

Agenda

Advisory Committee on Model Civil Jury Instructions

November 9, 2009
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

Welcome and approval of minutes	Tab 1	John Young
Construction Contracts	Tab 2	Kent Scott John Young
Accountant Negligence	Tab 3	Frank Carney Bob Gilchrist

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.

December 14, 2009
January 11, 2010
February 8, 2010
March 8, 2010
April 12, 2010
May 10, 2010
June 14, 2010
September 13, 2010
October 12, 2010 (Tuesday)
November 8, 2010
December 13, 2010

Tab 1

MINUTES

Advisory Committee on Model Civil Jury Instructions

October 13, 2009

4:00 – 6:00 p.m.

Present: Juli Blanch, Marianna Di Paolo, Phillip Ferguson, Rich Humpherys, John Lund, Stephen Nebeker, Timothy Shea, Kent Scott, Peter Summerill, John Young

Excused: Judge William Barrett, Frank Carney, Tracy Fowler, Colin King, Paul Simmons

Mr. Young called the meeting to order.

Mr. Young reported that he and Mr. Shea had met with the Board of District Court Judges to encourage feedback about the model instructions. Board members stated that they were using the new instructions and thought that they were well done. The Board members also stated that, even if there is no Utah law on a matter, that it would be helpful for the committee to draft an instruction based on the law of other states, providing a majority and minority view when appropriate. Other committee members stated that the new instructions seem to be gaining acceptance. Mr. Young thought that Chief Justice Durham's letter to the district court judges had been very helpful.

Mr. Shea reported that, based on his research and the earlier draft provided by Mr. Young, he recommends breaking up the instructions for liability and damages for defective work to cover three concepts: contractor's liability; owner's damages; and avoiding unreasonable economic waste. He reported that the law on the first two is reasonable clear, but that the law on the last is not.

CV2214. Contractor's liability for defective work. The committee decided to omit (2) in light of the recent Davencourt decision. The committee added "did not comply with industry standards" to the bracketed language in (1). The committee approved the instruction.

CV2215. Damages for contractor's defective work. The committee added noncompliance with "industry standards" to the bracketed language. The committee approved the instruction.

CV2216. Avoiding unreasonable economic waste. Mr. Shea reported that Utah law is clear that the contractor bears the burden of proving that the cost to repair or replace defective construction involves unreasonable economic waste. Some states place the burden of disproving that on the owner. Mr. Shea reported that the Stangl case, which establishes the principle, quotes Corbin for the principle that the contractor must prove "affirmatively and convincingly," that the cost to repair or replace involves economic waste. Whether that means the standard or proof is clear and convincing evidence is unstated.

It is also unclear what constitutes unreasonable economic waste, other than it has to be extreme. The committee thought that the concept of the cost to repair or replace

being way out of proportion to the value of the project should be added. The committee decided to add “clearly” out of proportion to (1). The committee approved the instruction.

CV2228. Owner’s claim for damages for delay caused by contractor. Mr. Scott explained that there is no Utah law on damages for delay other than liquidated damages. The committee decided that this instruction should more closely parallel contractor’s claim for damages caused by owner, which is the counterpart to this instruction. The committee edited 2227 to fit the context of the owner’s damages and approved the instruction.

CV2235. Mitigation of damages. The committee decided to copy the commercial contract instruction on mitigation, but to use “without unreasonable risk or burden” rather than “undue” and to separate humiliation since there seems to be no concept that a reasonable amount of humiliation might be acceptable.

CV2236. Impossibility. The committee approved the instruction as drafted.

CV2237. Excessive and unreasonable cost. The committee decided to omit this instruction because it restates the concepts in the “cardinal change” instruction.

CV2238. Frustration of purpose. The committee decided to copy the commercial contract instruction on frustration of purpose. There is no Utah law in the construction context.

CV2239. Estoppel. The committee decided to omit this instruction.

CV2240. Accord and satisfaction. The committee decided to copy the commercial contract instruction on accord and satisfaction.

CV2241. Damages for termination for convenience. Mr. Scott will draft a new instruction.

The meeting was adjourned.

Tab 2

Construction Contracts

- (1) CV2239. Termination for convenience. 2
- (2) CV2240. Damages for termination for convenience. 2
- (3) CV2241. Damages for owner’s breach that prevents contractor’s performance... 3
- (4) CV2242. Liquidated damages. 4
- (5) CV22##. Implied warranty of workmanship and habitability. 4

(1) CV2239. Termination for convenience.

[Name of owner] claims [he] had the right to terminate the contract without cause and for [his] convenience even though [name of contractor] did not breach [his] contract with [name of owner]. To succeed on this claim, [name of owner] must prove that:

(1) the contract between [name of owner] and [name of contractor] provides [name of owner] the right to terminate the contract without cause;

(2) [name of owner] did not breach the contract in any important way at the time [name of owner] gave [name of contractor] notice of the termination for convenience; and

(3) [name of owner] exercised [his] right to terminate the contract for convenience in good faith.

