Agenda
Advisory Committee on
Model Civil Jury Instructions

August 11, 2008
4:00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Judicial Council Room, Suite N31

Approval of minutes	Tab 1	John Young
Product Liability Instruction 1057	Tab 2	John Young
Med Mal Instruction 324	Tab 3	Frank Carney
Contract Instructions	Tab 4	Bruce Badger Gary Johnson

Committee Web Page: http://www.utcourts.gov/committees/muji/

Published Instructions: http://www.utcourts.gov/resources/muji/

Meeting Schedule: Matheson Courthouse, 4:00 to 6:00 p.m.

September 8, 2008	Motor Vehicles
October 14, 2008	Premises Liability
November 10, 2008	Employment
December 8, 2008	Insurance Obligations
January 12, 2009	Construction Contracts
February 9, 2009	Intentional Torts / Fraud and Deceit
March 9, 2009	Eminent Domain
April 13, 2009	Probate
May 11, 2009	Professional Liability

Tab 1

MINUTES
Advisory Committee on Model Civil Jury Instructions
June 9, 2008
4:00 p.m.

Present: John L. Young (chair), Honorable William W. Barrett, Francis J. Carney, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Colin P. King, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, David E. West

1. *Products Liability and Medical Malpractice Instructions*. Mr. Young announced that the products liability and medical malpractice instructions that have been approved will be published on the courts' website, subject to supplementation.

2. *CV 1057. Safety risks*. The committee considered CV 1057. Some committee members thought it was not a proper instruction in light of *Randall v. Allen* and *Green v. Louder*. Mr. Shea suggested revising the instruction to read: "A [product] is not defective or unreasonably dangerous merely because it could have been made safer or because a safer model of the [product] is available." Mr. West questioned whether this was an accurate statement of the law. He thought that if a product could be made safer economically, it should be. Mr. Fowler said that was not the law, citing *Slisze v. Stanley-Bostitch,* 1999 UT 20. Mr. Young suggested adding a committee note outlining the differing views of committee members and noted that the validity of the instruction would be up to the courts to decide.

Mr. Fowler and Mr. King volunteered to work on a committee note to accompany the instruction.

Mr. West suggested replacing "is not" in the first line with "may not be." Mr. Summerill thought the instruction was an accurate statement of the law but should not be given as a jury instruction. Mr. King cautioned against jury instructions that emphasize the negative of certain elements of a claim. The committee voted on whether to include the instruction. The vote was 5-5, with Messrs. Barrett, Ferguson, Fowler, Humpherys, and Nebeker voting in favor of the instruction, and Messrs. Carney, King, Simmons, Summerill, and West voting against it.

Mr. Young indicated that he would break the tie after he sees the committee note that Mr. Fowler and Mr. King will propose.

3. The committee continued its review of the contract instructions. Mr. Ferguson was the only member of the reviewing subcommittee present, so he led the discussion:

a. *CV 2126. Fraudulent inducement*. Mr. Summerill questioned the use of the terms "induce" and "representation." Mr. Ferguson noted that Dr. Di Paolo did not think the terms were too confusing for lay jurors. Mr. King

suggested "statement" for "representation," but other committee members thought that "representation" denoted more than "statement." Mr. Humpherys asked whether actions or nondisclosure can give rise to fraudulent inducement. Mr. Young suggested asking the contract instructions subcommittee to define "representation." He then suggested leaving it to the court to determine whether conduct or failure to disclose can constitute a "representation" in a particular case. Mr. Young also suggested revising subparagraph (1) to read, "[Name of plaintiff] made the following representation:" The committee approved the instruction as modified.

b. *CV 2128. Impossibility/Impracticability.* Mr. Ferguson noted that Dr. Di Paolo was comfortable with the term "impracticable." Mr. Simmons noted that the first paragraph says that performance must be "highly impracticable," but the second paragraph only defines "impracticable," not "highly impracticable." He asked whether "highly" should be struck from the first paragraph or whether the second paragraph should be revised to define "highly impracticable." Mr. Carney checked the cases cited, which use the phrase "highly impracticable." At Mr. Young's suggestion, "highly" was added before "impracticable" in the second and sixth paragraphs. Mr. Young asked whether a supervening event can occur before or after the contract is made. Mr. Humpherys thought that if it occurred before, it would be a case of mutual mistake, not impossibility. At Mr. Simmons's suggestion, the last paragraph was revised to make it clear who has the burden of proof: "If you decide that [name of defendant] has proved that the circumstances just described are a supervening event, . . ."

c. *CV 2129. Frustration of purpose.* Mr. Young cited Dr. Di Paolo for the proposition that only people can be "frustrated," not contracts. At the suggestion of Messrs. Humpherys and Simmons, the third paragraph was revised to read: "To prevail on this claim, [name of defendant] must show: . . ."

d. *CV 2130. Unconscionability.* Mr. Summerill suggested breaking the instruction into two instructions--one for substantive unconscionability, and one for procedural unconscionability. Mr. Ferguson noted that his subcommittee had considered doing so but thought there would rarely be a case involving both types of unconscionability. Mr. Young suggested keeping one instruction but adding a comment saying that if the case only involves one form of unconscionability, the court should use only the relevant part of the instruction. The committee thought it best to divide the instruction into two instructions. Mr. Humpherys asked if there was a better word than "unconscionable." The committee could not come up with one, and Mr. Ferguson noted that Dr. Di Paolo was comfortable with "unconscionable." Mr. King suggested that the instructions

start out: "[Name of party] claims that the contract is [substantively/procedurally] unconscionable." Messrs. West and Summerill did not think the last sentence of the second paragraph accurately stated the law. Mr. Ferguson noted that the reviewing committee did not try to figure out if the instructions accurately stated the law. Mr. West asked whether unconscionability was a question of law or fact. Mr. Summerill said it was a mixed question of law and fact. Mr. Humpherys objected to use of the phrase "For example." He said we should not be giving a laundry list of factors to consider if they do not apply in the particular case. Mr. King suggested leaving the examples to the facts of the particular case.

The committee will send the instruction back to the contracts subcommittee for further consideration in light of the committee's discussion.

Mr. Summerill noted that he had an alternative draft instruction that the subcommittee can consider.

e. *CV 2131. Mutual mistake.* Mr. Humpherys asked whether the third element (that the defendant would not have agreed to the contract if he had known of the mistake) is judged by an objective or subjective standard. He thought it should be an objective standard; otherwise, the element would be unnecessary because the defendant will always claim that he would not have entered into the agreement had he known about the mistake. Mr. King agreed. Mr. Ferguson thought that it was a subjective standard, based on the language of the instruction.

The committee approved the instruction, subject to the contracts subcommittee's answer to the following question: Is the third element judged by a subjective or an objective standard?

f. *CV 2132. Unilateral mistake.* Mr. Humpherys thought "unconscionable" in subparagraph (2) needed to be defined. Mr. Ferguson thought that "unconscionable" would be defined by giving the instructions on unconscionability, but if those instructions were not given, the definition of substantive unconscionability could be repeated in this instruction. Mr. King asked why CV 2131 and CV 2132 did not use the same language. The former refers to "a basic assumption or vital fact upon which [the parties] based their bargain," whereas the latter refers to a matter "related to an important feature of the contract." He thought the latter was a lower burden. Messrs. Young and Ferguson thought it should be a higher standard, that is, that it should be harder

to prove a unilateral mistake than a mutual mistake. At Mr. Humpherys's suggestion, subparagraph (5) was revised to read: "(5) [name of plaintiff] can be put back in the position [he] was in before the contract, losing only the benefit of the bargain." Mr. West thought this element would generally be a question for the court, not the jury.

