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The Florida Standard Jury Instructions Committee Alters Florida Insurer Bad Faith Law with Proposed Jury Instructions

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Dennis Wall is a sole practitioner with a unique practice. For thirty-two (32) years, his expertise and knowledge in Insurance Coverage and Bad Faith have led attorneys and companies across the United States to retain his services as an Expert Witness, Counsel and Consultant concerning Insurance Questions.

Elected to the American Law Institute in 2009, he has been selected by his peers as a Florida Super Lawyer in "Insurance Coverage" for each of the last four years in a row, before which time he was previously elected each year to the "Florida Legal Elite" and before that to the "Best of the Bar".

Dennis Wall is the author of the leading book on Bad Faith, "Litigation and Prevention of Insurer Bad Faith," Second Edition (Shepard's/McGraw-Hill Companies Second Edition; 2010 Supplement in process West Publishing Company, Third Edition to be published in 2011 by Thomson/West). This Book is the product of three decades of research and analysis. Updated annually, to date it reviews 3,700 cases, statutes, regulations, and other legal authorities in 1,339 printed pages and 14 Chapters addressing 365 Sections of Insurance issues, plus 11 Appendices, in Print and Online.

Dennis Wall is also the Co-Author of "CAT Claims: Insurance Coverage for Natural and Man-Made Disasters" (2008 Thomson/West, 2009 Supplement). A frequent presenter on Insurance topics, Mr. Wall has been authorized by the Florida Office of Insurance Regulation to make Adjuster Licensing Ethics Credits available by the Florida Office of Insurance Regulation (Florida Department of Insurance).

Mr. Wall is the author of two acclaimed web logs on Insurance: "Insurance Claims and Issues Web Log," which is ranked Number One by the American Bar Association, and "Insurance Claims and Bad Faith Web Log," both of which can be linked through the American Bar Association web site and dennisjwall.com.

The Florida Bar Standard Jury Instructions Committee has recommended a complete new wardrobe for the Standard Instructions in Florida Civil Cases. On March 4, 2010 the Florida Supreme Court authorized the publication of these new clothes, and some new proposed "Standard Instructions," in an enormously long opinion which you can download here: Download In re Standard Jury Instructions in Civil Cases (Fla. Case No. SC09-284, Opinion Filed March 4, 2010). This opinion and its appendix of proposed new Standard Jury Instructions is also published as In re Standard Jury Instructions in Civil Cases, 2010 WL 727521 (Fla. March 4, 2010)(*subscription required to access Westlaw).*

The Standard Instructions are all renumbered and regrouped. "Insurer's Bad Faith" is now addressed in several proposed Standard Jury Instructions, 404.1 through 404.13, inclusive. Several of the proposed changes do not appear to be substantive changes concerning Insurer Bad Faith Claims, but some may have the effect of changing the outcome of Jury Trials in Bad Faith Cases.

Newly proposed SJI 404.2 provides that "(Claimant)[Defendant] must prove [his][her][their] claim(s) [and defenses] by the greater weight of the evidence." Whatever the substantive accuracy or inaccuracy of this assertion, it is a *change* from the current opening Instruction, MI 3.1 b, which does not advise the Jury of who has what burden of proof, but instead instructs the Jury on what they should determine from all that they have seen and heard during the Trial: "If the greater weight of the evidence does not support the claim of (claimant), your verdict should be for (defendant). However, if the greater weight of the evidence does support the claim of (claimant), your verdict should be for (claimant)."

The Jury in an Insurer Bad Faith Case is likely to be confused by this unnecessary change in language from SJI MI 3.1 b, to proposed SJI 404.2, above. It is not the *Jury's* job to determine whether one party or another has met her, his or its burden of proof. That is the *Judge's* job. Rather, the Jury's job is to review *all* the evidence, regardless of who introduced it, and

then determine on the full record whether or not the "greater weight of the evidence" supports the claim.

The proposed SJI 404.2 evidences an effort to be fair by eliminating that part of the current Instruction that the Jury's "verdict should be for (claimant)" if the Jury determines that the manifest weight of the evidence supports the claim in the given case. There are Defenses based on alleged *Facts* to consider too, which the proposed change would include and the current SJI MI 3.1 b does not address. Inherently, SJI MI 3.1 b is premised on an idea that all Defenses that may be available in Insurer Bad Faith Cases must always be based on *Law* rather than on *Fact*, so this is a good change to recommend to that extent, but not in the proposed language.

