Nos. 16-55839 and 16-55863

IN THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CARLOS MADRIGAL; ANNA TANG; RICHARD TANG,
Plaintiffs—Appellees—Cross-Appellants,

v.

ALLSTATE INDEMNITY COMPANY, a corporation erroneously sued as Allstate Insurance Company,
Defendant—Appellant—Cross-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA
SUZANNE H. SEGAL, DISTRICT JUDGE • CASE NO. 14-CV-04242

AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANT, APPELLANT, CROSS-APPELLEE ALLSTATE INDEMNITY COMPANY IN FAVOR OF REVERSAL

HORVITZ & LEVY LLP
STEVEN S. FLEISCHMAN
MITCHELL C. TILNER
3601 WEST OLIVE AVENUE, 8TH FLOOR
BURBANK, CALIFORNIA 91505-4681
(818) 995-0800

ATTORNEYS FOR AMICI CURIAE
PERSONAL INSURANCE FEDERATION OF CALIFORNIA AND PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Regulations

Miscellaneous

IN THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CARLOS MADRIGAL; ANNA TANG; RICHARD TANG,
Plaintiffs—Appellees—Cross-Appellants,

v.

ALLSTATE INDEMNITY COMPANY, a corporation erroneously sued as Allstate Insurance Company,
Defendant—Appellant—Cross-Appellee.

AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANT, APPELLANT, CROSS-APPELLEE ALLSTATE INDEMNITY COMPANY IN FAVOR OF REVERSAL

INTERESTS OF AMICI CURIAE

Personal Insurance Federation of California ("PIFC") is a trade organization dedicated to representing its member companies' interests before governmental bodies, including the California Legislature, the California Insurance Commissioner, and the California courts. PIFC's members are insurers specializing in personal lines of insurance, primarily homeowners and private passenger automobile insurance. These member

companies account for more than 50% of all personal lines insurance premiums paid in California.

Property Casualty Insurers Association of America ("PCI") is a trade organization dedicated to promoting and protecting the viability of a competitive private insurance market for the benefit of consumers and insurers. PCI does business in California as the Association of California Insurance Companies. PCI is composed of nearly 1,000 member companies, representing the broadest cross section of insurers of any national trade association. PCI members write $202 billion in annual premiums, 35% of the nation's property casualty insurance. Member companies write 42% of the U.S. automobile insurance market, 27% of the homeowners market, 33% of the commercial property and liability market, and 34% of the private workers compensation market. In California, PCI members write 29.5% of the property casualty market, including 29.8% of the personal lines market and 29.3% of the commercial lines market. One important way in which PCI represents its members is through amicus

curiae submissions in cases that present issues of concern to PCI members and their policyholders. PCI believes this is such a case.[1]

SUMMARY OF THE ARGUMENT

This case involves an all-too-common fact pattern: an injured third-party claimant "sets up" an insurance company for a bad faith action by making an early policy limits demand with an arbitrary deadline for acceptance then refusing to accept the policy limits when the insurer offers them a few days after the deadline.

Before any lawsuit was filed against its insured, Allstate offered to pay full policy limits to protect its insured and settle the personal injury claim. Allstate made its offer within thirty days after completing its investigation and just days after the claimant's own policy limits demand expired. Nothing occurred during those few days to cause the claimant to refuse the same offer he had been willing to accept days earlier. However,

---

[1] No party or party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund the preparation or submission of this brief. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), amici disclose that this brief was funded by PCI, by members of PCI and PIFC, and by nonmembers One Beacon Insurance Group, Loya Insurance Group, and the Interinsurance Exchange of the Automobile Club.

by rejecting the insurer's offer and forcing litigation, the claimant preserved the possibility of collecting more than the policy limits from Allstate on the theory that Allstate breached its implied covenant of good faith and fair dealing by failing to meet the arbitrary deadline and settle the case.

This case exemplifies what the First Circuit has called "a game of cat-and-mouse" designed to set up an insurance bad faith action. *Peckham v. Cont'l. Cas. Ins. Co.*, 895 F.2d 830, 835 (1st Cir. 1990).