The committee decided to send the instructions on mutual and unilateral mistake back to the contracts subcommittee to say whether the second element of CV 2131 and the third element of CV 2132 should be the same.

g. *CV 2133. Third-party beneficiary.* At Mr. Young's suggestion, the first part of the instruction was revised to read:

> [Name of plaintiff] claims that [he] is a third-party beneficiary of a contract between [list parties to the contract]. To be a third-party beneficiary of a contract, [name of plaintiff] must prove that the parties to the contract intended the contract to benefit [name of plaintiff]. The intentions of the parties to benefit [name of plaintiff] must be clear from the terms of the contract. . . .

Judge Barrett thought the third paragraph (defining "incidental beneficiary") was awkward. Mr. King asked what rights an incidental beneficiary has. He thought that if he has none, then the jury did not need to be instructed on incidental beneficiaries. Mr. Humpherys questioned whether the last sentence of the second paragraph was necessary. He also thought it was an incomplete statement of the law, that a third-party beneficiary can only enforce a contract to the extent of his personal rights.

Mr. Shea will revise the instruction.

Mr. Young was excused. Mr. Carney took over for Mr. Young.

h. *CV 2134. Assignment.* At Mr. Summerill's suggestion, the first sentence of the second paragraph was revised to read: "If [name of assignor] assigned [his] rights under the contract to [name of assignee], then [name of assignee] had the right to demand that [name of other party] do [specify contractual obligations at issue]." Mr. Humpherys asked who must consent to the assignment. Mr. Ferguson said the other party to the contract (the party that is not making the assignment). Mr. Humpherys suggested that the instruction use the parties' names, to be less confusing. The committee approved the instruction as revised.

i. *CV 2135. Delegation*. Mr. Carney asked how this instruction differed from CV 2134 (Assignment). Mr. Ferguson explained that contractual rights are assigned, and contractual duties are delegated. Mr. Humpherys suggested putting CV 2134 and 2135 in context by adding an introductory sentence: "[Name of party] claims that [name of party's] [rights/duties] under the contract were [assigned/delegated] to [name of party]." Mr. King asked who had the burden of proof to show an assignment or delegation. Mr. Ferguson thought the burden was on the party claiming that there was an assignment or delegation. Mr. Humpherys asked how the instruction would apply, since a delegation does not excuse the delegator from performance. Mr. Summerill said the issue arises in premises cases, where a landowner may delegate his responsibility for snow removal, for example, to a third party. Mr. King noted that it also comes up in structured settlements. Mr. King questioned whether the instruction accurately stated the law. He thought a party to a contract could always delegate duties unless the contract said that they were nondelegable or personal. Mr. Summerill thought the problem with the instruction was that it did not tell the jury what it was supposed to do with the information. Is the question for the jury whether or not there was a delegation, whether or not the delegator is liable, whether or not the delegatee is liable, or whether or not the duty was nondelegable, and, if the latter, isn't that a question of law for the court?

The committee decided to send the instruction back to the contracts subcommittee to answer the following questions: (1) What is the jury being asked to do? and (2) is it actually the law that the delegator remains liable on the contract? If so, why would the issue ever come up?

j. *CV 2136. Modification*. Mr. Ferguson asked what the jury was being asked to do. Mr. Summerill suggested changing the instruction to read: "[Name of party] claims that [he] and [name of other party] changed their contract. If you find that both parties agreed to change the contract and agreed on the new terms, then any old terms that conflict with the new terms cannot be enforced." Mr. West questioned whether the instruction accurately stated the law. He said that if a contract has to be in writing to comply with the statute of frauds, then any modification of the contract must also be in writing. He suggested adding a committee note to that effect. But some committee members noted that a contract may be taken out of the statute of frauds by part performance. And, Mr. Ferguson noted, if the statute of frauds does not apply, the parties may orally change a contract requirement that any modification be in writing. Mr. Carney asked what the issue for the jury would be--whether the contract is one that must comply with the statute of frauds? The committee

approved the instruction, subject to the addition of a committee note telling the court and counsel to consider the application of the statute of frauds.

k. *CV 2137. Abandonment*. Mr. Shea asked whether it will always be the plaintiff who is claiming that a contract was abandoned. The committee agreed that it would not be. Mr. Fowler noted that the phrase "One way a contract can be abandoned" was problematic. The committee revised the instruction to read:

> [Name of party] claims that [he] and [name of other party] abandoned their contract. To prove abandonment, [name of party] must prove that--
>
> (1) the parties agreed to abandon their contract, or
>
> (2) the parties acted as if the contract no longer existed.
>
> If you find that the parties abandoned their contract, then the parties have no further obligation to do what they promised to do.

Mr. King asked whether there was some time element to abandonment by acting as if the contract no longer existed. Mr. West thought there was a recent case that spelled out the elements for abandonment. The committee approved the instruction as modified.

l. *CV 2138. Nominal damages*. The committee revised the first paragraph to read: "A party damaged by [the other party's] breach of the contract has a right to recover the damages caused by the breach." At Mr. Simmons's suggestion, the instruction will be moved to follow the other damage instructions.

m. *CV 2139. Damages related to expected benefits*. At Mr. Humpherys's suggestion, "a party" was replaced by "[name of party]." Mr. King questioned the use of the term "general damages." He suggested calling them "contractual damages" (as opposed to "consequential damages"). Mr. Humpherys objected to the phrase "expected to receive." He noted that a party may have unreasonable expectations. The committee revised the instruction to read:

> If [name of party] is damaged by a breach of a contract, then [he] has a right to recover damages that follow naturally and normally from the breach, measured as follows: . . ."

Next Meeting. There is no meeting scheduled for July 2008. The next regularly meeting is Monday, August 11, 2008, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

Tab 2

CV 1057. Safety risks.

A [product] ~~is~~ may not be defective or unreasonably dangerous ~~merely because it presents some safety risks that cause it to be dangerous for its intended use, nor is it defective or unreasonably dangerous~~ merely because it could have been made safer or because a safer model of the [product] is available.

References

Slisze v. Stanley-Bostitch, 1999 UT 20, ¶ 10.

Fed. Jury Prac. and Instr., § 122.10 (5th Ed. 2000) (modified).

MUJI 1st References

Committee Notes

Tracy & Colin will draft note.

Tab 3

CV324. Use of alternative treatment methods.

When there is more than one method of [diagnosis/treatment] that is approved by a respectable portion of the medical community, and no particular method is used exclusively by all provider, it is not medical malpractice for a provider to select one of the approved methods, even if it later turns out to be a wrong selection, or one not favored by some other providers. The provider has the burden to prove that the method used is approved by a respectable portion of the medical community.

References

Cf. Butler v. Naylor, 1999 UT 85, 987 P.2d 41 (even if the evidence did not support giving this instruction, it was harmless error to do so, because the jury could have found for the defendant on other grounds).

