# Agenda
## Advisory Committee on
## Model Civil Jury Instructions

June 9, 2008
4:00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Judicial Council Room, Suite N31

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| Approval of minutes | Tab 1 | John Young |
| Product Liability Instruction 1057 | Tab 2 | John Young |
| Contract Instructions | Tab 3 | Gary Johnson |

**Committee Web Page:** http://www.utcourts.gov/committees/muji/

**Published Instructions:** http://www.utcourts.gov/resources/muji/

**Meeting Schedule:** Matheson Courthouse, 4:00 to 6:00 p.m.

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|---|---|
| August 11, 2008 | Motor Vehicles |
| September 8, 2008 | Premises Liability |
| October 14, 2008 | Employment |
| November 10, 2008 | Insurance Obligations |
| December 8, 2008 | Construction Contracts |
| January 12, 2009 | Intentional Torts / Fraud and Deceit |
| February 9, 2009 | Eminent Domain |
| March 9, 2009 | Probate |
| April 13, 2009 | Professional Liability |

# Tab 1

***MINUTES***
Advisory Committee on Model Civil Jury Instructions
May 12, 2008
4:00 p.m.

Present: John L. Young (chair), Juli Blanch, Phillip S. Ferguson, L. Rich Humpherys, Gary L. Johnson, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons

The committee reviewed the contract instructions:

1. *CV 2101. Issues in a breach of contract case*. The committee approved this instruction.

Mr. Nebeker joined the meeting.

2. *CV 2102. Elements for breach of contract.* At Mr. Simmons's suggestion, "whether" in each of the subparagraphs was replaced with "that." The committee approved the instruction as modified. The bracketed note suggesting that definitions of "express" and "implied" were needed was moved to CV 2103.

3. *CV 2103. Creation of a contract*. At Mr. Simmons's suggestion, "verbal" in the second line was replaced with "oral," and the third paragraph was revised to read: "What the parties have promised to do for each other has to be clear enough that they can tell what it is they have each promised to do for the other." Mr. Simmons also pointed out that the instruction only applies to executory contracts and not to unilateral contracts. **The committee will ask the subcommittee to add a note to that effect.** The committee approved the instruction, subject to review of the subcommittee note.

4. *2104. Offer*. The committee approved this instruction.

5. *2105. Acceptance*. The phrase "by words" in the third line was replaced with "orally." Mr. Nebeker questioned whether "objective" in the second paragraph was necessary. Mr. Johnson noted that the test is an objective one. Without the word "objective," the jury may think it is a subjective standard as long as the offeree is a reasonable person. The instruction was approved as modified.

6. *2106. Withdrawal of an offer*. The committee approved this instruction.

Ms. Blanch and Mr. Humpherys joined the meeting.

7. *2107. Consideration*. At Mr. Ferguson's suggestion, **the committee will ask the subcommittee to add a note regarding unilateral contracts, similar to the note requested for CV 2103.** Mr. Simmons suggested that the note also cross-reference the instruction on promissory estoppel, since reliance can take the place

of consideration. At Ms. Blanch's suggestion, the sentence, "This is called 'consideration.'" was added after the first sentence, so that jurors will understand the term if it is used in the contract. Mr. Humpherys suggested using "consideration" rather than "something of value" after the term is defined, but the committee thought "something of value" would be more easily understood by lay jurors. Mr. Nebeker suggested revising the last clause to read, "then there is no consideration," but the committee thought it best to leave it as it is. The committee approved the instruction as modified.

8. *CV 2108. Duty to perform.* Mr. Humpherys thought the title of the instruction was misleading. At Mr. Shea's suggestion, it was changed to "Simultaneous duty to perform." Mr. Simmons noted that the instruction says the parties agree that the contract required simultaneous performance and asked what happens if the parties can't agree. Mr. Young suggested adding a committee note saying when to use CV 2108 and when to use CV 2109. At Mr. Humpherys's suggestion, "either did or was ready to do" was changed to "[did/was ready to do]."

9. *CV 2109. Time of performance.* The title was changed to "Unspecified time of performance." Mr. Johnson noted that the subcommittee had included as a factor to consider "anything else you feel is relevant." His reviewing committee thought this language was too broad and replaced it with "anything else that a reasonable person would think is relevant." Mr. Nebeker asked whether it should be "an objective reasonable person," in keeping with the language of CV 2105. Mr. Humpherys thought the instruction mixed an objective standard with a subjective standard and questioned whether the legal standard was when the plaintiff "would have expected" the defendant to have performed. He asked why the plaintiff's expectations are relevant and thought that the jury must determine when performance should take place, not when the plaintiff expected performance. Mr. Simmons suggested that the plaintiff's expectations should perhaps be just one more factor for the jury to consider. **The committee concluded that it was not familiar enough with the law to resolve this issue and agreed to send the instruction back to the subcommittee to answer the question.**

10. *CV 2110. Discharge by performance.* Mr. Simmons asked why the instruction was necessary. He thought it was adequately covered by CV 2110. Mr. Johnson noted that his reviewing committee had the same question and added the note saying that the instruction should only be used in the absence of any defenses. Mr. Young suggested that the problem was with the title. The title was changed to "Damages for nonperformance," and the instruction was moved to the damage instructions.

11. *CV 2111. Substantial performance.* Mr. Young thought that subparagraph (2) was awkward. It was eventually revised to read:

> (2) what [he] failed to do was important to fulfilling the purpose of the contract. A failure is not important to fulfilling the purpose of the contract if it was minor and could be fixed without difficulty.

Ms. Blanch asked whether the legal standard was "minor *and* could be fixed" or "minor *or* could be fixed." Mr. Simmons noted that the instruction does not specify who has the burden of proof on the issue. Mr. Humpherys asked if the general instruction on burden of proof would satisfy that concern. Mr. Ferguson noted that the burden of proof my depend on how the issue is presented and could shift. Mr. Young suggested adding a committee note to the effect that an appropriate instruction will have to be given on the burden of proof.

