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: Are the Twin Goals of Accuracy and Understandability in Conflict?

By John K. DiMugno

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A bedrock principle on which the rule of law is built in this country is that judges and courts decide what the law is and juries apply the law to the facts. Scholars have argued that clearly defined roles of courts and juries were essential to the economic growth of the country in the 19th and 20th Centuries. Requiring juries to resolve disputes based on instructions from the court about the applicable law, rather than their own sense of justice, allowed for the emergence of a relatively predictable set of legal rules necessary for commercial transactions. *See generally,* Leonard Levy, *The Palladium of Justice: Origins of Trial by Jury* (Chicago: Ivan R. Dee, 1999).

In order for juries to fulfill their role properly, courts must instruct them about the law applicable to a dispute in language that is both understandable and accurate. In the face of complaints that California's Jury Instructions were "simply impenetrable to the ordinary juror," the California Judicial Council appointed a committee in 1997 to draft new civil jury instructions. Completed and adopted by the Judicial Council in 2003, the Judicial Council of California Civil Jury Instructions (CACI) are now used in civil trials throughout California.

In order to ensure that the CACI instructions remain current and accurate as the common law evolves and the California legislature enacts new laws, the California Judicial Council created the Civil Jury Instructions Advisory Committee (Advisory Committee). The Advisory Committee regularly reviews case law and statutes, and proposes revisions and additions to the existing CACI instructions. This can be a daunting task in an area of law as complex and as plagued by lack of consensus as insurance bad faith. Although California's body of insurance bad faith law is extensive, uncertainty remains regarding a variety of outcome determinative questions. May an inadequate investigation give rise to bad faith liability even though an adequate investigation would have provided the insurer with a reasonable, albeit erroneous, basis for denying coverage? Does proof that a rejected third-party settlement demand was reasonable establish a liability insurer's liability for bad faith failure to settle? Or must the insured also

establish that the insurer acted unreasonably in rejecting the settlement demand? Must a liability insurer unilaterally initiate settlement negotiations? Or may the insurer sit back and wait for the claimant to make settlement overtures? Despite California's well-developed body of insurance bad faith law, the way lawyers answer these questions is inevitably a function of whether they represent policyholders or insurance companies. Both sides of the bar can cite authority for their points of view, but the California Supreme Court has yet to provide definitive guidance on these questions.

Not surprisingly, the Advisory Committee's recent proposals to amend the CACI instructions on insurance bad faith proved contentious, generating nearly 200 comments. The vast majority of the comments were highly critical, recommending revisions to the Advisory Committee's proposals and/or rejection by the Judicial Council. Much of the controversy centered on two of the proposed changes.

First, the Advisory committee proposed to eliminate language in five jury instructions that give policyholders alternative routes to establishing a breach of the implied covenant of good faith and fair dealing. Under jury instructions in force since the CACI jury instructions were adopted in 2003, insurers committed bad faith if they acted either unreasonably or without proper cause. The revised jury instructions conflate the meaning of unreasonableness and lack of proper cause into one test by equating the two terms.

Second, the Advisory Committee proposed to revise jury instruction No. 2334 on bad faith failure to settle to require policyholders (or their assignees) to prove both that claimant's settlement demand was reasonable and that the insurer acted unreasonably in rejecting the settlement offer. Existing jury instructions required proof only of the reasonableness of the settlement demand in light of the insured's potential liability.

The Advisory Committee refused to adopt the policyholder bar's recommendations that the existing instructions retain language giving plaintiffs alternative routes to establishing first party bad faith. The new language defining unreasonableness as lack of probable cause was adopted by the Judicial Council at its December 11, 2015 meeting. The Advisory Committee, however, agreed to modifications of its proposal to add a second reasonableness inquiry to No. 2334. The final proposal submitted to the Judicial Council dropped language requiring the jury to assess the reasonableness of the insurer's decision not to settle from CACI No. 2334, but included language in the sample instruction's "Directions for Use" allowing trial courts to insert such a requirement. The Judicial Council approved the changes to No 2334 at the Judicial Council's June 24, 2016 meeting.

My next two posts will examine the new jury instructions, with a focus on whether they meet the Judicial Council's twin goals of providing jurors with a clear and accurate statement of California's law of insurance bad faith.