MUJI 1st Instruction

6.29

Committee Notes

This instruction is slightly modified from MUJI 1st 6.29. The committee agreed on deleting the “best judgment” language from the instruction, as that inappropriately suggested a subjective standard of care might be followed; that is, what defendant “thinks best,” whether it is within the standard of care or not.

This instruction should only be used when a proper foundation is laid for it, namely, that the “alternative method” is shown by defendant to be used by something more than a small minority of doctors, but not necessarily the majority. In other words, the defendant must show that the challenged treatment enjoys such substantial support within the medical community that it truly is “generally” recognized. See Peters v. Vander Kooi, 494 N.W.2d 708 (Iowa 1993); Bickham v. Grant, 861 So.2d 299 (Miss. 2003); Velazquez v. Portadin, 751 A.2d 102 (N.J. 2000); Yates v. University of W. Va. Bd. of Trustees, 549 S.E.2d 681(W. Va. 2001); R.A. Eades, JURY INSTRUCTIONS ON MEDICAL ISSUES, Instruction 3-38, cmt. 3 (LexisNexis, 6th ed. 2007).

The drafting subcommittee was not unanimous in its approval of this instruction, so counsel and the trial court should review it with caution. Some thought that it is inappropriate to instruct a jury that a doctor is “not negligent” if he uses an approved method, but that this is simply one factor to consider in determining whether the provider met the standard of care.

Some members of the committee expressed concerns regarding this instruction, and these concerns are summarized as:

First, no Utah authority recognizes the appropriateness of this instruction, and Butler v. Naylor did not question the propriety of giving the "alternative methods" instruction. Rather, appellant only challenged the instruction on the basis that the “evidence failed to establish that the surgical procedure used [was] recognized by a respectable portion of the medical community.” Butler v. Naylor, 1999 UT 85 at & 19, 987 P.2d 41. Butler avoided any detailed examination of the instruction “because [the instruction] presents only one of several theories upon which the jury could have relied in finding for [Defendant].” Id. at & 20. Accordingly, the court offered no direct endorsement or

rejection of the instruction as an accurate statement of the law. At best, Butler is ambiguous about whether the instruction reflects the state of the law in Utah.

Second, the instruction is inconsistent with Utah law defining medical malpractice and standard of care. We tell jurors that a health care provider is required to use the same degree of learning, care, and skill ordinarily used by other qualified providers in good standing practicing in the same. This instruction, however, then tells the jurors that "it is not negligence" if more than one method exists, effectively eliminating any requirement that a physician exercise that degree of learning, care and skill ordinarily used

The bare existence of more than one method automatically excuses the physician because "it is not medical malpractice" to choose one method over another, thereby alleviating the physician of their duty to exercise any degree of learning, care or skill ordinarily used in the field. Under this instruction, the physician becomes "not negligent" simply by the existence of alternative methods without needing to exercise any judgment or care whatsoever in choosing the method.

This ignores whether one method may be safer, more effective, or carry less risk of complication. Instead, it simply says that if there is more than one method and the method is "accepted by a respectable portion of medical community," it is not malpractice to choose one over the other. Clearly, this cannot be the law of medical negligence where every practitioner must exercise their skill, learning and professional care in treating patients.

Tab 4

Contract Instructions

Table of Contents

CV2101. Issues in a breach of contract case.

[Name of plaintiff] claims that [he] had a contract with [name of defendant] for [list purpose or description of the contract]. [Name of plaintiff] also claims that [name of defendant] breached the contract by not performing [his] obligations and that [name of plaintiff] has been damaged as a result. [Name of plaintiff] wants [name of defendant] to pay [him] money to compensate [him] for the damages [he] claims to have suffered.

[Name of defendant] denies [name of plaintiff]'s claims and in [his] defense claims that [list affirmative defenses].

MUJI 1st Instruction

Approved

CV2102. Elements for breach of contract.

In order to recover damages, [name of plaintiff] must prove each of these four things:

(1) ~~whether~~ that there was a contract between [name of plaintiff] and [name of defendant];

(2) ~~whether~~ that [name of plaintiff] did what the contract required [him] to do, or ~~whether~~ that [he] was excused from performing [his] contract obligations;

(3) ~~whether~~ that [name of defendant] breached the contract by not performing [his] obligations; and

(4) ~~whether~~ that [name of plaintiff] was damaged because [name of defendant] breached the contract.

References

Bair v. Axiom Design, L.L.C., 2001 UT 20, ¶ 14.

MUJI 1st Instruction

Approved

CV2103. Creation of a contract.

You must decide whether [name of plaintiff] and [name of defendant] had a contract. A contract is an agreement between two or more parties. It can be either ~~verbal~~ oral or written, or a mixture of both.

To create a contract, each party must promise to do something for the other party in exchange for something of value. "Value" doesn't necessarily have to be money. It can be a promise to do some act in exchange for the other party's act or promise.

What the parties have promised to do for each other has to be ~~spelled out, either expressly or impliedly, well~~ clear enough that they can tell what it is they have each promised to do for the other.

References

Glacier Land Co., L.L.C. v. Claudia Klawe & Associates, L.L.C., 2006 UT App 516.

Golden Key Realty, Inc. v. Mantas, 699 P.2d 730 (Utah 1985).

MUJI 1st Instruction

Subcommittee: Definition and instruction on "implied" or "express" is needed. Need Committee Note that the instruction applies only to executory contracts and not to unilateral contracts.

CV2104. Offer.

To create a contract, the parties have to agree on the terms of the contract. Whether they have agreed on the terms of the contract depends on whether [party's name] made an offer that was accepted by [other party's name].

A party makes an offer when [he] invites the other party to accept [his] terms in such a way that the party accepting the offer realizes that if [he] accepts the terms, both parties will become obligated to each other. The terms of the offer have to be clear and definite.

All of the important terms of the offer have to be accepted unconditionally. If the accepting party accepts some terms of the offer, but not others, or proposes different or additional terms, this becomes a counteroffer which then must be accepted unconditionally by the other party before a contract is formed.

Nunley v. Westgates Casing Services, Inc., 1999 UT 100(citing Engineering Assoc. v. Irving Place Assoc., 622 P.2d 784, 787 (Utah 1980)).

References

DCM Investment Corp. v. Pinecrest Investment Co., 2001 UT 91, ¶ 12.

Cal Wadsworth Construction v. City of St. George, 898 P.2d 1372 (Utah 1995).

Equitable Life & Cas. Ins. Co. v. Ross, 849 P. 2d 1187, 1192 (Utah Ct. App. 1993).

MUJI 1st Instruction

Approved

CV2105. Acceptance.

A party accepts an offer when [he] agrees unconditionally to all of the terms. Unless an offer specifies that the terms need to be accepted in a certain manner, acceptance can be shown by something in writing, or ~~by words~~ orally, or by the conduct of the party who accepts the offer.

In order to decide whether the offer was accepted in this case, ask yourself whether [party's name] communicated [his] acceptance of the offer so that an objective, reasonable person would understand that a contract had been made.

References

Cal Wadsworth Construction v. City of St. George, 898 P.2d 1372 (Utah 1995).

Engineering Assoc. v. Irving Place Assoc., 622 P.2d 784, 787 (Utah 1980). Nunley v. Westgates Casing Servs., Inc., 1999 UT 100, ¶ 27.

