Agenda
Advisory Committee on
Model Civil Jury Instructions
April 12, 2021
4:30 to 6:00 p.m.
Via Webex

Welcome and approval of minutes	Tab 1	Ruth Shapiro, Chair
Update on Trespass and Nuisance and General Instructions Comment Periods		Ruth Shapiro
Subcommittees and subject area timelines	Tab 2	Ruth Shapiro
Products Liability • The Committee has worked through 1013 (relating to component parts). There are several loose ends among the instructions that have been reviewed and some follow up work that is needed by the subcommittee. The subcommittee will have some proposed revisions/additions for the Committee to review at its May meeting. • The Committee has yet to review the remaining instructions, 1047-1053. • The subcommittee has finished additional instructions (starting with 1054) that are now included.	Tab 3	Tracy Fowler and Peter Summerill (for Paul Simmons)
Other business		Ruth Shapiro
In pipeline: caselaw updates (Motor Vehicles)		

Committee Web Page

Published Instructions

Meeting Schedule: Monthly on the 2nd Monday at 4pm

Next meeting: May 10, 2021

Tab 1

MINUTES
Advisory Committee on Model Civil Jury Instructions
March 8, 2021
4:00 p.m.

Present: Ruth A. Shapiro (chair), Honorable Kent Holmberg, Honorable Keith A. Kelly, Nancy J. Sylvester (staff), Marianna Di Paolo, Joel Ferre, Douglas G. Mortensen, Lauren A. Shurman, Samantha Slark, Randy Andrus, Ricky Shelton, Adam D. Wentz (recording secretary).
Also present: Tracy Fowler. Paul M. Simmons

Excused: Alyson McAllister, Honorable Judge Kent Holmberg

1. *Welcome.*

Ruth Shapiro welcomed everyone to the meeting.

2. *Approval of Minutes.*

Ruth Shapiro asked for a motion on the February meeting minutes. The minutes were unanimously approved.

3. *Timeline.*

The committee discussed the timeline and decided to hold off on 1009 and circle back at the next meeting.

4. *Discussion of Product Liability Instructions.*

- 1010 (previously 1012)
  - The two groups agree on this instruction.
  - Ruth Shapiro questioned whether we should have a definition for "component part."
    - Tracy Fowler agreed that a committee note is appropriate explaining that the court provide a definition of "component part."
    - Lauren Shurman suggested we simply add a bracketed instruction to describe component part within the language of the instruction itself.
    - Judge Kelly agreed that a bracketed instruction to describe component part be included.
  - The committee discussed removing the word "integration" as it may not be understandable to laypeople. Looking for something simpler. Discussed using bracketed options instead. (Installed, incorporated, used.)
    - Marianna Di Paolo suggested that the instruction should be consistent throughout, whatever the committee decide: either integration or the bracketed options.

        - Keith Kelly suggested using "integrated/integration" throughout, even though it creates redundancy within the language of the instruction.
        - Marianna Di Paolo suggested using the phrase "included with" instead of integrated/integration as it is much more common. The committee discussed whether that phrase would properly apply to all possible fact patterns.
        - Judge Kelly prefered using the language used by the Utah Supreme Court in their decisions. The cited precedent used "integration." He would only prefer switching out Court-used language if and when it is not understandable to jurors.
        - Paul Simmons agreed that integration better explains the Supreme Court's decision in *Gudmundson v. Del Ozone*, 2010 UT 33, 232 P.3d 1059.
        - Marianna Di Paolo reminded the committee that "integrated" does not cover all possible fact patterns.
        - Judge Kelly noted that the instruction should only apply to those fact patterns where integration of one product into another is occurring and that perhaps a different instruction would be necessary for other fact patterns. If one product is not being integrated into another, then the *Gudmundson* standard would not apply.
        - Paul Simmons agreed with Judge Kelly and suggested that integration be used throughout the instruction.
    - Marianna Di Paolo suggested replacing the phrase "finished product" with "final product."
        - Tracy Fowler had no objection at this point to "final product."
        - Paul Simmons also had no objection.
    - Judge Kelly made a motion for using the term "integrated" throughout the instruction rather than the bracketed options, along with replacing the phrase "finished product" with "final product."
        - The committee informally approved this motion but will revisit it with a committee note if there is one to be included in 1010.

- 1011 (formally 1013)
    - The plaintiff group believes this instruction should not be included because it is contrary to *Bylsma v. R.C. Willey*, 2017 UT 85, ¶ 81, 416 P.3d 595.
    - The defense group thinks it is appropriate for the trial judge to consider as a counterpart to CV1010.
    - Lauren Shurman suggested that the plaintiff's group propose an alternative instruction.

