Agenda
Advisory Committee on Model Civil Jury Instructions

March 11, 2013
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 Joung
Insurance Litigation Instructions	Tab 2	Rich Humpherys

Committee Web Page

Published Instructions

Meeting Schedule: Matheson Courthouse, Judicial Council Room, 4:00 to 6:00 unless otherwise stated.

April 8, 2013
May 13, 2013
September 9, 2013
October 15, 2013 (Tuesday)
November 12, 2013 (Tuesday)
December 9, 2013

Tab 1

MINUTES

Advisory Committee on Model Civil Jury Instructions
December 10, 2012
4:00 p.m.

Present: John L. Young (chair), Diane Abegglen, Juli Blanch, Francis J. Carney, Marianna Di Paolo, Tracy H. Fowler, Honorable Ryan M. Harris, Gary L. Johnson, Timothy M. Shea, Paul M. Simmons, Honorable Andrew H. Stone, Peter W. Summerill. Also present: Craig R. Mariger, Chair of the Design Professional subcommittee

Excused: Phillip S. Ferguson, Ryan M. Springer, and David E. West

The committee continued its review of the Professional Liability: Design Professionals instructions:

1. *CV504. Damages.* Mr. Shea verified that the committee had decided to delete CV504 and add links to other damage instructions. The committee noted that most design professional claims will be contract claims, not tort claims. Mr. Shea will add references to the contract damage instructions.

Dr. Di Paolo joined the meeting.

2. *CV505. Damages. Measure of property damages.* Mr. Young compared CV505 with CV2231, the instruction on damages for a contractor's defective work. The latter says that the measure of damages is the cost of repair unless that would result in unreasonable economic waste. CV505 says the measure of damages is (1) the cost of repair (unless unreasonably wasteful) or (2) lost value. Mr. Young thought the two instructions should be the same. Mr. Young will send CV2231 back to John Lund and Kent Scott to consider adding the property's lost value as an alternative in CV2231.

Mr. Young noted that CV2231 uses the phrase "unreasonable economic waste," whereas CV505 uses "unreasonably wasteful." He thought the two instructions should use the same terms. Ms. Blanch thought "unreasonably wasteful" was preferable. Mr. Mariger noted that the term was chosen because it was thought to be plainer English. Mr. Shea will change the language in CV2231 to "unreasonably wasteful." Mr. Summerill asked whether the term was defined. The committee noted that CV2232 provides an explanation. Mr. Mariger thought that CV2232 may have been based on real property cases, whereas Utah law follows the first Restatement of Contracts in design professional cases, in which case CV2232 should not be used. Mr. Young thought that CV2232 was based on a comment to the first Restatement. If that is the case, Messrs. Young and Mariger thought similar language could be included in CV505. Mr. Summerill thought that the jury needed some guidance on determining whether the cost of repair would be unreasonably wasteful. Mr. Mariger noted that it is a matter of looking at the disparity between the cost of repair and the value of the repaired property and deciding whether that disparity is reasonable, which is a question for the jury to determine based on the evidence and their judgment and experience.

At Ms. Blanch's suggestion, the phrase "If repair is not possible or if [name of defendant] proves that the costs of repair would be unreasonably wasteful," was deleted from the second paragraph as repetitive. It was suggested that the phrase "that the costs of repair of the property are sufficiently more than the loss in the value of the property caused by the breach of the standard of care" be deleted from the preceding sentence, but Mr. Mariger thought that language should stay.

At Mr. Young's suggestion, the term "give" was changed to "award," to make the instruction consistent with CV2231.