References

Encon Utah, LLC v. Flour Ames Kraemer, LLC, 210 P.3d 263 (Utah 2009)

Morrison Knudsen Corp. v. Fireman's Fund Insurance Co., 175 F.3d 1221 (10th Cir. 1999)

EDO Corp. v. Beech Aircraft Corp., 911 F.2d 1447, 1453 n. 6 (10th Cir. 1990)

Bruner & O'Connor Construction Law §§ 18:45-47

Committee Note

If the owner is given the unilateral right to terminate the contract for its convenience and not for cause arising from the contractor's breach, there is a perceived concern among the courts that the contract may create an unenforceable and illusory promise lacking consideration due to the absence of mutuality. In order to address this concern courts throughout the country have determined that the owner's right to terminate the contract for convenience should be done in good faith. The general view is that the owner has an implied duty of good faith and fair dealing when exercising its rights under a termination for convenience clause. See Bruner & O'Connor Construction Law §§ 18:47

(2) CV2240. Damages for termination for convenience.

Proposed

If [name of owner] terminated the contract for convenience in good faith, [name of contractor] is entitled to the damages defined in the contract. You may consider awarding [name of contractor] the following damages:

(1) reasonable out of pocket costs for the work performed;

(2) reasonable overhead for the work performed;

(3) reasonable profit for the costs and overhead;

(4) reasonable demobilization costs;

(5) other reasonable costs relating to the termination for convenience

References

Encon Utah, LLC v. Flour Ames Kraemer, LLC, 210 P.3d 263 (Utah 2009)

Bruner & O'Connor Construction Law §5:272

12 ALR Fed. 2d 551

Committee Notes

If the contract expressly excludes any item of damages, do not include it when instructing the jury. If the contract provides for additional damages, include these additional categories when instructing the jury.

Approved

The contract has been properly terminated for convenience, and you must decide the amount of damages to award [name of contractor] for each of the following:

- (1) the cost of preparations made before the termination;
- (2) the value of work completed;
- (3) a reasonable profit on the work performed;
- (4) the cost to de-mobilize from the job site; and
- (5) the cost to prepare a termination settlement proposal.

References

Flynn v. W.P. Harlin Constr. Co., 509 P.2d 356, 358 (Utah 1978).

Bruner & O'Connor Construction Law §§ 5:272.

12 ALR Fed.2d 551.

64 Am.Jur. 2d Public Works and Contracts § 164.

Committee Notes

If the contract expressly excludes any item of damages, do not include it when instructing the jury. If the contract provides for additional damages, include these additional categories when instructing the jury.

(3) CV2241. Damages for owner's breach that prevents contractor's performance.

If you find that [name of owner] breached the contract and that the breach prevented [name of contractor] from completing performance, then [name of contractor] is entitled to recover the amount that [he] would have received for finishing the project, less what would have been the reasonable expense to complete performance.

References

Flynn v. Schocker Constr, Co., 459 P.2d 433 (Utah 1969).

Flynn v. W.P. Harlin Constr. Co., 509 P.2d 356 (Utah 1973).

(4) CV2242. Liquidated damages.

[Name of owner] seeks to recover the damages for delay specified in the contract. You must enforce the damages clause in the contract if you find that, at the time the parties entered into the contract:

- (1) the amount of damages was a reasonable estimate of the damages [name of owner] would suffer as a result of a delay, and
- (2) the damages arising from the delay were difficult to accurately estimate.

References

Reliance Ins. Co. v. Utah Dep't of Transportation, 858 P.2d 1363, 1366-67 (Utah 1993)

Woodhaven Apartments v. Washington, 942 P.2d 918, 921 (Utah 1997)

Allen v. Kingdon, 723 P. 2d 394, 397 (Utah 1986)

Soffe v. Ridd, 659 P.2d 1082, 1084 (Utah 1983)

Restatement of Contracts §339 (1932)

(5) CV22##. Implied warranty of workmanship and habitability.

[Name of owner] claims that the new residence [he] purchased from [name of builder/developer] is defective and [name of builder/developer] has breached the implied warranty of workmanship and habitability. To succeed on this claim [name of owner] must prove that:

- (1) [he] purchased a new residence from [name of builder/developer];
- (2) the residence contained a ~~latent~~ hidden defect;
- (3) the defect ~~manifested itself~~ became noticeable after [name of owner] purchased the residence;
- (4) the defect was caused by improper design, material, or workmanship; and
- (5) the defect created a ~~question of safety~~ hazard or made the residence unfit for human habitation.

References

Davencourt v. Davencourt, 2009 UT 65.

Tab 3

Accountant Negligence

Table of Contents

(1) CV401. Committee Note on Legal Malpractice Instructions.	3
(2) CV402. Elements of claim for legal malpractice.	3
(3) CV403. Elements of claim for breach of fiduciary duty.	3
(4) CV404. Attorney-client relationship.	3
(5) CV405. Duty of care.	3
(6) CV406. Scope of representation.....	3
(7) CV407. "Cause" defined.	3
(8) CV408. Plaintiff's fault.	3
(9) CV409. Damages caused by a judicial mistake.....	3
(10) CV410. Negligence and breach of contract.	3
(11) CV411. Elements of claim for negligence.	4
(12) CV412. Duty of care and standard of care. "Negligence" defined.....	4
(13) CV413. Negligence. GAAP and GAAS as standards of care (Alternate A).	5
(14) CV414. Expert testimony.....	5
(15) CV415. Causation.	6
(16) CV416. Negligence. Affirmative defenses.	6
(17) CV417. Comparative negligence.....	7
(18) CV418. Negligence. Plaintiff's Duty to mitigate.....	7
(19) CV419. Accountant's breach of contract. Elements.....	8
(20) CV420. Breach of contract defined.....	9
(21) CV421 Plaintiff's duty to perform under the contract (Substantial Performance Doctrine).....	9
(22) CV422. Defendant's duties under contract.	9
(23) CV423. Defendant's duties under contract. Implied.....	10
(24) CV424. Breach of contract. Damages and causation.....	10
(25) CV425 Breach of contract. Defenses.	11
(26) CV426. Breach of contract. Plaintiff's duty to mitigate.....	11
(27) CV427. Definition. "Financial statement" defined.....	12
(28) CV428 Management's duties.....	12
(29) CV429. Auditor's duties.	13
(30) CV430. Types of engagements. AICPA standards of care.....	13

