MINUTES

Advisory Committee on Model Civil Jury Instructions
September 9, 2013
4:00 p.m.

Present: John L. Young (chair), Alison Adams-Perlac, Juli Blanch, Marianna Di Paolo, Phillip S. Ferguson, Honorable Ryan M. Harris, L. Rich Humpherys, Gary L. Johnson, Timothy M. Shea, Paul M. Simmons, Ryan M. Springer, Honorable Andrew H. Stone

1. *Alison Adams-Perlac.* Mr. Young welcomed Ms. Adams-Perlac to the committee. She is a new staff attorney with the Administrative Office of the courts who will be taking Mr. Shea's place. The committee thanked Mr. Shea for all of his good work over the years.

2. *CV2018, Aggravation of symptomatic pre-existing conditions, and CV2019, Aggravation of dormant pre-existing condition.* CV2018 and CV2019 were based in part on the Utah Court of Appeals' decision in *Harris v. ShopKo Stores, Inc.*, 2011 UT App 329, the reasoning of which was recently rejected by the Utah Supreme Court. *See Harris v. ShopKo Stores, Inc.*, 2013 UT 34. Messrs. Johnson and Summerill revised these instructions accordingly. The committee approved the changes, which eliminate CV2019, and will add a citation to the Utah Supreme Court's decision in the references to CV2018.

3. *Insurance Litigation Instructions.* The committee continued its review of the Insurance Litigation instructions. Mr. Humpherys noted that he would like to separate the instructions by category, such as first-party claims, third-party claims, bad faith, etc. Mr. Humpherys was under the impression that the instructions were added to the courts' website as they were approved. Mr. Shea noted that they are on the committee's page on the courts' website but are not added to MUJI 2d instructions until the whole section is completed, although, he added, if the Insurance Litigation instructions were put into categories, a particular category could be added when it was completed.

a. *CV2408. Insurance policy must conform to Utah law.* Mr. Shea recommended making subparagraph (3) a separate instruction. It requires a definition of "prejudice," which is contained in CV2411. Mr. Young noted that the subcommittee has also proposed a new instruction on prejudice from delay in providing notice of a claim. Messrs. Humpherys and Johnson noted that proof of loss and notice of claim are separate and are governed by separate instructions. Mr. Humpherys added that less is required for notice of loss than for proof of loss. Mr. Young noted that the notice-of-loss instructions should come before the proof-of-loss instructions. Mr. Johnson suggested comparing CV2408 with CV2410, Notice of loss. Mr. Ferguson and Mr. Shea suggested deleting the opening clause of CV2408 ("As it relates to a proof of loss, the law that applies is:"). Judge Harris thought that the instruction did not match the title. Mr.

Young suggested changing the title to "Adequate compliance for proof of loss." Dr. Di Paolo thought that strict and substantial compliance were concepts not easily understandable to lay people and suggested deleting the last sentence of subparagraph (1). Mr. Simmons asked whether substantial compliance was a question of law or fact. Messrs. Humpherys and Ferguson thought it was a fact question. Mr. Ferguson asked whether it is a term of art. Mr. Shea suggested starting the instruction with, "A proof of loss is adequate if it is (1) timely, and (2) substantially complies with the proof-of-loss provisions of the policy." Dr. Di Paolo asked whether we could use a term other than "substantial" and suggested "adequate." Mr. Shea suggested saying that proof of loss is adequate if what was not done was not important or was minor or if it put the company on notice of the loss. Mr. Humpherys asked whether the standard was an objective one, i.e., would a reasonable insurer have known of the claim from the proof of loss. Mr. Humpherys noted that the issue can arise in two ways: (1) the insurer claims that it is relieved of liability under the policy because it did not get notice or proof of loss, or (2) the insurer claims that the insured breached the contract because he or she did not give adequate notice or proof of loss. Mr. Shea suggested that he and Ms. Adams-Perlac put CV2407 and CV2410 into the same format and then create two additional instructions, on adequacy and prejudice. Dr. Di Paolo noted that the prejudice instructions use "material" in a way that creates an ambiguity for a layperson, who could understand it to mean "touchable," and suggested changing "material" to "important." Mr. Shea noted that the construction contract instructions use "important" for "material." Dr. Di Paolo also suggested including in the instruction a definition of "strict compliance" and "substantial compliance." Mr. Humpherys thought they were already defined in CV2407, which states the purpose of the proof-of-loss requirement. Judge Harris thought that we needed to use the terms the courts have used ("strict" and "substantial" compliance) and that the best we could do to explain them would be to give examples. The committee suggested common issues that come up, such as whether the proof has to be notarized or whether it has to be on the insurer's form. But Judge Harris also thought that by listing specific examples, we may be implying that those are the only requirements that don't have to be strictly complied with. Ms. Blanch noted that strict compliance means 100% compliance. What is substantial compliance is not clear; is 80% enough? 85%? Mr. Young thought that "substantial" compliance was whatever was sufficient compliance in the jurors' minds. Mr. Humpherys thought that compliance was "substantial" if the purpose of the notice- or proof-of-loss requirements was fulfilled. Dr. Di Paolo thought the instruction needed to say that. The committee turned its attention to CV2407.

