Agenda
Advisory Committee on
Model Civil Jury Instructions

September 8, 2008
4:00 to 6:00 p.m.

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

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

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

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

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

September 22, 2008	Motor Vehicles
October 14, 2008	Premises Liability
October 27, 2008	Insurance Obligations
November 10, 2008	Construction Contracts
December 8, 2008	Intentional Torts / Fraud and Deceit
January 12, 2009	Eminent Domain
February 9, 2009	Probate
March 9, 2009	Professional Liability
April 13, 2009	Employment

Tab 1

MINUTES
Advisory Committee on Model Civil Jury Instructions
August 11, 2008
4:00 p.m.

Present: John L. Young (chair), Francis J. Carney, Dr. Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Gary L. Johnson, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill. Also present: P. Bruce Badger, Katie Carreau, Todd Shaughnessy, Elliott J. Williams

1. *Medical Malpractice Instruction CV324. Use of alternative treatment methods*. Mr. Carney noted that he had cleaned up the instruction and the committee note. He indicated that the instructions were generally agreed to as a group and that the defense attorneys on the medical malpractice subcommittee had made concessions. Mr. Carney noted that this was an instruction that the defense bar felt strongly about. Mr. Carney was concerned that, if the instruction was rejected, the defense bar may want to go back and revisit all the medical malpractice instructions. Mr. Carney noted that he personally might not favor the instruction in the abstract, but he recommended that the committee approve the instruction. Mr. Williams spoke in favor of the instruction, noting that it has a long history, beginning with a California pattern instruction and continuing through JIFU and MUJI 1st. He said the instruction was an effort to give effect to what doctors would expect the law to be. He said that the plaintiffs' attorneys on the MUJI 1st committee did not have a problem with it. He noted that the subcommittee voted 3-1 in favor of the instruction. The committee voted to approve the instruction, with Messrs. Carney, Fowler, Johnson, and Nebeker voting in favor of the instruction, and Mr. Simmons abstaining. Mr. Williams was excused.

Messrs. Ferguson and Summerill joined the meeting. Mr. Summerill expressed concern that the committee had voted on the instruction without him. He objected to the phrase in the instruction that says "it is not medical malpractice" to select an approved alternative method of treatment and proposed revising the instruction to read:

> When there is more than one method of [diagnosis/treatment etc.] that is approved by a respectable portion of the medical community, and no particular method is used exclusively by all providers, you may consider that in determining whether or not the physician failed to follow the standard of care as outlined above. The provider has the burden to prove that the method used is approved by a respectable portion of the medical community.

He also proposed cross-referencing CV301, which defines the standard of care. Mr. Young was reluctant to reopen the matter since Mr. Williams had not seen the proposal and had been excused, but he indicated that Mr. Summerill could bring the matter back to the committee at its next meeting if the subcommittee approved it. Mr. Carney said that he would be willing to take Mr. Summerill's proposal back to the subcommittee and see if the subcommittee would be willing to revisit the issue.

2. *Product Liability Instruction CV1057. Safety risks*. Mr. Young noted that the committee had deadlocked on this instruction at the last meeting. Mr. Young indicated that he would not break the tie at this time but asked the subcommittee to revisit the instruction and explain why it was not covered by CV1005 and CV1009. He noted that the instruction appeared to be an attempt to make the issue of duty a matter of instruction rather than a question of law for the court to decide.

Dr. Di Paolo joined the meeting.

3. *Contract Instructions*. The committee continued its review of the contract instructions. Mr. Young welcomed Mr. Badger, the chair of the contracts subcommittee, and Mr. Shaughnessy and Ms. Carreau to the meeting. Mr. Badger had responded in writing to some of the questions that the committee had raised the last time it considered the contract instructions, and Mr. Shea had circulated his responses to the committee.

a. *CV2103, Creation of a contract, & CV2107, Consideration*. The committee had suggested a note saying that the instructions apply only to executory contracts and not to unilateral contracts. Mr. Badger asked whether the committee meant "bilateral" contracts, instead of "executory contracts." The committee said it did. The subcommittee will propose comments for these instructions.

b. *CV2109. Unspecified time of performance*. The committee had asked what role the plaintiff's expectations play in determining time of performance. Mr. Badger noted that the case law says that what constitutes a reasonable time must be determined from all the relevant circumstances but does not specify what circumstances are relevant. The subcommittee recommended the following substitute instruction:

> When a provision in a contract 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 contract does not require [name of defendant] to [describe the act] 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 [name of defendant] to [describe the act].

At Mr. Shaughnessy's suggestion, "name of defendant" was changed to "name of party." As modified, the substitute instruction was approved.

c. *CV2113. Disputed condition precedent.* The committee had asked whether the instruction was limited to verbal or implied conditions. The subcommittee thought that whether a contract contains a condition precedent is a question of law if the contract is in writing, and that the only time a jury needs to decide if a condition precedent exists is if the contract is oral or implied. If the court determines that the written contract is unambiguous, then the existence of the condition precedent is a matter of law, and the jury only decides if the condition has been satisfied. But if the court determines that the contract is ambiguous, then the jury decides whether the contract contains a condition precedent. Accordingly, the subcommittee recommended revising the instruction to read as follows:

> [Party's name] claims that [he] did not have to [describe the obligation] unless [describe the alleged condition] occurred first. Based on the evidence, you must decide whether the parties intended that this condition was part of the contract. If you decide that this condition was part of the contract, then [party's name] had to [describe the obligation] before [other party's name] was required to perform his contract obligations.

