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UNITED STATES DISTRICT COURT  
DISTRICT OF VERMONT

ACADIA INSURANCE COMPANY :  
 :  
 v. : Civil No. 1:97CV434  
 :  
 HIGH VIEW CHURCH FARM, INC. :  
 d/b/a JOLLY FARMER PRODUCTS :  
 \_\_\_\_\_ :

CHARGE TO THE JURY

GENERAL INSTRUCTIONS

General Introduction -- Province of the Court and Jury

MEMBERS OF THE JURY:

Now that you have heard the evidence and the arguments, it becomes my duty to give you the instructions of the Court as to the law applicable to this case.

In a moment, I will explain to you the assortment of claims and counterclaims which have been raised by the parties and which require your consideration. By way of introduction, however, let me just observe that, at its most basic level, resolution of this matter requires you to consider whether the insurance contracts between the parties provide coverage in this case and whether the parties have met their obligations to treat each other fairly and act in good faith as required by law.

It is your duty as jurors to follow the law as I shall state it to you and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but you must consider

the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me.

Counsel have quite properly referred to some of the governing rules of law in their arguments. If, however, any difference appears to you between the law as stated by plaintiff or defense counsel and that stated by the Court in these instructions, you are to be governed by the Court's instructions.

Nothing I say in these instructions is to be taken as an indication that I have any opinion about the facts of the case, or what that opinion is. It is not my function to determine the facts, but rather yours.

You must perform your duties as jurors without bias or prejudice as to any party. The law does not permit you to be governed by sympathy, prejudice or public opinion. All parties expect that you will carefully and impartially consider all of the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

Corporations as Parties

The parties in this case are corporations. A corporation can only act through its officers, employees and agents, and it is liable for the acts and omissions of an employee who is acting within the scope of his or her employment. For the purposes of your deliberations, you should consider the act or omission of any employee of a corporate party to be the act or omission of the corporation itself.

Evidence in the Case

Statements and arguments of counsel are not evidence in the case. When, however, both sides stipulate or agree as to the existence of a fact, the jury must, unless otherwise instructed, accept the stipulation and regard that fact as proved.

Unless you are otherwise instructed, the evidence in the case always consists of the sworn testimony of the witnesses, regardless of who may have called them; and all exhibits received in evidence, regardless of who may have produced them; and all facts which may have been admitted or stipulated.

Any evidence as to which an objection was sustained by the Court, and any evidence ordered stricken by the Court, must be entirely disregarded.

Questions Not Evidence

If plaintiff's counsel or defense counsel has asked a witness a question which contains an assertion of fact, you may not consider the assertion of fact in the question as evidence of that fact. These assertions of fact are not evidence.

Evidence -- Direct, Indirect, or Circumstantial

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence -- such as the testimony of an eyewitness. The other is indirect or circumstantial evidence -- the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

As a general rule, the law makes no distinction between direct or circumstantial evidence, but it simply requires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

### Inferences Defined

You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to the statements of the witnesses. In other words, you are not limited to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been proved, such reasonable inferences as seem justified in the light of your experience.

Inferences are deductions or conclusions which reason and common sense lead the jury to draw from facts which have been established by the evidence in the case.

### Opinion Evidence -- Expert Witness

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call "expert witnesses." Witnesses who, by education and experience, have become expert in some art, science, profession, or calling, may state their opinions as to relevant and material matters in which they profess to be expert, and may also state their reasons for the opinion.

Expert testimony is presented to you because someone is experienced in the field and can assist you in understanding the evidence or in reaching an independent decision on the evidence. You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely.



Credibility of Witnesses -- Discrepancies in Testimony

You, as jurors, are the sole judges of the credibility of the witnesses, including expert witnesses, and the weight their testimony deserves. You may be guided by the appearance and conduct of the witness, or by the manner in which the witness testifies, or by the character of the testimony given, or by evidence to the contrary of the testimony given.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor or manner while on the stand. Consider the witness' ability to observe the matters as to which the witness has testified, and whether the witness impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case; any bias or prejudice; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more

persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such weight, if any, as you may think it deserves.