        - Paul Simmons suggested that there be language that the manufacturer of the component part can be held jointly and severally liable.
    - Tracy Fowler does not believe that "jointly and severally liable" should be included.
    - Tracy Fowler stated that in theory there could be a dispute between the component part manufacturer and the final product manufacturer about what made the final product defective and that is why 1011 would be necessary.
    - Judge Kelly asked what instruction would apply, if any, where one component manufacturer of many argues that its component did not create the defect in the final product. Paul Simmons suggested that 1010 would cover this scenario.
    - Judge Kelly questioned whether the committee should even be creating an instruction if the law is indeed unclear as Paul Simmons suggests.
        - Tracy Fowler believes that precedent in *Bylsma* does, in fact, cover the scenarios spelled out in 1011. To the extent there is uncertainty, he opined that the committee should reflect that in a committee note.
    - Ruth Shapiro suggested whether a committee note informing that there is some disagreement as to the underlying case law, whether that would create enough flexibility to allow the instruction to move forward.
    - Paul Simmons opined that 1010 could apply to all scenarios that the defendant group believes 1011 answers.
    - Doug Mortensen suggested striking 1011 and that the subcommittee work on a comment in 1010 to address the scenarios from 1011.
        - Tracy Fowler argued that 1011 should stay with a committee note.
        - Paul Simmons argued that the committee send the instruction back to the subcommittee.
    - Judge Kelly made a motion to send the instruction back to the subcommittee for a compromise or alternative instructions/comments.
        - The committee informally approved this motion.

- 1012 (formally 1014)
    - The two groups agree on this instruction.
    - Doug Mortensen expressed concern regarding the "inadequate warning" language.
    - Judge Kelly made a motion to approve this instruction as written.
        - The committee informally approved this motion.

- 1013 – Failure to warn claims for FDA approved drugs.
    - The two groups do not agree on this instruction.

- The plaintiff group does not believe that the law is settled on this issue as the 10th Circuit did not provide a lot of guidance in *Cerveny v. Aventis, Inc.*, 855 F.3d 1091 (10th Cir. 2017). As such, the plaintiff group believes that it should be omitted.
- The defendant group believes the plaintiff group's concerns regarding *Cerveny* be addressed in a committee note rather than omitting the instruction altogether.
- Lauren Shurman questioned whether a jury should be even considering this affirmative defense.
- Judge Kelly is concerned that by including this instruction, we are rendering this a question for the jury and not the judge. The committee must be sure that is what it wants to do. He is also concerned that the cited case is so unusual that it may not warrant having a separate jury instruction.
    - Tracy is worried that if we do not include this instruction, parties will imply that the issues addressed in 1013 were not intended to be questions for the jury. He also opined that the precedent cited may not be a common case, but it is not an unusual one.
- Judge Kelly suggested we send the instruction back to the subcommittee to come up with alternatives.
- Ruth Shapiro suggested looking at other jurisdictions to see whether they have similar instructions and suggested it could provide guidance.
    - Tracy Fowler agreed to look into this very issue.
- Marianna Di Paolo suggested changing the phrase "not liable for not including." It may be grammatically correct but can be difficult to process.

5. *Adjournment.*

The meeting concluded at 6:03 P.M.

6. *Next Meeting.*

April 12, 2021.

Tab 2

Subject	Sub-C in place?	Sub-C Members	Projected Starting Month	Projected Finalizing Month	Comments Back/Notes
Caselaw updates	-	-	*Ongoing*	*Ongoing*	
Products Liability Updates	Yes	Tracy Fowler, Paul Simmons, Nelson Abbott, and Todd Wahlquist	October-20	April 2021	
Easements and boundary lines	No	Adam Pace (amp@scmlaw.com) Robert Cummings (rbc@scmlaw.com); Robert J. Fuller (rob@fullerattorney.com); "Farr, Doug" <dfarr@swlaw.com>	May 2021	June 2021	
Pandemic	No	Judge Chiara			
Implicit Bias	TBD	Judge Su Chon (chair)	TBD	TBD	
Assault/ False Arrest	Yes	Rice, Mitch (chair); McAllister, 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	
Easements and boundary lines	No	Adam Pace (amp@scmlaw.com) Robert Cummings (rbc@scmlaw.com); Robert J. Fuller (rob@fullerattorney.com); "Farr, Doug" <dfarr@swlaw.com>			Handful of instructions at most

Tab 3

Defense Group Proposal	Plaintiff Group Proposal (if different)
CV1001 Strict liability. Introduction and Elements of the Claim. [Name of plaintiff] seeks to recover damages based on a claim that [s/he/it] was injured by a defective product. [Name of defendant] may be liable even if [name of defendant] has exercised all possible care in the development and sale of the product. A product may be defective [in the way that it was designed], [in the way that it was manufactured], or [in the way that its users were warned.] To succeed on [name of plaintiff]'s claim, [name of plaintiff] must prove that: 1. There was a defect in the [product], ~~1~~2. ~~A~~ The defect in the [product] made it unreasonably dangerous, ~~2~~3. The defect was present at the time of the [product]'s sale, and ~~3~~4. The defect was a cause of ~~the~~ [name of plaintiff]'s injuries. I will now explain what [name of plaintiff] is required to prove to satisfy these claims and elements. **References** *Burningham v. Wright Med. Tech., Inc.*, 2019 UT 56, 448 P.3d 1283. *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. *House v. Armour of America*, 929 P.2d 340 (Utah 1996).	**NOTE TO COMMITTEE:** **The two groups agree on this instruction.** **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.**

