Agenda
Advisory Committee on
Model Civil Jury Instructions
October 26, 2020
4:00 to 6:00 p.m.
Via Webex

Welcome, introductions, and approval of February minutes	Tab 1	Judge Andrew Stone, Chair
Subcommittees and subject area timelines	Tab 2	Judge Andrew Stone
Product Liability	Tab 3	Tracy Fowler
Other business -Scheduling -CV 632. Threshold: next meeting		Judge Andrew Stone

Committee Web Page

Published Instructions

Meeting Schedule: TBD

Tab 1

Model Utah Civil Jury Instructions Committee

Summary Minutes

February 10, 2020

In attendance:

Judge Andrew Stone (chair), Nancy Sylvester (staff), Joel Ferre, Judge Keith Kelly, Randy Andrus, Lauren Shurman, Marianna Di Paolo, Samantha Slark, Doug Mortensen.

Excused:

Ricky Shelton, Ruth Shapiro, Alyson McAllister

1) **Welcome.**

Judge Stone welcomed everyone to the meeting.

2) **Approval of Minutes.**

Judge Stone asked for a motion on the January meeting minutes. The minutes were unanimously approved.

3) **Discuss timeline/Upcoming topics.**

The committee discussed its timeline and determined that Tracy Fowler's committee would report in March.

4) **Discussion of Uniformity Instructions.**

The committee finalized the Uniformity instructions, as attached.

5) **Adjournment.**

The meeting adjourned at 6 p.m.

6) **Next meeting.**

The next meeting was scheduled to be held in March but was cancelled due to COVID-19.

MUJI 2D GENERAL INSTRUCTIONS

Table of Contents

MUJI 2d GENERAL INSTRUCTIONS

OPENING INSTRUCTIONS

CV101 GENERAL ADMONITIONS. Approved June 10, 2019.

Now that you have been chosen as jurors, you are required to decide this case based only on the evidence that you see and hear in this courtroom and the law that I will instruct you about. For your verdict to be fair, you must not be exposed to any other information about the case. This is very important, and so I need to give you some very detailed explanations about what you should do and not do during your time as jurors.

First, although it may seem natural to want to investigate a case, you must not try to get information from any source other than what you see and hear in this courtroom. ~~It's natural to want to investigate a case, but y~~You may not use any printed or electronic sources to get information about this case or the issues involved. This includes the I~~i~~nternet, reference books or dictionaries, newspapers, magazines, television, radio, computers, ~~Blackberries,~~ iPhones, Smartphones, ~~PDAs,~~ or any social media or electronic device.

You may not do any personal investigation. This includes visiting any of the places involved in this case, using Internet maps or Google Earth, talking to possible witnesses, or creating your own experiments or reenactments.

Second, although it may seem natural, you must not communicate with anyone about this case, and you must not allow anyone to communicate with you. ~~This also is a natural thing to want to do, but y~~You may not communicate about the case by any means, including by ~~via~~ emails, text messages, tweets, blogs, chat rooms, comments, ~~or~~ other postings, ~~Facebook, MySpace, LinkedIn, or any other~~ or any social media.

You may notify your family and your employer that you have been selected as a juror and you may let them know your schedule. But do not talk with anyone about the case, including your family and employer. You must not even talk with your fellow jurors about the case until I send you to deliberate. If you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter. And then please report the contact to the clerk or the bailiff, and they will notify me.

Also, do not talk with the lawyers, parties or witnesses about anything, not even to pass the time of day.

I know that these restrictions affect activities that you consider to be normal and harmless and very important in your daily lives. However, these restrictions ensure that the parties have a fair trial based only on the evidence and not on outside information. Information from an outside source might be inaccurate or incomplete, or it might simply not apply to this case, and the parties would not have a chance to explain or contradict that information because they wouldn't know about it. That's why it is so important that you base your verdict only on information you receive in this courtroom.

Courts used to sequester—or isolate—jurors to keep them away from information that might affect the fairness of the trial, but we seldom do that anymore. But this means that we must rely upon your honor to obey these restrictions, especially during recesses when no one is watching.

Any juror who violates these restrictions jeopardizes the fairness of the proceedings, and the entire trial may need to start over. That is a tremendous expense and inconvenience to the parties, the court and the taxpayers. Violations may also result in substantial penalties for the juror.

If any of you have any difficulty whatsoever in following these instructions, please let me know now. If any of you becomes aware that one of your fellow jurors has done something that violates these instructions, you are obligated to report that as well. If anyone tries to contact you about the

case, either directly or indirectly, or sends you any information about the case, please report this promptly as well. Notify the bailiff or the clerk, who will notify me.

These restrictions must remain in effect throughout this trial. Once the trial is over, you may resume your normal activities. At that point, you will be free to read or research anything you wish. You will be able to speak—or choose not to speak—about the trial to anyone you wish. You may write, or post, or tweet about the case if you choose to do so. The only limitation is that you must wait until after the verdict, when you have been discharged from your jury service.

So, keep an open mind throughout the trial. The evidence that will form the basis of your verdict can be presented only one piece at a time, and it is only fair that you do not form an opinion until I send you to deliberate.

References

CACI 100

MUJI 1st Instruction

1.1; 2.4.

Committee Notes

News articles have highlighted the problem of jurors conducting their own internet research or engaging in outside communications regarding the trial while it is ongoing. See, e.g., Mistrial by iPhone: Juries' Web Research Upends Trials, New York Times (3/18/2009). The court may therefore wish to emphasize the importance of the traditional admonitions in the context of electronic research or communications.

Amended Dates:

~~9/2011.~~

CV101A GENERAL ADMONITIONS. (SELF-REPRESENTED LITIGANT VERSION). Approved June 10, 2019.

Now that you have been chosen as jurors, you are required to decide this case based only on the evidence that you see and hear in this courtroom and the law that I will instruct you about. For your verdict to be fair, you must not be exposed to any other information about the case. This is very important, and so I need to give you some very detailed explanations about what you should do and not do during your time as jurors.

First, although it may seem natural to want to investigate a case, you must not try to get information from any source other than what you see and hear in this courtroom. You may not use any printed or electronic sources to get information about this case or the issues involved. This includes the Internet, reference books or dictionaries, newspapers, magazines, television, radio, computers, iPhones, Smartphones, or any social media or electronic device.

~~First, you must not try to get information from any source other than what you see and hear in this courtroom. It's natural to want to investigate a case, but you may not use any printed or electronic sources to get information about this case or the issues involved. This includes the internet, reference books or dictionaries, newspapers, magazines, television, radio, computers, Blackberries, iPhones, Smartphones, PDAs, or any social media or electronic device.~~ You may not do any personal investigation. This includes visiting any of the places involved in this case, using Internet maps or Google Earth, talking to possible witnesses, or creating your own experiments or reenactments.

Second, although it may seem natural, you must not communicate with anyone about this case, and you must not allow anyone to communicate with you. You may not communicate about the

case by any means, including by emails, text messages, tweets, blogs, chat rooms, comments, other postings, or any social media.

~~Second, you must not communicate with anyone about this case, and you must not allow anyone to communicate with you. This also is a natural thing to want to do, but you may not communicate about the case via emails, text messages, tweets, blogs, chat rooms, comments or other postings, Facebook, MySpace, LinkedIn, or any other social media.~~ You may notify your family and your employer that you have been selected as a juror and you may let them know your schedule. But do not talk with anyone about the case, including your family and employer. You must not even talk with your fellow jurors about the case until I send you to deliberate. If you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter. And then please report the contact to the clerk or the bailiff, and they will notify me.

[Name of plaintiff] [name of defendant] is representing him/herself.

[Name of defendant] [name of plaintiff] is represented by _____.

[Name of plaintiff], [name of defendant], attorneys for the [plaintiff][defense] and witnesses are not allowed to speak with you during the case. When you see [plaintiff's] [defendant's] attorneys at a recess or pass them in the halls and they do not speak to you, they are not being rude or unfriendly – they are simply following the law.

I know that these restrictions affect activities that you consider to be normal and harmless and very important in your daily lives. However, these restrictions ensure that the parties have a fair trial based only on the evidence and not on outside information. Information from an outside source might be inaccurate or incomplete, or it might simply not apply to this case, and the parties would not have a chance to explain or contradict that information because they wouldn't know about it. That's why it is so important that you base your verdict only on information you receive in this courtroom. Courts used to sequester—or isolate—jurors to keep them away from information that might affect the fairness of the trial, but we seldom do that anymore. But this means that we must rely upon your honor to obey these restrictions, especially during recesses when no one is watching.

Any juror who violates these restrictions jeopardizes the fairness of the proceedings, and the entire trial may need to start over. That is a tremendous expense and inconvenience to the parties, the court and the taxpayers. Violations may also result in substantial penalties for the juror.

If any of you have any difficulty whatsoever in following these instructions, please let me know now. If any of you becomes aware that one of your fellow jurors has done something that violates these instructions, you are obligated to report that as well. If anyone tries to contact you about the case, either directly or indirectly, or sends you any information about the case, please report this promptly as well. Notify the bailiff or the clerk, who will notify me.

These restrictions must remain in effect throughout this trial. Once the trial is over, you may resume your normal activities. At that point, you will be free to read or research anything you wish. You will be able to speak—or choose not to speak—about the trial to anyone you wish. You may write, or post, or tweet about the case if you choose to do so. The only limitation is that you must wait until after the verdict, when you have been discharged from your jury service.

So, keep an open mind throughout the trial. The evidence that will form the basis of your verdict can be presented only one piece at a time, and it is only fair that you do not form an opinion until I send you to deliberate.

References

MUJI CV 101.

Preliminary Jury Instructions for use with self-represented litigants, U.S. District Court, Eastern District of California.

Committee Notes

News articles have highlighted the problem of jurors conducting their own internet research or engaging in outside communications regarding the trial while it is ongoing. See, e.g., Mistrial by iPhone: Juries' Web Research Upends Trials, New York Times (3/18/2009). The court may therefore wish to emphasize the importance of the traditional admonitions in the context of electronic research or communications.

Amended Dates:

~~12/2013~~

CV101B FURTHER ADMONITION ABOUT ELECTRONIC DEVICES.