You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying to the existence or non-existence of any fact. You may find that the testimony of one witness, or of a small number of witnesses, as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

### Credibility of Witnesses -- Inconsistent Statements

The testimony of a witness may be discredited, or as we sometimes say, "impeached," by showing that he or she previously made statements which are different than or inconsistent with his or her testimony here in court. The earlier inconsistent or contradictory statements are admissible only to discredit or impeach the credibility of the witness and not to establish the truth of these earlier statements made somewhere other than here during this trial, unless the witness has adopted, admitted or ratified the prior statement during the witness' testimony in this trial. It is the province of the jury to determine the credibility, if any, to be given the testimony of a witness who has made prior inconsistent or contradictory statements.

If a person is shown to have knowingly testified falsely concerning any important or material matter, you obviously have a right to distrust the testimony of such an individual concerning other matters. You may reject all of the testimony of that witness or give it such weight or credibility as you think it deserves.

Verdict -- Unanimous -- Duty to Deliberate

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of the other jurors, or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are judges -- judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

INSTRUCTIONS OF LAW

It is now my duty to give you instructions concerning the law that applies to this case. It is your duty as jurors to follow the law as stated in these instructions. You must then apply these rules of law to the facts you find from the evidence.

It is the sole province of the jury to determine the facts in this case. By these instructions, I do not intend to indicate in any way how you should decide any question of fact.

### Burden of Proof and Preponderance of the Evidence

The burden is on the plaintiff in a civil action, such as this, to prove every essential element of its claims by a preponderance of the evidence. If the proof should fail to establish any essential element of plaintiff's claims by a preponderance of the evidence in the case, the jury should find for the defendant as to that claim.

To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true. This rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

Stated another way, to establish a fact by a preponderance of the evidence means to prove that the fact is more likely true than not true. A preponderance of the evidence means the greater weight of the evidence. It refers to the quality and persuasiveness of the evidence, not to the number of witnesses or documents. In determining whether a claim or a fact in issue has been proven by a preponderance of the

evidence, you may consider the relevant testimony of all witnesses, regardless of who may have called them, and all the relevant exhibits received in evidence, regardless of who may have produced them.

The one exception to this general rule is Acadia Insurance Company's fraud claim, which must be proved by clear and convincing evidence. "Clear and convincing evidence" is a more exacting standard than proof by a preponderance of the evidence, where you need believe only that a party's claim is more likely true than not true. On the other hand, "clear and convincing" proof is not as high a standard as the burden of proof applied in criminal cases, which is proof beyond a reasonable doubt.

Clear and convincing proof leaves no substantial doubt in your mind. It is proof that establishes in your mind, not only the proposition at issue is probable, but also that it is highly probable. It is enough if the party with the burden of proof establishes his claim beyond any "substantial doubt;" it does not have to dispel every "reasonable doubt."

Acadia's Claims

Acadia Insurance Company (hereinafter "Acadia") essentially makes four claims against High View Church Farm, Inc. d/b/a Jolly Farmer Products (hereinafter "Jolly Farmer"):

- (1) that the harm at issue was not an accident, and therefore there is no coverage under the insurance policy at issue;
- (2) that Jolly Farmer breached the contractual covenant of good faith and fair dealing;
- (3) that Jolly Farmer committed fraud;
- and (4) that by its own actions, Jolly Farmer is equitably estopped from claiming the benefits of insurance coverage.



"Accident"

Under the insurance policies at issue, coverage is only available for damages caused by an "accident." For you to resolve this claim, you must decide whether the facts as you find them constitute an "accident." Acadia has the burden of proving the claims asserted against Jolly Farmer were not the result of an "accident" by a preponderance of the evidence.

In making this determination, you should note that an insurance policy must be construed according to its terms and the intent of the parties as expressed in the policy language. Disputed terms should be read according to their plain, ordinary and popular meaning.