The committee approved the revised instruction.

d. *CV2114, Performance excused by material breach, & CV2118, Material breach.* Ms. Carreau suggested dropping CV2114 in favor of CV2118, which she thought was a clearer statement of the law. Dr. Di Paolo thought that CV2114 was clearer because it defined "material," whereas CV2118 uses "material" without explaining it. Dr. Di Paolo suggested that CV2118 would be clearer if it were broken up into paragraphs. The committee revised CV2118 to read:

> You must decide if there was a material breach of the contract.
>
> A breach is material if a party fails to perform an obligation that was important to fulfilling the purpose of the contract.
>
> A breach is not material if the failure was minor and could be fixed without difficulty.
>
> If you decide that [name of defendant] materially breached the contract, then [name of plaintiff] was excused from doing what [he] had promised to do under the contract.

CV2118 was approved as revised, subject to a proposal from Dr. Di Paolo to modify the instruction if she chooses to make one. CV2114 was deleted.

e. *CV2119. Total breach.* At Mr. Badger's suggestion, the instruction was deleted as unnecessary.

f. *CV2115. When performance is not excused by other party's non-performance.* The committee had suggested a note on who has the burden of proof. Mr. Summerill noted that whoever claims that his performance was excused should have the burden of proof. The committee approved the instruction as written.

g. *CV2121. Anticipatory breach.* The committee had questioned what the standard of proof is to show an anticipatory breach. Mr. Badger noted that the case law consistently says that a party must "positively and unequivocally" show that he or she does not intend to perform the contract. Courts look to whether the party's language was sufficiently positive that it expressed a clear intent not to perform the contract. Mr. Simmons thought it was confusing to use "material breach" in this instruction when it is defined differently in CV2118. Mr. Shea noted that CV2118 defined "material breach" as a failure to do something, whereas this instruction deals with one party saying it will not do something. Messrs. Young and Shea suggested saying, "An anticipatory breach must be a material breach." Messrs. Carney and Ferguson and Ms. Carreau suggested not using the word "material." The subcommittee proposed a new instruction CV2121. Dr. Di Paolo suggested revising the first sentence of the new instruction to read, "[Name of plaintiff] claims that [name of defendant] breached the contract by making statements that he was not going to perform an important contract obligation." Mr. Badger suggested: "[Name of plaintiff] claims that [name of defendant] breached their contract by making statements that he was not going to perform a contract obligation that was important to fulfilling the purpose of the contract. A party must indicate positively and unequivocally that he does not intend to perform his contract obligations to materially breach the contract." Dr. Di Paolo thought that lay people take "positively" to mean "without any negatives," and to say, "I won't perform the contract" is a negative statement and therefore not a "positive" and unequivocal refusal to perform. Mr. Ferguson noted that "positively" is a philosophical term (related to "positivism") and may be misunderstood. Mr. Carney suggested a synonym, such as "definitively" or "unambiguously." Mr. Shea thought the instruction would be clear if it just said "unequivocally" or "clearly" and not "positively and unequivocally," perhaps with a committee note saying that the committee did not intend any substantive change in the law but was just trying to make the instruction understandable for lay people. Mr. Nebeker asked whether the cases distinguish between "positively"

and "unequivocally." Dr. Di Paolo noted that, if the instruction uses the term "positively," it should be defined in the instruction so that the jury does not use the wrong definition of it. Mr. Badger suggested making the second sentence of the first paragraph the last sentence. He proposed revising the first paragraph of the instruction to read:

> If a party merely says that he doesn't want to perform his contract obligations, or that he has misgivings about the contract, this isn't enough to constitute a material breach of contract. But when a party is supposed to perform his obligation at some time in the future, it is a material breach of contract if he manifests positively and unequivocally that he does not intend to perform his contract obligations when the time arrives. [Name of plaintiff] claims that [name of defendant] materially breached their contact by making statements that he was not going to perform his contract obligation.

Mr. Shaughnessy and Ms. Carreau suggested replacing "manifests" with "indicates." Mr. Young noted that the instruction is called "Anticipatory breach," yet the word "anticipate" (or any of its forms) does not appear in the instruction. The subcommittee noted that an anticipatory breach gives the nonbreaching party three options but did not think the jury needed to be instructed on the options. At Mr. Badger's suggestion, the instruction was referred back to the subcommittee for reconsideration in light of the committee's discussion.

h. *CV2122. Implied covenant of good faith and fair dealing*. Mr. Humpherys had expressed concerns about the instruction, but he was not at the meeting to explain his concerns. The committee noted that there will be separate jury instructions on insurance bad faith. Mr. Badger did not think that bad faith in other contractual situations required any more than what CV2122 provided. Mr. Summerill thought the instruction was unwieldy. Mr. Carney thought the instruction should make clear that the court should only instruct on the limits set out in the second paragraph that apply in the particular case. The subcommittee will revisit the instruction.

i. *CV2125, Duress, & CV2126, Improper threat*. Mr. Young asked whether the instructions cover economic duress. The subcommittee will revisit CV2125 and CV2126.

j. *CV2130, Substantive unconscionability, & CV2131, Procedural unconscionability*. The subcommittee was not prepared to discuss CV2130 and CV2131, so further discussion was deferred until the next meeting.

