CIVIL JUSTICE
ASSOCIATION OF CALIFORNIA

September 12, 2022

Hon. Lee Smalley Edmon, Presiding Justice
California Court of Appeal
Second Appellate District, Div. Three
300 S. Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013

Re: Request for Publication of *Julio Palma, et al. v. Mercury Ins. Co.*, No. B309063 (Decided August 23, 2022).

Dear Presiding Justice Edmon and
Associate Justices:

The Civil Justice Association of California ("CJAC") urges the Court to certify for publication its opinion in the above captioned case. Doing so will benefit counsel and courts by providing useful guidance about what is permitted and prohibited when it comes to settlement negotiations between plaintiffs and insurance companies, specifically what conduct by an insurer constitutes "bad faith" leading to liability for damages in excess of its insured's policy limits.

CJAC is a long-standing nonprofit organization of businesses, professional associations and financial institutions. Our principal purpose is to secure "fairness, efficiency, uniformity and clarity" in the making, interpretation and application of laws determining who gets paid, how much, and under what circumstances when the conduct of some occasions harm to others. Toward this end, CJAC participates as amicus curiae in selected cases and matters before California appellate courts.

Publication of this opinion will further the public interest and CJAC's goals by providing greater fairness, clarity and efficiency in the future resolution of insurance bad faith claims. (See Cal. Rules of Court, rule 8.1105(c)(2) [opinion should be published when it applies a rule of law to facts significantly different from those in other published opinions]; and (c)(6) [publication warranted when it addresses a legal issue of continuing public interest].) Though we have insurance companies who are members, Mercury Insurance Company is not a CJAC member or contributor; and no party in this case paid for or drafted this letter.

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Several reasons support publication of this opinion.

First, there is no dispute that if published it will be the first citable California appellate opinion holding that negligence alone is insufficient conduct by an insurer in a *third-party claim* to be held liable for "bad faith." Here the insured was successfully sued by plaintiff after the insurer promptly accepted the demand for full policy limits from plaintiff's counsel based on what it misconstrued as a valid settlement offer. The insured then assigned its $3 million judgment that plaintiff obtained against him to the plaintiff in exchange for his agreement not to execute on the insured's personal assets; and the plaintiff proceeded to file suit against the insurer for its "bad faith" refusal to act "reasonably" and accept its counsel's poorly worded and invalid settlement demand.

To date, all published opinions holding that mere negligence by an insurer in settlement negotiations is not enough to prove "bad faith" have involved first party lawsuits by the insured against the insurer, and not assignments of judgments by an insured to third parties who then sue the insurer. (See, *e.g.*, *Adelman v. Associated International Ins. Co.* (2001) 90 Cal.App.4th 352, 357.) This opinion clarifies for the first time "that the 'unreasonableness' requirement in CACI No. 2334 means something more egregious than negligence" and applies to *both* first and third-party insurance bad faith claims. (Letter from the Association of Defense Counsel of Northern California and the Association of Southern California Defense Counsel urging publication of this opinion, September 7, 2022, p. 7.)

Second, this opinion provides new and useful guidance to courts and counsel as to what kinds of conduct constitute "bad faith" by insurance companies when plaintiffs sue them and then engage in settlement negotiations that ultimately become the basis for alleging that the insurers' "unreasonable conduct" during the negotiations breached their obligations to their policy holders. It further clarifies the dividing line between negligence and "bad faith," a line that has been blurred by the "on again, off again" policy of the Judicial Counsel in removing and then later reinserting the "unreasonable conduct" criterion for ascertaining whether the insurer acted in "bad faith."

