of punitive damages awards is meant to identify awards that are the product of juries' improper motivations. In selecting the appropriate test to apply to the question whether the amount of punitive damages violated the Due Process Clause, the Supreme Court explained that "a jury imposing a punitive damages award must make a qualitative assessment based on a host of facts and circumstances unique to the particular case before it." (*TXO*, *supra*, 509 U.S. at pp. 456, 457.)

The Court noted that there is a presumption of validity to punitive damages awards when the jury was unbiased and fair, that is, when "the members of the jury [are] determined to be impartial before they [are] allowed to sit, [when] their assessment of damages [is] the product of collective deliberation based on evidence and the arguments of adversaries," and when the jury's award is reviewed "for arbitrariness" by the trial court "who also heard the testimony" and then affirmed by an appellate court. (*Ibid.*) As in *Haslip*, the Supreme Court was once again satisfied that the traditional punitive damages procedures followed by West Virginia did not violate due process.

3. Review Of Punitive Damages Awards Must Be Conducted In Accordance With Traditional Procedures

Only a year later, when the Supreme Court was confronted with a punitive damages award that represented a "departure from traditional procedures," it struck it down. (*Honda Motor Co., Ltd. v. Oberg* (1994) 512 U.S. 415, 421 (*Oberg*).) *Oberg* involved a challenge to the constitutionality of an Oregon statute that categorically prohibited Oregon appellate courts from reviewing the amount of punitive damages. The Supreme Court held that the Due Process Clause requires the availability of meaningful judicial review of the amount of punitive damages, because such "procedures are necessary to ensure that punitive damages *are not imposed in an arbitrary manner.*" (*Id.* at p. 420, italics added.)

The Supreme Court observed that, in *Haslip*, it had approved the common-law method for assessing punitive damages because of the inherent procedural safeguards of that method, and it cautioned against departures from that orthodox approach. "In the 19th century, both before and after the ratification of the Fourteenth Amendment, many American courts reviewed damages for 'partiality' or 'passion and prejudice.' Nevertheless, because of the difficulty of probing juror reasoning, passion and prejudice review was, in fact, review of the amount of awards. Judges would infer passion, prejudice, or partiality from the size of the award." (*Oberg*, *supra*, 512 U.S. at p. 425.) The Court further noted: "This

aspect of passion and prejudice review has been recognized in many opinions of this Court." (*Id.* at p. 425, fn. 4, citing *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.* (1989) 492 U.S. 257, 272; *Haslip*, *supra*, 499 U.S. at p. 21, fn. 10; *id.* at p. 27 (conc. opn. of Scalia, J.); *TXO*, *supra*, 509 U.S. at p. 467 (conc. opn. of Kennedy, J.); *id.* at pp. 476-478 (dis. opn. of O'Connor, J.).)

By prohibiting review of the size of punitive damages awards, Oregon failed to ensure adequate mechanisms to enable appellate courts to detect awards that were tainted by passion or prejudice. "Oregon's abrogation of a well-established common-law protection against arbitrary deprivation of property raises a presumption that its procedures violate the Due Process Clause. As this Court has stated from its first due process cases, *traditional practice provides a touchstone for constitutional analysis.*" (*Oberg*, *supra*, 512 U.S. at p. 430, italics added.) Because "[p]unitive damages pose an acute danger of arbitrary deprivation of property" and of juries "express[ing] biases against big business," in reviewing such awards, the courts' focus must be on identifying "arbitrary awards and potentially biased juries." (*Oberg*, *supra*, 512 U.S. at pp. 431, 432.)

4. The *Gore* Guideposts Enable Courts To Identify Punitive Damages Awards That Are Tainted By Irrationality Or Improper Motives

Subsequent Supreme Court decisions reinforce this conclusion. In *Gore*, the Court held that a $2 million punitive damages award that exceeded the $4,000 compensatory damages by 500 times was unconstitutional. (*Gore, supra,* 517 U.S. at p. 574.) *Gore* established three guideposts for judicial review of punitive damages awards: the degree of reprehensibility of the defendant's conduct, the disparity of the harm or potential harm suffered by the plaintiff and the punitive damages award, and the difference between the punitive damages award and the civil penalties authorized in comparable case. (*Id.* at pp. 574-575.) The Supreme Court explained that these guideposts are derived from "[e]lementary notions of fairness enshrined in our constitutional jurisprudence [which] dictate 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." (*Id.* at p. 574.)

In assessing the three guideposts, the Supreme Court focused on the evidence presented to the jury. (*Gore, supra,* 517 U.S. at pp. 574-575) As to reprehensibility, the Supreme Court noted that there was no evidence in the record that the harm to the plaintiff was other than economic [*id.* at p. 576], that BMW persisted in a course of conduct after it had been adjudged unlawful, or of deliberate false statements [*id.* at p. 579]. The Supreme Court also concluded that the ratio between the compensatory and punitive

damages was impermissible because the punitive damages were "500 times the amount of [the plaintiff's] *actual harm as determined by the jury*." (*Id.* at p. 582, italics added.) Finally, there were no sanctions for comparable misconduct that could justify the punitive damages award.

In his concurrence, joined by two other justices, Justice Breyer carefully identified the precise nature of the due process violation involved in *Gore*. Pointing to *TXO*, Justice Breyer clarified that a "grossly excessive" punitive damages award violates the Due Process Clause precisely because such an award "amounts to an 'arbitrary deprivation of property.'" (*Gore*, *supra*, 517 U.S. at p. 586 (conc. opn. of Breyer, J.).) The reason the punitive damages in *Gore* were constitutionally excessive as measured against the guideposts was because the "standards the [state] courts applied [in that case were] vague and open ended to the point where they risk[ed] arbitrary results . . . ." (*Id.* at p. 588 (conc. opn. of Breyer, J.).) Justice Breyer emphasized that punitive damages must be "rational in light of their purpose to punish what has occurred," and they must not be the product of "a decisionmaker's caprice . . . ." (*Id.* at p. 587, citations omitted (conc. opn. of Breyer, J.).)