4. *New Committee Member*. Messrs. Young and Carney made a joint motion to add John Lund of Snow, Christensen & Martineau as a member of the committee. Mr. Johnson seconded the motion. There was no opposition.

5. *Next Meeting*. Mr. Young thought that the committee needed to meet twice in September and October to get back on schedule. The next meeting will be Monday, September 8, 2008, at 4:00 p.m. The committee will try to finish the contract instructions at that meeting. The committee will then meet on Monday, September 22, 2008, to discuss the motor vehicle accident instructions. The committee will also meet on Tuesday, October 14, 2008 (because Monday, October 13, is Columbus Day) and may meet again on Monday, October 27, 2008, if necessary.

The meeting concluded at 6:00 p.m.

Tab 2

September 2, 2008

Tim,

Our contracts subcommittee has considered the remaining issues posed to us by the Advisory Committee following its May 12, June 9, and August 11, 2008 meetings. We respond as follows:

- CV2103 Creation of a contract.

The proposed instruction submitted by our subcommittee originally included language that read:

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

This language, of course, addresses the basic contract principle that there must be mutual assent or a meeting of the minds and that a contract can be enforced by the courts only if the obligations of the parties are set forth with sufficient definiteness that it can be performed. The advisory committee revised and then approved the instruction that now reads:

> ## CV2103. Creation of a contract.
>
> You must decide whether [name of plaintiff] and [name of defendant] had a contract. A contract is an agreement between two or more parties. It can be either oral or written, or a mixture of both.
> To create a contract, each party must promise to do something for the other party in exchange for something of value. "Value" doesn't necessarily have to be money. It can be a promise to do some act in exchange for the other party's act or promise.
> *What the parties have promised to do for each other has to be clear enough that they can tell what it is they have each promised to do for the other.* (italic added).
>
> References
> Glacier Land Co., L.L.C. v. Claudia Klawe & Associates, L.L.C., 2006 UT App 516.
> Golden Key Realty, Inc. v. Mantas, 699 P.2d 730 (Utah 1985).

MUJI 1st Instruction

The issue is not that the deal between the parties needs to be clear as the final paragraph of the approved instruction suggests. In fact, many contracts are ambiguous, yet still enforceable. Rather, the deal needs to be spelled out with sufficient definiteness so that each party knows what he has promised to do for the other. In other words, there has to be a meeting of the minds. The advisory committee may have been concerned about the "spelled out, either expressly or impliedly" language in the initial version of this instruction and felt that it does not represent the plain language that we are striving for in MUJI 2d. We suggest that the final paragraph of this instruction should be replaced with the following language:

> *To create a contract, what the parties have promised to do for each other has to be spelled out well enough that they can tell what it is they have each promised to do for the other.*

The advisory committee also asked our subcommittee to draft an advisory committee note to follow CV2103 suggesting that this instruction applies only to bilateral, not unilateral contracts. It is the second paragraph of the instruction (which is really an explanation of the concept of consideration) that applies only to bilateral contracts and not to unilateral contracts. Inasmuch as MUJI 2d will contain a separate instruction about consideration (i.e., CV2107) we suggest that the second paragraph of CV2103 be deleted and that the following advisory committee note be added to CV2103:

> *Advisory Committee note: A valid contract also requires consideration, which is conceptually different for bilateral and unilateral contracts. The jury instruction concerning consideration – CV2107, should be read in conjunction with CV2103 if the contract at issue is a bilateral contract*

To summarize, we recommend the following instruction, with accompanying committee note:

> **CV2103. Creation of a contract.**
>
> You must decide whether [name of plaintiff] and [name of defendant] had a contract. A contract is an agreement between two or more parties. It can be either oral or written, or a mixture of both.
>
> To create a contract, what the parties have promised to do for each other has to be spelled out well enough that they can tell what it is they have each promised to do for the other.
>
> References

Glacier Land Co., L.L.C. v. Claudia Klawe & Associates, L.L.C., 2006 UT App 516.
Golden Key Realty, Inc. v. Mantas, 699 P.2d 730 (Utah 1985).
MUJI 1st Instruction

Advisory Committee note: A valid contract also requires consideration, which is conceptually different for bilateral and unilateral contracts. The jury instruction concerning consideration – CV2107, should be read in conjunction with CV2103 if the contract at issue is a bilateral contract

- CV2107 Consideration

The advisory committee asked our subcommittee to provide a note explaining that this instruction only applies to bilateral contracts. Here's our proposed note:

Advisory Committee note: This instruction, which applies only to bilateral contracts, is intended to address the concept of consideration in a way that will be plainly understood by jurors. Consideration in a bilateral contract is typically a return promise that is usually express, but may be implied. Consideration for a unilateral contract is not a return promise, but some performance by the promisee. E. Allen Farnsworth, Contracts, § 2.3 (1982).

- CV2121 Anticipatory Breach

The advisory committee and our subcommittee worked together on August 11, 2008 to rephrase CV 2121- Anticipatory Breach. As we have recommended, the Utah Supreme Court case law refers to the repudiating party's "positive and unequivocal" intent not to perform his future contract obligations. The advisory committee revised the proposed instruction in its May 12, 2008 meeting and took out "positive". We recommended when we met with the advisory committee on August 11, 2008 that "positive" needs to go back into the instruction. The advisory committee also wondered during its May 12 meeting how the jury can find a "positive and unequivocal" intent not to perform a contract by a preponderance of the evidence. As we have suggested, we are unable to locate any case law suggesting that there is a heightened burden of proof. Moreover, "positive and unequivocal" focuses on whether "a [repudiating] party's language [is] sufficiently positive to be reasonably interpreted to mean that the party will not perform." *Amoco Oil Co. v. Premium Oil Co.*, 313 F. Supp. 2d 1233 (D. Ut. 2004), citing

Scott v. Majors, 980 P. 2d 214, 218 (Utah Ct. App. 1999), while the preponderance of the evidence is the proponent's burden of proving that measure of intent.

