

ST. PAUL FIRE AND MARINE
INSURANCE COMPANY

Plaintiffs,

v.

CLARK & COMPANY, INC.,

Defendant.

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IN THE DISTRICT COURT

DALLAS COUNTY

44TH JUDICIAL DISTRICT

ORIGINAL

CHARGE TO THE JURY

LADIES AND GENTLEMEN OF THE JURY:

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.
2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the court, that is, what you have seen and heard in this courtroom, together with the law as given you by the court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.
3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.
5. You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.
6. Unless otherwise instructed, you may answer a question upon the vote of ten or more jurors. If you answer more than one question upon the vote of ten or more jurors, the same group of at least ten of you must agree upon the answers to each of those questions.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

The presiding juror or any other who observes a violation of the court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

When words are used in this charge in a sense that varies from the meaning commonly understood, you are given a proper legal definition, which you are bound to accept in place of any other meaning.

Answer "Yes" or "No" to all questions unless otherwise instructed. A "Yes" answer must be based on a preponderance of the evidence *unless otherwise instructed*. If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No." The term "preponderance of the evidence" means the greater weight and degree of credible testimony or evidence admitted in this case. A preponderance of the evidence is not measured by the number of witnesses or by the number of documents admitted in evidence. For a fact to be proved by a preponderance of the evidence, you must find that the fact is more likely true than not true. Whenever a question requires an answer other than "Yes" or "No," your answer must be based on a preponderance of the evidence *unless otherwise instructed*.

A fact may be established by direct evidence or by circumstantial evidence or both. A fact is established by direct evidence when proved by documentary evidence or by witnesses who saw the act done or heard the words spoken. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.

A party's failure to comply is excused if the other party previously failed to comply with a material obligation of the same agreement.

A party's failure to comply is excused if compliance is waived by the other party. Waiver is an intentional surrender of a known right or intentional conduct inconsistent with claiming the right.

DEFINITIONS

1. St. Paul Fire & Marine Insurance Company is referred to herein as "St. Paul."
2. Clark & Company, Inc. is referred to herein as "Clark & Company."
3. The term "Reinsurance Agreement" as used herein refers to the 100% Quota Share Reinsurance Agreement effective April 1, 1999.
4. The term "General Agency Agreement" as used herein refers to the General Agency Agreement effective April 1, 1999.
5. "Negligence" means failure to use ordinary care, that is, failing to do that which a person of ordinary prudence would have done under the same or similar circumstances or doing that which a person of ordinary prudence would not have done under the same or similar circumstances.
6. "Ordinary care" when used with respect to a managing general agent, means that degree of care that would be used by a managing general agent of ordinary prudence under the same or similar circumstances.
7. "Proximate cause" means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using *ordinary care* would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

QUESTION NUMBER 1

Did St. Paul and Clark & Company agree that the reinsurance placement slips would control beginning January of 2001?

In deciding whether the parties reached an agreement, you may consider what they said and did in light of the surrounding circumstances, including any earlier course of dealing. You may not consider the parties' unexpressed thoughts or intentions.

A party's conduct includes the conduct of another who acts with the party's authority or apparent authority.

Authority for another to act for a party must arise from the party's agreement that the other act on behalf and for the benefit of the party. If a party so authorizes another to perform an act, that other party is also authorized to do whatever else is proper, usual, and necessary to perform the act expressly authorized.

Apparent authority exists if a party (1) knowingly permits another to hold himself out as having authority or, (2) through lack of ordinary care, bestows on another such indications of authority that lead a reasonably prudent person to rely on the apparent existence of authority to his detriment. Only the acts of the party sought to be charged with responsibility for the conduct of another may be considered in determining whether apparent authority exists.

A party's conduct includes conduct of others that the party has ratified. Ratification may be express or implied.

Implied ratification occurs if a party, though he may have been unaware of unauthorized conduct taken on his behalf at the time it occurred, retains the benefits of the transaction involving the unauthorized conduct after he acquired full knowledge of the unauthorized conduct. Implied ratification results in the ratification of the entire transaction.

Answer "Yes" or "No": Yes

QUESTION NUMBER 2

If your answer to Question Number 1 is "Yes," then answer the following question. Otherwise, do not answer the following question.

