MINUTES

Advisory Committee on Model Civil Jury Instructions
April 8, 2013
4:00 p.m.

Present: Dianne Abegglen, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Honorable Ryan M. Harris, L. Rich Humpherys, Timothy M. Shea, Paul M. Simmons, Ryan M. Springer, Honorable Andrew H. Stone

Excused: John L. Young (chair), Tracy H. Fowler, Gary L. Johnson, David E. West

Mr. Shea conducted the meeting in Mr. Young's absence. The committee continued its review of the Insurance Litigation instructions:

1. *CV2401, Insurance policy is a contract, and CV2402, General description of claims and defenses*. Mr. Ferguson moved that the committee approve CV2401 and CV2402 as modified at the last meeting and as reflected in the meeting materials. Mr. Carney seconded the motion. The motion passed without opposition.

2. *CV2403, Coverage provision*. Mr. Humpherys repeated his suggestion made at the last meeting that not all claims for benefits are necessarily breach-of-contract claims and illustrated his position with sample policy provisions. For example, where an auto policy says that the insurer will pay uninsured motorist (UM) or underinsured motorist (UIM) benefits that the insured is "legally entitled to recover" from an uninsured or underinsured driver, has the insurer breached the contract by not paying benefits where there has not yet been any finding that the insured is "legally entitled" to recover anything? Similarly, if a homeowner's policy says that the insurer will pay a loss within 60 days after the value of the loss is established by an appraisal or some other means and the value has not yet been established, has the insurer breached the contract by not paying the loss? Mr. Humpherys did not think so and suggested that there should be a third category of insurance claims, in addition to claims for breach of an express contract and breach of the implied covenant of good faith and fair dealing, namely, a request for a judicial declaration of what is owing under the policy. Mr. Simmons questioned whether that would be a jury claim. Mr. Humpherys drew a distinction between a denial of coverage and a disagreement over the amount due under a policy and thought that, under the latter, the insured would not be able to recover consequential damages. Judge Harris and Mr. Simmons thought that a dispute over the amount due can be characterized as a claim for breach of contract. Judge Harris noted that damages are part of a breach-of-contract claim and that many breach-of-contract claims, not just in the insurance context but also in other areas of the law such as vendor-purchaser cases, are framed as breach-of-contract actions. If the trier of fact determines that the plaintiff was entitled to $x under the contract and the defendant did not offer or pay him $x, then there has been a breach of contract. What is owing under the contract is a preliminary question that the trier of fact must determine in deciding a breach-of-contract case. Judge Harris suggested trying to draw a distinction between the two may be splitting hairs. Mr. Ferguson asked, where the insured is claiming he is

entitled to $1,000,000, and the insurer claims he is only entitled to $500,000, if the court or jury decides he is entitled to $750,000, was the insurer in breach? Judge Harris and Mr. Simmons thought so, if the insurer did not offer to pay the $750,000. Mr. Simmons thought that, until the Utah appellate courts recognize the distinction, the committee should stick to recognized causes of action (i.e., breach of express contract, and breach of the implied covenant of good faith and fair dealing). Mr. Shea asked whether the issue could be adequately covered by CV2402, setting out the parties' positions. Mr. Carney suggested explaining the issue in a committee note. He asked how the jury instructions would differ in a case where the only dispute was over the value of the insured's loss. Mr. Humpherys noted that the damages recoverable would be different. Mr. Simmons asked whether the plaintiff would be entitled to recover damages if there was no breach of either the insurance contract or the implied covenant of good faith and fair dealing. Mr. Carney thought a claim for benefits would be similar to an eminent domain case, where the issue is the value of the property taken. Mr. Humpherys will propose a new instruction to cover this third category of insurance claims.