Gore thus reinforces the point that, when courts review a punitive damages award, they are attempting to protect "against purely *arbitrary behavior*." (*Gore*, *supra*, 517 U.S. at p. 588, italics added.) The Supreme Court in *Gore* was therefore engaging

in the classic method of judicial review of a punitive damages award: inferring from the size of the award the presence of passion and prejudice—a measure of irrationality in the manner in which the jury had arrived at the punitive damages figure on the basis of the evidence presented to the jury.[2]

5. The Supreme Court Has Mandated De Novo Review Of Punitive Damages Awards As A Means Of Ensuring Rational Decisionmaking

These themes were echoed in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424 (*Cooper Industries*), which mandated that appellate courts conduct a de novo review of punitive damages awards under the *Gore* criteria. Quoting Justice Breyer's concurrence in *Gore*, the Supreme Court explained that de novo review will best ensure due process because it requires "'the application of law'" and eliminates any deference to "'a decisionmaker's caprice.'" (*Id.* at p. 436, quoting *Gore*, *supra*, 517 U.S. at p. 587 (conc. opn. of Breyer, J.).) The Supreme Court pointed out that, in conducting the requisite de novo review, appellate courts must defer to "findings of fact" by juries. (*Id.* at p. 440, fn. 14.)

---

[2] According to the concurring opinion, "the rules that purport[ed] to channel discretion" in that case did not in fact do so. (*Gore*, *supra*, 517 U.S. at p. 595 (conc. opn. of Breyer, J.).) "That means that the award in this case was both (a) the product of a system of standards that did not significantly constrain a court's, and hence a jury's, discretion in making that award; and (b) grossly excessive in light of the State's legitimate punitive damages objectives." (*Ibid.*)

Thus, like its predecessors, *Cooper Industries* teaches that the purpose of judicial review of punitive damages awards is to guarantee that such awards are the product of juries' "rational decisionmaking" and not improper motivations. The Court also made it clear that the evidence presented during the trial, and the trier of fact's factual findings, are the factual basis of the constitutional analysis.

Two years later, in *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408 (*Campbell*), the Supreme Court once again reiterated *Haslip's* admonition that courts ensure that punitive damages awards reflect rational decisionmaking by juries. *Campbell* involved a $145 million punitive damages award against an insurance company for bad-faith failure to settle within policy limits, fraud, and intentional infliction of emotional distress. (*Id.* at pp. 412-414.) The compensatory damages the jury awarded were $2-6 million. (*Id.* at p. 415.) In reversing that award, the Supreme Court repeated the necessity for curbing "arbitrary" punitive damages awards, and avoiding jury instructions that allow juries to express "biases against big business." (*Campbell*, *supra*, 538 U.S. at pp. 417-418.)

The root of the Due Process problem in *Campbell* was that the $145 million punitive damages award was a product of the jury's improper motivation—the desire to punish the defendant for its nationwide claims handling policies and practices. "From their opening statements onward the [plaintiffs] framed this case as a

chance to rebuke State Farm for its nationwide activities." (*Campbell*, *supra*, 538 U.S. at p. 420.) Thus, the punitive damages award, as reinstated by the Utah Supreme Court, violated the defendant's due process rights because "it was an irrational and arbitrary deprivation of the property of the defendant." (*Id.* at p. 429.)

6. Because A Defendant Has A Due Process Right To Present A Full Defense Against A Claim For Punitive Damages, A Jury Can Impose Such Damages Only On The Basis Of Evidence Of Harm To The Plaintiff

Haslip's most recent progeny, *Philip Morris USA v. Williams*, once again drives home the point that judicial review of punitive damages awards must be rationally related to the evidence of harm presented to the jury. In *Williams*, the Court held that the Due Process Clause does not permit a jury to base its punitive damages award upon the desire to punish the defendant for harming persons who are non-parties or strangers to the litigation, such as victims whom the parties do not represent. (*Williams*, *supra*, 549 U.S. at p. 349.)

Williams involved a large punitive damages award against a tobacco company, and potentially inflammatory evidence of harm to smokers other than the plaintiff. (*Williams*, *supra*, 549 U.S. at pp. 349-351.) Once again, the Supreme Court's holding was driven by the need to ensure that punitive damages awards are based on a jury's rational decisionmaking. (*Id.* at pp. 352-353).

The Court explained that "to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation. How many such victims are there? How seriously were they injured? Under what circumstances did the injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate. And the fundamental due process concerns to which our punitive damages cases refer—risks of arbitrariness, uncertainty, and lack of notice—will be magnified." (*Id.* at p. 354.)

Critically, the aspect of the due process problem the Supreme Court emphasized in *Williams* was the lack of a fair opportunity for the defendant to present a defense. The "Due Process Clause prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense.' Yet a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing, for example . . ., that the other victim was not entitled to damages . . . ." (*Williams*, *supra*, 549 U.S. at p. 353, citation omitted.) The Supreme Court stated that, "given the risks of arbitrariness," states have a responsibility to ensure that any punitive damages award reflects harm or potential harm to the plaintiff and not to nonparties. (*Id.* at p. 355.)

Beginning with *Haslip*, the Supreme Court's decisions express a unified theme: in reviewing a punitive damages award to determine whether it comports with the Due Process Clause, an

appellate court assesses whether that award, in light of the evidence presented to the jury, was the product of "rational decisionmaking" as opposed to an expression of the jury's passion, prejudice, bias or other improper motive on the jury's part. Under the Supreme Court's punitive damages jurisprudence, therefore, in determining whether a punitive damages award comports with the Due Process Clause, the focus of a reviewing court is always on the evidence that was presented to the jury.

Plaintiff argues that due process review under the *Gore* guideposts has two aspects—to ensure fair notice to the defendant of sanctionable conduct and the severity of the potential punishment. (OBOM 16-17.) As the above analysis demonstrates, plaintiff is telling only part of the story. Although the Due Process Clause is concerned with fair notice and proportionality, it is, first and foremost, concerned with ensuring that punitive damages awards are untainted by a jury's irrationality, bias, and passion. The concurring opinion in *Gore* makes clear that this consideration is the fountainhead of the *Gore* guideposts. As the Supreme Court has pointed out in discussing the common law roots of due process review, "because of the difficulty of probing juror reasoning, passion and prejudice review was, in fact, review of the amount of the awards. Judges would infer passion, prejudice, or partiality from the size of the award." (*Oberg*, *supra*, 512 U.S. at p. 425.)