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). Utah Code Section 78B-6-701, et seq. **Committee Notes** Instruct the jury only as to the type of claim(s) that is relevant to the case (e.g., design defect, manufacturing defect, warning). The jury should be instructed on each of the three elements that are in dispute. 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 fourth element: "whether … 4. [Name of defendant] was engaged in the business of selling the [product]." 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**~~	~~**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 instructions defining**~~

defect claim as set out in CV1002 and 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. 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). *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**	**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).**

~~12.1.~~	
~~CV1003~~ CV1002 Strict liability. Definition of "design defect." [Alternative A.] INFORMALLY APPROVED 2/8/2021. [Name of plaintiff] claims that the product had a design defect. The [product] had a design defect if 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. ~~[Name of plaintiff] claims that the product had a design defect.~~ ~~"Design defect" means that~~ ~~(1) the [product] was designed in a way that failed to eliminate a hazard, or that~~ ~~(2) the [product] lacked features that would have reduced the risk of harm associated with the hazard.~~ [Alternative B.] [Name of plaintiff] claims that the product had a design defect. 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**	**NOTE TO COMMITTEE:** **Alternative A represents the Plaintiff group proposal; Alternative B represents the Defense group proposal.**

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(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 Powder 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~~ CV1003 Strict liability. Definition of "manufacturing defect." The [product] had a manufacturing defect if it differed from [(1) the manufacturer's design or specifications~~.~~] or [(2) products from the same manufacturer that were intended to be identical~~.~~]. **References** *Niemela v. Imperial Mfg., Inc.*, 2011 UT App 333, 20, 263 P.3d 1191. *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.	**NOTE TO COMMITTEE:** **The two groups agree on this instruction.**
~~CV1006~~ CV1004 Strict liability. Definition of "unreasonably dangerous." INFORMALLY APPROVED 1/2021. [Alternative A.]	**NOTE TO COMMITTEE:** **Alternative A is Plaintiff group proposal; Alternative B is Defense group proposal. Plaintiff group would make this instruction CV1002.**

A [product] was unreasonably dangerous if it was more dangerous than an ordinary and prudent buyer, consumer, or user of 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 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-6-702.
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 based on ~~a restatement of~~ Utah Code Section 78B-6-702. ~~, 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 based on ~~a restatement of~~ *Brown v. Sears, Roebuck &*

In support of their Alternative A, Plaintiff group offers the follow:

Brown v. Sears, Roebuck & Co. did not say that the knowledge, training, and experience of the user is a complete defense. It only said that the user's actual knowledge, training, or experience may increase the extent of the perceived danger beyond that contemplated by the ordinary and prudent person, making it more likely that a jury might find the product not unreasonably dangerous, but it is still up to the jury to decide how much the plaintiff's subjective understanding of the danger affects whether or not the product is unreasonably dangerous. (*Brown*'s discussion of this issue was dicta, since the plaintiff had failed to show that the product was more dangerous than an ordinary user would expect, making the actual user's knowledge irrelevant.)

Niemela v. Imperial Manufacturing, Inc., did not "adopt" the 10th Circuit's reading of the statute in *Brown* but merely explained the *Brown* court's reasoning. Rather, the court applied the statute as written.

Co., 328 F.3d 1274 (10th Cir. 2003), ~~adopted~~ cited 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.~~	
CV~~1007~~1005 Strict liability. Duty to warn. INFORMALLY APPROVED 2/8/2021. [Name of plaintiff] claims that [he/she/it] 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 not required to warn about a danger from the [product]'s foreseeable use that is generally known and recognized.] [In other words,] [Name of defendant] was required to warn about a danger from the [product]'s foreseeable use of which [he/she/it] 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, if the manufacturer does not dispute that it had a duty to warn	**NOTE TO COMMITTEE:** **The two groups agree on this instruction.**

the plaintiff of a particular danger, or if the Court determines as a matter of law that a warning was required. But even where the manufacturer provided a warning, the adequacy of the warning is a question of fact for the jury to decide. *Feasel v. Tracker Marine LLC*, 2020 UT App 28, ¶ 22, 460 P.3d 145, *cert. granted*, Order, Case No. 20200327-SC (Utah June 26, 2020). The ~~last~~ bracketed paragraph of this instruction should not be given when the danger is capable of being economically alleviated. *House v. Armour of America, Inc.*, 929 P.2d 340, 344 (Utah 1996). 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." 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'." [REVISIT THIS COMMITTEE NOTE BEFORE FINAL VOTE.]	
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.** DEFER CONSIDERATION BASED ON CV1001. SUBCOMMITTEE WILL REVIEW. [If you find that a warning was required,] [[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	**NOTE TO COMMITTEE:** **Plaintiff group would delete this instruction entirely. See Note to Committee in CV1002 above.**

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). **MUJI 1st Instruction** 12.6; 12.7. **Committee Notes** Which set of bracketed language in the first paragraph should be given depends on whether the jury 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~~ CV1007 Strict liability. Definition of "adequate warning." INFORMALLY APPROVED 2/8/2021. A warning is adequate if, in light of the ordinary knowledge common to members of the community who use the [product], the warning:	**NOTE TO COMMITTEE:** **The two groups agree on this instruction.**

(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 P.3d 1072. **Committee Notes** This instruction should be followed by Instruction 1006. Definition of "unreasonably dangerous." [REVISIT THIS FOR NUMBERING] 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~~ CV1008 Failure to warn. No adequate warning; Rebuttable presumption that an adequate warning would have been read and followed. INFORMALLY APPROVED 2/8/2021. If you find [name of defendant] did not provide an adequate warning, you must presume that [name of plaintiff] would have read and followed an adequate warning unless [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.	**NOTE TO COMMITTEE:** **The two groups agree on this instruction.**

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.