12. *CV 2112. Occurrence or failure of condition precedent; and CV 2113. Disputed condition precedent.* Mr. Simmons suggested that these two instructions cross-reference each other. CV 2112 applies when the parties agree that there was a condition precedent, and CV 2113 applies when the existence of a condition precedent is disputed. Mr. Simmons also asked whether the existence of a condition precedent is a question for the jury or a question of law for the court. Mr. Humpherys suggested that the jury must decide whether a condition is part of the contract (particularly in the case of oral and implied contracts), but the judge decides whether a condition is a condition precedent or not. He suggested adding a committee note saying that the judge must decide whether a condition is a condition precedent, but the jury must decide whether the condition was part of the contract and whether it was met. The instructions were approved, **subject to the subcommittee's response to the question of whether CV 2113 was meant to apply only where there is a question as to whether a condition was part of an oral or implied contract.**

13. *CV 2114. Performance excused by material breach; and CV 2118. Material breach.* Mr. Simmons noted that CV 2114 uses a different standard for material breach than CV 2118. **The instructions were sent back to the subcommittee to clarify whether the standards are different depending on which party is claimed to have breached the contract or whether they should be the same, and, if the same, what the correct standard is.**

14. *CV 2115. Performance not excused by other party's non-performance.* At Mr. Simmons's suggestion, the title was changed to "When performance not excused by other party's non-performance." At Mr. Humpherys's suggestion, the references to the parties were revised to indicate that the names of the parties should be used. At Mr. Young's suggestion, the instruction was revised to read:

> [Name of party] cannot by a willful act or omission make it difficult or impossible for [name of the other party] to perform [describe

> obligation] and then be excused from performing [the obligation] because [name of the other party] did not perform.
>
> If you decide that [name of party] was willing and able to perform [his] obligation, but that [he] could not perform [the obligation] because of something that [name of party] purposely did or failed to do, then [name of party] was excused from performing [his] obligation under the contract.

Messrs. Young and Humpherys also suggested adding a committee note regarding who has the burden of proof on the issue. As modified, the committee approved the instruction.

15. *CV 2116. Promissory estoppel.* At Mr. Simmons's suggestion, the second paragraph was revised to read, "To succeed on this claim [name of plaintiff] must prove that:" and the phrase "to the extent necessary to avoid injustice" was added to the end of the instruction. Mr. Humpherys asked whether the latter addition was better included in the damage instructions, and Mr. Young questioned whether the last paragraph was necessary. The words "you must" were added before "decide" in the sixth paragraph. The committee approved the instruction as revised.

16. *CV 2117. Breach of the contract.* Mr. Simmons thought the instruction was unnecessary, that it was covered by CV 2102, but the committee approved the instruction.

17. *CV 2119. Total breach.* **The committee wondered why the instruction was necessary and sent it back to the subcommittee to answer that question.**

18. *CV 2120. Partial breach.* Mr. Simmons suggested that the instruction be moved to the damage instructions. Mr. Young asked whether the instruction precluded consequential damages. The committee thought it did not. The committee approved the instruction.

19. *CV 2121. Anticipatory breach.* Mr. Johnson noted that the instruction received from the subcommittee said that an anticipatory breach required the breaching party to "manifest[] positively and unequivocally." The reviewing committee changed this to "shows unequivocally," but the committee wondered what that meant in terms of the standard of proof. Must a party prove an anticipatory breach by clear and convincing evidence? **The committee sent the instruction back to the subcommittee to answer this question.** Mr. Simmons noted that the phrase "when the time arrives" at the end of the first paragraph was ambiguous. At Mr. Young's

suggestion, the sentence was revised to say that it is a material breach if a party "shows unequivocally that [he] does not intend to perform [his] future contract obligations." At Mr. Humpherys's suggestion, the word "broken" in subparagraph (1) was changed to "breached" since the other instructions all talk about breaches of contract and not "broken" contracts. Mr. Humpherys asked when subparagraph (2) would ever apply. **This question was also referred to the subcommittee.**

20. *CV 2122. Implied covenant of good faith and fair dealing.* Mr. Young thought the instruction should have a committee note saying that a breach of the implied covenant of good faith can give rise to consequential damages even if the contract purports to exclude consequential damages. Mr. Humpherys thought that the second sentence was an incomplete statement of the law, that a breach of the covenant does not necessarily require an intent to injure. Mr. Humpherys also thought the second paragraph was misleading. He thought the judge, not the jury, decides whether what is being claimed is inconsistent with the terms of the contract. Other committee members suggested that the issue would generally be decided before trial, on a motion for summary judgment or motion in limine. Mr. Ferguson suggested bracketing ways in which a party may act in bad faith, and let the parties and the court choose the alternatives that apply to the particular case. He asked whether the duty of good faith and fair dealing is the same in the insurance context as it is in other commercial contexts. Mr. Humpherys said it was not; it is broader in insurance cases and includes a duty to investigate and a duty to treat lay people as lay people, among other things. Insurance bad faith will be the subject of another instruction or set of instructions (one for first-party bad faith and one for third-party bad faith). The committee discussed additional case law on bad faith. **The committee decided to send the instruction back to the subcommittee to be reworked in light of the additional cases.**

> **If committee members have additional cases that they think the subcommittee should consider, they should get them to Mr. Shea as soon as possible.**

21. *CV 2123. Accord and satisfaction.* Mr. Humpherys thought the instruction should define the contractual obligations at issue. The instruction was revised to read:

> [Name of defendant] claims that [he] did not have to perform [describe contract obligation] because [he] and [name of plaintiff] had a disagreement about the contract that they resolved by entering into a new contract that replaced the first contract. [Name of defendant] claims that the new contract required [describe the new obligation(s)] and that [he] has fully performed or is performing these obligations.

To succeed on this claim [name of defendant] must prove that:

. . .

(2) [name of defendant] fully performed or is performing [his] obligations under the new contract.

If you decide that [name of defendant] has proved both of these things, then [name of defendant] is released from performing [describe contract obligation(s)] under the original contract.

The committee approved the instruction as revised.

22. *CV 2124. Novation.* The instruction was revised to read:

[Name of defendant] claims that [he] did not need to perform [describe contract obligation(s)] under the old contract because of a new contract that substitutes [name of new party], who will perform in [his] place. To succeed on this claim, [name of defendant] must prove all of the following:

. . .

(3) [Name of plaintiff] intended to accept the new party as a substitute for [name of defendant] and to release [name of defendant] of [his] obligations under the old contract.

The committee approved the instruction as revised.