(31) CV431. "GAAP" and "GAAS" defined. 14
(32) CV432. "Audit" defined. 15
(33) CV433 "Financial forecast" defined. 15
(34) CV434. "Financial projection" defined..... 16
(35) CV435. "Compilation of financial forecasts or projections" defined..... 16
(36) CV436. "Compilation report" defined. 17
(37) CV437 "Examination report" defined. 18

- (1) CV401. Committee Note on Legal Malpractice Instructions.
- (2) CV402. Elements of claim for legal malpractice.
- (3) CV403. Elements of claim for breach of fiduciary duty.
- (4) CV404. Attorney-client relationship.
- (5) CV405. Duty of care.
- (6) CV406. Scope of representation.
- (7) CV407. "Cause" defined.
- (8) CV408. Plaintiff's fault.
- (9) CV409. Damages caused by a judicial mistake.
- (10) CV410. Negligence and breach of contract.

~~[Name of plaintiff] asserts two claims against [name of defendant]. The plaintiff's first claim is that [name of defendant] performed the accounting services negligently. The plaintiff's second claim is that the [name of defendant] performed accounting services in a way that violated or breached the contract between the parties.~~

~~If you find for the plaintiff on either of these two claims, you may award the plaintiff any damages as you find resulted from the [name of defendant]'s negligence or breach of contract.~~

~~MUJI 1st Reference~~

~~7.1~~

~~References~~

~~DCR Inc. v. Peak Alarm Co., 663 P.2d 433 (Utah 1983).~~

~~Milliner v. Elmer Fox & Co., 529 P.2d 806 (Utah 1974).~~

~~Western Surety Co. v. Loy, 594 P.2d 257 (Kan. App. 1979).~~

~~Committee Notes~~

The contract sections of these instructions are essentially the same as commercial contracts. I recommend that we rely on those instructions. Maybe we go so far as to eliminate the general negligence instructions as well. The influence of GAAP and GAAS on both accountant contracts and accountant negligence is important. And there are a few other specialized instructions worth keeping, but the rest of this is simply standard contract or negligence law. The citations may refer to caselaw involving accountants, but I have not checked.

(11) CV411. Accountant's Elements of claim for negligence. Elements.

[Name of plaintiff] claims that [name of defendant] negligently performed accounting services ~~negligently~~. ~~For the plaintiff to recover on the negligence claim, the~~ To succeed on this claim, [name of plaintiff] must prove ~~each of the following elements that~~:

(1) [name of plaintiff] ~~engaged~~ hired [name of defendant] to perform accounting services;

(2) [name of defendant] performed those ~~accounting~~ services negligently; and

~~(3) [name of plaintiff] suffered damages, the amount of which can be determined with reasonable certainty; and~~

~~(4) the [name of defendant]'s negligence of the defendant proximately caused was a cause of~~ [name of plaintiff]'s damages.

MUJI 1st Reference

7.2

See MUJI 3.1 and 7.14

References

Committee Notes

(12) CV412. Duty of care and standard of care. "Negligence" defined.

~~An accountant~~ [Name of defendant] has a duty to ~~exercise use~~ the same degree of care, skill, judgment and diligence ~~generally practiced used~~ by qualified accountants under similar circumstances.

~~"Negligence" on the part of an accountant consists of doing something means that~~ [name of defendant] did something that qualified accountants generally would not do under similar circumstances, or ~~of failing failed~~ to do something that qualified accountants generally would do under similar circumstances.

MUJI 1st Reference

7.3

References

Nauman v. Harold K. Beecher & Assoc., 467 P.2d 610 (Utah 1970).

Maduff Mortgage Corp. v. Deloitte Haskins & Sells, 779 P.2d 1083 (Or. App. 1989).

See <a href=

http://www.utcourts.gov/resources/muji/inc_list.asp?action=showRule&id=2#202>Instruction CV202, "Negligence" defined.

Committee Notes

I added "judgment" from the lawyer negligence instructions.

(13) CV413. Negligence. GAAP and GAAS as standards of care (Alternate A).