3. *CV506. Betterment or value added.* Mr. Summerill asked whether betterment was the flip side of economic waste and asked how the issue would be addressed on a special verdict form. Mr. Mariger noted that betterment only applies to a repair measure of damages. Mr. Young thought there would need to be a finding of fact on the special verdict form. Mr. Shea suggested making two instructions–505A for the repair measure of damages, which could also include betterment, and 505B for loss of property value. Mr. Mariger thought it was better to keep the betterment instruction separate, since it will not apply in every case and has not been unambiguously adopted in Utah. Mr. Young asked Mr. Mariger to have his subcommittee draft a comment saying that it is unclear whether the doctrine has been adopted in Utah. Mr. Mariger noted that, although there are no cases expressly adopting the doctrine in Utah, there are no cases rejecting it either, and there are a lot of cases saying that the plaintiff should not be placed in a better position by a breach of contract than he would have been in if the contract had been performed. Mr. Mariger had no doubt that the instruction correctly stated the law in Utah. He said the cases focus not on whether the doctrine exists but whether it applies in a given case, that is, on whether the plaintiff was bettered under the facts of the case. Judge Harris thought that the current committee note was unnecessary. Mr. Shea asked how much of the parenthetical information should be included in the references section.

The committee revised the instruction to read:

> The damages you award to [name of plaintiff] cannot place [him] in a better position than the position that [he] would have been in had [name of defendant] not breached the standard of care.
>
> To prevent [name of plaintiff] from being placed in a better position, you must reduce from the damages any additional amount of money that [name of plaintiff] would have paid in designing and constructing the [facility name] if [name of defendant] had provided services that met the standard of care. You must make this reduction only if [name of defendant] proves that [name of plaintiff] would have completed the [facility name] at the additional cost for construction if the services had met the standard of care. . . .

4. *CV507. Creation of a warranty*. Dr. Di Paolo thought the instruction should define warranty before telling the jury what it has to decide (namely, whether there was a warranty and whether it was breached). Mr. Mariger could not think of a warranty "made by the actions of" the defendant in this context. He noted that a warranty claim differs from a negligence claim but that, under *SME Industries, Inc. v. Thompson, Ventulett, Stainback & Associates, Inc.,* 2001 UT 54, 28 P.3d 669, there is no implied warranty other than that the work complies with the standard of care. Specifically, there is no implied warranty of fitness for a particular purpose in design professional cases. Dr. Di Paolo was not clear on the distinction and asked whether we even need to instruct on an implied warranty claim. Mr. Mariger thought so, since implied warranty claims are very common. Mr. Young noted that AIA contracts disclaim any implied warranties. But Mr. Mariger thought that the implied warranty recognized in *SME* cannot be disclaimed. The committee decided to move the second sentence of the instruction to the end of the instruction and to delete the words "operation of" from the phrase "by operation of law" in the definition of implied warranty. It also decided to add the *SME* and *Groen v. Tri-O-Inc.* cases to the references and delete the reference to BAJI.

5. *CV508. Breach of warranty essential elements*. The committee revised the instruction to read:

> [Name of plaintiff] must prove the following elements to prove breach of warranty:
>
> (1) [Name of defendant] made a warranty that [describe the warranty];
>
> (2) [Name of defendant] reasonably expected that [name of plaintiff] would rely on the warranty, and [name of plaintiff] in fact reasonably relied on the warranty;
>
> (3) The [work/services] of [name of defendant] [was/were] not as promised;
>
> (4) [Name of plaintiff] was injured and incurred damages as a consequence of the breach of warranty by [name of defendant]; and
>
> (5) It was reasonably foreseeable at the time the warranty was made that [name of plaintiff] would be harmed if the [work/services] [was/were] not done as promised in the warranty.

> [To establish breach of an express warranty, [name of plaintiff] does not also have to prove that [name of defendant] was negligent.]

Mr. Shea asked whether the fourth element could be stated "[Name of defendant]'s breach of warranty was a cause of [or "caused"] [name of plaintiff]'s harm." Mr. Mariger noted that in warranty and contract actions, the breach must be "the cause" of the plaintiff's harm; the plaintiff can only recover for the harm caused by the breach of warranty (or contract). The committee questioned whether comparative fault would apply in a breach of implied warranty case under *SME,* since the implied warranty in effect applies a negligence standard.

The committee bracketed the last paragraph at Judge Harris's suggestion because the sentence only applies to express warranty claims; under *SME,* the plaintiff does have to prove that the defendant was negligent for breach of an implied warranty in a design professional case. Dr. Di Paolo and Judge Stone expressed concerns with the last paragraph. Messrs. Young and Mariger suggested alternative instructions, for breach of express warranty and breach of implied warranty. Judge Stone thought the instruction could be adapted based on how the warranty claim was defined. He also suggested using "breached the standard of care" for "negligent." The committee decided to add a comment saying to give the bracketed paragraph only where the claim is not one for breach of the standard of care, that is, where it is a claim for breach of express warranty. The instruction was approved as revised.