23. *CV 2126. Improper threat.* **Mr. Johnson noted that this instruction needs to go back to the subcommittee because it uses undefined terms that are not familiar to lay jurors, such as "tort" and "use of civil process."**

*Next Meeting*. The next regularly meeting is Monday, June 9, 2008, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

# Tab 2

**CV 1057. Safety risks.**

A [product] is not defective or unreasonably dangerous ~~merely~~ because it presents some safety risks that cause it to be dangerous for its intended use, nor is it defective or unreasonably dangerous ~~merely~~ because it could have been made safer or because a safer model of the [product] is available.

**References**

Slisze v. Stanley-Bostitch, 1999 UT 20, ¶ 10.

Fed. Jury Prac. and Instr., § 122.10 (5th Ed. 2000) (modified).

**MUJI 1st References**

**Committee Notes**

# Tab 3

# Contract Instructions

## Table of Contents

**CV2101. Issues in a breach of contract case.**

[Name of plaintiff] claims that [he] had a contract with [name of defendant] for [list purpose or description of the contract]. [Name of plaintiff] also claims that [name of defendant] breached the contract by not performing [his] obligations and that [name of plaintiff] has been damaged as a result. [Name of plaintiff] wants [name of defendant] to pay [him] money to compensate [him] for the damages [he] claims to have suffered.

[Name of defendant] denies [name of plaintiff]'s claims and in [his] defense claims that [list affirmative defenses].

MUJI 1st Instruction

Approved

**CV2102. Elements for breach of contract.**

In order to recover damages, [name of plaintiff] must prove each of these four things:

(1) ~~whether~~ that there was a contract between [name of plaintiff] and [name of defendant];

(2) ~~whether~~ that [name of plaintiff] did what the contract required [him] to do, or ~~whether~~ that [he] was excused from performing [his] contract obligations;

(3) ~~whether~~ that [name of defendant] breached the contract by not performing [his] obligations; and

(4) ~~whether~~ that [name of plaintiff] was damaged because [name of defendant] breached the contract.

References

Bair v. Axiom Design, L.L.C., 2001 UT 20, ¶ 14.

MUJI 1st Instruction

Approved

**CV2103. Creation of a contract.**

You must decide whether [name of plaintiff] and [name of defendant] had a contract. A contract is an agreement between two or more parties. It can be either ~~verbal~~ oral or written, or a mixture of both.

To create a contract, each party must promise to do something for the other party in exchange for something of value. "Value" doesn't necessarily have to be money. It can be a promise to do some act in exchange for the other party's act or promise.

What the parties have promised to do for each other has to be ~~spelled out, either expressly or impliedly, well~~ clear enough that they can tell what it is they have each promised to do for the other.

References

Glacier Land Co., L.L.C. v. Claudia Klawe & Associates, L.L.C., 2006 UT App 516.

Golden Key Realty, Inc. v. Mantas, 699 P.2d 730 (Utah 1985).

MUJI 1st Instruction

Committee Note: Unilateral contract. Acceptance by performance.

[Subcommittee: Definition and instruction on "implied" or "express" is needed (2103).]

Approved.

**CV2104. Offer.**

To create a contract, the parties have to agree on the terms of the contract. Whether they have agreed on the terms of the contract depends on whether [party's name] made an offer that was accepted by [other party's name].

A party makes an offer when [he] invites the other party to accept [his] terms in such a way that the party accepting the offer realizes that if [he] accepts the terms, both parties will become obligated to each other. The terms of the offer have to be clear and definite.

All of the important terms of the offer have to be accepted unconditionally. If the accepting party accepts some terms of the offer, but not others, or proposes different or additional terms, this becomes a counteroffer which then must be accepted unconditionally by the other party before a contract is formed.

Nunley v. Westgates Casing Services, Inc., 1999 UT 100(citing Engineering Assoc. v. Irving Place Assoc., 622 P.2d 784, 787 (Utah 1980)).

References

DCM Investment Corp. v. Pinecrest Investment Co., 2001 UT 91, ¶ 12.

Cal Wadsworth Construction v. City of St. George, 898 P.2d 1372 (Utah 1995).

Equitable Life & Cas. Ins. Co. v. Ross, 849 P. 2d 1187, 1192 (Utah Ct. App. 1993).

MUJI 1st Instruction

Approved

**CV2105. Acceptance.**

A party accepts an offer when [he] agrees unconditionally to all of the terms. Unless an offer specifies that the terms need to be accepted in a certain manner, acceptance can be shown by something in writing, or ~~by words~~ orally, or by the conduct of the party who accepts the offer.

In order to decide whether the offer was accepted in this case, ask yourself whether [party's name] communicated [his] acceptance of the offer so that an objective, reasonable person would understand that a contract had been made.

References

Cal Wadsworth Construction v. City of St. George, 898 P.2d 1372 (Utah 1995).

Engineering Assoc. v. Irving Place Assoc., 622 P.2d 784, 787 (Utah 1980). Nunley v. Westgates Casing Servs., Inc., 1999 UT 100, ¶ 27.

MUJI 1st Instruction

Approved

**CV2106. Withdrawal of offer.**

An offer can be withdrawn at any time before it is accepted, but not afterwards.

Jones v. New York Life Insurance Co., 15 Utah 522, 50 P. 620 (1897).

MUJI 1st Instruction

Approved

**CV2107. Consideration.**

To create a contract, each party must promise to do something for the other party in exchange for something of value. This is called "consideration." It can be a promise to do some act in exchange for the other party's act. "Value" doesn't necessarily have to be money, but it can be.

If you find that either party did not agree to give something of value in exchange for the other party's promise to perform [his] obligations under the contract, then there is no contract.

References

Resources Management Co. v. Weston Ranch & Livestock Co., 706 P.2d 1028 (Utah 1985).

Latimer v. Holladay, 103 Utah 152, 134 P.2d 183 (1943).

Restatement (Second) of Contracts § 71 (1979).

MUJI 1st Instruction

Committee Note: Relates to executory contract. Not unilateral. Reference promissory estoppel. 2116

Approved

**CV2108. ~~D~~Simultaneous duty to perform.**

[Name of plaintiff] and [name of defendant] agree that their contract required both parties to perform their contract obligations at the same time. Consequently, [name of defendant] had to do what [he] promised to do only if [name of plaintiff] ~~either~~ [did]/~~ or~~ [was ready to do] what [he] promised to do.

References

Collard v. Nagle Construction, Inc., 2002 UT App 306, ¶ 19.

