IRG INSURANCE RESEARCH GROUP
John K. DiMugno, Attorney-at-Law

Insurance Research Group/John K. DiMugno, Attorney-at-Law

3450 Palmer Dr., Suite 4-285
Cameron Park, CA 95682

Phone: 530-344-0239
Fax: 530-344-0189
Email: jd@dimugnolaw.com

Revising California's Jury Instructions on Insurance Bad Faith: The Nature of the Tort of Insurance Bad Faith

By John K. DiMugno

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My **last post** discussed briefly two significant revisions to the Judicial Council of California Civil Jury Instructions (CACI) on insurance bad faith. This post examines in greater depth revisions designed to clarify the nature of the tort of insurance bad faith.

In defining the tort of insurance bad faith, courts have focused on the reason for its recognition—ensuring that policyholders receive the peace of mind they thought they were purchasing when they entered into an insurance contract. To that end, insurers are required to give the interests of their insureds at least as much consideration as they give their own interests. Courts, however, have been less than clear about the extent to which an insurer's knowledge of the wrongfulness of its conduct is an element of the tort of insurance bad faith, except to note that the tort requires more than simple negligence but less that the specific intent to harm.

The Advisory Committee responsible for proposing revisions to California's jury instructions expressed the concern that former CACI No. 2330's characterization of bad faith conduct as "unreasonable" conduct misled juries about the nature of the tort of insurance bad faith. Jurors, the Advisory Committee warned, were unlikely to recognize a distinction between acting "unreasonably" and showing a lack of due care and thus incorrectly impose liability on insurers for negligent conduct. In order to help jurors understand that acting "unreasonably" involves more than acting negligently, the Advisory Committee submitted, and the Judicial Council approved, the following revisions to CACI No. 2330:

> **2330. Implied Obligation of Good Faith and Fair Dealing Explained**
>
> In every insurance policy there is an implied obligation of good faith and fair dealing that neither the insurance company nor the insured will do anything to injure the right of the other party to receive the benefits of the agreement.

> To fulfill its implied obligation of good faith and fair dealing, an insurance company must give at least as much consideration to the interests of the insured as it gives to its own interests.
>
> To breach the implied obligation of good faith and fair dealing, an insurance company must, unreasonably ~~or without proper cause~~, act or fail to act in a manner that deprives the insured of the benefits of the policy. ~~It~~ *To act unreasonably* is not a mere failure to exercise reasonable care. *It means that the insurer must act or fail to act without proper cause.* However, it is not necessary for the insurer to intend to deprive the insured of the benefits of the policy

Under the revised version of No. 2330, acting unreasonably is defined as acting without proper cause. CACI Nos. 2331-2337 also were revised to equate unreasonableness with lack of proper cause, changing the phrase “unreasonably or without proper cause” to “unreasonably, that is, without proper cause” or to state simply that “‘reasonably’ means the insurer had no proper cause.

Do the Revisions to CACI No. 2330-2337 Accurately Reflect California Law?

Attorneys for policyholders are likely to challenge the now-adopted revisions to CACI No. 2330-2337 on the ground that they improperly narrow the circumstances within which an insurer can be found liable for bad faith claims handling by conflating acting without proper cause and acting unreasonably into a single definition of bad faith. Prior to these revisions, juries were told that a plaintiff may establish bad faith in one of two alternative ways: (1) showing that the insuring lacked a “proper cause” for denying benefits, or (2) showing that the insurer acted “unreasonably” in denying benefits.

The “without proper cause” test ensured that the insurer has a “proper”—defined in *Black’s Law Dictionary* (10th ed. 2014) as “[a]ppropriate, suitable, right, fit, or correct; according to the rules”— basis for denying coverage. Whether the insurer had a “proper” basis for contesting coverage depended on the strength of the insurer’s coverage position. In order to prevail under the proper cause test, the plaintiff would have to show more than that the insurer’s doubts about coverage were erroneous; the policyholder would have to show that the insurer’s doubts were illegitimate or not genuine given the language of the policy and the state of the law.

The “acted unreasonably” test, by contrast, allowed a jury to impose liability when the insurer acts on admittedly legitimate doubts about coverage in an unreasonable manner. For example, an insurer could commit bad faith by failing to conduct an investigation sufficient to support what would have been a legitimate basis for denying coverage. The requirement that insurers act reasonably imposed supplemental duties designed to ensure that policyholders are not deprived of the peace of mind sought when purchasing insurance.

Insurer's Response

Insurers opposing attempts to restore the old language may argue that the distinction advocated by ignores the role of causation in the law of insurance bad faith. As a general principle, a defendant

incurs no liability, no matter how evil his motive, if the harm the plaintiff suffered would have occurred even if the defendant had conducted himself properly. Applied to an insurance bad faith claim, this principle dictates that an insurer, no matter how badly it mishandles a claim, should incur no liability for its denial of a claim if a reasonable insurer, after a complete and thorough investigation, would still have denied the claim. In such situations, the insurer's failure to investigate causes the insured no harm: if the insurer had properly investigated, its subsequent denial would have had a proper basis. Just as an insurer is charged, in the absence of investigation, with knowledge of all facts supporting coverage which a reasonable investigation would have disclosed, it should also be given the benefit of later-discovered facts supporting denial.

My next post will examine the revisions CACI No. 2334, which explains the duty of liability insurers to accept reasonable settlement offers within policy limits.