MINUTES
Advisory Committee on Model Civil Jury Instructions
May 13, 2013
4:00 p.m.

Present: John L. Young (chair), Dianne Abegglen, Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Honorable Ryan M. Harris, L. Rich Humpherys, Gary L. Johnson, Timothy M. Shea, Paul M. Simmons, Honorable Andrew H. Stone

Excused: Ryan M. Springer, David E. West

The committee continued its review of the Insurance Litigation instructions:

1. *CV2403, Coverage provision*. Mr. Shea proposed a change in the title (to "Breach of policy provision") and rewrote the instruction and committee note. The committee approved Mr. Shea's changes.

2. *CV2404. Elements of the claim*. Mr. Shea rewrote this instruction as well. The committee approved his changes.

Craig Mariger (chair of the Design Professional subcommittee) joined the meeting but was excused because the committee was not prepared to discuss the latest draft of the Design Professional instructions.

Ms. Blanch joined the meeting.

3. *CV2405. Value of loss*. Messrs. Humpherys and Johnson agreed that the offer is irrelevant. The committee revised the instruction to read: "[Name of plaintiff] claims that [name of defendant] has not paid for [describe [name of plaintiff]'s loss]. To succeed on this claim, plaintiff has the burden to prove the value of [his] loss." The committee approved the instruction as modified.

4. *CV2406. Exclusion from coverage*. CV2406 was previously approved. Mr. Humpherys thought that the instruction needs a comment. He said that exclusions are typically decided by the court. The instruction would only apply if there is an unambiguous exclusion, and the issue is whether the facts fall within the exclusion. If the exclusion is ambiguous, the ambiguity is resolved in favor of the insured. Examples of such factual disputes are whether a person is a member of the insured's household, whether an event was expected or intended by the insured, whether someone had the insured's permission to use his automobile, and whether the insured's actions were intentional. Mr. Ferguson suggested adding, "You must decide [explain the fact question]." Mr. Johnson suggested adding, "[Name of plaintiff] has the burden of proving an exception to the exclusion." He noted that there is a shifting burden of proof: it is the insured's burden to prove that a claim comes under a coverage provision; it is the insurer's burden to prove that an exclusion applies; and it is the insured's burden to

prove an exception to the exclusion. Mr. Young suggested a separate jury instruction for exceptions to an exclusion. Mr. Humpherys suggested handling the matter by a committee note, which could say that if there is an exception to an exclusion, CV2406 can be adapted to show who has the burden of proving the exception. Mr. Johnson offered to propose a committee note. The instruction was otherwise approved.

5. *CV2407. Proof of loss.* CV2407 was previously approved. Mr. Shea noted that the instruction does not say who has the burden of proof or what the jury is supposed to do with the information. He suggested adding, "You must decide whether the proof of loss here was adequate." Mr. Humpherys thought that the issue was an affirmative defense, but Mr. Johnson suggested that it was a condition precedent. He noted that the fact questions for the jury to resolve are (1) the timeliness of the proof of loss, (2) its adequacy, and (3) whether the insurer was prejudiced by any untimeliness or inadequacy. He suggested adding a reference to the statute (Utah Code Ann. § 31A-21-312) and governing regulation (Utah Admin. Code 590-190-3(10)). He thought that the burden of proof should be on the insured to show that he or she gave proof of loss, but the burden of proof is on the insurer to show that it was prejudiced. Mr. Humpherys suggested changing the title to "Defense of inadequate proof of loss" and to begin the instruction with "To determine whether there was a breach of contract, you must decide whether [name of plaintiff] gave sufficient proof of loss to enable [name of defendant] to investigate," etc. He thought that if the plaintiff was not making a claim for benefits, then breach of contract is not at issue, and the instruction would be irrelevant. Dr. Di Paolo suggested changing the second sentence of the instruction to read, "A proof of loss is a summary of the facts and circumstances that gave rise [not "giving rise"] to the covered loss." She also questioned the use of the terms "substantial compliance" (which Judge Harris explained means "close enough") and "prejudiced." Mr. Shea suggested revising the instruction to read:

> [Name of defendant] claims that it did not breach the insurance policy because [name of plaintiff] did not submit an adequate proof of loss. [Name of defendant] has the burden of proving that the proof of loss was not adequate to allow it to investigate, to prevent fraud, and to form an estimate of its rights and obligations under the policy. 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. Only substantial compliance–not strict compliance–is required.
>
> You must decide whether the proof of loss was adequate. If you find that the proof of loss was not adequate, you must decide whether [name of defendant] was prejudiced.

Mr. Shea also suggested that there be a question on the special verdict form that asks, "Was the proof of loss adequate?" Mr. Humpherys suggested dealing with prejudice in a separate instruction. He noted that if the proof of loss is adequate, there is no breach of contract, but if there is prejudice, there is no coverage. Mr. Johnson liked the idea of two instructions and volunteered to propose a separate instruction. The committee deferred further discussion of CV2407 until Mr. Johnson can propose a new instruction.

6. *CV2408. Unspecified time of performance.* Mr. Johnson asked when the instruction would apply if there is not a bad-faith claim. Mr. Humpherys suggested a cross-reference to the corresponding commercial contract instruction (CV2109). Dr. Di Paolo said she liked the original structure of the instruction. Mr. Humpherys asked whether the instruction merged the implied duty of good faith and the implied duty to pay within a reasonable time. Mr. Shea suggested using "date" for "time" throughout the instruction. The committee approved the instruction as modified.

7. *CV2409. Recovery of consequential damages.* Ms. Blanch questioned the use of "generally" in the second paragraph. Mr. Humpherys noted that one does not have to foresee the special damage. Mr. Ferguson noted that the standard is "reasonably foreseeable," not actually foreseen. He and Mr. Humpherys asked whether consequential damages (those "naturally flowing" from the breach) present a jury question or a question of law for the court. They also suggested adding a reference to *Beck v. Farmers Insurance Exchange,* 701 P.2d 795 (Utah 1985). Judge Harris suggested keeping the first paragraph and then referring back to the commercial contract instructions on general and consequential damages (CV2135 and CV2136, respectively). Messrs. Humpherys and Johnson suggested adding a committee note to say that the instruction sets out recoverable damages "unless otherwise modified by statute," such as in the case of personal-injury-protection (PIP) benefits. Mr. Simmons asked whether general damages in a breach-of-insurance-contract case are simply the unpaid benefits owing. Mr. Humpherys thought they were broader and included all damages naturally flowing from the breach. The committee adopted Judge Harris's suggestion and approved the instruction as revised.

8. *Bad-faith subcommittee.* The committee discussed potential members of the insurance bad faith subcommittee, including Mr. Humpherys, Mr. Lund, Alan Bradshaw, and Paul Belnap or Stuart Schultz from Strong and Hanni.

9. *Next meeting:* The next meeting will be June 10, 2013, at 4:00 p.m. There will be no committee meetings in July and August.

The meeting concluded at 5:30 p.m.