MUJI 1st Instruction

Approved

CV2106. Withdrawal of offer.

An offer can be withdrawn at any time before it is accepted, but not afterwards.

Jones v. New York Life Insurance Co., 15 Utah 522, 50 P. 620 (1897).

MUJI 1st Instruction

Approved

CV2107. Consideration.

To create a contract, each party must promise to do something for the other party in exchange for something of value. This is called "consideration." It can be a promise to do some act in exchange for the other party's act. "Value" doesn't necessarily have to be money, but it can be.

If you find that either party did not agree to give something of value in exchange for the other party's promise to perform [his] obligations under the contract, then there is no contract.

References

Resources Management Co. v. Weston Ranch & Livestock Co., 706 P.2d 1028 (Utah 1985).

Latimer v. Holladay, 103 Utah 152, 134 P.2d 183 (1943).

Restatement (Second) of Contracts § 71 (1979).

MUJI 1st Instruction

Subcommittee: Need Committee Note that the instruction applies only to executory contracts and not to unilateral contracts. Also a note referring to 2116 on promissory estappel since reliance can take the place of consideration.

CV2108. ~~D~~Simultaneous duty to perform.

[Name of plaintiff] and [name of defendant] agree that their contract required both parties to perform their contract obligations at the same time. Consequently, [name of defendant] had to do what [he] promised to do only if [name of plaintiff] ~~either~~ [did]/ ~~or~~ [was ready to do] what [he] promised to do.

References

Collard v. Nagle Construction, Inc., 2002 UT App 306, ¶ 19.

Century 21 All Western Real Estate and Inv., Inc. v. Webb, 645 P.2d 52, 55-56 (Utah 1982).

Restatement (Second) of Contracts § 238.

MUJI 1st Instruction

Committee Note: Application of these two instructions under what circumstances.

Approved

CV2109. ~~T~~Unspecified time of performance.

Even though the contract does not specify a time ~~by which~~ when [name of defendant] had to do what [he] promised to do, [name of defendant] had to do what [he] promised to do within a reasonable time.

You must decide what a reasonable time was by considering the nature of the agreement, the relationship between the parties, the circumstances surrounding [name of defendant]'s performance of [his] duties, and anything else that a reasonable person would think is relevant to determining when ~~[name of plaintiff] would have expected~~ [name of defendant] ~~to~~ should have performed [his] contract obligations.

References

Coulter & Smith, Ltd. v. Russell, 966 P.2d 852 (Utah 1998).

Bradford v. Alvey & Sons, 621 P.2d 1240, 1242 (Utah 1980).

MUJI 1st Instruction

Subcommittee. Is plaintiff's expectation one of the factors to consider? Or is plaintiff's expectation determinative?

CV2110. ~~Discharge by~~ Damages for non-performance.

[Name of plaintiff] is entitled to recover damages from [name of defendant] if [name of plaintiff] did everything [he] had promised to do under the contract and [name of defendant] failed to do what [he] had promised to do under the contract.

Advisory Committee Note: This instruction should be used only in the absence of any defenses.

References

Restatement (Second) of Contracts § 235.

Smith v. Grand Canyon Expeditions Co., 2003 UT 57, ¶ 27.

MUJI 1st Instruction

Move to damages section

Approved

CV2111. Substantial performance.

[Name of plaintiff] claims that even though [he] did not do everything exactly as the contract required, [he] should still recover damages from [name of defendant] because [name of defendant] breached the contract. [Name of plaintiff]'s failure to do everything exactly as promised under the contract does not prevent [him] from recovering damages unless

(1) [he] acted in bad faith or

(2) what [he] failed to do was important to fulfilling the purpose of the contract. ~~In order to decide whether the things [name of plaintiff] failed to do were~~ A failure was not important to fulfilling the purpose of the contract, ~~you will need to decide whether [name of plaintiff]'s failure~~ if it was minor and could be fixed without difficulty.

Advisory Committee Note: The term "bad faith" is defined separately in Instruction CV21##.

References

Reliance Ins. Co. v. Utah Dep't of Transp., 858 P.2d 1363, 1370 (Utah 1993).

MUJI 1st Instruction

Committee note. Give instruction on who has the burden of proof.

Approved

CV2112. Occurrence or failure of condition precedent.

[Name of plaintiff] and [name of defendant] agree that their contract did not require [party's name] to [describe the obligation] unless [describe the condition] occurred. You must decide whether this condition occurred. If it did, then [party's name] had to [describe the obligation]. If the condition did not occur, then [party's name] did not have to perform [his] contract obligations.

References

Baxter v. Saunders Outdoor Advertising, Inc., 2007 UT App 340.

MUJI 1st Instruction

Approved

CV2113. Disputed condition precedent.

[Party's name] claims that according to the contract, [he] did not have to [describe the obligation] unless [describe the condition] occurred first. You must decide whether, according to the contract, this condition had to occur before [party's name] was required to perform [his] contract obligations.

References

Baxter v. Saunders Outdoor Advertising, Inc., 2007 UT App 340.

McBride-Williams v. Huard, 2004 UT 21, ¶ 13.

MUJI 1st Instruction

Subcommittee: Is this limited to verbal or implied condition/contract?

CV2114. Performance excused by material breach.

[Name of plaintiff] claims that [he] was excused from performing [his] contract obligations because [name of defendant] failed to perform an important part of what [he] had promised to do. Specifically, [name of plaintiff] claims that [name of defendant] failed to [describe the claimed breach].

To decide whether [name of defendant]'s obligation was an important part of the contract, you should ask yourselves whether a reasonable person would have entered into the contract if a promise to [describe the obligation] had not been included.

If you decide that [name of defendant] did not perform an obligation that was an important part of the contract, then you should find that [name of plaintiff] was excused from performing [his] contact obligations. If, on the other hand, you decide that the obligation [name of defendant] failed to perform was not an important part of the contract, then [name of plaintiff] was not excused from performing [his] contract obligations.

References

Bonneville Distributing Co. v. Green River Development, 2007 UT App 175, ¶ 32.

Jackson v. Rich, 499 P.2d 279, 280 (Utah 1972).

Restatement (Second) of Contracts §243 (1979).

MUJI 1st Instruction

CV2115. ~~P~~When performance is not excused by other party's non-performance.

~~One party to a contract~~ [Name of Party] cannot by a willful act or omission make it difficult or impossible for ~~the~~ [name of other party] to perform [describe obligation] and then be excused from performing the obligation because ~~the~~ [name of other party] did not perform.

If you decide that [name of ~~plaintiff~~party] was willing and able to perform [his] ~~contract~~ obligation~~s~~, but that [he] could not perform the obligation because of something that [name of ~~defendant~~other party] purposely did or failed to do, then [name of ~~plaintiff~~party] was excused from performing [his] obligation~~s under the contract~~.

References

Baxter v. Saunders Outdoor Advertising, Inc., 2007 UT App 340, ¶ 15.

Saunders v. Sharp, 840 P.2d 796, 805-806 (Utah Ct. App. 1992).

Cahoon v. Cahoon, 641 P.2d 140, 144 (Utah 1982).

MUJI 1st Instruction

Committee note. Instruct on burden of proof

CV2116. Promissory estoppel.

