Letters to California Judicial Council re: Civil Jury Instructions for Bad Faith and Insurer Defense Cost Reimbursement

Year: 2015
Court:
Case Number:

UP submitted letters to the California Judicicial Council regarding proposed revisions to California Civil Jury Instructions ("CACI") Nos. 2330-2337 and 2351: First, UP argued that the proposed language of CACI 2330-2337 conflates the standard for "bad faith" claim by collapsing the "unreasonably" and "without proper cause" standards into a single inquiry of whether the insurer acted" without proper cause," while the current instructions and the supporting case law treats "without proper cause" "unreasonable" conduct as two separate bases for liabillity for bad faith. The proposed revision would be contrary to more than two dozen published California appellate decisions holding that an insurer may be liable for a "bad faith" claim if it acts "unreasonably," separate and apart from whether it has "proper cause" for failing to pay benefits owing under an insurance policy. See, e.g., Brandwein v. Butler (2013) 218 Cal.App.4th 1485, 1515 ("the…requirements for a breach of the implied covenant are…the reason for withholding benefits must have been unreasonable or without proper cause"). The proposed change is likely to create confusion for law jurors as to the proper standard for bad faith liability. Second, and similarly, UP argued that the proposed revisions to CACI 2351, regarding what defense costs may be reimbursable to the insurer are likely to cause confusion with lay jurors. As set out in the proposed instruction, and consistent with California law, to obtain partial reimbursement, an insurer bears the burden of proof and can recover only those expenses that the insurer establishes were incurred solely in the defense of claims that are not potentially covered. Buss v. Superior Court (1997) 16 Cal.4th 35, 53. In other words, an insurer may not be reimbursed for defense expenses that were incurred to defend both covered and non-covered claims. While the proposed jury instruction reflects that standard, its wording is

likely to confuse a lay juror. Thus, UP proposed the following changes to the second paragraph of the proposed instruction: First, instead of simply saying the jury should determine the “costs of defense that were attributable only to [non-covered] claims,” it should refer to the “costs of defense that [name of insurer] has proven were attributable only to [non-covered] claims” to clarify that the insurer bears the burden of proof. Second, instead of stating that defense costs benefiting potentially covered claims “should not be included” in this determination, the jury instruction should state simply that such costs “are covered and [the jury] should award them.” This change should help alleviate confusion.

UP's letters were authored pro bono by David B. Goodwin, Esq., of Covington and Burling