Agenda
Advisory Committee on
Model Civil Jury Instructions

October 15, 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 Young
Design Professionals	Tab 2	Craig Mariger
Pro Se Litigant – email from Judge Toomey	Tab 3	
CV 324 Use of alternative treatment methods	Tab 4	Ryan Springer
Insurance Litigation continued from September 9, 2013	Tab 5	Rich Humpherys and Gary Johnson

Committee Web Page

Published Instructions

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

November 12, 2013 (Tuesday)
December 9, 2013
January 13, 2014

Tab 1

MINUTES

Advisory Committee on Model Civil Jury Instructions
September 9, 2013
4:00 p.m.

Present: John L. Young (chair), Alison Adams-Perlac, Juli Blanch, Marianna Di Paolo, Phillip S. Ferguson, Honorable Ryan M. Harris, L. Rich Humpherys, Gary L. Johnson, Timothy M. Shea, Paul M. Simmons, Ryan M. Springer, Honorable Andrew H. Stone

1. *Alison Adams-Perlac.* Mr. Young welcomed Ms. Adams-Perlac to the committee. She is a new staff attorney with the Administrative Office of the courts who will be taking Mr. Shea's place. The committee thanked Mr. Shea for all of his good work over the years.

2. *CV2018, Aggravation of symptomatic pre-existing conditions, and CV2019, Aggravation of dormant pre-existing condition.* CV2018 and CV2019 were based in part on the Utah Court of Appeals' decision in *Harris v. ShopKo Stores, Inc.*, 2011 UT App 329, the reasoning of which was recently rejected by the Utah Supreme Court. *See Harris v. ShopKo Stores, Inc.*, 2013 UT 34. Messrs. Johnson and Summerill revised these instructions accordingly. The committee approved the changes, which eliminate CV2019, and will add a citation to the Utah Supreme Court's decision in the references to CV2018.

3. *Insurance Litigation Instructions.* The committee continued its review of the Insurance Litigation instructions. Mr. Humpherys noted that he would like to separate the instructions by category, such as first-party claims, third-party claims, bad faith, etc. Mr. Humpherys was under the impression that the instructions were added to the courts' website as they were approved. Mr. Shea noted that they are on the committee's page on the courts' website but are not added to MUJI 2d instructions until the whole section is completed, although, he added, if the Insurance Litigation instructions were put into categories, a particular category could be added when it was completed.

a. *CV2408. Insurance policy must conform to Utah law.* Mr. Shea recommended making subparagraph (3) a separate instruction. It requires a definition of "prejudice," which is contained in CV2411. Mr. Young noted that the subcommittee has also proposed a new instruction on prejudice from delay in providing notice of a claim. Messrs. Humpherys and Johnson noted that proof of loss and notice of claim are separate and are governed by separate instructions. Mr. Humpherys added that less is required for notice of loss than for proof of loss. Mr. Young noted that the notice-of-loss instructions should come before the proof-of-loss instructions. Mr. Johnson suggested comparing CV2408 with CV2410, Notice of loss. Mr. Ferguson and Mr. Shea suggested deleting the opening clause of CV2408 ("As it relates to a proof of loss, the law that applies is:"). Judge Harris thought that the instruction did not match the title. Mr.

Young suggested changing the title to "Adequate compliance for proof of loss." Dr. Di Paolo thought that strict and substantial compliance were concepts not easily understandable to lay people and suggested deleting the last sentence of subparagraph (1). Mr. Simmons asked whether substantial compliance was a question of law or fact. Messrs. Humpherys and Ferguson thought it was a fact question. Mr. Ferguson asked whether it is a term of art. Mr. Shea suggested starting the instruction with, "A proof of loss is adequate if it is (1) timely, and (2) substantially complies with the proof-of-loss provisions of the policy." Dr. Di Paolo asked whether we could use a term other than "substantial" and suggested "adequate." Mr. Shea suggested saying that proof of loss is adequate if what was not done was not important or was minor or if it put the company on notice of the loss. Mr. Humpherys asked whether the standard was an objective one, i.e., would a reasonable insurer have known of the claim from the proof of loss. Mr. Humpherys noted that the issue can arise in two ways: (1) the insurer claims that it is relieved of liability under the policy because it did not get notice or proof of loss, or (2) the insurer claims that the insured breached the contract because he or she did not give adequate notice or proof of loss. Mr. Shea suggested that he and Ms. Adams-Perlac put CV2407 and CV2410 into the same format and then create two additional instructions, on adequacy and prejudice. Dr. Di Paolo noted that the prejudice instructions use "material" in a way that creates an ambiguity for a layperson, who could understand it to mean "touchable," and suggested changing "material" to "important." Mr. Shea noted that the construction contract instructions use "important" for "material." Dr. Di Paolo also suggested including in the instruction a definition of "strict compliance" and "substantial compliance." Mr. Humpherys thought they were already defined in CV2407, which states the purpose of the proof-of-loss requirement. Judge Harris thought that we needed to use the terms the courts have used ("strict" and "substantial" compliance) and that the best we could do to explain them would be to give examples. The committee suggested common issues that come up, such as whether the proof has to be notarized or whether it has to be on the insurer's form. But Judge Harris also thought that by listing specific examples, we may be implying that those are the only requirements that don't have to be strictly complied with. Ms. Blanch noted that strict compliance means 100% compliance. What is substantial compliance is not clear; is 80% enough? 85%? Mr. Young thought that "substantial" compliance was whatever was sufficient compliance in the jurors' minds. Mr. Humpherys thought that compliance was "substantial" if the purpose of the notice- or proof-of-loss requirements was fulfilled. Dr. Di Paolo thought the instruction needed to say that. The committee turned its attention to CV2407.

