MINUTES
Advisory Committee on Model Civil Jury Instructions
December 11, 2006
4:00 p.m.

Present: Juli Blanch, Francis J. Carney, Ralph L. Dewsnup, Phillip S. Ferguson, Tracy H. Fowler, Colin P. King, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, David E. West, and Kamie F. Brown

Excused: John L. Young

Mr. Fowler, the chair of the Products Liability subcommittee, conducted the meeting in Mr. Young's absence. Mr. Fowler explained that the Products Liability subcommittee has been working on instructions in four areas: (1) strict liability, (2) negligence, (3) breach of warranty, and (4) defenses. Mr. Shea noted that the instructions will not be posted on the court's website for use until the whole section on products liability has been approved.

Draft Instructions

The committee reviewed the draft instructions on strict products liability.

1. *1001. Introduction.* Mr. Dewsnup did not like defining "defective" in terms of "a defect" and suggested revising the second paragraph to read: "A product may be defective in one or more of three ways." Others pointed out that the jury does not have to be instructed on all the ways a product can be defective but only on the way or ways at issue in the case. Mr. King suggested revising the instruction to read, "[Name of plaintiff] claims that the product is defective in [manufacture] [and/or] [design] [and/or] [because of a failure to adequately warn]." Other committee members pointed out that the instruction would then simply duplicate subsequent instructions on each type of product defect, which begin, "[Name of plaintiff] claims . . ." Mr. Fowler questioned whether the instruction was necessary.

Mr. Shea suggested bracketing "product" so that the court could use the name of the product instead. Mr. Fowler thought the practice should be consistent throughout the instructions.

Mr. Shea asked whether the comment was necessary, given courts' citations to the statute. Mr. Simmons pointed out that no Utah appellate court has squarely addressed the issue of whether those portions of the statute that were declared unconstitutional in *Berry v. Beech Aircraft* and never repealed or reenacted are effective.

Mr. Fowler asked if a reference to *Sanns v. Butterfield Ford* should be added to the last paragraph of the note. Mr. King and Mr. Simmons thought not, since the comment is merely talking about nomenclature and not the law of retailer liability.

Someone asked if there was a corresponding instruction in MUJI 1st. There is not, but the first paragraph of the comment has a counterpart in the comment to MUJI 12.12. Mr. Carney noted that the medical malpractice subcommittee is preparing a table cross-referencing MUJI 1st to MUJI 2d and explaining why some instructions in MUJI 1st are not included in MUJI 2d. The committee thought it would be a good idea to do the same for all instructions. Mr. Shea noted that the table should exist separately from the committee notes. The usefulness of the table will diminish over time, as courts and attorneys become more familiar with MUJI 2d and begin to use it exclusively. Mr. Fowler noted that MUJI 12.1 has not been replicated and that the subcommittee has avoided using "strict liability" in the text of the instructions.

Mr. Ferguson joined the meeting.

The draft instructions do not say that lack of privity and the exercise of reasonable care are not defenses. Mr. Simmons asked whether the committee had found that jurors are concerned about privity. The committee thought they were not. Mr. Fowler noted that an instruction on the exercise of care may be necessary where theories of strict liability and negligence both go to the jury. In those cases, the court and parties may need to craft an instruction explaining the difference between the two theories.

2. *1002. Strict liability. Elements of claim for manufacturing defect.* The committee noted that the comment to instruction 1002 applies to strict liability claims generally and not just to manufacturing defect claims. Mr. Fowler suggested moving the comment up to instruction 1001. Mr. Carney suggested making an introductory note for the whole topic. Mr. King and Ms. Brown noted that comments relevant to one theory of products liability may not be relevant to another and suggested having introductory notes for each subsection, such as one for strict liability and one for negligence.

Mr. King volunteered to have the subcommittee revise its notes.

Mr. Dewsnup expressed a concern about the structure of the instructions. He noted that the elements of a strict liability claim are (1) a defect, (2) that made the product unreasonably dangerous, (3) that was present at the time the product left the defendant, and (4) that caused the plaintiff's injuries. He thought there should be a generic instruction on the elements, followed by instructions defining each of the different types of product defects, followed by an instruction defining "unreasonably dangerous," followed by instructions on the other elements. Mr. Dewsnup thought that the first element as stated in instruction 1002 ("that a defect made the product unreasonably dangerous") should be broken out into two elements ("defect" and "unreasonably dangerous"). He also questioned whether the definition of "unreasonably dangerous" is different depending on the type of defect. Mr. Simmons noted that the elements as stated in instruction 1002 were taken from the Utah Supreme Court's statement of the elements of a strict liability claim. The committee thought, however, that it was not bound to state them in

the same language as the supreme court but could restate them to make them clearer to jurors. Ms. Brown defended the structure of the draft instructions, noting that the elements as stated in 1002 may not be helpful in a failure to warn case.

