MINUTES
Advisory Committee on Model Civil Jury Instructions
September 8, 2008
4:00 p.m.

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

1. *Contract Instructions.* The committee continued its review of the contract instructions.

a. *CV2103. Creation of a contract.* Ms. Blanch thought that the instruction should make explicit that if there is no meeting of the minds, there is no contract. The following sentence was added to the end of the subcommittee's recommended instruction: "If you cannot tell what the parties have promised to do for each other, there is no contract." Mr. Badger noted that the instruction should probably be rewritten in each case to make it case specific. At Mr. Fowler's suggestion, the word "valid" was struck from the first line of the advisory committee note. The committee approved the instruction as modified.

b. *CV2107. Consideration.* The committee approved the proposed advisory committee note, explaining that the instruction applies only to bilateral contracts.

c. *CV2121. Anticipatory breach.* At Mr. Humpherys's suggestion, "Also" was deleted from the start of the second paragraph. The committee revised the last paragraph to read:

> [Name of defendant] breached the contract if you find that [he] (1) made statements that could be reasonably interpreted to mean that he positively and unequivocally refused to perform his contract obligations, and (2) 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.

Mr. Jemming asked whether one could repudiate a contract by indicating to a third person that he would not perform. Mr. Badger suggested deleting the phrase "to the other party" in the first sentence of the instruction. Mr. Young suggested bracketing the phrase and adding a committee note noting the issue. The subcommittee was given additional time to try to resolve the issue. The committee approved the instruction, subject to any further recommendations by the subcommittee.

Mr. King joined the meeting.

d. *CV2122. Implied covenant of good faith and fair dealing*. Mr. Young asked whether the instruction should be made more case specific, e.g., "[Name of plaintiff] is claiming that [name of defendant] did [specify conduct] and that [name of defendant's] conduct breached the implied covenant of good faith and fair dealing," or, as Mr. Shaughnessy suggested, "[Name of plaintiff] claims that [name of defendant] breached the implied covenant of good faith and fair dealing by . . ."

At Mr. King's suggestion, "consistent" in the last sentence of the first paragraph was replaced with "inconsistent."

Mr. Humpherys asked whether "justified expectations" (as used in the first paragraph) needed to be defined. He also asked whether the justification for a party's expectations is to be determined by a subjective or objective standard and whether it was for the court or the jury to determine whether a party's expectations were justified. Mr. Carney suggested that these issues be raised in a committee note. Mr. Fowler suggested substituting "reasonable expectations" for "justified expectations." Mr. Shaughnessy noted that the issue would likely be decided on summary judgment; if the court decides that the expectations were justified, it would not need to instruct the jury on justification; if the court decides they were not justified, then the issue would not go to the jury; or the court could conclude that the issue was for the jury to decide on disputed facts.

Dr. Di Paolo joined the meeting.

Mr. Jemming suggested deleting the modifier "justified." Dr. Di Paolo noted that "justified expectations" is hard to understand: how are "justified expectations" different from "expectations"? She thought that "reasonable expectations" was easier to process. But Mr. Johnson noted that the Utah Supreme Court has rejected the "reasonable expectations" doctrine in the context of insurance contracts. Mr. King suggested a committee note saying that the committee favored "reasonable expectations" but that the case law uses the phrase "justified expectations." Dr. Di Paolo suggested replacing "justified expectations" with "expectations that are justified." She also suggested breaking the last sentence of the first paragraph into subparts. Mr. Shaughnessy, however, thought the issue did not lend itself to subparts but depended on the totality of the circumstances. He suggested revising the last sentence of the first paragraph to read:

> You should consider, in light of the contract language and the dealings between and conduct of the parties, whether [name of defendant's] actions were inconsistent with (1) the agreed common purpose and (2) the justified expectations of the parties.

The fifth paragraph was revised to read:

> Third, this unwritten promise does not require either party to use a contract right in a way that would be harmful to themselves simply to benefit the other party.

At Ms. Blanch's suggestion, "may not" was replaced with "cannot" in the next paragraph.

Mr. King moved to approve the instruction as proposed by the subcommittee, with the committee's proposed changes to the fifth and sixth paragraphs. Mr. Johnson seconded the motion. The motion passed. A committee note will be added stating that there are no judicial decisions on what "justified expectations" means.

e. *CV2125. Duress.* Mr. Badger noted that the subcommittee separated the instructions on duress and improper threat. Mr. Badger also noted that the subcommittee had not found any cases dealing with economic duress, so the instruction does not mention economic duress. Mr. Shea asked whether the last sentence of the duress instruction modifies just the third element or all three elements. At Mr. Ferguson's suggestion, the first element was revised to read "[he] was physically forced to enter into the contract by [name of plaintiff or plaintiff's agent]." The committee approved the instruction as modified.

f. *CV2126, Improper threat.* The committee thought that subparagraph (1) was too technical and confusing for jurors. Mr. Humpherys suggested replacing "tort" with "civil liability." Mr. Shaughnessy noted that, if subparagraph (1) is an issue, the court and parties will have to modify the instruction to specify the alleged tort or crime involved. The committee approved the instruction.