Judge Stone joined the meeting.

b. *CV2407. Proof-of-loss.* The committee revised the instruction to read:

> The insurance company must be given adequate proof of loss. A proof of loss is a summary of the facts and circumstances that gave rise to the covered loss. The law does not require strict compliance with policy provisions related to submission of the proof of loss as long as it is adequate. A proof of loss is adequate if it gives [the insurance company] a sufficient opportunity to investigate, to prevent fraud, and to form an estimate of its rights and obligations under the policy.
>
> [[Name of insurance company] claims that [name of policyholder] is not covered because the insurance company did not receive [adequate/timely] proof of loss.]
>
> [[Name of insurance company] claims that it was not required to pay for the loss sooner because it did not receive a[n] [adequate/timely] proof of loss.]
>
> [If it was not reasonably possible to give the proof of loss within the required time, the failure to give proof of loss within the time required by the policy is not a valid reason to deny the claim.]
>
> You must decide whether the proof of loss was [adequate/timely]. [Name of insurance company] has the burden to prove that the proof of loss was not [adequate/timely].

The terms "policy holder" and "insurance company" were substituted for "plaintiff" and "defendant," respectively, because the plaintiff is not always the policy holder. The insurance company may bring the action for a declaratory judgment that there is no coverage because a timely or adequate proof of loss was not given, for example. Also, the passive voice was used because the proof of loss does not have to come from the policy holder; it can come from an insurance agent, the third-party claimant, a claims administrator, etc. The committee approved CV2407 as revised.

c. *CV2408 revisited.* The committee returned to its consideration of CV2408. Subparagraphs (1) and (2) have now been incorporated into CV2407 and are no longer necessary. Subparagraph (3) on prejudice will be incorporated into a separate instruction on prejudice. Mr. Young suggested adding a new subparagraph for "Other," allowing the parties to address any other issues that might arise regarding proof of loss. Mr. Simmons asked who has the burden of

proof on each of the issues covered by subparagraphs (2), (4), and (5). Judge Harris thought that subparagraph (5) implied that direct delivery or first-class mail to the insurer are the only ways the proof of loss can be delivered. Ms. Blanch thought "given directly" implied hand delivery. Mr. Humpherys asked whether e-mail would be sufficient. He noted that the instruction was based on Utah Administrative Code R590-190-3 and suggested adding "or by other reliable means of communication." Judges Harris and Stone questioned the need for the instructing on subparagraphs (4) and (5) at all. Judge Stone noted that if the regulation covers those situations, the court can decide the question as a matter of law. The rest of CV2408 was therefore deleted. The references to CV2408 will be moved to CV2407.

d. *CV2408. Unspecified time of performance.* [Note: There were two instructions numbered CV2408 in the materials. This is the second of the two.] This instruction was previously approved, but the committee agreed to substitute "time" for "date" in the instruction, and the committee approved the instruction again as modified.

e. *CV2410, Notice of loss, and CV2411, "Prejudice" defined.* Mr. Shea and Ms. Adams-Perlac will revise CV2410 and CV2411 in light of the committee's revisions of CV2407 and CV2408.

f. *CV2412. Coverage by estoppel.* Messrs. Ferguson and Johnson noted that they disagree with the decision in *Youngblood v. Auto-Owners Insurance Co.*, 2007 UT 28, 158 P.3d 1088, on which CV2412 is based, but agreed that the instruction accurately states the law as stated in *Youngblood*. Mr. Ferguson questioned the use of "material" mispresentation. Mr. Young suggested replacing "material" with "important." Dr. Di Paolo thought that "significant" might be better in this context. At Mr. Humpherys's suggestion, the second sentence was revised to read, "[Name of plaintiff] therefore claims that [he/she/it] is entitled to modify the policy to conform to what was represented by [name of defendant]'s agent." Mr. Shea asked if there was a distinction between "coverage," "benefits," and "protection." The committee thought that "coverage" and "protection" were not both necessary in the instruction. The committee approved the instruction as modified.

g. *CV2413, Insurable interest.* Mr. Johnson suggested using the statutory definition of "insurable interest," noting that it can apply to people as well as to property. Mr. Humpherys will redo the instruction.

h. *CV24__, Compliance with Utah law.* Mr. Ferguson questioned whether the terms "construe" and "ambiguous" were plain English. He also asked whether the instruction covered a question of law rather than fact. Mr.

