University of San Diego SCHOOL OF LAW

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August 23, 2024

Jeff Wiemann
Executive Director
Angels Foster Family Network
9295 Farnham Street, Suite 200
San Diego, CA 92123

RE: AB 2496 – INFORMATION FOR YOUR CONSIDERATION

Dear Director Wiemann:

By this letter, the Children's Advocacy Institute (CAI) at the University of San Diego School of Law respectfully offers for your consideration an explanation of the arguments and facts that led CAI and other child advocacy legal groups to oppose the introduced version of AB 2496, with the hope that doing so might aid in shaping a conversation toward solutions acceptable to our foster family agency (FFA) child welfare colleagues and attorneys working with and on behalf of foster children.

In the spirit of transparency and cooperation, CAI hopes to provide our FFA colleagues with factual information to explain why we opposed the prior version of the bill, the version that was introduced. Specifically, we respectfully write (i) to identify legal precedent that would, unlike AB 2496, immediately prevent cancellations and nonrenewals of FFA insurance policies, (ii) to share our research identifying how the original bill was based upon incorrect information regarding the lawsuit that apparently was the motivating reason for it, and (iii) to highlight and explain certain technical aspects of the bill as it was introduced that were harmful to FFAs.

I. No Provision of AB 2496 Prevented Cancellations or Nonrenewals.

In its original form, no provision of AB 2496 restrained in any fashion your insurer from canceling or nonrenewing your insurance policies. The bill in its original form could have passed and your insurer would still have been legally permitted to cancel or nonrenew your policy. This is so even though the Legislature has fairly recently enacted legislation that actually paused cancellations and nonrenewals of insurance policies; namely, SB 824 from the 2017–18 legislative session.[1] Florida has enacted a similar pause button.[2] Florida has also enacted a measure to stabilize its reinsurance market.[3] And Texas has increased the amount of time required to cancel or nonrenew a policy.[4]

[1] https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB824

[2] https://news.wfsu.org/state-news/2022-09-29/insurers-in-florida-are-temporarily-blocked-from-dropping-policies-as-ian-crosses-the-state

[3] Roher, Gary, "Lawmakers plan $1B for reinsurance to stabilize property insurance industry," Florida Politics, December 1, 2022. https://floridapolitics.com/archives/575542-lawmakers-plan-1b-for-reinsurance-to-stabilize-property-insurance-industry/.

[4] https://www.jdsupra.com/legalnews/non-renewal-cancellation-reformation-2588119/

II. The Reasons Asserted Justifying the AB 2496's Former Provisions Were Based on an Incorrect Portrayal of a Recent Jury Verdict.

The now-deleted provisions of AB 2496 were apparently included based upon assertions that juries are broadly awarding damages against FFAs for "unforeseeable" harms caused by "technical violations" of laws applicable to children placed in FFAs. Such verdicts, it was argued, necessitated preventing foster children who happen to be under the care of an FFA and end up being abused from obtaining the same compensation available to every other child and adult who suffers identical abuse. If there are indeed cases where unjustifiably large jury awards based upon truly meaningless violations of law exist and have withstood appeal, CAI is pleased to collaborate with stakeholders on tailored, even-handed legislation addressing such instances.

However, only one case has been identified to support the assertion that FFAs were being held liable for unforeseeable harms caused by purely technical violations of law*: C.F. v. Martinez*, now on appeal, where a jury awarded $24.8 million against an FFA.

CAI has had the opportunity to review that case, again the only one identified as the source of the now-deleted provisions. Respectfully, the facts of this case do not support — indeed, they contradict — the assertion that juries are awarding damages for unforeseeable harms caused by technical violations of laws.

A. What happened in the only case identified as the basis for the prior version of AB 2496? What offer did the insurer reject and what was the evidence presented to the jury?

Every foster child, by definition, has already endured abuse or neglect. The tragic case of *C.F. v. Martinez* involved three young foster children, ages two, five, and six who were sexually abused by an FFA-recruited foster parent. The FFA that certified, placed, and supervised the foster parents was insured by NIAC. The foster parent was criminally convicted of sexually abusing the three children and sentenced to a term of up to life in prison.

The case was filed and then served in 2019. The NIAC insurance policy limit was $11 million. The plaintiffs sought to settle the case at the insurance policy limit to be split equally between the three survivors on several occasions. At one point, the plaintiffs proposed to settle the case for a combined total for all three child victims well below the policy limit. The insurer rejected the settlement offers.

After trial, the jury returned a verdict in December of 2023 for $24.8 million, of which $15.1 million was collectible against the FFA and NIAC. The verdict remains unpaid to the children because an appeal has been filed. (1st District Court of Appeals, A170226, *C.F. v. Martinez*, et al.)

Below are just some of the Power Point slides presented to the actual jury at closing argument so you may read for yourself and decide whether the violations of laws related to screening foster parents discussed were "technical" and the sexual abuse harms caused by the foster parent who was unlawfully screened were "unforeseeable."

