# THE ANSWER IS: ASK THE QUESTION

*by DAN JACOBSON*

In the recent case of *Mills v. AAA California, Nevada and Utah Insurance Exchange*, 3 Cal. App. 5th 528 (2016), had the court utilized an alternative analysis, there would have been a different result. This article highlights how the same facts can yield different results, depending on the analytical approach.

*Mills* generally dealt with an Insurance Code section that allows an insurer to cancel an automobile policy if there is a "substantial increase in the hazard insured against." Cal. Ins. Code § 1861.03(c)(1). But, this article is not about that general issue, but how the raising of a particular sub-issue would have probably altered the ultimate outcome of the case. On summary judgment, the *Mills* court did not address whether the reasonableness of a "Notice" sent by Defendant AAA Insurance (AAA) was a matter of law or a question of fact. The Notice at issue was required by a regulation promulgated pursuant to Insurance Code section 1861.03(c)(1). *See* Cal. Code Regs. tit. 10, § 2632.19(b)(1).

A "motion for summary judgment shall [only be granted if] there is no triable issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Cal. Civil Proc. Code § 437c(c). Generally, "reasonableness is a question of fact for the trier of fact." *Biron v. City of Redding*, 225 Cal. App. 4th 1264, 1267 (2014). In other words, reasonableness is a jury question. *See* Cal. Evid. Code § 312. On the other hand, writings typically are matters of law for the court to decide. Cal. Evid. Code § 310. So, what happens when the question is whether a writing is reasonable? This is an issue that could have been raised from the *Mills* facts; but, the court chose an analysis that did not raise this question, probably affecting the outcome of the case.

In order for an auto insurer to cancel a policy before expiration of the policy period because of a "substantial increase in the hazard insured against" . . ., the insurer must take certain steps . . . .

In *Mills*, the plaintiff sued AAA because AAA failed to cover an auto accident. 3 Cal. App. 5th at 530. The insured married couple's son had an accident in a car that was covered by the couple's AAA automobile policy. The son's accident was not the accident for which the plaintiff was claiming coverage. Rather, the son's accident triggered the purported cancellation of the AAA policy. *Id.* at 531. The accident for which the plaintiff claimed coverage happened a few months after the son's accident and shortly after AAA had purportedly canceled the policy. (The appellant/plaintiff was Trent Mills, a third-party beneficiary of the AAA policy.) *Mills*, 3 Cal. App. 5th at 530-31.

AAA brought a motion for summary judgment based partially on its assertion that it had lawfully canceled the policy. *Id.* at 532. The trial court ruled that AAA had indeed lawfully canceled the policy; and, it granted AAA's motion for summary judgment. The court of appeal affirmed; and did so without raising the fact versus law issue. *Id.* at 538.

In order for an auto insurer to cancel a policy before expiration of the policy period because of a "substantial increase in the hazard insured against" under Insurance Code section 1861.03(c)(1), the insurer must take certain steps, as delineated in title 10, § 2632.19(b)(1) of the Code of Regulations. That regulation also defines a "substantial


Matter of Law
Question of Fact

increase in the hazard insured against": "A 'substantial increase in the hazard insured against' occurs when, among other things, the insured refuses or fails to provide the insurer, 'within 30 days after reasonable written request to the insured, information necessary to accurately underwrite or classify the risk.'" *Mills*, 3 Cal. App. 5th at 531 (quoting Cal. Code Regs. tit. 10, § 2632.19(b)(1)).

The court appropriately found that AAA had mailed the insureds a request for information concerning underwriting or classifying the risk. The court also took appropriate steps to determine the meaning of title 10, section 2632.19(b)(1)'s insistence that an insurer's written request for underwriting/classification information be "reasonable." "The construction of the meaning of a statute is a matter of law." *Graham v. Hopkins*, 13 Cal. App. 4th 1483, 1487 (1993). So presumably is the construction of the meaning of a regulation. The court appropriately decided the meaning of the word "reasonable," as used in Code of Regulations title 10, § 2632.19(b)(1), finding that, "to be . . . 'reasonable' [the] written request [for underwriting/classification information] must be rational, appropriate for the circumstance, and necessary to the insurer's ability to evaluate the risk of offering the policy. The request cannot be arbitrary or unrelated to the insurer's need to reevaluate the risk it incurs." *Mills*, 3 Cal. App. 5th at 535.

