MINUTES

Advisory Committee on Model Civil Jury Instructions
October 15, 2007
4:00 p.m.

Present: Juli Blanch, Francis J. Carney, Phillip S. Ferguson, Tracy H. Fowler, Jonathan G. Jemming, Gary L. Johnson, Colin P. King, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, and John L. Young (chair). Also present: Kamie F. Brown

1. *New Committee Members.* Mr. Young welcomed Gary L. Johnson to the committee. Mr. Carney nominated Pete Summerill to take Mr. Dewnsup's place on the committee. The committee approved the nomination.

2. *Minutes of September 10, 2007, Meeting.* Mr. Young noted that the minutes of the last meeting indicated that the products liability subcommittee was going to consider whether to include sellers and distributors in CV 1014 or in a separate negligence instruction. The subcommittee has not met since the last committee meeting. Mr. Young also noted that the minutes did not clearly reflect whether CV 1017 was approved. The committee agreed that the minutes should show that it was approved.

3. *Products Liability Instructions.* The committee continued its review of the products liability instructions.

a. *CV 1020. Negligence. Drug manufacturer's duty to warn.* Mr. Nebeker asked whether the duty extended beyond a duty to warn the medical profession. Mr. Fowler noted that the instruction was a corollary to the learned intermediary doctrine, under which a drug manufacturer may discharge its duty by informing health-care providers of potential problems with its product. Mr. Ferguson questioned whether "adverse reaction reports" should be defined. Mr. Fowler thought they would be adequately explained by the evidence at trial. Mr. Young asked whether adverse reaction reports should be the subject of a committee note. Mr. Ferguson did not think so; he considered it a question of juror comprehension and not an issue of law for the court. Ms. Blanch was troubled by the phrase "and other available means of communication." Ms. Brown noted that the language came from *Barson v. E.R. Squibb & Sons.* Mr. Carney cautioned the committee not to rely too heavily on quotations from cases, which are not necessarily written with prospective jurors in mind. Mr. Johnson thought it was implicit in the phrase that the other "means of communication" be trustworthy. [Mr. King joined the meeting.] Mr. Shea suggested replacing "pertaining to" (in the second paragraph) to "about." He also thought that the last sentence of the instruction restated the first sentence. Mr. Fowler pointed out that they deal with different duties: a duty to stay current on information about the drug (the last sentence), and a duty to communicate its knowledge to the medical community (the first sentence).

The subcommittee will review CV 1020 in light of the *Barson* decision and the committee's concerns.

b. *CV 1019. Negligence. Duty of designer/manufacturer.* Mr. Fowler noted that the reference to the *Hunt* decision should be to page 1137, not 1127.

c. *CV 1021. Negligence. Retailer's duty.* Mr. Fowler noted that this instruction was an effort to deal with *Sanns v. Butterfield Ford*, 2004 UT App 203, 94 P.3d 301. Mr. Simmons noted that CV 1049 also deals with *Sanns* and asked whether both instructions were necessary. Mr. Fowler agreed that they should be merged into one instruction. Mr. Young suggested that, in that case, the instruction be referred back to the subcommittee. Mr. King agreed that the instructions needed more work and noted that CV 1021 was more limited than CV 1049, which he thought was better. Mr. Simmons noted that CV 1021 is based on Restatement (Second) of Torts §§ 401 and 402 as well as *Sanns*, whereas CV 1049 is based solely on *Sanns*. Mr. Fowler noted that *Sanns* may not present a question for the jury. Mr. King noted that the jury may have to decide whether a seller of a product was a passive retailer or something more. Mr. King suggested deleting the first sentence of CV 1021 and beginning with "If [name of defendant] knew or had reason to know . . ." Mr. Fowler said he did not want the jury speculating about what the defendant could have done under the "reason to know" language. For example, he did not want the jury to think that a retailer had "reason to know" because he could have opened the packaging and inspected the product, when the retailer had no duty to inspect the product. Mr. Shea noted that CV 1021 refers to the "buyer," whereas other products liability instructions refer to the "user" and suggested that we use one term consistently. Mr. Fowler agreed that the instructions should refer to the "user" of the product.

The subcommittee will reconsider CV 1021 and CV 1049 in light of *Sanns* and the committee's discussion.