Humpherys noted that at can be a breach of contract if an adjuster does not construe a policy according to Utah law but added that the instruction is probably more applicable to bad-faith cases, not breach-of-contract cases. He will put the instruction in the bad-faith instructions.

i. *CV__, Recovery of consequential damages.* Mr. Humpherys noted that recovery of consequential damages in insurance cases is different enough from recovery of consequential damages in other commercial contract cases that it should be covered by a separate instruction and not merely refer to CV2136, the commercial contract instruction.

4. *Next meeting.* The next meeting will be on Tuesday, October 15, 2013, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

Tab 2

Professional Liability: Design Professionals

CV 501. Standard of care for design professionals. 1
CV 502. Standard of care of a specialist. 2
CV 503. Evidence of standard of care where expert is required 3
CV 504. Damages. 4
CV 505. Damages. Measure of property damages. 4
CV 506. Betterment or value added. 5
CV 507. Creation of a warranty. 6
CV 508. Breach of warranty essential elements. 7
CV 509. Implied warranties. Accuracy and fitness for purpose. 7

CV 501. Standard of care for design professionals.

A[n] [architect] [landscape architect] [engineer] [land surveyor] is required to use the same degree of learning, care, and skill ordinarily used by other [architects] [landscape architects] [engineers] [land surveyors] under like circumstances. This is known as the "standard of care." The law does not require perfect [plans/drawings/services] or satisfactory results but rather requires compliance with the standard of care.

[The standard of care may change over time and may be different in different localities. If the standard of care has changed over time or does vary by locality, the "applicable standard of care" is the standard of care existing at the time of [name of defendant]'s services and in the same or similar locality as where [name of defendant]'s services were performed.]

The failure to follow the standard of care is a form of fault known as "professional malpractice." [Name of defendant] is a[n] [architect] [landscape architect] [engineer] [land surveyor]. To establish professional malpractice by [name of defendant], [name of plaintiff] has the burden of proving three things:

(1) what the standard of care is;

(2) that [name of defendant] failed to follow this standard of care; and

(3) that this failure to follow the standard of care was the cause of [name of plaintiff]'s harm.

In this case, [name of plaintiff] alleges that [name of defendant] failed to follow the standard of care in the following respects:

(1)

(2)

(3)

If you decide that [name of defendant] failed to follow the standard of care in any of these respects, then you must determine whether that failure was the cause of [name of plaintiff]'s harm and the amount of the harm.

References

SME Industries, Inc. v. Thompson, Ventulett, Stainback and Assoc., Inc., 2001 UT 54, &&25-29, 28 P.3d 669.

Erickson Landscaping Co. v. Wessel, 711 P. 2d 250, 253 (Utah 1985).

Nauman v. Harold K. Beecher & Assocs., 24 Utah 2d 172, 178-80, 467 P.2d 610, 614-15 (1970).

Whitman v. W.T. Grant Co., 16 Utah 2d 81, 83, 395 P.2d 918, 920 (1964).

Klein v. Catalano, 437 N.E.2d 514 (Mass. 1982).

Borman's, Inc. v. Lake State Dev. Co., 230 N.W.2d 363 (Mich. Ct. App. 1975).

Committee Notes

Use the bracketed second paragraph only if evidence is admitted that the standard of care has changed over time or varies by locality.

MUJI 1st

7.30

CV 502. Standard of care of a specialist.

A[n] [architect] [landscape architect] [engineer] [land surveyor] holding itself out to the public to be a specialist in a particular field of [architecture] [landscape architecture] [engineering] [land surveying] is held to the standard of learning, skill and care ordinarily possessed by others who are specialists in that field.

References

Steiner Corp. v. Johnson & Higgins of California, 118 F. Supp. 2d 1174,1182-83 (D. Utah 2000) [Actuary holding itself out to public as specializing expert in actuarial field is held to the "heightened standard of care" of similar professionals].

MUJI 1st

7.32

CV 503. Evidence of standard of care where expert is required.

Due to the advanced learning and skill involved in [architecture] [landscape architecture] [engineering] [land surveying], I have determined that you must use only the standard of care established through evidence presented by expert witnesses and through other evidence admitted for the purpose of defining the standard of care. You may not use a standard based on your own experience or any other standard of your own.

If you find that an expert witness has relied on a fact that has not been proved, or has been disproved, you may consider that in determining the value of the witness's opinion.

References

Preston & Chambers, P.C. v. Koller, 943 P.2d 260, 263 (Utah Ct. App. 1997).

Wyaclis v. Guardian Title of Utah, 780 P.2d 1989, 726 n. 8 (Utah Ct. App. 1989).

Groen v. Tri-O-Inc., 667 P.2d 598, 603 (Utah 1983).

Dixon v. Stewart, 658 P.2d 591, 597 (Utah 1982).

Nauman v. Harold K. Beecher & Assocs., 24 Utah 2d 172, 467 P.2d 610 (1970).