Century 21 All Western Real Estate and Inv., Inc. v. Webb, 645 P.2d 52, 55-56 (Utah 1982).

Restatement (Second) of Contracts § 238.

MUJI 1st Instruction

Committee Note: Application of these two instructions under what circumstances.

Approved

**CV2109. ~~T~~Unspecified time of performance.**

Even though the contract does not specify a time ~~by which~~ when [name of defendant] had to do what [he] promised to do, [name of defendant] had to do what [he] promised to do within a reasonable time.

You must decide what a reasonable time was by considering the nature of the agreement, the relationship between the parties, the circumstances surrounding [name of defendant]'s performance of [his] duties, and anything else that a reasonable person would think is relevant to determining when ~~[name of plaintiff] would have expected~~ [name of defendant] ~~to~~ should have performed [his] contract obligations.

References

Coulter & Smith, Ltd. v. Russell, 966 P.2d 852 (Utah 1998).

Bradford v. Alvey & Sons, 621 P.2d 1240, 1242 (Utah 1980).

MUJI 1st Instruction

Return to subcommittee. Plaintiff's expectation is one of the factors to consider?

**CV2110. ~~Discharge by~~ Damages for non-performance.**

[Name of plaintiff] is entitled to recover damages from [name of defendant] if [name of plaintiff] did everything [he] had promised to do under the contract and [name of defendant] failed to do what [he] had promised to do under the contract.

Advisory Committee Note: This instruction should be used only in the absence of any defenses.

References

Restatement (Second) of Contracts § 235.

Smith v. Grand Canyon Expeditions Co., 2003 UT 57, ¶ 27.

MUJI 1st Instruction

Move to damages section

Approved

**CV2111. Substantial performance.**

[Name of plaintiff] claims that even though [he] did not do everything exactly as the contract required, [he] should still recover damages from [name of defendant] because [name of defendant] breached the contract. [Name of plaintiff]'s failure to do everything exactly as promised under the contract does not prevent [him] from recovering damages unless

(1) [he] acted in bad faith or

(2) what [he] failed to do was important to fulfilling the purpose of the contract. ~~In order to decide whether the things [name of plaintiff] failed to do were~~ A failure was not important to fulfilling the purpose of the contract, ~~you will need to decide whether [name of plaintiff]'s failure~~ if it was minor and could be fixed without difficulty.

Advisory Committee Note: The term "bad faith" is defined separately in Instruction CV21##.

References

Reliance Ins. Co. v. Utah Dep't of Transp., 858 P.2d 1363, 1370 (Utah 1993).

MUJI 1st Instruction

Committee note. Give instruction on who has the burden of proof.

Approved

**CV2112. Occurrence or failure of condition precedent.**

[Name of plaintiff] and [name of defendant] agree that their contract did not require [party's name] to [describe the obligation] unless [describe the condition] occurred. You must decide whether this condition occurred. If it did, then [party's name] had to [describe the obligation]. If the condition did not occur, then [party's name] did not have to perform [his] contract obligations.

References

Baxter v. Saunders Outdoor Advertising, Inc., 2007 UT App 340.

MUJI 1st Instruction

Approved

**CV2113. Disputed condition precedent.**

[Party's name] claims that according to the contract, [he] did not have to [describe the obligation] unless [describe the condition] occurred first. You must decide whether, according to the contract, this condition had to occur before [party's name] was required to perform [his] contract obligations.

References

Baxter v. Saunders Outdoor Advertising, Inc., 2007 UT App 340.

McBride-Williams v. Huard, 2004 UT 21, ¶ 13.

MUJI 1st Instruction

SubC Is this limited to verbal condition/contract?

Approved

**CV2114. Performance excused by material breach.**

[Name of plaintiff] claims that [he] was excused from performing [his] contract obligations because [name of defendant] failed to perform an important part of what [he] had promised to do. Specifically, [name of plaintiff] claims that [name of defendant] failed to [describe the claimed breach].

To decide whether [name of defendant]'s obligation was an important part of the contract, you should ask yourselves whether a reasonable person would have entered into the contract if a promise to [describe the obligation] had not been included.

If you decide that [name of defendant] did not perform an obligation that was an important part of the contract, then you should find that [name of plaintiff] was excused from performing [his] contact obligations. If, on the other hand, you decide that the obligation [name of defendant] failed to perform was not an important part of the contract, then [name of plaintiff] was not excused from performing [his] contract obligations.

References

Bonneville Distributing Co. v. Green River Development, 2007 UT App 175, ¶ 32.

Jackson v. Rich, 499 P.2d 279, 280 (Utah 1972).

Restatement (Second) of Contracts §243 (1979).

MUJI 1st Instruction

**CV2115. ~~P~~When performance is not excused by other party's non-performance.**

~~One party to a contract~~ [Name of Party] cannot by a willful act or omission make it difficult or impossible for ~~the~~ [name of other party] to perform [describe obligation] and then be excused from performing the obligation because ~~the~~ [name of other party] did not perform.

If you decide that [name of ~~plaintiff~~party] was willing and able to perform [his] ~~contract~~ obligation~~s~~, but that [he] could not perform the obligation because of something that [name of ~~defendant~~other party] purposely did or failed to do, then [name of ~~plaintiff~~party] was excused from performing [his] obligation~~s under the contract~~.

References

Baxter v. Saunders Outdoor Advertising, Inc., 2007 UT App 340, ¶ 15.

Saunders v. Sharp, 840 P.2d 796, 805-806 (Utah Ct. App. 1992).

Cahoon v. Cahoon, 641 P.2d 140, 144 (Utah 1982).

MUJI 1st Instruction

Committee note. Instruct on burden of proof

**CV2116. Promissory estoppel.**

[Name of plaintiff] claims that [name of defendant] made a promise to him that [describe the promise], and that as a result of that promise [name of plaintiff] [describe the action or inaction].

~~You must decide whether~~ To succeed on this claim [name of plaintiff] must prove that:

(1) [name of defendant] made a promise to [name of plaintiff];

(2) the promise reasonably caused [name of plaintiff] to [describe the action or inaction taken]; and

(3) only by enforcing the promise can injustice be avoided.

To decide whether the promise reasonably caused [name of plaintiff] to [describe the action or inaction taken], you must decide whether a reasonable person would have expected [name of plaintiff] to do what [he] did based on the promise [name of defendant] made.

