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*Via email and first class mail*

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: Comments of United Policyholders on Proposed CACI Jury Instruction Nos. 2330-2337 and 2351**

Dear Mr. Greenlee:

I write on behalf of United Policyholders to comment on the proposed amendments to eight existing CACI jury instructions on insurance bad faith issues and a proposed new jury instruction regarding an insurer's claim for reimbursement of costs paid by a defending insurer to the insured's independent defense counsel.

United Policyholders opposes the proposed revisions to the eight jury instructions on insurance bad faith. The current jury instructions correctly instruct jurors that an insurer can be found liable on a "bad faith" claim for acting "unreasonably" *or* "without proper cause." In contrast, the proposed amendments to CACI Nos. 2330-2337 conflate these two distinct tests, collapsing the bad faith inquiry into a single question of whether the insurer acted "without proper cause" and effectively eliminating "unreasonable" conduct as a basis for bad faith liability. That 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. United Policyholders therefore urges the Advisory Committee on Civil Jury Instructions to reject the proposed amendments to CACI Nos. 2330-2337, which seek to impose burdens on policyholders pursuing bad faith claims that are contrary to long-settled California law.

Additionally, United Policyholders suggests revisions to Civil Jury Instruction No. 2351, a new instruction that would be used in cases where an insurer seeks reimbursement for certain defense costs. While such an instruction is welcome, the

proposed instruction is likely to confuse jurors. United Policyholders proposes an alternate wording that states the jury's task more clearly.

## I. Interest of United Policyholders

United Policyholders is a non-profit 501(c)(3) organization founded in 1991 that has twenty-four years of experience helping solve insurance problems and advocating for consumer rights. Its first major project was aiding over a thousand victims of an October 1991 firestorm in the hills of Oakland and Berkeley, California.[1] United Policyholders helped the victims understand their policies and receive prompt, fair insurance settlements. United Policyholders has expanded on its tradition and mission by providing consumer-oriented insurance advocacy and education across America.[2] Donations, foundation grants and volunteer labor fuel the organization. Its Board of Directors includes the former Chief Justice of the Arizona Supreme Court and the former Washington State Insurance Commissioner.

United Policyholders' work is divided into three program areas: *Roadmap to Recovery* provides tools and resources that help individuals and businesses solve insurance problems that can arise after an accident, illness, disaster, or other adverse event. The *Roadmap to Preparedness* program promotes insurance and financial literacy as well as disaster preparedness. The *Advocacy and Action* program advances policyholders' interests in courts of law, legislative and public policy forums, and in the media. United Policyholders participates in the proceedings of the National Association of Insurance Commissioners as an official consumer representative, and chairs a Consumer Advisory Task Force convened by California Insurance Commissioner Poizner. United Policyholders offers an extensive library of publications, legal briefs, sample policies, forms and articles on commercial and personal lines insurance products, coverage and the claims process at www.unitedpolicyholders.org.

United Policyholders has appeared as *amicus curiae* in over two hundred and eighty cases throughout the United States. Arguments from its *amicus curiae* brief were cited with approval in *TRB Investments, Inc. v. Fireman's Fund Ins. Co.* (2006) 40 Cal.4th 19, *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815 , *Watts Industries, Inc. v. Zurich American Insurance Co.* (2004) 121 Cal.App.4th 1029, and *Julian v. Hartford,*

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[1] *See, e.g.*, Kenneth Reich, *Under Covered Insurance Advocacy Group Aids Victims of Oakland Fire*, Los Angeles Times, at 3 (Mar. 1, 1992) ("Because of some well-placed pressure by a nonprofit organization called United Policyholders, many insurers have retroactively upgraded their customers' policies, agreeing to pay higher settlements without filing lawsuits.").

