MINUTES
Advisory Committee on Model Civil Jury Instructions
June 9, 2008
4:00 p.m.

Present: John L. Young (chair), Honorable William W. Barrett, Francis J. Carney, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Colin P. King, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, David E. West

1. *Products Liability and Medical Malpractice Instructions*. Mr. Young announced that the products liability and medical malpractice instructions that have been approved will be published on the courts' website, subject to supplementation.

2. *CV 1057. Safety risks*. The committee considered CV 1057. Some committee members thought it was not a proper instruction in light of *Randall v. Allen* and *Green v. Louder*. Mr. Shea suggested revising the instruction to read: "A [product] is not defective or unreasonably dangerous merely because it could have been made safer or because a safer model of the [product] is available." Mr. West questioned whether this was an accurate statement of the law. He thought that if a product could be made safer economically, it should be. Mr. Fowler said that was not the law, citing *Slisze v. Stanley-Bostitch,* 1999 UT 20. Mr. Young suggested adding a committee note outlining the differing views of committee members and noted that the validity of the instruction would be up to the courts to decide.

Mr. Fowler and Mr. King volunteered to work on a committee note to accompany the instruction.

Mr. West suggested replacing "is not" in the first line with "may not be." Mr. Summerill thought the instruction was an accurate statement of the law but should not be given as a jury instruction. Mr. King cautioned against jury instructions that emphasize the negative of certain elements of a claim. The committee voted on whether to include the instruction. The vote was 5-5, with Messrs. Barrett, Ferguson, Fowler, Humpherys, and Nebeker voting in favor of the instruction, and Messrs. Carney, King, Simmons, Summerill, and West voting against it.

Mr. Young indicated that he would break the tie after he sees the committee note that Mr. Fowler and Mr. King will propose.

3. The committee continued its review of the contract instructions. Mr. Ferguson was the only member of the reviewing subcommittee present, so he led the discussion:

a. *CV 2126. Fraudulent inducement*. Mr. Summerill questioned the use of the terms "induce" and "representation." Mr. Ferguson noted that Dr. Di Paolo did not think the terms were too confusing for lay jurors. Mr. King

suggested "statement" for "representation," but other committee members thought that "representation" denoted more than "statement." Mr. Humpherys asked whether actions or nondisclosure can give rise to fraudulent inducement. Mr. Young suggested asking the contract instructions subcommittee to define "representation." He then suggested leaving it to the court to determine whether conduct or failure to disclose can constitute a "representation" in a particular case. Mr. Young also suggested revising subparagraph (1) to read, "[Name of plaintiff] made the following representation:" The committee approved the instruction as modified.

b. *CV 2128. Impossibility/Impracticability.* Mr. Ferguson noted that Dr. Di Paolo was comfortable with the term "impracticable." Mr. Simmons noted that the first paragraph says that performance must be "highly impracticable," but the second paragraph only defines "impracticable," not "highly impracticable." He asked whether "highly" should be struck from the first paragraph or whether the second paragraph should be revised to define "highly impracticable." Mr. Carney checked the cases cited, which use the phrase "highly impracticable." At Mr. Young's suggestion, "highly" was added before "impracticable" in the second and sixth paragraphs. Mr. Young asked whether a supervening event can occur before or after the contract is made. Mr. Humpherys thought that if it occurred before, it would be a case of mutual mistake, not impossibility. At Mr. Simmons's suggestion, the last paragraph was revised to make it clear who has the burden of proof: "If you decide that [name of defendant] has proved that the circumstances just described are a supervening event, . . ."

c. *CV 2129. Frustration of purpose.* Mr. Young cited Dr. Di Paolo for the proposition that only people can be "frustrated," not contracts. At the suggestion of Messrs. Humpherys and Simmons, the third paragraph was revised to read: "To prevail on this claim, [name of defendant] must show: . . ."