Removed 9/2011. Incorporated into CV 101.

CV102 ROLE OF JUDGE, LAWYERS, AND JURY. ~~ROLE OF THE JUDGE, JURY AND LAWYERS.~~ Approved 1/13/20.

Replaced with CR105 (modified)

All of us, judge, lawyers, and jury, are officers of the court and have different roles during the trial:

As the judge I will supervise the trial, decide what evidence is admissible, and instruct you on the law.

The lawyers will present evidence and try to persuade you to decide the case in one way or the other.

As the jury, you must follow the law as you weigh the evidence and decide the factual issues. Factual issues relate to what did, or did not, happen in this case.

Neither the lawyers nor I decide the case. That is your role. Do not be influenced by what you think our opinions might be. Make your decision based on the law given in my instructions and on the evidence presented in court.

References

Utah Code Ann. § 77-17-10(1).

Utah Code Ann. § 78A-2-201.

State v. Sisneros, 631 P.2d 856, 859 (Utah 1981).

State v. Gleason, 40 P.2d 222, 226 (Utah 1935).

75 Am. Jur.2d Trial §§ 714, 719, 817.

~~You and I and the lawyers play important but different roles in the trial.~~

~~I supervise the trial and to decide all legal questions, such as deciding objections to evidence and deciding the meaning of the law. I will also explain the meaning of the law.~~

~~You must follow that law and decide what the facts are. The facts generally relate to who, what, when, where, why, how or how much. The facts must be supported by the evidence.~~

~~The lawyers present the evidence and try to persuade you to decide the case in favor of his or her client.~~

~~Television and the movies may not accurately reflect the way real trials should be conducted. Real trials should be conducted with professionalism, courtesy and civility.~~

MUJI 1st Instruction

1.5; 2.2; 2.5; 2.6.

Amended Dates:

~~9/2011.~~

CV102A ROLE OF THE JUDGE, LAWYERS, ~~PARTIES~~SELF-REPRESENTED PARTY(IES), AND JURY. Approved 1/13/20.

~~(SELF-REPRESENTED LITIGANT VERSION)~~

All of us, judge, lawyers, [name of plaintiff] [name of defendant], and jury have different roles during the trial:

As the judge I will supervise the trial, decide what evidence is admissible, and instruct you on the law.

The lawyers and [name of self-represented plaintiff] [name of self-represented defendant] will present evidence and try to persuade you to decide the case in one way or the other.

As the jury, you must follow the law as you weigh the evidence and decide the factual issues. Factual issues relate to what did, or did not, happen in this case.

Neither the lawyers, parties, nor I decide the case. That is your role. Make your decision based on the law given in my instructions and on the evidence presented in court.

~~You and I and [name of plaintiff] [name of defendant] and the lawyers play important but different roles in the trial.~~

~~I supervise the trial and to decide all legal questions, such as deciding objections to evidence and deciding the meaning of the law. I will also explain the meaning of the law.~~

~~You must follow that law and decide what the facts are. The facts generally relate to who, what, when, where, why, how or how much. The facts must be supported by the evidence.~~

~~The lawyers present the evidence and try to persuade you to decide the case in favor of his or her client.~~

~~It is the self-represented [plaintiff] [defendant] and [plaintiff] [defense] counsel's duty to object when the other side offers testimony or other evidence that the self-represented [plaintiff] [defendant] or [plaintiff][defense] counsel believes is not admissible. You should not be unfair or prejudiced against the self-represented [plaintiff] [defendant], [plaintiff] [defense] counsel, or [plaintiff] [defendant] because the self-represented [plaintiff] [defendant] or [plaintiff] [defense] counsel has made objections. Television and the movies may not accurately reflect the way real trials should be conducted. Real trials should be conducted with professionalism, courtesy and civility.~~

References

MUJI CV 102.

Preliminary jury instructions for use with pro se litigants, U.S. District Court, Eastern District of California.

Amended Dates:

12/2013

CV103 NATURE OF THE CASE.

In this case [Name of plaintiff] seeks [describe claim].

[Name of defendant] [denies liability, etc.].

[Name of defendant] has filed what is known as a [counterclaim/cross-claim/third-party complaint/etc.,] seeking [describe claim].

MUJI 1st Instruction

1.1.

Amended Dates:

9/2011.

CV104 ORDER OF TRIAL.

The trial will proceed as follows:

(1) The lawyers will make opening statements, outlining what the case is about and what they think the evidence will show.

(2) [Name of plaintiff] will offer evidence first, followed by [name of defendant]. I may allow the parties to later offer more evidence.

(3) Throughout the trial and after the evidence has been fully presented, I will instruct you on the law. You must follow the law as I explain it to you, even if you do not agree with it.

(4) The lawyers will then summarize and argue the case. They will share with you their views of the evidence, how it relates to the law and how they think you should decide the case.

(5) The final step is for you to go to the jury room and discuss the evidence and the instructions among yourselves until you reach a verdict.

MUJI 1st Instruction

1.2.

Amended Dates:

9/2011.

CV105 SEQUENCE OF INSTRUCTIONS NOT SIGNIFICANT.

The order in which I give the instructions has no significance. You must consider the instructions in their entirety, giving them all equal weight. I do not intend to emphasize any particular instruction, and neither should you.

MUJI 1st Instruction

2.1.

Amended Dates:

9/2011.

CV106 JURORS MUST FOLLOW THE INSTRUCTIONS.

Removed 9/2011. Incorporated into CV 102.

MUJI 1st Instruction

1.5.

CV107 JURORS MAY NOT DECIDE BASED ON SYMPATHY, PASSION AND PREJUDICE. Approved 1/13/20.

You must decide this case based on the facts and the law, without regard to sympathy, passion, or prejudice. You must not decide for or against anyone because you feel sorry for or angry at ~~anyone~~that person or anyone else.

MUJI 1st Instruction

2.3.

Amended Dates:

9/2011

CV108 NOTE-TAKING. Approved 1/13/20.

Replaced with CR110

Feel free to take notes during the trial to help you remember the evidence, but do not let note-taking distract you. Your notes are not evidence and may be incomplete.

~~You may take notes during the trial and have those notes with you when you discuss the case. If you take notes, do not over do it, and do not let your note-taking distract you from following the evidence. Your notes are not evidence, and you should use them only as a tool to aid your personal memory. [I will secure your notes in the jury room during breaks and have them destroyed at the end of the trial.]~~

References

URCP 47(n).

MUJI 1st Instruction

1.6.

Committee Notes

The judge may instruct the jurors on what to do with their notes at the end of each day and at the end of the trial.

Amended Dates:

~~9/2011.~~

CV109 JUROR QUESTIONS FOR WITNESSES. [Optional for judges who permit questions.] Approved ~~6/10/19~~1/13/20.
Added from CR111 (modified)

During the trial you may submit questions to be asked of the witnesses, but you are not required to do so. You should write your questions down as they occur to you. Please do not ask your questions out loud. To make sure the questions are legally appropriate, we will use the following procedure: After the lawyers have finished questioning each witness, I will ask if you have any questions for that witness. You should hand your questions to the bailiff when I ask for them. I will review them with the lawyers to ~~make~~ determine if ~~sure~~ they are allowed. If they are allowed, your questions will be asked.~~I will tell you if your questions are allowed or not.~~

References
Utah R. Civ. P. 47(j).

CV110 RULES APPLICABLE TO RECESSES.

Removed 9/2011. Incorporated into CV 101.

MUJI 1st Instruction

1.8; 1.7

CV111A DEFINITION OF "PERSON."

"Person" means an individual, corporation, organization, or other legal entity.

Amended Dates:

9/2011.

CV111B ALL PERSONS EQUAL BEFORE THE LAW.

The fact that one party is a natural person and another party is a [corporation/partnership/other legal entity] should not play any part in your deliberations. You must decide this case as if it were between individuals.

MUJI 1st Instruction

2.8.

Amended Dates:

9/2011.

CV112 MULTIPLE PARTIES.

There are multiple parties in this case, and each party is entitled to have its claims or defenses considered on their own merits. You must evaluate the evidence fairly and separately as to each plaintiff and each defendant. Unless otherwise instructed, all instructions apply to all parties.

Amended Dates:

9/2011.

CV113 MULTIPLE PLAINTIFFS.

Although there are _____ plaintiffs, that does not mean that they are equally entitled to recover or that any of them is entitled to recover. [Name of defendant] is entitled to a fair consideration of [his] defense against each plaintiff, just as each plaintiff is entitled to a fair consideration of [his] claim against [name of defendant].

MUJI 1st Instruction

2.21.

Amended Dates:

9/2011.

CV114 MULTIPLE DEFENDANTS.

Although there are _____ defendants, that does not mean that they are equally liable or that any of them is liable. Each defendant is entitled to a fair consideration of [his] defense against each of [name of plaintiff]'s claims. If you conclude that one defendant is liable, that does not necessarily mean that one or more of the other defendants are liable.

MUJI 1st Instruction

2.22.

Amended Dates:

9/2011.

CV115 SETTLING PARTIES.

[Name of persons] have reached a settlement agreement.

There are many reasons why persons settle their dispute. A settlement does not mean that anyone has conceded anything. Although [name of settling person] is not a party, you must still decide whether any of the persons, including [name of settling person], were at fault.

You must not consider the settlement as a reflection of the strengths or weaknesses of any person's position. You may consider the settlement in deciding how believable a witness is.

References

Slusher v. Ospital, 777 P.2d 437 (Utah 1989).

Paulos v. Covenant Transp., Inc., 2004 UT App 35 (Utah App. 2004).

Child v. Gonda, 972 P.2d 425 (Utah App. 1998).

URE 408.

MUJI 1st Instruction

2.24.

Committee Notes

The judge and the parties must decide whether the fact of settlement and to what extent the terms of the settlement will be revealed to the jury in accordance with the principles set forth in *Slusher v. Ospital*, 777 P.2d 437 (Utah 1989).

Substitute other legal concepts if "fault" is not relevant. For example, in commercial disputes.

Amended Dates:

9/2011.

CV116 DISCONTINUANCE AS TO SOME DEFENDANTS.