The *Gore* guideposts, therefore, do not function in an appellate vacuum. Nor are they some novel method of reviewing

punitive damages awards. They are, rather, firmly anchored in the traditional method courts have used to review punitive damages awards—inextricably intertwined with, and an effective vehicle for detecting, the passion, prejudice, partiality and irrationality that lie at the core of the due process problem in the area of punitive damages. And because judicial review of punitive damages awards is designed to root out awards that are tainted by such improper motivations, such review can be effective only if it is based on the evidence that was presented to the jury. As demonstrated in the next section, this Court's own punitive damages case law is fully aligned with that approach.

B. This Court's Approach To Reviewing Punitive Damages Awards Has Been Consonant With That Of The Supreme Court

Even before *Haslip*, this Court had announced similar standards for reviewing punitive damages awards as a matter of California law. In *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910 (*Neal*), this Court articulated various factors to guide courts in reviewing punitive damages awards, including the degree of the defendant's reprehensibility, the amount of compensatory damages awarded, and also the defendant's wealth. (*Id.* at p. 928 & fn. 13.) This Court stated that these criteria are designed to identify situations where "the recovery [of punitive damages] is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice." (*Ibid.*, internal quotation mark omitted.) Thus, even as a matter of California law, the inquiry into whether a

punitive damages award is excessive boils down to whether the award is the result of passion or prejudice, based on the evidence presented.

In 1991, the same year the Supreme Court decided *Haslip*, this Court held, again as a matter of state law, that evidence of a defendant's financial condition is a prerequisite to an award of punitive damages. (*Adams v. Murakami* (1991) 54 Cal.3d 105, 117-118 (*Adams*).) The Court reasoned that evidence of financial condition is critical to whether a punitive damages award serves the purposes of punishment and deterrence without destroying the defendant financially. (*Ibid.*) Such a rule, said the Court, "reflected sound considerations of fairness and *a concern for rationality in the awarding of punitive damages*." (*Id.* at p. 116, italics added.)

Adams emphasized that although the question raised in that case was one of California law, due to *Haslip*, the question had "recently acquired a federal constitutional dimension . . . ." (*Adams*, *supra*, 54 Cal.3d at p. 116.) In discussing whether California's substantive "passion and prejudice" standard comported with due process, this Court recognized that California's "passion and prejudice" test may not even be *sufficient* to satisfy due process in light of *Haslip*. (*Adams*, *supra*, 54 Cal.3d at p. 118, fn. 9, quoting *Haslip*, *supra*, 499 U.S. at p. 21, fn. 10.) Because the punitive damages award had to be set aside due to the absence of financial condition evidence, this Court did not reach the issue

"whether the traditional California 'passion and prejudice' standard of review is constitutionally sufficient under *Haslip*." (*Ibid.*)

Moreover, *Adams* is clear that evidence of financial condition must be presented to the jury at trial. In *Adams*, this Court cited with approval the Court of Appeal's decision in *Dumas v. Stocker* (1989) 213 Cal.App.3d 1262 (*Dumas*), which had explained that the absence of evidence as to financial condition frustrates meaningful appellate review of punitive damages awards. (*Id.* at p. 1269.) This Court stated that *Dumas* had "also correctly observed that, absent financial evidence, a jury will be encouraged (indeed, required) to speculate as to a defendant's net worth in seeking to return a verdict that will appropriately punish the defendant . . . . Sound public policy should preclude awards based on mere speculation. The traditional rule is that compensatory damages must not be based on speculation. There is no reason for a different standard for punitive damages." (*Adams, supra,* 54 Cal.3d at p. 114.) This Court further held that the plaintiff "bears the burden of introducing the evidence at trial." (*Id.* at p. 119.) Because the plaintiff had presented no evidence to the jury of the defendant's financial condition, this Court reversed the punitive damages award.

Adams establishes that a punitive damages award that is the product of passion and prejudice can *never* survive scrutiny under the Due Process Clause. (See *Oberg*, *supra*, 512 U.S. at p. 430 ["most of our due process decisions involve arguments that

traditional procedures provide too little protection and that additional safeguards are necessary to ensure compliance with the Constitution"]; see also *Simon*, *supra*, 35 Cal.4th at p. 1172 [the "'[e]xacting appellate review'" of a punitive damages award for constitutional excessiveness "is intended to ensure punitive damages are the product of 'application of law, rather than a decisionmaker's caprice'"] [quoting *Campbell*, *supra*, 538 U.S. at p. 418]; *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 824 (*Egan*) [punitive damages award that was 40 times larger than compensatory damages award had to "be deemed the result of passion and prejudice on the part of the jurors and excessive as a matter of law"].) It also establishes that the jury must be given *all* of the evidence it needs to make a rational, non-speculative decision about the appropriate amount of punitive damages.

Simon picked up where *Adams* left off. This Court in *Simon* made clear that the required "de novo" review of punitive damages awards is based on the evidence that was presented to the jury. In discussing the applicable standard of review, this Court emphasized that, even though appellate courts are required to make an "independent assessment" of the *Gore* guideposts, "findings of historical fact made in the trial court are still entitled to the ordinary measure of appellate deference." (*Simon*, *supra*, 35 Cal.4th at p. 1172, citing *Cooper Industries*, *supra*, 532 U.S. at p. 440, fn. 14, and *Leatherman Tool Group, Inc. v. Cooper Industries, Inc.* (9th Cir. 2002) 285 F.3d 1146, 1150 (decision on remand) ["Although determining the 'degree of reprehensibility' ultimately involve a

legal conclusion, we must accept the underlying facts as found by the jury . . . ."].) And, when "neither party contends" that the jury's findings "lack substantial evidentiary support in the record, *we accept them as the factual basis for our constitutional analysis of the punitive damages award.*" (*Ibid.*, italics added.)

