MINUTES
Advisory Committee on Model Civil Jury Instructions
March 12, 2007
4:00 p.m.

Present: John L. Young (chair), Honorable William W. Barrett, Jr., Juli Blanch, Francis J. Carney, Marianna Di Paolo, Jonathan G. Jemming, Colin P. King, Timothy M. Shea, Paul M. Simmons, and Kamie F. Brown

Excused: Tracy H. Fowler

The committee continued its review of the products liability instructions.

1. *1003. Strict liability. Definition of "design defect" and "unreasonably dangerous."* Mr. Simmons proposed an alternative to subparagraph (2) of the definition of design defect, which Mr. Shea thought was more easily understood. Ms. Brown insisted that the definition include the concepts of technical and economic feasibility and availability. Mr. Simmons thought these concepts were not required in every case and were best left for argument. Mr. Young thought that jurors would not understand the phrase "practicable under the circumstances." At Mr. Shea's suggestion, instruction 1003 was divided into two instructions: 1003 (definition of "design defect") and 1005 (definition of "unreasonably dangerous"). Subparagraph (2) of the instruction 1003 was revised to read:

> [(2) at the time the [product] was designed, a safer alternative design was available that was technically and economically feasible under the circumstances.]

As modified, the instruction was approved.

Mr. King joined the meeting.

2. *[New] 1005. Strict liability. Definition of "unreasonably dangerous."* Mr. Simmons proposed an alternative instruction based on Utah Code Ann. § 78-15-6(2). Dr. Di Paolo asked what the difference was between alternative A and alternative B. Ms. Brown, Mr. Shea, and Mr. Simmons explained that under alternative A the jury considers the product's characteristics and the user's knowledge separately, and, if the user knew or should have known of the dangers associated with the product, it is not unreasonably dangerous as a matter of law; the user's knowledge can only work against him and never help him. Under alternative B, the jury considers all of the factors listed, but it is up to the jury to decide what weight or effect to give them; the user's knowledge of a product does not necessarily mean that the product was not unreasonably dangerous. Dr. Di Paolo thought that alternative B was not as understandable as alternative A. At Dr. Di Paolo's suggestion, the phrase *that were* was added to subparagraph (1) of alternative A between *uses* and *foreseeable.* The introductory phrase to each alternative was revised to read, "A [product] with a [design/manufacturing] defect was unreasonably dangerous if . . ." Mr. King moved to reverse the order of the alternatives, placing alternative B (the statutory definition) first. Mr. Simmons and Mr. Carney seconded the motion. Ayes: Messrs.

Young, Carney, King, and Simmons. Nays: Ms. Blanch, Dr. Di Paolo, and Ms. Brown. The motion carried. The instruction was approved as modified.

Mr. Shea will add a statement to the introduction to the effect that the order of alternative instructions is not meant to be significant.

3. *1004. Strict liability. Definition of "manufacturing defect."* The alternatives were taken out of instruction 1004 and are now covered by instruction 1005. As so modified, the instruction was approved.

Mr. Shea will divide up the references and advisory committee notes to correspond to the new instructions 1003, 1004, and 1005.

4. *[New] 1006. Strict liability. Elements of claim for failure to adequately warn.* Dr. Di Paolo thought that subparagraph (2) was awkward. Mr. Carney suggested replacing *at the time* in subparagraph (2) with *when.* Mr. Simmons suggested revising it to say, "the product had an inadequate warning when it was [manufactured/distributed/sold]." Mr. King suggested combining subparagraphs (1) and (2).

Mr. Jemming joined the meeting.

At Mr. Shea's suggestion, the phrase *of a danger involved in its foreseeable use* was dropped from the introductory paragraph. Mr. Shea asked whether the instruction should be revised to cover inadequate instructions as well as inadequate warnings. The committee thought that a sentence could be added to the advisory committee notes to the effect that the terms *instruct* and *instructions* could be substituted for *warn* and *warnings* in an appropriate case. Mr. Carney thought that the last paragraph of the instruction was argument and should not be included. Mr. King and Mr. Simmons agreed. Mr. Young questioned whether it stated a specific defense for failure-to-warn cases. Ms. Brown thought so. Mr. King pointed out that it was not an affirmative defense but simply negated an element of the plaintiff's prima facie case (causation) and therefore did not justify an instruction, since the jury will have already been instructed on the elements of a prima facie case. The paragraph was deleted from instruction 1006, with the understanding that the committee could revisit the issue later. At Mr. Simmons's suggestion, a sentence was added to the end of the instruction. The revised instruction reads:

> [Name of plaintiff] claims that [he] was injured by a [product] that was defective and unreasonably dangerous because it lacked an adequate warning. You must decide whether:
>
> (1) [name of defendant] failed to provide an adequate warning at the time the product was manufactured;

> (2) the lack of an adequate warning made the [product] defective and unreasonably dangerous; and
>
> (3) the lack of an adequate warning was a cause of [name of plaintiff]'s injuries.
>
> I will now explain what the terms "defective" and "unreasonably dangerous" mean.

Judge Barrett joined the meeting.