[2] *See, e.g.*, Angela Lau, *Poizner Hails Recovery from Fires, Says Most Claims Are Resolved*, San Diego Union-Tribune, at B-3 (Nov. 10, 2009) (Karen Reimus, disaster recovery coordinator for the nonprofit United Policyholders, which educates consumers about their insurance rights, said [California Insurance Commissioner Steve] Poizner still has not fulfilled his promise to audit 2007 wildfire insurance claims so that his department could make it easier for future victims.").

(2005) 35 Cal.4th 747. United Policyholders also has appeared as an *amicus curiae* in the United States Supreme Court in *Metlife v. Glenn, Campbell v. State Farm, FL Aerospace v. Aetna Casualty and Surety Co.*, and *Humana, Inc. v. Forsyth* in which United Policyholders' brief was cited in the published opinion at 525 U.S. 299.

## II. The California Judicial Council Should Reject The Proposed Amended "Bad Faith" Jury Instructions

According to the California Rules of Court, rule 2.1050(a):

> The California jury instructions approved by the Judicial Council are the official instructions for use in the state of California. *The goal of these instructions is to improve the quality of jury decision making by providing standardized instructions that accurately state the law in a way that is understandable to the average juror.*

(Emphasis added.) Thus, the adoption of new jury instructions on an important area of the law is not something that the Council should do, or does, lightly.

In this instance, the draft amendments to the Judicial Council of California Civil Jury Instruction Nos. 2330 through 2337 (the "draft amended instructions") conflate the meaning of "unreasonably" and "without proper cause" in insurance bad faith cases. In so doing, these draft amended instructions do not satisfy the Council's mandate because they misstate the law and may not be understandable to the average juror. In fact, a likely result – if these proposed instructions were adopted – is the transformation of insurance bad faith from a standard that an average jury can understand ("was the insurer unreasonable in refusing to pay the claim?") into something that would require expert testimony to resolve ("was the cause of the insurer's coverage denial proper?") and, hence, would require parties to bear higher litigation expenses and face more uncertainty. On top of this, the amendments would undermine the purpose of the doctrine of good faith and fair dealing in the insurance context.

### A. By Conflating "Unreasonably" and "Without Proper Cause," the Draft Amended Instructions Misstate the Law

California law implies a "covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement. . . . This principle is applicable to policies of insurance." *Comunale v. Traders & Gen. Ins. Co.* (1958) 50 Cal.2d 654, 658. An insurance company breaches this implied covenant of good faith and fair dealing when that insurer delays or denies payment of policy benefits to the insured and, in so doing, "act[s] *unreasonably* or *without proper cause*." *Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1072.

The reference to conduct that is *either* "unreasonable *or* without proper cause" as sufficient to establish liability for insurance bad faith was not a mere slip of the pen. In

fact, *more than two dozen published California decisions* distinguish between insurer conduct that is "unreasonable" or "without proper cause," as do an even larger number of federal court decisions applying California law. These cases set out the rule that a plaintiff can establish bad faith liability in one of two alternative ways, *i.e.*, showing that, in denying or delaying benefits, the insurer acted unreasonably *or* that the insurer acted without proper cause.[3] In contrast, United Policyholders has not located a single