CACI 418 – Presumption of Negligence Per Se

California Department of Social Services 88331.5(a)
(a) A foster family agency shall conduct interviews as follows:
(1) A minimum of three face-to-face interviews of an applicant.
(A) If there is more than one applicant, then one individual interview of each applicant and one joint interview of all applicants shall occur.

California Department of Social Services 88331.5(c)
(a) A foster family agency shall conduct interviews as follows:
(c) The majority of interviews shall take place in the home of an applicant…

California Department of Social Services 88331.5(d)
(d) At a minimum, the following information shall be gathered to complete a psychosocial assessment of an applicant:
(3) A risk assessment, which shall include:
(A) Past and current alcohol and other substance use and abuse history.
(B) Physical, emotional, sexual abuse and family domestic violence history.
(C) Past and current physical and mental health.

California Department of Social Services Interim Licensing Standard 88431.1
An applicant shall be in good physical and mental health.

AFS MUST FOLLOW ALL LAWS, RULES, POLICIES, AND PROCEDURES OR CHILDREN WILL BE HARMED

"Q: And is it known in the social services and the welfare circle that people who may want to harm children physically or sexually may attempt to infiltrate the system to get access to children?
A: Yes. And that's why there's so many precautions in the approval process.
Q: And in order to prevent that to the best of our ability, does a foster care agency or company have to follow all of the rules, laws, and policies and procedures to keep kids safe?
A: Yes. They are there to protect the children." (TT 1181:7-1182:1.)

AFS was negligent because…

AFS did not interview each foster parent applicant separately.

AFS violated CDSS 88331.5(a).

"9 of 12" "More likely than not"

AFS' contemporaneous records show no separate interviews of Mark and Martha…

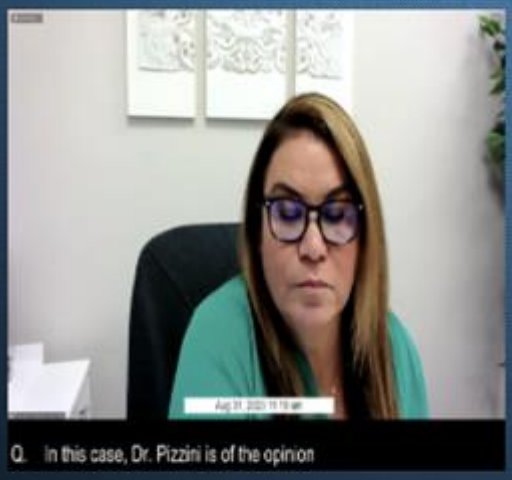
>>DATES OF CONTACT

Date	Person(s) Interviewed	Length of Interview	Location
01/11/18	Marta and Mark	2 hours	Home
03/03/18	Marta and Mark	3 hours	Santa Rosa Office
03/10/18	Marta and Mark	3 hours	Santa Rosa Office
03/14/18	Marta and Mark	1 hour	Home

Exhibit 209, page 2

13

Dr. Pizzini and Dr. Stolar-Peterson agreed as of August 31, 2023 that CDSS 88331.5(a) was violated…



"Q:...Does CDSS 88331.5(a) require that if there are two foster parent applicants, that each shall be interviewed separately?
A: Yes.
Q: And do you have a conclusion in this case as to whether AFS violated CDSS 88331.5(a) with respect to approving the Martinez home?
A: Yes, I have an opinion.
Q: And what is that?
A: That was violated because they were not interviewed separately.
Q: And is AFS allowed to approve the Martinez home with a violation of CDSS 878331.5(a)?
A: No, they are not allowed to approve the home."
(TT 1082:25-1083:14.)

AFS was negligent because…

AFS did not conduct the majority of interviews in the Martinez home.

AFS violated CDSS 88331.5(c).

"9 of 12"

"More likely than not"

AFS' contemporaneous records show majority of interviews not in Martinez home…

>>DATES OF CONTACT

Date	Person(s) Interviewed	Length of Interview	Location
01/11/18	Marta and Mark	2 hours	Home
03/03/18	Marta and Mark	3 hours	Santa Rosa Office
03/10/18	Marta and Mark	3 hours	Santa Rosa Office
03/14/18	Marta and Mark	1 hour	Home