[Name of defendant] is no longer involved in this case because [explain reasons]. But you must still decide whether fault should be allocated to [name of defendant] as if [he] were still a party.

MUJI 1st Instruction

2.23.

Committee Notes

This instruction should be given at the time the party is dismissed. The court should explain the reasons why the defendants have been dismissed to the extent possible. If allocation of fault to the dismissed party is not appropriate under applicable law the final sentence should not be given.

CV117 PREPONDERANCE OF THE EVIDENCE.

You may have heard that in a criminal case proof must be beyond a reasonable doubt, but this is not a criminal case. In a civil case such as this one, a different level of proof applies: proof by a preponderance of the evidence.

When I tell you that a party has the burden of proof or that a party must prove something by a "preponderance of the evidence," I mean that the party must persuade you, by the evidence, that the fact is more likely to be true than not true.

Another way of saying this is proof by the greater weight of the evidence, however slight. Weighing the evidence does not mean counting the number of witnesses nor the amount of testimony. Rather, it means evaluating the persuasive character of the evidence. In weighing the evidence, you should consider all of the evidence that applies to a fact, no matter which party presented it. The weight to be given to each piece of evidence is for you to decide.

After weighing all of the evidence, if you decide that a fact is more likely true than not, then you must find that the fact has been proved. On the other hand, if you decide that the evidence regarding a fact is evenly balanced, then you must find that the fact has not been proved, and the party has therefore failed to meet its burden of proof to establish that fact.

[Now] [At the close of the trial] I will instruct you in more detail about the specific elements that must be proved.

References

Johns v. Shulsen, 717 P.2d 1336 (Utah 1986).

Morris v. Farmers Home Mut. Ins. Co., 500 P.2d 505 (Utah 1972).

Alvarado v. Tucker, 268 P.2d 986 (Utah 1954).

Hansen v. Hansen, 958 P.2d 931 (Utah App. 1998)

MUJI 1st Instruction

2.16; 2.18.

Amended Dates:

9/2011

CV118 CLEAR AND CONVINCING EVIDENCE.

Some facts in this case must be proved by a higher level of proof called "clear and convincing evidence." When I tell you that a party must prove something by clear and convincing evidence, I mean that the party must persuade you, by the evidence, to the point that there remains no serious or substantial doubt as to the truth of the fact.

Proof by clear and convincing evidence requires a greater degree of persuasion than proof by a preponderance of the evidence but less than proof beyond a reasonable doubt.

I will tell you specifically which of the facts must be proved by clear and convincing evidence.

References

Essential Botanical Farms, LC v. Kay, 2011 UT 71.

Jardine v. Archibald, 279 P.2d 454 (Utah 1955).

Greener v. Greener, 212 P.2d 194 (Utah 1949).

See also, *Kirchgestner v. Denver & R.G.W.R. Co.*, 233 P.2d 699 (Utah 1951).

MUJI 1st Instruction

2.19.

Committee Notes

In giving the instruction on clear and convincing evidence, the judge should specify which elements must be held to this higher standard. This might be done in an instruction and/or as part of the verdict form. If the judge gives the clear and convincing evidence instruction at the start of the trial and for some reason those issues do not go to the jury (settlement, directed verdict, etc.) the judge should instruct the jury that those matters are no longer part of the case.

Amended Dates:

9/2011.

CV119 EVIDENCE. <u>Approved 1/13/20.</u>

"Evidence" is anything that tends to prove or disprove a disputed fact. It can be the testimony of a witness or documents or objects or photographs or certain qualified opinions or any combination of these things.

You must entirely disregard any evidence for which I sustain an objection and any evidence that I order to be struck.

Anything you may have seen or heard outside the courtroom is not evidence and you must entirely disregard it.

The lawyers might stipulate—or agree—to a fact or I might take judicial notice of a fact. Otherwise, what I say and what the lawyers say ~~usually are~~is not evidence.

You are to consider only the evidence in the case, but you are not expected to abandon your common sense. You are permitted to interpret the evidence in light of your experience.

Comment [NS1]: Implicit bias subcommittee should look at this paragraph.

MUJI 1st Instruction

1.3; 2.4.

Amended Dates:

9/2011.

CV119A EVIDENCE. ~~(~~[Self-represented litigant version]~~)~~ Approved 1/13/20.

"Evidence" is anything that tends to prove or disprove a disputed fact. It can be the testimony of a witness or documents or objects or photographs or certain qualified opinions or any combination of these things.

You must entirely disregard any evidence for which I sustain an objection and any evidence that I order to be struck.

Anything you may have seen or heard outside the courtroom is not evidence and you must entirely disregard it.

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

(1) Arguments and statements by ~~pro se~~ [self-represented plaintiff] [self-represented defendant] and [plaintiff] [defense] counsel are not evidence. ~~Pro se~~ [Self-represented plaintiff] [self-represented defendant] when acting as [his/her/their] own counsel and [plaintiff] [defense] counsel are not witnesses. What they ~~have said~~say in their opening and closing statements~~, will say in their closing arguments,~~ and what they say ~~at other times~~when they are not testifying as a witness is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way they have stated them, your memory of them controls. However, ~~pro se~~ [self-represented plaintiff] [self-represented defendant]'s statements as a witness are evidence.

(2) Questions and objections by ~~pro se~~ [self-represented plaintiff] [self-represented defendant] and [plaintiff] [defense] counsel are not evidence.

The ~~lawyers~~ parties might stipulate -- or agree -- to a fact or I might take judicial notice of a fact. Otherwise, what is said in court, other than sworn testimony, ~~I say and what the lawyers say usually~~ is not evidence.

You are to consider only the evidence in this case, but you are not expected to abandon your common sense. You are permitted to interpret the evidence in light of your experience.

Comment [NS2]: Implicit bias subcommittee should look at this.

References

CV 119.

Preliminary jury instructions for use with pro se litigants, U.S. District Court, Eastern District of California.

Amended Dates:

November 2013.

CV120 DIRECT ~~AND~~ /CIRCUMSTANTIAL EVIDENCE. Approved 1/13/20.

Replaced with CR210 (modified)

Facts may be proved by direct or circumstantial evidence. The law does not treat one type of evidence as better than the other.

Direct evidence can prove a fact by itself. It usually comes from a witness who perceived firsthand the fact in question. For example, if a witness testified he looked outside and saw it was raining, that would be direct evidence that it had rained.

Circumstantial evidence is indirect evidence. It usually comes from a witness who perceived a set of related events, but not the fact in question. However, based on that testimony someone could conclude that the fact in question had occurred. For example, if a witness testified that she looked outside and saw that the ground was wet and people were closing their umbrellas, that would be circumstantial evidence that it had rained.

~~A fact may be proved by direct or circumstantial evidence. Circumstantial evidence consists of facts that allow someone to reasonably infer the truth of the facts to be proved. For example, if the fact to be proved is whether Johnny ate the cherry pie, and a witness testifies that she saw Johnny take a bite of the cherry pie, that is direct evidence of the fact. If the witness testifies that she saw Johnny with cherries smeared on his face and an empty pie plate in his hand, that is circumstantial evidence of the fact.~~

MUJI 1st Instruction

2.17.

References

29 Am. Jur.2d Evidence § 4.
29 Am. Jur.2d Evidence § 1468.

Amended Dates:

~~9/2011.~~

CV121 ~~BELIEVABILITY OF WITNESSES.~~WITNESS CREDIBILITY. Approved 1/13/20.

CV121-123 replaced with CR207

In deciding this case you will need to decide how believable each witness was. Use your judgment and common sense. Let me suggest a few things to think about as you weigh each witness's testimony:

- How good was the witness's opportunity to see, hear, or otherwise observe what the witness testified about?
- Does the witness have something to gain or lose from this case?
- Does the witness have any connection to the people involved in this case?
- Does the witness have any reason to lie or slant the testimony?
- Was the witness's testimony consistent over time? If not, is there a good reason for the inconsistency? If the witness was inconsistent, was it about something important or unimportant?

Comment [NS3]: Implicit bias subcommittee.

- How believable was the witness's testimony in light of other evidence presented at trial?
- How believable was the witness's testimony in light of human experience?
- Was there anything about the way the witness testified that made the testimony more or less believable?

In deciding whether or not to believe a witness, you may also consider anything else you think is important.

You do not have to believe everything that a witness said. You may believe part and disbelieve the rest. On the other hand, if you are convinced that a witness lied, you may disbelieve anything the witness said. In other words, you may believe all, part, or none of a witness's testimony. You may believe many witnesses against one or one witness against many.

In deciding whether a witness testified truthfully, remember that no one's memory is perfect. Anyone can make an honest mistake. Honest people may remember the same event differently.

References

Utah Code Ann. § 78B-1-128.

United States v. McKissick, 204 F.3d 1282, 1289 (10th Cir. 2000).

Toma v. Utah Power & Light Co., 365 P.2d 788, 792-793 (Utah 1961).

Gittens v. Lundberg, 3 Utah 2d 392, 284 P.2d 1115 (1955).

State v. Shockley, 80 P. 865, 879 (1905).

75 Am. Jur.2d Trial § 819.

~~Testimony in this case will be given under oath. You must evaluate the believability of that testimony. You may believe all or any part of the testimony of a witness. You may also believe one witness against many witnesses or many against one, in accordance with your honest convictions. In evaluating the testimony of a witness, you may want to consider the following:~~

~~(1) Personal interest. Do you believe the accuracy of the testimony was affected one way or the other by any personal interest the witness has in the case?~~

~~(2) Bias. Do you believe the accuracy of the testimony was affected by any bias or prejudice?~~

~~(3) Demeanor. Is there anything about the witness's appearance, conduct or actions that causes you to give more or less weight to the testimony?~~

~~(4) Consistency. How does the testimony tend to support or not support other believable evidence that is offered in the case?~~

~~(5) Knowledge. Did the witness have a good opportunity to know what [he] is testifying about?~~

~~(6) Memory. Does the witness's memory appear to be reliable?~~

~~(7) Reasonableness. Is the testimony of the witness reasonable in light of human experience?~~

~~These considerations are not intended to limit how you evaluate testimony. You are the ultimate judges of how to evaluate believability.~~

MUJI 1st Instruction

2.9, 2.10, 2.11.