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[3] *See, e.g.*, *Brandwein v. Butler* (2013) 218 Cal.App.4th 1485, 1515 (the two separate requirements for a breach of the implied covenant are '(1) benefits due under the policy must have been withheld; and (2) the reason for withholding benefits must have been unreasonable or without proper cause'"); *Bosetti v. U.S. Life Ins. Co. in City of New York* (2009) 175 Cal.App.4th 1208, 1237 fn. 20 ("[B]efore an insurer can be found to have acted in bad faith for its delay or denial in the payment of policy benefits, it must be shown that the insurer acted *unreasonably* or *without proper cause*."); *CalFarm Ins. Co. v. Krusiewicz* (2005) 131 Cal.App.4th 273, 286 ("it must be shown that the insurer acted *unreasonably* or *without proper cause*") (internal quotation marks omitted); *Century Sur. Co. v. Polisso* (2006) 139 Cal.App.4th 922, 949 ("unreasonable or without proper cause"); *Jordan v. Allstate Ins. Co.*, 148 Cal.App.4th at 1072 ("Before an insurer can be found to have acted in bad faith for its delay or denial in the payment of policy benefits, it must be shown that the insurer acted *unreasonably* or *without proper cause*"); *Nager v. Allstate Ins. Co.* (2000) 83 Cal.App.4th 284, 288 ("the insurer's conduct not only must be erroneous but 'unreasonable' or 'without proper cause' as well"); *Chateau Chamberay Homeowners Ass'n v. Assoc. Int'l Ins. Co.* (2001) 90 Cal.App.4th 335, 347 ("it must be shown that the insurer acted *unreasonably* or *without proper cause*"); *Cnty. of San Diego v. Ace Prop. & Cas. Ins. Co.* (2003) 106 Cal.App.4th 349 ( "the reason for withholding benefits must have been unreasonable or without proper cause"), *aff'd,* (2005) 37 Cal.4th 406; *George F. Hillenbrand, Inc. v. Ins. Co. of N. Am.* (2002) 104 Cal.App.4th 784, 807-808 (plaintiff must show "the insurer acted unreasonably or without proper cause to prove a bad faith claim"); *Hailey v. Cal. Physicians' Serv.* (2007) 158 Cal.App.4th 452, 472 ("*unreasonably* or *without proper cause*") (quotation marks omitted); *Jafari v. EMC Ins. Companies* (2007) 155 Cal.App.4th 885, fn. 47 ("unreasonable or without proper cause"); *Love v. Fire Ins. Exch.* (1990) 221 Cal.App.3d 1136, 1151 ("unreasonable or without proper cause"); *Major v. W. Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1209 ("unreasonable or without proper cause") (quotation marks omitted); *McCoy v. Progressive W. Ins. Co.* (2009) 171 Cal.App.4th 785, 793 ("The linchpin of a bad faith claim is that the denial of coverage was unreasonable. Before an insurer can be found to have acted in bad faith for its delay or denial in the payment of policy benefits, it must be shown that the insurer acted unreasonably or *without proper cause*.'") (quotation marks omitted); *Nager v. Allstate Ins. Co.* (2000) 83 Cal.App.4th 284, 288 ("the insurer's conduct not only must be erroneous but 'unreasonable' or 'without proper cause' as well"); *Nieto v. Blue Shield of Cal. Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 86-87 ("unreasonable or without proper cause"); *Prudential Ins. Co. of Am. v. Superior Court* (2002) 98 Cal.App.4th 585, 605 ("unreasonably or without proper cause"); *R & B Auto Ctr., Inc. v. Farmers Grp., Inc.* (2006) 140 Cal.App.4th 327, 354 ("*unreasonably* or *without proper cause*"); *Progressive West Ins. Co. v. Superior Court* (2005) 135 Cal.App.4th 434, 437 (same); *Schwartz v. State Farm Fire & Cas. Co.* (2001) 88 Cal.App.4th 1329, 1340 ("unreasonable or without proper cause"); *Shade Foods, Inc. v. Innovative Prods. Sales & Mktg., Inc.* (2000) 78 Cal.App.4th 847, 881 ("A breach of the duty to defend . . . may also violate the covenant of good faith and fair dealing where it involves unreasonable conduct or an action taken without proper cause."); *Smith v. State Farm Mut.*

California appellate decision holding that an insurer must act both "unreasonably *and* without proper cause" to face liability.

