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domicile, or consent) or if certain minimum contacts are established. While the court acknowledged that the Missouri Supreme Court in *K-Mart* did not decide if having an agent for service of process was enough to extend general personal jurisdiction to the defendant, the court mentioned that the *K-Mart* court did recognize in-state service traditionally would suffice for jurisdiction. The court concluded that the Missouri Supreme Court would likely find the foreign corporation had consented to jurisdiction by having a registered agent who is served in state and the defendant was subject to personal jurisdiction in Missouri.

Circuit courts ruling on personal jurisdiction motions in Missouri have been inconsistent in their interpretation of the *Daimler* decision and the effect of registering to do business in the state and appointing a registered agent to accept service. Missouri attorneys should be advised this inconsistency will likely continue until the issue is addressed by the Missouri Court of Appeals and, ultimately, by the Missouri Supreme Court.

There Is A New MAI 3.01 In Town Effective January 1, 2016

by Mary L. Reitz[1]; Greensfelder, Hemker, and Gale, P.C.; St. Louis, MO

In July 2015, the Missouri Supreme Court approved two new Instructions,[2] revisions to a number of existing Instructions,[3,4] and updates to some of the "Notes on Use" and "Committee Comments."[5] However, one of the changes to the Missouri Approved Instructions approved in 2015 will impact almost all civil trial attorneys. A revised MAI 3.01 concerning the General Burden of Proof Instruction was approved on July 13, 2015 and became effective January 1, 2016. MAI 3.01 is the most commonly used Burden of Proof instruction and it has not been revised since 1998. The use of the 2015 revision to MAI 3.01 is mandatory as of January 1, 2016 and using the outdated version after that will create the risk of an appeal relating to instructional error. Since MAI 3.01 is given in the majority of civil cases, the revision to this instruction is a significant development.

The new language of MAI 3.01 is:

> Your verdict will depend on the facts you believe after considering all the evidence. The party who

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2 The two new instructions are MAI 31.07(A) Admission of Liability – Amount of Damages Only in Issue and MAI 31.07(B) Admission of Negligence Only – Causation and Damages Still at Issue. The prior MAI 31.07 was withdrawn.

3 The instructions revised without any revision to the "Notes on Use" and/or "Committee Comments" are: MAI 3.01 – General Burden of Proof.

4 The instructions that were revised along with the corresponding "Notes on Use" and/or "Committee Comments" updated are: MAI 24.01(A) Verdict Directing - Constructive Knowledge Not In Issue - Failure to Provide Safe Place to Work; MAI 24.01(B) Verdict Directing - Constructive Knowledge Disputed – Failure to Provide Safe Place to Work; MAI 24.02 Verdict Directing - Locomotive Inspection Act Violation; and MAI 24.03 Verdict Directing - Safety Appliance Act Violation

5 The instructions to which only the "Notes on Use" and/or "Committee Comments were revised are: MAI 23.05 - Fraudulent Misrepresentations - Pecuniary Loss; MAI 24.04(B) Affirmative Defenses - Contributory Negligence; MAI 24.06 - Damages - Death of Employee; MAI 38.01(A) - Verdict Directing - Missouri Human Rights Act; MAI 38.01(B) - Verdict Directing--Missouri Human Rights Act—Employment Discrimination by Reason of Disability—Existence of Disability Disputed; MAI 38.03 - Verdict Directing - Wrongful Discharge in Violation of Public Policy; MAI 39.01 - Verdict Directing - Violation of Missouri Merchandising Practices Act

relies upon any disputed fact has the burden to cause you to believe that such fact is more likely true than not true. In determining whether or not you believe any fact, you must consider only the evidence and the reasonable conclusions you draw from the evidence.

[There is a different burden of proof that applies only to punitive damages.[1] A party seeking to recover punitive damages has the burden to cause you to believe that the evidence has clearly and convincingly established the facts necessary to recover punitive damages.][2]

The Notes on Use, to which the footnotes in the instruction refer, and the Committee Comment to MAI 3.01 were not revised.[6] The language to the revised instruction is contained in the Pocket Part. However, the text of the footnotes within the instruction is found in text of the main volume of Missouri Approved Jury Instructions, Seventh Edition.

The new instruction is more concise and sets out the burden of proof for punitive damages in a separate paragraph.[7] This revision clarifies the separate burden of proof for the facts required to obtain a verdict on the primary issues from that needed to award punitive damages.

While many attorneys are familiar with and use the disc that accompanies the MAI and the annual updates when preparing instructions, some still use sets they submitted in the past to save time. Acknowledging that time is a precious commodity to an attorney during trial, the practice of using a prior set of instructions, even the preliminary general instructions, has become increasingly problematic over the past five to ten years based on the changes to the MAI. This is especially true since several of the general instructions have been revised and new instructions added for use during voir dire. Proofreading all instructions against the MAI and the current pocket part should now be common practice for all trial attorneys to be certain that all of the instructions in the package of instructions to be submitted to the Court are current and up to date. Revisions to approved instructions are made to keep current with existing law and/or to make the instructions more understandable to the jury. As a result, using the most recent versions is important to both sides in any litigation.

If an instruction is revised due to a change in the law, the risk of prejudicial error due to using the outdated version is extremely high. The determination of whether instructional error is prejudicial is based on whether the instruction misdirected, confused or misled the jury. *See Seitz v. Lemay Bank and Trust Co*., 959 S.W.2d 458, 463 (Mo. banc 1998). If the MAI was revised to reflect a change in law, logic dictates that the use of an outdated instruction would undoubtedly mislead and misdirect the jury and likely lead to reversible error.