Committee Notes

This instruction should not be given unless the court has determined that expert testimony is required to establish the standard of care. It may be that lay persons are competent to decide whether the defendant breached the standard of care without relying on expert testimony.

Instruction CV 136, Conflicting testimony of experts, might be given in conjunction with this instruction, but if the court has determined that expert testimony is required to establish the standard of care, Instruction CV 129, Statement of opinion, should not be given.

This instruction will require modification if experts in disciplines other than the defendant's are found competent to testify to the applicable standard of care. See Wessel v. Erickson Landscaping Company, 711 P.2d 250 (Utah 1985).

If expert testimony is required to establish the element of causation, this instruction may be modified to address that issue at well. See Bowman v. Kalm, 2008 UT 9, 179 P.3d 754.

MUJI 1st

7.33

CV 504. Damages.

Committee Notes

Due to Utah's economic loss rule, claims for recovery of solely economic losses (the damages claimed do not seek recovery for personal injuries or damage to property separate from the property that is the subject of the design professional's services contract) against design professionals are normally submitted to the jury on breach of contract causes of action. In those cases, in addition to Instructions CV 505 and 506 as applicable and appropriate, the court should use the damages instructions (CV 2135, CV 2136, CV 2137, CV 2138, CV 2140 and CV 2141) in Commercial Contracts, CV 2101, *et. seq*., to the extent applicable and appropriately modified as circumstances in the case require.

With respect to claims against design professionals submitted to the jury in tort, including claims for personal injuries and claims for damages to property separate from the property that is the subject of the design professional's services contract, in addition to Instructions CV 505 and 506 as applicable and appropriate, the court should use the instructions in Tort Damages, CV 2001, *et. seq*., to the extent applicable and appropriately modified as circumstances in the case require. <

CV 505.Measure of Damages. Defective Improvements. .

If [[name of defendant]'s breach of the standard of care has caused to be constructed defective improvements, the amount of money that will reasonably compensate [name of plaintiff] for the injury resulting from receipt of the defective improvements will be either (1) a "repair" measure of damages or (2) a "loss in market value" measure of damages.

"Repair" Measure of Damages: If repairing the improvements is possible and would not be unreasonably wasteful, you must award [name of plaintiff] the reasonable cost to repair the improvements to the condition they would have been in if [name of defendant] had not breached the standard of care. This is called the "repair" measure of damages.

"Loss in Market Value" Measure of Damages: If repairing the improvements is not possible, or if [name of defendant] proves that the cost to repair the improvements is sufficiently more than the loss in fair market value of the improvements caused by the breach of the standard of care that it would be unreasonably wasteful to repair the improvements, then you cannot award [name of plaintiff] the "repair" measure of damages. You must instead award [name of plaintiff] damages equal to the difference between the fair market value that the improvements would have had if [name of defendant] had not breached the standard of care and the fair market value of the improvements received by [name of plaintiff] following [name of defendant]'s breach of the standard of care. This is called the "loss in market value" measure of damages.

Economic waste results from the spending of money to improve property without an equal or higher increase in the fair market value of the property as a consequence of the improvement. To determine whether it would be unreasonably wasteful to repair defective improvements, you must decide if to repair the improvements results in economic waste because the cost to repair the improvements exceeds the increase in the fair market value of the improvements resulting from the repair. If [name of defendant] has proven that the cost to repair the improvements are sufficiently larger than the increase in the fair market value of the improvements resulting from the repair that it would not be prudent or reasonable under the circumstances to repair the improvements, then you should find it is unreasonably wasteful to repair the improvements and you should award to [name of plaintiff] the "loss in the market value" measure of damages.

References

Winsness v. M. J. Conoco Distributors, Inc., 593 P.2d 1303, 1307 (Utah 1979)

F.C. Stangl, III v. Todd, 554 P.2d 1316, 1320 (Utah 1976).

Rex T. Fuhriman, Inc. v. Jarrell, 21 Utah 2d 298, 302-03, 445 P.2d 136, 139 (Utah 1968).

Restatement (First) of Contracts § 346(1) (1932).

See, Western Land Equities, Inc. v. City of Logan, 617 P. 2d 388, 395 [Economic waste results from expenditures of construction costs without benefit to public or private property owners].

MUJI 1st

7.40.

Committee Notes

It is appropriate to give in connection with Instruction CV 505, Instruction CV 2010, "Fair market value" defined.

CV 506. Betterment or value added.

The damages you award to [name of plaintiff] cannot place [him] in a better position than [he] would have been in if had [name of defendant] not breached the standard of care.

To prevent [name of plaintiff] from being 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 and services that met the standard of care.

For the same reasons, you must reduce from the damages you award to [name of plaintiff] using a "repair" measure of damages the costs of any repairs that add value to the [facility name] beyond the value it would have had if [name of defendant] had not breached the standard of care.

References

Lochrane Engineering, Inc. v. Willingham Realgrowth Inv. Fund, Ltd., 552 So. 2d 228, 232-33 (Fla. App. 1989).

