MINUTES

Advisory Committee on Model Civil Jury Instructions
January 13, 2014
4:00 p.m.

Present: John L. Young (chair), Alison A. Adams-Perlac, Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Paul M. Simmons, Peter W. Summerill

Absent: Honorable Ryan M. Harris, Gary L. Johnson, John R. Lund, Ryan M. Springer, Honorable Andrew H. Stone, David E. West

1. *Instructions for Cases Involving Pro-se Litigants.* The committee approved the committee note to CV099 that Ms. Adams-Perlac drafted.

2. *Insurance Litigation Instructions.* The committee continued its review of the Insurance Litigation instructions:

a. *CV2415. Compliance with Utah law.* Mr. Humpherys noted that this instruction relates more to bad-faith claims than to breach-of-contract claims. The committee agreed, noting that the issue would not go to the jury in a breach-of-contract case, since the court would construe the contract as a matter of law. Mr. Humpherys thought an instruction might be needed to keep the jury from construing the policy anyway, since the policy is typically admitted into evidence. Mr. Young and Ms. Blanch thought that the problem could be handled by redacting any policy provision that the court has held is contrary to Utah law.

Dr. Di Paolo joined the meeting.

Ms. Blanch thought that a single stock instruction would not be able to cover all the different circumstances and noted that the court and the parties will need to decide the best way to keep the jury from considering policy language it should not consider based on the circumstances of the particular case. Mr. Young asked if there needed to be a committee note addressing the problem. Mr. Humpherys thought it was already covered in CV2403. The committee decided to omit CV2415 from the breach-of-contract instructions and reconsider it as part of the bad-faith instructions.

b. *CV2416. Recovery of consequential damages.* Mr. Humpherys noted that consequential damages can include damages for emotional distress if emotional distress was reasonably foreseeable from a breach of the contract and not excluded by the contract. The Utah Supreme Court rejected the argument that consequential damages are only available for bad faith in *Machan v. UNUM Life Insurance Company*, 2005 UT 37, 116 P.3d 342. Mr. Ferguson noted that consequential damages in a breach-of-contract case do not include attorney's fees. He asked whether CV2416 tracked the instruction on consequential

damages in commercial contract cases. The committee compared the two instructions (CV2416 and CV2136) and concluded they were substantially the same. Mr. Young noted, however, that CV2136 referred to "the parties' contemplation," whereas CV2416 referred to the defendant's contemplation. Mr. Simmons noted that the result would probably be the same, since the plaintiff will always claim that he contemplated the damages he is seeking, but the committee revised CV2416 to refer to the "parties" rather than the "defendant." Mr. Ferguson asked what "generally foreseen" meant. Mr. Humpherys checked the case law and changed "generally" to "reasonably." At Mr. Young's suggestion, the phrase "at the time the policy was issued" was moved to the end of the second paragraph, and the last phrase in that paragraph was deleted. At Mr. Fowler's suggestion, "follows" was changed to "naturally flows." So the second and third paragraphs now read:

> Consequential damages are those damages caused by [name of defendant]'s breach that the parties could have reasonably foreseen at the time the policy was issued.
>
> A loss is foreseeable if it naturally flows from the breach in the ordinary course of events. A loss is also foreseeable if it is the result of special circumstances, beyond the ordinary course of events, that the parties knew of or had reason to know of.

The parenthetical quotations from *Black v. Allstate Ins. Co.* in the References section were deleted. The committee approved the instruction as modified.

c. *CV2417. Claim regarding insurable interest.* The committee thought that most questions of insurable interest would be decided by the court as a matter of law. But the statute does not cover every situation, and the statutory language at times makes the question a fact question, e.g., Utah Code Ann. § 31A-21-104(1)(c) (defining insurable interest in property or liability to require a "*substantial* economic interest" in the nonoccurrence of an event) (emphasis added). Mr. Summerill asked who had the burden of proving that the plaintiff did or did not have an insurable interest. Mr. Humpherys thought it was an affirmative defense and that the insurer would have the burden. Mr. Young noted that generally the party making a claim or raising a defense has the burden of proving his claim or defense. Mr. Summerill suggested adding a sentence at the end of the instruction: "To prevail on this claim, [name of defendant] must prove that [name of claimant] did not have an insurable interest at the time of the loss." Mr. Carney, however, found some authority for the proposition that the plaintiff has the burden of proving an insurable interest in at least some cases. The committee decided not to address the burden of proof in the instruction

absent a clear expression of Utah law on the issue but to note the question in a committee note. Ms. Adams-Perlac volunteered to research the issue.

Ms. Blanch was excused.