The Courts of Appeal in this State have understood that post-verdict damage awards have no place in the due process inquiry. In *Amerigraphics, Inc. v. Mercury Cas. Co.* (2010) 182 Cal.App.4th 1538, as in this case, the Court of Appeal held that *Brandt* fees awarded by the trial court post-verdict may not be considered in deciding the appropriate ratio of punitive damages to compensatory damages. (*Id.* at p. 1565 ["the actual damages as determined by the jury should be used as the base figure for calculating the punitive damages ratio"].) And in *Bardis v. Oates* (2004) 119 Cal.App.4th 1, the Court of Appeal held that fees and costs ordered by the trial court post-verdict could not be included in the punitive to compensatory damages ratio because they were not part "of the 'actual harm as determined by the jury.'" (*Id.* at pp. 17-18, citing *Gore, supra,* 517 U.S. at p. 582.) The court explained: "Logic and common sense tell us that the amount the jury found to be" the total damages "most closely reflects the United States Supreme Court's formulation of the 'actual harm as determined by the jury.'" (*Ibid.*)

C. *Simon* Is Consistent With Settled Constitutional Law

Plaintiff cites *Simon* as an example where this Court has considered matters not presented to the jury in its review of punitive damages awards. (OBOM 23-24.) As noted, however, in reality, *Simon* undermines plaintiff's position. In *Simon*, this Court held that a punitive damages award that was 340 times larger than the compensatory damages award was constitutionally excessive. The plaintiff in that case sued the defendant for breach of contract and promissory fraud. (*Id.* at p. 1170.) As to breach of contract, the jury by special verdict found the parties had no "binding and enforceable agreement." (*Ibid.*) As to fraud, the jury found the defendant had made a false promise that damaged the plaintiff in the amount of $5,000, his out-of-pocket loss. (*Ibid.*) The jury also found the defendant had acted with fraud, malice or oppression and awarded $2.5 million in punitive damages. (*Ibid.*) The trial court ordered a new trial on punitive damages unless the plaintiff agreed to their reduction to $250,000. (*Ibid.*) The plaintiff declined the remittitur. (*Ibid.*) On retrial of punitive damages, a new jury awarded the plaintiff $1.7 million, and the trial court rendered judgment upon that award together with the $5,000 in compensatory damages. (*Ibid.*)

Before undertaking the multifactor *Gore* evaluation, this Court considered the relevance to the punitive damages award of the plaintiff's claimed uncompensated or potential harm. (*Simon*, *supra*, 35 Cal.4th at p. 1174.) Specifically, the plaintiff defended the large

ratio on the theory that his potential harm was $400,000, his anticipated gain from the purchase of the building. (*Id.* at p. 1175.) This Court indicated that "in the absence of an express finding on the question we must independently decide whether defendant's promissory fraud did, or foreseeably could have, hurt plaintiff in the amount of $400,000." (*Ibid.*) Plaintiff here seizes upon this language to argue that *Simon* stands for the proposition that a court can uphold a punitive damages award on the basis of damages "even though the jury ha[s] not calculated it." (OBOM 24.) Plaintiff's argument is misleading.

To begin, this Court in *Simon* rejected the plaintiff's argument that his potential loss was $400,000. This Court pointed out that, even though the special verdict did not reflect an express finding regarding the nature of the fraudulent misrepresentation, whatever its nature, it could not have caused the plaintiff to lose the anticipated gain because the first jury had found the plaintiff had no contractual right to buy the property. (*Simon*, *supra*, 35 Cal.4th at p. 1175.) As a matter of law, "in the absence of any contractual obligation to sell [plaintiff] the property, [the defendant's] tortious conduct could not have had the foreseeable effect of depriving" the plaintiff of future profits. (*Id.* at p. 1178.)

More to the point, in rejecting the plaintiff's potential harm argument, this Court did not consider any evidence that was not presented to the jury. On the contrary, *Simon* makes clear that the evidence that was presented at trial is the "factual basis for" a

reviewing court's "constitutional analysis of the punitive damages award." (*Simon, supra,* 35 Cal.4th at p. 1172.) Consistent with this approach, this Court's analysis of harm in *Simon* was based squarely on the evidence presented at trial. Rebuffing the plaintiff's argument that the defendant's fraud would have caused him greater harm had the defendant accomplished the goal of its conduct, this Court emphasized that there was no evidence in the record to support the plaintiff's argument on this score: "As the *record* does not reveal the goals" of the defendant's "fraud, it is difficult to say what injuries beyond his $5,000 out-of-pocket loss, if any, [the plaintiff] would have suffered had those goals been achieved . . . . [the plaintiff's] only resulting loss, as far as the *record* shows, was the $5,000" out-of-pocket loss the jury awarded him, "the true measure of the harm" the tortious conduct caused the plaintiff. (*Simon*, *supra*, 35 Cal.4th at p. 1179, italics added.)[3]

The use of post-verdict evidence of harm thus not only finds no support in the decisions of the United States Supreme Court, it finds no support in the decisions of this Court as well.

---

[3] Plaintiff's reliance on *Boeken v. Philip Morris Inc.* (2005) 127 Cal.App.4th 1640 is misplaced. (See OBOM 24.) The Court of Appeal in that case considered a post-verdict punitive damages award against the same defendant in another case. (*Boeken*, *supra*, 127 Cal.App.4th at pp. 1701, 1703; OBOM 24.) The court concluded that no more than a single-digit multiplier was justified, taking into account the incentive value of a master settlement agreement with California and the recent final punitive damages award in the other case. (*Id.* at p. 1703.) The Court of Appeal did not consider evidence of harm not presented to the jury.

D. Review Of Punitive Damages Awards On The Basis Of Evidence The Jury Never Heard Would Be Inconsistent With The Applicable Case Law And Violate A Defendant's Right To Due Process

Review of punitive damages awards on the basis of evidence that was not presented to the jury is not permissible because such evidence is irrelevant to the due process inquiry, and reliance on such evidence would violate a defendant's due process right to present every available defense to a claim for punitive damages.

1. Evidence Of Harm The Jury Never Heard Is Irrelevant To The Due Process Analysis

As noted, under the Due Process Clause, punitive damages awards must be reviewed to ensure that they are the result of a jury's rational decisionmaking. Evidence of damages the jury never heard has no relevance to that analysis. By definition, such evidence does not help a reviewing court determine whether the jury was acting rationally, that is, whether its punitive damages award was based on the evidence.

