MINUTES

Advisory Committee on Model Civil Jury Instructions
March 11, 2013
4:00 p.m.

Present: John L. Young (chair), Dianne Abegglen, Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Honorable Ryan M. Harris, L. Rich Humpherys, Gary L. Johnson, John R. Lund, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill

Excused: Tracy H. Fowler, Honorable Andrew H. Stone, David E. West

1. *Design Professional Instructions*. Mr. Young reported that he and Mr. Shea received some proposed committee notes and proposed changes to the design professional instructions today from Craig Mariger, the chair of the Design Professional subcommittee. The committee will review the proposals at its May 2013 meeting because Mr. Mariger cannot attend the April meeting.

2. *Insurance Litigation Instructions*. The committee reviewed the first of the insurance litigation instructions. Mr. Humpherys noted that the instructions will be divided into the following categories: (1) breach of contract; (2) claim for benefits; and (3) bad faith (i.e., breach of the implied covenant of good faith and fair dealing). Each category may be further divided into first-party and third-party claims (first-party claims being claims between the insured and insurer, and third-party claims being claims arising out of a third party's claim against the insured). Mr. Humpherys suggested that there was a distinction between a claim for benefits and a breach-of-contract claim. Some committee members (such as Ms. Blanch and Messrs. Young, Johnson, and Simmons) did not see the distinction and thought both fell within the rubric of breach of contract. Mr. Humpherys, however, did not think there could be a breach of contract until there had been a determination of what the insurer was legally obligated to pay. Mr. Humpherys used the example of an insurance policy that provides that the insurer does not have to pay property damage until 30 days after the value of the damage has been determined through arbitration. If the plaintiff files an action for payment of property damage sooner than 30 days after an arbitration, arguably there has been no breach of contract. Some committee members questioned whether the plaintiff could even bring a claim in that situation. They thought it would be subject to dismissal as not ripe. Mr. Humpherys asked whether a dispute over the value of a claim is a breach of the contract. Mr. Young suggested it may be more akin to an action for declaratory relief. Mr. Humpherys asked whether it should have its own set of instructions. He noted that under *Mahan,* for a breach-of-contract claim there must be an express provision of the contract that has not been adhered to. Mr. Humpherys thought that consequential damages would be available for a breach of contract but not for a mere claim for benefits and that attorney fees would be available for bad faith but not for a mere breach of contract. The committee did not reach any consensus on these issues. Some, such as Mr. Carney, thought it would depend on the specific language of the contract and what it says about what the insurer has to pay and when.

Mr. Humpherys asked Mr. Lund if he would serve on the insurance instruction subcommittee, and Mr. Lund agreed. Mr. Humpherys noted that he also intended to ask Paul Belnap, Stuart Schultz, Alan Bradshaw, and David Olsen to serve on the subcommittee.

Judge Harris and Dr. Di Paolo joined the meeting.

a. *CV2401. Breach of contract–General description of claims and defenses.* At Mr. Young's suggestion, the committee reversed the order of CV2401 and CV2402. Mr. Ferguson questioned whether "policy contract" was necessary throughout the instructions. The committee felt that it was important to state up front that an insurance policy is a contract, before setting out the parties' claims and defenses, but that after that the instructions could use "policy" or "contract" without having to say every time that the policy is a contract or that the contract is the policy. Mr. Humpherys thought that lay jurors would think there was a distinction between an insurance policy and a contract. Mr. Johnson noted that there are two lines of cases in Utah law, one emphasizing the contractual nature of insurance policies and one emphasizing their differences from other contract (such as their adhesive nature). He preferred to have the option of using either term ("contract" or "policy") depending on the facts of the case and suggested putting both terms in brackets. For example, if the policy was negotiated at arm's length, "contract" might be more appropriate than "policy." Dr. Di Paolo thought "policy" would be more understandable to lay jurors. The committee was fairly evenly split on whether to use "policy" or "contract," with Dr. Di Paolo and Messrs. Young, Carney, Simmons, and Summerill preferring "policy," and Ms. Blanch and Messrs. Ferguson, Johnson, and Lund preferring "contract." Mr. Carney suggested adding a committee note saying that if the policy was negotiated to use "contract" instead of "policy." Judge Harris said that his default would probably be "policy," but that if it was not an adhesion contract, he would allow "contract."

Mr. Shea thought the first two sentences of CV2401 said the same thing. The committee combined the sentences to read: "[Name of plaintiff] claims that [name of defendant] breached the insurance policy and claims to have been damaged by the breach of the policy provisions as follows: [Define claimed losses.]" The second paragraph was revised to read: "[Name of defendant] claims that [describe defenses]."