St. Joseph Hosp. v. Corbetta Constr. Co., 21 Ill. App. 3d 925, 936-941,316 N.E. 2d 51, 59-62 (1974).

Henry J. Robb, Inc. v. Urdahl, 78 A. 2d 387, 388-89 (D.C. App. 1951).

Reiman Construction Co. v. Jerry Hiller Co., 709 P.2d 1271, 1277 (Wyo. 1985).

Pingree v. Continental Group of Utah, Inc., 558 P.2d 1317, 1319-20 (Utah 1976) .

Ogden Livestock Shows, Inc. v. Rice, 108 Utah 228, 233-34, 159 P.2d 130, 132-33 (Utah 1945).

Committee Notes

Limiting damages so that plaintiff is not better off than s/he would have been had s/he not been harmed by defendant's breach is a well-established concept in many circumstances, but it has not specifically been adopted in Utah in the context of negligence by design professionals.

MUJI 1

7.41

CV 507. Creation of a warranty.

[Name of plaintiff] claims that [name of defendant] owes damages for breach of warranty. A warranty is an assurance or promise of a certain fact or condition regarding [name of defendant]'s [work/service]. A warranty that is expressed in written or oral words is an express warranty. A warranty that is made by law is known as an implied warranty. You must decide whether [name of defendant] made a warranty of [his] [work/service] to [name of plaintiff].

MUJI 1st

7.35; 7.37

References

SME Industries, Inc. v. Thompson,Ventulett, Stainbeck and Associates, 2001 UT 54, ¶ 21, 28 P. 2d 669.

Groen v. Tri-O-Inc., 667 P. 2d 598, 606 (Utah 1983).

CV 508. Breach of warranty essential elements.

To prove breach of warranty [name of plaintiff] must prove all of the following:

(1) [name of defendant] made a warranty [describe warranty]; and

(2) [name of plaintiff] relied on the warranty; and

(3) [name of defendant] reasonably expected that [name of plaintiff] would rely on the warranty; and

(4) [name of defendant]'s services were not as promised in the warranty; and

(5) [name of defendant]'s breach of warranty caused [name of plaintiff]'s harm; and

(6) it was reasonably foreseeable at the time the warranty was made that [name of plaintiff] would be harmed if [name of defendant]'s services were not performed as promised in the warranty.

[To establish breach of an express warranty, [name of plaintiff] does not also have to prove that the [name of defendant] breached the standard of care.]

References

Management Comm. of Graystone Pines Homeowners Ass'n v. Graystone Pines, Inc., 652 P.2d 896 (Utah 1982).

Committee Notes

This instruction should be given only if the express warranty is independent of the standard of care. Do not give the bracketed last paragraph if the warranty at issue is an implied warranty by a design professional implicit in the contract to do work or perform a service to use reasonable skill and care in doing so. See, **SME Industries, Inc. v. Thompson,Ventulett, Stainbeck and Associates, 2001 UT 54, ¶ 29, 28 P. 2d 669.**

MUJI 1st

7.36.

CV 509. Implied warranties. Accuracy and fitness for purpose.

[Name of defendant] made an implied warranty to [name of plaintiff] that his services would not fall below the standard of care, but did not make an implied warranty to [name of plaintiff] that [his] services would be performed without errors or defects, or that [his] services would be suitable for the purpose intended by [name of plaintiff].

References

Nauman v. Harold K. Beecher & Assocs., 24 Utah 2d 172, 467 P.2d 610 (1970).

Mississippi Meadows, Inc. v. Hodson, 299 N.E.2d 359 (Ill. App. Ct. 1973).

Klein v. Catalano, 437 N.E.2d 514 (Mass. 1982).

Borman's, Inc. v. Lalm State Dev. Co., 230 N.W.2d 363 (Mich. Ct. App. 1975).

John Cruet, Jr. v. Robert Carroll, 2001 Conn. Super. Lexis 3336.

SME Industries v. Thompson, 28 P.3d 669 (Utah 2001).

Committee Notes

Give this instruction only if the design professional is an architect, engineer or land surveyor and the claim is that the architect, engineer or land surveyor made an implied warranty implicit in the contract to do work or perform a service to use reasonable skill and care in doing so. See, **SME Industries, Inc. v. Thompson,Ventulett, Stainbeck and Associates, 2001 UT 54, ¶ 29, 28 P. 2d 669.**

Do not give the first clause of this instruction if the plaintiff was not the party contracting with the design professional, as the implied warranty implicit in the contract of an architect, engineer or land surveyor to do work or perform a service to use reasonable skill and care in doing so is made only to the party contracting with the design professional. .Id. Give this instruction in conjunction with See <a href=http://www.utcourts.gov/resources/muji/inc_list.asp?action=showRule&id=5#501>Instruction CV 501/a>. Standard of care for design professionals.

MUJI 1st

7.38.