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~~ CV1009 Failure to warn. Presumption that a warning will be read and followed. TRACY WILL DRAFT A FEW SENTENCES IN THE COMMITTEE NOTE. PICK UP HERE NEXT TIME. SHOULD "ADEQUATE" ALWAYS BE IN HERE?

If you find that [name of defendant] gave an adequate warning, [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

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.

followed, is not in a defective condition, nor is it unreasonably dangerous.

References
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.

There is some disagreement among committee members as to whether the word "adequate" should appear in the instruction.

~~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.

CV1010~~12~~ Strict liability. Component part manufacturer. Part defective only as incorporated into finished product. Informally approved March 8, 2021.

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

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]~~ integrated into the ~~finished~~ final product, then for [name of defendant] to be liable, [name of plaintiff] must prove all of the following:

(1) [Name of defendant] substantially participated in the integration of the component part into the ~~finished~~ final product;

(2) The integration of the component part into the ~~finished~~ final product made the ~~finished~~ final product defective; and,

(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~~ final 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

NOTE TO COMMITTEE:

The two groups agree on this instruction.

NEED SEPARATE INSTRUCTION ON WHAT IS COMPONENT PART VS. OTHER PARTS. ALSO NEED TO DRAFT COMMITTEE NOTE. Deal with integration issue in the contention instruction. Integration includes installation, incorporation, or the use of the component part in the finished product?

substantially participated. **References** *Gudmundson v. Del Ozone*, 2010 UT 33, 232 P.3d 1059.	
NOTE TO COMMITTEE: The defense group thinks this instruction is a necessary counterpart to instruction CV1012 so that the jury is instructed on both of the two scenarios—whether the component part was defective in isolation or not. And while not directly addressed by Bylsma, it is a logical application of Bylsma to hold all upstream sellers of a defective product (component part product or otherwise) liable for injuries caused by that product. ~~**CV1013**~~ **CV1011 Strict liability. Component part manufacturer. Defective part incorporated into finished product.** [Name of defendant] [designed/manufactured/distributed/sold] a component part of the [product]. [Name of plaintiff] claims that the component part of the [product] rendered the final product defective. If you find each of the following: (1) the component part was defective as [designed/manufactured/distributed/sold], (2) the defective part made the ~~finished~~ final 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 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~~ final product, liable to [name of plaintiff].	**PLAINTIFF GROUP DOES NOT BELIEVE THIS INSTRUCTION SHOULD BE INCLUDED AT ALL –** The Plaintiff group would omit this instruction. Utah appellate courts have not yet decided whether or how liability should be apportioned between the manufacturer of a defective component part and the manufacturer of a product that may have been defective even without the component part. Under *Bylsma*, determining fault among various defendants downstream from a defective product is irrelevant and inappropriate. "The relative culpability of the defendants does not factor into the jury's allocation at all." *Bylsma v. R.C. Willey*, 2017 UT 85, ¶ 81, 416 P.3d 595. Until Utah courts decide the issue, the Plaintiff group thinks the instruction is premature, speculative, and not supported by Utah law. **SUBCOMMITTEE EITHER COMES UP WITH BETTER LANGUAGE TO EXPLAIN CV1011 OR INCORPORATES THE INSTRUCTION INTO A COMMITTEE NOTE TO CV1010 (BRING BOTH OPTIONS).**

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 the liability of the manufacturer of a component part that is defective and made the ~~finished~~ final product 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 where both the component part and the finished product are defective and the plaintiff is injured by the defective product.	
~~CV1014~~ CV1012 No design defect in FDA approved drugs. Informally approved March 8, 2021. 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	**NOTE TO COMMITTEE:** **The two groups agree on this instruction.**

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. CV1014 does not apply to medical devices approved by the FDA under the § 510(k) process. *Burningham v. Wright Med. Tech., Inc.*, 2019 UT 56, 448 P.3d 1283. Whether such a device is unavoidably unsafe may be raised as an affirmative defense and determined as a question of fact on a case-by-case basis. *See* CV1054. This instruction is applicable to both negligence and strict product liability claims.	
NOTE TO COMMITTEE: The defense group would include this instruction because, as a result of federal preemption, this federal law applies in all warnings claims for FDA approved drugs, even such claims brought in state court. The defense group recommends the plaintiff group concerns that *Cerveny* left open the question of whether such a determination is a question of fact or law, be addressed in the committee note. **CV1013 – 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	**NOTE TO COMMITTEE:** The Plaintiff group would omit this instruction. It involves a preemption defense, which is generally a question of law--federal law. The only authority for it, *Cerveny v. Aventis, Inc.*, 855 F.3d 1091 (10th Cir. 2017), recognizes that there is a question as to whether the "clear evidence" test in the instruction involves a question of fact or law, and the court doesn't resolve that issue. 855 F.3d at 1098-99. Nor does the court define "clear evidence." SUBCOMMITTEE PROPOSES 2 ALTERNATIVES: DISCUSS INSTRUCTION FURTHER (COMPROMISE) AND COMMENT LANGUAGE ON PRIOR INSTRUCTION. (LOOK AT OTHER JURISDICTIONS)

