



# Appellate Reports and cases in brief

## *Cases of interest to members of the plaintiffs' bar*

By JEFFREY ISAAC EHRLICH

### ***Nickerson v. Stonebridge Life Ins. Co.***

(2013) \_ Cal.App.4th \_\_ (2d Dist., Div.3.)

#### **Who needs to know about this case?**

Lawyers who litigate insurance bad-faith cases, and cases involving punitive-damage claims.

**Why it's important:** Affirms a punitive damage award with a 10:1 ratio of punitives to compensatory damages in an insurance bad-faith case with no physical injuries. Makes clear that jury verdict forms should ask the jury to find "malice, fraud, or oppression" in the disjunctive, in a single question – and not to make separate findings for each element. Finds that an insurer can be held liable for punitive damages for relying on an unenforceable provision in its policy, even if that provision has not previously been held to be unenforceable. Agrees with prior cases that the insurance policy proceeds and *Brandt* fee award determined post-verdict cannot be included in the denominator of the punitive-damages ratio.

**Synopsis:** Nickerson, a former marine, purchased a hospital indemnity policy from Stonebridge, which promised benefits of \$300 per day for each day he was confined in the hospital. Although payment of the funds is related to health-care services, the funds can be used for any purpose. The policy promises payment for hospital confinement for "necessary care and treatment" of an injury. The definition of "necessary care" contains what is, for all purposes, an exclusion for care that was not provided "in the most economical and medically appropriate site for treatment."

Nickerson is a paraplegic, and suffered a severe fracture of his leg when he fell from a motorized wheelchair lift on his van. He was hospitalized at the VA

Hospital in the spinal-cord unit, which was equipped to treat paraplegics, at no charge to him. He was placed in a full-length cast and suffered complications. His doctors determined it was safe to discharge him and allow him to return home after 109 days. Stonebridge's claims' personnel thought this sounded excessive, so they retained an independent medical review. In filling out the assignment form for the medical review, the Stonebridge personnel did not check the box on the form that directed the reviewer to contact the insured's physician. When Nickerson's physician wrote a letter explaining why he had not discharged Nickerson sooner, the Stonebridge personnel determined that it added no new information to what was in Nickerson's medical records, and they decided not to forward it to the medical reviewer.

The medical reviewer advised Stonebridge that after 20 days of hospitalization, Nickerson could have been transferred to a less acute care environment, and that the remaining 89 days of hospitalization were not medically necessary. Stonebridge paid for only 20 days of confinement and denied the rest of the claim. Nickerson sued.

The trial court determined that the exclusion in the definition of "necessary care" was not conspicuous and was unenforceable, and awarded Nickerson \$31,500 in unpaid benefits on a directed verdict. The jury found Stonebridge's failure to pay benefits unreasonable. The verdict form concerning punitive damages asked the jury to determine whether there was "malice," "oppression," or "fraud" as independent questions. The jury answered "no" for malice and oppression, but "yes" for fraud. It awarded Nickerson emotional-distress damages of \$35,000, and punitive damages of \$19 million, approximately five percent of its net worth.

The trial court cut the punitive-damage award to \$350,000 – ten times the emotional-distress award, finding that this amount was likely too low to deter future misconduct by Stonebridge, but that it was "constrained" by the Supreme Court's due-process cases to limit the award to a 10:1 ratio. Affirmed.

The court held that, even though Nickerson did not suffer any physical harm, Stonebridge's conduct was highly reprehensible. It found that it acted with indifference or reckless disregard of Nickerson's health or safety; that Nickerson was a financially vulnerable target; that Stonebridge's conduct involved repeated actions, and was not an isolated incident; and that the harm was the result of intentional deceit, not a mere accident.

The Court held that a 10:1 ratio was proper because the defendant's financial condition may combine with high reprehensibility and a low compensatory award to justify an extraordinary ratio between compensatory and punitive damages. The court agreed that it was likely that Stonebridge "may fold this award into its cost of doing business," but held that it, like the trial court, was constrained by the due-process clause from imposing an award higher than 10:1.

The court also agreed with the court in *Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1224, that in an insurance bad-faith case, the policy proceeds should not be included in the punitive-damages ratio "as punitive damages are not authorized in contract actions." It also agreed with the court in *Amerigraphics, Inc. v. Mercury Casualty Co.* (2010) 182 Cal.App.4th 1538, 1565, that because the *Brandt* fee award was not made by the jury, it could not be included in the ratio.

Justice Croskey dissented. He would have found that the jury's finding of "no malice" was inconsistent with its finding



that Stonebridge acted with “fraud,” and that there was no substantial evidence to support a punitive-damages award based on fraud. [Ed note. Jeff Ehrlich was appellate counsel for Nickerson in this case.]

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