If you decide that [name of plaintiff] has proved these three things, then you may enforce the promise to the extent necessary to avoid injustice.

References

Restatement (Second) of Contracts § 90.

MUJI 1st Instruction

Approved

**CV2117. Breach of the contract.**

[Name of plaintiff] claims that [name of defendant] breached their contract. A party to a contract breaches the contract if [he] fails to do what [he] promised to do in the contract.

References

Restatement (Second) of Contracts § 235.

MUJI 1st Instruction

Approved

**CV2118. Material breach.**

If [name of defendant] failed to do what [he] promised to do in the contract, and that promise was important to fulfilling the purpose of the contract, then [name of defendant] materially breached the contract. If you decide that [name of defendant] materially breached the contract, then [name of plaintiff] was excused from doing what [he] had promised to do under the contract. However, if you decide that what [name of defendant] failed to do was not important to fulfilling the purpose of the contract, then [name of plaintiff] was not excused from doing what [he] promised to do in the contract. In order to decide whether the things [name of defendant] failed to do were important to fulfilling the purpose of the contract, you will need to decide whether [name of defendant]'s failure was minor and could be fixed without difficulty.

References

Eggett v. Wasatch Energy Corp., 2004 UT 28, ¶ 22.

Polyglycoat Corp. v. Holcomb, 591 P.2d 449, 451 (Utah 1979).

Black's Law Dictionary (8th ed. 2004) (defining breach of contract).

MUJI 1st Instruction

SubC: This and 2114 raise different standards. Should they be the same?

**CV2119. Total breach.**

A total breach occurred if [name of plaintiff] did not receive any of the benefits [he] was due under the contract.

References

Restatement of Contracts § 236.

MUJI 1st Instruction

SubC Do we need this?

**CV2120. Partial breach.**

If [name of defendant] did some but not all of the things [he] promised to do under the contract, then [name of plaintiff] may recover damages related only to what [name of defendant] failed to do under the contract.

References

Restatement of Contracts § 236.

MUJI 1st Instruction

Approved

**CV2121. Anticipatory breach.**

When a party is supposed to perform [his] contract obligations at some time in the future, it is a material breach of the contract if [he] shows unequivocally that [he] does not intend to perform [his] future contract obligations ~~when the time arrives~~.

When this happens, the other party has three options:

(1) [he] can treat the entire contract as ~~broken~~ breached;

(2) [he] can treat the contract as still binding and wait until the time arrives for its performance; or

(3) [he] can cancel the contract.

["shows without a doubt" – alternative phrasing]

References

Cobabe v. Stanger, 844 P.2d 298, 303 (Utah 1992).

Kasco Services Corp. v. Benson, 831 P. 2d 86, 88 (Utah 1992).

Restatement (Second) of Contracts § 253.

MUJI 1st Instruction

Advisory Committee Note

The doctrine of anticipatory breach is not applicable to unilateral contracts. Greghuhn v. Mutual of Omaha Ins. Co., 461 P.2d 285 (Utah 1969).

SubC What is the standard of proof on this issue? Unequivocal does not mesh w/ preponderance. Is #2 needed?

**CV2122. Implied covenant of good faith and fair dealing.**

All contracts contain an unwritten or implied promise that the parties will deal with each other fairly and in good faith. This means that [name of plaintiff] and [name of defendant] have promised not to intentionally do anything to injure each other's right to receive the benefits of the contract. (This is not the limit of the covenant.) A violation of this implied or unwritten promise is a breach of the contract.

There are some limits, however, to this implied promise to deal fairly and in good faith. First, the duty to act in good faith does not establish new, independent rights or duties to which [name of plaintiff] and [name of defendant] did not agree. Second, the duty to act in good faith does not create rights and duties inconsistent with the actual terms of the contract. Third, the duty to act in good faith does not require either party to decide to use a right they have under the contract that will be harmful to themselves

simply for the purpose of benefiting the other party. Finally, you may not use the duty to act in good faith to achieve an outcome in harmony with your sense of justice but inconsistent with the actual terms of the contract.

You must decide whether or not [name of defendant] breached the duty to act in good faith.

To make that decision, you must ask yourselves if [name of plaintiff] has proved both of the following:

(1) that [name of defendant] breached the implied promise to deal with [name of plaintiff] fairly and in good faith; and,

(2) that [name of plaintiff] was damaged as a result.

References

Mark Technologies Corp. v. Utah Resources International, Inc., 2006 UT App 418, ¶ 7, citing St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194, 199 (Utah 1991).

Oakwood Village, LLC v. Albertsons, Inc., 2004 UT 101, ¶ 45.

MUJI 1st Instruction

SubC. Note: Finding of breach of covenant may entitle party to consequential damages. Cite case. 2d para difficult. Perhaps incorrect.

**CV2123. Accord and satisfaction.**

[Name of defendant] claims that [he] did not have to perform [his] [describe old contract obligations] because [he] and [name of plaintiff] had a disagreement about the contract that they resolved by entering into a new contract that replaced the first contract. [Name of defendant] claims that the new contract required [describe the new obligation(s)] and that [he] has fully performed or is performing these obligations.

~~You must decide whether:~~To succeed on this claim, [name of defendant] must prove that:

(1) [name of plaintiff] and [name of defendant] had a dispute about the original contract that they resolved by entering into a new contract; and

(2) ~~whether~~ [name of defendant] fully performed or is performing [his] obligations under the new contract.

If you decide that [name of defendant] has proved both of these things, then [name of defendant] is released from performing ~~[his]~~ [describe obligations] under the original contract.

References

Cannon v. Stevens School of Business, Inc., 560 P.2d 1383 (Utah 1977).

Stratton v. West States Constr., 440 P.2d 117 (1968).

Restatement (Second) of Contracts § 281.

MUJI 1st Instruction

Approved

**CV2124. Novation.**

[Name of defendant] claims that [he] did not need to perform [his] [describe old contract obligations] under the old contract, because of a new contract that substitutes [name of new party] who will perform in [his] place, ~~that [he] did not need to perform [his] contract obligations under the old contract~~.

To succeed on this claim, [Name of defendant] ~~bears the burden of proving~~must prove all of the following:

(1) There was a contract between [name of plaintiff] and [name of defendant].

