UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

MASKA U.S., INC.	:	
	:	
v.	:	Civil No. 1:93CV309
	:	
UNITED STATES FIRE INSURANCE COMPANY, ZURICH INSURANCE COMPANY and RELIANCE INSURANCE COMPANY	:	

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 arguments, it becomes my duty to give you the instructions of the Court as to the law applicable to this case.

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 counsel and the law 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.

Multiple Defendants

The parties in this case are corporations. A corporation is entitled to the same fair trial at your hands as a private individual. All persons, including corporations, stand equal before the law and are to be dealt with as equals in a court of justice.

Although there are three defendants in this action, it does not follow from that fact alone that if one is liable, all are liable. Each defendant is entitled to a fair consideration of its own defenses, and is not to be prejudiced by the fact, should it become a fact, that you find against one of the defendants. Unless otherwise stated, all instructions given you govern the case as to each defendant.

Finally, when a corporation is involved, of course, it may act only through natural persons as its agents or employees. In general, any agent or employee of a corporation may bind the corporation by his acts and declarations made while acting within the scope of his authority delegated to him by the corporation, or within the scope of his duties as an employee of the corporation.

Evidence in the Case

Statements and arguments of counsel are not evidence in the case. When, however, the attorneys on 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 a lawyer has asked a witness a question which contains an assertion of fact, you may not consider the lawyer's assertion as evidence of that fact. The lawyer's statements 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 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 bald 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 suggest are probably true, based on the 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.

You should consider each expert opinion received in evidence in this case, and give it such weight as you may think it deserves. As with ordinary witnesses, you should determine each expert's credibility from his or her demeanor, candor, any bias, and possible interest in the outcome of the trial. 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 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 give you cause 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 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.

An act or omission is "knowingly" done if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

Verdict -- Unanimous -- Duty to Deliberate

The verdict must represent the considered judgment of each juror. 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 his or her claim by a preponderance of the evidence. If the proof should fail to establish any essential element of plaintiff's claim by a preponderance of the evidence in the case, the jury should find for the defendant as to that claim.

As to certain affirmative defenses which I will discuss later in these instructions, however, the burden of establishing the essential facts is on the defendant asserting the defense. If the proof should fail to establish any essential element of a defendant's affirmative defense by a preponderance of the evidence in the case, the jury should find for the plaintiff 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 fact, claim or affirmative defense 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.

Insurance Contracts

Plaintiff alleges one or more of the defendants breached its contract to insure it and that it has suffered damages. Regarding each alleged contract of insurance at issue, the plaintiff must prove each of the following essential elements by a preponderance of the evidence:

1. that an "occurrence," as defined by the policy you are considering, took place during the policy period;

2. that "property damage" caused by the occurrence took place during the policy period;

3. that the plaintiff had an obligation to pay third parties for property damage that occurred during the policy period.

Your first task is to consider the specific definition of "occurrence" in each of the policies at issue. Each definition may differ. Under each of the policies at issue, the defendant-insurer is liable only if an "occurrence" has taken place during the period that the policy was in effect. Generally, an "occurrence" under the policies is an accident, act, event, or happening, or a continuous or repeated exposure to conditions, which results in unintended or unexpected property damage.

You must next consider whether the defendant whose policy you are considering has in fact breached one or more of the policy's terms. An insurer breaches an insurance contract

when it does not comply with the terms of the contract as agreed to by the parties.

Next, plaintiff must prove by a preponderance of the evidence that it suffered damages as a proximate result of any defendant's breach.

Lastly, the plaintiff must prove the amount of its damages by a preponderance of the evidence.

If you find that Maska has proven each of these elements as they relate to a particular defendant and insurance policy, then you may find that the defendant is liable for breach of that particular insurance policy and assess damages. However, if you find that Maska has failed to prove any one of these elements as they relate to the particular defendant and insurance policy which you are considering, or if you find in favor of a defendant on one or more of the affirmative defenses which I will describe to you, then you should enter a verdict on behalf of the defendant as to that particular insurance policy.

Affirmative Defense

The defendants have raised as an affirmative defense to Maska's claims that the damage was expected or intended by Maska. Each defendant must prove this affirmative defense by a preponderance of the evidence to prevail.

Expected or Intended

There is no insurance coverage under the policies at issue if you find the occurrences were "expected or intended." If one or more of the defendants proves by a preponderance of the evidence that the environmental harm resulting from Maska's actions was expected or intended, then it is entitled to a judgment in its favor.