Mr. Young noted that CV 1021 is a negligence instruction, but there are no instructions clearly explaining the differences between strict products liability and negligence. He asked if there should be. Mr. Fowler thought the distinction could be made clear to the jury through the instructions explaining the parties' contentions and the special verdict form. Mr. Young thought there needed to be some transition between the strict liability instructions and the negligence instructions. He noted that, if he were representing a passive seller, for example, he would want it to be clear to the jury that the instructions on strict products liability did not apply to his client. Mr. Carney suggested separate instructions to the court and indicated that the medical malpractice subcommittee was crafting such instructions.

d. *CV 1022. Breach of warranty. "Warranty" defined.* Mr. Fowler noted that CV 1022 was the beginning of the warranty instructions and that it was ironic that an area of the law that almost never goes to the jury has so many instructions. He further noted that the subcommittee had not tried to deal with the UCC as a whole but only as it related to products liability actions. Mr. Fowler noted that there had been much disagreement within the subcommittee. The committee note to CV 1022 tries to explain the disagreements. The principal area of disagreement was whether there needed to be separate instructions for a breach of warranty claim sounding in contract and one sounding in tort. Mr. Simmons noted that the UCC is broad enough to cover tort claims for breach of warranty and that no other jurisdiction has separate warranty instructions for tort and contract breach-of-warranty claims. Mr. Young did not like the phrase "that something is so" in the second sentence of the instruction. He suggested that the first two sentences be more specific to the product and the parties' claims. Mr. Carney suggested replacing the phrase with "that the product is safe for its intended use." Other committee members noted, however, that the instruction was meant as an overview of warranty claims and could apply to express warranties as well as implied warranties of merchantability or fitness for a particular purpose, and an express warranty may be broader or more specific than that the product is safe for its intended use. Messrs. Young and Jemming suggested saying that a warranty is a promise or guarantee regarding the condition or performance of a product. Ms. Brown wanted to add reliance to the definition, but Messrs. Young, King, and Simmons did not think reliance was part of the definition. The committee debated whether the definition needed to include both "promise" and "guarantee" and concluded that it did. Mr. Carney asked whether the definition needed to include both "condition" and "performance." The committee concluded that it did, since some breaches of warranty, for example, warranties about the purity of food or a drug, relate to the product's condition and not necessarily to its performance. At Mr. Shea's suggestion, the instruction was revised to read in whole: "[Name of plaintiff] claims that [name of defendant] breached a warranty. A warranty is a promise or guarantee about the condition or performance of a product." The rest of the instruction was deleted.

Mr. Simmons suggested changes to the committee note. He suggested deleting the first sentence of the second paragraph, since it implied that a warranty claim under the UCC only sounded in contract and not in tort. Mr. King suggested deleting the second paragraph in its entirety. After further discussion, the committee agreed to delete the first sentence only. Mr. Simmons also suggested revisions to the fourth paragraph: In the sentence "Utah courts have stated that when brought under a tort theory, the elements of strict liability and breach of warranty 'are essentially the same,'" he suggested replacing "warranty" with "implied warranty of merchantability," since that is what *Ernest W. Hahn,*

Inc. v. Armco Steel Co., the principal authority cited for the proposition, said. The change was approved, subject to further review by Mr. Fowler and Ms. Brown. Mr. Simmons also suggested deleting the phrase "which was the predecessor of Utah's Product's Liability Act" from the parenthetical following the citation to *Grundberg v. Upjohn Co.*, since it implied that the Products Liability Act replaced section 402A. At Mr. Young's suggestion, the phrase was revised to read "which preceded enactment of Utah's Product's Liability Act." At the suggestion of Messrs. Johnson and Simmons, the sentence beginning, "Utah courts have concluded . . ." was revised to read, "Courts interpreting Utah law have concluded . . ." And the reference to "Utah Code Ann (2006)" at the end of the paragraph was dropped. Mr. Shea suggested breaking up the fourth paragraph into two paragraphs. Mr. Fowler pointed out that "principle" in the third line of paragraph five should be "principal." Finally, at Mr. Simmons's suggestion, the phrase "These committee members believe" was dropped before "the Utah Supreme Court has stated that the Products Liability Act does not subsume all claims involving products."

e. *CV 1023. Breach of express warranty. How an express warranty is created.* Mr. Young suggested that the title should say, "Creation of an express warranty." Mr. Shea asked whether the phrase "makes a promise or representation" in subparagraph (1) should be "makes a promise or guarantee," to track CV 1022. The UCC says, "promise or affirmation." Mr. Johnson thought that an "affirmation" was more than a "representation." Ms. Blanch agreed. She thought that the party making an "affirmation" vouches for the product. But the committee agreed that juries would likely not understand "affirmation" or not understand the distinction. Mr. Ferguson suggested that the question the jury must decide is whether a given statement was an "affirmation" about the product or only the seller's opinion. Mr. Shea searched for synonyms for "affirmation." The committee finally settled on "The seller of a product makes a promise or statement of fact about the condition or performance of a product that reasonably induces . . ." Mr. Johnson said he would prefer "verify" or "certify" to "makes a statement," but the instruction was approved as revised. Mr. Carney noted that section 2-313 of the UCC was broader than CV 1023. Mr. Simmons pointed out that the additional material in section 2-313 is covered in CV 1025. Mr. Johnson suggested adding a "puffing" instruction.

4. *Next Meeting.* The next meeting will be Monday, November 10, 2007, at 4:00 p.m.

The meeting concluded at 6:00 p.m.