The "Sources and Authority" for the proposed instructions include several of the cases in footnote 3 in support of the draft amended instructions. In addition to citing *Jordan v. Allstate Insurance Co.*, which sets out the "unreasonably *or* without proper cause" rule, *see* 148 Cal.App.4th at 1072, each of the other cases in the "Sources and Authority" sets out a similar standard—a standard that differentiates *between* "unreasonable" actions *and* actions taken "without proper cause," with either being sufficient to establish bad faith liability.[4]

California courts do not treat "unreasonable" conduct as if it were identical to conduct undertaken without "proper cause." *See George F. Hillenbrand, Inc. v. Ins. Co. of N. Am.* (2002) 104 Cal.App.4th 784, 808 ("The jury could have found that benefits were not unreasonably delayed though the insurer acted without proper cause."). For instance, in *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, the court noted that a "breach of the duty to defend . . . may also violate the covenant of good faith and fair dealing where it involves unreasonable conduct or an action taken without proper cause." *Id.* at 881. But, the court continued, "[o]n the other hand, '[i]f the insurer's refusal to defend is reasonable, no liability will result.'" *Id.* This is because the "ultimate test of [bad faith] liability in the first party cases is whether the refusal to pay policy benefits was unreasonable." *Dalrymple v.*

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*Auto. Ins. Co.* (1992) 5 Cal.App.4th 1104, 1109-1110 ("It is well established that '[a]n insurer that has failed to defend may be liable for bad faith if it did so unreasonably or without proper cause.'"); *Tilbury Constructors, Inc. v. State Comp. Ins. Fund* (2006) 137 Cal.App.4th 466, 475 ("unreasonable or without proper cause").

A Google Scholar search also uncovered 94 federal court decisions decided under California law that apply the "unreasonable *or* without proper cause" test. *See, e.g., Pyramid Tech., Inc. v. Hartford Cas. Ins. Co.* (9th Cir. 2014) 752 F.3d 807, 823 ("Under California law, to establish a breach of the implied covenant of good faith and fair dealing, 'a plaintiff must show: (1) benefits due under the policy were withheld; and (2) the reason for withholding benefits was unreasonable or without proper cause.'"); *Feldman v. Allstate Ins. Co.* (9th Cir. 2003) 322 F.3d 660, 669 (same); *Guebara v. Allstate Ins. Co.* (9th Cir. 2001) 237 F.3d 987, 992 (same).

[4] *See Major*, 169 Cal.App.4th at 1209 ("to establish the insurer's 'bad faith' liability, the insured must show that the insurer has (1) withheld benefits due under the policy, and (2) that such withholding was '*unreasonable*' *or* '*without proper cause.*'") (emphasis added); *Love*, 221 Cal.App.3d at 1151 ("[T]here are at least two separate requirements to establish breach of the implied covenant: (1) benefits due under the policy must have been withheld; and (2) the reason for withholding benefits must have been *unreasonable or without proper cause*." (emphasis added); *Shade Foods*, 78 Cal.App.4th at 881 ("A breach of the duty to defend in itself constitutes only a breach of contract, but it may also violate the covenant of good faith and fair dealing where it involves *unreasonable conduct or an action taken without proper cause*. On the other hand, '[i]f the insurer's refusal to defend is reasonable, no liability will result.'") (emphasis added).

*United Servs. Auto. Ass'n* (1995) 40 Cal.App.4th 497, 520 (quotation marks omitted) (alterations in original).

Consistent with the distinction between an insurer acting "unreasonably" and "without proper cause," the Supreme Court has emphasized that even if an insurer has legitimate doubts about an insurance claim, it must address those concerns in a reasonable manner. Thus, in *Wilson v. 21st Century Insurance Co.* (2007) 42 Cal.4th 713, the Supreme Court held that to the extent an insurer had "good faith doubts" about its insured's claims of injury, it could have asked her doctor to reexamine or obtain opinions from other doctors. *Id.* at 722. However, the insurance company could not "*ignore*" the treating physician's conclusions "without any attempt at adequate investigation, and reach contrary conclusions lacking any discernable medical foundation." *Id.* The Supreme Court rejected the proposition that an insurer could avoid a bad faith claim on the grounds that it had a "legitimate" or "genuine" dispute about coverage, even if the insurer acted unreasonably. *Id.* at 724 fn.7. Rather, the Court held, an insurance bad faith "dispute is not 'legitimate' unless it is founded on a basis that is reasonable under all the circumstances." *Id.*

Thus, the Supreme Court has emphasized that the existence of a dispute about coverage is not necessarily determinative of a bad faith claim; the insurer still must act reasonably.