(2) There is a new contract, agreed to by all of the parties, that replaces the old contract and substitutes the performance of a new party in place of [name of defendant].

(3) [Name of plaintiff] ~~must~~ intended ~~for the new contract to release [name of defendant] of [his] obligations under the old contract and~~ to accept the new party as a substitute for [name of defendant] and to release [name of defendant] of [his] obligations under the old contract.

References

First American Commerce Co. v. Washington Mut. Sav. Bank., 743 P.2d 1193, 1195 (Utah 1987).

Horman v. Gordon, 740 P. 2d 1346, 1352 (Utah Ct. App. 1987).

Kennedy v. Griffith, 95 P. 2d 752 (1939).

MUJI 1st Instruction

Approved

**CV2125. Duress.**

[Name of defendant] claims that [he] is not bound by the contract because [he] was forced to enter into the contract. To succeed, [name of defendant] must prove that [he] did not intend to enter into the contract, and:

Either [Instruct only on the elements for which there is some evidence.]

(1) [he] was physically forced to enter into the contract; or

(2) [he] was influenced to enter into the contract by an improper threat by [name of plaintiff] that left [him] no reasonable alternative but to agree; or

(3) [he] was influenced to enter into the contract by physical force or an improper threat by someone who is not a party to the contract that left [him] no reasonable alternative but to agree. If the person making the threat is not the [name of plaintiff] or [his] agent, this will not excuse [name of defendant] if [name of plaintiff] in good faith and without reason to know of the duress either gives value or relies materially on the transaction.

If you decide that [name of defendant] has proved that [he] entered into the contract as a result of duress, then no enforceable contract was created.

References

Andreini v. Hultgren, 860 P.2d 916 (Utah 1993).

Brinton v. IHC Hospitals, Inc., 973 P.2d 956 (Utah 1998).

Restatement (Second) of Contracts §§ 174-176.

MUJI 1st Instruction

**CV2126. Improper threat. [back to subcommittee]**

A threat is "improper" if [use only those relevant to the case] what is threatened is:

(1) a crime or a tort, or the threat itself would be a crime or a tort if it resulted in obtaining property;

(2) a criminal prosecution;

(3) the use of civil process and the threat is made in bad faith, or

(4) a breach of the duty of good faith and fair dealing under a contract with the recipient.

A threat is also improper if [use only those relevant to the case] the resulting exchange is not on fair terms, and:

(1) the threatened act would harm the recipient and would not significantly benefit the party making the threat,

(2) the effectiveness of the threat in influencing the agreement is significantly increased by prior unfair dealing by the party making the threat, or

(3) what is threatened is otherwise a use of power for illegitimate ends.

References

Andreini v. Hultgren, 860 P.2d 916 (Utah 1993).

Brinton v. IHC Hospitals, Inc., 973 P.2d 956 (Utah 1998).

Restatement (Second) of Contracts §§ 174-176.

MUJI 1st Instruction

Juror will not understand "tort" "use of civil process."

**CV2127. Fraudulent inducement.**

[Name of defendant] claims that no contract was created because [he] was induced to enter into the contract by fraud. To succeed on this claim, [name of defendant] must prove all of the following.

(1) [Name of plaintiff] represented that [insert alleged fraudulent statement].

(2) [Name of plaintiff] either knew that the representation was false or made the representation recklessly without sufficient knowledge upon which to base the representation.

(3) [Name of plaintiff] made the representation to induce [name of defendant] to agree to the contract.

(4) [Name of defendant] reasonably relied on this representation without knowledge of its falsity.

(5) [Name of defendant] entered into the contract.

(6) [Name of defendant] would not have entered into the contract if [he] had known that the representation was not true.

References

Armed Forces Ins. Exch. V. Harrison, 70 P.3d 35, 40 (Utah 2003).

MUJI 1st Instruction

**CV2128. Impossibility/Impracticability.**

[Name of defendant] claims that [his] performance under the contract was made impossible or highly impracticable by an unforeseen supervening event.

"Impracticable" means that performance under the contract can be done only at an excessive and unreasonable cost.

A "supervening event" is an event that creates a major change in the expected circumstances.

[Name of defendant] makes this assertion based on the following circumstances:

[Insert description of circumstances, such as death of essential participant, destruction of essential property, unforeseen change of law, act of God, etc.]

If you decide that these circumstances just described are a supervening event, unforeseen at the time the contract was entered into and occurred through no fault of [name of defendant] and that the circumstances rendered [name of defendant]'s performance of the contract impossible or impracticable, then [name of defendant]'s obligations under the contract are excused.

References

Holmgren v. Utah-Idaho Sugar Co., 582 P.2d 856, 861 (Utah 1978).

Commercial Union Associates v. Clayton, 863 P.2d 29 (Utah Ct. App. 1993).

MUJI 1st Instruction

**CV2129. Frustration of purpose.**

[Name of defendant] claims that [his] performance under the contract is excused because of the following circumstances:

[Insert description of circumstances which frustrated that purpose.]

To determine if defendant is excused from performance under the contract, you must decide:

(1) the original purpose of the contract contemplated by the parties;

(2) whether the circumstances just described are a supervening event, unforeseen at the time the contract was entered into;

(3) whether the circumstances occurred through no fault of [name of defendant]; and

(4) whether the new circumstances have made the purpose of the contract useless.

References

Castagno v. Church, 552 P.2d 1282 (Utah 1976).

Diston v. EnviroPak Medical Products, Inc., 893 P.2d 1071 (Utah Ct. App. 1995).

MUJI 1st Instruction

Staff note: The last paragraph contains a lot of stuff, some of it not contained in the introductory paragraph. Consider redrafting it as:

**CV2130. Unconscionability.**

In order to decide whether one or more terms of the contract are unconscionable, you will need to decide whether there was "substantive unconscionability" and/or "procedural unconscionability."

Substantive unconscionability focuses on the terms of the agreement and requires you to examine the relative unfairness of the contractual obligations. Even if a contract is unreasonable or more advantageous to one party, the contract is not necessarily unconscionable. Rather, for the contract to be substantively unconscionable, the terms must be so one-sided as to oppress or surprise an innocent party, or there must be an overall imbalance in the obligations and rights imposed by the contract, such as excessive price or other terms which you decide are inconsistent with accepted customs of commercial practice.