Exhibit 209, page 2

18

Dr. Pizzini testified at trial that CDSS 88331.5(c) was violated…

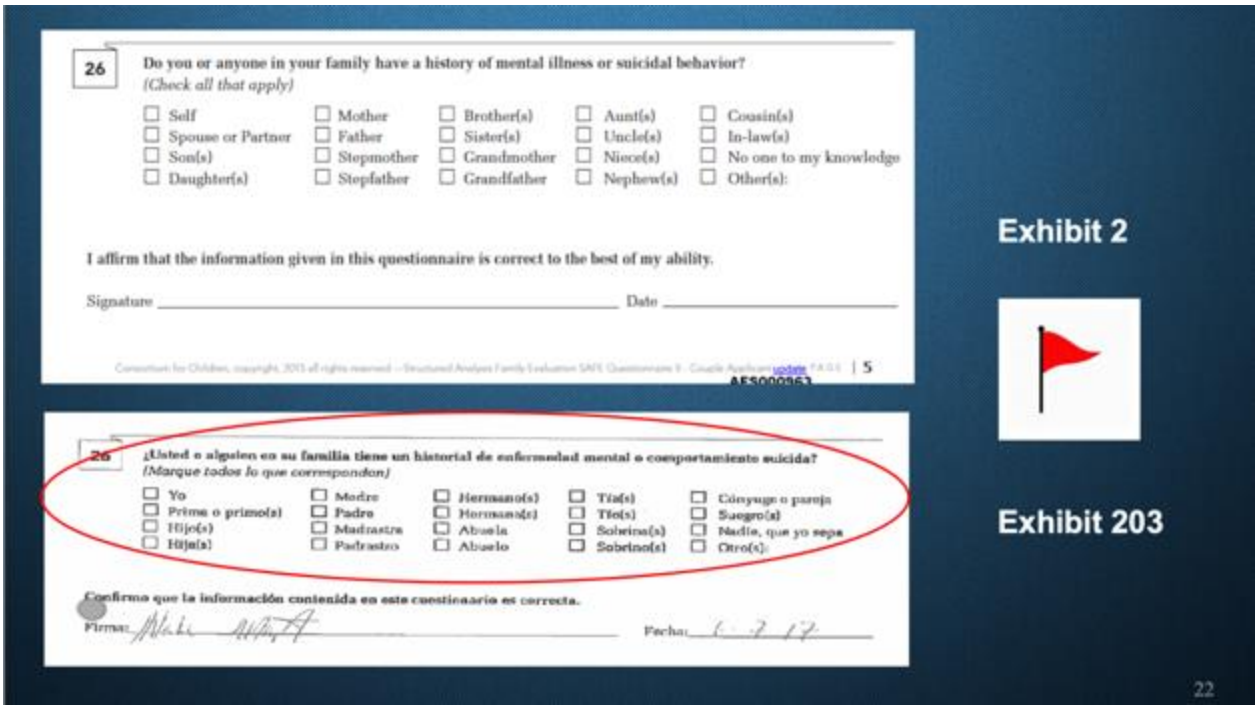
"Q: Does CDSS 88331.5(c) require that the majority of interviews of prospective foster parents occur in the prospective foster home?
A: Yes.
Q: And in this case, do you have a conclusion as to whether AFS violated CDSS 88331.5(c)?
A: Yes, I have a conclusion.
Q: And what is that conclusion?
A: That the -- that section was violated because the majority of interviews were not held in the home.
Q: And is AFS allowed to approve the Martinez foster home with this violation of CDSS 88331.5(c)?
A: No, they are not allowed to approve the home." (TT 1083:17-1084:6.)

AFS was negligent because…

AFS did not fully complete the risk assessment.

AFS violated CDSS 88331.5(d).

"9 of 12" "More likely than not"



26 Do you or anyone in your family have a history of mental illness or suicidal behavior?
(Check all that apply)

☐ Self	☐ Mother	☐ Brother(s)	☐ Aunt(s)	☐ Cousin(s)
☐ Spouse or Partner	☐ Father	☐ Sister(s)	☐ Uncle(s)	☐ In-law(s)
☐ Son(s)	☐ Stepmother	☐ Grandmother	☐ Niece(s)	☐ No one to my knowledge
☐ Daughter(s)	☐ Stepfather	☐ Grandfather	☐ Nephew(s)	☐ Other(s):

I affirm that the information given in this questionnaire is correct to the best of my ability.

Signature _____ Date _____

| 5

AFS000963

26 ¿Usted o alguien en su familia tiene un historial de enfermedad mental o comportamiento suicida?
(Marque todos lo que correspondan)

☐ Yo	☐ Madre	☐ Hermano(s)	☐ Tía(s)	☐ Cónyuge o pareja
☐ Prima o primo(s)	☐ Padre	☐ Hermana(s)	☐ Tío(s)	☐ Suegro(s)
☐ Hijo(s)	☐ Madrastra	☐ Abuela	☐ Sobrina(s)	☐ Nadie, que yo sepa
☐ Hija(s)	☐ Padrastro	☐ Abuelo	☐ Sobrino(s)	☐ Otro(s):

Confirmo que la información contenida en este cuestionario es correcta.

