

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. The parties to this case and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law that I give you, and reach a just verdict regardless of the consequences.

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. It is not my function to determine the facts in this case. That function belongs to you.

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.

As I stated, it is your duty to determine the facts. In determining the facts, you must consider only the evidence that I have admitted in the case. The evidence consists of the testimony of the witnesses, testimony that was read to you from depositions, and the exhibits admitted in evidence.

During the trial, certain testimony was presented to you by the reading of a deposition. Deposition testimony is entitled to the same consideration as testimony that was given in court. You are to judge its truthfulness and accuracy, and you are to weigh and consider it, insofar as possible, in the same way as if the witness had been present and testified from the witness stand.

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.

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.

Some of you may have heard the phrase "direct evidence" 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. You are to consider both direct and circumstantial evidence. The law allows you to give equal weight to both types of evidence, but it is up to you to decide how much weight to give to any evidence in the case.

You are to consider all of the evidence in determining your verdict. However, that does not mean that you must accept all of the evidence as true or accurate.

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.

In determining the facts in 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. You will also have to decide what weight, if any, to give to the testimony of each witness.

In considering the testimony of any witness, you may take into account:

- the opportunity and ability of the witness to see or hear or know the things that the witness testified about;
- the witness's memory;
- the witness's intelligence;
- any interest the witness may have in the outcome of the case, and any bias or prejudice the witness may have;
- the witness's manner while testifying;
- any prior statements the witness may have made about the matter in question;
- the reasonableness of the witness's testimony in light of all the evidence in the case; and
- any other factors that bear on believability.

The weight of the evidence as to a particular fact does not necessarily depend on the number of witnesses who testify. You may find the testimony of a smaller number of witnesses to be more persuasive than that of a greater number.

It is proper for an attorney to interview a witness for the purpose of learning what testimony the witness will give. The fact that the witness has talked to an attorney does not, by itself, reflect negatively on the truth of the witness's testimony.

You have heard witnesses 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.

When I say that a party has the burden of proof on any proposition, or when I use the expression “if you find,” or “if you decide,” I mean that you must be persuaded, considering all the evidence in the case, that the proposition on which that party has the burden of proof is more likely true than not.

In deciding whether any fact has been proven by a preponderance of the evidence, you may 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 "contract", I mean the insurance policy entered into between Industrial Enclosure Corporation, the plaintiff, and Northern Insurance Company of New York, the defendant. I will refer to the plaintiff as "IEC" and to the defendant as "Northern Insurance."

The terms of the contract are as follows:

In consideration for the premium paid by IEC to Northern Insurance, Northern Insurance promised to pay IEC for direct physical loss and damage to IEC's building, the business equipment located therein, and compensation for lost business income, caused by water that backs up from a sewer or drain.

The insurance policy also provides that Northern Insurance will not pay for loss or damage caused directly or indirectly by flood, surface water, or overflow of any body of water, regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

IEC claims that it is entitled to recover from Northern Insurance for the loss and damage to its building and business equipment, as well as compensation for lost business income, on the grounds that its plant and the business equipment located therein was damaged and/or destroyed by water that backed up from sewers and drains. Northern Insurance denies this claim.

Northern Insurance claims that the loss and damage to IEC's building and business equipment, and any lost business income, was caused by flood, surface water or overflow of a body of water, or that flood, surface water, or overflow of a body of water contributed concurrently or in some sequence to the loss. IEC denies this claim.

IEC has the burden of proving each of the following propositions:

First, that IEC performed all obligations that were required of it under the contract. (This proposition is not disputed by Northern Insurance.)

Second, that IEC's building and business equipment sustained loss and damage caused by water that backed up through sewers and drains.

Third, that Northern Insurance failed to pay IEC for the loss and damage that it sustained.

In this case, Northern Insurance has asserted the affirmative defense that IEC's loss and damage was caused by flood, surface water, or overflow of a body of water, or that such cause or event contributed concurrently or in some sequence to IEC's loss.

Northern Insurance has the burden of proving this affirmative defense.

If you find from your consideration of all the evidence that each of the propositions on which IEC has the burden of proof has been proved, and that Northern Insurance's affirmative defense has not been proved, then your verdict should be for IEC.

If, on the other hand, you find from your consideration of all the evidence that any of the propositions on which IEC has the burden of proof has not be proved, or that Northern Insurance's affirmative defense has been proved, then your verdict should be for Northern Insurance.

When I use the term “flood,” I mean water that escapes from a water course in large volumes and floods over adjoining property in no regular channel.

When I use the term “surface water,” I mean water from falling rain, lying or flowing naturally on the earth’s surface, not gathering into or forming any more definite body of water, and following no defined course or channel.

If you decide for IEC, you must fix the amount of money damages to which IEC is entitled under the terms of the insurance policy.

If you decide for Northern Insurance, you will have no occasion to consider the question of damages.

