

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

FEDERAL INSURANCE COMPANY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 03 C 1174
	)	
ARTHUR ANDERSEN LLP,	)	The Honorable Amy J. St. Eve
and LARRY J. GORRELL,	)	
	)	
Defendants.	)	

**FINAL JURY INSTRUCTIONS**

Members of the jury, you have seen and heard all of the evidence and the arguments of the attorneys. Now I will instruct you on the law that applies to this case.

You have two duties as a jury. Your first duty is to decide the facts from the evidence in this case. This is your job, and yours alone.

Your second duty is to apply the law that I give you to the facts. You must follow these instructions, even if you disagree with them. Each of the instructions is important, and you must follow all of them.

You must perform your duties fairly and impartially. In deciding your verdict, you must not allow sympathy, bias, prejudice, fear, or public opinion to influence you. You should not be influenced by any person's race, color, religion, national ancestry, or sex.

Nothing I say now, and nothing I said or did during the trial, is meant to indicate any opinion on my part about what the facts are or about what your verdict should be.

You should consider and decide this case as an action between persons of equal standing in the community, and holding the same or similar stations in life. Each party is entitled to the same fair consideration. A corporation is entitled to the same fair consideration as a private individual. All persons, and corporations, stand equal before the law and are to be dealt with as equals in a court of justice.

In determining the facts of this case, you must consider only the evidence that I have admitted in the case. The evidence consists of the testimony of the witnesses and the exhibits admitted in evidence.

Certain things are not evidence. I will list them for you. First, testimony and exhibits that I struck from the record, or that I told you to disregard, are not evidence and must not be considered. Second, anything that you may have seen or heard outside the courtroom is not evidence and must be entirely disregarded. This includes any press, radio, or television reports that you may have seen or heard. Third, questions and objections by the lawyers are not evidence. Attorneys have a duty to object when they believe a question is improper. You should not be influenced by any objection or by my ruling on it. Fourth, the lawyers' statements and arguments to you are not evidence. The purposes of these statements and arguments is to discuss the issues and the evidence. If the evidence as you remember it is different from what the lawyers said, your memory is what counts.

At various times during the trial, the lawyers addressed you. At the beginning of the trial you heard the lawyers' opening statements, at the end of the trial you heard the lawyers' closing arguments, in between you heard the lawyers' interim statements. If at any time you find that the lawyers said something to you that was not shown by the evidence, you should disregard what the lawyers have said. None of the statements or arguments made by the lawyers is evidence.

Certain diagrams or computer presentations have been shown to you. These diagrams and presentations are used for convenience and to help explain the facts of the case. They are not themselves evidence or proof of any facts.

Some of you may have heard the phrases “direct” and “circumstantial evidence.” Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence. In other words, it is proof of one or more facts that point to the existence or non-existence of another fact. The law makes no distinction between the weight to be given either direct or circumstantial evidence. You should decide how much weight to give to any evidence. All the evidence in the case, including the circumstantial evidence, should be considered by you in reaching your verdict.

You should use common sense in considering the evidence, and you should consider the evidence in light of your own observations in life. In our lives, we often look at one fact and conclude from that fact that another fact exists. In law we call this an “inference.” You are allowed to make reasonable inferences. Any inferences that you make must be reasonable and must be based on the evidence in the case.

You are to decide whether the testimony of each of the witnesses is truthful and accurate, in part, in whole, or not at all, as well as what weight, if any, you give to the testimony of each witness. In evaluating the testimony of any witness, you may consider, among other things: the witness's intelligence; the ability and opportunity the witness had to see, hear, or know the things that the witness testified about; the witness's memory; any interest, bias or prejudice the witness may have; the manner of the witness while testifying; and the reasonableness of the witness's testimony in light of all the evidence in the case.

A witness may be discredited or “impeached” by contradictory evidence, by, among other things, a showing that he or she testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something that is inconsistent with the witness’s testimony. If you believe that any witness has been impeached, then you must determine whether to believe the witness’s testimony in whole, in part, or not at all, and how much weight to give to that testimony.