Firma: _____ Fecha: _____

Exhibit 2

Exhibit 203

22

Dr. Pizzini and Dr. Stolar-Peterson agreed, as of August 31, 2023, that CDSS 88331.5(d) was violated…

"Q I want to talk to you now about CDSS 4 88331.5(d). Does CDSS 88331.5(d) require a risk assessment of prospective foster parents which is to include assessment of past and current mental health?
A: Yes.
Q: Do you have a conclusion in this case as to whether AFS violated CDSS 88331.5(d)?
A: Yes.
Q: And what is your conclusion?
A: My conclusion is that that requirement was violated.
Q: Was AFS allowed to approve the Martinez home with this violation of CDSS 88331.5(d)?
A: No, they were not allowed to approve the home."
(TT 1092:3-19.)

AFS was negligent because…

Mark Martinez was not of good mental health.

AFS violated CDSS 88431.1.

"9 of 12"

"More likely than not"

Mark Martinez was not of good mental health.

"Q: And in your review of the criminal file, Mr. Martinez was found to be incompetent and have a delusional disorder by a Dr. Samuel Libeu, a psychiatrist; correct?
A: Correct." (TT 705:8-12.)

"Q: Would someone who has a delusional disorder be a – an appropriate foster parent?
A: They would not.
Q: Would someone who has a delusional disorder be a potential danger to foster children due to their disorder?
A: They could be, yes." (TT 705:22-706:3.)

AFS violated CDSS 88431.1.

"Q:...Does CDSS 88431.1 require that all foster parent applicants be of good mental health?
A: Yes.
Q: And do you have a conclusion in this case as to whether AFS violated CDSS 88431.1 when they approved Mr. Martinez?
A: Yes.
Q: And what is your conclusion?
A: That the mental health challenges of Mr. Martinez were not -- were not considered as -- as required as part of the licensing process. The evidence being in the questionnaires that are required to be responded to as part of the licensing process, there were a lot of places where there were -- mental health issues were raised but never further explored by the AFS home approver."
(TT 1080:24-1081:15.)

No testimony that Mark Martinez was of good mental health.

No evidence of a mental health screening performed by AFS.

No testimony that AFS did not violate CDSS 88431.1.

CACI 205- Failure to Explain or Deny Evidence

AFS was negligent because…

A conflict regarding sex existed between Mark and Martha on Questionnaire I that was not resolved…

- Would a "reasonably careful" company do this?
- Is this being extra careful to protect children?

"9 of 12" "More likely than not"

Conflict re: sex in risk assessment questions…

33 Check the boxes that best describe the major areas of conflict between you and your spouse/partner:

☐ Discipline of children	☐ Personal habits	☐ Sexual relations	☐ Personal expectations
☐ Religion	☐ Household chores	☐ Politics	☐ Friends
☐ Alcohol/Drugs	☐ Work	☐ Values	☐ Leisure time
☐ Emotional closeness	☐ Infidelity	☐ Separate activities	☐ Shared activities
☐ Family involvement	☐ Emotional separateness	☐ Time apart	☐ Time together
☐ Money	☐ Travel	☐ Other:	

PAGE | 7

Exhibit 208

33 Marque las casillas que mejor describen las principales áreas de conflicto entre Usted y su cónyuge / pareja actual:

☐ Expectativas personales	☑ Hábitos personales	☑ Las relaciones sexuales
☐ La política	☑ La disciplina de los niños	☑ Los quehaceres domésticos
☑ El trabajo	☐ Los amigos	☐ La religión
☐ Alcohol / drogas	☐ Los valores	☑ El tiempo libre
☐ Actividades compartidas	☐ Infidelidad	☐ Actividades separadas
☐ Cercanía emocional	☐ Separación emocional	☑ Viajes/vacaciones
☐ Tiempo aparte	☑ Tiempo juntos	☐ La participación familiar
☑ El dinero	☐ Otros:	

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Exhibit 204

45

The conflict regarding sexual relations was a safety concern that was not explored in violation of SAFE…

"Q: On Questionnaire I, Mark Martinez noted that another area of conflict with his spouse was sexual relations at Question 33. Do I have that correct?
A: Yes, I see that.
Q: And is this a potential red flag for a home approver and why?
A: Yes. **It is a big red flag.** It's important for the home approval -- approver to question the applicants about, you know, what's going on in the sexual relationships, and how does it affect their communication with each other, their relationship, and, more importantly, how does it spill out into their other relationships? **Are there potentials for taking sexual frustrations and carrying them out with other people, you know, especially children in this case. So that definitely needed a deeper probe into what was going on.**
Q: And did you -- In the documentation you reviewed, did you see anywhere that AFS probed deeper into that conflict regarding sexual relationships between Mark and Martha?
A: No. I didn't see any discussions, there was nothing documented. And if there was a discussion, again, it was required that it be documented.
Q: Again, was that a violation of SAFE?
A: Yes." (TT 1113:25-1115:1.)

AFS was negligent because…

9 required questions were left unanswered on SAFE Questionnaire II…

- Would a "reasonably careful" company do this?
- Is this being extra careful to protect children?

