

MINUTES

Advisory Committee on Model Civil Jury Instructions

June 10, 2013

4:00 p.m.

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

Excused: John L. Young (chair), Juli Blanch, John R. Lund, Peter W. Summerill, David E. West

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

1. *CV2406, Exclusion from coverage.* The instruction was previously approved. Mr. Johnson added a committee note. Mr. Humpherys questioned whether citations to cases from other jurisdictions should be included. The committee decided that they were not necessary and deleted them. The comment was approved as modified.

Mr. Springer joined the meeting.

2. *CV2407, Proof of loss.* Messrs. Shea and Simmons questioned the necessity of the third paragraph. Messrs. Humpherys, Ferguson, and Johnson explained why the second and third paragraphs were both necessary: an inadequate or untimely proof of loss can give rise to two defenses: (1) that the plaintiff breached the contract, meaning that there is no coverage, or (2) that the defendant did not breach the contract because the plaintiff failed to comply with a condition precedent, meaning that the defendant was excused from timely performing its obligations.

Dr. Di Paolo joined the meeting.

Mr. Simmons proposed adding to the end of the second paragraph the phrase "and that its further performance was therefore excused." Dr. Di Paolo thought the phrase "performance was excused" would be unclear to a lay juror. Mr. Shea suggested "it did not have to pay for the loss." Dr. Di Paolo suggested "it was not required to pay for the loss sooner." The committee revised the second and third paragraphs to read:

[[Name of defendant] claims that [name of plaintiff] is not covered because [name of plaintiff] breached the terms of the insurance contract by not giving [adequate/timely] proof of loss.]

[[Name of defendant] claims that it was not required to pay for the loss sooner because [name of plaintiff] did not submit [adequate/timely] proof of loss.]

Mr. Shea questioned whether paragraph 4 was necessary. Mr. Humpherys thought it was because attorneys may want to quote the policy language on proof of loss, but the policy requirements may be unenforceable under Utah's proof-of-loss statute and the cases construing it. At Mr. Shea's suggestion the first two sentences of subparagraph (1) were moved to the end of the first paragraph.

Mr. Ferguson questioned the use of "preclude" in subparagraph (2), and Mr. Shea thought that "the claim" was ambiguous, since it could refer to a claim for coverage or one of the claims in the case. Mr. Shea suggested revising subparagraph (2) to read: "If it was not reasonably possible to give proof of loss within the time required by the policy, there is still coverage for the claim unless [name of defendant] can prove that it was prejudiced by [name of plaintiff]'s failure to give proof of loss." Mr. Humpherys explained that prejudice is not an issue if it was not reasonably possible to give proof of loss in the time required by the policy. The committee decided to break subparagraph (2) into two parts:

(2) If it was not reasonably possible to give the proof within the time required by the policy, the failure to give proof of loss within the required time is not a valid reason to deny the claim.

(3) The failure to give [adequate/timely] proof of loss is not a valid reason to deny the claim unless [name of defendant] proves that it was prejudiced by [name of plaintiff]'s failure to give timely proof of loss.

Dr. Di Paolo suggested using "harmed" for "prejudiced," but Mr. Johnson explained that "prejudiced" was a term of art that would be explained in another instruction.

At Mr. Humpherys's suggestion, subparagraphs (2), (3), (4), and (5) were bracketed, since all may not apply in a given case.

Judge Stone joined the meeting.

Some committee members questioned whether the last paragraph was necessary. Mr. Simmons pointed out that it explains who has the burden of proof. At Mr. Ferguson's suggestion, the paragraph was revised to read:

You must decide whether the proof of loss was [adequate/timely]. [Name of defendant] has the burden to prove that the proof of loss was not [adequate/timely].

At Mr. Simmons's suggestion, the paragraph was moved to the fourth paragraph of the instruction.

Dr. Di Paolo suggested breaking up the instruction into two instructions. Mr. Humpherys said his preference was to leave them as one because they would need to be given together.

Judge Stone suggested making the paragraph about the policy having to conform to Utah law a separate instruction. Mr. Humpherys thought that was a good idea, since the concept arises in other contexts as well. He, Mr. Johnson, and Mr. Ferguson will draft a proposed instruction that says that the terms of an insurance policy must conform to Utah law.

The committee broke CV2407 into two instructions—the first defining proof of loss and stating the parties' claims, and the second setting out the specific law that applies to proofs of loss. Mr. Shea asked where the committee note and references should go—with the first instruction or the second. Mr. Humpherys noted that the committee note needs to be revised. The only reference the first instruction needs is to *Zions First National Bank v. National American Title Insurance Co.*, 749 P.2d 651, 655-56 (Utah 1988). All three references should be included with the second instruction. The instruction was approved as modified.

3. *CV2410. Notice of loss.* Because the notice-of-loss instruction tracked the proof-of-loss instruction, the committee agreed to defer discussion of CV2410 until Mr. Shea has had an opportunity to revise CV2410 to conform with the revisions to CV2407. Dr. Di Paolo asked what the difference between a proof of loss and a notice of loss is. Mr. Humpherys explained that the notice of loss is notice to the insurer of the fact of a loss, and proof of loss is evidence of the amount claimed. Dr. Di Paolo suggested explaining the difference in the instructions and putting the two instructions next to each other. Mr. Shea noted that the organization of the instructions needs to be revised but can wait until a subset of the insurance instructions is complete.

4. *CV2408 [now renumbered 2409]. Unspecified time of performance.* The instruction was previously approved. The committee agreed to delete the links to the commercial contract instructions and approved the committee note to read, "This instruction applies only if the policy or the law does not provide when the performance at issue must be done." The committee approved the note as modified.

5. *CV2409 [now renumbered 2410]. Recovery of damages.* The instruction was previously approved. The committee added a citation to *Beck v. Farmers Insurance Exchange*, 701 P.2d 795 (Utah 1985), and changed "statute" to "law" in the committee note and approved the instruction as revised.

6. *CV2411. "Prejudice" defined.* Mr. Shea presented a new instruction he had recently received from Mr. Johnson defining "prejudice." Mr. Humpherys thought that the instruction needed more work and suggested deferring discussion of it until the next meeting. He noted that the definition of "prejudice" may depend on the context and the facts of the case, such as whether the policy is a liability policy or a life insurance policy, if the issue is lack of notice or failure to obtain approval to settle, etc. The committee also deferred discussion of the remaining instructions (CV2411, Coverage by estoppel, and CV2412, Insurable interest) until the next meeting.

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

The meeting concluded at 5:45 p.m.