~~**CV122 INCONSISTENT STATEMENTS.**~~

~~You may believe that a witness, on another occasion, made a statement inconsistent with that witness's testimony given here. That doesn't mean that you are required to disregard the testimony. It is for you to decide whether to believe the witness.~~

Comment [NS4]: Implicit bias subcommittee

Comment [NS5]: Implicit bias subcommittee.

~~**MUJI 1st Instruction**~~

~~2.10.~~

~~**CV123 EFFECT OF WILLFULLY FALSE TESTIMONY.**~~

~~If you believe any witness has intentionally testified falsely about any important matter, you may disregard the entire testimony of that witness, or you may disregard only the intentionally false testimony.~~

~~**References**~~

~~*Gittens v. Lundberg*, 3 Utah 2d 392, 284 P.2d 1115 (1955).~~

~~**MUJI 1st Instruction**~~

~~2.11.~~

CV124 STIPULATED FACTS.

A stipulation is an agreement. Unless I instruct you otherwise, when the lawyers on both sides stipulate or agree to a fact, you must accept the stipulation as evidence and regard that fact as proved.

The parties have stipulated to the following facts:

[Here read stipulated facts.]

Since the parties have agreed on these facts, you must accept them as true for purposes of this case.

MUJI 1st Instruction

1.3; 1.4

Committee Notes

This instruction should be given at the time a stipulated fact is entered into the record.

CV125 JUDICIAL NOTICE.

I have taken judicial notice of [state the fact] for purposes of this trial. This means that you must accept the fact as true.

MUJI 1st Instruction

1.3.

Committee Notes

This instruction should be given at the time the court takes judicial notice of a fact.

CV126 DEPOSITIONS.

A deposition is the sworn testimony of a witness that was given previously, outside of court, with the lawyer for each party present and entitled to ask questions. Testimony provided in a deposition is evidence and may be read to you in court or may be seen on a video monitor. You should consider deposition testimony the same way that you would consider the testimony of a witness testifying in court.

MUJI 1st Instruction

2.12.

Amended Dates:

9/2011.

CV127 LIMITED PURPOSE EVIDENCE.

Some evidence is received for a limited purpose only. When I instruct you that an item of evidence has been received for a limited purpose, you must consider it only for that limited purpose.

MUJI 1st Instruction

1.3.

Amended Dates:

9/2011.

CV128 OBJECTIONS AND RULINGS ON EVIDENCE AND PROCEDURE. Approved 2/10/2020. (Doug-1; Judge Kelly-2)

From time to time during the trial, I may have to make rulings on objections or motions made by the lawyers. Lawyers on each side of a case have a right to object when the other side offers evidence that the lawyer believes is not admissible. You should not think less of a lawyer or a party because the lawyer makes objections. You should not conclude from any ruling or comment that I make that I have any opinion about the merits of the case or that I favor one side or the other. And if a lawyer objects and I sustain the objection, you should disregard the question and any answer.

During the trial I may have to confer with the lawyers out of your hearing about questions of law or procedure. Sometimes you may be excused from the courtroom for that same reason. I will try to limit these interruptions as much as possible~~, but you should remember the importance of the matter you are here to decide~~. Please be patient even ~~though~~if the case may seem to go slowly.

MUJI 1st Instruction

2.5.

CV128A OBJECTIONS AND RULINGS ON EVIDENCE AND PROCEDURE [Self-represented litigant version. Approved 2/10/2020. (Doug-1; Judge Kelly-2)

From time to time during the trial, I may have to make rulings on objections or motions made by the lawyers or the parties. Lawyers and parties on each side of a case have a right to object when the other side offers evidence that the lawyer believes is not admissible. You should not think less of a lawyer or a party because they make objections. You should not conclude from any ruling or comment that I make that I have any opinion about the merits of the case or that I favor one side or the other. And if a lawyer or party objects and I sustain the objection, you should disregard the question and any answer.

During the trial I may have to confer with the lawyers and parties out of your hearing about questions of law or procedure. Sometimes you may be excused from the courtroom for that same reason. I will try to limit these interruptions as much as possible. Please be patient even if the case may seem to go slowly.

MUJI 1st Instruction

2.5.

CV129 STATEMENT OF OPINION.

Under limited circumstances, I will allow a witness to express an opinion. Consider opinion testimony as you would any other evidence, and give it the weight you think it deserves.

You may choose to rely on the opinion, but you are not required to do so.

If you find that a witness, in forming an opinion, has relied on a fact that has not been proved, or has been disproved, you may consider that in determining the value of the witness's opinion.

References

Lyon v Bryan, 2011 UT App 256 (jury entitled to disregard even unrebutted expert testimony).

MUJI 1st Instruction

2.13; 2.14.

Committee Notes

This instruction may be given if an expert or another witness is permitted to express an opinion on a matter that the jury is capable of deciding with or without expert testimony. This instruction should not be given if the jury is required to rely on expert testimony to establish the standard of care or some other fact. See, for example, Instruction CV 326. Expert testimony required..

If the jury is required to rely on expert testimony for some decisions and is allowed to decide other facts with or without expert testimony, the court's instructions should distinguish for the jury which matters the jury must decide based only on expert testimony and which matters they may decide by giving the expert testimony the weight they think it deserves.

Amended Dates:

September, 2011; November 13, 2012.

CV130A CHARTS AND SUMMARIES AS EVIDENCE.

Charts and summaries that are received as evidence will be with you in the jury room when you deliberate, and you should consider the information contained in them as you would any other evidence.

MUJI 1st Instruction

2.15.

Committee Notes

Use this instruction if the charts and summaries used at trial are introduced as evidence under URE 1006.

Amended Dates:

9/2011.

CV130B CHARTS AND SUMMARIES OF EVIDENCE.

Certain charts and summaries will be shown to you to help explain the evidence. However, these charts and summaries are not themselves evidence, and you will not have them in the jury room when you deliberate. You may consider them to the extent that they correctly reflect the evidence.

MUJI 1st Instruction

2.15.

Committee Notes

Use this instruction if the charts and summaries used at trial are used only as demonstrative aids.

Amended Dates:

9/2011.

CV131 SPOLIATION. Approved 2/10/20. (Doug-1; Judge Kelly-2)

I have determined that [name of party] intentionally concealed, destroyed, altered, or failed to preserve [describe evidence]. You [may/must] assume that the evidence would have been unfavorable to [name of party].

References

Hills v. United Parcel Service, Inc., 2010 UT 39, 232 P.3d 1049.

Daynight, LLC v. Mobilight, Inc., 2011 UT App 28, 248 P.3d 1010.

Burns v. Cannondale Bicycle Co., 876 P.2d 415 (Utah Ct. App. 1994).

URCP 37(~~g~~e).

Committee Notes

Utah appellate courts have not recognized a cause of action for first-party spoliation (a claim against a party to the underlying action – or the party's attorney – who spoliates evidence necessary or relevant to the plaintiff's claims against that party), or a cause of action for third-party spoliation (a stranger to the underlying action or a party not alleged to have committed the underlying tort as to which the loss or destroyed evidence is related). *Hills v. United Parcel Serv., Inc.*, 2010 UT 39, 232 P.3d 1049; *Burns v. Cannondale Bicycle Co.*, 876 P.2d 415 (Utah Ct. App. 1994). Rule 37(~~g~~b), (e), however, expressly provides authority to trial courts to address spoliation of evidence by a litigant, including instructing the jury regarding an adverse inference. See, URCP 37(b)(7).~~2)(F).~~ Instructing the jury to draw an adverse inference is just one of several sanctions the court may impose for spoliation. URCP37(e). There may be circumstances when whether spoliation occurred is a question for the jury.

In *Daynight, LLC v. Mobilight, Inc.*, 2011 UT App. 28, 248 P.3d 1010, the Utah Court of Appeals observed that "spoliation under [Rule 37(e~~g~~)], meaning the destruction and permanent deprivation of evidence, is on a qualitatively different level than a simple discovery abuse under [Rule 37(b)~~(2)~~] which typically pertains only to a delay in the production of evidence. . . . [~~r~~R~~l~~ule 37(e~~g~~)] of the Utah Rules of Civil Procedure does not require a finding of 'willfulness, bad faith, fault or persistent dilatory tactics' or the violation of court orders before a court may sanction a party." Id. at ¶ 2.

~~The standard announced by the *Daynight* court differs from that employed by the United States Court of Appeals for the Tenth Circuit. Spoliation sanctions are proper in federal court when (1) a party has a duty to preserve evidence because it knew, or should have known the litigation was imminent, and (2) the adverse party was prejudiced by the destruction of the evidence. If the aggrieved party seeks an adverse inference to remedy the spoliation, it must also prove bad faith. Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case. Without a showing of bad faith, a district court may only impose lesser sanctions. *Turner v. Public Serv. Co.*, 563 F.3d 1136, 1149 (10th Cir. 2009). In addition, it is appropriate for a federal trial court to consider "the degree of culpability of the party who lost or destroyed the evidence." *North v. Ford Motor Co.*, 505 F. Supp. 2d 1113, 1116 (D.Utah 2007).~~

~~The discussion by the Utah Court of Appeals in *Daynight* appears to indicate that even the negligent destruction of evidence will be sufficient to trigger a spoliation instruction without a finding of willfulness or bad faith.~~

Amended Dates:

9/2011.

~~CV135~~ CV132 OUT-OF-STATE OR OUT-OF-TOWN EXPERTS.

You may not discount the opinions of [name of expert] merely because of where [he] lives or practices.

References

Swan v. Lamb, 584 P.2d 814, 819 (Utah 1978).

MUJI 1st Instruction

6.30

Committee Notes

The committee was not unanimous in its approval of this instruction. Use it with caution.

~~CV136~~ CV133 CONFLICTING TESTIMONY OF EXPERTS.

In resolving any conflict that may exist in the testimony of [names of experts], you may compare and weigh the opinion of one against that of another. In doing this, you may consider the qualifications and credibility of each, as well as the reasons for each opinion and the facts on which the opinions are based.