Did Clark & Company partially or completely perform under the agreement that the reinsurance placement slips would control beginning January of 2001.

Answer "Yes" or "No": Yes

QUESTION NUMBER 3

If your answer to Question Number 1 is "Yes," then answer the following question. Otherwise, do not answer the following question.

Is Clark & Company estopped from asserting that the reinsurance placement slips did not control beginning January of 2001?

Estoppel occurs when someone, or their agent, says or does something and another person reasonably relies on such statement or action to such an extent that it would be unfair to allow the first person to change his statement or action.

Estoppel also applies where it would be unconscionable to allow a person to maintain a position inconsistent with one in which he acquiesced, or of which he accepted a benefit.

Answer "Yes" or "No": Yes

QUESTION NUMBER 4

If your answer to Question Number 1 is "Yes," then answer the following question. Otherwise, do not answer the following question.

Did Clark & Company fail to comply with its agreement with St. Paul as governed by the reinsurance placement slips?

Answer "Yes" or "No": Yes

QUESTION NUMBER 5

If your answer to Question Number 4 is "Yes," then answer the following question. Otherwise, do not answer the following question.

What sum of money, if paid now in cash, would fairly and reasonably compensate St. Paul for its damages, if any, as a result of Clark & Company's failure to comply with its agreement with St. Paul as governed by the reinsurance placement slips?

Consider the following elements of damages, if any, and none other.

50% of the difference, if any, between the amount Clark & Company agreed with St. Paul to withdraw as commissions from the premium trust account pursuant to the reinsurance placement slips and the amount of commissions Clark & Company actually withdrew from the premium trust account.

Do not add any amount for interest on damages, if any.

Answer in dollars and cents for damages, if any:

Answer: \$ 353,131.00

QUESTION NUMBER 6

If your answer to Question Number 4 is "Yes," then answer the following question. Otherwise do not answer the following question.

By what date should St. Paul, in the exercise of reasonable diligence, have discovered Clark & Company's failure to comply?

Answer with a date in the blank below.

Answer: April 11, 2002

QUESTION NUMBER 7

Did St. Paul substantially rely to its detriment on Clark & Company's promise, if any, and was this reliance foreseeable by Clark & Company?

Answer "Yes" or "No": yes

QUESTION NUMBER 8

If your answer to Question Number 7 is "Yes," then answer the following question. Otherwise, do not answer the following question.

What sum of money, if paid now in cash, would fairly and reasonably compensate St. Paul for its damages, if any, as a result of its reliance on Clark & Company's promise?

Do not add any amount for interest on damages, if any.

Answer in dollars and cents for the following, if any:

Answer: \$504,455.00

QUESTION NUMBER 9

Did Clark & Company commit fraud against St. Paul?

Fraud occurs when—

- a. a party makes a material misrepresentation,
- b. the misrepresentation is made with knowledge of its falsity or made recklessly without any knowledge of the truth and as a positive assertion,
- c. the misrepresentation is made with the intention that it should be acted on by the other party, and
- d. the other party relies on the misrepresentation and thereby suffers injury.

“Misrepresentation” means:

- a. A false statement of fact or
- b. A promise of future performance made with an intent, at the time the promise was made, not to perform as promised

Fraud also occurs when—

- a. a party fails to disclose a material fact within the knowledge of that party,
- b. the party knows that the other party is ignorant of the fact and does not have an equal opportunity to discover the truth,
- c. the party intends to induce the other party to take some action by failing to disclose the fact, and
- d. the other party suffers injury as a result of acting without knowledge of the undisclosed fact.

Answer “Yes” or “No”: Yes

QUESTION NUMBER 10

If your answer to Question Number 9 is "Yes," then answer the following question. Otherwise, do not answer the following question.

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate St. Paul for its damages, if any, that resulted from Clark & Company's fraud?

Do not add any amount for interest on damages, if any.

Answer in dollars and cents for the following, if any:

Answer: \$857,586.00

QUESTION NUMBER 11

If your answer to Question Number 9 is "Yes," then answer the following question. Otherwise, do not answer the following question.

By what date should St. Paul, in the exercise of reasonable diligence, have discovered Clark & Company's fraud?

Answer with a date in the blank below.

Answer: ~~yes~~ ^{AAH} April 11, 2002

QUESTION NUMBER 12

If your answer to Question Number 4 or 7 is "No," then answer the following question. Otherwise, do not answer the following question.