You should not interpret the fact that I am giving instructions about damages as an indication in any way that I believe that IEC should, or should not, win this case. That is your function, and yours alone. I am instructing you on damages so that you will have guidance in the event you decide that Northern Insurance is liable to IEC and that IEC is entitled to recover money from Northern Insurance.

In calculating IEC's damage, you should determine that sum of money that will put IEC in as good a position as it would have been in if Northern Insurance had performed its obligations under the contract.

The elements of damages claimed by IEC are the following:

- 1) Purchased goods and services to replace, repair and restore tools, inventory, raw materials, finished goods, damaged or destroyed manufacturing equipment and machinery, tools, office furnishings and supplies, computer equipment, and building repairs;
- 2) The replacement value of damaged office furnishings and equipment that were not replaced;
- 3) The replacement value of damaged computers and computer hardware that were not replaced;
- 4) The replacement value of shop furnishings that were not replaced;
- 5) The replacement value (based on estimate of 80% loss) of raw material inventory that was not replaced;
- 6) The replacement value of miscellaneous shop equipment and materials;
- 7) The cost of labor and material for repair or replacement of building components and shop equipment;
- 8) The cost of employee labor for clean-up and repairs that were completed;
- 9) The cost of outside labor;
- 10) Salaries that IEC claims are owed to employees for 10% reduction in earnings;
- 11) The cost of officers' labor for clean-up and repairs beyond their normal duties;
- 12) The estimated labor cost for clean-up yet to be completed; and
- 13) Lost business income, sometimes referred to as "business interruption."

Whether any of these elements of damages have been proved is for you to determine.

The insurance policy in this case provided that in the event of a loss or damage to IEC's building and business personal property, Northern Insurance would pay IEC the "replacement cost" of the property, but only if IEC actually repaired or replaced the lost or damaged property as soon as reasonably possible after the loss or damage. "Replacement cost" means the cost of repairing or replacing the building and business personal property.

The insurance policy provided that if the property was not repaired or replaced as soon as reasonably possible after the loss or damage, Northern Insurance would pay IEC the "actual cash value" of the property. "Actual cash value" means the cost of repairing or replacing the building and business personal property, minus depreciation. "Depreciation" means the decline in value of property caused by age.

If the result of Northern Insurance's denial of IEC's claim under the insurance policy was to make it impossible for IEC to repair or replace its property, then IEC may recover the "replacement value" of lost or damaged property even if it did not repair or replace the property.

The insurance policy in this case also provided that in the event of a loss covered by the policy, Northern Insurance would pay IEC for “lost business income” that it sustained due to the necessary suspension of business operations during the “period of restoration.”

“Lost business income” (or “business interruption”) is defined as the net profit before income taxes that would have been earned, and any continuing normal operating expenses incurred, including payroll, as well as any necessary expenses incurred by IEC that it would not have incurred if there had been no loss or damage.

The “period of restoration” begins 72 hours after the time of the loss or damage and ends on the date on which the property should be repaired, rebuilt, or replaced with reasonable speed and similar quality.

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.

If you find for the plaintiff Industrial Enclosure Corporation and against the defendant Northern Insurance Company of New York, then you should use Verdict Form A.

If you find for the defendant Northern Insurance Company of New York and against the plaintiff Industrial Enclosure Corporation, then you should use Verdict Form B.

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.

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.

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 a unanimous verdict.

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

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

VERDICT FORM A

We, the jury, find for the plaintiff, Industrial Enclosure Corporation, and against the defendant, Northern Insurance Company of New York.

We assess damages in the sum of \$ _____, itemized as follows:

- 1) Purchased goods and services to replace, repair and restore tools, inventory, raw materials, finished goods, damaged or destroyed manufacturing equipment and machinery, tools, office furnishings and supplies, computer equipment, building repairs: \$ _____
- 2) Replacement value of damaged office furnishings and equipment (exclusive of computers) not replaced: \$ _____
- 3) Replacement value of damaged computers and computer hardware not replaced: \$ _____
- 4) Replacement value of shop furnishings not replaced: \$ _____
- 5) Replacement value of miscellaneous shop equipment, and materials: \$ _____
- 6) Estimate of labor and material for repair or replacement of building components and shop equipment: \$ _____
- 7) Replacement value (based on estimate of 80% loss) of raw material inventory not replaced: \$ _____
- 8) Employees' labor for clean-up and repairs completed: \$ _____
- 9) Salaries owed to employees for 10% reduction in earnings: \$ _____
- 10) Cost of outside labor: \$ _____
- 11) Officers' labor beyond normal duties for clean-up and repairs: \$ _____
- 12) Estimate of labor cost for clean-up to be completed: \$ _____
- 13) Loss business income ("business interruption" loss): \$ _____

Foreperson

Dated: _____

VERDICT FORM B

We, the jury, find for the defendant, Northern Insurance Company of New York,
and against the plaintiff, Industrial Enclosure Corporation.

Foreperson

Dated: _____