### B. The Draft Amended Instructions May Not Be Understandable to the Average Juror and Will Increase the Likelihood of Confusion

As mentioned above, California cases distinguish between acting "unreasonably" and acting "without proper cause." Whether a person or entity has acted unreasonably is, of course, a "bread and butter" jury issue, as reasonableness is an element of dozens of causes of actions, both within and outside of insurance disputes. A juror would understand "unreasonable" as "not acting according to reason," "exceeding the bounds of reason or moderation." *Webster's Third New Int'l Dict.* (1968) 2507. In insurance bad faith cases, factors (a) through (p) of CACI No. 2337 would help inform the jury's finding on "reasonableness."

In contrast, "proper" means "[a]ppropriate, suitable, right, fit, or correct; according to the rules." *Black's Law Dictionary* (10th ed. 2014). Thus, a lay juror would likely understand "proper cause" to mean an appropriate, suitable, right, or correct cause, *i.e.*, a cause for action or inaction that was "according to the rules." Jurors may reasonably interpret this to consider the terms of the insurance policy, or insurance industry custom and practice, the state of the law, or the purpose of the implied covenant (discussed further below).

Moreover, determining whether an insurer acted "without proper cause" would likely require an expert. This is because the jury would need to consider the cause the insurer had for its refusal to pay the insurance claim and whether the insurer acted properly in basing its denial of coverage on that cause. For example, an insurer might

have a bright-line rule that it never pays a certain type of claim, because processing the claim would be expensive and the vast majority of claims, after investigation, would not be covered. The insurer might argue that it has proper cause for its blanket denial of coverage – lowering costs and thereby reducing insurance premiums – but a jury, without expert assistance, might not be able to assess whether such conduct is proper.[5]

The differences between "unreasonably" and "without proper cause" may cause real confusion if the jury instructions conflate those two terms. The Council's proposed draft of instruction 2337 sets out examples that a jury may consider to determine whether the defendant acted "unreasonably*, that is* without proper cause." Proposed Amendment to CACI No. 2337 (emphasis added). If the jury's decision is limited to determining whether the defendant acted "without proper cause" – as the proposed draft implies – some of the factors listed in the instruction would not assist the jury's analysis and, indeed, may cause confusion. For instance, the fact that the defendant "[f]ailed to acknowledge and act reasonably promptly after receiving communications about [the plaintiff's] claim arising under the insurance policy," (CACI No. 2337(b), as amended), fails to illuminate the inquiry as to whether the insurer acted or failed to act "without proper cause" in denying the plaintiff the benefits of the policy. That is because a belated response does not mean that someone acted "without proper cause" but it may mean that the person acted unreasonably. (See the discussion of *Major* in the Section C below for an example.) Likewise, "[f]ail[ing], after payment of a claim, to inform [the plaintiff] at [his/her/its] request, of the coverage under which payment was made," (CACI No. 2337(i), as amended, fourth alteration in original), does not mean the insurer denied the plaintiff benefits "without proper cause," but it may mean that the insurer acted unreasonably. This confusion could be a pervasive problem under the proposed amended instructions because these factors, rightly, depend upon a distinction between "unreasonable" and "without proper cause."

### C. Conflating These Two Standards Jeopardizes the Purpose of the Cause of Action and Risks Outcomes at Odds with Precedent

California law implies a covenant of good faith and fair dealing into every contract so "that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." *Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 573. This may mean that the insurer must go beyond the express language of the policy to protect the rights of its insured. *Comunale*, 50 Cal.2d at 659 ("[T]he implied obligation of good faith and fair dealing requires the insurer to settle in an appropriate case although the express terms of the policy do not impose such a duty."). "In sum, the covenant is implied as a supplement to the express contractual covenants, to prevent a

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[5] This fact scenario is not an invention. The undersigned was counsel in a case in which a major liability insurer had a policy of refusing to defend insureds against pollution claims that appeared to result from routine business practices. The jury found this conduct to be in bad faith and ultimately awarded $26.4 million in damages, which the Court of Appeal affirmed in an unpublished decision.

contracting party from engaging in conduct that frustrates the other party's rights to the benefits of the agreement." *Waller v. Truck Ins. Exch., Inc.* (1995) 11 Cal.4th 1, 36.

