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Using the New Pattern Jury Charge Insurance Contract Questions

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Mark Kincaid is a partner in George Brothers Kincaid & Horton, L.L.P., where he represents consumers and businesses in consumer, insurance, and deceptive trade practices litigation.

GBKH is recognized in *Best Lawyers* for high-stakes commercial litigation, including intellectual property, securities, insurance, professional liability, media, and First Amendment disputes. Mark Kincaid is listed in *Best Lawyers* for his extensive work in commercial and insurance litigation.

Mark has extensive experience representing consumers and businesses in insurance disputes, and in a broad array of civil litigation. Mark represents insureds and claimants in cases involving liability insurance, life insurance, errors and omissions, directors and officers, homeowners, commercial property, automobile, commercial automobile, health, disability, employment practices, advertising injury, title, and excess insurance. Mark represents consumers and businesses in professional liability suits and other financial and commercial litigation.

Mark is board-certified by the Texas Board of Legal Specialization in Civil Trial Law, Consumer & Business Law, and Civil Appellate Law. He represents clients as trial lawyer, appellate advocate, expert, advisor, and negotiator in individual cases, class actions, and mass torts. Mark also assists other lawyers in representing clients with complex insurance issues.

Mark Kincaid successfully argued the landmark Texas cases establishing the right of first party insureds to sue for unfair insurance settlement practices (*Vail v. Texas Farm Bureau*) and the right of insureds under liability policies to sue for an insurer's unfair refusal to settle (*Rocor v. National Union*).

In 1994, Mark Kincaid was appointed by Governor Ann Richards to head the Office of Public Insurance Counsel, a state agency that advocates for insurance consumers.

Mark Kincaid teaches Insurance Litigation as an Adjunct Professor at the University of Texas School of Law. He has served as chair of the Consumer Law Council of the State Bar of Texas, and as a member of the Insurance Law Council. Mark Kincaid co-authors West's *Texas Practice Guide: Insurance Litigation* (2000-present). In addition, Mark has been a member of the Pattern Jury Charge Committee for Business, Consumer, Insurance & Employment Law since 1995, serving as chair from 2009 to 2011.

Mark's colleagues have given him an "AV" rating in the Martindale-Hubbell Law Directory, and have designated him a *Super Lawyer* in the 2003 through 2015 surveys of Texas lawyers published by Law & Politics Media and the publishers of *Texas Monthly* magazine.

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PJC 101.1 Basic Question—Existence

QUESTION _____

Did *Paul Payne* and *Don Davis* agree [*insert all disputed terms*]?

[Insert instructions, if appropriate.]

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 101.1 submits the issue of the existence of an agreement. It should be used if there is a dispute about the existence of an agreement or its terms and a specific factual finding is necessary to determine whether the agreement constitutes a legally binding contract. (See the discussion of consideration and essential terms below.) Usually PJC 101.1 will apply in cases involving oral agreements, oral modification of written agreements, and agreements based on several written instruments.

Broad-form submission. The broad form of this question follows the mandate of Tex. R. Civ. P. 277, which states: "In all jury cases the court shall, whenever feasible, submit the cause upon broad-form questions."

In some cases an even broader question that combines issues of both existence and breach of an agreement may be appropriate. For example:

Did *Don Davis* fail to comply with the agreement, if any?

In such a case, however, care should be taken that the submission does not ask the jury to decide questions of law, which must be determined by the court alone. *MCI Telecommunications Corp. v. Texas Utilities Electric Co.*, 995 S.W.2d 647, 650–51 (Tex. 1999) (construction of unambiguous contract is question of law for court).

Accompanying instructions. In most cases, the court should instruct the jury to consider the facts and circumstances surrounding the contract's execution. See PJC 101.3.

Essential terms. To be enforceable, a contract must be reasonably definite and certain. *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992); *Kirkwood & Morgan, Inc. v. Roach*, 360 S.W.2d 173, 175 (Tex. Civ. App.—San Antonio 1962, writ ref'd n.r.e.). Failure to agree on or include an essential term renders a contract unenforceable. *T.O. Stanley Boot Co.*, 847 S.W.2d at 221. The court should include in PJC 101.1 all disputed terms essential to create an enforceable agreement. A

disputed nonessential term should also be included if it is the basis of the plaintiff's claim for damages.

Some omitted terms supplied by law. Some omitted terms will be supplied by application of law, and the failure to include those terms will not render the agreement invalid. See, e.g., PJC 101.10 (instruction on time of compliance) and 101.13 (instruction on price). In such cases it is not necessary to secure a jury finding on the parties' agreement to those terms, and they should not be included in PJC 101.1 unless their absence will be confusing to the jury. *See America's Favorite Chicken Co. v. Samaras*, 929 S.W.2d 617, 625 (Tex. App.—San Antonio 1996, writ denied). The circumstances of each case will determine whether it is appropriate to include instructions such as those contemplated by PJC 101.10 and 101.13.

Agreement contemplating further negotiations or writings. During negotiations, the parties may agree to some terms of the agreement with the expectation that other terms are to be agreed on later. Such an expectation may not prevent the agreement already made from being an enforceable agreement if the circumstances indicate that the parties intended to be bound. *Scott v. Ingle Bros. Pacific, Inc.*, 489 S.W.2d 554, 555–56 (Tex. 1972); *see also Simmons & Simmons Construction Co. v. Rea*, 286 S.W.2d 415 (Tex. 1955); *but see Ski River Development, Inc. v. McCalla*, 167 S.W.3d 121, 134 (Tex. App.—Waco 2005, pet. denied) (when contract left material and essential terms for future negotiation, agreement was not definite and specific and, therefore, was not enforceable). In such a case, the basic issue submitted in PJC 101.1 should be modified to inquire whether the parties intended to bind themselves to an agreement that includes the terms initially agreed on. *Scott*, 489 S.W.2d at 555. Case law suggests the following question:

> Did *Paul Payne* and *Don Davis* intend to bind themselves to an agreement that included the following terms:
>
> *[Insert disputed terms.]*

See Scott, 489 S.W.2d at 555; *see also Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768, 814 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.), *cert. dismissed*, 485 U.S. 994 (1988) (applying New York law).

A similar issue is presented if the parties reach preliminary agreement on certain material terms yet also contemplate a future written document. Whether the parties intended to be bound in the absence of execution of the final written document is ordinarily a question of fact. *Foreca, S.A. v. GRD Development Co.*, 758 S.W.2d 744 (Tex. 1988). The *Foreca* opinion approves the following submission in such a case:

> Do you find that the writings of *September 2, 2001*, and *October 19, 2001*, constituted an agreement whereby [*insert disputed terms*]?

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