6. *CV509. Implied warranties. Accuracy and fitness for purpose.* Judge Stone questioned the use of "impliedly warrant or guarantee" and suggested substituting "promised" in its place. Dr. Di Paolo suggested "does not imply a warranty or guarantee." Mr. Mariger suggested "makes an implied warranty to the contracting party," noting that there are no implied warranties to third parties in design professional cases. The committee revised the instruction to read:

> The [name of defendant] made an implied warranty to [name of plaintiff] that the services would not fall below the standard of care, but [he] did not make an implied warranty to [name of plaintiff] that [his] services would be performed without error or defects or that [his] services would be suitable for the purpose intended by [name of plaintiff]. The [architect] [engineer] [land surveyor] does warrant that [his] services will not fall below the ordinary skill and care exercised by others engaged in the same profession in the same locality.

Ms. Blanch was excused.

Mr. Mariger suggested adding a committee note to the effect that the instruction does not apply if the plaintiff was not the contracting party. Mr. Mariger and Judge

Stone also thought the note should say that the instruction should be used in conjunction with CV501, "Standard of care for design professionals." The reference to MUJI 7.39 should be changed.

7. *CV510. Implied warranties. Compliance with building code.* Mr. Mariger noted that there is no law in Utah to support this instruction. He said that the AIA contract does not expressly waive an implied warranty of compliance with building codes. The *Allen Steel* case said that the implied warranty had to be expressly disclaimed, but the opinion was withdrawn because the case settled. Mr. Mariger offered to bring a copy of the opinion to the next meeting and added that some jurisdictions hold otherwise. Mr. Carney asked if there was a difference between a warranty and a guaranty. Mr. Mariger did not think so. Judge Harris asked when the issue became a jury question. Mr. Mariger thought it was not clear what is and is not a jury question. Mr. Young thought that it would be up to the jury to decide whether the defendant complied with the building code. Mr. Summerill suggested letting the attorneys argue the issue rather than instruct on it. Mr. Mariger did not think that a jury instruction was necessary but said that it was very important to the plaintiffs' bar. The matter was deferred till the next meeting.

The meeting concluded at 6:00 p.m.

Next Meeting. The next meeting, scheduled for January 14, 2013, was canceled. The next meeting will be Monday, February 11, 2013, at 4:00 p.m.

Tab 2

Insurance Litigation

CV 2401. Breach of contract – General description of claims and defenses. 1
CV 2402. Breach of contract – General relationship. 1
CV 2403 Breach of contract – Coverage provision. 2
CV 2404 Breach of contract – Exclusion provision. 2
CV 2405 Breach of contract – Proof of loss. 3
CV 2406. Breach of contract – Unspecified time of performance. 3
CV 2407. Breach of contract – Recovery of consequential damages. 4

CV 2401. Breach of contract – General description of claims and defenses.

[Name of plaintiff] claims that [name of defendant] breached the insurance policy by not paying [him] the benefits due under the policy. [Name of plaintiff] wants [name of defendant] to pay the benefits that [name of plaintiff] claims are owing under the policy and to compensate [him] for the damages [he] claims to have suffered from the breach of the policy contract provisions.

[Name of defendant] claims that

(1) [it paid all of the benefits that were owing under the policy];

(2) [it was justified in denying coverage];

(3) [it did not breach the policy contract];

(4) [[name of plaintiff] did not suffer any damages].

References

MUJI 1

Committee Notes

CV 2402. Breach of contract – General relationship.

An insurance policy is a contract between the insurance company and the policy holder and, therefore, the relationship between [name of plaintiff] and [name of defendant] is contractual. The insurance policy simply obligates [name of defendant] to pay the covered claims submitted by [name of plaintiff] as required by the terms of the policy.

References

MUJI 1

Committee Notes

See the instructions relating to breach of contract, CV2101 et. seq. which may have some application here, depending on the circumstances.