[Name of plaintiff] claims that [name of defendant] made a promise to him that [describe the promise], and that as a result of that promise [name of plaintiff] [describe the action or inaction].

~~You must decide whether~~ To succeed on this claim [name of plaintiff] must prove that:

(1) [name of defendant] made a promise to [name of plaintiff];

(2) the promise reasonably caused [name of plaintiff] to [describe the action or inaction taken]; and

(3) only by enforcing the promise can injustice be avoided.

To decide whether the promise reasonably caused [name of plaintiff] to [describe the action or inaction taken], you must decide whether a reasonable person would have expected [name of plaintiff] to do what [he] did based on the promise [name of defendant] made.

If you decide that [name of plaintiff] has proved these three things, then you may enforce the promise to the extent necessary to avoid injustice.

References

Restatement (Second) of Contracts § 90.

MUJI 1st Instruction

Approved

CV2117. Breach of the contract.

[Name of plaintiff] claims that [name of defendant] breached their contract. A party to a contract breaches the contract if [he] fails to do what [he] promised to do in the contract.

References

Restatement (Second) of Contracts § 235.

MUJI 1st Instruction

Approved

CV2118. Material breach.

If [name of defendant] failed to do what [he] promised to do in the contract, and that promise was important to fulfilling the purpose of the contract, then [name of defendant] materially breached the contract. If you decide that [name of defendant] materially breached the contract, then [name of plaintiff] was excused from doing what [he] had promised to do under the contract. However, if you decide that what [name of defendant] failed to do was not important to fulfilling the purpose of the contract, then [name of plaintiff] was not excused from doing what [he] promised to do in the contract. In order to decide whether the things [name of defendant] failed to do were important to fulfilling the purpose of the contract, you will need to decide whether [name of defendant]'s failure was minor and could be fixed without difficulty.

References

Eggett v. Wasatch Energy Corp., 2004 UT 28, ¶ 22.

Polyglycoat Corp. v. Holcomb, 591 P.2d 449, 451 (Utah 1979).

Black's Law Dictionary (8th ed. 2004) (defining breach of contract).

MUJI 1st Instruction

SubC: This and 2114 raise different standards. Should they be the same?

CV2119. Total breach.

A total breach occurred if [name of plaintiff] did not receive any of the benefits [he] was due under the contract.

References

Restatement of Contracts § 236.

MUJI 1st Instruction

SubC Do we need this?

CV2120. Partial breach.

If [name of defendant] did some but not all of the things [he] promised to do under the contract, then [name of plaintiff] may recover damages related only to what [name of defendant] failed to do under the contract.

References

Restatement of Contracts § 236.

MUJI 1st Instruction

Approved

CV2121. Anticipatory breach.

When a party is supposed to perform [his] contract obligations at some time in the future, it is a material breach of the contract if [he] shows unequivocally that [he] does not intend to perform [his] future contract obligations ~~when the time arrives~~.

When this happens, the other party has three options:

(1) [he] can treat the entire contract as ~~broken~~ breached;

(2) [he] can treat the contract as still binding and wait until the time arrives for its performance; or

(3) [he] can cancel the contract.

["shows without a doubt" – alternative phrasing]

References

Cobabe v. Stanger, 844 P.2d 298, 303 (Utah 1992).

Kasco Services Corp. v. Benson, 831 P. 2d 86, 88 (Utah 1992).

Restatement (Second) of Contracts § 253.

MUJI 1st Instruction

Advisory Committee Note

The doctrine of anticipatory breach is not applicable to unilateral contracts. Greghuhn v. Mutual of Omaha Ins. Co., 461 P.2d 285 (Utah 1969).

Subcommittee: What is the standard of proof on this issue? "Shows unequivocally" does not mesh w/ preponderance. Is #2 needed?

CV2122. Implied covenant of good faith and fair dealing.

All contracts contain an unwritten or implied promise that the parties will deal with each other fairly and in good faith. This means that [name of plaintiff] and [name of defendant] have promised not to intentionally do anything to injure each other's right to receive the benefits of the contract. (This is not the limit of the covenant.) A violation of this implied or unwritten promise is a breach of the contract.

There are some limits, however, to this implied promise to deal fairly and in good faith. First, the duty to act in good faith does not establish new, independent rights or duties to which [name of plaintiff] and [name of defendant] did not agree. Second, the duty to act in good faith does not create rights and duties inconsistent with the actual terms of the contract. Third, the duty to act in good faith does not require either party to decide to use a right they have under the contract that will be harmful to themselves simply for the purpose of benefiting the other party. Finally, you may not use the duty to act in good faith to achieve an outcome in harmony with your sense of justice but inconsistent with the actual terms of the contract.

You must decide whether or not [name of defendant] breached the duty to act in good faith.

To make that decision, you must ask yourselves if [name of plaintiff] has proved both of the following:

(1) that [name of defendant] breached the implied promise to deal with [name of plaintiff] fairly and in good faith; and,

(2) that [name of plaintiff] was damaged as a result.

References

Mark Technologies Corp. v. Utah Resources International, Inc., 2006 UT App 418, ¶ 7, citing St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194, 199 (Utah 1991).

Oakwood Village, LLC v. Albertsons, Inc., 2004 UT 101, ¶ 45.

MUJI 1st Instruction

SubC. Note: Finding of breach of covenant may entitle party to consequential damages. Cite case. 2d para difficult. Perhaps incorrect.

CV2123. Accord and satisfaction.

[Name of defendant] claims that [he] did not have to perform [his] [describe old contract obligations] because [he] and [name of plaintiff] had a disagreement about the contract that they resolved by entering into a new contract that replaced the first contract. [Name of defendant] claims that the new contract required [describe the new obligation(s)] and that [he] has fully performed or is performing these obligations.

~~You must decide whether:~~To succeed on this claim, [name of defendant] must prove that:

(1) [name of plaintiff] and [name of defendant] had a dispute about the original contract that they resolved by entering into a new contract; and

(2) ~~whether~~ [name of defendant] fully performed or is performing [his] obligations under the new contract.

If you decide that [name of defendant] has proved both of these things, then [name of defendant] is released from performing ~~[his]~~ [describe obligations] under the original contract.

References

Cannon v. Stevens School of Business, Inc., 560 P.2d 1383 (Utah 1977).

Stratton v. West States Constr., 440 P.2d 117 (1968).

Restatement (Second) of Contracts § 281.

MUJI 1st Instruction

Approved

CV2124. Novation.

[Name of defendant] claims that [he] did not need to perform [his] [describe old contract obligations] under the old contract~~,~~ because of a new contract that substitutes

[name of new party] who will perform in [his] place, ~~that [he] did not need to perform [his] contract obligations under the old contract~~.

To succeed on this claim, [Name of defendant] ~~bears the burden of proving~~must prove all of the following:

(1) There was a contract between [name of plaintiff] and [name of defendant].

(2) There is a new contract, agreed to by all of the parties, that replaces the old contract and substitutes the performance of a new party in place of [name of defendant].

(3) [Name of plaintiff] ~~must~~ intended ~~for the new contract to release [name of defendant] of [his] obligations under the old contract and~~ to accept the new party as a substitute for [name of defendant] and to release [name of defendant] of [his] obligations under the old contract.