3. *CV2403. Coverage provision.* Mr. Shea noted that the instruction has been revised to only instruct on contract interpretation if the jury is required to apply a special meaning to a term of the contract, not if it is simply to give the words of the contract their ordinary and customary meanings. Mr. Carney questioned whether the last part of the instruction ("You will be asked to decide whether . . .") was necessary since the jury will be told the parties' claims and defenses in CV2402. Judge Stone and Mr. Carney suggested breaking CV2403 into two instructions–one on contract interpretation, and one on the elements of a breach-of-express-contract claim. Messrs. Ferguson, Shea, and Simmons suggested that the latter instruction should start, "To succeed on this claim, [name of plaintiff] has the burden of proving . . ." Mr. Humpherys noted that subparagraphs (1)-(3) in CV2403 were just meant as examples; he was inclined to leave them out. Mr. Ferguson suggested cross-referencing the instruction on the elements for breach of contract from the commercial contract instructions (CV2107) and instructing the court and attorneys to list the elements in dispute. Mr. Simmons asked whether it was part of the plaintiff's prima facie case to prove that he complied with everything the policy required him to do or was excused from complying, or whether it was up to the defendant to raise an affirmative defense of noncompliance. Mr. Shea suggested adding a committee note saying that what the plaintiff has to prove depends on the issues in dispute. Judge Stone agreed that the parties' claims and defenses should limit the issues for the jury to decide. The committee did not want the jury going through the entire policy and deciding the case on an issue that was not addressed by the parties. Judge Harris and Mr. Ferguson thought that, as a practical matter, whether the plaintiff had met any conditions precedent in the policy will generally be decided by pretrial motions. Mr. Humpherys

thought that there needs to be more guidance from the courts on who has the burden of proof.

4. *CV2404. Exclusion provision.* Mr. Simmons noted that CV2404 had the language that was deleted in CV2403 about using the ordinary and customary meaning of words. The committee agreed that CV2403 and CV2404 should be handled the same. The third paragraph of CV2404 was revised to read, "[When deciding this case, you must use the following definitions: . . .]" At Judge Harris's suggestion, the last paragraph was deleted. Mr. Shea questioned whether the alternatives "arose out of/was caused by/resulted from" were all necessary. Mr. Simmons asked whether the appropriate phrase depended on the language of the policy. Judge Stone suggested revising the fourth paragraph to read, "To succeed, [name of defendant] has the burden of proving that [name of plaintiff]'s loss fell within the exclusion." Dr. Di Paolo questioned whether "loss" was the right word. She noted that the plaintiff may simply be claiming that he did not get as much money as he wanted. The committee suggested "claim" or "benefit" as alternatives. Messrs. Humpherys and Ferguson noted that the applicability of any exclusion is generally decided by the court on summary judgment. At Mr. Stone's suggestion, the paragraph was revised to read: "To succeed, [name of defendant] has to prove that the exclusion applies to [name of plaintiff]'s claim." The instruction was approved as modified.

5. *CV2405. Proof of loss.* Mr. Humpherys noted that this instruction only applies where a breach of contract is claimed; it does not apply in cases where the jury is just determining the value of a claim or loss. Mr. Ferguson suggested adding a statement to that effect in a committee note. Dr. Di Paolo questioned the use of the term "substantial compliance." She thought it would be unfamiliar and confusing to lay jurors. She suggested using "largely" or "mostly" for "substantial." The committee recognized that "substantial compliance" was a term of art in the law and was not easily defined. It felt that using a different term could invite a reversal. Mr. Ferguson noted that "substantial compliance" is a familiar concept in construction law. Mr. Shea suggested defining "substantial compliance" by its purpose and revising the first paragraph to say: ". . . A proof-of-loss is a summary of the facts and circumstances giving rise to the covered loss. It must be sufficient to give [name of defendant] an adequate opportunity to investigate, to prevent fraud, and to form an estimate of its rights and obligations under the policy." Mr. Humpherys thought the first two paragraphs should be left as is. At Judge Harris's suggestion, the second sentence of the second paragraph was revised to read, "The law does not require that the proof-of-loss be notarized or that [name of plaintiff] strictly comply with the proof-of-loss provisions in the policy." Judge Harris suggested contrasting substantial compliance with strict compliance. The last sentence of the second paragraph was revised to read, "Only substantial compliance–not strict compliance–is required." At Judge Harris's suggestion, the third paragraph was deleted, since it does not tell the jury anything new

(such as who has the burden of proof on the issue of proof of loss). The committee approved the instruction as modified.

6. *Next Meeting*. The next meeting will be Monday, May 13, at 4:00 p.m.

The meeting concluded at 6:00 p.m.