defendant] proves by clear evidence that the FDA would have rejected [name of plaintiff]'s proposed [label] [warning], [name of defendant] is not liable to [name of plaintiff] for not including the information on the [label][warning]. TOO MANY NEGATIVES **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). The case law doesn't define "clear evidence." This instruction is applicable to both negligence and strict product liability claims.	
CV1047 Sophisticated user. [Name of defendant] claims that [name of plaintiff] was a sophisticated user of the [product]. To establish this defense, [name of defendant] must prove that [name of plaintiff] either: (1) had special knowledge or expertise about the dangerous or unsafe character of the [product]; or (2) belonged to a group or profession that generally knows about the	**NOTE TO COMMITTEE:** **The two groups agree on this instruction.**

dangerous or unsafe character of the [product]. If you find that [name of defendant] has proved that [name of plaintiff] was a sophisticated user, then [name of defendant] cannot be liable for failure to give an adequate warning. **References** House v. Armour, 929 P.2d 340 (Utah 1996). Henrie v. Northrop Grumman Corp., 502 F.3d 1228 (10th Cir. 2007).	
CV1048 Conformity with government standard. If you find that the manufacturer of a [product] complied with federal or state laws, standards or regulations for the industry, regarding proper design, inspection, testing, or manufacture that were in effect when it made the [product], it is presumed that the [product] is not defective. However, if you find that [name of plaintiff] has proved, by a preponderance of evidence, that the [product] was defective even though the manufacturer followed government laws, standards or regulations, then the presumption that the product is not defective no longer applies. **References** Utah Code Section 78B-6-703(2). Egbert v. Nissan, 2007 UT 64, ¶14. Niemela v. Imperial Mfg., Inc., 2011 UT App 333. **MUJI 1st Instruction** 12.1.	**NOTE TO COMMITTEE:** **The two groups agree on this instruction.**
CV1049 Product misuse. [Name of defendant] claims that [name of plaintiff] misused the [product] and that the misuse was a cause of [name of plaintiff]'s harm. To establish this defense, [name of defendant] must prove that: (1) [name of plaintiff] used [the product] in a way that the manufacturer did not intend and could not have reasonably anticipated; and	**NOTE TO COMMITTEE:** **The two groups agree on this instruction.**

(2) the misuse was a cause of [name of plaintiff]'s harm. If you find that [name of defendant] has proved these points, you must consider [name of plaintiff]'s misuse of the [product] in allocating fault on the Special Verdict form. **References** Bylsma v. R.C.Willey, 416 P.3d 595 (2017) **MUJI 1st Instruction** 12.39.	
CV1050 Product alteration. [Name of defendant] claims that the [product] was modified or altered by someone else. To prove this defense, [name of defendant] must prove that: (1) the [product] was altered or modified after [name of defendant] sold the [product]; (2) the alteration or modification changed the manufacturer's intended purpose, use, construction, function, design, or manner of use of the [product]; and (3) the modification or alteration was a cause of [name of plaintiff]'s harm. If [name of defendant] proves these things, you must consider this defense when allocating fault on the Special Verdict form. **References** Utah Code Section 78B-6-705. Bylsma v. R.C.Willey, 416 P.3d 595 (2017) **MUJI 1st Instruction** 12.11.	**NOTE TO COMMITTEE:** **The two groups agree on this instruction.**
CV1051 Unreasonable use. (Assumption of a known risk.)	**NOTE TO COMMITTEE:**

[Name of defendant] claims that, if the [product] was defective, [name of plaintiff] knew about the defect and voluntarily proceeded to use the [product]. To establish this defense, [name of defendant] must prove that [name of plaintiff]: (1) knew about the defect; (2) knew the defect could cause injury; (3) proceeded to use the [product] despite this knowledge; and (4) that a reasonably prudent person would not have used the [product] under the circumstances. If [name of defendant] proves these things, you must consider this defense when allocating fault on the Special Verdict form. **References** Bylsma v. R.C.Willey, 2017 UT 85, 416 P.3d 595 Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301 (Utah 1981). Jacobsen Constr. Co. v. Structo-Lite Eng'g Inc., 619 P.2d 306 (Utah 1980). Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152, 158 (Utah 1979). Restatement (Second) of Torts § 402A cmt. n (1963 & 1964). **MUJI 1st Instruction** 12.40	**The two groups agree on this instruction.**
CV1052 Comparative fault of Plaintiff. [Name of defendant] claims that [name of plaintiff] was at fault and that [name of plaintiff]'s fault caused or contributed to the harm. This is called comparative fault. Comparative fault is [negligence] [misuse] [alteration] [assumption of risk] [or other misconduct] by [name of plaintiff] that causes or	**NOTE TO COMMITTEE:** **The two groups agree on this instruction.**