Using these principles, the term "accident" is defined as an unexpected happening. The "unexpected happening" is the harm which occurs, not the act which causes the harm. Thus, if harm was expected or intended by Jolly Farmer, the fact that Jolly Farmer or its officers may not have known the extent of the harm that would result is irrelevant. In other words, an intentional act may constitute an "accident," if the harm which results from that act was not expected or intended by the insured.

### Good Faith and Fair Dealing

Acadia also claims Jolly Farmer violated the covenant of good faith and fair dealing which the law implies in every contract. To prevail, Acadia must prove its claim by a preponderance of the evidence.

Under Vermont law, the insurer and the insured alike owe each other the duty of utmost good faith in their dealings with each other, and in exercising the privileges and discharging the duties specified in the policy contract. In this relationship of trust, the insurance carrier and its insured are required to rise to a higher standard than that which exists in ordinary, day-to-day business relationships. Full candor and complete honesty are required. The failure to act with full candor and complete honesty may result in a breach of the contract of insurance.

## Fraud

Acadia claims Jolly Farmer committed fraud. In this context, "fraud" is an intentional omission of material information which is done with an intent to deceive, and which is relied on by the other party to its detriment.

To prove its claim of fraud, Acadia must persuade you by clear and convincing evidence of each of the following essential elements:

1. that Jolly Farmer misrepresented or failed to disclose an existing material fact to affect the essence of its transaction with Acadia;

2. that Jolly Farmer did so intentionally with the goal of wrongfully inducing Acadia to provide a defense and coverage that Jolly Farmer was not entitled to receive;

3. that the misrepresentation was false when made and that Jolly Farmer knew it was false at the time it made the misrepresentation;

4. that the correct information was not available to Acadia; and

5. that Acadia justifiably relied on the misrepresentation to its detriment.

If Acadia has proved each of the elements by clear and convincing evidence, then you should find that Jolly Farmer defrauded Acadia. If, however, Acadia has failed to prove any

one of these elements, then you should enter a verdict on this claim in favor of Jolly Farmer.

You should keep in mind that, because of the element of intent, positive proof of fraudulent misrepresentation is difficult to uncover. Accordingly, you should consider all the circumstances you find relevant. Circumstances inconclusive in themselves if separately considered may, by their number and joint operation, be sufficient to constitute conclusive proof of fraudulent intent.

### Estoppel

"Estoppel" is a legal term. In more common terms, "estoppel" means that a party, by its own acts, is prevented from claiming a right to the detriment of another party who was entitled to rely on its conduct and has acted accordingly. Thus, if a party is "estopped," that individual is barred from denying or alleging a certain fact because of that individual's previous conduct. In other words, a party may not take an inconsistent position if permitting him to do so would cause a loss or injury to another.

Here, Acadia also claims that Jolly Farmer, by its conduct, is estopped from claiming the benefits of its insurance policy because of inconsistent positions relating to the policies at issue. A party to an insurance contract may lose rights under a contract by estoppel. The doctrine of estoppel is based on concerns of public policy and an interest in encouraging fair dealing, good faith and justice. The test to determine whether a party is estopped from a claim is simple: Whether, in all the circumstances of the case, conscience and duty of honest dealing should deny one the right to receive a benefit despite its prior representations or conduct.

To prevail on this claim, Acadia must prove by a preponderance of the evidence each of the following elements:

1. Jolly Farmer knew the facts;

2. Jolly Farmer intended Acadia to act upon its conduct or Acadia reasonably believed it had a right to act upon Jolly Farmer's conduct;

3. Acadia was ignorant of the true facts; and

4. Acadia relied on the conduct of Jolly Farmer to its detriment.

Jolly Farmer's Counterclaims

Jolly Farmer has the following counterclaims against Acadia: (1) that Acadia breached the contractual covenant of good faith and fair dealing; (2) that Acadia is equitably estopped from denying coverage or its duty to defend; (3) that Acadia acted in bad faith; (4) that Acadia breached its agreement to defend against claims covered under the policy; and (5) that Acadia breached its agreement to indemnify Jolly Farmer for losses covered under the policy.