"9 of 12" **"More likely than not"**

The conflict regarding sexual relations was a safety concern that was not explored in violation of SAFE…

"Q: In the questionnaire completed by Mark Martinez, Mr. Martinez identified sexual relations as a source of conflict between him and Martha Martinez. Do you recall that?
A: I do.
Q: And why is **that a red flag** that needs to be followed up on, the fact that one spouse has an issue with sexual relations as a conflict between the other spouse?
A: Because in cases of incest, it is often that the male figure will seek the oldest daughter as a sexual surrogate for the age-appropriate partner. And so if they are not getting their sexual needs met, they may try to meet them with a child within the home." (TT 714:16-715:6.)

"Q: And in this case, when you reviewed the evidence, did you see anything that showed that that red flag was followed up on as to that conflict between them?
A: I did not." (TT 715:7-11.)

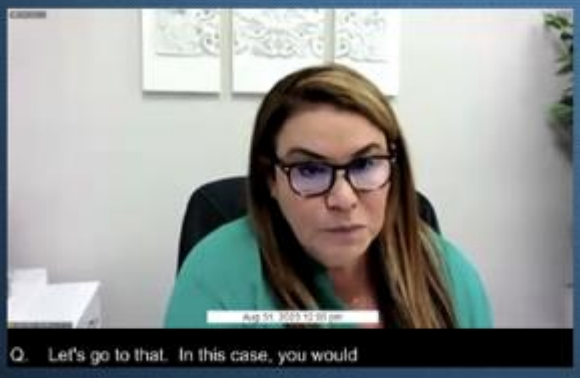
AFS was negligent because…

AFS violated SAFE rules and its own policies and procedures…

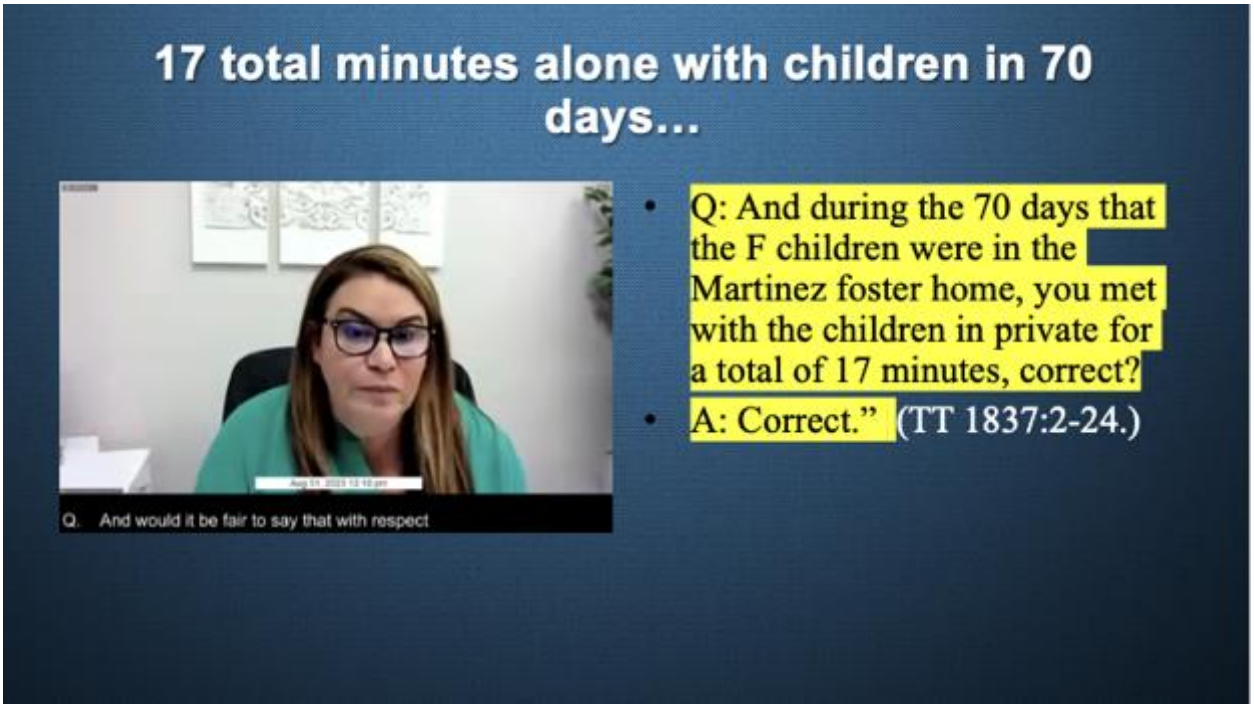
- **Would a "reasonably careful" company do this?**
- **Is this being extra careful to protect children?**

"9 of 12" **"More likely than not"**

No unannounced visits…



"Q: Did AFS violate the standard of care in this case with respect to having contact and documenting the contact with the foster father, Mark Martinez, during the placement?
A: Yes.
Q: Did AFS violate its own policies and procedures during the placement by not having unannounced visits to the home?
A: Yes, they did.
Q: Did AFS violate the standard of care during the supervision of the home by not following up regarding the lap-sitting and hugging by Mark Martinez early in the placement?
A: Yes." (TT 1178:2-15.)



