DUTY OF JURY TO FIND FACTS AND FOLLOW LAW

Members of the jury, now that you have heard all the evidence and the arguments of the attorneys, it is my duty to instruct you on the law that applies to this case.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. You must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath promising to do so at the beginning of the case.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all equally important. Also, you must not read into these instructions, or into anything the court may have said or done, any suggestion as to what verdict you should return - that is a matter entirely up to you.

WHAT IS EVIDENCE

The evidence from which you are able to decide what the facts are consists of:

1. the sworn testimony of witnesses;

2. the exhibits which have been received into evidence; and

3. any facts to which the lawyers have agreed or stipulated.

WHAT IS NOT EVIDENCE

Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

1. Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements and closing arguments, and at other times, is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory controls.
2. Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.
3. Testimony that has been excluded or stricken, or that you have been instructed to disregard, is not evidence and must not be considered.
4. Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at trial.

DIRECT AND CIRCUMSTANTIAL EVIDENCE

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as the testimony of an eye witness. Circumstantial evidence is proof of one or more facts from which you could find another fact. You should consider both kinds of evidence. As a general rule, the law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

DEPOSITION TESTIMONY

During the trial, you have heard reference to the terms "examination under oath" and "deposition." As it applies in this case, these terms mean sworn testimony, under oath, given by a witness before this trial began. To the extent that you have heard reference to, and quotations from, such "deposition" or "examination under oath," you may give it the same credibility or weight as live witness testimony. That is to say, whatever credibility or weight, if any, you think it may deserve.

CREDIBILITY OF WITNESSES

In deciding the facts of this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it at all. In considering the testimony of any witness, you may take into account:

1. the opportunity and ability of the witness to see or hear or know the things testified to;
2. the witness's memory;
3. the witness's manner while testifying;
4. the witness's interest in the outcome of the case and any bias or prejudice the witness may have;
5. whether other evidence contradicted the witness's testimony; and
6. the reasonableness of the witness's testimony in light of all the evidence.

EXPERT WITNESSES

During this trial, you have heard testimony from a witness who claims to have specialized knowledge in a technical field. Such persons are sometimes referred to as expert witnesses. Because of their specialized knowledge, they are permitted to express opinions which may be helpful to you in determining the facts.

Since they do have specialized knowledge, the opinions of expert witnesses, whether expressed personally or in documents which have been admitted into evidence, should not be disregarded lightly.

On the other hand, you are not required to accept such opinions just because the witnesses have specialized knowledge.

In determining what weight to give to the testimony of a so-called expert witness, you should apply the same tests of credibility that apply to the testimony of any other witness. You are not bound to accept the opinion of an expert.

CORPORATIONS

The law makes no distinction between corporations and private individuals, nor does it distinguish between the size or type of business in which a corporation engages. All persons, including corporations, stand equal before the law and are to be dealt with as equals in this case. The corporate defendant in this case is entitled to the same fair and unprejudiced treatment as an individual would be under like circumstances, and you should decide the case with the same impartiality you would use in deciding a case between individuals.

At all times, you should consider treating this matter as an action between persons of equal standing in the community, of equal worth and holding the same or similar stations in life or in the community. Corporations act through their agents and employees.

BURDEN OF PROOF

The Plaintiffs have the burden of proving by a fair preponderance of the evidence, that is by the greater weight of the evidence, the facts necessary to support their case. Because the Plaintiffs are advancing the proposition that the Defendant should have paid their claim for the loss sustained by their vessel, it is the Plaintiffs who have the responsibility of producing evidence that leads you to believe that the Plaintiffs' claim is more likely true than not. The Defendant, on the other hand, has no obligation to produce evidence concerning the Plaintiffs' claim.

The Defendant does, however, have the burden of proving its affirmative defenses; I will address these defenses in a few minutes.