You may find the testimony of one witness or a few witnesses more persuasive than the testimony of a larger number. You need not accept the testimony of the larger number of witnesses.

It is proper for an attorney to interview any witness for the purpose of learning what testimony the witness will give.

Any notes you have taken during this trial are only aids to your memory. The notes are not evidence. If you have not taken notes, you should rely on your independent recollection of the evidence and not be unduly influenced by the notes of other jurors. Notes are not entitled to any greater weight than the recollections or impressions of each juror about the testimony.

You have heard a witness give opinions about matters requiring special knowledge or skill. You should judge this testimony in the same way that you judge the testimony of any other witness. The fact that such a person has given an opinion does not mean that you are required to accept it. Give the testimony whatever weight you think it deserves, considering the reasons given for the opinion, the witness's qualifications, and all of the other evidence in the case.

A preponderance of the evidence simply means evidence that persuades you that a party's claim is more likely true than not true. In deciding whether any fact has been proved by a preponderance of the evidence, you may, unless otherwise instructed, consider the testimony of all the witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them.

When I use the word “insurer,” “plaintiff,” or “Federal,” I am referring to Federal Insurance Company. When I use the word “policyholders,” “insureds,” or “defendants,” I am referring collectively to Arthur Andersen LLP and Larry Gorrell. When I use the word “Andersen” I am referring to Arthur Andersen LLP. When I use the word “Gorrell,” I am referring to Larry Gorrell.

When I use the term “policy,” I mean the policy of insurance issued by Federal that provides Fiduciary Liability Coverage for the policyholders Arthur Andersen LLP and Larry Gorrell. The policy provides that Federal shall have “the right and duty to defend” any claim made against the policyholders. In addition, the policy provides that Arthur Andersen and Gorrell agree to provide Federal with all information, assistance and cooperation that Federal reasonably requests.

This is an insurance coverage dispute. To guide you in your consideration of this matter, I am going to explain the duties an insurer owes to its policyholders. The type of policy at issue in this case is a form of liability insurance. It imposes on Federal a duty to defend the policyholders, in this case Andersen and Mr. Gorrell, against claims seeking a recovery potentially covered by the policy. The duty to defend is determined by the allegations of the claims against the policyholders, and it is separate and distinct from the duty to pay for a judgment or settlement resulting from a claim. A duty to defend requires an insurer within a reasonable time either to appoint defense counsel of its own choosing or to agree to, and pay for, defense attorneys hired by the policyholder. Under the duty to defend, the policyholder is to be defended against the claimants' allegations, whether true or not.

I have already determined that Federal did owe Andersen and Mr. Gorrell a duty to defend the claims, as identified by the next instruction, which are at issue in this case. I did not determine whether Federal breached its duty to defend. That is an issue that you must decide. Please note, however, that in your deliberations you must not consider whether the policy actually covers the retired partners' claims against the policyholders. That is a question for the Court.

Andersen and Mr. Gorrell contend that Federal is liable because Federal breached its duty to defend them against the claims at issue in this case. Federal, on the other hand, contends that it is not liable because it did not breach its duty to defend them, and, alternatively, Andersen and Mr. Gorrell, through their conduct, effectively relieved Federal of its duty to defend. These are issues you must decide.

This lawsuit involves separate claims and separate parties. You must give separate consideration to each claim and each party in this case.

The claims of Andersen and Gorrell are separate and distinct. Each of them has separate claims against Federal related to Federal's compliance with its duty to defend them. It does not follow that if Federal breached its duty to defend one of the defendants that it breached its duty to defend the other defendant. You will have to decide whether Andersen and Gorrell proved that Federal breached its duty to defend on each claim of Andersen and Gorrell.

You also must give separate consideration to Federal's defense to Andersen's and Gorrell's claims. Federal's defenses to the claims of Andersen and Gorrell are separate and distinct. It does not follow that if Federal proved that one of the defendants was unresponsive and uncooperative that it also proved that the other defendant was unresponsive and uncooperative. You will have to decide whether Federal proved its defense on each claim of Andersen and Gorrell.