Thus, the violations the jury found occurred were not "technical," especially the blanks in the risk assessment. These requirements for screening foster parents exist to protect children and because, in part, as the evidence shows, potential sexual abusers may try "to infiltrate" the foster care system. And that is tragically what apparently happened here.

B. <u>Even when laws are broken, current law says lawbreaking is not enough to be entitled to damages. Current law says that the harm must be the kind of harm that is foreseeable from the laws being broken</u>.

Nor was the sexual abuse that occurred as a result of the failure to screen lawfully "unforeseeable." The screening exists to screen out potential abusers. The screening was not done lawfully. A sexual abuser got through. Indeed, the "red flags" discussed above were specifically about sexual abuse.

Yet even though the jury concluded that all this lawbreaking occurred, that is not enough to sustain a lawful jury verdict under current California law. Under current law, the jury must have found <u>both</u> that the laws broken were promulgated to prevent the very harms suffered by the children <u>and</u> that the lawbreaking caused that harm to the three children.

Evidence Code section 669 governs how evidence of lawbreaking can be the basis for finding liability and damages. With emphasis added and in pertinent part, it reads:

> *(a) The failure of a person to exercise due care is presumed if:*
> *(1)* ***He violated a*** *statute, ordinance, or* ***regulation*** *of a public entity;*
> *(2) The* ***violation proximately caused death or injury to person*** *or property [and;]*
> *(3)* ***The death or injury resulted from an occurrence of the nature*** *which the statute, ordinance, or* ***regulation was designed to prevent****; …*

C. Conclusion: The *Martinez* case did not involve unforeseeable harms caused by technical violations of law and the insurer was fully capable of settling the case far within its policy limits. Something else – not this one case -- is prompting the cancellations and nonrenewals.

This is the only case identified as being representative that juries in other cases are behaving irrationally. But what happened in the *Martinez* case respectfully does not support the assertion that the jury awarded damages to the sexually abused children for unforeseeable harms arising from picayune, "technical" violations of law. Also, **it was entirely within the power of the insurer to settle this case for below its policy limits**; **limits that, as correctly predicted by the insurer when it sold the policy to the FFA, could have been more than sufficient to cover the settlement.** The insurer chose to roll the dice before a jury involving three sexually abused children instead, with the risk being borne by the FFA, not the insurer, as we will discuss below in the section about "time-limited decisions."

If there are indeed cases where unjustifiably large jury awards based upon truly meaningless violations of law exist and have withstood appeal, CAI is pleased to collaborate with FFAs on tailored, even-handed legislation addressing such instances. Respectfully, however, no legislation enacting unique standards that reduce compensation only to abused and neglected foster children who are again abused and neglected while in one kind of foster care placement can be justified by pointing to the Martinez case which, in any event, has been appealed.

III. AB 2496's Provisions for "Time-limited Demands" Would Have Exposed FFAs to Vast, Unique, and Unprecedented Liability, and Would Have Made the Usefulness of Buying Insurance for FFAs At Best Unpredictable, Most Likely Useless When Needed Most.

It is important to appreciate how the so-called "time-limited" provisions that used to be in AB 2496 worked to the enormous and entirely unique disadvantage of FFAs.

A. What is a "time-limited" demand"?

A "time-limited" demand is simply when a plaintiff sends an offer to settle a claim for damages to a defendant where the plaintiff demands a response within an identified – "time-limited" -- amount of time.

B. Why do the current rules on time-limited demands protect businesses like FFAs?

For over a century, insurance companies have had a duty to act in good faith and to timely pay up to their policy limits when demands like time-limited ones are received by an insured.[5] To hold insurers accountable to their duty to act in good faith to their insureds, California law provides for consequences when an insurer fails to timely pay policy limits in response to time-limited demands.[6] Those

[5] CACI No. 2334. Bad Faith (Third Party) - Refusal to Accept Reasonable Settlement Demand Within Liability Policy Limits - Essential Factual Elements https://www.justia.com/trials-litigation/docs/caci/2300/2334/

[6] CACI No. 2350. Damages for Bad Faith https://www.justia.com/trials-litigation/docs/caci/2300/2350/

consequences include paying the jury verdict amount that is above the policy limit, attorney's fees, and punitive damages.

These authorities are really important for FFAs specifically, insurance buyers generally. When someone buys an insurance policy with a certain coverage limit, if the insurance company is free without consequence to reject reasonable offers within the limit, the insured has not got what it paid for. This is made worse if the insurer rejects the reasonable policy limit offer and the jury award is in excess of the coverage limit, with the insured on the hook for paying the excess.