References

First American Commerce Co. v. Washington Mut. Sav. Bank., 743 P.2d 1193, 1195 (Utah 1987).

Horman v. Gordon, 740 P. 2d 1346, 1352 (Utah Ct. App. 1987).

Kennedy v. Griffith, 95 P. 2d 752 (1939).

MUJI 1st Instruction

Approved

CV2125. Duress.

[Name of defendant] claims that [he] is not bound by the contract because [he] was forced to enter into the contract. To succeed, [name of defendant] must prove that [he] did not intend to enter into the contract, and:

Either [Instruct only on the elements for which there is some evidence.]

(1) [he] was physically forced to enter into the contract; or

(2) [he] was influenced to enter into the contract by an improper threat by [name of plaintiff] that left [him] no reasonable alternative but to agree; or

(3) [he] was influenced to enter into the contract by physical force or an improper threat by someone who is not a party to the contract that left [him] no reasonable alternative but to agree. If the person making the threat is not the [name of plaintiff] or [his] agent, this will not excuse [name of defendant] if [name of plaintiff] in good faith and without reason to know of the duress either gives value or relies materially on the transaction.

If you decide that [name of defendant] has proved that [he] entered into the contract as a result of duress, then no enforceable contract was created.

References

Andreini v. Hultgren, 860 P.2d 916 (Utah 1993).

Brinton v. IHC Hospitals, Inc., 973 P.2d 956 (Utah 1998).

Restatement (Second) of Contracts §§ 174-176.

MUJI 1st Instruction

CV2126. Improper threat. [back to subcommittee]

A threat is "improper" if [use only those relevant to the case] what is threatened is:

(1) a crime or a tort, or the threat itself would be a crime or a tort if it resulted in obtaining property;

(2) a criminal prosecution;

(3) the use of civil process and the threat is made in bad faith, or

(4) a breach of the duty of good faith and fair dealing under a contract with the recipient.

A threat is also improper if [use only those relevant to the case] the resulting exchange is not on fair terms, and:

(1) the threatened act would harm the recipient and would not significantly benefit the party making the threat,

(2) the effectiveness of the threat in influencing the agreement is significantly increased by prior unfair dealing by the party making the threat, or

(3) what is threatened is otherwise a use of power for illegitimate ends.

References

Andreini v. Hultgren, 860 P.2d 916 (Utah 1993).

Brinton v. IHC Hospitals, Inc., 973 P.2d 956 (Utah 1998).

Restatement (Second) of Contracts §§ 174-176.

MUJI 1st Instruction

Juror will not understand "tort" "use of civil process."

CV2127. Fraudulent inducement.

[Name of defendant] claims that no contract was created because [he] was induced to enter into the contract by fraud. To succeed on this claim, [name of defendant] must prove all of the following.

(1) [Name of plaintiff] made the following representation: ~~represented that~~ [insert ~~alleged fraudulent statement~~ the representation].

(2) [Name of plaintiff] either knew that the representation was false or made the representation recklessly without sufficient knowledge upon which to base the representation.

(3) [Name of plaintiff] made the representation to induce [name of defendant] to agree to the contract.

(4) [Name of defendant] reasonably relied on this representation without knowledge of its falsity.

(5) [Name of defendant] entered into the contract.

(6) [Name of defendant] would not have entered into the contract if [he] had known that the representation was not true.

References

Armed Forces Ins. Exch. V. Harrison, 70 P.3d 35, 40 (Utah 2003).

MUJI 1st Instruction

Approved

CV2128. Impossibility/Impracticability.

[Name of defendant] claims that [his] performance under the contract was made impossible or highly impracticable by an unforeseen supervening event.

"Highly Impracticable" means that performance under the contract can be done only at an excessive and unreasonable cost.

A "supervening event" is an event that creates a major change in the expected circumstances.

[Name of defendant] makes this assertion based on the following circumstances:

To prevail on this claim defendant must show: (numbered list)

[Insert description of circumstances, such as death of essential participant, destruction of essential property, unforeseen change of law, act of God, etc.]

If you decide that [name of the defendant] has proved these circumstances just described are a supervening event, unforeseen at the time the contract was entered into and occurred through no fault of [name of defendant] and that the circumstances rendered [name of defendant]'s performance of the contract impossible or highly impracticable, then [name of defendant]'s obligations under the contract are excused.

References

Holmgren v. Utah-Idaho Sugar Co., 582 P.2d 856, 861 (Utah 1978).

Commercial Union Associates v. Clayton, 863 P.2d 29, 38 (Utah Ct. App. 1993).

MUJI 1st Instruction

Approved

CV2129. Frustration of purpose.

[Name of defendant] claims that [his] performance under the contract is excused because of the following circumstances:

[Insert description of circumstances which frustrated that purpose.]

To determine if defendant is excused from performance under the contract, you must decide:

(1) the original purpose of the contract contemplated by the parties;

(2) whether the circumstances just described are a supervening event, unforeseen at the time the contract was entered into;

(3) whether the circumstances occurred through no fault of [name of defendant]; and

(4) whether the new circumstances have made the purpose of the contract useless.

References

Castagno v. Church, 552 P.2d 1282 (Utah 1976).

Diston v. EnviroPak Medical Products, Inc., 893 P.2d 1071 (Utah Ct. App. 1995).

MUJI 1st Instruction

Approved

CV2130. Substantive ~~U~~unconscionability.

~~In order to decide whether~~ [Name of party] claims one or more terms of the contract are substantively unconscionable~~., you will need to decide whether there was "substantive unconscionability" and/or "procedural unconscionability."~~

Substantive unconscionability focuses on the terms of the agreement and requires you to examine the relative ~~un~~fairness of the contract~~ual obligations~~. ~~Even if a contract is unreasonable or more advantageous to one party, the contract is not necessarily unconscionable. Rather, for the contract to be substantively unconscionable, the terms must be so one-sided as to oppress or surprise an innocent party, or there must be an overall imbalance in the obligations and rights imposed by the contract, such as excessive price or other terms which you decide are inconsistent with accepted customs of commercial practice.~~In order to find that the contract is substantively unconscionable you must find either:

(1) the contract terms are so one sided as to oppress or surprise an innocent party; or

(2) the contract terms result in an overall imbalance in the obligations and rights between the parties.

References

The Cantamar, L.L.C. v. Champagne, 2006 UT App 321, ¶¶ 31-36.

Ryan's v. Dan's Food Stores, Inc., 972 P. 2d 395, 402 (Utah 1998).

Sosa v. Paulos, 924 P. 2d 357 (Utah 1996).

Equitable Life & Cas. Ins. Co. v. Ross, 849 P. 2d 1187, 1190 (Utah Ct. App. 1993).

Klas v. Van Wagoner, 829 P.2d 135 (Utah Ct. App. 1992).

MUJI 1st Instruction

CV2131. Procedural unconscionability.

[Name of party] claims one or more terms of the contract are procedurally unconscionable.