Dr. Di Paolo raised the question of when the insurable interest must exist–at the time the policy is taken out or at the time a claim is made. From the statutory language ("An insurer may not knowingly provide insurance to a person who does not have or expect to have an insurable interest in the subject of the insurance," Utah Code Ann. § 31A-21-104(2)(a)), Mr. Humpherys thought it was when the policy was bought. Mr. Carney found an article in the *Utah Bar Journal* (Mark W. Dykes, *Parduhn Me: The Utah Supreme Court and the Insurable Interest Requirement*, 19 UTAH B. J. 38 (July/Aug. 2006)) supporting this position in the context of a life insurance policy. Mr. Ferguson asked what happens if the plaintiff has no insurable interest at the time of the loss. Mr. Young suggested adding a committee note that would refer attorneys to the statute for determining when an insurable interest must exist. Ms. Adams-Perlac added a note to that effect. The committee revised the last paragraph of the instruction to read:

> [Name of insurance company] claims that [name of claimant] did not have an insurable interest in [describe–item of property/person's life/liability for an event, etc.]. Unless [name of claimant] had an insurable interest, the insurance is not valid, and [name of insurance company] is not required to pay benefits.

The committee approved the instruction as modified, subject to Ms. Adams-Perlac's research on the burden of proof.

d. *CV2418. Insurable interest in property or liability*. Mr. Humpherys noted that the instruction followed the statutory language, but the statutory language was not easily understandable to lay people. At the suggestion of Mr. Young and Dr. Di Paolo, the phrase "nonoccurrence of the" was deleted. Mr. Young suggested saying that an insurable interest means an interest "in the insurance policy for the purpose of insuring against the occurrence of an event." Dr. Di Paolo and Mr. Humpherys thought the interest wasn't in the policy but in the property or event insured against. Mr. Young suggested adding an introductory section saying that insurance is bought to insure against the occurrence of an event. The committee thought that an introduction was not necessary, that other instructions adequately covered the concept and that jurors would understand the purpose of insurance at least by the time this instruction is given. The instruction was revised to read:

> An insurable interest means any lawful and substantial economic interest in the [property/event] that is insured.

The committee approved the instruction as modified.

e. *CV2419. Life insurance–insurable interest.* Some of the committee questioned whether "love and affection" was always required in the case of a close family relative. Mr. Simmons suggested moving the phrase "if it is a person closely related by blood or by law" to the end of the first paragraph, since, as the instruction is written, it applies to both subsections (1) and (2). Dr. Di Paolo suggested starting the instruction, "For [name of plaintiff] to have an insurable interest in [name of person] . . ." Mr. Humpherys noted, however, that it is not simply a matter of listing the elements of an insurable interest. He explained that the list in CV2419 and the statute it is based on (Utah Code Ann. § 31A-21-104(3)) is not exhaustive but only covers the most common situations that might present a jury question. Mr. Humpherys thought that subsection (2) was a general statement of the law (i.e., that the person making the claim for insurance benefits must have "a lawful and substantial interest in having the life, health, or bodily safety of the person insured continue"). If the people are closely related, the substantial interest may be that engendered by love and affection rather than an economic interest (as in the case of business partners or an ex-spouse). The committee thought the phrase "engendered by love and affection" was not sufficiently plain English and suggested alternatives ("comes from," "is rooted in," "generated by"). The committee revised the instruction to read:

> For [name of plaintiff] to have an insurable interest in the [life/health/safety] of [name of person], [he/she] must have a lawful and substantial interest in the continued [life/health/bodily safety] of [name of person]. If [name of person] is closely related by blood or law to [name of plaintiff], then the substantial interest may be that generated by love and affection.

The committee approved the instruction as modified.

f. *CV2420. Representation, warranty and estoppel.* In answer to a question from Mr. Ferguson, Mr. Humpherys noted that *Youngblood v. Auto-Owners Insurance Company,* 2007 UT 28, also applied to representations, warranties, and estoppel. Mr. Humpherys noted a caveat–the representation must not be one as to a future occurrence. The committee questioned whether certain terms in the instruction would be clear to lay jurors, viz., "warranty," "representation," "negotiation of an insurance policy." Mr. Young suggested revising the instruction to read:

> A statement made by any person representing [name of insurer] in buying an insurance policy that affects the insurance company's obligations under the policy is unenforceable unless it is stated in the policy or in a written application signed by the applicant.

Dr. Di Paolo suggested using "explanation" for "statement." Mr. Humpherys suggested adding a committee note referring the reader to the instructions on agency if there is any question about the agent's authority. Mr. Humpherys thought that the instruction needed more work and suggested that it be put over to the next meeting.

3. *Next meeting.* The next meeting will be on Monday, February 10, 2014, at 4:00 p.m.

The meeting concluded at 6:00 p.m.