Amici urge this Court to help put an end to such gamesmanship by holding that, as a matter of law, an insurance company acts reasonably (i.e., not in bad faith) when it offers full policy limits before its insured has been sued and within a reasonable period of time after completing its investigation. Such a holding is particularly appropriate in a case like this where the claimant suffered no prejudice or change in position during the short period of time between the expiration of his own policy limits demand and the insurer's offer of full policy limits. Such a holding would also be consistent with: (1) the purpose of the implied "duty to settle," which is to protect the insured, not the third-party claimant; (2) the strong policy in favor of settlement; and (3) the need to eliminate gamesmanship

in making policy limit demands. Whether Allstate met the claimant's arbitrary deadline might be relevant if the controlling question was whether the parties formed a binding contract to settle the claim. But that is not the issue. This is a bad faith action. The controlling question is whether Allstate acted reasonably. As a matter of law, it did.

ARGUMENT

I. THE COURT SHOULD HOLD AN INSURER CANNOT BE LIABLE FOR BREACHING THE IMPLIED "DUTY TO SETTLE" WHEN IT OFFERS FULL POLICY LIMITS WITHIN A REASONABLE TIME AFTER COMPLETING ITS PRE-SUIT INVESTIGATION.

A. The duty to settle exists to benefit the insured, not the third-party claimant.

Under California law, the implied covenant of good faith and fair dealing obligates an insurance company to make reasonable efforts to settle a third party's lawsuit against the insured within policy limits. For convenience, we refer to this as the "duty to settle," though the insurer is not actually obliged to settle but only to make reasonable efforts to settle. *See Reid v. Mercury Ins. Co.,* 220 Cal. App. 4th 262, 272-73 (2013).

The focus of the duty is on the *reasonableness* of the insurer's conduct. "If the insurer breaches the implied covenant by *unreasonably*

refusing to settle the third party suit, the insured may sue the insurer in tort to recover damages proximately caused by the insurer's breach." *PPG Indus., Inc. v. Transamerica Ins. Co.*, 20 Cal. 4th 310, 312 (1999) (emphasis added); *accord Graciano v. Mercury Gen. Corp.*, 231 Cal. App. 4th 414, 425 (2014).

Importantly, the duty to settle is designed to protect the *insured*, not the third-party claimant, in this case Carlos Madrigal. *Murphy v. Allstate Ins. Co.*, 17 Cal. 3d 937, 943-44 (1976). In *Murphy,* the California Supreme Court held that the duty to settle is implied in law for the benefit of the insured ("to protect the insured from exposure to liability in excess of coverage as a result of the insurer's gamble") and "does not directly benefit the injured claimant." *Id.* at 941. Hence, the third-party claimant may not directly enforce the duty to settle. "Because . . . the duty to settle is intended to benefit the insured and not the injured claimant, third party beneficiary doctrine does not furnish a basis for the latter to recover." *Id.* at 944; *accord Kransco v. American Empire Surplus Lines Ins. Co.*, 23 Cal. 4th 390, 401 (2000) ("Accordingly, the insured has the legitimate right to expect that the method of settlement within policy limits will be employed in order to give him such protection." (citation omitted)); *J.C. Penney Cas.*

Ins. Co. v. M. K., 52 Cal. 3d 1009, 1018 (1991) (absent an assignment, "a third party claimant cannot bring an action upon a duty owed to the insured by the insurer" (citation omitted)); *Hand v. Farmers Ins. Exch.*, 23 Cal. App. 4th 1847, 1855 (1994) ("Generally—by definition—the implied covenant runs in favor of the other contracting party, and hence it is generally perceived as axiomatic that a 'third party claimant' may not bring an action for breach of the covenant or its duties. Thus, an ordinary accident claimant is categorically disqualified, regardless of the insurer's conduct, from invoking or suing upon the insurer's good faith duty to settle the claim within policy limits." (citation omitted)).

Consequently, the insurer does not owe a duty of good faith to the third party, and the third party cannot maintain a direct cause of action against the insurer for breach of the implied covenant based on how the insurer negotiates or settles the third party's claim. *See Coleman v. Gulf Ins. Group*, 41 Cal. 3d 782, 795 (1986) ("[A]n alleged breach of the covenant does not give rise to a cause of action by third party claimants."); Justice H. Walter Croskey et al., California Practice Guide: Insurance Litigation ¶ 12:254 (Rutter Group 2015) ("The implied covenant of good faith and fair dealing runs only between parties to the insurance contract.

The injured party is neither a party nor an intended beneficiary of the contract (at least prior to obtaining a judgment against the insured . . .). Thus, an injured party has no cause of action against the insurer for breach of implied covenant based on the insurer's refusal to settle a claim.").

