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September 2, 2015

Via email

Advisory Committee on Civil Jury Instructions
c/o Administrative Office of the Courts
Office of General Counsel
455 Golden Gate Avenue
San Francisco, California 94102-3588
Attn: Mr. Bruce Greenlee

Re: Further Comments of United Policyholders on Proposed CACI Jury Instruction No. 2334

Dear Mr. Greenlee:

The Judicial Council has instructed the Committee to draft CACI jury instructions to provide courts and litigants with "standardized instructions *that accurately state the law* ...." Cal.R.Ct., rule 2.1050(a) (italics added). However, the recent email exchange concerning proposed CACI 2334 appears to have strayed from a discussion of what the law *is*, to an argument about what certain commentators *want* the law to be.

I therefore request the Committee's permission to respond briefly to that discussion to reiterate that the current wording of CACI 2334 reflects what the law is, with respect to proving a bad faith refusal to accept a reasonable settlement offer within policy limits, as reflected in numerous published California appellate cases. As set out more fully in the August 19 letter that I submitted on behalf of United Policyholders (and in the August 26 letter of the Consumer Attorneys of California, which focuses on the proposed amendments to CACI 2334), the proposed revision to CACI 2334 would add as an element of a bad faith claim that an insurer's "failure to accept a reasonable settlement demand was unreasonable, which means without proper cause" – a standard that is without support in existing California law.

Contrary to some comments the Committee has received, the current version of CACI 2334 does not impose "strict liability" on insurers. Rather, CACI 2334 states that the insurer must have "failed to accept a reasonable settlement demand for an amount within policy limits" and further defines a "reasonable" settlement demand. Therefore, as currently worded, the instruction properly focuses on the reasonableness of the settlement demand, which is the proper standard for a bad faith claim based on rejecting a third party's settlement offer. *See, e.g., Johansen v. Cal. State Auto. Assn.*

Inter-Ins. Bureau (1975) 15 Cal.3d 9, 16 ("We have held that whenever it is likely that the judgment against the insured will exceed policy limits so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured's interest requires the insurer to settle the claim." (quotation marks omitted)).

Nothing in *Graciano v. Mercury General Corp.* (2014) 231 Cal.App.4th 414 counsels a different result. *Graciano* held simply that an insurer did not receive an offer to settle claims against its insured within the insured's policy limits when the third-party plaintiff identified the wrong driver and the wrong policy (which had been canceled) in its communications with the insurer. *Id.* at 427-428. Because the injured party never "demanded payment" of the insured's policy limits "in exchange for a release of [the insured's] liability," the settlement demand was not reasonable. *Id.* at 428, 425.

There is no indication that the scenarios set out in other comments submitted to the Committee warrant adopting the proposed changes to CACI 2334. For instance, I am unaware of any cases where a jury relying upon CACI 2334 has found an insurer liable for bad faith because its adjuster was hit by a bus while in the process of mailing a letter accepting a settlement demand. To the extent that any commenters believe that the binding California standards on bad faith lead to undesirable results, those arguments are better addressed to the California Supreme Court or Court of Appeal in the appropriate case than to the Committee.

We appreciate the Council's consideration of the comments in this letter.

Respectfully submitted,

/s/

David B. Goodwin (Bar No. 104469)