Good Faith and Fair Dealing, Waiver and Estoppel

Jolly Farmer claims Acadia breached the covenant of good faith and fair dealing, waived, and is estopped from asserting any defenses to coverage under the contract. To prevail on these claims, Jolly Farmer must prove them by a preponderance of the evidence. In considering these claims, you should refer to the explanation I have already provided you when explaining Acadia's estoppel and good faith and fair dealing claims against Jolly Farmer.

These claims are related in that the same allegations of wrongdoing provide the basis for recovery. Therefore, I have asked you to consider them together.

Specifically, Jolly Farmer claims Acadia acted improperly in a variety of ways and is therefore estopped from denying coverage. First, Jolly Farmer alleges Acadia cannot deny coverage because it investigated, handled, negotiated or settled some of the claims, and investigated and defended the O'Neil lawsuit, without entering into an adequate "nonwaiver agreement." A "nonwaiver agreement" is an agreement whereby an insurer undertakes the defense of a claim on behalf of its insured or pays out an award, while simultaneously preserving the right to dispute issues with its insured relating to the insurance contract. When an insurer negotiates and settles a claim against its insured without expressly reserving the right



to pursue recovery or to raise defenses against its insured at a later time, then the insurer has waived the right to such recovery or to raise such defenses. If you find that Acadia, in fact, did not enter into an adequate nonwaiver agreement, then you may find for Jolly Farmer on that issue.

Jolly Farmer also claims that Acadia waived coverage defenses by failing to timely investigate and disclose all defenses to coverage it might decide to assert. The law requires an insurer to inform its insured of all its reasons to deny coverage when it had notice of enough information to believe that a coverage defense might exist. Here, Acadia asserts Jolly Farmer was not entitled to coverage because the injuries complained of by fish farmers were not an accident and because Jolly Farmer did not comply with its duties under the insurance contract. If you find Acadia timely and fully investigated and disclosed these defenses to Jolly Farmer, then you should find for Acadia on this claim. On the other hand, if you find Acadia waited too long to investigate and disclose these defenses, then you should find for Jolly Farmer on this claim.

### Bad Faith

Jolly Farmer also claims Acadia acted in bad faith by not adequately protecting its interests and by deliberately and intentionally disregarding its rights under the insurance policies at issue.

The legal principles governing a claim of insurer bad faith arise out of the insurance company's control of the handling and settlement of a claim brought against the insured. Under the policy provisions, the insured surrenders to the insurer the complete control and management of a lawsuit up to the limit of the policy coverage. Since the insurer has the power, through the control of the defense and settlement, to adversely affect the insured's interests, it must necessarily bear a legal responsibility for the proper exercise of that power.

Thus, when handling a claim and investigating and considering a settlement offer, the insurer must in good faith take into account the interests of the insured, and it will be held liable if it failed to do so or intentionally disregarded the financial interests of the insured in the hope of escaping its full responsibilities as imposed under the insurance policy.

### Acadia's Duty to Defend

The insurance policies at issue required Acadia to defend Jolly Farmer in any suit for which the policies might arguably provide coverage. Jolly Farmer claims Acadia breached its duty to defend.

Acadia's duty to defend is different from and broader than its duty to indemnify, which I will explain to you in a moment. An insurance company's duty to defend is determined by comparing the allegations in the underlying claim against the insured to the terms of coverage contained in the policy. An insurer has the duty to defend if any claim against the insured potentially comes within the policies' coverage. To escape its duty to defend, the burden is on Acadia to show that the claims against Jolly Farmer are entirely excluded from coverage.

Breach of Duty to Defend

If you find Acadia had a duty to defend Jolly Farmer, then you must determine whether Acadia breached that duty. It is Jolly Farmer's burden to prove a breach of duty by a preponderance of the evidence.