Therefore, in evaluating Allstate's liability it is important to focus on Allstate's conduct vis-à-vis its insured, not its conduct toward the third-party claimant. It is undisputed that Allstate offered to pay its full policy limits, i.e., to fulfill its contractual obligation to its insured, within thirty days after completing its investigation and just days after expiration of an arbitrary deadline set by the third-party claimant. (AOB 55-57.) Under these circumstances, Allstate acted *reasonably* in seeking to protect its insured and should not be subject to extra-contractual liability.

Indeed, Allstate could do no more to attempt to settle than to offer its full policy limits: "When a liability insurer *does* timely tender its 'full policy limits' in an attempt to effectuate a reasonable settlement of its insured's liability, the insurer has acted in good faith as a matter of law because 'by offering the policy limits in exchange for a release, the insurer has done all within its power to effect a settlement.'" *Graciano*, 231 Cal.

App. 4th at 434 (citations omitted). "[P]erfection is not required." *Id.*at 435; *accord State Farm Fire & Cas. Co. v. Superior Court*, 45 Cal. App. 4th 1093, 1105 (1996) (finding that a breach of the covenant of good faith and fair dealing "implies *unfair dealing* rather than just mistaken judgment"); *Walbrook Ins. Co. v. Liberty Mutual Ins. Co.*, 5 Cal. App. 4th 1445, 1460 (1992) ("[S]o long as insurers are not subject to a strict liability standard, there is still room for an honest, innocent mistake.").

Where, as here, the relevant historical facts are not in dispute, this Court may determine as a matter of law whether the insurer's conduct was reasonable:

> When a claim is based on the insurer's bad faith, alleging either the insurer unreasonably refused to pay policy benefits or did not conduct an adequate investigation, the ultimate test is whether the insurer's conduct was unreasonable under all of the circumstances. Although the reasonableness of an insurer's claims-handling conduct is ordinarily a question of fact, it becomes a question of law where the evidence is undisputed and only one reasonable inference can be drawn from the evidence.

Graciano, 231 Cal. App. 4th at 427 (citations omitted).

Because Allstate's conduct in promptly offering full policy limits was *reasonable* as a matter of law, Allstate is entitled to judgment in its favor.

B. This Court's holding that an insurer cannot be liable for breach of the duty to settle when it offers full policy limits within a reasonable time after completing its pre-suit investigation will promote the important policy favoring settlement.

Like other jurisdictions, California has a strong policy in favor of settlement. *Village Northridge Homeowners Ass'n v. State Farm Fire & Cas. Co.*, 50 Cal. 4th 913, 930 (2010) ("The law favors settlements.") (quoting *Bush v. Superior Court,* 10 Cal. App. 4th 1374, 1382 (1992)). Whether an insurer should be held liable for breach of the duty to settle must be evaluated in light of this policy. *See State Farm Mut. Auto. Ins. Co. v. Crane*, 217 Cal. App. 3d 1127, 1138 (1990) ("[W]e think the rule proposed by appellant Crane would unfortunately discourage settlements and would foster additional litigation over the issue of good faith of settlement offers."). As one California court aptly observed more than fifty years ago:

> A major portion of today's litigation consists of personal injury actions defended by liability insurers. Settlement practices and timing have a direct effect on the quantity and flow of court business and thus on the administration of justice generally. Public policy permitting or proscribing tactical weapons developed by claimants and insurers should be shaped by two influences: (1) the public interest in encouraging settlements, and (2) fairness, that is, equalization of the contenders' strategic advantages.

Critz v. Farmers Ins. Group, 230 Cal. App. 2d 788, 800 (1964), disapproved on other grounds by *Crisci v. Security Ins. Co. of New Haven, Conn.,* 66 Cal. 2d 425, 433 (1967).

A holding by this Court that, as a matter of law, an insurer cannot be liable for breaching its implied duty to settle when it offers policy limits within thirty days after completing its investigation and within days after the claimant's own policy limits demand expired will help foster the policy in favor of settlements. Such a holding will remove the incentive for third-party claimants to reject policy limit offers *solely* in the hope of bringing a bad faith action seeking to recover damages in excess of policy limits.

Look at this case as an example. Rather than accept Allstate's offer of policy limits and avoid litigation, Madrigal has now subjected our overburdened judicial systems to two jury trials (the underlying personal injury action and this bad faith action) and two appeals.[2] Why did Madrigal decline Allstate's policy limits offer after he himself had demanded those limits to settle? Because it arrived a few days after the arbitrary deadline he had unilaterally imposed. And what transpired

---

[2] *See Madrigal v. Tang*, No. B246120, 2014 WL 1318688 (Cal. Ct. App. Apr. 2, 2014) (appeal in underlying personal injury action).

during those few days that transformed Allstate's policy limits offer from acceptable to unacceptable? Nothing. Absolutely nothing—except that Madrigal suddenly perceived an opportunity to hold Allstate liable for bad faith.