Following the advisory committee's August 11, 2008 meeting our subcommittee continued to revise this instruction and we now recommend that the following instruction be adopted, including the additional references:

CV2121 Anticipatory Breach

When a party is supposed to perform his contract obligations at some time in the future, that party breaches the contract if he indicates to the other party that when the time comes for him to perform his obligations, he will not do so. The contract obligations must be important to fulfilling the purpose of the contract. It is not a breach of the contract if the party merely indicates that he doesn't want to perform his contract obligations, or that he has misgivings about the contract. Rather, the party must indicate positively and unequivocally that he does not intend to perform his contract obligations.

Also, a party who has indicated that he is not going to perform his contract obligations is allowed to change his mind before his performance is due, but only if he lets the other party know before the other party files a lawsuit or otherwise relies on the statements and significantly changes his position.

If you find that [name of defendant] made statements that could be reasonably interpreted to mean that he positively and unequivocally refused to perform his contract obligations, and that he did not change his mind and notify [name of plaintiff] before [name of plaintiff] either filed a lawsuit or otherwise relied on the statements and significantly changed his position, then [name of defendant] breached the contract.

Cobabe v. Stanger, 844 P.2d 298, 303 (Utah 1992).
Kasco Services Corp. v. Benson, 831 P. 2d 86, 89 (Utah 1992).
Hurwitz v. David K. Richards & Co., 436 P. 2d 794 (Utah 1968).
Scott v. Majors, 980 P. 2d 214,218 (Utah Ct. App. 1999).

OLP, LLC v. Burningham, 2008 UT App 173, ¶¶ 43-44.
Amoco Oil Co. v. Premium Oil Co., 313 F. Supp. 2d 1233, 1238 (D. Ut. 2004).
Lantec v. Novell, 306 F. 3d 1003, 1014 (10th Cir. 2002).
Restatement (Second) of Contracts §§250, 253.
Restatement of the Law, Contracts § 319
MUJI 1st Instruction

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

- CV2122-Implied Covenant of Good Faith and Fair Dealing.

The instruction concerning the implied good faith covenant appears to have been the subject of considerable discussion during the advisory committee meetings. We recognize that the implied covenant of good faith is more expansive in an insurance context and we recommend that, as in MUJI 1st, a separate instruction be included in the insurance instructions section of MUJI 2d. We submit the following instruction for inclusion in the contracts section:

CV2122. Implied covenant of good faith and fair dealing.

All contracts contain an unwritten or implied promise that the parties will deal with each other fairly and in good faith. This means that [name of plaintiff] and [name of defendant] have promised not to intentionally do anything to injure each other's right to receive the benefits of the contract. To decide if [name of defendant] violated this unwritten promise, you should consider whether [his] actions were consistent with the agreed common purpose and justified expectations of [name of plaintiff] in light of the contract language and the dealings between and conduct of the parties.

There are some limits to this unwritten promise that you need to keep in mind.

First, this unwritten promise between the parties to deal fairly with each other and in good faith does not establish new,

independent rights or duties that [name of plaintiff] and [name of defendant] did not agree to.

Second, this unwritten promise does not create rights and duties that are inconsistent with the actual terms of the contract.

Third, this unwritten promise does not require either party to use a right they have under the contract that will be harmful to themselves simply for the purpose of benefiting the other party.

Finally, you may not use this unwritten promise to achieve an outcome that you believe is fair but is inconsistent with the actual terms of the contract.

If you find that [name of defendant] violated this unwritten promise to deal fairly and in good faith, then [name of defendant] breached the contract.

References
Mark Technologies Corp. v. Utah Resources International, Inc., 2006 UT App 418, ¶ 7.
St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194, 199 (Utah 1991).
Oakwood Village, LLC v. Albertsons, Inc., 2004 UT 101, ¶ 45.
MUJI 1st Instruction

Advisory Committee note: The duty of good faith and fair dealing as it applies to insurance contracts is addressed in MUJI 2d, [insert insurance instruction numbers].

Subcommittee Note: A finding that there has been a breach of the implied covenant of good faith may entitle the non-breaching party to consequential damages as for any other breach of a contract . Damages are addressed separately and should not be addressed in this instruction.

- CV2125 Duress and CV 2126 Improper Threat.

I created confusion at the August 11, 2008 advisory committee meeting by suggesting that the Improper Threat instruction was not one that our subcommittee had submitted. In fact, our subcommittee had submitted the Improper Threat instruction to follow CV 2125-Duress. We have revised both CV2125-Duress and CV 2126-mproper Threat and submit the following instructions:

CV2125. Duress.

[Name of defendant] claims that [his] contract with [name of plaintiff] is not binding because [he] was forced to enter into the contract. To succeed on this claim, [name of defendant] must prove that [he] did not intend to enter into the contract, and:

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

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

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

(3) [he] was influenced to enter into the contract by an improper threat by [someone other than plaintiff or plaintiff's agent] that left [him] no reasonable alternative but to agree. This, however, will not relieve [name of defendant] from the contract if [name of plaintiff] in good faith and without reason to know of the improper threat either gave up something of value or relied on the contract in a significant way.