This is where an alternate analytical avenue probably would have yielded a different outcome. The *Mills* court could have asked, is the application of the word "reasonable" a matter of law or a question of fact when that application is applied to a writing? The *Mills* opinion's affirmance of summary judgment was partially based on that court's finding that AAA's written request was reasonable; a finding that the court would have not made had it found the application of the word to be a question of fact.

Generally matters of law can be decided on summary judgment; matters of material fact cannot be so decided. *Nathanson v. Heck*, 99 Cal. App. 4th 1158, 1162 (2002). There are two hornbook law general rules that collide when one asks if a writing is reasonable (as one must ask under the terms of title 10, section 2632.19(b)(1)). First, generally, writings are matters of law for the court to decide. Cal. Evid. Code § 310(a). Second, generally, "[t]he issue of reasonableness is a factual question." *Contra Costa Cnty. v. Pinole Point Prop., LLC*, 235 Cal. App. 4th 914, 925 (2015) (citing *Keys v. Romely*, 64 Cal. 2d 396, 410 (1996)).

Because *Mills* is silent on the fact versus law question, it is necessarily silent on the answer. To obtain the answer, the question of whether the word "reasonable" is a matter of law or a question of fact, when that application is applied to a writing, must be answered. The rules mandating that a writing is a matter of law and that the issue of reasonableness is a factual question are well-documented. The answer lies in a completely separate rule.

It must be recalled that the written notice to the insured was required by a regulation. This is key. "The construction of the meaning of a statute [and presumably a resulting regulation] is a matter of law." *Graham*, 13 Cal. App. 4th at 1487. "The question of whether a statute [and presumably a resulting regulation] was violated is generally for the jury." *Horn v. Oh*, 147 Cal. App. 3d 1094, 1102 (1983). Consider an extreme example. There is a statute against murder. It is axiomatic that the meaning of that statute is a matter of law; and, it is just as axiomatic that whether the statute has been violated is a factual matter for the jury. That is the case whether the alleged murder was accomplished by shooting a gun or by handing a cashier a "hand over the money" note that caused him/her to die of a heart attack. Thus, a distinction is laid bare: (1) what a regulation means, and (2) whether that regulation was violated. This distinction exists regardless of whether a writing is involved in an alleged violation.

Viewed from this perspective, an analysis of the *Mills* case would have (a) asked the question as to whether the reasonableness of a writing is a matter of law or a question of fact; (b) would have recognized the conflict between matters of law and questions of fact; and, (c) would have settled the matter by deciding the meaning of the regulation as a matter of law (as it did), and finding that the question of whether that regulation had been violated is a matter of fact, not judiciable at summary judgment. Had this analytical path been followed, summary judgment probably would not have been affirmed, because the legal analysis would have ended at the legal question of what reasonable means under title 10, section 2632.19(b)(1). Whether the Notice was reasonable, under the court's legal definition of that word, would have been a matter for the jury. A different analysis could have yielded a different outcome.

***Dan Jacobson*** *is an Expert Witness in Property/Casualty Insurance cases, a Contracts Professor at Pacific West College of Law, and an attorney practicing in Tustin, at Jacobson & Associates. He can be reached at dlj@badfaithexpertwit.com*

*This article first appeared in* Orange County Lawyer*, February 2017 (Vol. 59 No. 2), p. 48. The views expressed herein are those of the Author. They do not necessarily represent the views of* Orange County Lawyer *magazine, the Orange County Bar Association, the Orange County Bar Association Charitable Fund, or their staffs, contributors, or advertisers. All legal and other issues must be independently researched.*