Jolly Farmer claims Acadia breached its duty to defend Jolly Farmer during November 1997, between the time when Attorney John Faignant moved to withdraw and the time Acadia hired Attorney John Brady to defend it. Jolly Farmer also claims Acadia breached its duty to defend by failing to provide Jolly Farmer with a satisfactory defense in good faith.

Breach of Agreement to Indemnify

The "duty to indemnify" refers to an insurer's obligation to pay a loss or damages covered by an insurance policy. To prevail on its claim that Acadia did not indemnify it when required, Jolly Farmer bears the burden of proving by a preponderance of the evidence that its loss is covered.

Here, the basis of Jolly Farmer's claim is that it was required to settle with O'Neil and Sweetwater before trial and without Acadia's help. Jolly Farmer claims those settlements were reasonable and covered by the insurance policies at issue; therefore, they are entitled to recover the costs it incurred as a result of those settlements from Acadia.

If you find for Jolly Farmer on the issue of coverage, then you must consider Acadia's defense that the O'Neil settlement was unreasonable and that the insurer should therefore not be required to indemnify. I instruct you as a matter of law that the Sweetwater settlement was reasonable. Whether a settlement was unreasonable depends on what a reasonable prudent person in the insured's position would have settled for on the merits of the claimant's case. Acadia bears the burden of proving by a preponderance of the evidence that the O'Neil settlement was unreasonable.

### Damages

The amount of damages either Acadia or Jolly Farmer shall recover, if any, is solely a matter for you to decide. The purpose of damages is to compensate the injured party fully and adequately for all injuries and losses caused by the other party's wrongful conduct. In other words, the purpose of awarding damages is to place the injured person in the position he or she occupied immediately before the injury occurred, as nearly as can be done with an award of money damages.

Before either Acadia or Jolly Farmer may collect damages, it must prove, by a preponderance of the evidence, that the other's conduct proximately caused its injuries. When this Court speaks of the proximate cause of an injury, it means that cause, which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury and without which the result would not have occurred.

You may include only the damages proven with reasonable certainty. You may not award speculative damages or damages based on sympathy.

In this case, should you find for Acadia on one or more of its causes of action, Acadia claims the following as damages: The amount of money Acadia expended in paying the claims of Matthew Danaher, Louis Warlick and Seventh Ray.

If, on the other hand, you find for Jolly Farmer on one or more of its counterclaims, Jolly Farmer claims the following as damages: the amount it paid to settle the O'Neil, Sweetwater Trout Farm and other claims, as well as costs reasonably incurred to protect its interest and limit its liability, including attorney's fees and other costs incurred in defending the O'Neil litigation and other claims to the extent not already reimbursed by Acadia.

Selection of Foreperson

I will select \_\_\_\_\_ to act as your foreperson. The foreperson will preside over your deliberations and will be your spokesperson here in court.

A form of special verdict has been prepared for your convenience. You will take this form to the jury room. I direct your attention to the form of the special verdict.

[Form of special verdict read.]

You will note that each of these interrogatories or questions call for a "Yes" or "No" answer. The answer to each question must be the unanimous answer of the jury. Your foreperson will write the unanimous answer of the jury in the space provided opposite each question, and will date and sign the special verdict, when completed.



Verdict Forms - Jury's Responsibility

It is proper to add the caution that nothing said in these instructions and nothing in any form of verdict prepared for your convenience is meant to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is your sole and exclusive duty and responsibility.

### Conclusion

To return a verdict, all jurors must agree to the verdict. In other words, your verdict must be unanimous.

Upon retiring to the jury room your foreperson will preside over your deliberations and be your spokesperson here in Court.

When you have reached a unanimous verdict, your foreperson should sign and date the verdict form.

If, during your deliberations, you should desire to communicate with the Court, please reduce your message or question to writing, signed by the foreperson, and pass the note to the Marshal. He will then bring the message to my attention. I will then respond as promptly as possible, either in writing or by having you return to the courtroom so that I may address your question orally. I caution you, with regard to any message or question you might send, that you should never specify where you are in your deliberations or your numerical division, if any, at the time.