References
Andreini v. Hultgren, 860 P.2d 916 (Utah 1993).
Brinton v. IHC Hospitals, Inc., 973 P.2d 956 (Utah 1998).
Restatement (Second) of Contracts §§ 174-176.
MUJI 1st Instruction

CV2126. Improper threat.

For purpose of the instruction I just read, a threat is "improper" if [use only those relevant to the case] what was threatened is:

(1) a crime [identify the criminal violation and, if necessary, the elements thereof] or a tort [identify the tort and, if necessary, the elements thereof], or the threat itself would be a crime or a tort if it resulted in obtaining property;

(2) a criminal prosecution;

(3) a lawsuit and the threat is made in bad faith, or

(4) a breach of the unwritten or implied promise to deal fairly and in good faith in a contract with the recipient.

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

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

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

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

References
Andreini v. Hultgren, 860 P.2d 916 (Utah 1993).
Brinton v. IHC Hospitals, Inc., 973 P.2d 956 (Utah 1998).
Restatement (Second) of Contracts §§ 174-176.
MUJI 1st Instruction

Advisory Committee Note: Counsel are advised to consult the case law and Restatement (Second) of Contracts §§174-176 and to tailor this instruction to the specific facts and circumstances of the case.

- CV2127 Fraudulent Inducement

The advisory committee previously approved CV2127-Fraudulent Inducement as submitted by our subcommittee. We regret that the draft we submitted omitted the heightened "clear and convincing" burden of proof. We also left out one element (i.e., that the

misrepresentation must relate to a presently existing material fact). We have revised the instruction and recommend that the following instruction be re-approved by the advisory committee.

CV2127. Fraudulent inducement.

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

(1) [Name of plaintiff] made the following representation: [insert the representation];

(2) The representation was about a presently existing fact that was important;

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

(4) ~~That~~ [Name of plaintiff] made the representation to induce ~~to induce~~ [name of defendant] to agree to the contract ~~agree to the contract;~~

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

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

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

References
Armed Forces Ins. Exch. v. Harrison, 2003 UT 14, ¶ 16, 70 P.3d 35, 40.
MUJI 1st Instruction

- CV2130-Substantive Unconscionability and CV2131-Procedural Unconscionability

The advisory committee recommended that the two flavors of unconscionability (i.e., substantive and procedural) be reflected in separate instructions. We believe this is a wise approach. We submit the following two instructions for inclusion in MUJU 2d:

CV2130. Substantive unconscionability.

[Name of party] claims that the contract [or, alternatively, the following terms of the contract (list terms)] is unenforceable because it is substantively unconscionable.

Substantive unconscionability focuses on the terms of the contract and requires you to examine the relative fairness of the contract at the time it was entered into. Even if a contract is unreasonable or more advantageous to one party, the contract, without more, is not unconscionable. Rather, in order to find that the contract [or contract terms] is substantively unconscionable, you must find that [name of party] proved the following by clear and convincing evidence:

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

(2) That the contract terms result in an overall imbalance in the parties' obligations and rights that is inconsistent with accepted customs and business practices at the time and place the contract was made.

References
The Cantamar, L.L.C. v. Champagne, 2006 UT App 321, ¶¶ 31-36.
Ryan's v. Dan's Food Stores, Inc., 972 P. 2d 395, 402 (Utah 1998).
Sosa v. Paulos, 924 P. 2d 357 (Utah 1996).
Equitable Life & Cas. Ins. Co. v. Ross, 849 P. 2d 1187, 1190 (Utah Ct. App. 1993).
Klas v. Van Wagoner, 829 P.2d 135 (Utah Ct. App. 1992).

Resource Management Co. v. Weston Ranch & Livestock Company, Inc., 706 P.2d 1028 (Utah 1985).
MUJI 1st Instruction

CV2131. Procedural unconscionability.

[Name of party] claims that the contract is unenforceable because it is procedurally unconscionable.

Procedural unconscionability focuses on the negotiation of the contract and the circumstances of the parties. In order to succeed on this claim, [name of party] must prove by clear and convincing evidence that at the time the contract was entered into, [name of other party] had an unfairly superior bargaining position and that he overreached in his negotiation with [name of party]. You may consider all of the following circumstances, keeping in mind that the purpose of procedural unconscionability is to prevent oppression and unfair surprise:

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

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

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

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

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

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

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

Advisory Committee asks: What happens if conditions are met? Answer: This is a question for the court and is likely to result in separate questions on the verdict form. See proposed Advisory Committee note below.

References
The Cantamar, L.L.C. v. Champagne, 2006 UT App 321, ¶¶ 31-36.
Ryan's v. Dan's Food Stores, Inc., 972 P. 2d 395, 402 (Utah 1998).
Sosa v. Paulos, 924 P. 2d 357 (Utah 1996).
Equitable Life & Cas. Ins. Co. v. Ross, 849 P. 2d 1187, 1190 (Utah Ct. App. 1993).
Klas v. Van Wagoner, 829 P.2d 135 (Utah Ct. App. 1992).
Resource Management Co. v. Weston Ranch & Livestock Company, Inc., 706 P.2d 1028 (Utah 1985).
MUJI 1st Instruction

Advisory Committee Note
The court should instruct on the circumstances showing procedural unconscionability that are supported by the evidence. Case law suggests that "While a determination of substantive unconscionability may by itself lead to our concluding the contract was unconscionable, procedural unconscionability alone 'rarely render[s] a contract unconscionable.'" Ryan's v. Dan's Food Stores, Inc., 972 P. 2d 395, 402 (Utah 1998); see also, Resource Management Co. v. Weston Ranch & Livestock Company, Inc., 706 P.2d 1028, 1043 (Utah 1985). Accordingly, the parties may wish to include separate interrogatories on the verdict form.