Tab 3

Utah State Courts

Alison Adams-Perlac <alisonap@utcourts.gov>

MUJI request

Judge Kate Toomey <ktoomey@utcourts.gov> Tue, Oct 8, 2013 at 4:08 PM
To: jlyoung@yahlaw.com
Cc: Alison Adams-Perlac <alisonap@utcourts.gov>

Dear Mr. Young:

I write on behalf of the Board of District Court Judges to request that the Committee consider drafting a model jury instruction concerning self-represented litigants. We think it might be useful to explain that pro se litigants have the right to represent themselves, are equal in the eyes of the law to those who have counsel, and the Court neither favors nor disfavors them. We are aware of a growing body of case law addressing how the courts should treat pro se litigants and in view of the increasing number of cases in which a party has no counsel, think it would be helpful to have a thoroughly vetted, Supreme Court-approved jury instruction available.

Thank you for considering this request. If it would be helpful for me to meet with the Committee, I will make myself available at your convenience.

Sincerely,

Kate Toomey

Tab 4

Use of alternative treatment methods

(1) 324. Use of alternative treatment methods. ……1

(1) 324. 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 providers, 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).

Turner v. University of Utah Hospitals and Clinics, 2011 UT App 431, rev'd 2013 UT 52.

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 5

CV 2401. Insurance policy is a contract. Approved 1
CV 2402. General description of claims and defenses. Approved 2
CV 2403. Breach of policy provision. Approved 2
CV 2404. Elements of the claim. Approved 2
CV 2405. Value of loss. Approved 3
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Breach of contract. First party claim.

CV 2401. Insurance policy is a contract. Approved

An insurance policy is a contract between an insurance company and a policy holder, and therefore the relationship between [name of plaintiff] and [name of defendant] is contractual. The insurance policy obligates both [name of plaintiff] and [name of defendant] to comply with the terms of the policy.

References

MUJI 1

21.4

Committee Notes

See also the Commercial Contract instructions, CV 2101 et seq., which may have some application here, depending on the circumstances.

CV 2402. General description of claims and defenses. Approved

[Name of plaintiff] claims that [name of defendant] breached the insurance policy and claims to have been damaged by the breach as follows: [describe claimed losses].

[Name of defendant] claims that [describe defenses].

References

MUJI 1

Committee Notes

CV 2403. Breach of policy provision. Approved

[Name of plaintiff] claims that [name of defendant] breached the following provisions in the policy: [Quote applicable policy language.]

[When deciding this case, you must use the following definitions: Instruct the jury to apply any judicially determined definitions or interpretations about the language of the policy.]

References

MUJI 1

Committee Notes

The interpretation of the policy is the court's responsibility. If there are words and phrases 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. Elements of the claim. Approved

To succeed on this claim, [name of plaintiff] has the burden to prove [state the elements of the claim that are in dispute].

References

MUJI 1

Committee Notes

The existence of a contract between the insured and the insurer is rarely disputed, and rather than restate all of the elements necessary for a breach of contract claim — see CV 2102, Elements for breach of contract — the judge should focus the jury on those elements that are in dispute.

CV 2405. Value of loss. Approved

[Name of plaintiff] claims that [name of defendant] has not paid for [describe loss]. To succeed on this claim, [name of plaintiff] has the burden to prove the value of [his] loss.

References

MUJI 1

Committee Notes

CV 2406. Exclusion from coverage. Approved

[Name of defendant] claims that the policy excludes [name of plaintiff]'s claim from coverage. The exclusion reads:

[Quote the exclusion or limitation.]

[When deciding this case, you must use the following definitions: instruct the jury to apply any judicially determined definitions or interpretations about the language of the policy.]

To succeed on this claim, [name of defendant] has the burden to prove that the exclusion applies to [name of plaintiff]'s claim.

References

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

MUJI 1

Committee Notes

See the committee note to CV 2403, Breach of policy provision.

It is the general rule in coverage litigation that the burden is on the insured to demonstrate that the loss (under either third-party or first-party coverage) is encompassed by the general coverage provisions of the insurance contract. See, e.g., Quaker State Minit-Lube v. Fireman's Fund Ins. Co., 868 F.Supp. 1278, 1295-96 (D. Utah 1994), aff'd, 52 F.3d 1522 (10th Cir. 1995) (insured bears the burden of proving that its claim comes within the broad meaning of occurrence, and thus comes within the coverage under an insurance policy).

In Young v. Fire Ins. Exchange, 2008 UT App 114, 182 P.3d 911, the Utah Court of Appeals concluded that in litigation arising out of a first party property claim based on a fire, the insured had the threshold burden to present evidence that the fire was the result of an accident. Id. at ¶ 28.

Once the insured meets its burden of establishing that the loss comes within the grant of coverage of the insurance contract, the burden then shifts to the insurer to show the application of an exclusion which would bar coverage. LDS Hospital v. Capitol Life Ins. Co., 765 P.2d 857, 859 (Utah 1988); Metric Construction Co. v. St. Paul fire & Marine Ins. Co., 2005 WL 2100939 at *2 (D. Utah August 31, 2005); Young v. Fire Ins. Exchange, 2008 UT App 114, ¶ 28, 182 P.3d 911; Draughon v. CUNA Mutual Ins. Soc., 771 P.2d 1105, 1108 (Utah Ct. App. 1989).