d. *CV 2130. Unconscionability.* Mr. Summerill suggested breaking the instruction into two instructions--one for substantive unconscionability, and one for procedural unconscionability. Mr. Ferguson noted that his subcommittee had considered doing so but thought there would rarely be a case involving both types of unconscionability. Mr. Young suggested keeping one instruction but adding a comment saying that if the case only involves one form of unconscionability, the court should use only the relevant part of the instruction. The committee thought it best to divide the instruction into two instructions. Mr. Humpherys asked if there was a better word than "unconscionable." The committee could not come up with one, and Mr. Ferguson noted that Dr. Di Paolo was comfortable with "unconscionable." Mr. King suggested that the instructions

start out: "[Name of party] claims that the contract is [substantively/procedurally] unconscionable." Messrs. West and Summerill did not think the last sentence of the second paragraph accurately stated the law. Mr. Ferguson noted that the reviewing committee did not try to figure out if the instructions accurately stated the law. Mr. West asked whether unconscionability was a question of law or fact. Mr. Summerill said it was a mixed question of law and fact. Mr. Humpherys objected to use of the phrase "For example." He said we should not be giving a laundry list of factors to consider if they do not apply in the particular case. Mr. King suggested leaving the examples to the facts of the particular case.

The committee will send the instruction back to the contracts subcommittee for further consideration in light of the committee's discussion.

Mr. Summerill noted that he had an alternative draft instruction that the subcommittee can consider.

e. *CV 2131. Mutual mistake.* Mr. Humpherys asked whether the third element (that the defendant would not have agreed to the contract if he had known of the mistake) is judged by an objective or subjective standard. He thought it should be an objective standard; otherwise, the element would be unnecessary because the defendant will always claim that he would not have entered into the agreement had he known about the mistake. Mr. King agreed. Mr. Ferguson thought that it was a subjective standard, based on the language of the instruction.

The committee approved the instruction, subject to the contracts subcommittee's answer to the following question: Is the third element judged by a subjective or an objective standard?

f. *CV 2132. Unilateral mistake.* Mr. Humpherys thought "unconscionable" in subparagraph (2) needed to be defined. Mr. Ferguson thought that "unconscionable" would be defined by giving the instructions on unconscionability, but if those instructions were not given, the definition of substantive unconscionability could be repeated in this instruction. Mr. King asked why CV 2131 and CV 2132 did not use the same language. The former refers to "a basic assumption or vital fact upon which [the parties] based their bargain," whereas the latter refers to a matter "related to an important feature of the contract." He thought the latter was a lower burden. Messrs. Young and Ferguson thought it should be a higher standard, that is, that it should be harder

to prove a unilateral mistake than a mutual mistake. At Mr. Humpherys's suggestion, subparagraph (5) was revised to read: "(5) [name of plaintiff] can be put back in the position [he] was in before the contract, losing only the benefit of the bargain." Mr. West thought this element would generally be a question for the court, not the jury.

The committee decided to send the instructions on mutual and unilateral mistake back to the contracts subcommittee to say whether the second element of CV 2131 and the third element of CV 2132 should be the same.

g. *CV 2133. Third-party beneficiary.* At Mr. Young's suggestion, the first part of the instruction was revised to read:

> [Name of plaintiff] claims that [he] is a third-party beneficiary of a contract between [list parties to the contract]. To be a third-party beneficiary of a contract, [name of plaintiff] must prove that the parties to the contract intended the contract to benefit [name of plaintiff]. The intentions of the parties to benefit [name of plaintiff] must be clear from the terms of the contract. . . .

Judge Barrett thought the third paragraph (defining "incidental beneficiary") was awkward. Mr. King asked what rights an incidental beneficiary has. He thought that if he has none, then the jury did not need to be instructed on incidental beneficiaries. Mr. Humpherys questioned whether the last sentence of the second paragraph was necessary. He also thought it was an incomplete statement of the law, that a third-party beneficiary can only enforce a contract to the extent of his personal rights.

Mr. Shea will revise the instruction.