- CV2132-Mutual Mistake and CV2133-Unilateral Mistake

The advisory asked our subcommittee to respond to several questions about the mutual and unilateral mistake instructions. One issue raised was whether the third element of the mutual mistake instruction we submitted (i.e., "that defendant would not have agreed to enter into the contract if she had known about the mistake") is a subjective or objective determination. We have conducted additional research and have concluded that this third element in the mutual mistake instruction should be omitted. The advisory committee also asked whether the second element of mutual mistake (i.e., "that these facts were a basic assumption or a vital fact upon

which they based their bargain") is the same standard as the third element of unilateral mistake (i.e., "that the matter about which the mistake was made related to an important feature of the contract"). We answer that the two instructions state the correct legal standard. Notice that the party must demonstrate unconscionability when proving unilateral mistake which makes unilateral mistake more difficult to prove than mutual mistake.

We have further revised both mistake instructions to incorporate the "clear and convincing" burden of proof that is required to prove mistake and have added an advisory committee notes as follows:

CV2132. Mutual mistake.

[Name of defendant] claims that the contract is not enforceable because both parties were mistaken about [insert description of mutual mistake of fact].

For [name of defendant] to prevail, you must find that he proved the following by clear and convincing evidence:

(1) that at the time the contract was entered into both [name of defendant] and [name of plaintiff] were mistaken about these facts, and

(2) that these facts were a basic assumption or a vital fact upon which they based their bargain.

References
England v. Horbach, 944 P.2d 340 (Utah 1997).
Despain v. Despain, 855 P.2d 254 (Utah Ct. App. 1993).
Robert Langston Ltd. v. McQuarrie, 741 P.2d 554 (Utah Ct. App. 1987).
Restatement (Second) of Contracts §§ 151, 152 (1979).
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Advisory Committee note: Mutual mistake of fact makes a contract voidable, and is a basis for equitable rescission. See Robert Langston Ltd. v. McQuarrie, 741 P.2d 554, 557 (Utah Ct. App. 1987). To reform a contract due to a mutual mistake in the integration, the party claiming mistake must prove "that the minds of both parties had been in agreement on a term

which they mutually failed to incorporate into the writing." R.L.Warner v. Sirstens, 838 P. 2d 666 (Utah Ct. App. 1992).

CV2133. Unilateral mistake.

[Name of defendant] claims the contract is not enforceable because [he] was mistaken about [insert description of unilateral mistake of fact].

For [name of defendant] to prevail, you must find that he proved the following by clear and convincing evidence:

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

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

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

(4) that the mistake occurred even though [name of defendant] made a reasonable effort to understand the circumstances about which he was mistaken.

(5) that [name of plaintiff] can be put back in the same position [he] was in before the contract, losing only the benefit of the bargain.

References
Guardian State Bank v. Stangl, 778 P.2d 1, 4-5 (Utah 1989).
Equitable Life & Casualty Insurance Co., 849 P. 2d 1187 (Utah Ct. App. 1993).
Klas v. Van Wagoner, 829 P.2d 135 (Utah Ct. App. 1992).
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Advisory Committee note: when giving this instruction the court should also read CV2130-Substantive Unconscionability and/or CV2131-Procedural Unconscionability, as appropriate.

- CV2134-Third Party Beneficiary

The advisory committee substantially revised this instruction before approving it. We recommend that the instruction be revised yet again in one particular so that the second sentence of the instruction is corrected to read:

> *"To be a third party beneficiary of a contract, [name of plaintiff] must prove:"*

- CV2135-Assignment

It seems that the Assignment instruction that our subcommittee initially submitted was substantially revised before the advisory committee had an opportunity to discuss it. The instruction that our subcommittee submitted reads:

> **ASSIGNMENT**
>
> An assignment is a transfer of a party's rights under the contract.
>
> [Assignor's name] was permitted to assign [her] rights under the contract to [Assignee's name] either orally or in writing unless such an assignment was prohibited by the contract or unless the assignment makes important changes to the duties, risks, or value of the contract to [Other Party].
>
> If [Assignor's name] assigned her rights under the contract to [Assignee's name], then [Assignee's name] had the right to demand that [Other Party] do what [he] had promised to do under the contract. However, unless [Assignee's name] agreed to assume [Assignor's name] liabilities and duties under the contract and [Other Party] has given his consent, [Assignor's name] is still responsible for doing what she was required to do under the contract.

The instruction that has been approved reads:

CV2135. Assignment.

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

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

As approved by the advisory committee, CV2135 leaves out some relevant legal issues:

(1) A party may not assign its rights (i) if the assignment is prohibited under the contract; or (ii) if the assignment makes important changes to the duties, risks, or value of the contract to the other party.
   - If X is supposed to paint Y's house and Y transfers the right to Z that may not be permissible if Z lives far away.

(2) The assignment can be oral or written.