Without these rules, insurance coverage implicated in lawsuits becomes a "heads I win, tails you lose" proposition favoring the insurance company. Heads I win: I reject an offer within policy limits and the jury comes back with a verdict lower than what I rejected, lower than the limit the insured paid for. Tails you lose: I reject an offer within policy limits, the jury comes back with a verdict in excess of those limits, I pay the maximum of what I expected to pay, and the insured literally pays the cost of my rolling the dice.

This is not conjecture. Take, as a real-world example, the case just discussed above. The jury saw and heard evidence of the FFA breaking numerous and foundational laws related to the screening of foster parents. For example, questions intended to screen for sexual predators were left blank and questions that were answered indicating "red flag" concerns about sexual abuse were not investigated.

The NIAC insurance policy limit was $11 million. The plaintiffs sought to settle the case at or less than the insurance policy limit. After trial, the jury returned a verdict in December of 2023 for $24.8 million, of which $15.1 million was collectible against the FFA and NIAC.

Thus, here, the normal rules regarding time-limited demands protect insured FFAs (and every other business and person in California) by protecting against an insurer that rolls the litigation dice, refuses a reasonable time-limited demand to pay within the insured's policy limit (the coverage the insured has been paying for), at their insured's possible expense.

C. How AB 2496 proposed changing these rules for FFAs.

1. AB 2496's definition of "time-limited demand" is comprehensive.

"(e) 'Time-limited demand' means an offer, whenever made, …."

AB 2496's original text would, through this definition, have applied to a time-limited demand "whenever made." That means whether made after discovery is closed in a case and all the facts known, immediately prior to trial, during trial, after each side had fully presented their case but before verdict, or on appeal.

2. AB 2496's definition of "time limited demand" is very different from the definition in the statute identified by NIAC as the inspiration of the proposal, Civil Code section 999, et seq.

NIAC argued that AB 2496 was inspired by current law, Civil Code section 999. But, right off the bat, current law's definition of time-limited demand is very different, and is as follows:

> (a)(2) "Time-limited demand" means an offer prior to the filing of the complaint or demand for arbitration to settle any cause of action or a claim for personal injury,

> property damage, bodily injury, or wrongful death made by or on behalf of a claimant to a tortfeasor with a liability insurance policy for purposes of settling the claim against the tortfeasor within the insurer's limit of liability insurance, which by its terms must be accepted within a specified period of time.

Current law makes sense. This statute only applies prior to the case being actually filed and, so, prior to when the facts of a case have been subject to discovery and revealed to both the insurer and insured. It is far harder to say that an insurance company acted unreasonably in rejecting a demand for the payment of money before the facts are known than when the facts are known to both the insurer and FFA. But AB 2496's definition applies "whenever made," and so applies even when the insurance company has a complete picture of the facts of a case. The more the facts are known to an insurer about the possible liability of their insured, the more facts are available to determine whether, when an insurance company rejected a settlement offer, it acted reasonably to protect the interests of its insured; here, the FFA. As it read previously, AB 2496 made no such distinctions.

3. Key parts of how AB 2496's time-limited proposal work, all to the disadvantage of FFAs.

Here is the key part. AB 2496 in its original form sought to enact the following.

1062.35.

> *(a) This section shall apply to both of the following:*
>
> *(1) Any time-limited demand to settle a claim or lawsuit against an FFA for the acts of their employees, contractors, or volunteers brought by a recipient of the FFA's services or on the recipient's behalf.*
>
> *(2) Any time-limited demand to settle, notwithstanding Section 998.*

Code of Civil Procedure section 998 permits offers of settlement to be made **ten days prior** to the commencement of arbitration or trial. However, in contrast to the proposed provisions of AB 2496, a "time-limited demand" is defined as one "whenever made." The language reinforces that a time-limited demand made before or after the filing of a case is permitted under AB 2496 by highlighting that it applies to "any" time-limited demand "notwithstanding" or despite the requirements ordinarily set out by Section 998.

Next, this section of the bill would have established many new requirements for time-limited demands in suits against FFAs – rules applicable only to FFAs. As will be seen, if ***a plaintiff*** fails to abide by these requirements, **it is *the FFA* that could be impacted.** We have highlighted a couple of the requirements.

> *(b) A time-limited demand to settle any claim shall be in writing, be labeled as a time-limited demand or reference this section, and contain material terms, which shall include all of the following:*
>
> *(1) The time period within which the demand must be accepted shall be not fewer than 60 days from date of transmission of the demand, if transmission is by email, facsimile, or certified mail, or not fewer than 63 days, if transmission is by mail.*

(2) A clear and unequivocal offer to settle all claims within policy limits, including the satisfaction of all liens.

(3) An offer for a complete release from the claimant for the liability insurer's insureds from all present and future liability for the occurrence.

(4) The date and location of the loss.

(5) The claim number, if known.

(6) A description of all known injuries sustained by the claimant.

(7) Sufficient evidence, which may include, if applicable, medical records or bills, sufficient to support the claim.[7]

1062.38.