~~In determining whether [name of defendant] exercised reasonable care, skill and diligence in performing accounting services for the plaintiff, you may consider Generally Accepted Accounting Principles, commonly known as "GAAP," and Generally Accepted Auditing Standards, commonly known as "GAAS."~~

~~However, [name of defendant]'s compliance with these standards does not by itself mean that [he] used reasonable care, skill and diligence. Similarly, [his] failure to comply with these standards does not by itself mean that [he] was negligent. [Name of defendant]'s compliance or failure to comply with "GAAP" or "GAAS" is simply one factor among others you may consider in deciding whether or not [name of defendant] was negligent.~~

~~MUJI 1st Reference~~

~~7.4~~

~~References~~

~~Bily v. Arthur Young & Co., 271 Cal. Rptr. 470 (Cal. Ct. App. 1990).~~

~~Maduff Mortgage Corp. v. Deloitte Haskins & Sells, 779 P.2d 1083 (Or. App. 1989).~~

~~Committee Notes~~

~~The law is unsettled on whether compliance with GAAP or GAAS completely satisfies the accountant's duty of care. The Committee takes no position on which of the alternate instructions should be adopted in Utah.~~

~~It looks like GAAP and GAAS come into play in both tort and contract, so I recommend deleting this instruction and relying on the definition instruction below.~~

(14) CV414. Negligence. Expert testimony.

~~In determining deciding whether [name of defendant] exercised the standard of used reasonable care, skill, judgment and diligence generally practiced by accountants in similar circumstances, you may consider the opinions of expert witnesses who, by virtue because of their education and experience, knew of that standard of care as it existed know what care, skill, judgment and diligence was generally being used by accountants in similar circumstances at the time in question [name of defendant] performed the accounting services.~~

~~You may resolve any conflict in the testimony of the expert witnesses by weighing the different opinions against each other, taking into consideration the reasons given for the opinion, the facts relied upon by the witness, and the relative credibility, special knowledge, skill, experience, training and education of the witness. You should carefully consider each opinion and give it the weight to which you deem it entitled.~~

~~MUJI 1st Reference~~

~~7.6~~

~~References~~

~~Koch v. Southern Pacific Co., 266 Or. 335, 513 P.2d 770 (1973).~~

Wulff v. Sprouse-Reitz Co., Inc., 262 Or. 293, 498 P.2d 766 (1972).

Committee Notes

I recommend that we delete the second paragraph and rely on CV136 instead.

(15) CV415. ~~Negligence. Causation.~~

~~In order to recover damages in this case, the plaintiff must prove that the defendant's negligence was a proximate cause of those damages. To establish proximate cause, the plaintiff must prove that the defendant's negligence was a substantial and foreseeable factor in causing the plaintiff's damages. [Name of plaintiff] claims that [name of defendant]'s negligence was a cause of the damages.~~

[Insert Instruction CV209.]

~~Negligent accounting practices such are a factor cause of [name of plaintiff]'s damages if correct accounting practices would have averted-avoided the plaintiff's damages, and if it were foreseeable that the plaintiff's damages would result from the negligent accounting practices were foreseeable. The defendant's negligence need not be the only cause of the plaintiff's damages.~~

MUJI 1st Reference

7.7

References

Mitchell v. Pearson Enters., 697 P.2d 240 (Utah 1985), cited in Prosser, Law of Torts, § 41 at 241 (4th ed. 1971)

Watters v. Query, 626 P.2d 455 (Utah 1981).

Hall v. Blackham, 417 P.2d 664 (Utah 1966).

~~Drabkin v. Alexander Grant & Co., 905 F.2d 453 (D.C. Cir. 1990).~~

~~JIFU No. 15.6 (1957).~~

~~BAJI No. 3.75 (1986). Reprinted with permission; copyright © 1986 West Publishing Company~~

See MUJI 3.12 and 6.36

Committee Notes

(16) CV416. Negligence. Affirmative defenses.

~~If the plaintiff proves that the defendant was negligent, you must then consider the defendant's defenses to that claim. The defendant has the burden of proving each defense.~~

MUJI 1st Reference

7.8

References

JIFU 2.2

Committee Notes

I recommend deleting this instruction. It is simply a bridge, which we have not developed in other contexts.

(17) CV417. Negligence. Plaintiff's Comparative negligence fault.

~~The defendant alleges, as a defense, [Name of defendant] claims that [name of plaintiff] was negligent. In order to establish this defense, the defendant To succeed on this claim, [name of defendant] must prove that:~~

(1) [name of plaintiff] was negligent;

(2) [name of plaintiff]'s negligence interfered with [name of defendant]'s ability to perform its ~~[audit]~~[accounting services]; and

(3) [name of plaintiff]'s negligence, ~~if any,~~ was a ~~proximate~~ cause of ~~the plaintiff's~~ ~~[his]~~ damages.

If you find all three of ~~those~~ these elements, you ~~shall~~ must then ~~determine~~ decide what percentage of fault is attributable to each party.

MUJI 1st Reference

7.9

References

Fullmer v. Wohlfeiler & Beck, 905 F.2d 1394 (10th Cir. 1990).

Shapiro v. Glekel, 380 F. Supp. 1053 (S.D.N.Y. 1974).

Lincoln Grain, Inc. v. Coopers & Lybrand, 216 Neb. 433, 345 N.W.2d 300 (1984).

See Damage Apportionment in Accounting Malpractice Actions: The Role of Comparative Fault, 1990 BYU L. Rev. 949 (1990).

Committee Notes

See http://www.utcourts.gov/resources/muji/inc_list.asp?action=showRule&id=2#211>Instruction CV211, Allocation of fault.