Procedural unconscionability focuses on the creation of the contract and the circumstances of the parties. Procedural unconscionability causes oppression and unfair surprise and you should examine all of the circumstances. For example, to decide whether there was procedural unconscionability, consider the following:

(1) whether each party had a reasonable opportunity to understand the terms and conditions of the agreement;

(2) whether there was a lack of opportunity for meaningful negotiation;

(3) whether the agreement was printed on a duplicate or boilerplate form drafted solely by the party in the strongest bargaining position;

(4) whether the terms of the agreement were explained to the weaker party;

(5) whether the [aggrieved party] had a meaningful choice or instead felt compelled to accept the terms of the agreement; and/or

(6) whether the [stronger party] employed deceptive practices to hide key contractual provisions.

References

The Cantamar, L.L.C. v. Champagne, 2006 UT App 321, ¶¶ 31-36.

Ryan's v. Dan's Food Stores, Inc., 972 P. 2d 395, 402 (Utah 1998).

Sosa v. Paulos, 924 P. 2d 357 (Utah 1996).

Equitable Life & Cas. Ins. Co. v. Ross, 849 P. 2d 1187, 1190 (Utah Ct. App. 1993).

Klas v. Van Wagoner, 829 P.2d 135 (Utah Ct. App. 1992).

MUJI 1st Instruction

Advisory Committee Note

Case law suggests that "While a determination of substantive unconscionability may by itself lead to our concluding the contract was unconscionable, procedural unconscionability alone 'rarely render[s] a contract unconscionable.'" Ryan's v. Dan's Food Stores, Inc., 972 P. 2d 395, 402 (Utah 1998)).

**CV2131. Mutual mistake.**

[Name of defendant] claims that there was no contract because both parties were mistaken about [insert description of mistake]. To succeed on the claim that there is no contract, [name of defendant] must prove all of the following:

(1) Both parties, at the time the contract was entered into, were mistaken about [insert description of mistake].

(2) This mistake was a basic assumption or vital fact upon which they based their bargain.

(3) [Name of defendant] would not have agreed to enter into this contract if [he] had known about the mistake.

References

England v. Horbach, 944 P.2d 340 (Utah 1997).

Despain v. Despain, 855 P.2d 254 (Utah Ct. App. 1993).

Restatement (Second) of Contracts §§ 151, 152 (1979).

MUJI 1st Instruction

**CV2132. Unilateral mistake.**

[Name of defendant] claims that there was no contract because [he] was mistaken about [insert description of mistake]. To succeed on the claim that there is no contract, [name of defendant] must prove all of the following:

(1) [Name of defendant] was mistaken about [insert description of mistake].

(2) [Name of defendant]'s mistake must have such serious consequences that to enforce the contract as made would be unconscionable.

(3) The matter about which the mistake was made related to an important feature of the contract.

(4) The mistake occurred even though [name of defendant] made a reasonable effort to understand the circumstances described in paragraph (1) above.

(5) It is possible to put [name of plaintiff] back in the position [he] was in prior to the contract, losing only the benefit of the bargain.

References

Guardian State Bank v. Stangl, 778 P.2d 1, 4-5 (Utah 1989).

Bekins Bar V Ranch v. Huth, 664 P.2d 455 (Utah 1983).

Klas v. Van Wagoner, 829 P.2d 135 (Utah Ct. App. 1992).

MUJI 1st Instruction

**CV2133. Third-party beneficiary.**

[Name of plaintiff] claims that [he] is a third party beneficiary of a contract between [list parties to the contract].

Parties to a contract can create rights under the contract in favor of another who is not named as a party to the contract. Such a person is called an "intended third party beneficiary." The third party can enforce [his] rights under the contract just as if [he] had been named as a party to the contract.

Someone who receives benefits under a contract, without the parties to the contract intending to create rights for that person under the contract, is an "incidental beneficiary" under the contract. An incidental beneficiary has no rights under the contract.

[Name of plaintiff] must be an "intended beneficiary" of the contract, and the intention of the parties to "benefit" the third party must be clear from the terms of the contract. A third-party who is only "incidentally benefited" has no rights under the contract.

References

Wasatch Bank v. Surety Ins. Co., 703 P.2d 298 (Utah 1985).

Tracy Collins Bank & Trust v. Dickamore, 652 P.2d 1314 (Utah 1982).

Rio Algom Corp. v. Jimco Ltd., 618 P.2d 497 (Utah 1980).

MUJI 1st Instruction

**CV2134. Assignment.**

An assignment transfers a party's rights under the contract to another.

If [Assignor's name] assigned [his] rights under the contract to [Assignee's name], then [Assignee's name] had the right to demand that [name of other party] do what [he] had promised to do under the contract. An assignment does not relieve the assignor of his obligation to perform his duties under the contract when the assignee agrees to perform those duties and the party gives his consent.

References

Winegar v. Froerer Corp., 813 P.2d 104, 107 (Utah 1991).

First American Commerce Co. v. Washington Mut. Sav. Bank, 743 P. 2d 1193, 1194 (Utah 1987).

Restatement (Second) of Contracts §§ 317, 324, 336.

MUJI 1st Instruction

**CV2135. Delegation.**

A delegation transfers a party's duties under a contract to another.

[Delegator's name] was permitted to delegate [his] duties under the contract to [delegatee's name] unless [name of other party] had a substantial interest in having [delegator's name] personally fulfill the duties. However, even if [delegator's name] delegates [his] duties to [delegatee's name], [delegator's name] is still responsible for guaranteeing that [delegatee's name] performs those duties.

References

Winegar v. Froerer Corp., 813 P.2d 104, 107 (Utah 1991).

First American Commerce Co. v. Washington Mutual Sav. Bank, 743 P.2d 1193, 1194 (Utah 1987).

Restatement (Second) of Contracts § 318.

MUJI 1st Instruction

**CV2136. Modification.**

[Name of party] claims that [he] and [name of other party] changed their contract. The parties to an oral or written contract may agree later to change it. To change a contract, both parties must agree on the new terms. If a contract has been changed, then any old terms that conflict with the new terms cannot be enforced.

R.T. Nielson Co. v. Merrill Cook, 2002 UT 11, ¶ 13 n.4.

Richard Barton Enterprises, Inc. v. Tsern, 928 P.2d 368, 373 (Utah 1996).

Copper State Leasing Co. v. Blacker Appliance & Furniture Co., 770 P.2d 88, 90 (Utah 1988).