MUJI 1st Instruction

6.31

~~**CV137 Selection of jury foreperson and deliberation.**~~

~~When you go into the jury room, your first task is to select a foreperson. The foreperson will preside over your deliberations and sign the verdict form when it's completed. The foreperson should not dominate the discussions. The foreperson's opinions should be given the same weight as the opinions of the other jurors.~~

~~After you select the foreperson you must discuss with one another – that is deliberate – with a view to reaching an agreement. Your attitude and conduct during discussions are very important.~~

~~As you begin your discussions, it is not helpful to say that your mind is already made up. Do not announce that you are determined to vote a certain way or that your mind cannot be changed. Each of you must decide the case for yourself, but only after discussing the case with your fellow jurors.~~

~~Do not hesitate to change your opinion when convinced that it is wrong. Likewise, you should not surrender your honest convictions just to end the deliberations or to agree with other jurors.~~

~~Amended Dates:~~

~~9/2011.~~

~~**CV138 Do not speculate or resort to chance.**~~

~~When you deliberate, do not flip a coin, speculate or choose one juror's opinions at random. Evaluate the evidence and come to a decision that is supported by the evidence.~~

~~If you decide that a party is entitled to recover damages, you must then agree upon the amount of money to award that party. Each of you should state your own independent judgment on what the amount should be. You must thoughtfully consider the amounts suggested, evaluate them according to these instructions and the evidence, and reach an agreement on the amount. You must not agree in advance to average the estimates.~~

~~References~~

~~Day v. Panos, 676 P.2d 403 (Utah 1984).~~

~~**CV139 Agreement on special verdict.**~~

~~I am going to give you a form called the Special Verdict that contains several questions and instructions. You must answer the questions based upon the instructions and the evidence you have seen and heard during this trial.~~

~~Because this is not a criminal case, your verdict does not have to be unanimous. At least six jurors must agree on the answer to each question, but they do not have to be the same six jurors on each question.~~

~~As soon as six or more of you agree on the answer to all of the required questions, the foreperson should sign and date the verdict form and tell the bailiff you have finished. The bailiff will escort you back to this courtroom; you should bring the completed Special Verdict with you.~~

~~**Amended Dates:**~~

~~9/2011.~~

~~**CV140 Discussing the case after the trial.**~~

~~Ladies and gentlemen of the jury, this trial is finished. Thank you for your service. The American system of justice relies on your time and your sound judgment, and you have been generous with both. You serve justice by your fair and impartial decision. I hope you found the experience rewarding.~~

~~You may now talk about this case with anyone you like. You might be contacted by the press or by the lawyers. You do not have to talk with them – or with anyone else, but you may. The choice is yours. I turn now to the lawyers to instruct them to honor your wishes if you say you do not want to talk about the case.~~

~~If you do talk about the case, please respect the privacy of the other jurors. The confidences they may have shared with you during deliberations are not yours to share with others.~~

~~Again, thank you for your service.~~

~~CV141~~ CV134 NO RECORD OF TESTIMONY.

At the end of trial, you must make your decision based on what you recall of the testimony. You will not have a transcript or recording of the witnesses' testimony. I urge you to pay close attention to the testimony as it is given.

Amended Dates:

~~Added 9/2011.~~

CLOSING INSTRUCTIONS

CV-151. CLOSING ROADMAP. Approved 2/10/20 (Lauren-1; Samantha-2)

[from CR201, CR202]

Members of the jury, you now have all the evidence. Three things remain to be done:

First, I will give you additional instructions that you will follow in deciding this case.

Second, the lawyers will give their closing arguments. The Plaintiff(s) will go first, then the Defendant(s). The Plaintiff(s) may give a rebuttal.

Finally, you will go to the jury room to ~~discuss the evidence and the instructions and~~ decide the case.

~~**INSTRUCTION NO. CV 152**~~

~~**[from CR202]**~~

In the jury room you will ~~You~~ have two main duties as jurors.

First, you will decide from the evidence ~~The first is to decide from the evidence~~ what the facts are. You may draw all reasonable inferences from that evidence. ~~Deciding what the facts are is your job, not mine.~~

Second, you will ~~The second duty is to~~ take the law I give you in the instructions, apply it to the facts, and reach a verdict.

CV-152~~3~~. CLOSING ARGUMENTS. Approved 2/10/20 (Doug-1; Lauren-2)

[from CR203]

When the lawyers give their closing arguments, keep in mind that they are advocating their views of the case. What they say during their closing arguments is not evidence. If the lawyers say anything about the evidence that conflicts with what you remember, you are to rely on your memory of the evidence. If they say anything about the law that conflicts with these instructions, you are to rely on these instructions.

CV-154~~3~~. LEGAL RULINGS. Approved 2/10/20 (Judge Kelly-1; Samantha-2)

[from CR204]

During the trial I have made certain rulings. I made those rulings based on the law, and not because I favor one side or the other.

However,

• if I sustained an objection,

• if I did not accept evidence offered by one side or the other, or

• if I ordered that certain testimony be stricken,

then you must not consider those things in reaching your verdict.

CV-~~155~~154. JUDICIAL NEUTRALITY. Approved 2/10/20 (Judge Kelly-1; Doug-2)

[from CR205]

As the judge, I am neutral. If I have said or done anything that makes you think I favor one side or the other, that was not my intention. Do not interpret anything I have done as indicating that I have any particular view of the evidence or the decision you should reach.

~~CV137~~ CV155. FOREPERSON SELECTION AND DUTIES AND JURY DELIBERATIONS.~~SELECTION OF JURY FOREPERSON AND DELIBERATION~~. Approved 2/10/20 (Judge Kelly-1; Doug-2)

CV 137 replaced with CR 216-217 (modified) and renumbered

Among the first things you should do when you go to the jury room to deliberate is to appoint someone to serve as the jury foreperson. The foreperson should not dominate the jury's discussion, but rather should facilitate the discussion of the evidence and make sure that all members of the jury get the chance to speak. The foreperson's opinions should be given the same weight as those of other members of the jury. Once the jury has reached a verdict, the foreperson is responsible for filling out and signing the verdict form(s) on behalf of the entire jury.

In the jury room, discuss the evidence and speak your minds with each other. Open discussion should help you reach an agreement on a verdict. Listen carefully and respectfully to each other's views and keep an open mind about what others have to say. I recommend that you not commit yourselves to a particular verdict before discussing all the evidence.

Try to reach an agreement, but only if you can do so honestly and in good conscience. If there is a difference of opinion about the evidence or the verdict, do not hesitate to change your mind if you become convinced that your position is wrong. On the other hand, do not give up your honestly held views about the evidence simply to agree on a verdict, to give in to pressure from other jurors, or just to get the case over with. In the end, your vote must be your own.

~~In reaching your verdict you may not use methods of chance, such as drawing straws or flipping a coin. Rather, the verdict must reflect your individual, careful, and conscientious judgment~~

~~When you go into the jury room, your first task is to select a foreperson. The foreperson will preside over your deliberations and sign the verdict form when it's completed. The foreperson should not dominate the discussions. The foreperson's opinions should be given the same weight as the opinions of the other jurors.~~

~~After you select the foreperson you must discuss with one another – that is deliberate – with a view to reaching an agreement. Your attitude and conduct during discussions are very important.~~

~~As you begin your discussions, it is not helpful to say that your mind is already made up. Do not announce that you are determined to vote a certain way or that your mind cannot be changed. Each of you must decide the case for yourself, but only after discussing the case with your fellow jurors.~~

~~Do not hesitate to change your opinion when convinced that it is wrong. Likewise, you should not surrender your honest convictions just to end the deliberations or to agree with other jurors.~~

~~CV138~~ CV156. DO NOT ~~SPECULATE OR~~ RESORT TO CHANCE. Approved 2/10/20 (Judge Kelly-1; Doug-2)

When you deliberate, do not~~-~~ flip a coin, draw straws, choose opinions at random, or use other methods of chance. ~~speculate or choose one juror's opinions at random.~~ Instead you must ~~Evaluate~~weigh the evidence carefully and come to a decision that is supported by the evidence.

If you decide that a party is entitled to recover damages, you must then agree upon the amount of money to award that party. Each of you should state your own independent judgment on what the amount should be. You must thoughtfully consider the amounts suggested, evaluate them according to these instructions and the evidence, and reach an agreement on the amount. You must not agree in advance to average the estimates.

References

Day v. Panos, 676 P.2d 403 (Utah 1984).

~~CV139~~ CV157. AGREEMENT ON SPECIAL VERDICT.

I am going to give you a form called the Special Verdict that contains several questions and instructions. You must answer the questions based upon the instructions and the evidence you have seen and heard during this trial.

Because this is not a criminal case, your verdict does not have to be unanimous. At least six jurors must agree on the answer to each question, but they do not have to be the same six jurors on each question.

As soon as six or more of you agree on the answer to all of the required questions, the foreperson should sign and date the verdict form and tell the bailiff you have finished. The bailiff will escort you back to this courtroom; you should bring the completed Special Verdict with you.

~~CV140~~CV158. DISCUSSING THE CASE AFTER THE TRIAL.

Ladies and gentlemen of the jury, this trial is finished. Thank you for your service. The American system of justice relies on your time and your sound judgment, and you have been generous with both. You serve justice by your fair and impartial decision. I hope you found the experience rewarding.

You may now talk about this case with anyone you like. You might be contacted by the press or by the lawyers. You do not have to talk with them - or with anyone else, but you may. The choice is yours. I turn now to the lawyers to instruct them to honor your wishes if you say you do not want to talk about the case.

If you do talk about the case, please respect the privacy of the other jurors. The confidences they may have shared with you during deliberations are not yours to share with others.

Again, thank you for your service.