Proposed SJI 404.5 is totally new. It would address "only" Cases involving "Medical Malpractice Insurer's Bad Faith Failure to Settle," according to the new Committee Comment. This is ostensibly premised on a Florida Statute, Section 766.1185 (2009). This Statute purports to apply to "all actions for bad faith against a medical malpractice insurer relating to professional liability insurance coverage for medical negligence". To begin with, the continuing validity of this Statute is highly questionable on Equal Protection grounds advanced by various parties. *S*ee Dennis J. Wall, "Litigation and Prevention of Insurer Bad Faith" § 3:2 (2009 Supplement West Publishing Company).

Moreover, proposed SJI 404.5 is not complete. *Proposed SJI 404.5 totally ignores each and all of the provisions of Section 766.1185 which the Legislature placed ahead of the limited language selected for the proposed Instruction:*

> (1)(a) An insurer shall not be held in bad faith for failure to pay its policy limits if it tenders its policy limits and meets other reasonable conditions of settlement by the earlier of either:
>
> 1. The 210th day after service of the complaint in the medical negligence action upon the insured. The time period specified in this subparagraph shall be extended by an additional 60 days if the court in the bad faith action finds that, at any time during such period and after the 150th day after service of the complaint, the claimant provided new information previously unavailable to the insurer relating to the identity or testimony of any material witnesses or the identity of any additional claimants or defendants, if such disclosure materially alters the risk to the insured of an excess judgment; or
>
> 2. The 60th day after the conclusion of all of the following:
>
> a. Deposition of all claimants named in the complaint or amended complaint.
>
> b. Deposition of all defendants named in the complaint or amended complaint, including, in the case of a corporate defendant, deposition of a designated representative.
>
> c. Deposition of all of the claimants' expert witnesses.
>
> d. The initial disclosure of witnesses and production of documents.
>
> e. Mediation as provided in s. 766.108.
>
> (b) Either party may request that the court enter an order finding that the other party has unnecessarily or inappropriately delayed any of the events specified in subparagraph (a)2. If the court finds that the claimant was responsible for such unnecessary or inappropriate delay, subparagraph (a)1. shall not apply to the insurer's tendering of policy limits. If the court finds that the defendant or insurer was responsible for such unnecessary or inappropriate delay, subparagraph (a)2. shall not apply to the insurer's tendering of policy limits.
>
> (c) If any party to an action alleging medical negligence amends its witness list after service of the complaint in such action, that party shall provide a copy of the amended witness list to the insurer of the defendant health care provider.
>
> (d) The fact that the insurer did not tender policy limits during the time periods specified in this paragraph is not presumptive evidence

that the insurer acted in bad faith.

Fla. Stat. § 766.1185(1)(a)-(d) (2009). The Statute expressly provides in Subsection (2) that certain factors—which appear in somewhat altered form in the newly proposed Instruction 404.5—apply "[w]hen subsection (1) does not apply". Fla. Stat. § 766.1185(2) (2009). Since the Legislature expressly intended for the events it enumerated in *subsection (1) to be determined first, before any of the events which the Legislature thereafter enumerated in subsection (2) are determined,* it is certainly incongruous if not misleading to blow past the subsection (1) events entirely as if they did not exist and as if they are not worth mentioning even in passing, and go directly to (2).

One last change remains for discussion this day. Proposed SJI 404.9 breaks out the language of current SJI MI 3.1 c, which is simply that in cases without claims for mental distress, the Jury should be instructed: "If your verdict is for (claimant), the court will award damages in an amount allowable under Florida law." Proposed SJI 404.9 would add a new title to hang down over this language like a banner, that it is the "Concluding Instruction When Court to Award Damages". Maybe, maybe not. But the change is not necessary and the consequences of the change are not known, and may not be intended.

As it has done in the past when authorizing publication of the Jury Instruction Committee's recommendations, the Florida Supreme Court has carefully also stated that "we express no opinion on their correctness and remind all interested parties that this authorization forecloses neither requesting additional or alternative instructions nor contesting the legal correctness of the instructions." In re Standard Jury Instructions in Civil Cases, 2010 WL 727521 *5 (Fla. March 4, 2010).

Moreover, even then, "[t]he instructions as set forth in the appendix, fully engrossed, shall be effective when this opinion becomes final." The opinion was issued on March 4, 2010. In re Standard Jury Instructions in Civil Cases, 2010 WL 727521 *5 (Fla. March 4, 2010).