Is paragraph (2) necessary? It seems that (1) and (3) are sufficient for comparative fault. Is comparative fault in an accounting context different from generally? This is the first instruction that uses "auditing" as an alternative to "accounting." Should it have been used in the earlier instructions?

(18) CV418. Negligence. Plaintiff's Duty to mitigate.

~~Any plaintiff who claims damages as a result of a wrongful act of another has a duty to "mitigate" those damages — that is, to take advantage of any reasonable opportunity the plaintiff may have under the circumstances to reduce or minimize the loss or damage.~~

~~The defendant asserts as a defense in this case that the plaintiff failed to mitigate damages. To establish that defense, the defendant must prove first that the plaintiff had~~

~~a reasonable opportunity under the circumstances to mitigate damages, and second, that the plaintiff failed to take advantage of that opportunity.~~

~~If you find that the plaintiff had a reasonable opportunity to mitigate the damages caused by the defendant's negligence and failed to do so, then you should reduce any award in favor of the plaintiff by the amount of damages the plaintiff could have reasonably avoided.~~

MUJI 1st Reference

7.10

References

~~Alexander v. Brown, 646 P.2d 692 (Utah 1982).~~

~~Debry and Hilton Travel Serv., Inc. v. Capitol Int'l Airways, Inc., 583 P.2d 1181 (Utah 1978).~~

~~Pratt v. Board of Educ. of the Uintah County School Dist., 564 P.2d 294 (Utah 1977).~~

~~John Call Eng'g, Inc. v. Manti City Corp., 795 P.2d 678 (Utah Ct. App. 1990).~~

~~Price Orem Investment Co. v. Rollings, Brown and Gunnell, Inc., 784 P.2d 475 (Utah Ct. App. 1989).~~

Committee Notes

I recommend that we delete this instruction and rely on CV2020.

(19) CV419. Accountant's breach of contract. Elements.

~~[Name of plaintiff] claims that [name of defendant] breached the contract to perform accounting services for the plaintiff. For the plaintiff to recover on the breach of contract claim, [name of plaintiff] must prove each of the following elements:~~

~~(1) the existence of a contract between the plaintiff and the defendant;~~

~~(2) [name of defendant] failed to perform [his] duties under the contract;~~

~~(3) [name of plaintiff] complied with the conditions and performed the plaintiff's duties under the contract; and~~

~~(4) [name of plaintiff] suffered damages as a result of the defendant's failure to perform the defendant's duties under the contract.~~

MUJI 1st Reference

7.11

See MUJI § 26 passim

References

Committee Notes

(20) CV420. Breach of contract defined.

~~A breach of contract occurs when either party to the contract fails to perform as promised in the contract. The breach may occur with regard to either an express or an implied provision of the contract.~~

MUJI 1st Reference

7.12

See MUJI § 26 passim

References

Committee Notes

(21) CV421 Plaintiff's duty to perform under the contract (Substantial Performance Doctrine).

~~Before the plaintiff may recover for breach of contract, the plaintiff must prove that it performed its own obligations under the contract, or prove a valid excuse for its failure to perform. If the plaintiff does not prove that it performed its obligations under the contract, then the plaintiff may not recover for breach of contract.~~

MUJI 1st Reference

7.13

See MUJI 26.21 passim

References

Committee Notes

(22) CV422. Defendant's duties under contract. Express.

~~In this case, the plaintiff entered into~~ The parties have a written contract ~~with the defendant~~ in which ~~the defendant expressly~~ [name of defendant] agreed to:

(1) perform [~~the 20~~ _____ [name of plaintiff]'s year-end audit for the _____ audit year] [other accounting services], in accordance with "generally accepted auditing standards" (GAAS);

(2) express an opinion properly based upon "generally accepted accounting principles" (GAAP) on whether [name of plaintiff]'s financial statements were prepared and ~~fairly~~ presented in accordance with GAAP; and

(3) bring to [name of plaintiff]'s attention any ~~facts, circumstances, deficiencies or problems relevant and material important~~ facts, circumstances, deficiencies or problems relevant and material important to an understanding of [name of plaintiff]'s financial position, condition and results of operations ~~in for~~ the _____ audit year.

MUJI 1st Reference

7.14

References

Committee Notes

In (2), what is the alternative to “financial statements” that is should be bracketed? Is the auditor’s opinion in accordance with GAAP? Or or the financial statements prepared in accordance with GAAP? Or both? (3) is a mouthful. Are “financial position, condition and results of operations” different things?

(23) CV423. Defendant’s duties under contract. Implied.

~~Every contract imposes upon each party a duty to perform the contract in good faith. Good faith means that each party implied by promises that the party will not intentionally do anything to injure the other party’s right to receive the fruits of the contract.~~

~~The defendant had a duty to the plaintiff to act in good faith. If you find that the defendant did not perform the contract with the plaintiff in good faith, the defendant breached the contract.~~

~~MUJI 1st Reference~~

~~7.15~~

~~Adapted from MUJI § 26 passim.~~

~~References~~

~~Brehany v. Nordstrom, Inc., 812 P.2d 49 (Utah 1991).~~

~~St. Benedicts Dev. Co. v. St. Benedicts Hospital, 811 P.2d 194 (Utah 1991).~~

~~Resource Management Co. v. Weston Ranch, 706 P.2d 1028 (Utah 1985).~~

~~Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293 (Utah 1983).~~

~~Ferris v. Jennings, 595 P.2d 857 (Utah 1979).~~

~~Restatement (Second) of Contracts § 205.~~

~~3 Corbin, Contracts 349 § 571 (1960).~~

~~Substantially similar instruction used without error in Eggett v. Wasatch Energy Corp., 2004 UT 28, para 20 (2004). (shareholder purchasing agreement).~~

~~See also, Billings v. Union Bankers Ins. Co., 918 P.2d 461 (Utah 1996). (insurance coverage).~~

~~Committee Notes~~

(24) CV424. Breach of contract. Damages and causation.