Tab 2

Subject	Sub-C in place?	Sub-C Members	Projected Starting Month	Projected Finalizing	Comments Back/Notes
Trespass and Nuisance	Yes	Hancock, Cameron; Beckstrom, Ryan	November-18	October-19	HAVE BEEN POSTED BUT NEED TO BE CIRCULATED
Uniformity	Yes	Judge Keith Kelly (chair), Alyson McAllister, Lauren Shurman	February-19	February-20	HAVE BEEN POSTED BUT NEED TO BE CIRCULATED
Caselaw updates	n/a	n/a	November-20	TBD	
Implicit Bias	TBD	Judge Su Chon (chair)	TBD	TBD	
Products Liability	Yes	Tracy Fowler, Paul Simmons, Nelson Abbott, and Todd Wahlquist	October-20	TBD	
Assault/False Arrest	Yes	Rice, Mitch (chair); Carter, Alyson; Wright, Andrew (D); Cutt, David (P)	TBD	TBD	
Insurance	Yes	Johnson, Gary (chair); Pritchett, Bruce; Ryan Schriever, Dan Bertch, Andrew Wright, Rick Vazquez; Stewart Harman (D); Ryan Marsh (D)	TBD	TBD	
Unjust Enrichment	No (instructions from David Reymann)	David Reymann	TBD	TBD	
Abuse of Process	No (instructions from David Reymann)	David Reymann	TBD	TBD	
Directors and Officers Liability	Yes	Call, Monica;Von Maack, Christopher (chair); Larsen, Kristine; Talbot, Cory; Love, Perrin; Buck, Adam	TBD	TBD	
Wills/Probate	No	Barneck, Matthew (chair); Petersen, Rich; Tippet, Rust; Sabin, Cameron	TBD	TBD	Much of this is codified in statute. There may not be enough instructions to dedicate an entire instruction area.
Civil Rights: Set 2	Yes	Ferguson, Dennis (D); Mejia, John (P); Guymon, Paxton (P); Stavors, Andrew (P); Burnett, Jodi (D); Plane, Margaret (D); Porter, Karra (P); White, Heather (D)	TBD	TBD	
Sales Contracts and Secured Transactions	Yes	Cox, Matt (chair); Boley, Matthew; Maudsley, Ade	TBD	TBD	

Tab 3

Defense Group Proposal	Plaintiff Group Proposal (if different)
CV1001 Strict liability. Introduction. [Name of plaintiff] seeks to recover damages based upon a claim that [he] was injured by a defective and unreasonably dangerous [product]. A product may be defective and unreasonably dangerous [(1) in the way that it was designed.] [(2) in the way that it was manufactured.] [(3) in the way that its users were warned.] **References** House v. Armour of America, 929 P.2d 340 (Utah 1996). **Committee Notes** Instruct the jury only with the descriptions from (1), (2) and (3) that are relevant to the case. ~~Utah's Product Liability Act is codified at Utah Code Sections 78B-6-701 to 78B-6-707. Section 78-15-3of the Utah Product Liability Act was declared unconstitutional in Berry ex rel. Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985). Following the Berry decision, the Utah legislature repealed former sections 78-15-2 (legislative findings) and 78-15-3 (the unconstitutional statute of repose), and enacted a new section 78B-6-706 (statute of limitations). The legislature did not repeal, amend or otherwise change sections 78B-6-701, 78B-6-704, or 78B-6-703, which were held to be not severable from the portions of the statute declared unconstitutional in Berry. Although Utah courts have consistently cited and relied upon the Product Liability Act as codified since the~~	**CV1001 Strict liability. Introduction and Elements of the Claim.** Strict products liability means that [name of defendant] may be liable for harm **from** a defective and unreasonably dangerous product even if [name of defendant] has exercised all possible care in the preparation and sale of the product and even if [name of plaintiff] did not purchase the product directly from [name of defendant]. Strict products liability imposes liability on [name of defendant] without any regard to the culpability of [name of defendant], ensuring that [name of plaintiff] will have a meaningful remedy. [Name of plaintiff] claims that [he/she] was harmed by a product that was [designed/manufactured/sold/distributed] by [name of defendant]. To succeed on this claim, [name of plaintiff] must prove that: 1. A defect or defective condition of the product made it unreasonably dangerous; 2. The defect was present at the time of the product's sale; and 3. The defective condition was a cause of the plaintiff's injuries. **References** Bylsma v. R.C. Willey, 2017 UT 85, ¶¶ 23, 81, 416 P.3d 595. Gudmundson v. Del Ozone, 2010 UT 33, ¶ 53, 232 P.3d 1059 Schaerrer v. Stewart's Plaza Pharmacy, Inc., 2003 UT 43, ¶ 16, 79 P.3d 922. Interwest Constr. v. Palmer, 923 P.2d 1350, 1356 (Utah 1996).

~~legislature's action, the Utah Supreme Court has never directly addressed since Berry the constitutionality of those sections declared unconstitutional in Berry. See Egbert v. Nissan N. Am., Inc., 2007 UT 64, ¶ 8, n.3. The United States District Court for the District of Utah, however, has rejected the argument that section 78B-6-703 is unconstitutional. See Henrie v. Northrop Grumman Corp., 2006 U.S. LEXIS 23621 (D. Utah 2006).~~ In drafting instructions for a particular case, note that when the term "manufacturer" is used, the terms "retailer," "designer," "distributor," may be substituted, if appropriate, as the circumstances of the case warrant. **NOTE TO COMMITTEE: The deleted portion of the prior committee note was resolved in *Egbert v. Nissan Motor Co., Ltd.*, 2010 UT 8, ¶¶9-21 – no disagreement that the question of the constitutionality of the UPLA has been resolved.**	Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152 (Utah 1979). House v. Armour of America, 929 P.2d 340 (Utah 1996). Restatement (Second) of Torts § 402A (1963 & 1964). **Committee Notes** Because strict products liability imposes liability without regard to how careful the manufacturer/seller/distributor may be, it is important that the jury be educated on that aspect of the law. *Bylsma v. R.C. Willey* reaffirmed this as the foundation and basis for products liability law and it is not readily apparent or understood by jurors. The court should only give instruction on those elements which are in dispute. For example, it is often the case that there is no dispute that the defect was present at the time of the product's sale and, accordingly, the jury should not be instructed on that element. In drafting instructions for a particular case, note that when the term "manufacturer" is used, the terms "retailer," "designer," "distributor," may be substituted, if appropriate, as the circumstances of the case warrant~~.~~
NOTE TO COMMITTEE: **Defense group's position is that the separate instructions setting out the elements for design/manufacturing defect, CV1002, and failure to warn, CV1008, should be retained to provide clarity for the jury on the exact elements required for the given type of defect claim at issue and because not every case involves all three types of claimed defects. There would not be duplication or confusion because CV1001 would be retained in its current form such that the elements would be provided only in the instruction for the applicable type of defect claim as set out in CV1002 and**	**NOTE TO COMMITTEE:** **Plaintiff group would delete this instruction -CV1002 Strict liability. Elements of claim for a [design] [manufacturing] defect.- entirely.** **Plaintiff group proposes moving the definition of unreasonably dangerous, currently CV1006, to be the new CV1002.** **Plaintiff group's position is that because a product is only defective as defined by statute, the statutory definition for a defective product, CV1006, should be given next. Individual**

CV1008. **CV1002 Strict liability. Elements of claim for a [design] [manufacturing] defect.** [Name of plaintiff] claims that [he] was injured by a [product] that had a [design] [manufacturing] defect that made the [product] unreasonably dangerous. ~~You must decide whether~~To establish a [design] [manufacturing] defect claim, [name of plaintiff] must prove all of the following: (1) there was a [design] [manufacturing] defect in the [product]; (2) the [design] [manufacturing] defect made the [product] unreasonably dangerous; (3) the [design] [manufacturing] defect was present at the time [name of defendant] [manufactured/distributed/sold] the [product]; and (4) the [design] [manufacturing] defect was a cause of [name of plaintiff]'s injuries. I will now explain what the terms ["design] ["manufacturing] defect" and "unreasonably dangerous" mean. **References** *Bylsma v. R.C. Willey*, 2017 UT 85, 416 P.3d 595. Schaerrer v. Stewart's Plaza Pharmacy, Inc., 2003 UT 43, 16, 79 P.3d 922 (citing Interwest Constr. v. Palmer, 923 P.2d 1350, 1356 (Utah 1996)). Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152 (Utah 1979). Wankier v. Crown Equipment Corp., 353 F.3d 862, 867-68 (10th Cir. 2003).	**instructions defining a design/manufacturing/warning defect would then follow as needed, eliminating the repetition and confusion engendered by offering two instructions on each of the individual theories (design/manufacture/warn).**

Brown v. Sears, Roebuck & Co., 328 F.3d 1274, 1280 (10th Cir. 2003). Allen v. Minnstar, Inc., 8 F.3d 1470, 1472 (10th Cir. 1993). Restatement (Second) of Torts § 402A (1963 & 1964). **MUJI 1st Instruction** 12.1. **Committee Notes** Section 402A of the Restatement (Second) of Torts, which the Utah Supreme Court adopted in Ernest W. Hahn, Inc., requires that the defendant be engaged in the business of selling the product. Occasional sellers are not liable in product liability actions. See Louis R. Frumer & Melvin I. Friedman, Product Liability. Section 5.04 (1997). In most cases, there will be no dispute as to whether the defendant was engaged in the business of selling the product. If the defendant was not, the court will dismiss any strict products liability claim before trial. If there is evidence from which reasonable minds could disagree, however, the court should add a fifth element: "whether … (5) [Name of defendant] was engaged in the business of selling the [product]."	
CV1003 Strict liability. Definition of "design defect." [Alternative A.] [Name of plaintiff] claims that the product had a design defect. "Design defect" means that the product was designed in a way that failed to eliminate a hazard or that it lacked features that would have reduced the risk of harm associated with the hazard. ~~The [product] had a design defect if as a result of its design, the~~	**NOTE TO COMMITTEE:** **Alternative A represents the Plaintiff group proposal; Alternative B represents the Defense group proposal.**

~~[product] failed to perform as safely as an ordinary user would expect when the [product] was used in a manner reasonably foreseeable to the manufacturer.~~ [Alternative B.] The [product] had a design defect if: (1) as a result of its design, the [product] failed to perform as safely as an ordinary user would expect when the [product] was used in a manner reasonably foreseeable to the manufacturer; and (2) at the time the [product] was designed, a safer alternative design was available that was technically and economically feasible under the circumstances. **References** Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301 (Utah 1981). Straub v. Fisher and Paykel Health Care, 1999 UT 102, 19, 990 P.2d 384. Brown v. Sears, Roebuck & Co., 328 F.3d 1274, 1280-82 (10th Cir. 2003). Schaerrer v. Stewart's Plaza Pharmacy, Inc., 2003 UT 43, 16, 79 P.3d 922 (citing Interwest Constr. v. Palmer, 923 P.2d 1350, 1356 (Utah 1996)). Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152 (Utah 1979). Allen v. Minnstar, Inc., 8 F.3d 1470, 1472 (10th Cir. 1993). Wankier v. Crown Equipment Corp., 353 F.3d 862, 867-68 (10th Cir. 2003). Restatement (Second) of Torts § 402A (1963 & 1964).	