It must be borne in mind that punitive damages are intended to punish the defendant and, in that sense, are akin to criminal penalties. They are not compensation to which the plaintiff is entitled. As such, to decide whether punitive damage awards comport with the Due Process Clause, a reviewing court must determine whether this quasi-criminal punishment was rendered on

the basis of reason and not some improper motive. Such an analysis can be made only on the basis of evidence the jury heard. Indeed, *Gore* makes clear that, when it comes to assessing the ratio guidepost, the relevant evidence of compensatory damages is the "actual harm as determined by the jury." (*Gore*, *supra*, 517 U.S. at p. 582.) It is only *that* harm which may properly be considered in the due process analysis.

This Court's decisions in *Adams* and *Simon* are consistent with this approach. Both *Adams* and *Simon* make clear that, in reviewing a punitive damages award, a court is reviewing the *jury's* award. Thus, both of those decisions recognize that the rationality of a jury's punitive damages award can only be meaningfully reviewed on the basis of evidence that was presented to the jury. Post-verdict evidence of harm says nothing about whether the jury was acting out of passion or prejudice. Just as a plaintiff cannot seek to defend a punitive damages award on the basis of financial condition evidence the jury never heard, he or she cannot seek to defend such an award based on evidence of harm the jury never heard. Therefore, under this Court's own punitive damages jurisprudence no less than under the Supreme Court's case law, evidence of harm the jury never heard is irrelevant to the review of a punitive damages award.

In this case, the trial court awarded the *Brandt* fees after the verdict and on the basis of the parties' stipulation regarding the amount of fees. No evidence was presented to the jury

regarding the *Brandt* fees, and the jury was not advised of the court's determination. Under these circumstances, the trial court's and Court of Appeal's exclusion of the *Brandt* fees from the punitive damages ratio was correct. The post-verdict *Brandt* fees provide no information about whether the punitive damages award comported with due process, that is, whether the award was the product of the jury's rational decisionmaking or the result of inflamed passions. Indeed, the jury awarded the shocking amount of $19 million in punitive damages, even though it awarded $35,000 in compensatory damages. As the trial court and Court of Appeal both recognized, that amount was constitutionally impermissible and the product of improper motivations, and so they reduced the punitive damages to reflect a 10-to-1 ratio. Certainly, the post-verdict award of *Brandt* fees is completely unhelpful in the evaluation of the rationality of the jury's decisionmaking.[4]

---

[4] Plaintiff cites *Communale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, *Crisci v. Security Ins. Co. of New Haven Conn.* (1967) 66 Cal.2d 425, *Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, *Neal*, *supra*, 21 Cal.3d 910, and *Egan*, *supra*, 24 Cal.3d 809, for the proposition that insurers who do business in California have been on notice for a long time that they can face punitive damages if "they commit the tort of insurance bad faith . . . ." (OBOM 18-19.) As demonstrated above, however, fair notice is only one part of the due process equation. Insurers' awareness of the potential availability of punitive damages for tortious breaches of the implied covenant does not make the consideration of post-verdict evidence in the review of punitive damages awards proper. Where that occurs, an insurer who has notice of potential punitive damages exposure is nevertheless deprived of its due process right to present a full defense.

2. Reviewing A Punitive Damages Award On The Basis Of Evidence The Jury Never Heard Would Violate A Defendant's Due Process Right To Present Every Available Defense

"The Due Process Clause prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense.'" (*Williams*, *supra*, 549 U.S. at p. 353, quoting *Lindsey v. Normet* (1972) 405 U.S. 56, 66.) In *Williams*, the Supreme Court expressed serious concern that, because of the quasi-criminal nature of punitive damages awards, permitting such damages to be based on harm to nonparties would undermine a defendant's ability to "'present every available defense.'" (*Ibid.*) Reviewing a punitive damages award on the basis of evidence the jury never heard and the defendant never had an opportunity to address to the jury would infringe a defendant's due process right to present every available defense.

When evidence of harm is presented to the jury, a defendant has an opportunity—and the right—to address that evidence not only in the liability/damages phase of the trial but in the punitive damages phase as well. In particular, the defendant has the opportunity to discuss the meaning and significance of that evidence in relation to the appropriate amount of punitive damages. The defendant might, for example, be able to argue that the jury should discount that particular evidence of harm in determining the amount of punitive damages because the harm was speculative or purely economic. The defendant might also persuade the jury to

award lower punitive damages by arguing that the compensatory damages are sufficient to deter similar conduct in the future. Allowing a court to review a punitive damages award on the basis of evidence the jury never heard and the defendant never had the opportunity to address would therefore subvert a defendant's due process right to present a full defense to the claim for punitive damages.

The applicable California jury instructions on punitive damages also compel this conclusion. Under California law, the jury must award punitive damages in an amount that has a "reasonable relationship" to the harm suffered by the plaintiff. (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602-1605 [requiring "reasonable relation" jury instruction].) The CACI jury instruction regarding the amount of punitive damages—the instruction the jury received in this case—asks the jury to consider whether there is a "reasonable relationship between the amount of punitive damages and [plaintiff's] harm . . . that [defendant] knew was likely to occur because of [his/her/its] conduct." (CACI No. 3947.) Thus, as a matter of California law, the relationship between harm and punitive damages is a factual question for the jury.

When a jury hears evidence of *Brandt* fees, it can properly take such damages into account in its consideration of the relationship between compensatory and punitive damages. The jury may well award lower punitive damages in the belief that the total

compensatory damages have fully compensated the plaintiff and have an adequate punitive impact. In this case, for instance, even though the parties stipulated to *Brandt* fees in the amount of $12,500, plaintiff's motion for attorney fees initially requested a fee award of more than $537,000. More to the point, the presentation of the attorney fee evidence to the jury would allow the defendant to make these types of arguments in the punitive damages phase of the trial to persuade the jury to award less punitive damages. But a defendant cannot make an argument regarding the "reasonable relationship" of compensatory to punitive damages in accordance with the CACI instruction on the basis of evidence the jury never heard.

Indeed, these due process concerns are brought into sharp focus in the procedural and factual setting of this case. As the record establishes, the jury in this case was highly attuned to the issue of what constituted "harm" and was initially deadlocked on the question of compensatory damages. These facts suggest that arguments by Stonebridge regarding the relationship of harm to punitive damages might have resonated with the jury.