g. *CV2127. Fraudulent inducement.* Mr. Humpherys suggested changing "claim" to "defense" in the second sentence. Mr. Shaughnessy suggested changing "To succeed on this claim" to "To prevail," consistent with prior usage. Mr. Shea asked whether "presently existing fact" was redundant. Mr. Simmons suggested deleting "presently." Dr. Di Paolo suggested replacing the phrase with "an important fact that presently exists." The committee approved the instruction as drafted by the subcommittee, with Dr. Di Paolo dissenting.

h. *CV2130. Substantive unconscionability.* The committee approved the revised instruction proposed by the subcommittee.

i. *CV2131. Procedural unconscionability.* Ms. Blanch suggested reversing the order of CV2130 and CV2131. Mr. Shaughnessy, however, noted that substantive unconscionability is the more important concept and that contracts are rarely voided for procedural unconsionability. Mr. Nebeker asked whether the jury must find all of the factors listed or any one of them. Mr. Badger said that the jury does not have to find them all. Mr. Humpherys therefore suggested revising the last sentence of the first paragraph to say, "You may consider any [for "all"] of the following circumstances . . . ." At Mr. Shea's suggestion, the phrase "all of" was deleted. The committee approved the instruction as revised.

j. *CV2132. Mutual mistake.* Mr. Young asked what a "vital" fact was. Mr. Humpherys thought it meant more than important or material. Mr. Carney thought it meant one without which there would be no contract. Dr. Di Paolo noted that "vital" has an everyday meaning. Mr. Ferguson noted that its everyday meaning pertains to life, as in "vital statistics." At Mr. Shaughnessy's suggestion, the second sentence was revised to read, "For [name of defendant] to succeed on this claim, ..." Messrs. Badger and Shaughnessy questioned whether the instruction would ever be given to the jury. They noted that the usual remedies for a mutual mistake are equitable--reformation or rescission of the contract. They suggested adding a committee note to that effect. The committee approved the instruction with these changes.

k. *CV2133. Unilateral mistake.* The second paragraph was revised to read, "For [name of defendant] to succeed on this claim, ..." The committee questioned what type of unconscionability was required under subparagraph (2). Mr. Badger noted that the cases seem to allow procedural as well as substantive unconscionability. Mr. Simmons suggested revising subparagraph (2) to say that "to enforce the contract would be [substantively/procedurally] unconscionable," so that the jury could refer to the proper instruction on unconscionability, depending on the claims of the parties. Mr. Johnson thought that inequitable conduct was an element of a claim of unilateral mistake. At Mr. Shea's suggestion, the periods after each subparagraph were replaced with semicolons, and "and" was inserted before the last subparagraph, (5). The committee approved the instruction with Mr. Shea's changes.

l. *CV2134. Third-party beneficiary.* The committee approved the instruction as revised by the subcommittee. (The second sentence was corrected to read, "To be a third-party beneficiary of a contract, [name of plaintiff] must prove:")

m. *CV2135. Assignment.* Dr. Di Paolo thought the first sentence was confusing. Mr. Simmons noted that there was an *'s* missing after "[assignor's name]" in the second line. Mr. Shea will revise the phrases "assignor's name" and "assignee's name" to "name of assignor" and "name of assignee" to make them less confusing. The word "proven" was replaced with "proved" in the last paragraph. The committee approved the instruction as modified.

n. *CV2136. Delegation.* The committee agreed with the subcommittee's recommendation to delete this instruction, since the issue only arises in the context of a novation, and there is a separate instruction on novation.

o. *[New] CV2136. Modification.* The committee approved the advisory committee's recommended note. Mr. Badger noted that certiorari has been granted in the case cited in the note, so the committee may need to revise the note depending on what the Utah Supreme Court holds.

p. *CV2138 [now CV2137?]. Abandonment.* At Mr. Humpherys's suggestion, the second sentence was revised to read, "To succeed on this claim, [name of party] must prove by clear and convincing evidence . . . ." The committee approved the instruction as revised.

q. *CV2139. Damages related to expected benefits.* Ms. Blanch questioned what the phrase "flow naturally from the breach" means and whether it is sufficiently plain English. Mr. Badger thought it needed to be part of the instruction. It defines general damages for breach of contract (as opposed to special or consequential damages). The first paragraph was revised to read:

> If [name of party] is damaged by a breach of a contract, then [he] has a right to recover damages that flow naturally from the breach. These damages are calculated as follows:

At Mr. Badger's suggestion, the title was changed to "Expectation damages--general." The committee approved the instruction as modified.

r. *CV2142. Damages--foreseeability.* The committee adopted the subcommittee's recommendation to delete this instruction. It does not apply to general damages and is covered in the consequential damage instruction.

s. *CV2143. Mitigation and avoidance.* Mr. Badger noted that the case previously cited as authority for this instruction, *Mahmood v. Ross,* 1999 UT 104, is not a complete statement of the law. The subcommittee revised the

instruction to include language from *Alexander v. Brown,* 646 P.2d 692 (Utah 1982). Messrs. Young and Humpherys questioned whether that was the law. Ms. Blanch thought the additional language gutted the duty to mitigate. The last clause was revised to read, "[name of defendant] cannot succeed on his claim [instead of "cannot complain"] . . . ." The committee approved the instruction as modified.

2. *Next Meeting*. The next meeting will be Monday, September 22, 2008, to discuss the motor vehicle accident instructions.

The meeting concluded at 6:00 p.m.