Restatement (Third) of Torts § 2~~, notes~~(b), comment (d). Gudmundson v. Del Ozone, 2010 UT 33, ¶49 & n.13, 232 P.3d 1059.

MUJI 1st Instruction

12.3; 12.4; 12.5.

Committee Notes

Whether the second prong of the design defect definition in Alternative B - a safer alternative design - is an element of a design defect claim may be an open question. No Utah state appellate court has considered whether proving the existence of a safer alternative design is required, but the federal district courts in Utah and the Tenth Circuit have required this element as essential to a design defect claim. See Allen v. Minnstar, Inc., 8 F.3d 1470, 1472 (10th Cir. 1993); Brown v. Sears, Roebuck & Co., 328 F.3d 1274, 1280 (10th Cir. 2003); Wankier v. Crown Equipment Corp., 353 F.3d 862, 867-68 (10th Cir. 2003); Tingey v. Radionics, 193 Fed. Appx. 747 (10th Cir. 2006); Herrod v. Metal Powser Products, 413 Fed. Appx. 7 (10th Cir. 2010).

On the issue of availability, the court in Allen v. Minnstar recognized that plaintiff must prove the safer alternative design was "commercially available" or "commercially feasible." However, later pronouncements by the Tenth Circuit in Brown v. Sears, Roebuck & Co., and Wankier v. Crown Equipment Corp. have simply used the term "available." Whether the timeframe for the safer alternative design is at the time of design or manufacture or the date of sale will be determined by the particular facts of the case.

CV1004 Strict liability. Definition of "manufacturing defect." The [product] had a manufacturing defect if it differed from [(1) the manufacturer's design or specifications.] [(2) products from the same manufacturer that were intended to be identical.] **References** ~~Brown v. Sears, Roebuck & Co., 328 F.3d 1274, 1280-82 (10th Cir. 2003).~~ <u>Niemela v. Imperial Mfg., Inc., 2011 UT App 333, 20, 263 P.3d 1191.</u> Schaerrer v. Stewart's Plaza Pharmacy, Inc., 2003 UT 43, 16, 79 P.3d 922 (citing Interwest Constr. v. Palmer, 923 P.2d 1350, 1356 (Utah 1996)). Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152 (Utah 1979). Restatement (Second) of Torts § 402A (1963 & 1964). **MUJI 1st Instruction** 12.2. **Committee Notes** Instruct the jury only with the descriptions from (1) or (2) that are relevant to the case.	**<u>NOTE TO COMMITTEE:</u>** **The two groups agree on this instruction.**
CV1005 Industry standard. In deciding whether the [product] is defective, you may consider	**<u>NOTE TO COMMITTEE:</u>** **Plaintiff group believes this instruction should be deleted.**

the evidence presented concerning the design, testing, manufacture and type of warning for similar products. **References** Tafoya v. Sears Roebuck & Co., 884 F.2d 1330, 1332 (10th Cir. 1989). Restatement (Third) of Torts, Product Liability §4. **Committee Notes** This instruction is applicable to both negligence and strict product liability claims.	
CV1006 Strict liability. Definition of "unreasonably dangerous." [Alternative A.] A [product] ~~with [a design defect] [a manufacturing defect] [an inadequate warning]~~ was unreasonably dangerous if it was more dangerous than an ordinary and prudent buyer, consumer, or user of ~~the~~that [product] would expect considering the [product]'s characteristics, propensities, risks, dangers, and uses, together with any actual knowledge, training, or experience that the particular buyer, consumer, or user had. [Alternative B.] A [product] with [a design defect] [a manufacturing defect] [an inadequate warning] was unreasonably dangerous if: (1) it was more dangerous than an ordinary and prudent buyer, consumer, or user of the [product] would expect considering the [product]'s characteristics, propensities, risks, dangers, and uses	**NOTE TO COMMITTEE:** **Alternative A is Plaintiff group proposal; Alternative B is Defense group proposal.**

that were foreseeable to the manufacturer, and any instructions or warnings; and (2) [name of user] did not have actual knowledge, training, or experience sufficient to know the danger from the [product] or from its use. **References** Utah Code Section 78B-6-~~703(2).~~702. Brown v. Sears, Roebuck & Co., 328 F.3d 1274, 1280-82 (10th Cir. 2003). Restatement (Second) of Torts § 402A (1963 & 1964). Gudmundson v. Del Ozone, 2010 UT 33, ¶ 47, 232 P.3d 1059. Niemela v. Imperial Mfg., Inc., 2011 UT App 333, ¶ 9, 263 P.3d 1191. **MUJI 1st Instruction** 12.1; 12.14. **Committee Notes** Alternative A is a restatement of Utah Code Section 78B-6-~~703~~702, in which the knowledge, training, and experience of the user are among the factors for the jury to consider in deciding whether the product was unreasonably dangerous. Alternative B is a restatement of Brown v. Sears, Roebuck & Co., 328 F.3d 1274 (10th Cir. 2003), as adopted by the Utah Court of Appeals in *Niemela v. Imperial Mfg., Inc.*, 2011 UT App 333, in which the knowledge, training, and experience of the user are a complete defense.	

CV1007 Strict liability. Duty to warn.

[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 first decide if [name of defendant] was required to provide a warning.

[Name of defendant] was required to warn about a danger from the [product]'s foreseeable use of which [he] knew or reasonably should have known and that a reasonable user would not expect.

[Name of defendant] was not required to warn about a danger from the [product]'s foreseeable use that is generally known and recognized.

References

House v. Armour of America, Inc., 929 P.2d 340, 344 (Utah 1996).
Restatement (Second) of Torts § 402A comment j (1963 & 1964).

MUJI 1st Instruction

12.6; 12.7.

Committee Notes

This instruction may not be appropriate if the manufacturer provided a warning, ~~or~~ if the manufacturer does not dispute that it had a duty to warn the plaintiff of a particular danger, or if the Court determines as a matter of law that a warning was required.

If this instruction is not appropriate for the case, proceed to CV1008 “Strict liability. Elements of claim for failure to adequate warn” and CV1009 “Strict liability. Definition of ‘adequate

warning'." 	
NOTE TO COMMITTEE: **Defense group's position is that this instruction should be retained. See Note to Committee in CV1002 above.** **CV1008 Strict liability. Elements of claim for failure to adequately warn.** [If you find that a warning was required,] ~~you must [next] decide whether~~[[Name of plaintiff] claims that he was injured by a [product] that was defective and unreasonably dangerous because it lacked an adequate warning,] to establish a failure to warn claim, [name of plaintiff] must prove all of the following: (1) [name of defendant] failed to provide an adequate warning at the time the product was [manufactured/distributed/sold]; (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, meaning had an adequate warning been provided, [name of plaintiff] would have altered [his] use of the [product] or taken added precautions to avoid the injury. I will now explain what the terms "adequate warning" and "unreasonably dangerous" mean. **References** House v. Armour of America, 929 P.2d 340 (Utah 1996). Restatement (Second) of Torts § 402A (1963 & 1964). Kirkbride v. Terex, 798 F.3d 1343, 1350 (10th Cir. 2015).	**NOTE TO COMMITTEE:** **Plaintiff group would delete this instruction entirely. See Note to Committee in CV1002 above.**

MUJI 1st Instruction 12.6; 12.7. **Committee Notes** ~~The~~Which set of bracketed language in the first paragraph should be given ~~only if~~depends on whether the jury~~, not the judge, decides~~ must decide whether there was a duty to warn. A case might raise the issue of the adequacy of the product's instructions, rather than the adequacy of the warnings, in which case the judge would properly substitute "instruct" and "instructions" for "warn" and "warnings."	
CV1009 Strict liability. Definition of "adequate warning." A warning is adequate if, in light of the ordinary knowledge common to members of the community who use the [product], the warning: (1) was designed to reasonably catch the user's attention; (2) was understandable to foreseeable users; (3) fairly indicated the danger from the [product]'s foreseeable use; and (4) was sufficiently conspicuous to match the magnitude of the danger. **References** House v. Armour of America, Inc., 886 P.2d 542 (Utah Ct App 1994), affd 929 P.2d 340 (Utah 1996). Feasel v. Tracker Marine LLC, 2020 UT App 28, cert granted 466	**NOTE TO COMMITTEE:** **The two groups agree on this instruction.**

P.3d 1072. **Committee Notes** This instruction should be followed by Instruction 1006. Definition of "unreasonably dangerous." This instruction may not be appropriate if a regulatory body, such as the Food and Drug Administration, directs that a specific warning must be given for a product. See, e.g., 21 CFR 201.57, detailing format headings and order of warning for particular drugs and medical devices.	
CV1010 ~~Strict liability.~~ Failure to warn. ~~Presumption~~No adequate warning; Rebuttable presumption that ~~a~~an adequate warning would have been read and followed. ~~You can presume that if~~If you find [name of defendant] ~~had provided~~did not provide an adequate warning, you must presume that [name of plaintiff] would have read and followed ~~it~~an adequate warning unless ~~the evidence shows~~[name of defendant] proves that [name of plaintiff] would not have read or followed such a warning. If [name of defendant] proves that [name of plaintiff] would not have read or followed such a warning, you must find the lack of an adequate warning was not a cause of [name of plaintiff]'s injuries. **References** House v. Armour of America, Inc., 886 P.2d 542 (Utah Ct App 1994), affd 929 P.2d 340, 347 (Utah 1996). Kirkbride v. Terex, 798 F.3d 1343, 1351 (10th Cir. 2015). Rule 301. Utah Rules of Evidence.	**NOTE TO COMMITTEE:** **The two groups agree on this instruction.**