Limiting acting "unreasonably" to actions taken "without proper cause" changes the standard, jeopardizing the purpose of the doctrine. Under the good faith doctrine as it has developed in California, insurers have many supplemental duties: "an insurer must investigate claims thoroughly; it may not deny coverage based on either unduly restrictive policy interpretations or standards known to be improper; it may not unreasonably delay in processing or paying claims." *Love v. Fire Ins. Exchange*, 221 Cal.App.3d at 1148. But these duties may be avoided under the draft amended instructions, for example, if a jury determined that the insurer acted unreasonably, but had a "proper cause" to do so.

Critically, the draft amended instructions may result in unjust outcomes that are at odds with precedent. In *Major v. Western Home Insurance Company* (2009) 169 Cal.App.4th 1197, the Majors (the insured) had a homeowners policy, and their home burned down in October 2003. *Id.* at 1203-1205. An insurance representative agreed that time was of the essence, but still, in 2004 the insurance company was two months behind on the payment of mortgage benefits and payments for living expenses. *Id.* at 1205. Largely because a claims adjuster was too busy to process their claims, it took until April or May of 2005 for Western to pay all policy benefits due under the policy, and this was only after the Majors retained counsel. *Id.* at 1205-1206. The jury found for the Majors on the insurance bad faith claim, but one could easily imagine a different result if the "unreasonable" and "without proper cause" standards were conflated. A jury could determine that the insurance company had a "proper cause" for the delay—if, for example, the company's employees were overworked at that particular time and it did not make business sense to hire additional staff. If the draft amended instructions stand, business concerns may take precedent over an insurance company's responsibility as "purveyors of a vital service labeled quasi-public in nature." *Egan v. Mut. of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 820 (quotation marks omitted).

For all these reasons, United Policyholders asks the Judicial Council of California to retain the current language in the Civil Jury Instructions numbers 2330-2337.

## III. The Proposed Instruction Regarding Reimbursement of Defense Costs Will Confuse Lay Jurors

United Policyholders also suggests revisions to proposed CACI No. 2351. This new instruction provides welcome guidance in the important and often-litigated situation where an insurer defends under a reservation of rights and the insured retains independent counsel but, when the case is over, the insurer wishes to seek partial reimbursement for costs that it claims are not even potentially covered by the relevant insurance policy.

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. *Id.*

While the proposed jury instruction reflects that standard, its wording is likely to confuse a lay juror. Thus, we propose 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," the Committee 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." These changes are reflected below (with proposed deletions in strikeout, and proposed additions bolded and underlined).

> [*Name of insurer*] claims that it is entitled to partial reimbursement from [*name of insured*] for the costs that it spent in defending [*name of insured*] in the lawsuit brought by [*name of plaintiff in underlying suit*] against [*name of insured*]. [*Name of insurer*] may obtain reimbursement only for those defense costs that it proves can be allocated solely to claims that are not even potentially covered by the insurance policy.
>
> I have determined that the following claims in [*name of plaintiff in underlying suit*]'s lawsuit were not even potentially covered by the policy: [*specify*]. You must determine the dollar amount of [*name of insurer*]'s costs of defense that **[*name of insurer*] has proven** were attributable only to these claims. Costs for work that also helped the defense of the other claims that were potentially covered ~~should not be included~~ **are covered and you should award them**.

These modest changes will ensure that jurors better understand their task in making determinations regarding insurers' claims for reimbursement.

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

Respectfully submitted,

*/s/ David B. Goodwin*

David B. Goodwin (Bar No. 104469)