SUMMARY OF CLAIM: BREACH OF CONTRACT

In this case, the Plaintiffs have one claim against the Defendant. The Plaintiffs are seeking to recover damages for losses they claim to have sustained as a result of a fire that occurred on their vessel on August 12, 2002. The Plaintiffs contend that the Defendant is required to pay them for these losses pursuant to a policy of fire insurance issued by the Defendant.

SUMMARY OF AFFIRMATIVE DEFENSES

In this case, in addition to the Plaintiffs' claim, you will consider the Defendant's five claims that the Plaintiffs are not entitled to any payment under the insurance policy. These claims are called affirmative defenses. The Defendant asserts the following five affirmative defenses:

(1) concealment;

(2) misrepresentation;

(3) fraud;

(4) false swearing; and

(5) violation of the provision of the insurance contract entitled "Concealment or Fraud."

The Defendant has the burden of proving these affirmative defenses by a preponderance of the evidence. In a few minutes, I will explain to you what the Defendant must prove in order to establish each affirmative defense.

BREACH OF CONTRACT CLAIM

I will now instruct you on the Plaintiffs' claim. The Plaintiffs bear the burden of proving that the Defendant breached the insurance contract. In this case, the Plaintiffs claim that the Defendant breached the insurance policy by failing to pay the claim that they submitted under their insurance policy.

In order for the Plaintiffs to prevail on this claim, they must prove four (4) things, or what the law refers to as “elements”:

First, the Plaintiffs must prove that on August 12, 2002, they had ownership or another insurable interest in the property in question;

Second, the Plaintiffs must prove that on August 12, 2002, there was a contract or policy of insurance in effect that was issued by the Defendant;

Third, the Plaintiffs must prove that on August 12, 2002 they sustained a loss covered under the insurance policy; and

Fourth, the Plaintiffs must prove the amount of the loss.

ELEMENTS ONE, TWO, AND THREE HAVE ALREADY BEEN PROVEN

In this case, there is no dispute that a contract between the Plaintiffs and the Defendant exists. The Defendant, Nationwide Mutual Fire Insurance Company, agrees that it issued a boat owner's insurance policy to the Plaintiffs, Dennis Gamba and Sharon Gamba, for the vessel called "The Rage." The Defendant also agrees that this insurance policy was in effect on August 12, 2002, when fire damaged "The Rage." Therefore, you do not need to concern yourselves with the first three elements. You can accept as proven that on August 12, 2002, the Plaintiffs had a fire insurance policy, with the Defendant, for their vessel "The Rage," and that "The Rage" was damaged by fire. Of course, the insurance policy is subject to the terms and conditions in the policy. You will have a copy of that policy with you while you deliberate; the policy is Exhibit A.

Because the parties agree that there is no dispute about the first three elements, your only task regarding the breach of contract claim is to decide the fourth element, the amount of the loss.

ELEMENT FOUR: AMOUNT OF LOSS

You must determine whether or not the Plaintiffs have proven the fourth element by a preponderance of the evidence. This element concerns the amount of loss. In this case, the parties admit that "The Rage" was damaged by fire on August 12, 2002, but they do not agree on the amount of the loss to the vessel.

I will give you some instruction shortly on the issue of damages and if you reach this issue, it will be for you to determine whether and to what extent the Plaintiffs have proven loss.

AFFIRMATIVE DEFENSES - GENERAL

If you find that the Plaintiffs have proved their claim by a fair preponderance of the evidence, then you must then consider each of the affirmative defenses raised by the Defendant. If the Defendant proves any one of these affirmative defenses, then the Plaintiffs cannot recover anything.

I want to emphasize to you that the burden of proving each of the affirmative defenses is on the Defendant. In other words, since the Defendant is the one asserting these defenses, the law imposes on the Defendant the obligation of proving them. It is not up to the Plaintiffs to disprove the affirmative defenses; rather, it is up to the Defendant to prove them by a fair preponderance of the evidence.

You should also bear in mind that proof of any one of the affirmative defenses is sufficient to defeat the Plaintiffs' breach of contract claim. In other words, if you find that the Defendant has proven at least one of the affirmative defenses I am about to instruct you on, then you should return a verdict for the Defendant.