contributes to the harm. [Name of defendant] has the burden of proving [name of plaintiff]'s comparative fault by a preponderance of the evidence. If you allocate 50% or more of the total fault to [name of plaintiff], then [name of plaintiff] will recover nothing. If you allocate less than 50% of the total fault to [name of plaintiff], then I will reduce [name of plaintiff]'s total damages you have determined by the percentage of fault you attribute to [name of plaintiff]. You should not make this reduction on the special verdict form. I will make the calculated reduction later. **References** Bylsma v. R.C. Willey, 2017 UT 85, ¶ 78. Utah Code Section 78B-5-817 et seq. **MUJI 1st Instruction** 12.9; 12.10. **Committee Notes** "Fault" is defined in Instruction CV201, Fault defined. If nonparties are alleged to be at fault and will be listed on the verdict form, the instruction may have to be broadened to include nonparties as well as the plaintiff and defendants. The definition of "comparative fault" in the second paragraph should include only those forms of comparative fault that are at issue in the case. The court should give separate instructions defining the particular type of misconduct involved (e.g., misuse or unreasonable use).	
CV1053 Allocation Between Strict Liability Defendants and Other at Fault Parties/Third Parties. [Name of party] claims that [name of other defendants/third-parties] were [at fault] and that [their fault] was a cause of [name of plaintiff]'s harm. [Name of party] has the burden of proving [name of other	**NOTE TO COMMITTEE:** **The two groups agree on this instruction.**

defendants/third-parties]'s [fault] was a cause of [name of plaintiff]'s harm. If you determine that the [product] was defective and that any such defect was a cause of [plaintiff]'s harm, and that [name of other defendant(s)/third party (parties)] [was/were] also at fault and that [his/her/its/their] fault was a cause of [name of plaintiff]'s harm, then you also must determine what percentage of [name of plaintiff]'s harm was caused by the defective product as compared to what percentage of [name of plaintiff]'s harm was caused by the [fault] of [name of other defendants/third-parties]. Your allocation of percentages must add up to 100%. **References** Bylsma v. R.C. Willey, 2017 UT 85, ¶ 78. Utah Code Section 78B-5-817 et seq. **MUJI 1st Instruction** 12.9; 12.10. **Committee Notes** Allocation of fault is covered generally in Instruction CV211. Allocation of Fault.	

CV1054 Product unavoidably unsafe.
In response to [name of plaintiff]'s claim that the [product] was defective in design, [name of defendant] claims that the [product] was unavoidably unsafe and that it is therefore not at fault. Some products cannot be made safe for their intended use, but their benefits are great enough to justify their risks of harm. A knife is an example, since a knife blade must be sharp to serve its purpose, but the sharp blade poses a risk of injury.

To establish the defense that the [product] was unavoidably unsafe, [name of defendant] must prove that:

(1) when the [product] was made, it could not be made safe for its intended use even applying the best available testing and research; and

(2) the benefits of the [product] justified its risk.

[This defense is unavailable if the plaintiff proves that the product was improperly manufactured or contained inadequate directions or warnings.]

References
Grundberg v. Upjohn Co., 813 P.2d 89 (Utah 1991).
Restatement (Second) of Torts §402A, cmt. k.
Burningham v. Wright Medical Technology, Inc. 2019 UT 56.
Wankier v. Crown Equipment Co., 353 F.3d 862 (10th Cir. 2003).
Allen Minnstar, Inc., 8 F.3d 1470 (10th Cir. 1993).

Committee Notes
Some committee members believe that the jury should be permitted to consider whether the safety features are cost prohibitive in determining whether the product was unavoidably unsafe.

The bracketed sentence may be omitted if there is no manufacturing or warning claim presented to the jury.

CV1055 Learned intermediary.
A [designer] [manufacturer] of [prescription drugs] [medical devices] has a duty to warn only the [prescribing] [implanting] physician , not the patient, of the risks associated with the [drug] [medical device]-. If you find that the [designer] [manufacturer] gave

appropriate warnings to the physician, you must find that the [designer] [manufacturer] fulfilled its duty to warn.

References
Schaerrer v. Stewart's Plaza Pharmacy, Inc., 79 P.3d 922 (Utah 2003).
Tingey v. Radionics, 193 Fed. Appx. 747, 757 n.4 (10th Cir. 2006).

Committee Notes
Note, the learned intermediary rule does not preclude a negligence claim against a pharmacist for dispensing drug that has been withdrawn from the market. -*See Downing v Hyland Pharmacy*, 2008 UT 65.

CV1057 Product liability – No Duty to Make a Safe Product Safer.

[Name of defendant] may market a non-defective product even if a safer model is available. There is no duty to make a safe product safer. [Name of defendant] has no duty to inform the consumer of the availability of the safer model.