If, for any reason, an insurer does not accept a time-limited demand, all parties to the lawsuit or claim shall do all of the following:

(a) Meet and confer to discuss the relevant facts related to the time-limited demand, the reasonableness of the demand, and the reasonableness of the denial of the demand. This meeting shall take place no later than 14 days after the insurer issues written notification denying the demand or 7 days before the commencement of trial, whichever is sooner.

(b) Issue a joint statement regarding the reasonableness of the demand and the denial of the demand. This joint statement will include an identification of where the parties agree and disagree. This joint statement shall be signed by all parties or their legal counsel, no later than seven days after the meet and confer session.

(c) After the meet and confer session but before finalizing the joint statement, the insurer may accept the time-limited demand in accordance with Section 1062.35.

And, the language below ties this all together. Under proposed section 1062.39 below, if the plaintiff – *someone over whom the FFA has no control* -- fails to follow these requirements in making an offer to settle the case within policy limits, and a verdict ends-up being over the FFA's policy limits, *the FFA has no recourse against its insurer.*

1062.39.

In any lawsuit alleging or seeking extracontractual damages against the tortfeasor's liability insurer, all of the following shall apply:

[Note: The use of "tortfeasor" means the FFA. It is worth observing that the bill departs from the abbreviation "FFA" here in a manner that obscures its consequences to a non-lawyer reader.]

[7] Note that all the records, including the medical records, of foster children are confidential. Even guardians sometimes need to file a motion to obtain such records. See Welfare & Institutions Code section 827. How this requirement would work in a foster child case is unexplained.

> *(a) A time-limited demand that does not comply with the terms of this chapter* ***shall not be considered to be a reasonable offer to settle the claims against the tortfeasor for an amount within the insurance policy limits****.*

This language in bold means that, if a plaintiff violated the requirements for time-limited demands at literally any time during the case, **no matter how reasonable the plaintiff's offer to settle truly was**, ***the insurer has no liability to the FFA at all.***

More specifically, and for example, if the time limit in the demand was for 30 days instead of the required 60, or if the meet and confer required above is held 15 days after the insurer has in writing rejected the demand instead of 14 days, ***the FFA is entirely forbidden from suing its insurer for failing to accept even the most obviously reasonable offer to settle within policy limits.***

No other business operates under such insurance principles, and for good reason.

IV. How AB 2496 Would Have Hurt Abused and Neglected Children Who Are Abused Yet Again.

So, AB 2496 as introduced did not prevent insurers from canceling or nonrenewing policies. The bill as introduced cannot fairly have been motivated by the *Martinez* case specifically, unprecedented FFA jury verdicts unanticipated by the policies issued to FFAs generally. (Recall the offers made to settle the case within policy limits.) Yet, AB 2496 as introduced (i) would have placed unprecedented restrictions applicable to no other business where the ability of an FFA to enjoy the insurance coverage it paid for was concerned and (ii) similarly would have imposed unprecedented restrictions on the ability of abused and neglected children who are abused again to obtain compensation for their injuries when no other group of adults or children would have been subject to the same never-before-seen requirements.

These children – our legal children – should not be required, after all they have already endured, facing all the hardships we inflict upon them, to live under an experimental legal regime that offers to them even the remotest possibility of less compensation for their harms than the regime enjoyed by children raised by their supportive families.

If there is a crisis, then we are all together morally obligated to find another way to address it.

V. So, If There Is No Evidence Of A Broad-Based Number Of Runaway or Uninsurable Jury Verdicts, Why Is This Happening?

We can't be sure, but some experts believe that what is afflicting FFAs is not being caused by a single lawsuit that could have been settled well within policy limits, but something happening in the broader reinsurance market. As one expert analyst has observed:

> For a number of years, the reinsurance industry was essentially subsidizing the insurance industry, and ultimately the front-end consumer, because we were bearing more of the risk than we were getting paid for," said John Welch, chief underwriting officer at Aspen Reinsurance. "What we saw in 2023 is that, after several years of underperformance, the reinsurance companies said enough was enough."
>
> "It reached a tipping point where the reinsurers said, 'I can't get the return I need if I'm participating on every secondary peril cat that comes along, so I need to refocus the

business on the peak cats of earthquake, hurricane, etc. where there's less frequency and more severity.[8]

VI. Conclusion.

CAI sincerely thanks you for taking the time to review this lengthy correspondence. CAI and the other child advocacy legal organizations that opposed AB 2496 as it was introduced look forward to collaborating with any stakeholder, our FFA partners included, in addressing the current FFA insurance challenge (i) as a challenge raised by the behavior of insurers and (ii) in ways that do not impose upon either abused and neglected children who are abused again or FFAs unprecedented and factually unwarranted rules that would deny each compensation for harms they have unlawfully and unfairly endured.

Sincerely,

ED HOWARD
Senior Counsel, Children's Advocacy Institute

[8] https://www.insurancebusinessmag.com/uk/news/reinsurance/what-is-reshaping-the-reinsurance-market-today-496366.aspx