Courts recognize this sort of gamesmanship by third-party claimants and demand legitimate explanations why the claimant rejected the insurer's settlement offer:

> [T]he district court found that Wiebe's May 31 deadline for acceptance of the settlement offer was "completely arbitrary." The district court noted that Wiebe offered no evidence as to the significance of the deadline, there was no statute of limitations issue, no evidence of trial preparation or investigation taking place between May 31 and June 13, and that Wiebe offered no "legitimate reason why the policy limits offer which was acceptable to plaintiff on May 31, 2003, could not have been equally acceptable on June 13, 2003."

Wiebe v. Hicks, No. 98,990, 2008 WL 4291641, at *7, 192 P.3d 184 (Kan. Ct. App. 2008) (unpublished table decision); *see also DeLaune v. Liberty Mut. Ins. Co.*, 314 So. 2d 601, 603 (Fla. Dist. Ct. App. 1975) ("[T]o demonstrate that this whole charade might have been a 'set up' for just such a suit as we are considering (as argued by appellee) when Monday came, after the Friday deadline, and the home office authorized settlement, plaintiffs' counsel refused it.").

The policy favoring settlement supports a ruling by this Court that an insurer acts reasonably and not in bad faith by offering policy limits before its insured has been sued, within thirty days after completing its investigation, and within a short period of time following the expiration of the policy limits demand, at least where, as here, there is no evidence the deadline was anything but arbitrary. Such a holding will lead to more and earlier settlements of personal injury actions, which will mean fewer trials and appeals and fewer insureds exposed to excess judgments. The courts will also see fewer spurious bad faith actions, which should lead to lower insurance premiums for the public. *J.B. Aguerre, Inc. v. American Guarantee & Liab. Ins. Co.*, 59 Cal. App. 4th 6, 18 (1997) ("Every judgment against an insurer potentially increases the amounts that other citizens must pay for their insurance premiums.").

C. The Court should disapprove gamesmanship in the form of purported settlement offers designed primarily to "uncap" policy limits.

This case exemplifies how counsel for third-party claimants often focus their energy on trying to "set up" insurance carriers for subsequent bad faith claims. One justice on the California Supreme Court has identified the problem:

> The problem is not so much the theory of the bad faith cases, as its application. It seems to me that attorneys who handle policy claims against insurance companies are no longer interested in collecting on those claims, but spend their wits and energies trying to maneuver the insurers into committing acts which the insureds can later trot out as evidence of bad faith.

White v. Western Title Ins. Co., 40 Cal. 3d 870, 900 n.2 (1985) (Kaus, J., concurring and dissenting). Other courts have expressed similar concerns. *See, e.g., J.B. Aguerre,* 59 Cal. App. 4th at 18 ("Bad faith litigation is not a game, where insureds are free to manufacture claims for recovery."); *Matt v. Liberty Mut. Ins. Co.*, 798 F. Supp. 429, 435 (W.D. Ky. 1991) ("[T]his court finds that the Supreme Court of Kentucky would not permit the law of bad faith to become the pawn of creative plaintiffs[']attorneys."); *Wade v. Emcasco Ins. Co.*, 483 F.3d 657, 660 (10th Cir. 2007) (recognizing an "unusual set of undisputed facts" when a plaintiff rejected a policy limits offer made one day after the insurance company received medical records "solely because the plaintiff hoped to recover a much larger award on a bad-faith claim"); *Peckham*, 895 F.2d at 835 ("Courts should not permit bad faith in the insurance milieu to become a game of cat-and-mouse between claimants and insurer."); *Pavia v. State Farm Mut. Auto. Ins. Co.*, 626 N.E.2d 24, 28-29 (N.Y. 1993) ("Permitting an injured plaintiff's chosen

timetable for settlement to govern the bad-faith inquiry would promote the customary manufacturing of bad-faith claims, especially in cases where an insured of meager means is covered by a policy of insurance which could finance only a fraction of the damages in a serious personal injury case. Indeed, insurers would be bombarded with settlement offers imposing arbitrary deadlines and would be encouraged to prematurely settle their insureds' claims at the earliest possible opportunity in contravention of their contractual right and obligation of thorough investigation.").