After the jury began its deliberations at the close of the trial's first phase, the jury submitted a question to the trial court inquiring about the "the definition of 'harm'" in the special verdict form's second question, which asked: "Was Stonebridge Life Insurance Company's failure to pay policy benefits a substantial factor in causing harm." (7 RT 3003.) The trial court asked the

jurors for more information as to what prompted the question. (7 RT 3016.) The jury foreperson stated that they were unsure as to "what kind of factors could contribute to what is considered harm." (7 RT 3019.) The trial court answered the jury's question by advising the jury to review the jury instructions defining "damages" and the elements of plaintiff's cause of action for breach of the implied covenant of good faith and fair dealing. (7 RT 3054.)

After receiving the trial court's response, the jury resumed deliberations. Some time later, however, the jury advised the court that it was deadlocked on what damages to award for emotional distress. (7 RT 3089-3090.) In an effort to break the deadlock, the trial court permitted counsel to present further closing arguments to the jury. (7 RT 3309.) Counsel for plaintiff then urged the jury to come up with any number for the emotional distress damages. Counsel told the jury that plaintiff was not asking for a high number. "We want you to get to the punitive phase. And if it takes an amount that's a lot lower" than the range plaintiff's counsel had previously suggested, that was acceptable to plaintiff. (7 RT 3311.) "The more important thing is that we get to the punitive phase because without that, this company is going to keep on doing the same thing to other people." (7 RT 3312.) For his part, Stonebridge's trial counsel urged the jury not to "haste[n] to judgment" on the emotional distress damages simply to get into the punitive damages phase. (7 RT 3315.)

At the conclusion of counsels' additional arguments, the jury again resumed deliberations and returned with a verdict, awarding plaintiff $35,000 in emotional distress damages. (7 RT 3323.) The trial court then gave the jury instructions for the punitive damages phase. The only evidence plaintiff presented in the punitive damages phase of the trial was Stonebridge's annual statement reflecting its assets and liabilities. (7 RT 3336-3337, 3340-3341.) Plaintiff's counsel's closing argument focused exclusively on the purported need to punish Stonebridge for its conduct on the basis of Stonebridge's wealth. (7 RT 3347-3351.) Stonebridge's counsel, for his part, told the jury that the company had received the jury's message regarding Stonebridge's conduct, and the $35,000 emotional distress award, along with the contract damages in the form of policy benefits plaintiff would receive, adequately conveyed that message. (7 RT 3356.)

In his rebuttal, plaintiff's counsel emphasized that the compensatory damages award was not sufficient to punish the company, and he specifically told the jury to award punitive damages on the basis of Stonebridge's wealth. (7 RT 3367 ["Quite frankly, if you want to go easy on them and do 5 percent [of Stonebridge's net worth], it's $19 million."].) "If you have somebody that . . . defrauded somebody of . . . let's say $31,500 as in this case—and all you do is give the person the 31,500 back, what's that? I mean, that's just giving the money back to the person you took it from unlawfully. That's no punishment at all; that's no

message at all." (7 RT 3368-3369.) "Then they've gotten away with it, totally gotten away with it." (7 RT 3370.)

The record suggests that the jury adopted the $19 million punitive damages number plaintiff's counsel suggested because it did not believe that the compensatory damages award was sufficient to "send a message." Had the jury heard evidence of the damages in the form of *Brandt* fees, instead of basing its punitive damages award solely on Stonebridge's wealth, it might have adopted a different approach to its determination of punitive damages.

And the importance of the *Brandt* fee issue does not relate only to the amount of fees. It has to do with the character of such damages too. This is because the jury might have viewed plaintiff's recovery of the policy benefits and emotional distress damages together with attorney fees as representing full compensation for the range of plaintiff's injuries and of sufficient significance to deter similar future conduct by Stonebridge. This, too, could have altered the jury's approach to determining punitive damages and resulted in a lower award.

More to the point, the presentation of the *Brandt* fee damages evidence to the jury would have at least allowed Stonebridge's trial counsel the opportunity to make an argument regarding the adequacy of the deterrent message sent by the amount and character of the compensatory damages. There is no denying

that this was a jury that had "run wild," and no fair-minded person can view the $19 million punitive damages award as anything other than an expression of inflamed passions and "bias against big business." This does not mean, however, that Stonebridge could not have tried to mitigate that prejudice if the evidence of *Brandt* fees had been presented in the trial. Notwithstanding the jury's negative attitude toward Stonebridge, some hopeful signs remained: this same jury was deadlocked on the question of emotional distress damages, and it had requested clarification on the definition of harm. These facts suggest that the jury was concerned about the role that plaintiff's harm should play in its verdict, and that it would have attended to arguments regarding the significance of plaintiff's harm to the amount of punitive damages. Unfortunately, plaintiff's trial counsel used the compensatory damages award to fan the flames of prejudice, essentially telling the jury to ignore the compensatory damages in its assessment of punitive damages. Had there been more evidence of compensatory damages presented during the trial, Stonebridge's counsel may have been able to get the jury on a rational track in its approach to punitive damages.

Whether or not such an argument by Stonebridge would have been impactful is not material from the perspective of due process. Stonebridge's due process rights did not extend simply to the presentation of successful defenses. Rather, Stonebridge had a due process right to make these arguments to the jury in the punitive damages phase of the trial—to present "every available defense." Accordingly, because the jury never heard evidence of *Brandt* fees,

the inclusion of those damages in the determination of the appropriate ratio would deprive Stonebridge of that fundamental right.

Finally, a judicial review process based on evidence the jury never heard has no footing in the traditional common-law method for reviewing punitive damages awards that the Supreme Court endorsed in *Haslip*, *TXO* and *Oberg*. The Supreme Court has approved the common-law method for reviewing punitive damages awards as the "touchstone" of due process compliance, and it has disapproved and cautioned against departures from that method. The Supreme Court has been concerned with limiting the size of punitive damages awards and tightening judicial review of such awards to weed out cases of jury irrationality, bias and inflamed passions. By taking courts' focus away from the evidence that was presented to the jury, plaintiff's approach would make it more difficult for courts to detect awards that are tainted by bias and prejudice. For these reasons, reviewing punitive damages awards on the basis of evidence the jury never heard would represent exactly the kind of deviation from orthodoxy the Supreme Court decried in *Oberg*. This Court should reject such an ill-advised departure from constitutional norms.