~~A party who breaches an express or implied provision in a contract is responsible to the other party for damages resulting from that breach. However, in order to recover such damages, the plaintiff must prove that (1) the defendant’s breach caused the damages sought to be recovered by the plaintiff; and (2) the defendant could have reasonably foreseen that the breach would result in those damages.~~

~~MUJI 1st Reference~~

~~7.16~~

~~See MUJI § 26 passim~~

References

Committee Notes

(25) CV425 Breach of contract. Defenses.

~~If the plaintiff proves that the defendant breached the contract, you must then consider the defenses raised by the defendant. The defendant has the burden of proving each of the defendant's defenses.~~

~~MUJI 1st Reference~~

~~7.17~~

~~See MUJI § 26 passim~~

References

Committee Notes

(26) CV426. Breach of contract. Plaintiff's duty to mitigate.

~~A party to a contract who has been damaged by the other party's breach of contract has a duty to mitigate those damages — that is, to take advantage of any reasonable opportunity the party may have under the circumstances to reduce or minimize the loss or damage.~~

~~The defendant asserts as a defense that the plaintiff failed to mitigate the plaintiff's damages. To establish that defense, the defendant must prove first that the plaintiff had a reasonable opportunity under the circumstances to mitigate damages, and second, that the plaintiff failed to seek out or take advantage of the opportunity.~~

~~If you find that the plaintiff had a reasonable opportunity to mitigate the damages caused by the defendant's breach of contract and failed to do so, then you should reduce the plaintiff's award by the amount of damages the plaintiff could have reasonably avoided.~~

~~MUJI 1st Reference~~

~~7.18~~

References

~~Alexander v. Brown, 646 P.2d 692 (Utah 1982).~~

~~Debry and Hilton Travel Serv., Inc. v. Capitol Int'l Airways, Inc., 583 P.2d 1181 (Utah 1978).~~

~~Pratt v. Board of Education of the Uintah County School Dist., 564 P.2d 294 (Utah 1977).~~

~~John Call Engineering, Inc. v. Manti City Corp., 795 P.2d 678 (Utah Ct. App. 1990).~~

~~Price Orem Investment Co. v. Rollings, Brown and Gunnell, Inc., 784 P.2d 475 (Utah Ct. App. 1989).~~

Committee Notes

(27) CV427. Definition. “Financial statement” defined.

~~A financial statement refers to the financial position of a company at one historical moment in time and to the historical operating results for the fiscal period preceding that moment. A financial statement is prepared by the management of the company. In preparing the financial statement, management has the responsibility for adopting sound accounting policies for maintaining an adequate and effective system of accounts, for safeguarding assets, and for devising a system of internal controls that will, among other things, help assure the production of proper financial statements.~~

A financial statement shows a company’s financial position at the end of its fiscal year and the operating results for that year. The duties of the company that prepares the financial statement and of the independent certified public accountant who audits it are different. The company’s management prepares the financial statement from transactions that are within their direct knowledge. The auditor examines the financial statement and expresses an opinion about it.

MUJI 1st Reference

7.22

References

AICPA, Statements on Auditing Standards, AU § 110.02.

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Committee Notes

**(28) CV428 ~~General. Duties of company in preparing financial statements~~
Management’s duties.**

~~There are important distinctions between the roles and responsibilities of the company whose financial statements are in question and those of the independent certified public accountant who audits them. Because company management prepares the financial statements, the transactions which should be reflected in the accounts and in the financial statements are matters within the direct knowledge and control of management. The auditor’s knowledge of such transactions is limited to that acquired through its examination. Accordingly, the fairness of the representations made through financial statements is an implicit and integral part of [management’s] [the plaintiff’s] responsibility. While the [auditor] [defendant] examines and reports upon the company’s financial statements, the financial statements remain the representations of management, which is directly and primarily responsible for the statements.~~

The duty of the company’s management is to prepare a financial statement from transactions that are within their direct knowledge. Management must maintain a system of accounts to safeguard assets and a system of internal controls to ensure that a proper financial statement is prepared. The accuracy of the financial statement is an integral part of management’s duty. Management is exclusively responsible for its content.

MUJI 1st Reference

7.19

References

AICPA Statements on Auditing Standards AU § 110.02.

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Committee Notes

(29) CV429. ~~General. Role of auditor~~ Auditor's duties.

~~The duty of an auditor is to express an opinion, based on the application of various generally accepted accounting principles and auditing standards, as to whether the company's financial statements fairly present, on an overall basis, the position of the company at the end of its fiscal year and the results of its operations during that period. The auditor's responsibility for the statements it has examined is confined to the expression of its opinion on them. The financial statements remain the representations of management. Accordingly, the auditor is not a guarantor or insurer of the accuracy of financial statements.~~

The auditor's duty is to examine the company's financial statement and to express an opinion on whether it fairly shows, according to generally accepted accounting principles, (1) the company's position at the end of its fiscal year and (2) the results of the company's operations for that year. The auditor has no responsibility for the accuracy of the financial statement.

