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Via Email to civiljuryinstructions@jud.ca.gov August 23, 2017

Mr. Bruce Greenlee
Judicial Council of California
Advisory Committee on Civil Jury Instructions
455 Golden Gate Avenue
San Francisco, California 94102

Re: Response to Invitation To Comment On Proposed Revised CACI No. 2334 Jury Instruction

Dear Mr. Greenlee:

We write on behalf of United Policyholders concerning amendments to the Judicial Council of California's proposed revisions to CACI 2334, entitled: **Bad Faith (Third Party)—Refusal to Accept Reasonable Settlement Within Liability Policy Limits—Essential Factual Elements.** Although the request for comments referenced the revisions to the instruction and supporting authority, in light of changes in California law since the instruction was originally drafted, we write to raise concerns about the language of the original instruction itself as well as the associated Comments. The instruction, as currently drafted, is inconsistent with the cases that CACI cites to support the instruction and does not comport with California law. If left in its present form, the instruction would mislead juries considering a claim against an insurance carrier for "bad faith failure to settle."

The instruction reads:

[Name of plaintiff] claims that [he/she/it] was harmed by [name of defendant]'s breach of the obligation of good faith and fair dealing because [name of defendant] failed to accept a reasonable settlement demand in a lawsuit against [name of plaintiff]. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of plaintiff in underlying case] brought a lawsuit against [name of plaintiff]for a claim that was covered by [name of defendant]'s insurance policy;

2. That [name of defendant] failed to accept a reasonable settlement demand for an amount within policy limits; and

> 3. That a monetary judgment was entered against [name of plaintiff] for a sum greater than the policy limits.
>
> "Policy limits" means the highest amount available under the policy for the claim against [name of plaintiff].
>
> A settlement demand for an amount within policy limits is reasonable if [name of defendant] knew or should have known at the time the demand was rejected that the potential judgment was likely to exceed the amount of the demand based on [name of plaintiff in underlying case]'s injuries or loss and [name of plaintiff]'s probable liability. However, the demand may be unreasonable for reasons other than the amount demanded.

We offer four recommendations for revisions to the proposed instruction and Comments, which are set forth in bold below:

(1) Factor (1) states clearly and definitively that for the jury to find a bad faith failure to settle, it must fine that a lawsuit had been brought against the policyholder. That is too restrictive, as it does not recognize that contemporary liability insurance policies cover not just lawsuits but also other types of proceedings, such as arbitrations (*see* ISO CGL Form CG 00 01 10 01, at 15, ¶ V.18 ["suit" includes any "civil proceeding in which damages . . . are alleged," including arbitrations, and ADR proceedings]) and administrative proceedings (*see Powerine Oil Co. v. Superior Court* (2005) 37 Cal.4th 377), and that a bad faith failure to accept a settlement can arise in any type of proceeding that the insurance policy covers, and not just in the context of a lawsuit in court. A court or jury could well be misled by the current phrasing of Factor (1) into finding against a policyholder because the underlying proceeding was something other than a lawsuit.

Moreover, in some instances, California courts have imposed liability on an insurer for bad faith failure to settle even before a formal proceeding is filed, or where there ultimately is no formal suit or proceeding. For example, if a claimant offers to settle with the policyholder before filing suit, and the amount of the settlement demand is reasonable and well within policy limits, but the insurance company rejects that demand, a jury can find a bad faith failure to settle if accompanied by a *subsequent* lawsuit and judgment in excess of limits (or other damage). *See, e.g.*, *Shade Foods v. Innovative Products, Inc.* (2000) 78 Cal.App.4th 847 (finding bad faith on part of insurer for failure to investigate *and failure to settle a claim against the policyholder*, where no lawsuit had been filed against the policyholder because the policyholder reasonably settled the claim after the insurer denied coverage); *see also Critz v. Farmers Ins. Group* (1964) 230 Cal.App.2d 788, 797 ("That rejection of the compromise

offer happened early rather than late, that it preceded judgment or trial *or even commencement of suit*, does not preclude a finding of bad faith." (emphasis added).

We recommend that the Judicial Council add a Comment to CACI No. 2334 that explains that the instruction should be modified when the underlying proceeding at issue in the bad faith case is something other than a traditional lawsuit.

(2) Factor 2, requiring a demand within policy limits, when read in conjunction with the definition of "policy limits" – "the highest amount available under the policy for the claim" – also is contrary to the applicable legal standards for finding a bad faith failure to settle, because it requires the settlement demand to have been for no more than the limit of liability of the specific insurer's policy. Consider the following hypothetical:

> The primary insurer has a $1 million limit of liability and the excess insurer sitting right above that has a $2 million limit of liability. The underlying plaintiffs makes a reasonable demand to settle the case for $1.2 million. The excess insurer responds by offering its share, i.e., $200,000 to conclude the settlement, but the primary insurer rejects the settlement demand, refusing to contribute its $1 million limit.

Under the current instruction, the jury would be required to find that there was no bad faith on the part of the primary insurer because the settlement demand, $1.2 million, was higher than the primary insurer's own limit of liability (even though it is well within the limits of the available insurance), and thus Factor 2 could not be met. The same result would obtain under this instruction if there were two primary insurers, each with a $1 million limit, where one of them is willing to contribute its share of a $1.2 million settlement but the other rejects the demand. Because the total demand exceeded the recalcitrant insurer's limit, Factor 2, combined with the definition of "policy limits," would require the jury to find in favor of the recalcitrant insurer, even if the policyholder was harmed by, for instance, an excess judgment (of, say, $5 million in the above example) after the settlement fell through.