Did the negligence of Clark & Company proximately cause injury to St. Paul?

Answer "Yes" or "No": _____

QUESTION NUMBER 13

If your answer to Question Number 12 is "Yes," then answer the following question. Otherwise do not answer the following question.

What sum of money, if paid now in cash, would fairly and reasonably compensate St. Paul for its damages, if any, that were proximately caused by Clark & Company's negligence?

Do not add any amount for interest on damages, if any.

Answer in dollars and cents for the following, if any:

Answer: _____

QUESTION NUMBER 14

If your answer to Question Number 12 is "Yes," then answer the following question. Otherwise do not answer the following question.

By what date should St. Paul, in the exercise of reasonable diligence, have discovered Clark & Company's negligence?

Answer with a date in the blank below.

Answer: _____

QUESTION NUMBER 15

Did St. Paul fail to comply with the Reinsurance Agreement?

Answer "Yes" or "No": NO

QUESTION NUMBER 16

If your answer to Question No. 15 is "Yes," then answer the following question. Otherwise, do not answer the following question.

Was St. Paul's failure to comply excused?

Answer "Yes" or "No": _____

QUESTION NUMBER 17

If your answer to Question No. 15 is "Yes," then answer the following question. Otherwise, do not answer the following question.

What sum of money, if paid now in cash, would fairly and reasonably compensate Clark & Company for its damages, if any, as a result of St. Paul's failure to comply with the Reinsurance Agreement?

Consider the following elements of damages, if any, and none other.

The difference, if any, in the value of Clark & Company before St. Paul's failure to comply and the value of Clark & Company after St. Paul's failure to comply that was a natural, probable, and foreseeable consequence of St. Paul's failure to comply.

Consider only those damages resulting from an injury contemplated by the parties at the time they entered into the agreement, if any, and none other.

Do not include in your answer any amount that you find Clark & Company could have avoided by the exercise of reasonable care.

Do not add any amount for interest on damages, if any.

Answer in dollars and cents for damages if any:

Answer: _____

QUESTION NUMBER 18

Does St. Paul hold money that in equity and good conscience belongs to Clark & Company?

Answer "Yes" or "No": NO

QUESTION NUMBER 19

If your answer to Question No. 18 is "Yes," then answer the following question.
Otherwise, do not answer the following question.

What sum of money does St. Paul hold that in equity and good conscience belongs to
Clark & Company?

Do not add any amount for interest on damages, if any.

Answer in dollars and cents for the following, if any:

Answer: ~~NAK~~ 8 _____

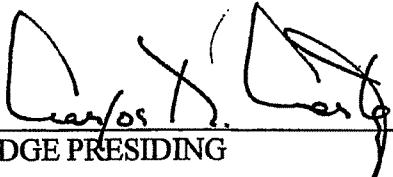
After you retire to the jury room, you will select your own presiding juror. The first thing the presiding juror will do is to have this complete charge read aloud and then you will deliberate upon your answers to the questions asked.

It is the duty of the presiding juror—

1. to preside during your deliberations,
2. to see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge,
3. to write out and hand to the bailiff any communications concerning the case that you desire to have delivered to the judge,
4. to vote on the questions,
5. to write your answers to the questions in the spaces provided, and
6. to certify to your verdict in the space provided for the presiding juror's signature or to obtain the signatures of all the jurors who agree with the verdict if your verdict is less than unanimous.

You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the jury room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the courthouse, at your home, or elsewhere, please inform the judge of this fact.

When you have answered all the questions you are required to answer under the instructions of the judge and your presiding juror has placed your answers in the spaces provided and signed the verdict as presiding juror or obtained the signatures, you will inform the bailiff at the door of the jury room that you have reached a verdict, and then you will return into court with your verdict.



JUDGE PRESIDING

CERTIFICATE

We, the jury, have answered the above and foregoing questions as herein indicated, and herewith return same into court as our verdict.

(To be signed by the presiding juror if the jury is unanimous.)

Ashley A. Hood
PRESIDING JUROR

Ashley A. Hood
Printed Name of Presiding Juror

(To be signed by those rendering the verdict if the jury is not unanimous.)

Jurors' Signatures

Jurors' Printed Names