Conceptually, of course, this demarcation is difficult enough due to the similarity between the negligence doctrine itself (*Tucker v. Lombardo* (1956) 47 Cal.2d 457, 464 ("*reasonable* foresight of harm is

essential to the concept of negligence, and supplies the criterion for determining whether it exists in a particular case")), and the "unreasonable conduct" standard for determining whether an insurer acted in "bad faith" when responding to a settlement demand. Reasonableness and unreasonableness are two sides of the same coin. All can benefit from whatever guidance appellate opinions offer on this distinction, and since each case is "fact specific," highlighting the facts to be taken into consideration in making that determination becomes critical to the jurisprudence on "bad faith."

The opinion achieves this goal by explaining why "no reasonable trier of fact could conclude [that the insurer] acted in bad faith." (Slip Opinion, p. 14; "Opn.") Key to that conclusion are three salient facts: (1) the inadvertent failure of the insurer to enclose in the letter to plaintiff's counsel that contained notification the insured accepted the settlement offer and the check for policy limits, a declaration from its insured that he had no other insurance policies besides the one with the insurer; (2) enclosing in that same letter a release of claims form that required plaintiffs to give up their property damage claims, even though the insurer only offered its bodily injury policy limits while inviting plaintiffs to let it know what revisions, if any, they wanted to make to the release consistent with their intentions; and (3) a general allegation without supporting facts that the insurer did not do all within its power to effectuate a settlement. (Opn. pp. 15-16, 18.)

The opinion underscores that this kind of "gamesmanship" by plaintiffs' counsel in trying to gin up "bad faith" claims against insurers for unreasonably rejecting plaintiffs' settlement demand will not wash. "There is . . . no doubt that had plaintiffs or [their counsel] simply told [the insurer] they had not received the [insured's] declaration with [the] acceptance letter, [the insurer] would have provided it by the original deadline. The issue could have been resolved with a single phone call or email." (*Id.* at 18.) Further, the opinion explains the reasonable conduct of the insurer that vitiates "bad faith" claims for unreasonably rejecting a settlement offer. "Here . . . [the insurer] made substantial efforts to accept [plaintiff counsel's] offer. Among other things, it informed [its insured] of the offer, obtained his consent to accept it, tendered its full bodily injury policy limits, made substantial efforts to obtain and deliver the requested information and documents, and expressed a willingness to modify the Release of Claims form." (*Id.* at 17.)

Third, while the opinion stresses the importance of a clear and unambiguous settlement demand (lacking in this case due to plaintiff counsel's negligence or otherwise), this was an independent and alternative ground for finding in favor of the insurer. "Even if [plaintiff counsel's] letter had offered to settle plaintiffs' claims, [the insurer] would be entitled to summary judgment because no reasonable trier of fact could conclude it acted in bad faith." (Opn. at 14.) All of what the opinion discusses as to why "bad faith" liability does not apply to the insurer's settlement negotiations is not, then, mere *dicta*. Where, as here, two independent reasons are given for a court's decision, neither is dictum "since there is no more reason for calling one ground the real basis of the decision than the other." Each ground is entitled to equal precedential effect. (*Southern Calif. Chapter of Associated Builders & Contractors, Inc., Joint Apprenticeship Committee v. California Apprenticeship Council* (1992) 4 Cal.4th 422, 431.)

For these reasons, CJAC asks this Court to publish its August 23, 2022 opinion.

Respectfully,

/s/ Fred J. Hiestand
Fred J. Hiestand
CJAC General Counsel

Proof of service attached

PROOF OF SERVICE

I, David Cooper, am employed in the city of Sacramento, Sacramento County, State of California. I am over the age of 18 years and not a party to the within action. My business address is 3418 Third Street, Suite 1, Sacramento, CA 95817.

On September 12, 2022, I served the foregoing document described as: Publication Request of the Civil Justice Association of California in *Julio Palma, et al. v. Mercury Ins. Co.*, B309063 on all interested parties in this action by sending a true copy thereof electronically as follows:

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[X](VIA E-SERVICE) I electronically served the foregoing document via the TrueFiling website.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed this 12th day of September 2022 at Sacramento, California.

/s/ David Cooper
David Cooper