There were three separate submissions to Federal, each containing separate claims:

**May 16, 2002 Submission to Federal**

1. Complaint captioned Buchholz et al v. Arthur Andersen, LLP and the Amended Complaint in the same action re-captioned as Bryce v. Arthur Andersen, LLP

**September 25, 2002 Submission to Federal**

1. Bryce Arbitration Demand
2. 214 Retired Partner Demand Letters
3. Amended Demand for Arbitration captioned Samore v. Arthur Andersen, LLP and Larry Gorrell
4. Complaint captioned Waters et al. v. Arthur Andersen LLP

**March 28, 2003 Submission to Federal**

1. Demand for Arbitration captioned Moriarty v. Arthur Andersen, LLP
2. 3 additional Retired Partner Demand Letters
3. Demand for Arbitration captioned Connolly v. Arthur Andersen LLP
4. Demand for Arbitration captioned Small v. Arthur Andersen LLP
5. Second Amended Class Action Complaint captioned Viets et al. v. Deloitte & Touche, LLP et al.

**As to Andersen:**

All of the separate claims, as listed above, were asserted against Andersen. You must answer the following two questions for each of the separate claims, as listed above, which were asserted against Andersen:

*First*, whether Andersen has satisfied its burden of proving, by a preponderance of the evidence, that Federal breached its duty to defend.

*Second*, whether Federal has satisfied its burden of proving, by a preponderance of the evidence, *either* (1) that Andersen decided to knowingly forgo Federal's assistance with its defense *or* (2) that Andersen was so unresponsive and uncooperative to reasonable requests from Federal for information needed by Federal to discharge its duty to defend that Federal could fairly conclude that Andersen did not want Federal's assistance with its defense.

**As to Gorrell:**

Three of the separate claims, as listed above, were also asserted against Gorrell. These three claims are: 1) the Amended Demand for Arbitration captioned Samore v. Arthur Andersen, LLP; 2) the Demand for Arbitration captioned Small v. Arthur Andersen LLP; and 3) the Second Amended Class Action Complaint captioned Viets et al. v. Deloitte & Touche, LLP et al. You must answer the following two questions for each of these three separate claims which were asserted

against Gorrell:

*First*, whether Gorrell has satisfied his burden of proving, by a preponderance of the evidence, that Federal breached its duty to defend.

*Second*, whether Federal has satisfied its burden of proving, by a preponderance of the evidence, *either* (1) that Gorrell decided to knowingly forgo Federal's assistance in his defense *or* (2) that Gorrell was so unresponsive and uncooperative to reasonable requests from Federal for information needed by Federal to discharge its duty to defend that Federal could fairly conclude that Gorrell did not want Federal's assistance with his defense.

The insurer's duty to defend begins when the insurer receives actual notice of a claim against the policyholder. An insurer has actual notice when it receives notice from any source that is sufficient to permit the insurer to locate and defend the claim against the policyholder. An insurer with actual notice of a claim against its policyholder cannot assume the policyholder does not want the insurer to defend it.

Instead, an insurer that owes a duty to defend the policyholder must, within a reasonable time, assume the defense of the policyholder, or reimburse the policyholder for its legal fees, depending on what type of defense assistance the policyholder desires. In order to prevail on their claim against Federal, Andersen and Mr. Gorrell have the burden of proving by a preponderance of the evidence that Federal breached its duty to defend any or all of the retired partner claims.

If you find that the policyholders have proven that Federal breached its duty to defend as to either defendant, then you must determine whether Federal has proven its affirmative defense as to that defendant.

Federal alleges that Andersen and Mr. Gorrell relieved Federal of its duty to defend them against the retired partners' claims. To sustain this defense, Federal has the burden of proving either of two propositions by a preponderance of the evidence:

(1) that the policyholders decided to knowingly forgo Federal's assistance with their defense;

or

(2) that the policyholders were so unresponsive and uncooperative to reasonable requests from Federal for information needed by Federal to discharge its duty to defend that Federal could fairly conclude that the policyholders did not want Federal's assistance with their defense.