AFFIRMATIVE DEFENSES

As I mentioned earlier, the Defendant has asserted five affirmative defenses. They are:

(1) concealment;

(2) misrepresentation;

(3) fraud;

(4) false swearing; and

(5) violation of the provision of the insurance contract entitled "Concealment or Fraud."

CONCEALMENT

The first affirmative defense is concealment. The term concealment means an affirmative act that is intended or known to be likely to keep another from learning of a fact of which he or she would have otherwise learned. Concealment is the intentional withholding of material facts; it is the act of refraining from disclosure.

I will define the terms “intentional” and “material” for you.

“INTENTIONAL” DEFINED

"Intentional" means the mental resolution or determination to do something. Intention is the purpose or design with which an act is done. An act is intentional if it is desired by the person doing it. Keep this definition in mind every time I use the word “concealment” in these instructions.

"MATERIAL" DEFINED

Matters are "material" when they pertain to a subject that is relevant and germane to the insurer's investigation as it was then proceeding. To be considered material, a statement need not relate to a matter or subject matter which ultimately proves to be decisive or significant if the statement was reasonably relevant to the insurance company's investigation of a claim.

Materiality should be judged as of the time when the alleged misrepresentation is made. In hindsight, the significance of an untruth may turn out to be greater or less than expected. Hindsight, however, is irrelevant to the materiality of an insurer's misrepresentation to the insurer.

The term "material" appears in several places in these instructions. I will not repeat the definition every time the term is used. The term has the same meaning each time I use it. You should refer back to this definition.

MISREPRESENTATION

In order to prevail on this affirmative defense, the Defendant must prove that one of the Plaintiffs made a misrepresentation. One of the Plaintiffs has made a misrepresentation if he or she asserted, by words or by conduct, the existence of a fact that did not exist at the time he or she made the assertion. The misrepresentation could be based on written or oral assertions, and it could be expressed or implied.

For the insurer to void a policy because of post-loss misrepresentation, the misrepresentation must be made knowingly and it must be material.

I will define the terms "knowingly" for you. You've already heard the definition of the term "material."

The insurer is not required to show prejudice from a post-loss misrepresentation to void the insurance policy. It is not required for an insurer to have relied on the misrepresentation to be relieved of liability as a result of a misrepresentation.

"KNOWINGLY" DEFINED

To “knowingly” make a misrepresentation means that the person or persons making the representation knew it to be false or untrue at the time they made the misrepresentation. A statement is not "knowingly" made if it is the result of a mistake or accident or because of another innocent reason.

The term "knowingly" will be used again in these instructions. Again, you should keep this definition in mind whenever I use the term.

FRAUD

The third affirmative defense is fraud. To prove fraud, the Defendant must prove that one of the Plaintiffs made a knowing misrepresentation of the truth or concealed a material fact in order to induce another to act. Fraud can occur through a statement or by conduct.

FALSE SWEARING

False swearing is the fourth affirmative defense. To prove this, the Defendant must prove that one of the Plaintiffs deliberately made material false or misleading statements while under oath.

False sworn answers are material if they may be said to have been calculated to either discourage, mislead or deflect the company's investigation in any area that might seem to the company, at that time, a relevant area to investigate.

The insured's motive for lying is irrelevant. Forfeiture does not depend on proof that in insured harbored an intent to recover proceeds to which he or she was not entitled.

"CONCEALMENT OR FRAUD" PROVISION OF POLICY

The fifth affirmative defense asserted by the Defendant is that the Plaintiffs violated a provision of the insurance policy entitled "concealment or fraud." As I mentioned, you will have a copy of the insurance policy in the jury room with you - it is Exhibit A. This provision appears on page ten of the policy. It states the following:

> 2. Concealment or Fraud.
>
> > a) this policy is void as to all insureds if you or any other insured has intentionally concealed or misrepresented any material fact or circumstances relating to this insurance.
> >
> > b) we do not provide coverage for an insured who, either before or after a loss, has:
> >
> > > (1)intentionally concealed or misrepresented any material fact or circumstance; or
> > >
> > > (2) has committed any fraud or made false statements;
> > > relating to this insurance.