Reference
Slisze v. Stanley-Bostitch, 1999 UT 20, ¶¶ 10 & 13, 979 P.2d 317

Committee Note
It is undecided whether this instruction is applicable to strict liability claims; but is clear it applies to negligence claims.

CV1057 Later remedial measures.
Any evidence you have heard about design changes with respect to the [product] made after the [accident] [injury] [product was designed/manufactured] cannot be considered to prove negligence, culpable conduct, a defect in the product, a defect in the [product]'s design, or a need for a warning or instruction. However, you may consider such evidence for other purposes, such as proof of [ownership] [control] [the feasibility of precautionary measures] or to impeach a witness's testimony.

References
~~Utah Code Section 78B-6-703.~~
Misener v. General Motors, 924 F. Supp. 130, 132-33 (D. Utah 1996).
Utah R. Evid. 407.

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Committee Notes
This instruction should only be given if evidence of later remedial measures is admitted at trial. Some committee members believe that the relevant time frame for consideration of subsequent remedial measures is based on the date the accident occurred. See Misener v. General Motors, 924 F. Supp. 130, 132-33 (D. Utah 1996). Other committee members believe that the relevant time frame for consideration of product defect according to Utah's Product Liability Act is when the product was designed or manufactured; therefore, subsequent remedial measures that occurred after the design or manufacture are irrelevant. See Utah Code Section 78B-6-703. Two alternatives are presented to reflect these viewpoints.

CV1058 Allergic reaction or hypersensitivity.
The [manufacturer] [designer] of a [product] is entitled to assume that the [product] will be put to "normal use" by a "normal person." If you find that [name of plaintiff]' s injuries in this case resulted from an allergy or physical hypersensitivity that most people do not have and [name of defendant] did not know about, then [name of defendant] cannot be liable for [name of plaintiff]'s injuries.

References
Bennett v. Pilot Products Co., 235 P.2d 525 (Utah 1951).
Restatement 3d Torts: Product ~~Liability~~Liability § 2, cmt. k.

CV1060 Enhanced Injury Instruction.

[Name of plaintiff] has brought what is called an enhanced injury claim. An enhanced injury occurs if an injury caused by some other event is increased or enhanced over and above the harm that would have otherwise resulted from the event, as a result of a defective product.

To establish an enhanced injury claim, [name of plaintiff] must prove all of the following:

(1) The product had a [design] [manufacturing] [warning] defect that made it unreasonably dangerous; and

(2) That defect was a substantial factor in increasing the harm [name of plaintiff] experienced~~, over and above the harm that would have otherwise resulted from the event~~.

If you find that a product defect was a substantial factor in increasing the harm [name of plaintiff] experienced, ~~over and above the harm that would have otherwise resulted~~

~~from the event,~~ then you must apportion the harm caused by the defect and the harm caused by the other event.

References

Egbert v. Nissan North America, 2007 UT 64, ¶ 19.
Egbert v. Nissan Motor Co., Ltd., 2010 UT 8, ¶¶ 23, 37 & 40.
Bylsma v. R.C. Willey, 2017 UT 85.
Restatement (Third) of Torts: Products Liability § 16(a).

CV10--- Implied Indemnity - Introduction
One who [is required to pay] [may be required to pay] [has paid] damages for causing injury to another may be reimbursed for that sum from another party in certain circumstances, which will be explained to you in the following instructions.

This is known as indemnity.

References
Bylsma v. R.C. Willey, 2017 UT 85.
Hanover Ltd. v. Cessna Aircraft Co., 758 P.2d 443 (Utah Ct. App. 1988).

Committee Notes
Though it had been thought that the Liability Reform Act abolished implied indemnity claims, the Utah Supreme Court explained this was not the case in Bylsma v. R.C. Willey, 2017 UT 85, noting implied indemnity was the "only place where culpability factors into the products liability equation at all." Id. at ¶32. "Implied indemnity is a doctrine applying in a limited number of scenarios that shifts the entire burden of a plaintiff's loss from a non-culpable party to a culpable party." Id. "This right of implied indemnification is accorded to a retailer against the manufacturer of an alleged defective product regardless of whether the seller is found liable to the purchaser under a strict liability theory in tort or that of breach of warranty." Hanover Ltd. v. Cessna Aircraft Co., 758 P.2d 443, 446 (Utah Ct. App. 1988). There may be instances where a manufacturer seeks indemnity from a retailer, such as when the manufacturer delegates some aspect of manufacture, e.g. final assembly or inspection, to a subsequent seller. Bylsma at ¶34, n. 62 (quoting RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. c (AM. LAW INST. 1998)).

CV10--- Elements of Indemnity Claim
[Claimed indemnitee] claims that [s/he/it] is entitled to indemnity from [alleged indemnitor]. [Claimed indemnitee] must prove [alleged indemnitor]'s conduct in the [design] [manufacture] [warning] [distribution] of the [product] is more culpable than [claimed indemnitee]'s conduct.

References
Bylsma v. R.C. Willey, 2017 UT 85.
Hanover Ltd. v. Cessna Aircraft Co., 758 P.2d 443 (Utah Ct. App. 1988).

Committee Notes

CV10--- Considerations for Determining the More Culpable Party.