Mr. Shea volunteered to work with Ms. Brown to reformat the instructions in the way Mr. Dewsnup suggested so that the committee can compare the two approaches. Mr. Dewsnup offered to help.

The committee then focused on the language of instruction 1002. Mr. Dewsnup questioned whether "identical" should be "the same." Mr. Fowler did not think the distinction was significant or that any difference was intended thereby. Mr. Ferguson noted that most manufacturing has reasonable tolerances for variations.

Mr. King suggested that the subcommittee reconsider the issue.

Ms. Blanch was excused.

Mr. Ferguson noted generally that the products liability instructions seemed to be written for those with a higher level of education than those for whom the other instructions are written, which may be because the subject matter requires more sophistication.

3. *1003. Strict liability. elements of claim for design defect.* Mr. Dewsnup suggested that, for the sake of symmetry and simplicity, the instructions should refer to "design defect" throughout, rather "defective in design."

4. *1004. Definition of "unreasonably dangerous."* Mr. Nebeker questioned whether the notes should refer to "some subcommittee members." Mr. Dewsnup suggested saying, "There is an issue as to . . ." Mr. Carney suggested, "The drafting committee was not unanimous. The instruction should be reviewed with caution." Mr. Shea questioned whether there should be any note where some members merely disagree with a decision, such as *Brown v. Sears, Roebuck & Co.* Mr. Simmons pointed out that *Brown* is not a Utah decision but a Tenth Circuit decision and therefore is not a definitive statement of Utah law. Mr. Shea suggested saying, "Utah state courts are silent on the issue, but federal courts have said . . ." Mr. King suggested saying, "There is a question as to whether the Tenth Circuit's opinion of Utah law is correct." Mr. Fowler noted that the disagreements among committee members may be because there is no Utah law on point, or they may disagree on the interpretation of Utah law. After further discussion, the committee thought that it was appropriate to present alternative instructions for instruction 1004.

5. *1005. Strict liability. Elements of claim for failure to warn.* Mr. Dewsnup questioned whether the term "hazard" should be "risk." Mr. Ferguson thought the two terms

were not synonymous, that "hazard" refers to a potential mechanism of injury, and "risk" refers to the likelihood of the hazard occurring.

Mr. Fowler asked whether there needs to be a definition of what constitutes an "adequate" warning. Mr. Ferguson thought so. Some committee members thought that no definition of the adequacy of a warning could be given since it depends on the facts of the particular case. Mr. Carney suggested looking at the case law on the adequacy of warnings to determine the standard.

Mr. King offered to check the California pattern instructions (CACI) to see how they address the adequacy of a warning.

Mr. Dewsnup asked whether inadequate instructions for the use of a product are treated as a failure to warn.

6. *1008. Failure to warn. Presumption that warning will be read and heeded.* Mr. Shea questioned whether alternative instructions were necessary. The difference between the two alternatives is primarily on the question of whether the presumption arises for any warning (alternative A) or only for an adequate warning (alternative B). Mr. King noted that alternative A was based on comment *j* to the Restatement (Second) of Torts § 402A and suggested that the adequacy of the warning was not an issue at that time. Messrs. Carney, King, Simmons, and West all thought that an adequate warning is a prerequisite for the presumption to apply. Mr. Fowler thought there was some difference of opinion worth preserving but suggested that alternative instructions may not be the best way to present that difference.

7. *1011. Strict liability in tort. Component part manufacturer. Defective part incorporated into finished product.* Mr. Shea suggested presenting alternative instructions rather than burying the alternative in the note.

8. *1012. Defective condition of FDA approved drugs.* Mr. Dewsnup thought the presumption stated in this instruction should be rebuttable. Mr. Carney thought there should be no presumption, given the way the FDA works.

9. *1013. Defect not implied from injury alone.* Mr. Dewsnup noted that his subcommittees had made a concerted effort not to state the negative of propositions. He thought that instruction 1013 was improper and should not be given. Messrs. Carney, King, Simmons, and West agreed. Mr. Fowler suggested leaving the instruction in but including a warning against using it. Mr. Shea and Mr. Simmons thought that if the instruction were included, attorneys would think that the committee had endorsed its use.

The meeting concluded at 6:00 p.m.

Next Meeting. The next meeting will be Monday, January 8, 2007, at 4:00 p.m.