

Agenda

Advisory Committee on Model Civil Jury Instructions

June 10, 2013
4:00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Judicial Council Room, Suite N31

Welcome and approval of minutes	Tab 1	John Young
Insurance Litigation Instructions	Tab 2	Rich Humpherys

[Committee Web Page](#)

[Published Instructions](#)

Meeting Schedule: Matheson Courthouse, Judicial Council Room, 4:00 to 6:00 unless otherwise stated.

September 9, 2013
October 15, 2013 (Tuesday)
November 12, 2013 (Tuesday)
December 9, 2013

Tab 1

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.

Tab 2

Insurance Litigation

CV 2401. Insurance policy is a contract. Approved 1
CV 2402. General description of claims and defenses. Approved..... 1
CV 2403. Breach of policy provision. Approved 2
CV 2404. Elements of the claim. Approved 2
CV 2405. Value of loss. Approved 3
CV 2406. Exclusion from coverage. Approved. 3
CV 2407. Proof-of-loss. 4
CV 2408. Unspecified time of performance. Approved..... 5
CV 2409. Recovery of damages. Approved. 5

Breach of contract. First party claim.

CV 2401. Insurance policy is a contract. Approved

An insurance policy is a contract between an insurance company and a policy holder, and therefore the relationship between [name of plaintiff] and [name of defendant] is contractual. The insurance policy obligates both [name of plaintiff] and [name of defendant] to comply with the terms of the policy.

References

MUJI 1

21.4

Committee Notes

See also the Commercial Contract instructions, CV 2101 et seq., which may have some application here, depending on the circumstances.

CV 2402. General description of claims and defenses. Approved

[Name of plaintiff] claims that [name of defendant] breached the insurance policy and claims to have been damaged by the breach as follows: [describe claimed losses].

[Name of defendant] claims that [describe defenses].

References

MUJI 1

Committee Notes

CV 2403. Breach of policy provision. Approved

[Name of plaintiff] claims that [name of defendant] breached the following provisions in the policy: [Quote applicable policy language.]

[When deciding this case, you must use the following definitions: Instruct the jury to apply any judicially determined definitions or interpretations about the language of the policy.]

References

MUJI 1

Committee Notes

The interpretation of the policy is the court's responsibility. If there are words and phrases in the policy which need special interpretation, the court will need to provide this to the jury. The jury would not interpret the provision, but only decide the contested facts that relate to the issue.

CV 2404. Elements of the claim. Approved

To succeed on this claim, [name of plaintiff] has the burden to prove [state the elements of the claim that are in dispute].

References

MUJI 1

Committee Notes

The existence of a contract between the insured and the insurer is rarely disputed, and rather than restate all of the elements necessary for a breach of contract claim — see

<a href=http://www.utcourts.gov/resources/muji/inc_list.asp?action=showRule&id=21#2102

>CV 2102, Elements for breach of contract — the judge should focus the jury on those elements that are in dispute.

CV 2405. Value of loss. Approved

[Name of plaintiff] claims that [name of defendant] has not paid for [describe loss]. To succeed on this claim, [name of plaintiff] has the burden to prove the value of [his] loss.

References

MUJI 1

Committee Notes

CV 2406. Exclusion from coverage. Approved.

[Name of defendant] claims that the policy excludes [name of plaintiff]'s claim from coverage. The exclusion reads:

[Quote the exclusion or limitation.]

[When deciding this case, you must use the following definitions: instruct the jury to apply any judicially determined definitions or interpretations about the language of the policy.]

To succeed on this claim, [name of defendant] has the burden to prove that the exclusion applies to [name of plaintiff]'s claim.

References

LDS Hospital v. Capitol Life Ins. Co., 765 P.2d 857, 859 (Utah 1988).

MUJI 1

Committee Notes

See the committee note to CV 2403, Breach of policy provision.

[It is the general rule in coverage litigation that the burden is on the insured to demonstrate that the loss \(under either third-party or first-party coverage\) is encompassed by the general coverage provisions of the insurance contract. See, e.g., Performance Autoplex II Ltd. v. Mid-Continent Cas. Co. 322 F.3d 847, 856 \(5th Cir. 2003\)\(it is an insured's burden to put forth evidence that its claim against an insurer is within the policy's coverage – applying Texas law\); Quaker State Minit-Lube v.](#)

Fireman's Fund Ins. Co., 868 F.Supp. 1278, 1295-96 (D. Utah 1994), aff'd, 52 F.3d 1522 (10th Cir. 1995)(insured bears the burden of proving that its claim comes within the broad meaning of occurrence, and thus comes within the coverage under an insurance policy – applying Utah law).

In Young v. Fire Ins. Exchange, 2008 UT App 114, 182 P.3d 911, the Utah Court of Appeals concluded that in litigation arising out of a first party property claim based on a fire, the insured had the threshold burden to present evidence that the fire was the result of an accident. Id. at ¶ 28.