CV 2403 Breach of contract – Coverage provision.

[Name of plaintiff] claims that [name of defendant] breached the following provisions in the policy contract:

[Quote applicable policy language]

When deciding this case, you must use [the ordinary and customary meaning of the words in the policy] [the following definitions:…]

You will be asked to decide whether:

(1) [[name of plaintiff] did what the policy required [him] to do]

(2) [[name of plaintiff] was excused from performing under the policy];

(3) [[name of defendant] breached the policy by failing to do what the policy required it to do];

References

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

MUJI 1

Committee Notes

The interpretation of the policy is a legal function performed by the court. Accordingly, if there are words in the policy which need special interpretation, the court will need to provide this to the jury. The Jury would not interpret the provision, but only decide the contested facts that relate to the issue.

CV 2404 Breach of contract – Exclusion provision.

[Name of defendant] claims that there is an [exclusion/limitation] in the policy which prevents [name of plaintiff] from recovering the benefits [he] seeks. The exclusion reads:

[Quote the exclusion or limitation]

When deciding this case, you must use [the ordinary and customary meaning of the words in the exclusion/limitation] [the following definitions:…]

To succeed, [name of defendant] has the burden to prove that [name of plaintiff]'s [loss] [arose out of/was caused by/resulted from] the above [exclusion/limitation].

You will be asked to decide whether this [exclusion/limitation] applies to prevent [name of plaintiff] from recovering the benefits.

References

LDS Hospital v. Capitol Life Ins. Co., 765 P.2d 857, 859 (Utah 1988).

MUJI 1

Committee Notes

See committee note to Instruction CV 2403.

CV 2405 Breach of contract – Proof of loss.

The insurance policy required [name of plaintiff] to submit a proof-of-loss. A proof-of-loss is a summary of the facts and circumstances giving rise to the covered loss.

The purpose of the proof-of-loss is to give [name of defendant] an adequate opportunity to investigate, to prevent fraud, and to form an estimate of its rights and obligations under the policy. The law does not require that the proof-of-loss be notarized or strictly comply with the proof-of-loss provisions in the policy. Only substantial compliance is required.

You must decide whether the proof of loss provided by [name of plaintiff] substantially complied with this proof of loss requirement.

References

Zions First National Bank v. National American Title Ins. Co., 749 P.2d 651, 655 – 656 (Utah 1988)

MUJI 1

Committee Notes

CV 2406. Breach of contract – Unspecified time of performance.

When the policy requires an act to be performed without specifying the time to perform the act, the act must be done within a reasonable time under the circumstances.

Because the policy does not require [insurer/plaintiff] to [pay the benefits, complete the investigation, submit proof of loss, respond to demands/offers, etc.] by a particular date or time, you will need to decide, based on all of the circumstances, what a reasonable date or time was for [insurer/plaintiff] to [pay the benefits, complete the investigation, submit proof of loss, respond to demands/offers, etc.].

References

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

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

MUJI 1

Committee Notes

This instruction applies only to the extent that the policy does not provide when the performance at issue must be done.

CV 2407. Breach of contract – Recovery of consequential damages.

If you find that [name of defendant] breached the provisions of the policy, [name of plaintiff] is entitled to the unpaid benefits under the policy and any "consequential" damages caused by [name of defendant]'s breach.

Consequential damages are those [damages, losses or injuries] caused by [name of defendant]'s breach which were reasonably within the contemplation of the parties at the time the policy contract was entered into. This means that at the time the policy was issued, [name of defendant] could have generally foreseen that the [damage, loss or injury] may occur if [name of defendant] breached the terms of the policy.

In order to decide whether the [damage, loss or injury] was foreseeable at the time the contract was made, you may consider the nature and language of the policy 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, 116 P.3d 342, 346.

Black v. Allstate Ins. Co., 2004 UT 66, ¶ 28, 100 P.3d 1163, 1170.

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

Gardiner v. York, 2006 UT App 496, ¶ 14, 153 P.3d 791, 795.

Restatement (Second) of Contracts § 351 (1981).

MUJI 1

Committee Notes