Even if the MAI revision is the result of a clarification and not a change in the law (as appears to be the case with the revision to MAI 3.01), using an outdated version of an MAI could constitute reversible error as the failure to use a mandatory MAI creates a rebuttable presumption of prejudice. *Hill v. Hyde*, 14 S.W.3d 294, 296 (Mo. Ct. App. 2000) (internal citations omitted). No judgment will be reversed on instructional error unless the instruction

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[6] The Notes on Use to MAI 3.01 read as follows:

Notes on Use (1998 Revision)

1. Substitute the phrase "damages for aggravating circumstances" for the phrase "punitive damages" if aggravating circumstances are submitted under MAI 6.02 in a wrongful death case.
2. Add bracketed material if punitive damages or damages for aggravating circumstances are submitted. See Rodriguez v. Suzuki Motor Corp., 936 S.W.2d 104 (Mo. banc 1996).

A burden of proof instruction must be given in every case. MAI 3.01 is to be used except where another burden of proof instruction has been provided.

[7] The 1998 version of MAI 3.01 read as follows:

In these instructions, you are told that your verdict depends on whether or not you believe certain propositions of fact submitted to you. [The burden is upon plaintiff to cause you to believe that the evidence has clearly and convincingly established the propositions of fact required for the recovery of punitive damages1 as submitted in Instruction Number _____ (insert the number of the punitive damage instruction). However, on all other propositions of fact,]2 (T)he burden is upon the party who relies upon any such proposition to cause you to believe that such proposition is more likely to be true than not true. In determining whether or not you believe any proposition, you must consider only the evidence and the reasonable inferences derived from the evidence. If the evidence in the case does not cause you to believe a particular proposition submitted, then you cannot return a verdict requiring belief of that proposition.

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materially affected the case. *Id*. at 296. The burden of showing a lack of prejudice generally falls to the party that tendered the instruction. *Id*. at 296. However, if the instructional error is noted before the jury returns its verdict, the error can be waived by not asking for relief from the court because a court has authority to correct instructional error at any time prior to the return of the verdict. *Id*. at 297 (citing *Buckallew v. McGoldrick*, 908 S.W.2d 704, 709 (Mo.Ct. App.1995) (quoting *Kasper v. Helfrich*, 421 S.W.2d 66, 71 (Mo.Ct. App.1967)). The trial court is not required to deny a new trial on the basis of waiver because the court has the power to grant a new trial due to an erroneous trial ruling regardless of whether an objection is timely made. *Hill* 14 S.W. 3d at 297 (internal citation omitted). Further, even if corrective action of instructional error is taken by the trial court before the verdict is returned, it does not conclusively eliminate any prejudice. *Bast v. St. Louis Frieghtliner, Inc*., 676 S.W.2d 42, 44 (Mo. App. 1984). The trial court might find the error in giving the erroneous instruction was so prejudicial that the curative action was not sufficient and still grant a new trial based on the instructional error. *See Wells v. Wilson*, 293 S.W. 127, 129 (Mo.1927) (finding that no one is in a better position than the trial judge to determine whether an instructional error is fully cured by trial court action).

Because of the risk of appeal from using an outdated MAI, it will be important for all counsel trying cases to make certain that the MAI 3.01 used in cases beginning in January 2016 is current.

When Do Insurers Receive Their Day In Court?

by Clay Crawford; Foland, Wickens, Eisfelder, Roper & Hofer, P.C.; Kansas City, MO

Missouri law has developed rapidly since the year 2000 in regard to a previously little used statute, Section 537.065 R.S.Mo.[1] After it became law in 1959, Section 537.065 was cited in just 14 cases during its first 30 years on the books, but has been cited in more than 50 reported opinions from Missouri appellate courts in just the past 10 years. Why?

At least part of the answer seems to lie in a few key opinions that have extended the doctrine of collateral estoppel, as applied, to "findings of fact" resulting from uncontested trials following Section 537.065 R.S.Mo. agreements. As it stands now, Missouri law has developed to the point that a plaintiff may argue that an insurer should be bound by findings of fact resulting from the uncontested trial of a case against an insured defendant. Missouri's apparent extension of the doctrine of collateral estoppel to bind insurers to "facts" they never had the opportunity to challenge has incentivized the use and, in some cases, the manipulation of Section 537.065 R.S.Mo. in such a way that some insurers might never receive their "day in court."

The rest of the answer may lie in the evolution of Missouri law further limiting liability insurers' right to contest the outcome of cases involving their policyholders when those insurers decline coverage or merely issue a reservation of rights while defending dubious claims. Missouri courts have long held that liability insurers have no right to intervene in cases involving policyholders or putative insureds to whom the insurer had declined coverage.[2] Originally, the reason for the rule was simple: a liability carrier has no direct interest in the outcome of a trial against its insured, until it is called upon to indemnify the resulting judgment.[3]

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[1] As of December 1, 2015 a simple Westlaw search for Missouri cases including the term "537.065" identified 125 opinions by Missouri appellate courts. Of those, 60% have been handed down since the turn of the century.

[2] *Whitehead v. Lakeside Hosp. Ass'n*, 844 S.W.2d 475, 479 (Mo. Ct. App. 1992) ("The liability of an insurer as potential indemnitor of the judgment debtor does not constitute a direct interest in such a judgment so as to implicate intervention as of right in that action.")

[3] *Id*.