Once the insured meets its burden of establishing that the loss comes within the grant of coverage of the insurance contract, the burden then shifts to the insurer to show the application of an exclusion which would bar coverage. Metric Construction Co. v. St. Paul fire & Marine Ins. Co., 2005 WL 2100939 at *2 (D. Utah August 31, 2005); Young v. Fire Ins. Exchange, 2008 UT App 114, ¶ 28, 182 P.3d 911; Draughon v. CUNA Mutual Ins. Soc., 771 P.2d 1105, 1108 (Utah Ct. App. 1989).

Once the insurer meets its burden of showing the application of an exclusion, should that exclusion contain any exceptions, the burden is on the insured to show the application of an exception to an exclusion. Quaker State Minit-Lube v. Fireman's Fund Ins. Co., 868 F. Supp 1278, 1312 (D. Utah 1994), aff'd, 52 F.3d 1522 (10th Cir. 2005); Bell Lumber and Pole Co. v. U.S. Fire Ins. Co., 60 F.3d 437, 441 (8th Cir. 1995)(burden on insured to prove the applicability of an exception to an exclusion – applying Minnesota law); St. Paul Fire and Marine Ins. Co. v. Warwick Dyeing Corp., 26 F.3d 1195, 1200 (1st Cir. 1994)(insured has burden of proving that an exception to an exclusion is applicable because the insured has the burden of establishing coverage – applying Rhode Island law).

CV 2407. Proof-of-loss.

The insurance policy required [name of plaintiff] to submit a proof-of-loss. A proof-of-loss is a summary of the facts and circumstances giving-that-gave rise to the covered loss.

The purpose of the proof-of-loss is 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. 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.

[Name of defendant] claims that it did not breach the insurance policy because [name of plaintiff] did not submit an adequate proof-of-loss. To succeed on this claim [name of defendant] has the burden to prove 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.

You must decide whether the proof-of-loss was adequate.

References

Utah Code Section 31A-21-312.

Zions First National Bank v. National American Title Ins. Co., 749 P.2d 651, 655 – 656 (Utah 1988).

Utah Administrative Code R590-190-3.

MUJI 1

Committee Notes

[This instruction applies only if plaintiff claims damages from breach of the insurance contract. It does not apply if the dispute is limited to the value of the loss, as represented by CV 2405, Value of loss.\]](http://www.utcourts.gov/resources/muji/inc_list.asp?action=showRule&id=24#2405)

Separate instruction on prejudice.

CV 2408. Unspecified time of performance. Approved

When the policy requires an act to be performed without specifying the date to perform the act, the act must be done by a reasonable date under the circumstances.

Because the policy does not require [name of defendant/name of plaintiff] to [pay the benefits, complete the investigation, submit proof of loss, respond to demands/offers, etc.] by a particular date, you must decide, based on all of the circumstances, what was a reasonable date for [insurer/plaintiff] to [pay the benefits, complete the investigation, submit proof of loss, respond to demands/offers, etc.].

References

Coulter & Smith, Ltd. v. Russell, 966 P.2d 852 (Utah 1998).

Bradford v. Alvey & Sons, 621 P.2d 1240, 1242 (Utah 1980).

MUJI 1

Committee Notes

[This instruction applies only if the policy does not provide when the performance at issue must be done. See also:](http://www.utcourts.gov/resources/muji/inc_list.asp?action=showRule&id=21#2115)

[Instruction CV2115](http://www.utcourts.gov/resources/muji/inc_list.asp?action=showRule&id=21#2115). Breach of the contract.

[Instruction CV2116](http://www.utcourts.gov/resources/muji/inc_list.asp?action=showRule&id=21#2116). Material breach.

http://www.utcourts.gov/resources/muji/inc_list.asp?action=showRule&id=21#2117
>Instruction CV2117. Partial breach.

CV 2409. Recovery of damages. Approved.

If you find that [name of defendant] breached the provisions of the policy, [name of plaintiff] is entitled to the unpaid benefits under the policy and damages caused by [name of defendant]'s breach.

As appropriate, instruct the jury on expectation damages:

http://www.utcourts.gov/resources/muji/inc_list.asp?action=showRule&id=21#2135
>Instruction CV2135. Expectation damages - General.

And consequential damages:

http://www.utcourts.gov/resources/muji/inc_list.asp?action=showRule&id=21#2136
>Instruction CV2136. Consequential damages.

References

Beck???

Machan v. UNUM Life Ins. Co. of Am., 2005 UT 37, ¶ 17, 116 P.3d 342, 346.

Black v. Allstate Ins. Co., 2004 UT 66, ¶ 28, 100 P.3d 1163, 1170.

Berube v. Fashion Centre, 771 P.2d 1033, 1050 (Utah 1989).

Gardiner v. York, 2006 UT App 496, ¶ 14, 153 P.3d 791, 795.

Restatement (Second) of Contracts § 351 (1981).

MUJI 1

21.9

Committee Notes

[The measure of damages for breach of an insurance contract is the same as for commercial contracts generally, unless changed by statute.](#)