In order to prevail on this affirmative defense, the Defendant must prove, by a preponderance of the evidence, that the Plaintiff has done one of the following acts, relating to the insurance contract: (1) intentionally concealed or misrepresented any material fact or circumstance; (2) committed fraud; or (3) made false statements.

Contracts of insurance may expressly declare that fraud, attempted fraud, or false swearing on the part of the insured or the claiming in making proof of loss shall forfeit all rights on the policy and bar recovery.

Concealment or fraud clauses apply when an insured misrepresents facts to the insurer while the insurer is investigating the loss.

The term "false statement" appears in this section of the policy. A false statement may be a statement that is untrue or a statement that omits an important fact and thereby misleads the party to which it is made as to what the facts are. For a false statement to void the coverage provided by an insurance policy, it must be knowingly made and concern a material fact. False statements do not need to be made under oath.

All of the other operative terms of this section have been previously defined, and in effect, this affirmative defense overlaps with the others.

DAMAGES

I am now going to instruct you on the issue of damages. By doing this, I in no way mean to suggest the outcome of the case. Since I do not know how you are going to decide the case, I need to frame the issue for you in the event you reach a verdict in favor of the Plaintiffs. If you find that the Defendant has breached its contract with the Plaintiffs, and that none of the affirmative defenses asserted by the Defendant have been proven, then you must reach the issue of damages.

If you reach the question of damages, it will be your job to determine the amount of loss for which the Plaintiffs may recover under the policy.

In this case, the parties disagree as to what the policy requires in terms of the amount to be paid by the insurer in the event of a loss. The Plaintiffs claim that the Defendant is obligated to pay the actual cash value of the vessel, and is not entitled to deduct any salvage amount. The Defendant claims that the policy contemplates that payment of actual cash value includes a reduction for salvage.

The policy states the following:

> 4. Loss Settlement: losses to covered property are settled at actual cash value at the time of loss. Such losses may not exceed the amount to repair or replace covered property, less the deductible.

The policy also defines the term "actual cash value." It states:

10. "actual cash value" means the amount it would cost to repair or replace covered property with material of like kind and quality, less allowance for physical deterioration and depreciation, including obsolescence.

UNANIMOUS VERDICT

In order to return a verdict in this case, all of you must agree as to what that verdict will be. You cannot return a verdict for either party unless your decision is unanimous. Therefore there are two things that you should keep in mind during the course of your deliberations.

On the one hand, you should listen carefully as to what your fellow jurors have to say and should be open minded enough to change your opinion if you become convinced that it was incorrect.

On the other hand, you must recognize that each of you has an individual responsibility to vote for the verdict that you believe is the correct one based on the evidence that has been presented and the law as I have explained it. Accordingly, you should have the courage to stick to your opinion even though some or all of the other jurors may disagree as long as you have listened to their views with an open mind.

COMMUNICATIONS WITH THE COURT

If it becomes necessary during your deliberations to communicate with me, you may send a note through the marshal, signed by the foreperson. No member of the jury should ever attempt to contact me except by a signed writing; and I will communicate with any member of the jury on anything concerning the case only in writing, or here in open court.

RETURN OF VERDICT

A verdict form has been prepared for you by the Court. In rendering a verdict, you should follow the questions as presented on the verdict form. After you have reached a unanimous agreement on a verdict, your foreperson will fill in the form that has been given to you, sign and date it, and advise the Court that you are ready to return to the courtroom.

COPY OF INSTRUCTIONS

I have instructed you on the law that governs your deliberations. I will send into the jury room a written copy of my instructions. You are reminded, however, that the law is as I have given it to you from the bench; and the written copy is merely a guide to assist you.