Our subcommittee is confused about the final sentence in CV2135 (as approved) which reads: "An assignment does not relieve [assignor] of his obligation to perform his duties under the contract when the [assignee] agrees to perform those duties and [other party] consents." If the other party consents, there may either be a novation or the new obligation by the assignee was simply accepted in addition to the assignor's own obligation.

You will notice in our subcommittee's version of this instruction we refer to the assignee's assumption of the assignor's liabilities. This assumption requires proof by clear and convincing evidence, which may be confusing to explain in an instruction where proof of the assignment itself is by a preponderance of the evidence. With all of these concerns in mind, we recommend that the advisory committee consider approving the following instruction:

CV2135. Assignment

[Name of party/assignee] claims that [assignor's name] assigned to [assignee's name] [assignor's name] right under the

contract to [specify contractual right assigned]. An assignment transfers a party's rights under a contract to another.

[Assignor's name] was permitted to assign [her] rights under the contract to [Assignee's name] either orally or in writing unless such an assignment was prohibited by the contract or unless the assignment makes important changes to the duties, risks, or value of the contract to [Other Party].

If you find [name of party/assignee] has proven that [assignor's name] assigned his rights under the contract to [assignee's name], then [assignee's name] had the right to demand that [name of other party] do [specify contractual right assigned].

References
Winegar v. Froerer Corp., 813 P.2d 104, 107 (Utah 1991).
First American Commerce Co. v. Washington Mut. Sav. Bank, 743 P. 2d 1193, 1194 (Utah 1987).
Restatement (Second) of Contracts §§ 317, 324, 336.
MUJI 1st Instruction

Advisory Committee note: This instruction addresses the assignment of contract rights, only. It does not address the delegation of duties or the assumption of the assignor's liabilities, the latter requiring proof by clear and convincing evidence. Winegar v. Froerer Corp., 813 P. 2d 104 (Utah 1991).

- CV2136-Delegation

Our subcommittee submitted an instruction about delegation. We have had a further opportunity to consider this instruction and we recommend that it be deleted. The issue of delegation would rarely come up – a defendant would not argue delegation – it is not a defense since the defendant (as delegator) remains liable for his contract obligations even if he has delegated his duties to another. A defendant would instead argue novation as an affirmative defense. We have reviewed jury instructions from other states and they do not include a delegation instruction, likely for this reason.

- CV2136-Modification

The advisory committee discussed the impact of the statute of frauds on an oral modification and recommended an advisory committee note. Our subcommittee suggests the following:

> *Advisory Committee note: Counsel and the court should consider the statute of frauds according to the particular circumstances of the case. "[I]f an original agreement is within the statute of frauds, a subsequent agreement which modifies the original agreement must also satisfy the statute of frauds to be enforceable." In re Olympus Construction, LC, 2007 UT App 361, ¶ 11, 173 P. 3d 192, cert. granted by Matthews v. Olympus Co., 186 P.3d 957 (Utah Feb. 14, 2008)*

- CV2137 Abandonment

There is a heightened "clear and convincing" burden of proof for abandonment that our subcommittee failed to acknowledge in our proposed instruction. We recommend that the following instruction be re-approved by the advisory committee, along with one additional reference as stated below:

> **CV2138. Abandonment.**
>
> [Name of party] claims that [he] and [name of other party] abandoned their contract. The party claiming abandonment must prove by clear and convincing evidence either that:
> (1) the parties agreed to abandon their contract; or
> (2) the parties acted as if the contract no longer existed.
> If you find that the parties abandoned their contract, then the parties have no further obligation to do what they promised to do.
>
> References
> Parduhn v. Bennett, 2002 UT 93, ¶ 11.
> Timpanogos Highlands, Inc. v. Harper, 544 P. 2d 481, 484 (Utah 1975).
> Restatement of Contracts § 283 Agreement of Rescission.
> MUJI 1st Instruction

- CV2139-Damages related to expected benefits

The italicized portion of the following approved instruction is a typographical error. As the advisory committee's minutes from the June 9, 2008 meeting suggest, the injured party has a right to recover damages "that flow naturally from the breach." We are unsure of the source of the advisory committee's further instruction that expectation damages flow (or follow) "normally" from the breach and recommend that "normally" be deleted from the instruction.

CV2139. Damages related to expected benefits.

If [name of party] is damaged by a breach of a contract, then *[he] has a right to recover damages that follow naturally and are normally from the contract measured as follows:* (italic added)
(1) the loss of the benefits from the contract caused by [name of party]'s breach; minus,
(2) any cost or other loss that [name of plaintiff] has avoided by not having to perform.
References
Black v. Allstate Ins. Co., 2004 UT 66, ¶28.
Ford v. Am. Express Fin. Advisors, Inc., 2004 UT 70, ¶ 39.
Mahmood v. Ross (In re Estate of Ross), 1999 UT 104, ¶ 19.
Thurston v. Workers Comp. Fund of Utah, 2003 UT App 438, ¶¶ 21-22.
Restatement (Second) of Contracts § 347.
MUJI 1st Instruction
Advisory Committee Note
This instruction is intended to be read in conjunction with the instruction on consequential damages where appropriate.

Accordingly, we recommend that the instruction should read:

CV2139. Damages related to expected benefits.

If [name of party] is damaged by a breach of a contract, then [he] has a right to recover damages that follow naturally from the breach~~and are normally from the contract measured~~ as follows:
(1) the loss of the benefits from the contract caused by [name of party]'s breach; minus,
(2) any cost or other loss that [name of party~~plaintiff~~] has avoided by not having to perform.