Restatement (Second) of Contracts § 149.

MUJI 1st Instruction

**CV2137. Abandonment.**

[Name of plaintiff (party?)] claims that [he] and [name of defendant (other party)] abandoned their contract. One way a contract can be abandoned is if the parties agree to abandon their contract. Another way the contract can be abandoned, is if the parties act as if the contract no longer exists. If a contract has been abandoned, then the parties have no further obligation to do what they promised to do.

References

Parduhn v. Bennett, 2002 UT 93, ¶ 11.

Restatement of Contracts § 283 Agreement of Rescission.

MUJI 1st Instruction

**CV2138. Nominal damages.**

A party who has been damaged by a breach of the contract by the other party to the contract has a right to recover the damages caused by the breach of the contract.

However, if [name of plaintiff] has not proved any actual or substantial damages caused by the breach, or if [name of plaintiff] has not proved the amount of damages, then you may award as damages a small or nominal sum such as One Dollar.

References

Bair v. Axiom Design, L.L.C., 2001 UT 20, ¶ 18.

Turtle Management v. Haggis Management, 645 P.2d 667, 670 (Utah 1982).

Snyderville Transp. Co. v. Christiansen, 609 P.2d 939, 941-942 (Utah 1980).

Restatement (Second) of Contracts § 346.

MUJI 1st Instruction

**CV2139. Damages related to expected benefits.**

If a party is damaged by a breach of a contract, then [he] has a right to recover general damages caused by [name of defendant]'s breach based on the benefits [he] expected to receive from the contract. General damages are those that follow naturally and are normally related to the loss of the expected benefits. General damages are measured as follows:

(1) the loss of the benefits from the contract caused by the breach; minus,

(2) any cost or other loss that [name of plaintiff] has avoided by not having to perform.

References

Black v. Allstate Ins. Co., 2004 UT 66, ¶28.

Ford v. Am. Express Fin. Advisors, Inc., 2004 UT 70, ¶ 39.

Mahmood v. Ross (In re Estate of Ross), 1999 UT 104, ¶ 19.

Thurston v. Workers Comp. Fund of Utah, 2003 UT App 438, ¶¶ 21-22.

Restatement (Second) of Contracts § 347.

MUJI 1st Instruction

Advisory Committee Note

This instruction is intended to be read in conjunction with the instruction on consequential damages where appropriate.

**CV2140. Consequential damages.**

If a party recovers damages for the benefits [he] expected to receive from the contract, then that party is also entitled to recover "consequential" damages caused by [name of defendant]'s breach.

Consequential damages are those losses or injuries reasonably within the contemplation of the parties, that is, they could have considered them or reasonably foreseen them, at the time the contract was made.

In order to decide whether a loss or an injury was foreseeable at the time the contract was made, you should examine the nature and language of the contract and the reasonable expectations of the parties. A loss may be foreseeable because it follows from the breach

(1) in the ordinary course of events, or

(2) as a result of special circumstances, beyond the ordinary course of events, that [name of defendant] had reason to know.

References

Mahan v. UNUM Life Ins. Co. of Am., 2005 UT 37, ¶ 17.

Black v. Allstate Ins. Co., 2004 UT 66, ¶ 28.

Berube v. Fashion Centre, 771 P.2d 1033, 1050 (Utah 1989).

Gardiner v. York, 2006 UT App 496, ¶ 14.

Restatement (Second) of Contracts § 351.

MUJI 1st Instruction

**CV2141. Reliance damages.**

Instead of damages based on the benefits [name of plaintiff] expected to receive from the contract, [name of plaintiff] has a right to recover the reasonable expenditures that [name of plaintiff] would have sustained if [name of defendant] had performed the contract as agreed. It is up to [name of defendant] to prove with reasonable certainty the loss [name of plaintiff] would have sustained.

References

Ranch Homes v. Greater Park City Corp., 592 P.2d 620, 624 (Utah 1979).

Skanchy v. Calcados Ortope SA, 952 P.2d 1071, 1078 (Utah 1998).

Restatement (Second) of Contracts § 349.

MUJI 1st Instruction

**CV2142. Damages. Foreseeability.**

[Name of plaintiff] may not recover damages for any loss that [name of defendant] did not have reason to foresee and did not anticipate as a probable result of the breach when the contract was made.

It is not enough that [name of defendant] knew of a possible harm. [Name of defendant] must have had reason to foresee the loss claimed by [name of plaintiff] as a probable result of the breach of the contract. A loss may be foreseeable as a probable result of a breach because it follows from the breach

(1) in the ordinary course of events, or

(2) as a result of special circumstances, beyond the ordinary course of events, that [name of defendant] had reason to know.

References

Ranch Homes v. Greater Park City Corp., 592 P.2d 620, 624 (Utah 1979) .

Brown's Shoe Fit Co. v. Olch, 955 P.2d 357, 365 (Utah Ct. App. 1998).

Restatement (Second) of Contracts § 351.

MUJI 1st Instruction

**CV2143. Mitigation and avoidance.**

[Name of plaintiff] had a duty to mitigate, that is, to minimize or avoid, the damages caused by the breach. [Name of plaintiff] may not recover damages that [he] could have avoided without undue risk, burden or humiliation. Likewise, [name of plaintiff] may not recover the damages for losses that were caused by or made worse by [his] own action or inaction.

However, [name of plaintiff] has a right to recover damages if [he] has made a reasonable but unsuccessful effort to avoid loss.

References

Mahmood v. Ross (In re Estate of Ross), 1999 UT 104, ¶ 31.

Restatement (Second) of Contracts § 350.

MUJI 1st Instruction

**CV2144. Damages. Reasonable certainty.**

Damages are only recoverable for loss in an amount that the evidence proves with reasonable certainty, although the actual amount of damages need not be proved with precision. Any alleged damages which are only remote, possible or a matter of guess work are not recoverable.

References

Sawyers v. FMA Leasing Co., 722 P.2d 773, 774 (Utah 1986). Winsness v. M.J. Conoco Distributors, Inc., Utah, 593 P.2d 1303, 1305 (1979).

Graham v. Street, 2 Utah 2d 144, 149, 270 P.2d 456, 459 (Utah 1954).

Schwartz v. Adair, 2007 UT App 75.

Restatement (Second) of Contracts § 352.

MUJI 1st Instruction