5. *1006 [new 1007]. Strict liability. Failure to warn. Definition of adequate warning and defect.* Ms. Brown circulated a new proposed instruction 1006 defining an inadequate warning. The elements were taken from *House v. Armour of America.* Mr. Carney noted that *House* was quoting a federal case and that the committee was not limited to the exact language from *House.* Ms. Blanch suggested that the phrase *justified by the magnitude of the danger* be replaced with *commensurate with the danger.* Mr. Carney suggested *proportionate to the danger.* Dr. Di Paolo suggested *equal to* or *matches* or *that corresponds to the level of the danger.* At Mr. King's suggestion, *designed so that it can* was deleted from subsection (1), and *consumer* was replaced with *user.* Mr. Carney suggested deleting *be comprehensible and* from subsection (2), since if a warning was not comprehensible it would not give a fair indication of the danger involved. Mr. Young suggested replacing *comprehensible* with *reasonably understandable.* Mr. Carney suggested the following language, taken from a monograph explaining Nevada warning law:

> To be adequate, a warning must catch the user's attention, be understandable, indicate the specific risks of using the product, and be sufficiently intense to match the magnitude of the risk.

Ms. Brown wanted to review the proposed language and compare it with *House* before approving it. Mr. King asked how the California model instructions handled the adequacy of a warning. Mr. Shea and Mr. Carney noted that California does not have a specific instruction explaining how to determine the adequacy of a warning. Dr. Di Paolo asked what the phrase *members of the community who use the product* in the second paragraph meant. She suggested alternatives: *who ordinarily use the product, foreseeable users of the product,* or *expected users of the product.* Mr. Carney noted that the concept was that a manufacturer does not have to warn the whole world but only those likely to come in contact with the product. He suggested *people who use the product.* Dr. Di Paolo thought that *people* was too broad. Dr. Di Paolo suggested making the second paragraph element (4), but Ms. Brown noted that it modifies elements (1) through (3) and needs to stand alone. Mr. Simmons suggested revising the third paragraph to read, "A product that has an inadequate warning is defective," since a defective product (not a defective warning)

is an element of the claim. At Mr. Jemming's suggestion, the order of the paragraphs was reversed, so the instruction now reads:

> A product that has an inadequate warning is defective.
>
> The adequacy of the warning given must be judged in light of the ordinary knowledge common to foreseeable users of the product.
>
> To be adequate, a warning must catch the user's attention, be understandable, indicate the specific risks of using the product, and be sufficiently intense to match the magnitude of the risk.

Ms. Blanch thought the instruction was misleading because it did not address other elements of the claim, such as causation. Mr. Simmons pointed out that the instruction was not meant to state the elements of the claim but just to define one of those elements (an inadequate warning that makes the product defective). The elements are explained in new instruction 1006.

> **Mr. Shea will revise the instruction in light of the committee's discussion, and the committee will review the revised instruction at a later meeting.**

6. *1007 [new 1008]. Strict liability. Failure to warn. Definition of unreasonably dangerous.* Ms. Brown circulated a new proposed instruction 1007 defining "unreasonably dangerous" in a failure-to-warn claim. Several committee members thought that the phrase *beyond that which would be contemplated* in the subparagraph (1) was awkward. Mr. King suggested deleting *characteristics or* from that subparagraph. Mr. Carney suggested substituting *a danger from the product's foreseeable use* or *unexpected danger.* Mr. King noted that the concept was that the danger must be greater than an ordinary person would know about. Mr. Young and Dr. Di Paolo suggested *involved with the product's foreseeable use that a reasonable user would not expect.* Mr. Jemming noted that the danger may not arise from the use of the product but from its storage or mere presence, such as asbestos or some other product that emits toxins. Mr. King and Mr. Carney suggested *involved with the product* (or *involved with the product or its foreseeable use).* Ms. Brown, Mr. Young, Mr. King, and Mr. Jemming thought it was important to include the concept of foreseeable use. Dr. Di Paolo asked whether one harmed by the mere presence of a product is a "user" of the product. Ms. Brown thought that *user* would be the proper term for most cases, but the advisory committee note could mention that *user* may have to be replaced with another term in certain cases. Mr. Simmons thought that subparagraph (2) was not part of the definition of "unreasonably dangerous." As the elements are stated, the product must be both "defective" and "unreasonably dangerous," and, under new proposed instruction 1007, the inadequacy of the warning goes to defect, not unreasonable danger. In other words, the jury must first determine whether the warning was inadequate. If it

was, the product was defective. It then must determine whether the inadequacy of the warning made the product unreasonably dangerous. For the second step, it should not have to determine the adequacy of the warning again. Mr. Carney asked why a separate definition of "unreasonably dangerous" for failure-to-warn cases was even necessary when there is a statutory definition of "unreasonably dangerous." Mr. Simmons noted that some subcommittee members thought the instruction was unnecessary for that very reason. What instruction 1007 adds is that the manufacturer must have known or should have known of the danger he was required to warn of. Also, there may need to be alternative instructions, along the lines of new instruction 1005, in light of the Tenth Circuit's decision in *Brown* interpreting the Utah statute. The committee deferred further discussion of instruction 1007 till a later meeting.

7. *Next Meeting.* The next meeting will be Monday, April 9, 2007, at 4:00 p.m.

The meeting concluded at 6:00 p.m.