- CV2142-Damages Foreseeability

Our subcommittee submitted this instruction without accurately stating that it applies to special (i.e., consequential damages), not to general damages. Inasmuch as there is already an instruction concerning consequential damages, we recommend that this instruction be deleted.

- CV2143 –Mitigation and Avoidance.

The instruction our subcommittee submitted did not fully capture the law concerning mitigation of damages. The instruction presently before the advisory committee reads:

> **CV2143. Mitigation and avoidance.**
>
> [Name of plaintiff] had a duty to mitigate, that is, to minimize or avoid, the damages caused by the breach. [Name of plaintiff] may not recover damages that [he] could have avoided without undue risk, burden or humiliation. Likewise, [name of plaintiff] may not recover the damages for losses that were caused by or made worse by [his] own action or inaction.
> However, [name of plaintiff] has a right to recover damages if [he] has made a reasonable but unsuccessful effort to avoid loss.
> References
> Mahmood v. Ross (In re Estate of Ross), 1999 UT 104, ¶ 31.
> Restatement (Second) of Contracts § 350.
> MUJI 1st Instruction

Our subcommittee recommends the following, more fully developed instruction:

> **CV2143. Mitigation and avoidance.**
>
> [Name of plaintiff] had a duty to mitigate, that is, to minimize or avoid, the damages caused by the breach.[Name of plaintiff] may not recover damages that [he] could have avoided without undue risk, burden or humiliation. Likewise, [name of plaintiff] may not recover the damages for losses that were caused by or made worse by [his] own action or inaction.
> However [Name of plaintiff] has a right to recover damages if [he] has made a reasonable but unsuccessful effort to avoid loss.
> [Name of plaintiff] had no obligation to mitigate his damages by taking action which [name of defendant] refused to take. If [name of defendant] had the primary responsibility to perform [list the act] and had the same opportunity to perform [the act]

and the same knowledge of the consequences as [name of plaintiff], [name of defendant] cannot complain that [name of plaintiff] failed to perform [the act]

References
Alexander v. Brown, 646 P. 2d 692 (Utah 1982).
Covey v. Covey, 2003 UT App 380, ¶ 30.
Mahmood v. Ross (In re Estate of Ross), 1999 UT 104, ¶ 31.
Restatement (Second) of Contracts § 350.
MUJI 1st Instruction

- CV2144-Damages. Reasonable Certainty.

We recommend adding the following additional reference for this instruction:

Traco Steel Erectors, Inc. v. Comtrol, Inc., 2007 UT App 407, ¶ 58.

Tab 3

CV 1057. Safety risks.

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

References

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

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

MUJI 1st References

Committee Notes

In Slisze v. Stanley-Bostitch, the Utah Supreme Court held that a product manufacturer does not have a duty to make a non-defective product safer or to warn a user that a safer alternative exists. 1999 UT 20, ¶¶ 9-15. Committee members who favored this instruction maintain that under Slisze, a plaintiff cannot establish that a product is defective or unreasonably dangerous merely by offering evidence that a safer alternative exists. A manufacturer is not an insurer of a product's safety, nor must a manufacturer provide only the very safest of products. See, e.g., Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152 (Utah 1979). Under Utah law, a product may not be considered to have a defect or to be in a defective condition unless at the time it was sold there was a defect or defective condition in the product that made it unreasonably dangerous to the user or consumer. Utah Code Ann. § 78B-6-703(1). Committee members who favored this instruction thought that it makes clear that there is no duty for manufacturers to provide products that are perfectly safe, consistent with the holding in Slisze.

Other committee members, however, thought that this instruction is unnecessary and improper. They believe that jury instructions should state what the law is, not what the law is not. The plaintiff must prove that a product is defective and unreasonably dangerous. This instruction states that a product may not be defective or unreasonably dangerous just because it could have been made safer or because a safer model is available. On the other hand, a jury may find that a product that could have been made safer *is* defective or unreasonably dangerous. The test is not whether the product could have been made safer but whether it was dangerous to an extent beyond what would be contemplated by the ordinary and prudent consumer or user of the product in that community. *See* Utah Code Section 78B-6-702. The jury is already instructed on the proper test; "unreasonably dangerous" is defined in CV 1006. These committee members believe this instruction does not help the jury decide whether a product is defective or unreasonably dangerous, but is just argumentative. Moreover, they believe that *Slisze* was a negligence case. They believe that Slisze did not address when a product is not defective or unreasonably dangerous and therefore do not think that Slisze supports the instruction.

These committee members also thought that the instruction is similar to an instruction that the mere fact of an accident does not necessarily mean that anyone was negligent, which the Utah Supreme Court has held is improper. *See Green v. Louder,*

2001 UT 62, ¶¶ 15-18, 29 P.3d 638. As the court noted in *Green,* if there is no evidence from which a jury could conclude that an element of the plaintiff's claim has been met, the court should direct a verdict for the defendant. If there is such evidence, the jury should be allowed to decide the issue based on proper instructions on the elements of the claim and the burden of proof, not on negative instructions about what does not constitute an element of the claim.

Tab 4

CV324. Use of alternative treatment methods.

When there is more than one method of [diagnosis/treatment] that is approved by a respectable portion of the medical community, and no particular method is used exclusively by all 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).

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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.

Approved.