An "accident" is an "unexpected happening without intention or design." Thus, to determine whether Maska expected or intended the environmental harm at issue, you must determine whether Maska knew its actions would cause damage. In general, what makes injuries or damages "expected or intended" rather than accidental are the knowledge and intent of the insured. It is not enough that an insured was warned that damages might ensue from its actions or that, once warned, an insured decided to take a calculated risk and proceed as before. Recovery will be barred only if you find the defendants have proven by a preponderance of the evidence that Maska intended the environmental damage or if Maska knew that damage would flow directly from its intentional actions.

Zurich's Waiver of Defenses

Prior to trial, the Court determined that Zurich waived its defenses to Maska's claim with respect to Zurich Policy 8902654. That policy covered Maska from February 21, 1986 to April 1, 1988. Accordingly, you may not consider any of the aforementioned affirmative defenses with respect to that particular policy. As to policy 8902654, if you find Maska has proven by a preponderance of the evidence that an occurrence covered by the policy took place between February 21, 1986 and April 1, 1988 and caused property damage during that time period, then you must find in favor of Maska on that particular claim.

However, as to the second Zurich policy, policy 8905270, you must still consider whether Zurich has proven by a preponderance of the evidence the affirmative defense I have just explained to you.

Effect of Instruction as to Damages

The fact that I will instruct you as to the proper measure of damages should not be considered as intimating any view of mine as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given for your guidance, in the event you should find in favor of the plaintiff from a preponderance of the evidence in the case in accordance with the other instructions.

Damages

If you should find for the plaintiff and against one or more of the defendants, then you must consider the issue of damages.

The amount of damages the plaintiff shall recover, if any, is solely a matter for you to decide. The purpose of damages is to compensate a plaintiff fully and adequately for all injuries and losses which you find are covered under the insurance policies at issue.

The plaintiff must prove, by a preponderance of the evidence, the amount of damages to which it is entitled. You may include only the damages the plaintiff has proven by a preponderance of the evidence. You may not award speculative damages or damages based on sympathy.

In this case, you have been asked to determine two types of damages: "indemnity" costs and "defense" costs.

Indemnity costs are those reasonably incurred to remedy property damage. Such sums include the amount Maska has paid or is obligated to pay Copeland and the Dunnacks. They also include remediation and cleanup costs imposed by the State of Vermont upon Maska as a result of environmental contamination.

By contrast, defense costs are costs reasonably incurred to protect the insured's interest and limit its liability. Prior to trial, the Court decided as a matter of law that only defendants Zurich and U.S. Fire are obligated to

pay Maska's costs of defending itself in the Copeland litigation and the Dunnack claim. Recoverable defense costs include Maska's attorney's fees, expert witness fees, consultant fees and other expenses and costs Maska incurred in defending itself against these claims.

Finally, Maska seeks coverage related to investigation of the contamination at the site. It is for you to determine what proportion of these investigative costs, if any, are properly considered "indemnity costs" and what proportion, if any, are properly considered "defense costs." If you find that the investigative costs for which Maska seeks coverage were incurred to remediate and clean the pollution at issue, then they are "indemnity costs." On the other hand, if you find the investigative costs for which Maska seeks coverage were incurred in an effort to limit Maska's liability, then they are "defense costs."

Mitigation of Damages

Any person who claims damages as a result of the alleged wrongful act of another has a duty under the law to "mitigate" those damages--that is, to take advantage of any reasonable opportunity it may have had under the circumstances to reduce or minimize the loss or damage. If you find a defendant has proven that Maska failed to take steps reasonably available to it to reduce the amount of its damages, then you should reduce the amount of any damages recovered from that defendant by the amount Maska could reasonably have realized had it taken such steps in mitigation.

Reasonableness of Settlements

When an insurer declines coverage, an insured may settle rather than proceed to trial to determine its legal liability. To recover the amount of a settlement from the insurers, the insured need not establish actual liability to the party with whom it has settled so long as a potential liability on the facts known to the insured exists, culminating in a settlement in an amount reasonable in view of the size of possible recovery and the degree of probability of claimant's success against the insured.

Here, Maska decided to settle with Copeland instead of proceeding to trial. The defendants have asserted that the Copeland settlement amount was unreasonable. The defendants bear the burden of proving this settlement was unreasonable by a preponderance of the evidence. If you find on the facts known to Maska at the time of the settlement, Maska had potential liability to Copeland, and you find that the amount of the settlement was reasonable in light of the facts known to exist and the potential for recovery, then the plaintiff is entitled to the amount of that settlement as damages.

Damages Not Punitive

If you should find the plaintiff is entitled to a verdict, in fixing the amount of your award, you may not include in, or add to an otherwise just award, any sum for the purpose of punishing any defendant, or to serve as an example or warning for others.

In addition, if you award the plaintiff damages, your award should not include any amount for interest.

Election 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 calls 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 court security officer. 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.