Mr. Young was excused. Mr. Carney took over for Mr. Young.

h. *CV 2134. Assignment.* At Mr. Summerill's suggestion, the first sentence of the second paragraph was revised to read: "If [name of assignor] assigned [his] rights under the contract to [name of assignee], then [name of assignee] had the right to demand that [name of other party] do [specify contractual obligations at issue]." Mr. Humpherys asked who must consent to the assignment. Mr. Ferguson said the other party to the contract (the party that is not making the assignment). Mr. Humpherys suggested that the instruction use the parties' names, to be less confusing. The committee approved the instruction as revised.

i. *CV 2135. Delegation*. Mr. Carney asked how this instruction differed from CV 2134 (Assignment). Mr. Ferguson explained that contractual rights are assigned, and contractual duties are delegated. Mr. Humpherys suggested putting CV 2134 and 2135 in context by adding an introductory sentence: "[Name of party] claims that [name of party's] [rights/duties] under the contract were [assigned/delegated] to [name of party]." Mr. King asked who had the burden of proof to show an assignment or delegation. Mr. Ferguson thought the burden was on the party claiming that there was an assignment or delegation. Mr. Humpherys asked how the instruction would apply, since a delegation does not excuse the delegator from performance. Mr. Summerill said the issue arises in premises cases, where a landowner may delegate his responsibility for snow removal, for example, to a third party. Mr. King noted that it also comes up in structured settlements. Mr. King questioned whether the instruction accurately stated the law. He thought a party to a contract could always delegate duties unless the contract said that they were nondelegable or personal. Mr. Summerill thought the problem with the instruction was that it did not tell the jury what it was supposed to do with the information. Is the question for the jury whether or not there was a delegation, whether or not the delegator is liable, whether or not the delegatee is liable, or whether or not the duty was nondelegable, and, if the latter, isn't that a question of law for the court?

The committee decided to send the instruction back to the contracts subcommittee to answer the following questions: (1) What is the jury being asked to do? and (2) is it actually the law that the delegator remains liable on the contract? If so, why would the issue ever come up?

j. *CV 2136. Modification*. Mr. Ferguson asked what the jury was being asked to do. Mr. Summerill suggested changing the instruction to read: "[Name of party] claims that [he] and [name of other party] changed their contract. If you find that both parties agreed to change the contract and agreed on the new terms, then any old terms that conflict with the new terms cannot be enforced." Mr. West questioned whether the instruction accurately stated the law. He said that if a contract has to be in writing to comply with the statute of frauds, then any modification of the contract must also be in writing. He suggested adding a committee note to that effect. But some committee members noted that a contract may be taken out of the statute of frauds by part performance. And, Mr. Ferguson noted, if the statute of frauds does not apply, the parties may orally change a contract requirement that any modification be in writing. Mr. Carney asked what the issue for the jury would be--whether the contract is one that must comply with the statute of frauds? The committee

approved the instruction, subject to the addition of a committee note telling the court and counsel to consider the application of the statute of frauds.

k. *CV 2137. Abandonment*. Mr. Shea asked whether it will always be the plaintiff who is claiming that a contract was abandoned. The committee agreed that it would not be. Mr. Fowler noted that the phrase "One way a contract can be abandoned" was problematic. The committee revised the instruction to read:

> [Name of party] claims that [he] and [name of other party] abandoned their contract. To prove abandonment, [name of party] must prove 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.

Mr. King asked whether there was some time element to abandonment by acting as if the contract no longer existed. Mr. West thought there was a recent case that spelled out the elements for abandonment. The committee approved the instruction as modified.

l. *CV 2138. Nominal damages*. The committee revised the first paragraph to read: "A party damaged by [the other party's] breach of the contract has a right to recover the damages caused by the breach." At Mr. Simmons's suggestion, the instruction will be moved to follow the other damage instructions.

m. *CV 2139. Damages related to expected benefits*. At Mr. Humpherys's suggestion, "a party" was replaced by "[name of party]." Mr. King questioned the use of the term "general damages." He suggested calling them "contractual damages" (as opposed to "consequential damages"). Mr. Humpherys objected to the phrase "expected to receive." He noted that a party may have unreasonable expectations. The committee revised the instruction to read:

> If [name of party] is damaged by a breach of a contract, then [he] has a right to recover damages that follow naturally and normally from the breach, measured as follows: . . ."

Next Meeting. There is no meeting scheduled for July 2008. The next regularly meeting is Monday, August 11, 2008, at 4:00 p.m.

The meeting concluded at 6:00 p.m.