Committee Notes This instruction is appropriate when it cannot be demonstrated whether the injured party would have read and followed an adequate warning. See House v. Armour of America, 886 P.2d 542 (Utah Ct App 1994), affd 929 P.2d 340, 347 (Utah 1996). Some members of the committee do not believe this instruction is appropriate in cases in which the "learned intermediary doctrine" applies. See Schaerrer v. Stewart's Plaza Pharmacy, Inc., 2000 Utah 43, 16, 79 P.3d 922 (citation omitted). While the FDA regulates the labeling of prescription pharmaceuticals and medical devices, it does not regulate the practice of medicine, including the prescribing practices of physicians. See 59 FR 59820-04, 1994 WL 645925 (1994). This instruction is applicable to both negligence and strict product liability claims.	
CV1011 ~~Strict liability.~~ Failure to warn. Presumption that a warning will be read and followed. If you find that [name of defendant] gave a[n adequate] warning, [~~he~~name of defendant] could reasonably presume that the warning would be read and followed. A product bearing a[n adequate] warning, which is safe for use if it is followed, is not in a defective condition, nor is it unreasonably dangerous. **References**	**NOTE TO COMMITTEE:** **The two groups continue to disagree about whether an "adequate" warning is required for CV1011 to apply, which disagreement is reflected in the bracketed language and committee note.**

Restatement (Second) of Torts § 402A comment j (1963 & 1964). House v. Armour of America, Inc., 886 P.2d 542 (Utah Ct App 1994), affd 929 P.2d 340 (Utah 1996). Kirkbride v. Terex, 798 F.3d 1343, 1351 (10th Cir. 2015). **MUJI 1st Instruction** 12.6; 12.7. **Committee Notes** The unbracketed language in the first sentence is based on Comment j to Section 402A, which states: "Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous." Restatement (Second) of Torts § 402A cmt. j (1964). This language from Comment j was recognized in House v. Armour of Am., 886 P.2d 542 (Utah Ct. App. 1994), affirmed 929 P.2d 340 (Utah 1996), and incorporated in the first version of the Model Utah Jury Instructions in instructions 12.6 and 12.7. Although the word "adequate" does not appear in this language of Comment j, some members of the committee believe that a defendant is entitled to the presumption only if the warning was adequate. These members suggest that the word "adequate" precede the word "warning" in this instruction to achieve uniformity with other instructions on warnings. This instruction is applicable to both negligence and strict product liability claims.	

CV1012 Strict liability. Component part manufacturer. Part defective only as incorporated into finished product.

[Name of defendant] [designed/manufactured/distributed/sold] a component part of the [product].

If you find that the component part was not defective as [designed/manufactured/distributed/sold~~]~~], but only became defective as a result of the way it was [installed/incorporated/used] in the finished ~~[~~product~~]~~,, then for [name of defendant] ~~can only~~to be liable ~~to~~, [name of plaintiff] ~~if~~must prove all of the following:

(1) [Name of defendant] ~~knew enough about the design or operation~~substantially participated in the integration of the component part into the finished ~~[~~product~~] that [he] could have reasonably foreseen that an injury could occur because~~;

~~(1)~~(2) The integration of the ~~way the~~ component part ~~would be used in~~into the ~~[~~finished product~~], and~~ made the finished product defective; and,

~~(2) [Name of defendant] did not warn the [final assembler of the product] of that danger.~~

(3) The defect in the [product] created by the integration of the component part was a cause [name of Plaintiff]'s harm.

To substantially participate, [name of defendant] must have had some control over the decision-making process of the final product or system. Knowledge of the ultimate design of the

finished product, by itself, does not amount to substantial participation. A component part [designer/manufacturer/distributor/seller] does not have a duty to foresee all the dangers that may result from the use of a final product which contains its component part and does not have a duty to analyze or anticipate the design of the finished product or system of which its component is a part. However, if the specifications for the component part are obviously unreasonably dangerous, [name of defendant] may be deemed to have control over the product and to have substantially participated. ~~**MUJI 1st Instruction**~~ ~~12.8.~~ **References** Gudmundson v. Del Ozone, 2010 UT 33, 232 P.3d 1059.	
CV1013 Strict liability. Component part manufacturer. Defective part incorporated into finished product. [Name of defendant] [designed/manufactured/distributed/sold] a component part of the [product]. If you find ~~that~~each of the following: (1) the component part was defective as [designed/manufactured/distributed/sold~~] and that~~],	

(2) the defective part made the finished product unreasonably dangerous, and

(3) the defect in the [product] created by the integration of the component part was a cause of [name of plaintiff]'s injuries,

then you ~~may~~must find both [name of defendant], the manufacturer of the component part, and [name of co-defendant or third party], the manufacturer of the finished product, liable to [name of plaintiff].

References

Utah Code Sections 78B-5-817 to 78B-5-823.
Bylsma v. R.C. Willey, 416 P.3d 595 (2017)
Restatement (Third) of Torts: Apportionment of Liability §13.

Committee Notes

The Utah Supreme Court has not yet determined ~~if or how fault should be apportioned between~~ the liability of the manufacturer of a component part that is defective ~~part~~ and ~~the manufacturer of the finished product. Some courts applying a comparative fault system similar to Utah's have concluded that, in some situations, such as in cases of vicarious liability or strict products liability, multiple defendants should be treated as a single unit, on the theory that they are "joint tortfeasors" in the original sense, that is, persons responsible for carrying out a tort by concerted action. See, e.g., In re Rapco Foam, Inc., 23 B.R. 692 (W.D. Wis. 1982); Arena v. Owens-Corning Fiberglas Corp., 74 Cal. Rptr. 2d 580, 593 (Ct. App.), review denied (Cal. 1998); Wimberly v. Derby Cycle Corp., 65 Cal. Rptr. 2d 532, 535-41 (Ct. App. 1997), and cases cited therein; Steenrod v. Doubrava, 498 N.Y.S.2d 225 (App. Div. 1986);~~

~~Restatement (Third) of Torts: Apportionment of Liability §§ 7 cmt. j; 13 & cmts. a, c, d, and e. Therefore, some subcommittee members favored the following instruction:~~ ~~If you find that the component part was defective as [designed/manufactured/distributed/sold] and that the defective part~~ made the finished product ~~unreasonably dangerous, then you may find both [name of defendant], the manufacturer of the component part, and [name of co-defendant or third party],~~defective. In *Bylsma,* the Utah Supreme Court held that strictly liable defendants who are liable for breaching the same duty by selling a dangerously defective product be treated as a unit, and each can be strictly liable for the plaintiff's harm. *See Bylsma v. R.C. Willey,* 2017 UT 85, ¶ 15, 416 P.3d 595. The same rationale is likely to apply to the manufacturer of a component part and the manufacturer of the finished product~~, liable to [name of~~ where both the component part and the finished product are defective and the plaintiff~~].~~ is injured by the defective product. Additionally, the Utah Supreme Court in Gudmundson v. Del Ozone, 2010 UT 33, declined to adopt the Restatement (Third) of Torts to the situation where the component part itself is defective. "We do not quote section (a) of the Restatement because it only addresses situations in which the component part itself is defective. Because this situation is adequately addressed in our case law, we do not wish to create confusion by applying the Restatement to those situations." Gudmundson, at ¶ 55, n. 4	
CV1014 ~~Strict liability. Defective condition of~~No design defect in FDA approved drugs.	

If a drug product conformed with the United States Food and Drug Administration (FDA) standards in existence at the time the product was sold, the product is free of any design defect. However, [name of plaintiff] may still prove that the product was defective and unreasonably dangerous due to a manufacturing defect or an inadequate warning.

References
Grundberg v. Upjohn Co., 813 P.2d 89 (Utah 1991).

MUJI 1st Instruction
12.13.

Committee Notes
In Grundberg v. Upjohn Co., 813 P.2d 89 (Utah 1991), the Utah Supreme Court exempted claims for misrepresentation on the FDA from the operation of this rule. However, in the subsequent decision of Buckman Co. v. Plaintiffs' Legal Committee, 531 U.S. 341, 121 S.Ct. 1012, 69 USLW 4101, the United States Supreme Court held that state law fraud on the FDA claims conflict with and are preempted by federal law. 531 U.S. at 348, 121 S.Ct. at 1017. Accordingly, the committee has not included claims of misrepresentation on the FDA in this instruction. ~~At the time of the drafting of this instruction, there was an unresolved split among federal district courts regarding preemption of warnings claims for FDA approved pharmaceuticals. The language of this instruction may, therefore, require amendment depending upon the resolution of that conflict.~~

This instruction is applicable to both negligence and strict product liability claims.

CV10-- – Failure to warn claims for FDA approved drugs.

Prescription drug [labels] [warnings] are regulated by the United States Food and Drug Administration ("FDA"). [Name of plaintiff] maintains [drug product] did not include an adequate warning. If [name of defendant] proves by clear evidence that the FDA would not have permitted the [label] [warning] to contain the additional information complained of by [name of plaintiff], [name of defendant] is not liable to [name of plaintiff] for not including the information on the [label][warning].

References

Cerveny v. Aventis, Inc., 855 F.3d 1091 (10th Cir. 2017).

Committee Notes

In Buckman Co. v. Plaintiffs' Legal Committee, 531 U.S. 341, 121 S.Ct. 1012, 69 USLW 4101, the United States Supreme Court held that state law fraud on the FDA claims conflict with and are preempted by federal law. 531 U.S. at 348, 121 S.Ct. at 1017. Accordingly, the committee has not included claims of misrepresentation on the FDA in this instruction. Applicable caselaw analyzing preemption of such claims holds a state law failure to warn claim is preempted by federal law "if a pharmaceutical company presents clear evidence that the FDA would have rejected an effort to strengthen the label's warnings." *Cerveny v. Aventis, Inc.*, 855 F.3d 1091 (10th Cir. 2017) (citing *Dobbs v. Wyeth Pharm.*, 606 F.3d 1269, 1269 (10th Cir. 2010).

This instruction is applicable to both negligence and strict product liability claims.