If you find that Federal has proven either of these propositions by a preponderance of the evidence as to either Defendant, then you must find for Federal as to that Defendant. If, on the other hand, you find that Federal has not proven by a preponderance of the evidence either of the propositions as to a Defendant, then you must find for that Defendant.

An “agent” is a person who, by agreement with another called the principal, represents the principal in dealings with third persons or transacts business, manages some affair or does some service for the principal, with or without compensation. The agreement may be oral or written, express or implied. Conduct, not title, determines this matter. The acts of an agent are to be considered the acts of the principal.

Andersen claims that Marsh was acting as Andersen’s agent and Federal’s agent. Federal denies that Marsh was acting as its agent. Federal claims that Marsh was acting exclusively as Andersen’s agent with respect to communication between Federal and Andersen.

In order to determine whether an insurance broker (Marsh) was acting on behalf of its insured (Andersen) or the insurer (Federal), you should consider the following four factors: (1) who called the broker into action; (2) who controls the broker’s actions; (3) who pays the broker; and (4) whose interests the broker represents. Additionally, payment of a commission alone is not enough to establish the existence of an agency relationship.

Upon retiring to the jury room, select one of your number as your foreperson. The foreperson will preside over your deliberations and will be your representative here in Court. Forms of verdict have been prepared for you. Take these forms to the jury room, and when you have reached unanimous agreement on the verdict, your foreperson will fill in and date the appropriate form, and each of you will sign it.

You are free to deliberate in any way you decide or select whomever you like as a foreperson. However, I am going to provide some general suggestions on the process to help you get started. When thinking about who should be foreperson, you may want to consider the role that the foreperson usually plays. The foreperson serving as the chairperson during the deliberations should ensure a complete discussion by all jurors who desire to speak before any vote. Each juror should have an opportunity to be heard on every issue and should be encouraged to participate. The foreperson should help facilitate the discussion and make sure everyone has a chance to say what they want to say.

In order to help you determine the facts, you may want to use my instructions to the jury as a guide to determine whether there is sufficient evidence to prove all necessary legal elements for each claim or defense. I also suggest that any public votes on a verdict be delayed until everyone can have a chance to say what they think without worrying what others on the panel might think of their opinion. I also suggest that separate tasks (such as note taking, time keeping, and recording votes), be assigned to more than one person to help break up the workload during your deliberations. I encourage you at all times to keep an open mind if you ever disagree or come to different conclusions on facts from any of your fellow jurors. Thinking about the other juror's point of view may help you understand their position better or give you a better way to explain why you think your position is correct.

I do not anticipate that you will need to communicate with me. If you do, however, the only proper way is in writing, signed by the foreperson, or if he or she is unwilling to do so, by some other juror, and given to the court security officer. If any communication is made, it should not indicate your numerical division.

You may, if you find it necessary during your deliberations, submit written questions to me about the case, but you should understand that you, as the jury, must decide the facts. You should make a determined effort to answer any question by referring to the jury instructions before you submit a question to me. If you do submit a question, I must show it to the lawyers for each side and consult with them before responding. I will either answer your question, or explain why I cannot answer your question.

The verdict must represent the considered judgment of each juror. Your verdict must be unanimous.

You should make every reasonable effort to reach a verdict. In doing so, you should consult with one another, express your own views, and listen to the views of your fellow jurors. Discuss your differences with an open mind. Do not hesitate to re-examine your own views and change your opinion if you come to believe it is wrong. But you should not surrender your honest beliefs about the weight or effect of evidence solely because of the opinions of your fellow jurors or solely for the purpose of returning an unanimous verdict.

All of you should give fair consideration to all of the evidence and deliberate with the goal of reaching a verdict consistent with the individual judgment of each juror.

You are impartial judges of the fact. Your sole interest is to determine the truth from the evidence in the case.