MUJI 1st Reference

7.20

References

S.E.C. v. Arthur Young & Co., 590 F.2d 785 (9th Cir. 1979).

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Committee Notes

(30) CV430. ~~Definition. Types of engagements.~~ AICPA standards of care.

~~The accounting profession refers to calls the relationship between an accountant and client as an "engagement." ~~An accountant may have one or~~ There are several ~~different~~ types of "engagements," ~~with a client~~ depending on what the client wants. Each ~~different~~ engagement requires an accountant to exercise a different ~~and particular~~ duty of care. ~~In one engagement, an accountant may have a duty to investigate, analyze, and report the client's full financial status. In another engagement, an accountant may have a duty to consider only one small aspect of the client's finances.~~~~

The American Institute of Certified Public Accountants (AICPA) defines standards of care setting forth the scope and content of for different engagements. You may consider these standards in determining deciding whether [name of defendant] exercised reasonable care, skill, judgment and diligence.

The jury will need more than this. What are these standards? Is the second paragraph merely a transition to GAAP and GAAS? There is no mention of which standard applies to which engagement. Are there standards other than GAAP and GAAS? A “compilation” is described in 435 as an engagement. Should it be an instruction in this series?

MUJI 1st Reference

7.21

References

Adams v. Standard Knitting Mills, Inc., 623 F.2d 422 (6th Cir. 1980), cert. denied sub nom. Adams v. Peat, Marwick, Mitchell & Co., 449 U.S. 1067 (1980).

Pegasus Fund, Inc. v. Laraneta, 617 F.2d 1335 (9th Cir. 1980).

AICPA Professional Standards, AU § 2100.01, et seq.

Committee Notes

(31) CV431 Definition. “GAAP” and “GAAS” defined.

In deciding whether [name of defendant] [was negligent] [breached the contract], you may consider Generally Accepted Accounting Principles, commonly known as “GAAP,” and Generally Accepted Auditing Standards, commonly known as “GAAS.”

~~During the trial we have used the term “generally accepted accounting principles” or “GAAP” and “generally accepted auditing standards” or “GAAS” to explain the standard applied to the independent auditor. GAAP and GAAS are derived and determined from a wide variety of conventions, rules and experiences, and incorporate the consensus among accountants and others as to about how financial information is to should be gathered, how economic resources and obligations should be measured, what information should be disclosed in financial statements, and how #financial information should be disclosed to fairly present show the financial condition of a company. Thus, GAAP and GAAS provide a standard, among other standards, by which to measure the accountant’s performance of the accounting duties.~~

[Name of defendant]’s failure to comply with these standards does not by itself mean that [he] [was negligent] [breached the contract]. Similarly, [his] compliance with these standards does not by itself mean that [he] [was not negligent] [did not breach the contract]. [Name of defendant]’s compliance or failure to comply with GAAP or GAAS is simply one factor you may consider.

MUJI 1st Reference

7.4; 7.23

References

Thor Power Tool Co. v. Commissioner, 439 U.S. 522 (1979).

Franklin Sav. Ass’n v. Director, Office of Thrift Supervision, 934 F.2d 1127 (10th Cir. 1991).

Godchaux v. Conveying Techniques, Inc., 846 F.2d 306 (5th Cir. 1988).

Matter of Mid-Atlantic Fund, Inc., 39 B.R. 88 (S.D.N.Y. 1984).

Bily v. Arthur Young & Co., 271 Cal. Rptr. 470 (Cal. Ct. App. 1990).

Thayer v. Hicks, 793 P.2d 784 (Mont. 1990).

Maduff Mortgage Corp. v. Deloitte Haskins & Sells, 779 P.2d 1083 (Or. Ct. App. 1989).

AICPA, Statements on Auditing Standards, AU § 150.

Committee Notes

Do we want to refer to CV212, Violation of a safety law, which is a similar principle?

(32) CV432. Definition. “Audit” defined.

An audit is ~~the an independent accountant’s~~ examination, ~~by an independent accountant,~~ of a company’s financial statements. The independent accountant who conducts ~~an the~~ audit is called an “auditor,” ~~and has a particular professional expertise.~~ ~~The auditor examines the financial statements to determine whether the financial statements, taken as a whole, fairly present the financial position of the company for the relevant period.~~

~~In performing an audit, the auditor may look to “GAAS” and “GAAP” for guidelines as to the objectives of its examination, and the nature and scope of the audit procedures to be employed in its examination. After the audit is conducted, the auditor issues a report containing its opinion about whether the company’s financial statements fairly represent the company’s financial condition in conformity with generally accepted accounting principles.~~

MUJI 1st Reference

7.24

References

S.E.C. v. Arthur Young & Co., 590 F.2d 785 (9th Cir. 1979).

In re Sioux Ltd. Securities Litigation Instructions.

Seafirst Securities Litigation Instructions.

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Committee Notes

The second paragraph is simply a restatement of the instruction on the auditor’s duties. Questionable whether the rest of the instruction is even needed. Move to before auditor’s duties.