Once the insurer meets its burden of showing the application of an exclusion, should that exclusion contain any exceptions, the burden is on the insured to show the application of an exception to an exclusion. Quaker State Minit-Lube v. Fireman's Fund Ins. Co., 868 F. Supp 1278, 1312 (D. Utah 1994), aff'd, 52 F.3d 1522 (10th Cir. 2005).

CV 2407. Notice of loss.

[Name of insurance company] claims that [name of policy holder] breached the terms of the insurance contract because [he/she/it] did not give [adequate/timely] notice of the loss.

[[Name of insurance company] claims that it did not breach the insurance policy because [name of policy holder] did not submit a[n] [adequate/timely] notice of loss.]

The insurance company must be given an adequate notice of loss. A notice of loss is adequate if it provides sufficient facts to identify the insurance policy.

[If it was not reasonably possible to give the notice of loss within the required time, the failure to give the notice of loss within the time required by the policy is not a valid reason to deny the claim unless [Name of defendant] can prove that it was prejudiced by the failure to give timely notice.

You must decide whether the notice of loss was [adequate/timely]. [Insurance company] has the burden to prove that the notice of loss was not [adequate/timely]. If it was not timely, [Insurance company] has the burden to prove it was prejudiced before you may rule in [Insurance company]'s favor.

References

Utah Code Section 31A-21-312.

Committee Notes

This instruction applies if plaintiff is claiming damages arising from breach of the insurance contract or if the insurer is claiming there is no coverage due to the failure to timely file a proof of loss. It may not apply if the dispute is simply to determine the value of the covered loss.

CV 2408. Proof-of-loss. Approved

[[Name of insurance company] claims that [name of policy holder] is not covered because it did not receive a[n] [adequate, timely] proof-of-loss.]

[[Name of insurance company] claims that it was not required to pay for the loss sooner because it did not receive a[n] [adequate, timely] proof of loss.]

The insurance company must be given an adequate proof-of-loss. [[Name of insurance company] claims that [name of policy holder] is not covered because it did not receive a[n] [adequate, timely] proof-of-loss.]

[[Name of insurance company] claims that it was not required to pay for the loss sooner because it did not receive a[n] [adequate, timely] proof of loss.]

A proof-of-loss is a summary of the facts and circumstances that gave rise to the covered loss. The law does not require strict compliance with policy provisions related to submission of the proof-of-loss, as long as the proof-of-loss is adequate. A proof-of-loss is adequate if it gives [[insurance company] a sufficient opportunity to investigate, to prevent fraud, and to form an estimate of its rights and obligations under the policy.

[If it was not reasonably possible to give the proof of loss within the required time, the failure to give proof of loss within the time required by the policy is not a valid reason to deny the claim.]

You must decide whether the proof-of-loss was [adequate/timely]. [Insurance company] has the burden to prove that the proof-of-loss was not [adequate/timely].

References

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

MUJI 1

Committee Notes

CV 2409. When Insurer claims prejudice from delay in notice or proof.

[Insurer] claims that [Insured's] delay in providing [notice][proof] of [describe claim or loss] was so lengthy it caused actual prejudice to [Insurer's] ability to adequately and fully [investigate and defend the claim][investigate and settle the loss]. An insurer is prejudiced if it suffers a material change in its ability to investigate, or defend, or resolve a claim.

When you consider whether [Insurer] suffered actual prejudice, you should consider the evidence in light of the purposes of the notice requirements, namely to enable insurer to investigate and take the necessary steps to evaluate the [claim][loss] and protect its interests.

In determining if [Insurer] suffered actual prejudice, you should consider whether the late notice interfered with the [Insurer's] ability to adequately:

(1) Examine the scene of the accident;

(2) Properly interview witnesses;

(3) Review and assess damages claims, both at the outset and as new information came in during the investigation;

(4) [Direct and control the actual trial with attorneys of its choosing;]

(5) Determine the reasonable cost for resolving the claim; and/or

(6) Retain experts to help assess liability and damages.

The failure to give [adequate/timely] [notice of loss][proof-of-loss] is a valid reason to deny the claim if the [name of defendant] proves that it was prejudiced by [name of plaintiff]'s failure to give [adequate/timely] proof-of-loss.

References

Busch v. State Farm Fire & Cas. Co., 743 P.2d 1217 (Utah 1987).
State Farm Mut. Auto Ins. Co., 2003 UT 48, 89 P.3d 97.
F.D.I.C. v. Oldenburg, 34 F.3d 1529.
Utah Transit Authority v. Liberty Mut. Ins. Co., 2006 WL 2992715 (D. Utah Oct. 18 2006) (applying Utah law).
Utah Code Section 32A-21-312(2).

Committee Notes

The wording selected will depend on whether the claim at issue is a first-party claim or a third-party claim. If a prejudice instruction is needed in a case involving breach of the consent to settle in the context of underinsured or uninsured motorist coverage. *See* State Farm Mut. Ins. Co. v. Green*,* 2003 UT 48, ¶ 33, 89 P.3d 97 (setting forth the factors to be considered).