This Court has expressed similar concerns in a case where the carrier's conduct showed that it would "have eagerly accepted a firm offer by the [claimant's] estate to settle for [the insured's] $10,000 limits" but was thwarted by the claimant's attorney, who rejected an insurer's policy limits offer as untimely. *Baton v. Transamerica Ins. Co.*, 584 F.2d 907, 914 (9th Cir. 1978); *see id.* ("The record strongly suggests that the real cause of Carpenter's inability to settle with the Baton estate was the conduct of the Batons' lawyer. . . . [I]t was unlikely that the lawyer ever intended to settle the case for $10,000.") ("If there was bad faith in this case, it was not proven to lie at the door of any insurance company.").

These sentiments might as well have been written for this case. Madrigal's lawyer did just what Justice Kaus bemoaned. He tried to set up this bad faith action, instead of promptly settling the underlying action, which he easily could have done.

This case is not an aberration. Throughout California and elsewhere, attorneys for third-party claimants often play games in the hope of setting up a subsequent bad faith action. *See, e.g., Grayson v. Allstate Ins. Co.*, No. 14-55959, 2016 WL 2849503, at *2 (9th Cir. May 16, 2016) (affirming summary judgment for insurer in bad faith breach of duty to settle case) (noting that insurer timely accepted third-party claimant's policy limits offer and forwarded standard release form, which claimant's counsel deemed a counteroffer and rejected, after which insurer sent a revised release form, which counsel again rejected without explanation) ("Allstate did not refuse to settle, much less unreasonably or unwarrantedly refuse. In fact, Allstate attempted repeatedly to settle the claim."); *Graciano*, 231 Cal. App. 4th at 418, 422 n.5 (noting counsel for third-party claimant failed to return insurer's phone calls and turned off her facsimile machine); *Interinsurance Exch. of Auto. Club of S. Cal. v. Soliz*, No. B222307, 2010 WL 4868171, at *3-4 (Cal. Ct. App. Nov. 30,

2010) (noting that third-party claimant's counsel refused to accept timely policy limits offer because of alleged additional terms included in a standard release) ("The November 11 letter concluded with a paragraph which, in our view, made clear the real purpose behind the short fuse settlement offer made by Soliz on October 21, 2008: 'Please refer this matter to the appropriate department with authority to discuss settlement beyond the limits of your insured's auto liability policy. Our client is willing to entertain an offer more reflective of the full value of the claim prior to entering into litigation.'");[3] *Wade*, 483 F.3d at 660 (emphasizing that plaintiff rejected policy limits offer made one day after insurer received medical records); *DeLaune*, 314 So. 2d at 603 (indicating court's displeasure with ten-day time limit in policy limits demand letter); Steven Plitt et al., A Critical Review of the Practice of Setting Up Insurance Companies for Bad Faith, 32 No. 10 Ins. Litig. Rep. 299 (2010) (collecting cases) ("The time-limited settlement demand in a third party liability case is the prototypical bad faith setup fact pattern. Indeed, the setup trend

[3] Unpublished California cases are citable to this Court. *See Beeman v. Anthem Prescription Mgmt., LLC*, 689 F.3d 1002, 1008 n.2 (9th Cir. 2012) (en banc) ("Although they are not precedent under California Rule of Court 977(a), we may nonetheless rely on" unpublished California opinions.).

originated in attempts to induce insurance companies to reject policy limits settlement offers.").

No doubt the third-party claimant may frame its offer as it chooses, unilaterally imposing a deadline to accept the offer. *Graciano,* 231 Cal. App. 4th at 426. But in determining whether the insurer acted in bad faith (as distinct from whether a settlement contract was formed), arbitrary deadlines cannot control. The issue is not whether the carrier kowtowed to the arbitrary deadline but whether the carrier acted *reasonably* under "the circumstances of each case." *Martin v. Hartford Accident & Indem. Co.*, 228 Cal. App. 2d 178, 185 (1964).

Therefore, the Court's inquiry should be whether Allstate's conduct was *reasonable* under the totality of circumstances, not whether Allstate accepted the claimant's policy limits demand within a unilateral and artificial time limit.

D. Under the totality of circumstances, Allstate acted reasonably as a matter of law.

Where, as here, the claimant demands policy limits long before litigation and discovery have begun, the insurer should be given a reasonable period of time to investigate the claim and to determine

whether to offer policy limits, without thereby exposing itself to liability beyond its contracted policy limits. In a pre-litigation setting, thirty days is certainly a reasonable period of time to allow insurers for investigating and considering whether to offer policy limits. *Cf.* Cal. Code Regs. tit. 10, § 2695.7(b) (2012) (allowing insurers forty days after receiving proof of loss to accept or deny claim).