Procedural unconscionability focuses on the creation of the contract and the circumstances of the parties. Procedural unconscionability causes oppression and unfair surprise and you should examine all of the circumstances. ~~For example, to~~ To decide whether there was procedural unconscionability, consider ~~the following~~:

[(1) whether each party had a reasonable opportunity to understand the terms and conditions of the agreement;]

[(2) whether there was a lack of opportunity for meaningful negotiation;]

[(3) whether the agreement was printed on a duplicate or boilerplate form drafted solely by the party in the strongest bargaining position;]

[(4) whether the terms of the agreement were explained to the weaker party;]

[(5) whether the [aggrieved party] had a meaningful choice or instead felt compelled to accept the terms of the agreement; ~~and/or~~]

[(6) whether the [stronger party] employed deceptive practices to hide key contractual provisions.]

[(7) describe other circumstances raised by the evidence that show procedural unconscionability.]

Subcommittee: What happens if conditions are met?

References

The Cantamar, L.L.C. v. Champagne, 2006 UT App 321, ¶¶ 31-36.

Ryan's v. Dan's Food Stores, Inc., 972 P. 2d 395, 402 (Utah 1998).

Sosa v. Paulos, 924 P. 2d 357 (Utah 1996).

Equitable Life & Cas. Ins. Co. v. Ross, 849 P. 2d 1187, 1190 (Utah Ct. App. 1993).

Klas v. Van Wagoner, 829 P.2d 135 (Utah Ct. App. 1992).

MUJI 1st Instruction

Advisory Committee Note

The judge should instruct on the circumstances showing procedural unconscionability that are supported by the evidence.

Case law suggests that "While a determination of substantive unconscionability may by itself lead to our concluding the contract was unconscionable, procedural unconscionability alone 'rarely render[s] a contract unconscionable.'" Ryan's v. Dan's Food Stores, Inc., 972 P. 2d 395, 402 (Utah 1998)).

Subcommittee: Draft a provision for 2130 and 2131 of what the jury should do if it finds substantive or procedural or unconscionability. The instruction as written only explains what the law is.

~~CV2131~~CV2132. Mutual mistake.

[Name of defendant] claims that there was no contract because both parties were mistaken about [insert description of mistake]. To succeed on the claim that there is no contract, [name of defendant] must prove all of the following:

(1) Both parties, at the time the contract was entered into, were mistaken about [insert description of mistake].

(2) This mistake was a basic assumption or vital fact upon which they based their bargain.

(3) [Name of defendant] would not have agreed to enter into this contract if [he] had known about the mistake.

Subcommittee: Number 3 as written tells the jury to apply a subjective standard: whether the defendant would not have entered into the contract. Is this correct or should the standard be objective: whether a reasonable person would not have entered into the contract.

References

England v. Horbach, 944 P.2d 340 (Utah 1997).

Despain v. Despain, 855 P.2d 254 (Utah Ct. App. 1993).

Restatement (Second) of Contracts §§ 151, 152 (1979).

MUJI 1st Instruction

Approved

~~CV2132~~CV2133. Unilateral mistake.

[Name of defendant] claims that there was no contract because [he] was mistaken about [insert description of mistake]. To succeed on the claim that there is no contract, [name of defendant] must prove all of the following:

(1) [Name of defendant] was mistaken about [insert description of mistake].

(2) [Name of defendant]'s mistake must have such serious consequences that to enforce the contract as made would be unconscionable.

(3) The matter about which the mistake was made related to an important feature of the contract.

(4) The mistake occurred even though [name of defendant] made a reasonable effort to understand the circumstances described in paragraph (1) above.

(5) ~~It is possible to put~~ [~~n~~Name of plaintiff] can be put back in the position [he] was in ~~prior to~~ before the contract, losing only the benefit of the bargain.

References

Guardian State Bank v. Stangl, 778 P.2d 1, 4-5 (Utah 1989).

Bekins Bar V Ranch v. Huth, 664 P.2d 455 (Utah 1983).

Klas v. Van Wagoner, 829 P.2d 135 (Utah Ct. App. 1992).

MUJI 1st Instruction

Subcommittee: 2133/2132. For mutual mistake, the error has to be "a basic assumption or vital fact upon which they based their bargain." For a unilateral mistake, the error has to be "related to an important feature of the contract." Are the two intentionally different? In the discussion, the committee thought that the standard for a unilateral mistake might be higher than for a mutual mistake, but this is the opposite.

~~CV2133~~CV2134. Third-party beneficiary.

[Name of plaintiff] claims that [he] is a third party beneficiary of a contract between [list parties to the contract]. To be a beneficiary of a third party contract, [name of plaintiff] must prove:

(1) that the parties to the contract intended that [name of plaintiff] benefit from the contract, and

(2) the intention of the parties to benefit" the third party must be clear from the terms of the contract.

~~Parties to a contract can create rights under the contract in favor of another who is not named as a party to the contract. Such a person is called an "intended third party beneficiary." The third party can enforce [his] rights under the contract just as if [he] had been named as a party to the contract.~~

~~Someone who receives benefits under a contract, without the parties to the contract intending to create rights for that person under the contract, is an "incidental beneficiary" under the contract. An incidental beneficiary has no rights under the contract.~~

~~[Name of plaintiff] must be an "intended beneficiary" of the contract, and the intention of the parties to "benefit" the third party must be clear from the terms of the contract. A third-party who is only "incidentally benefited" has no rights under the contract.~~

References

Wasatch Bank v. Surety Ins. Co., 703 P.2d 298 (Utah 1985).

Tracy Collins Bank & Trust v. Dickamore, 652 P.2d 1314 (Utah 1982).

Rio Algom Corp. v. Jimco Ltd., 618 P.2d 497 (Utah 1980).

MUJI 1st Instruction

~~CV2134~~CV2135. Assignment.

An assignment transfers a party's rights under the contract to another.

If [Assignor's name] assigned [his] rights under the contract to [Assignee's name], then [Assignee's name] had the right to demand that [name of other party] do ~~what [he] had promised to do under the contract~~ [specifiy contractual obligations]. An assignment does not relieve ~~the assignor~~ [assignor's name] of [his] obligation to perform [his] duties under the contract when the [name of assignee] agrees to perform those duties and [name of the other party] gives [his] consent.

References

Winegar v. Froerer Corp., 813 P.2d 104, 107 (Utah 1991).

First American Commerce Co. v. Washington Mut. Sav. Bank, 743 P. 2d 1193, 1194 (Utah 1987).

Restatement (Second) of Contracts §§ 317, 324, 336.

MUJI 1st Instruction

~~CV2135~~CV2136. Delegation.

A delegation transfers a party's duties under a contract to another.

[Name of party] claims that [name of delatgatee] was supposed to [describe duties under the contract]. [Delegator's name] ~~was permitted to~~ may delegate [his] duties under the contract to [delegatee's name] unless [name of other party] had a substantial interest in having [delegator's name] personally fulfill the duties. However, even if [delegator's name] delegates [his] duties to [delegatee's name], [delegator's name] is still responsible for guaranteeing that [delegatee's name] performs those duties.

References

Winegar v. Froerer Corp., 813 P.2d 104, 107 (Utah 1991).

First American Commerce Co. v. Washington Mutual Sav. Bank, 743 P.2d 1193, 1194 (Utah 1987).

Restatement (Second) of Contracts § 318.

MUJI 1st Instruction

Subcommittee. 2135 and 2136. For both of the instructions, the committee asked what is the jury being asked to decide? The instruction describes the law, but not what the jury is supposed to do with it. Also, who has the burden of proof? Is assignment/delegation a defense or a claim? For the latter, the committee asked: If the delegator remains liable, when would this ever come up?