3. That The Third *Gore* Guidepost Is A Question Reserved For Courts Does Not Permit The Inclusion Of Post-Verdict Evidence In The Review Of The Punitive Damages

Plaintiff attempts to justify the inclusion of post-verdict evidence in the determination of the ratio by pointing out that no evidence is presented to the jury regarding the third *Gore* guidepost—the availability of civil or criminal penalties that could be imposed for comparable misconduct. (OBOM 23.) Plaintiff's argument rests on a misunderstanding of the purpose of this guidepost.

Gore's adoption of this third factor was based on the rationale that "a reviewing court engaged in determining whether an award of punitive damages is excessive should 'accord "substantial deference" to legislative judgments concerning appropriate sanctions for the conduct at issue.'" (*Gore, supra*, 517 U.S. at p. 583.) This guidepost, therefore, was born of a concern that punitive damages in civil cases should be aligned with what legislatures have determined is an appropriate penalty for similar conduct. In *Cooper Industries*, the Supreme Court explained that this guidepost is one uniquely suited to the expertise of appellate courts because it "calls for a broad legal comparison . . . ." (*Cooper Industries, supra*, 532 U.S. at p. 440.)

The Court of Appeal's decision in *Century Sur. Co. v. Polisso* (2006) 139 Cal.App.4th 922 (*Century Surety*) also is

instructive. In that case, the defendant argued that the punitive damages award should be reversed because the jury instructions failed to tell the jury to consider the third *Gore* guidepost. The Court of Appeal disagreed, holding that the third "guidepost was not intended to be a factor for the jury's consideration." (*Id.* at p. 959.) The Court of Appeal explained that the third guidepost "requires that a legal comparison be made between the punitive damage award and other civil sanctions. Because that comparison involves a question of law, it is beyond the province of the jury . . . . [¶] . . . By contrast, the first guidepost, which involves an assessment of the degree of reprehensibility, is determined by considering the presence or absence of a number of aggravating factors. Because those factors involve questions of fact that a jury is qualified to consider (Evid. Code, §312), the standard jury instructions direct the jury to consider the degree of reprehensibility." (*Id.* at pp. 959-960, internal citations omitted.)

That the third guidepost enters the constitutionality analysis only at the post-verdict stage does not support plaintiff's argument that new *evidence* of harm (and, by plaintiff's logic, reprehensibility) can also enter that analysis at that stage. First, the motivation underlying the Supreme Court's adoption of the third guidepost is to make sure that courts accord the appropriate measure of deference to legislative determinations. That guidepost is not concerned with the defendant's due process right to ensure rational decisionmaking and freedom from prejudice and bias.

Second, because the third guidepost is an issue of law calling for a "broad legal comparison," courts' exclusive consideration of that factor does not present the same due process concerns as the consideration of post-verdict *evidence*. As *Century Surety* highlights, the reprehensibility guidepost clearly is a question for the jury. Moreover, as CACI instruction number 3947 makes clear, the ratio guidepost also is a factual question the jury must determine. Unlike reprehensibility and harm, the availability of penalties for comparable conduct is not an evidentiary matter appropriate for a jury's consideration. Because the jury is supposed to base its punitive damages award on the evidence of reprehensibility and harm, the defendant has a due process right to present its defense to the jury with respect to the meaning and significance of that evidence as it relates to the appropriate amount of punitive damages. The defendant, of course, also has a due process right to argue its position regarding the relevance of any available civil or criminal penalties. But the defendant's due process rights are protected so long as it is afforded an adequate opportunity to present its legal arguments to the court regarding the third guidepost. Put differently, it is precisely because juries are not allowed to consider the third guidepost's legal question, that preventing the defendant from addressing that issue to the jury, does not deprive a defendant of the opportunity to present a full defense. This is simply not true when it comes to consideration of post-verdict evidence of harm.

4. Plaintiff's Policy Arguments Are Unpersuasive

Plaintiff advances two policy arguments he claims support the notion that post-verdict evidence should be included in the review of punitive damages awards. Plaintiff argues that excluding such damages from the ratio analysis would diminish the deterrent effect of punitive damages awards. (OBOM 26-28.) He also argues that it would have adverse consequences for the judicial system because plaintiffs will put the *Brandt* fee issue to the jury in an effort to "maximize the potential size of the punitive damages award . . . ." (OBOM 28.)

These policy concerns do not override Stonebridge's right to due process and a fair trial. Considerations of cost and judicial economy "cannot outweigh [a] constitutional right. . . . Procedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions (or property) are about to be taken. [¶] The Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." (*Arnett v. Kennedy* (1974) 416 U.S. 134, 223-224, quoting *Fuentes v. Shevin* (1972) 407 U.S. 67, 90-91, fn. 22, internal quotation marks and alterations omitted; see

also *Goldberg v. Kelly* (1970) 397 U.S. 254, 266 [the right to due process "clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens"]; *Gooch v. Life Investors Ins. Co. of America* (6th Cir. 2012), 672 F.3d 402, 421 ["Even though reconsidering whether the class judgment complied with due process clause may not promote judicial 'efficiency' or protect the 'finality' of the original judgment, it is a due-process imperative that we are not free to ignore"] [citation omitted]; *In re Commercial Western Financial. Corp.* (9th Cir. 1985) 761 F.2d 1329, 1334-1335 ["'the requirements of due process outweigh those of judicial efficiency'"].)

A defendant has a due process right to present every available defense to a claim for punitive damages. Reviewing the constitutionality of a punitive damages award based on evidence of harm the jury never heard and the defendant never had an opportunity to explain to the jury would impair that right. The goals of greater deterrence and judicial economy that plaintiff advocates do not trump Stonebridge's right to due process and cannot justify a violation of that right.

Plaintiff also overstates the supposedly bad consequences for judicial economy. As noted, the critical question from the standpoint of due process is not whether the jury or the court determines the *Brandt* fees, but simply whether that evidence was presented to the jury. If a plaintiff wants the *Brandt* fees to be included in the punitive damages ratio without the jury *deciding* the

issue, all he or she has to do is have the trial court determine those fees prior to the punitive damages phase of the trial. If the trial court awards such fees, the jury can be advised of the existence and amount of that component of damages, just like the jury in this case was advised of the trial court's award of contract damages. The defendant would then have the opportunity to present to the jury its position regarding that component of damages in the punitive damages phase of the trial. Thus, there is no reason that protecting a defendant's due process right to a full defense cannot be reconciled with the goal of judicial efficiency.