CV 2410. Unspecified time of performance. Approved

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

Because the policy does not require [name of defendant/name of plaintiff] to [pay the benefits, complete the investigation, submit proof of loss, respond to demands/offers, etc.] by a particular date, you must decide, based on all of the circumstances, what was a reasonable time 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 if the policy or the law does not provide when the performance at issue must be done.

CV 2411. Recovery of damages. Approved.

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 damages caused by [name of defendant]'s breach.

As appropriate, instruct the jury on expectation damages:

Instruction CV2135. Expectation damages - General.

And consequential damages:

Instruction CV2136. Consequential damages.

References

Machan 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.

Beck v. Farmers Insurance Exchange, 701 P.2d 795 (Utah 1985).

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

MUJI 1

21.9

Committee Notes

The measure of damages for breach of an insurance contract is the same as for commercial contracts generally, unless changed by law.

CV 2412. Coverage by estoppel. Approved

[Name of plaintiff] claims that [Name of defendant]'s agent misrepresented the [scope of coverage/benefits] of [name of defendant]'s insurance policy. [Name of plaintiff] therefore claims that [he/she/it] is entitled to modify the insurance policy to conform to what was represented by [name of defendant]'s agent. To succeed, [name of plaintiff] must prove the following:

[Name of defendant]'s agent made an important misrepresentation to [name of plaintiff] regarding the [scope of coverage/ benefits/protection] provided by the insurance policy;

[Name of plaintiff] reasonably relied on [name of defendant]'s agent's misrepresentations, and

[Name of plaintiff] was harmed by [his/her/its] reliance.

References

Youngblood v. Auto-Owners Ins. Co., 2007 UT 28, ¶ 25, 158 P.3d 1088.

Committee Notes

Estoppel is generally an equitable relief to be decided by the court. This instruction applies if the court has an advisory jury to decide the factual issues.

CV 2413. Insurable interest.

You will be asked to decide whether [name of plaintiff] has an insurable interest in [real or personal property].

Under the law, a person has an insurable interest in [real or personal property] whenever [he/she/it] would profit by or gain some advantage by its continued existence and suffers some loss or disadvantage by its destruction. Title or possession to the property, or having a lien on the property, is not the deciding fact. The interest may be legal, qualified, conditional, contingent, or merely a right to use the property, with or without the payment of rent.

References

Error v Western Home Ins. Co., 762 P.2d 1077, 1081-1082 (1988).

Hill v Safeco Ins. Co., 22 Utah 2d 96, 448 P.2d 915 (1969).

CV 2414. Compliance with Utah law.

When interpreting the insurance contract, [name of defendant] was required to do so consistent with Utah law, which I will now explain.

[(1) An insurance company is required to construe any ambiguous or uncertain language in the policy in favor of coverage as long as the uncertain language could be reasonably interpreted in favor of coverage. The court has ruled that:]

[(2) An insurance company cannot deny a claim based on a provision in the policy which is contrary or inconsistent with Utah law. Utah law provides:

If [name of defendant] did not comply with the above, you may consider this in deciding if [name of defendant] breached the insurance contract.]

References

Lieber v. ITT Hartford Insurance Center, 2000 UT 90, ¶ 14, 15 P.3d 1030 (“[T]o the extent that any provision in this policy is not in harmony with the statutory requirements as we have interpreted them today, we hold such provisions invalid ...”).

CV 2415. 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 caused by [name of defendant]'s breach which, at the time the policy was issued, [name of defendant] could have generally foreseen might occur if it breached the terms of the policy.

A loss is foreseeable if it follows from the breach in the ordinary course of events. A loss is also foreseeable if it is the result of special circumstances, beyond the ordinary course of events, that [name of defendant] knew of or had reason to know of.

In deciding whether the damage was foreseeable at the time the policy was issued, you may consider the nature and language of the policy and the reasonable expectations of the parties.

References

Mahan v. UNUM Life Ins. Co. of Am., 2005 UT 37, ¶ 17, 116 P.3d 342.
Black v. Allstate Ins. Co., 2004 UT 66, ¶ 28, 100 P.3d 1163. ("Limiting Black's recovery in this action to contractual damages does not leave him without a meaningful remedy for Allstate's breach. …We stated [in *Beck*] that '[d]amages recoverable for breach of contract include both general damages, i.e., those flowing naturally from the breach, and consequential damages, i.e., those reasonably within the contemplation of, or reasonably foreseeable by, the parties at the time the contract was made.' …We recognized that 'consequential damages for breach of contract may reach beyond the bare contract terms,' indicating that '[a]though the policy limits define the amount for which the insurer may be held responsible in performing the contract, they do not define the amount for which it may be liable upon a breach.' Thus, while Black will be unable to recover punitive damages in this case, he may recover both general and consequential damages, which could conceivably exceed the amount of his policy limit.")