That result would be contrary to California law. In *Howard v. American National Fire Ins. Co.* (2010) 187 Cal.App.4th 498, the court held in a multiple insurer situation where the settlement demand exceeded each insurer's limits but not the limits of both:

> Although there was never a settlement demand within American's $500,000 policy limit, there was a settlement demand for $1.85 million that was well within the primary insurance policy limits of the multiple insurers on the risk, which totaled almost $4.3 million. That fact is

> relevant in evaluating whether an insurer, in a multiple insurer case, had an opportunity to settle. When multiple insurance policies provide coverage, each insurer's obligation is to cover the full extent of the insured's liability up to policy limits. (Citation.) American did not respond to the settlement demand with its policy limits and, had it and other insurers done so, could have settled the litigation. As the trial court observed, the law "cannot excuse one insurer for refusing to tender its policy limits simply because other insurers likewise acted in bad faith. If this were not the case, insurers on the risk could simply all act in bad faith, thus immunizing themselves from bad faith liability."

Id. at 525 (emphasis added). *Howard* also held:

> Moreover, in deciding whether or not to compromise the claim, the insurer must conduct itself as though it alone were liable for the entire amount of the judgment. [Citation.] Thus, the only permissible consideration in evaluating the reasonableness of the settlement offer becomes whether, in light of the victim's injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer. *Such factors as the limits imposed by the policy* ... or a belief that the policy does not provide coverage, *should not affect a decision as to whether the settlement offer in question is a reasonable one*.

Id. (emphasis added).

To rectify the current problem with the instruction, we comment a modification to the definition of "Policy Limits" that states that: "**'Policy limits' means the highest amount available under the policy [or if there are multiple available policies, the total amount of insurance available under all such policies] for the claim against [name of plaintiff].**" Alternatively, the Judicial Council could add a Comment that addresses the scenario raised in *Howard*.

(3) Factor 3 is fundamentally at odds with California law. Contrary to the language of this factor, which is stated as an absolute requirement of a "bad faith failure to settle" claim, under California law, an insured does *not* need to prove that a monetary judgment was entered against the policyholder for a sum greater than policy limits in order to establish a bad faith failure to settle. In *Howard v. American National Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 527 (internal citations omitted), the Court of Appeal held that "[a]n insurer's wrongful failure to settle may be actionable even without rendition of an excess judgment." Rather, the Court held, "[a]n insured may recover for bad faith failure to settle, *despite the lack of an excess judgment*, where the insurer's misconduct goes beyond a simple failure to settle within policy limits or the

insured suffers consequential damages apart from an excess judgment." *Id.* (emphasis added).[1]

We recognize that the Judicial Council has included a Comment noting that this instruction may be modified where there was a settlement rather than a judgment, but that does not cure the problem with the instruction, as it implies that a trial court could simply replace "judgment" with "settlement" and that the settlement would likewise have to exceed policy limits. There is no basis in the law for requiring an excess of limits settlement either. The policyholder could suffer consequential damages from either a judgment or settlement within policy limits, *e.g.*, if the failure to settle results in the policyholder's losing its business in the interim because of the failure to settle, or because the continued pendency of the case results in other financial harm to the policyholder.

The instruction should be modified so as to not confuse and mislead the jury into finding bad faith failure to settle arises only if there has been an excess judgment. The instruction should make clear that Factor 3 includes but is not limited to proof of an excess judgment. For instance, Factor 3 could be amended to state:

> **3. That the failure of [name of defendant] to accept a reasonable settlement demand caused injury to [name of plaintiff] because a monetary judgment was entered against [name of plaintiff] for a sum greater than the policy limits, or the conduct of [name of defendant] went beyond a simple failure to settle or caused [name of plaintiff] to suffer consequential damages apart from an excess judgment.**

(4) The final sentence of the instruction creates an ambiguity. Factor 2 accurately states that the insured must prove that the insurer "failed to accept" the demand, and it is correct that a failure to accept a demand is sufficient to subject the insurer to liability, even if the insurer did not formally "reject" the demand. Under the Fair Claims Settlement Practices Regulations issued by the California Insurance Commissioner, an insurer must respond promptly to communications from an insured, like a demand from the claimant. *See City of Hollister v. Monterey Ins. Co.* (2008) 165 Cal.App.4th 455, 488-90. Simply failing to respond to the demand, or delaying the

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[1] We note that the instruction includes a citation to *Howard*, quoting this very language. But the existence of a Comment quoting *Howard* does not rectify the serious problem created by phrasing the actual instruction in a way that is directly contrary to the holding of that case.

decision until after the time for acceptance has passed, contravenes the regulations and can give rise to liability. *Id.* However, the final sentence of the instruction speaks of "the time the demand was rejected." This implies that the insurer must have affirmatively rejected a reasonable demand in order to be found liable for bad faith failure to settle. That, as Factor 2 accurately reflects, is not the law.

We recommend that the final sentence be revised to replace "the demand was rejected" with "while the demand was pending."

We appreciate the Judicial Council's consideration of these comments and are hopeful that they will lead to modifications that will bring the instruction in line with current California law.

Respectfully submitted,

/s/

David B. Goodwin
Counsel for United Policyholders

cc: Mr. Michael Greenberg
Ms. Amy Bach
Mr. Dan Wade