In *Graciano*, less than three weeks after the third-party claimant's attorney contacted the carrier, the carrier made a full policy limits offer. *Graciano*, 231 Cal. App. 4th at 418. As in this case, the third-party claimant had previously made a policy limits demand with an arbitrary time limit to respond. *Id.* at 420. The carrier timely accepted that offer which was nonetheless rejected by the third-party claimant apparently over a dispute about the scope of the release. *Id.* at 422. The third-party claimant filed suit against the insured, obtained a $2 million judgment, and then filed a bad faith action against the insurer. *Id.* at 424. The jury found in favor of the plaintiff in the bad faith action. *Id.* at 424, 436.

The California Court of Appeal reversed, holding no substantial evidence supported a finding that the insurer unreasonably failed to timely tender policy limits. *Id.* at 434-35. The court noted that while the

third-party claimant was entitled to place a time limit on its policy limits demand, the insurer was not governed by that time limit. *Id.* at 434. When a carrier *timely* tenders policy limits it necessarily does not act in bad faith. *Id.* Because the carrier tendered policy limits within three weeks after learning of its insured's potential liability, the carrier "acted in good faith as a matter of law." *Id.* at 435.

Cases from this Court and other jurisdictions are in accord. *See, e.g., Baton*, 584 F.2d at 914 (reversing judgment in bad faith case against insurer) ("[W]e have found no Oregon case permitting an insurance company to be set up by carefully ambiguous demands coupled with sudden-death time tables."); *Meixell v. Superior Ins. Co.*, 230 F.3d 335, 337-38 (7th Cir. 2000) (holding carrier acted reasonably when it offered policy limits three months after demand expired); *Adduci v. Vigilant Ins. Co.*, 424 N.E.2d 645, 649 (Ill. App. Ct. 1981) (holding carrier was not unreasonable when it tendered policy limits forty days after demand expired); *Wiebe*, 2008 WL 4291641 at * 7 (holding policy limits offer made thirteen days after demand expired was reasonable).

Here, Allstate offered its full policy limits within thirty days after completing its investigation and long before any lawsuit was filed.

Moreover, Allstate offered its policy limits just five days after the claimant's own policy limits demand expired, a fact that strongly suggests Allstate's offer was timely and not prejudicial to the claimant. (AOB 55-56.) Under the totality of circumstances, Allstate acted reasonably as a matter of law and should not be subjected to extra-contractual liability.

II. ALTERNATIVELY, THE COURT SHOULD CONSIDER CERTIFYING THIS ISSUE TO THE CALIFORNIA SUPREME COURT FOR A DEFINITIVE ANSWER.

As set forth herein and in Allstate's opening brief, under California law Allstate acted reasonably under the totality of circumstances, and judgment should be entered in its favor. Nevertheless, should this Court determine that California law is uncertain, then this Court should consider certifying this important issue to the California Supreme Court under Rule 8.548 of the California Rules of Court. The California Supreme Court can provide a definitive answer to the question whether, under California law, an insurer that timely offers to settle for its policy limits before its insured has been sued, but a few days after the claimant's arbitrary deadline expired, can be liable for bad faith.

CONCLUSION

For the foregoing reasons, this court should reverse the judgment or, in the alternative, certify the issues raised by this appeal to the California Supreme Court for clarification.

September 8, 2016

HORVITZ & LEVY LLP
STEVEN S. FLEISCHMAN
MITCHELL C. TILNER

By: ***/s/ Steven S. Fleischman***
Steven S. Fleischman

Attorneys for Amici Curiae
PERSONAL INSURANCE FEDERATION OF CALIFORNIA AND PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA

CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS [FED R. APP. P. 32(a)(7)(C)]

☒ 1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

- ☒ this brief contains 4,356 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or
- ☐ this brief uses monospaced typeface and contains [state the number of] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

☒ 2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

- ☒ this brief has been prepared in a proportionally spaced typeface using MS-Word in 14-point Century Schoolbook font type, or
- ☐ this brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

September 8, 2016
Date

/s/ Steven S. Fleischman
ATTORNEY NAME

CERTIFICATE OF SERVICE

When All Case Participants are Registered for the CM/ECF System

I hereby certify that I electronically filed the foregoing Amicus Curiae Brief in support of Defendant, Appellant, Cross-Appellee Allstate Indemnity Company in favor of Reversal with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system on September 8, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Signature | *s/ Steven S. Fleischman*