And if in some cases the parties refuse to stipulate to court resolution of their *Brandt* fees claim and insist on putting that issue to the jury, that marginal increase in cost is one that must be paid for protecting defendants' due process rights. Indeed, the constraints on punitive damages awards the Supreme Court has mandated since *Haslip* have resulted in greater procedural complexity for trials of punitive damages as well as increased work for both trial and appellate courts in reviewing such awards. Because the rights to due process and to present a full defense are fundamental and paramount, however, such costs are acceptable precisely because they are not legitimately avoidable.

Finally, plaintiff overlooks the undesirable consequences for judicial economy and due process entailed in a broad rule allowing post-verdict evidence relevant to the *Gore* guideposts. Plaintiff does not recognize that, if post-verdict

evidence of harm is allowed to infiltrate the constitutionality analysis, that would open the door for judicial consideration of post-verdict "evidence" relevant to reprehensibility as well. If such post-verdict evidence is permitted, the trial court may be required to make determinations about witness credibility and might even be required to hold a post-verdict evidentiary hearing or bench trial to assess that new evidence. Such a system would be detrimental to judicial economy and cause trial courts to usurp juries' roles as the trier of fact, thereby violating a defendant's right to a jury trial. That type of system also would have little in common with the common law's historical procedures for the imposition and review of punitive damages.

In sum, plaintiff's asserted policy considerations cannot trump the Due Process Clause and, in any event, may be accommodated in a constitutionally permissible framework.

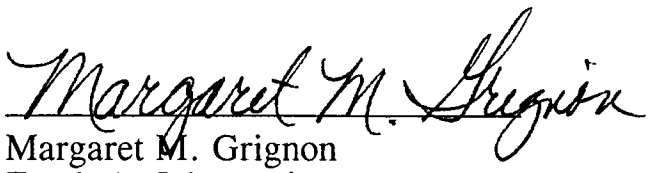
IV.
CONCLUSION

The Due Process Clause prohibits the consideration of evidence of harm the jury never heard in the review of the constitutionality of a punitive damages award. Because the jury in this case was never advised of the trial court's *Brandt* fees determination and no evidence regarding those damages was presented at trial, the Court of Appeal correctly refused to take the *Brandt* fees into account in determining the constitutionally

appropriate punitive to compensatory damages ratio. Accordingly, this Court should affirm the Court of Appeal decision.

DATED: April 11, 2014.

REED SMITH LLP

By 

Margaret M. Grignon
Zareh A. Jaltorossian
Attorneys for Defendant and Respondent *Stonebridge Life Insurance Company*

Certification of Word Count Pursuant To California Rules Of Court, Rule 8.504(d)(1)

I, Margaret M. Grignon, declare and state as follows:

1. The facts set forth herein below are personally known to me, and I have first-hand knowledge thereof. If called upon to do so, I could and would testify competently thereto under oath.

2. I am one of the appellate attorneys principally responsible for the preparation of the Answer Brief on the Merits in this case.

3. The brief was produced on a computer, using the word processing program Microsoft Word 2010.

4. According to the Word Count feature of Microsoft Word 2010, the Answer Brief on the Merits contains 11,607 words, including footnotes, but not including the table of contents, table of authorities, and this Certification.

5. Accordingly, the Answer Brief on the Merits complies with the requirement set forth in Rule 8.504(d)(1), that a brief produced on a computer must not exceed 14,000 words, including footnotes.

I declare under penalty of perjury that the forgoing is true and correct and that this declaration is executed on April 11, 2014, at Los Angeles, California.

Margaret M. Grignon

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is REED SMITH LLP, 355 South Grand Avenue, Suite 2900, Los Angeles, CA 90071. On April 11, 2014, I served the following document(s) by the method indicated below:

ANSWER BRIEF ON THE MERITS

☐	by transmitting via facsimile on this date from fax number (213) 457 8080 the document(s) listed above to the fax number(s) set forth below. The transmission was completed before 5:00 PM and was reported complete and without error. The transmission report, which is attached to this proof of service, was properly issued by the transmitting fax machine. Service by fax was made by agreement of the parties, confirmed in writing. The transmitting fax machine complies with Cal.R.Ct 2003(3).
☒	by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this Declaration.
☐	by placing the document(s) listed above in a sealed envelope(s) and by causing personal delivery of the envelope(s) to the person(s) at the address(es) set forth below.
☐	by personally delivering the document(s) listed above to the person(s) listed below in Dept. 25.

Joel A. Cohen Shernoff Bidart Echeverria & Bentley LLP 600 South Indian Hill Boulevard Claremont, CA 91711 Email: jcohen@shernoff.com Telephone: (909) 621-4935 Facsimile: (909) 625-6915	Attorneys for Plaintiff *Thomas Nickerson*
Jeffrey Isaac Ehrlich The Ehrlich Law Firm 16130 Ventura Blvd., Suite 610 Encino, CA 91436 Telephone: (818) 905-3970 Facsimile: (818) 905-3975 Facsimile: jehrlich@erlichfirm.com	Attorneys for Plaintiff *Thomas Nickerson*
David Lawrence Abney Knapp & Roberts, P.C. 8777 North Gainey Center Drive Suite 181 Phoenix, AZ 85258	Attorneys for Amicus Curiae *United Policyholders*

Amy Bach United Policyholders 381 Bush Street 8th Floor San Francisco, CA 94104	Amicus Curiae *United Policyholders*
Henry C. Wang Herbalife International 800 West Olympic Boulevard, Suite 406 Los Angeles, CA 90015 Telephone: (213) 745.0491 Facsimile: (213) 765.9890	Co-Counsel for Defendant and Respondent *Stonebridge Life Insurance Company*
Hon. Mary Ann Murphy Los Angeles Superior Court 111 North Hill Street, Dept. 25 Los Angeles, CA 90012-3014	Case No. BC405280
Court of Appeal Second Appellate District, Division Three 300 South Spring Street Second Floor, North Tower Los Angeles, CA 90013-1213	Case No. B234271

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on April 11, 2014, at Los Angeles, California.

Rebecca R. Rich