When considering whether [alleged indemnitor] was the more culpable party in causing [underlying plaintiff's] [injuries][damages], you may consider:

[who designed or manufactured the [product];]

[who participated in the design, manufacture, or assembly of the [product];]

[who was charged with conducting a final inspection of the [product];]

[whether any party was aware of the alleged defect at the time the [product] was sold;]

[whether [claimed indemnitee] was negligent in failing to discover the defect prior to distribution;]

[whether the [product] was defective when it left [claimed indemnitor]'s possession;]

[whether [claimed indemnitee] breached its warranty to [plaintiff];]

[the relative knowledge and specialization of the parties;] and

[insert any other factors regarding the parties' knowledge, control, and/or conduct as the case warrants.]

The difference in the conduct of the parties must be a difference in quality or nature, rather than in quantity.

References

Bylsma v. R.C. Willey, 2017 UT 85.
Hanover Ltd. v. Cessna Aircraft Co., 758 P.2d 443 (Utah Ct. App. 1988).
Restatement (Third) of Torts: Apportionment Liab. § 22 (2000).

Committee Notes

"[T]he purpose of implied indemnity is to shift the burden from an individual passive retailer—who bears no fault in the usual sense of the word—onto the party responsible for the defect, the manufacturer." Bylsma v. R.C. Willey, 2017 UT 85, ¶33. The factors identified above should be adjusted to account for the particular facts and circumstances of the case. Additional factors may be appropriate.

CV10--- Nature of the Indemnity Case

[Alternative 1]

[1] In addition to [plaintiff]'s claim[s] against [name of defendants] in this case, [cross-claimant] claims [s/he/it] is entitled to indemnity from [name of cross-defendant] for any sum [cross-claimant] may become liable to pay [plaintiff].

[2] [cross-claimant] claims that if [s/he/it] is found liable to [plaintiff], [cross-claimant] is entitled to indemnity because [cross-defendant]'s conduct was more culpable in [designing] [manufacturing] [distributing] the [product] in causing the [injuries] [damages] to [plaintiff], if any, than [cross-claimant]'s conduct in distributing the [product] to [plaintiff].

[3] [Insert brief description of cross-defendant's defenses.]

[Alternative 2]

[1] In addition to [plaintiff]'s claim[s] against [defendant(s)] in this case, [third party plaintiff] claims [s/he/it] is entitled to indemnity from [third party defendant] for any sum [third party plaintiff] may become liable to pay [plaintiff] because [third party defendant] [manufactured] [designed] [distributed] the [product].

[2] [Third party plaintiff] claims that if [s/he/it] is found liable to [plaintiff], [third party plaintiff], is entitled to indemnity because [third party defendant]'s conduct was more culpable in [designing] [manufacturing] [distributing] the [product] in causing the [injuries] [damages], if any, to [plaintiff] than [third-party plaintiff]'s conduct in distributing the [product] to [plaintiff].

[3] [Insert brief description of third party defendant's defenses.]

[Alternative 3]

[1] In a separate legal proceeding, [claimed indemnitee] was required to pay money to respond to allegations that [product] was defective and caused [injuries] [damages] to [name of underlying plaintiff]. [Claimed indemnitee] now seeks indemnity for that sum [plus attorneys fee] from [alleged indemnitor] because [alleged indemnitor]'s actions in [designing] [manufacturing] [distributing] the [product] are more culpable in causing [underlying plaintiff]'s [injuries] [damages] than [claimed indemnitee]'s conduct in distributing the [product] to [underlying plaintiff].

[2] [Insert brief description of claimed indemnitor's defenses.]

References

Bylsma v. R.C. Willey, 2017 UT 85.

Hanover Ltd. v. Cessna Aircraft Co., 758 P.2d 443 (Utah Ct. App. 1988).

Committee Notes
Alternative 1 is to be given when indemnitee and indemnitor are identified as tortfeasors in the plaintiff's complaint.

Alternative 2 is to be given when indemnitor is not charged as a tortfeasor in the plaintiff's complaint and the claim for implied indemnity is tried concurrently.

Alternative 3 is to be given when the indemnitor was not party to the action in which the third-party plaintiff incurred liability, attorneys' fees, and costs. Due to the factors discussed in Hanover Ltd. v. Cessna Aircraft Co., 758 P.2d 443 (Utah Ct. App. 1988), Alternative 3 is provided as a basic template and should be adapted to account for the specific circumstances of the case, e.g. whether a judgment has been entered or if there is a finding in the prior action that the product was defective. Id.

There are other procedural postures under which an implied indemnity case may be presented to the jury. These instructions may be modified to address those situations.

CV10--- Absence of Liability to Original Plaintiff
If you decide [claimed indemnitee] is not liable to [plaintiff], you will have no occasion to consider the question of indemnity.

References
Bylsma v. R.C. Willey, 2017 UT 85.
Hanover Ltd. v. Cessna Aircraft Co., 758 P.2d 443 (Utah Ct. App. 1988).

Committee Notes

This instruction is to be used when the question of indemnity is tried concurrently with the underlying plaintiff's claims.

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