Mr. Lund asked whether the instruction should be given at the beginning of the trial.

The committee renumbered CV2401 CV2402 and renamed it "General description of claims and defenses." Mr. Humpherys noted that he did not care if "Breach of contract" was in the title of each instruction but thought that there

should be a heading clearly delineating the breach of contract–first-party instructions from other insurance instructions.

b. *CV2402. Breach of contract–General relationship*. Mr. Shea suggested deleting the part that reads, "and, therefore, the relationship between [name of plaintiff] and [name of defendant] is contractual. The insurance policy simply . . ." The committee felt, however, that it would be helpful to the jury to tell them that the relationship is contractual. Mr. Lund asked whether the second sentence should be revised to include the duty to defend as well as the duty to pay covered claims. Mr. Humpherys thought third-party claims should be treated separately, since they give rise to tort duties, not just contractual duties. Mr. Ferguson asked if the duty to defend ever goes to the jury, since the question of duty is for the court to decide. Ms. Blanch thought that the instruction should also say that the insured has obligations. The committee revised the last sentence of the instruction to read: "The insurance policy obligates both [name of plaintiff] and [name of defendant] to comply with the terms of the contract."

The committee discussed using "insured" and "insurer" to avoid terms like "policy holder" and "insurance company" but decided against doing so, since they can be confusing to lay jurors, and the distinction between the two terms can be easily missed when jurors are listening to the instructions.

The committee renumbered the instruction CV2401 and renamed it "An insurance policy is a contract." The committee note referring the reader to the general contract instructions remained with the instruction.

c. *CV2403. Breach of contract–Coverage provision*. Mr. Humpherys explained the problem the subcommittee faced: The case law says that contract interpretation is a question of law, for the court to decide. But it also says that you use the ordinary and customary meanings of words unless the words have a special meaning. Mr. Humpherys thought the instructions should give the provision at issue and then define the terms; otherwise, the jury would be left to give the contract its own interpretation. Mr. Ferguson agreed, stating that we should not have the jury telling the parties what their contract means. Dr. Di Paolo asked how you decide which words to define. The committee thought that it depended on the relevance of the terms to the case and whether or not their definitions were disputed. Mr. Young asked why the court should tell the jury to use the ordinary and customary meaning of terms if the jury is not to construe the contract. Mr. Lund also expressed concerns about the court instructing the jury on contract construction, other than simply defining ambiguous terms. Mr. Lund suggested that if a contract term is ambiguous, the judge should define it, but if it is not, the judge should not say anything about construing the policy. Judge Harris thought that if a contract term was ambiguous and dispositive, the case wouldn't be going to the jury at all. Dr. Di Paolo noted that the issue may not be

one of ambiguity but of the policy using legal language, e.g., a term of art, that the judge may have to define for the jury. The committee agreed that the instruction should define any relevant technical language. Also, if the court has ruled on what contract language means, it should instruct the jury on that. The committee revised the first part of the instruction to read:

> [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: [Include specific judicial interpretations about the language of the policy.]

Judge Harris noted that the judicial interpretations should be limited to the court's interpretations in the case, such as on a prior motion for summary judgment or motion in limine, and not all judicial interpretations of the same or similar language. Judge Harris thought that the intent was that, if the trial judge had already determined that language in the policy had an unambiguous meaning, there should be an instruction giving the jury that specific interpretation. Mr. Humpherys thought that there did not need to be a prior decision on the meaning, but the court could decide the meaning as part of the jury instructions.

Messrs. Lund and Simmons questioned whether the last part of the instruction ("You will be asked to decide whether . . .") should explain which party has the burden of proof on the issues. Mr. Simmons thought that might depend on whether a particular issue was an affirmative defense or a condition precedent to coverage under the contract. Mr. Johnson agreed that who has the burden of proof can be confusing if the case involves exclusions and exemptions from or exceptions to the exclusions. Mr. Humpherys asked if there was a general instruction that whoever is trying to prove a fact has the burden of proving it. Mr. Lund thought that the burden of proof was generally part of each instruction on what the jury must decide. Some committee members thought that the last part of CV2403 should be its own instruction and cover the burden of proof.

Mr. Humpherys will take the instruction back to the subcommittee to revise in light of the committee's discussion.

3. *Next Meeting*. The next meeting will be Monday, April 9, 2012, at 4:00 p.m.

The meeting concluded at 6:00 p.m.