Judge Stone joined the meeting.

b. *CV2407. Proof-of-loss.* The committee revised the instruction to read:

> The insurance company must be given adequate proof of loss. A proof of loss is a summary of the facts and circumstances that gave rise to the covered loss. The law does not require strict compliance with policy provisions related to submission of the proof of loss as long as it is adequate. A proof of loss is adequate if it gives [the insurance company] a sufficient opportunity to investigate, to prevent fraud, and to form an estimate of its rights and obligations under the policy.
>
> [[Name of insurance company] claims that [name of policyholder] is not covered because the insurance company did not receive [adequate/timely] proof of loss.]
>
> [[Name of insurance company] claims that it was not required to pay for the loss sooner because it did not receive a[n] [adequate/timely] proof of loss.]
>
> [If it was not reasonably possible to give the proof of loss within the required time, the failure to give proof of loss within the time required by the policy is not a valid reason to deny the claim.]
>
> You must decide whether the proof of loss was [adequate/timely]. [Name of insurance company] has the burden to prove that the proof of loss was not [adequate/timely].

The terms "policy holder" and "insurance company" were substituted for "plaintiff" and "defendant," respectively, because the plaintiff is not always the policy holder. The insurance company may bring the action for a declaratory judgment that there is no coverage because a timely or adequate proof of loss was not given, for example. Also, the passive voice was used because the proof of loss does not have to come from the policy holder; it can come from an insurance agent, the third-party claimant, a claims administrator, etc. The committee approved CV2407 as revised.

c. *CV2408 revisited.* The committee returned to its consideration of CV2408. Subparagraphs (1) and (2) have now been incorporated into CV2407 and are no longer necessary. Subparagraph (3) on prejudice will be incorporated into a separate instruction on prejudice. Mr. Young suggested adding a new subparagraph for "Other," allowing the parties to address any other issues that might arise regarding proof of loss. Mr. Simmons asked who has the burden of

proof on each of the issues covered by subparagraphs (2), (4), and (5). Judge Harris thought that subparagraph (5) implied that direct delivery or first-class mail to the insurer are the only ways the proof of loss can be delivered. Ms. Blanch thought "given directly" implied hand delivery. Mr. Humpherys asked whether e-mail would be sufficient. He noted that the instruction was based on Utah Administrative Code R590-190-3 and suggested adding "or by other reliable means of communication." Judges Harris and Stone questioned the need for the instructing on subparagraphs (4) and (5) at all. Judge Stone noted that if the regulation covers those situations, the court can decide the question as a matter of law. The rest of CV2408 was therefore deleted. The references to CV2408 will be moved to CV2407.

d. *CV2408. Unspecified time of performance.* [Note: There were two instructions numbered CV2408 in the materials. This is the second of the two.] This instruction was previously approved, but the committee agreed to substitute "time" for "date" in the instruction, and the committee approved the instruction again as modified.

e. *CV2410, Notice of loss, and CV2411, "Prejudice" defined.* Mr. Shea and Ms. Adams-Perlac will revise CV2410 and CV2411 in light of the committee's revisions of CV2407 and CV2408.

f. *CV2412. Coverage by estoppel.* Messrs. Ferguson and Johnson noted that they disagree with the decision in *Youngblood v. Auto-Owners Insurance Co.*, 2007 UT 28, 158 P.3d 1088, on which CV2412 is based, but agreed that the instruction accurately states the law as stated in *Youngblood*. Mr. Ferguson questioned the use of "material" mispresentation. Mr. Young suggested replacing "material" with "important." Dr. Di Paolo thought that "significant" might be better in this context. At Mr. Humpherys's suggestion, the second sentence was revised to read, "[Name of plaintiff] therefore claims that [he/she/it] is entitled to modify the policy to conform to what was represented by [name of defendant]'s agent." Mr. Shea asked if there was a distinction between "coverage," "benefits," and "protection." The committee thought that "coverage" and "protection" were not both necessary in the instruction. The committee approved the instruction as modified.

g. *CV2413, Insurable interest.* Mr. Johnson suggested using the statutory definition of "insurable interest," noting that it can apply to people as well as to property. Mr. Humpherys will redo the instruction.

h. *CV24__, Compliance with Utah law.* Mr. Ferguson questioned whether the terms "construe" and "ambiguous" were plain English. He also asked whether the instruction covered a question of law rather than fact. Mr.

Humpherys noted that at can be a breach of contract if an adjuster does not construe a policy according to Utah law but added that the instruction is probably more applicable to bad-faith cases, not breach-of-contract cases. He will put the instruction in the bad-faith instructions.

i. *CV__, Recovery of consequential damages.* Mr. Humpherys noted that recovery of consequential damages in insurance cases is different enough from recovery of consequential damages in other commercial contract cases that it should be covered by a separate instruction and not merely refer to CV2136, the commercial contract instruction.

4. *Next meeting.* The next meeting will be on Tuesday, October 15, 2013, at 4:00 p.m.

The meeting concluded at 6:00 p.m.