(33) CV433 Definition. “Financial forecast” defined.

A financial forecast ~~is a financial statement that presents~~ shows, to the best of a company’s management’s knowledge and belief, the company’s expected financial position, ~~results of operations and~~ changes in financial position, and status of operations

at a defined future date ~~in the future~~. ~~The company Management~~ bases its financial forecast on assumptions that certain conditions will exist in the future and that the company will take certain courses of action in light of those future conditions.

MUJI 1st Reference

7.25

References

AICPA Professional Standards, Financial Forecasts and Projections, AT § 200.6.

Committee Notes

(34) CV434. Definition. “Financial projection” defined.

A financial projection ~~is a financial statement that presents~~ shows, given a hypothetical assumption that a certain condition or event may will occur ~~in the future~~, the expected course of action the company would will take and the company’s resulting financial position, change of financial position and status of operations. A hypothetical assumption presents a financial projection shows a response to a condition or course of action event that is not necessarily expected to occur, but is ~~presented~~ only to answer the question “What would happen if . . .?”

MUJI 1st Reference

7.26

References

AICPA Professional Standards, Financial Forecasts and Projections, AT § 200.06.

Committee Notes

(35) CV435. Definition. “Compilation of financial forecasts or projections” defined.

A compilation of financial forecasts or projections involves:

~~(1) Assembling, to the degree necessary, the financial forecasts or projections based on the company’s assumptions;~~

~~(2) Performing the required compilation procedures, which includes (1) reading the financial forecasts or projections with their summaries the summary of significant assumptions and accounting policies; and~~

~~(2) considering whether they appear to be are presented in conformity with AICPA presentation guidelines standards; and are not~~

~~(3) considering whether they are obviously inappropriate, incomplete or misleading; and~~

~~(3) (4) issuing a compilation report.~~

~~The accountant should consider whether representations or other information the accountant has received appears to be obviously~~ If the compilation of financial forecasts or projections is inappropriate, incomplete or otherwise misleading. ~~If so~~, the accountant should attempt to obtain additional or revised information.

A compilation is the least stringent engagement that an accountant can undertake ~~with respect to a company's financial forecasts or projections.~~ A compilation ~~of financial forecasts or projections, along with the assumptions underlying them, are is~~ provided by the company [or another responsible party], not by the accountant. A compilation ~~is not intended to, and should not,~~ provides no assurance as to of the accuracy of the company's assumptions underlying the financial forecasts or projections.

MUJI 1st Reference

7.27

References

AICPA Professional Standards, Financial Forecasts and Projections, AT §§ 200.0 through 200.14.

Committee Notes

I've deleted assembling the documents, which seems trivial. I've also deleted "required compilation procedures," It appears that these procedures "include" reading the summaries, but if there is more, so far we have not told the jury what they are.

Paragraph (2) is much stronger than 431. Are AICPA standards the same as GAAS and GAAP?

Regarding the paragraph following (4), this is a duty, not a definition.

Regarding the last paragraph, I'm left with the impression of "so what?" If it's important, that message is not delivered. It also is inconsistent with Paragraph (4). Paragraph (4) says the auditor issues the compilation report; the last paragraph says a compilation is provided by the company. Does the last paragraph fit better as part of the series on GAAP/GAAS and AICPA standards?

(36) CV436. ~~Definition. "Compilation report" on financial forecasts or projections defined.~~

~~A compilation report on financial forecasts or projections is the report that the accountant issues after completing the compilation. The accountant is not required to update the report for events occurring after the date of the report. The compilation report should include:~~

(1) ~~An identification of~~ identify the financial forecasts or projections presented ~~by the company [the responsible party];~~

(2) ~~A statement state~~ that the accountant has compiled the financial forecasts or projections in accordance with AICPA standards;

(3) ~~A statement state~~ that a compilation is limited in scope and does not enable the accountant to express an opinion or any other form of assurance on the financial forecasts, projections, or underlying assumptions;

(4) ~~A warning warn~~ that the prospective results may not be achieved; and

(5) ~~A statement state~~ that the accountant assumes no responsibility to update the report for events occurring after the date of the report.

MUJI 1st Reference

7.28

References

AICPA Professional Standards, AU § 2100.16.

Committee Notes

(37) CV437 Definition. “Examination report”-on financial forecasts or projections defined.

~~An examination report is the report issued by the accountant after the examination is completed. The accountant has no obligation to update the report for events and circumstances occurring after the date of the report. The examination report should include:~~

~~(1) An identification of identify the financial forecasts or projections presented;~~

~~(2) A statement state that the examination was made in accordance with AICPA standards and a brief description of the examination;~~

~~(3) state Tthe accountant’s opinion that the financial forecasts or projections are presented in conformity with AICPA presentation guidelines; and~~

~~(4) state the accountant's opinion that the underlying assumptions provide a reasonable basis for the forecast or a reasonable basis for the projection given the hypothetical assumptions;~~

~~(4) A warning (5) warn that the prospective results may not be achieved; and~~

~~(5) A statement (6) state that the accountant assumes no responsibility to update the report for events occurring after the date of the report.~~

MUJI 1st Reference

7.29

References

AICPA Professional Standards, AU § 2100.31.

Committee Notes

Paragraphs (2) and (3) are slightly different from (2) in 436. Is that intended? This defines a term that is not used in the instructions.