~~CV2136~~CV2137. Modification.

[Name of party] claims that [he] and [name of other party] changed their contract. ~~The parties to an oral or written contract may agree later to change it.~~ To change a contract, both parties must agree on the new terms. If you find that both parties agreed to change the ~~a~~ contract ~~has been changed~~, then any old terms that conflict with the new terms cannot be enforced.

R.T. Nielson Co. v. Merrill Cook, 2002 UT 11, ¶ 13 n.4.

Richard Barton Enterprises, Inc. v. Tsern, 928 P.2d 368, 373 (Utah 1996).

Copper State Leasing Co. v. Blacker Appliance & Furniture Co., 770 P.2d 88, 90 (Utah 1988).

Restatement (Second) of Contracts § 149.

MUJI 1st Instruction

Committee note. Counsel and judge should consider the application of the statute of frauds.

Approved

~~CV2137~~CV2138. Abandonment.

[Name of ~~plaintiff (~~party~~?)~~] claims that [he] and [name of ~~defendant (~~other party~~)~~] abandoned their contract. The party claiming abandonment must prove either that:

(1) the parties agreed to abandon their contract; or

(2) the parties acted as if the contract no longer existed.

~~One way a contract can be abandoned is if the parties agree to abandon their contract. Another way the contract can be abandoned, is if the parties act as if the contract no longer exists.~~ If ~~a~~ you find that the parties abandoned their contract ~~has been abandoned~~, then the parties have no further obligation to do what they promised to do.

References

Parduhn v. Bennett, 2002 UT 93, ¶ 11.

Restatement of Contracts § 283 Agreement of Rescission.

MUJI 1st Instruction

Approved

CV2139. Damages related to expected benefits.

If ~~a party~~ [name of party] is damaged by a breach of a contract, then [he] has a right to recover ~~general~~ damages ~~caused by [name of defendant]'s breach based on the benefits [he] expected to receive from the contract. General damages are those~~ that

follow naturally and are normally from the contract ~~related to the loss of the expected benefits. General damages are~~ measured as follows:

(1) the loss of the benefits from the contract caused by ~~the~~ [name of party]'s breach; minus,

(2) any cost or other loss that [name of plaintiff] has avoided by not having to perform.

References

Black v. Allstate Ins. Co., 2004 UT 66, ¶28.

Ford v. Am. Express Fin. Advisors, Inc., 2004 UT 70, ¶ 39.

Mahmood v. Ross (In re Estate of Ross), 1999 UT 104, ¶ 19.

Thurston v. Workers Comp. Fund of Utah, 2003 UT App 438, ¶¶ 21-22.

Restatement (Second) of Contracts § 347.

MUJI 1st Instruction

Advisory Committee Note

This instruction is intended to be read in conjunction with the instruction on consequential damages where appropriate.

CV2140. Consequential damages.

If a party recovers damages for the benefits [he] expected to receive from the contract, then that party is also entitled to recover "consequential" damages caused by [name of defendant]'s breach.

Consequential damages are those losses or injuries reasonably within the contemplation of the parties, that is, they could have considered them or reasonably foreseen them, at the time the contract was made.

In order to decide whether a loss or an injury was foreseeable at the time the contract was made, you should examine the nature and language of the contract and the reasonable expectations of the parties. A loss may be foreseeable because it follows from the breach

(1) in the ordinary course of events, or

(2) as a result of special circumstances, beyond the ordinary course of events, that [name of defendant] had reason to know.

References

Mahan v. UNUM Life Ins. Co. of Am., 2005 UT 37, ¶ 17.

Black v. Allstate Ins. Co., 2004 UT 66, ¶ 28.

Berube v. Fashion Centre, 771 P.2d 1033, 1050 (Utah 1989).

Gardiner v. York, 2006 UT App 496, ¶ 14.

Restatement (Second) of Contracts § 351.

MUJI 1st Instruction

CV2141. Reliance damages.

Instead of damages based on the benefits [name of plaintiff] expected to receive from the contract, [name of plaintiff] has a right to recover the reasonable expenditures that [name of plaintiff] would have sustained if [name of defendant] had performed the contract as agreed. It is up to [name of defendant] to prove with reasonable certainty the loss [name of plaintiff] would have sustained.

References

Ranch Homes v. Greater Park City Corp., 592 P.2d 620, 624 (Utah 1979).

Skanchy v. Calcados Ortope SA, 952 P.2d 1071, 1078 (Utah 1998).

Restatement (Second) of Contracts § 349.

MUJI 1st Instruction

CV2142. Damages. Foreseeability.

[Name of plaintiff] may not recover damages for any loss that [name of defendant] did not have reason to foresee and did not anticipate as a probable result of the breach when the contract was made.

It is not enough that [name of defendant] knew of a possible harm. [Name of defendant] must have had reason to foresee the loss claimed by [name of plaintiff] as a probable result of the breach of the contract. A loss may be foreseeable as a probable result of a breach because it follows from the breach

(1) in the ordinary course of events, or

(2) as a result of special circumstances, beyond the ordinary course of events, that [name of defendant] had reason to know.

References

Ranch Homes v. Greater Park City Corp., 592 P.2d 620, 624 (Utah 1979) .

Brown's Shoe Fit Co. v. Olch, 955 P.2d 357, 365 (Utah Ct. App. 1998).

Restatement (Second) of Contracts § 351.

MUJI 1st Instruction

CV2143. Mitigation and avoidance.

[Name of plaintiff] had a duty to mitigate, that is, to minimize or avoid, the damages caused by the breach. [Name of plaintiff] may not recover damages that [he] could have avoided without undue risk, burden or humiliation. Likewise, [name of plaintiff] may not recover the damages for losses that were caused by or made worse by [his] own action or inaction.

However, [name of plaintiff] has a right to recover damages if [he] has made a reasonable but unsuccessful effort to avoid loss.

References

Mahmood v. Ross (In re Estate of Ross), 1999 UT 104, ¶ 31.

Restatement (Second) of Contracts § 350.

MUJI 1st Instruction

CV2144. Damages. Reasonable certainty.

Damages are only recoverable for loss in an amount that the evidence proves with reasonable certainty, although the actual amount of damages need not be proved with precision. Any alleged damages which are only remote, possible or a matter of guess work are not recoverable.

References

Sawyers v. FMA Leasing Co., 722 P.2d 773, 774 (Utah 1986). Winsness v. M.J. Conoco Distributors, Inc., Utah, 593 P.2d 1303, 1305 (1979).

Graham v. Street, 2 Utah 2d 144, 149, 270 P.2d 456, 459 (Utah 1954).

Schwartz v. Adair, 2007 UT App 75.

Restatement (Second) of Contracts § 352.

MUJI 1st Instruction

CV2145. Nominal damages.

A party damaged by the other party's breach of the contract has a right to recover the damages caused by the breach. However, if [name of plaintiff] has not proved any actual or substantial damages caused by the breach, or if [he] has not proved the amount of damages, then you may award as damages a small or nominal sum such as One Dollar.

References

Bair v. Axiom Design, L.L.C., 2001 UT 20, ¶ 18. 20 P3d 388 (Utah 2001)

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MUJI 1st Instruction

Approved